

IMEDIPA/UCL/Bilgi University Conference

**Roundtable 2: Regulatory design: the evolution of
the institutional framework and regulatory
techniques**

Alexandre de Stree
University of Namur and CRID

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OUTLINE

A. Quick view of the current 2003 regulatory framework

B. Assessment of the 2003 framework

C. The 2007 Review of the regulatory framework

D. Conclusion

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Three steps to impose remedies

1. EU screening	3 criteria test SSNIP test	Commission Recommendation
1bis. National Screening	(3 criteria test) SSNIP test	Possible Commission veto
+ <i>Emerging market</i>	<i>No inappropriate selection</i>	
2. Market analysis	No effective competition = SMP = Dominance	Possible Commission veto
3. Remedies	At least one Mainly behavioural Proportionate	Possible Commission comments

1. Objectives

Article 8 of the Framework Directive

- Promotion of effective competition
- Development of internal market
- Promotion of the interests of the EU citizens

2. Scope of regulation: Market screening test (as proposed by the Commission)

- Markets where competition does not work properly
- *Markets where national and Community competition law remedies are not sufficient to address the (competitive) problem.*
(Recital 27 of the Framework Directive)
- *(a) the presence of high and non-transitory barriers to entry. These may be of a structural, legal or regulatory nature;*
(b) a market structure which does not tend towards effective competition within the relevant time horizon. The application of this criterion involves examining the state of competition behind the barriers to entry;
(c) the insufficiency of competition law alone to adequately address the market failure(s) concerned.
(Article 2 of the Commission Recommendation 2007/879) ⁵

2. Scope of regulation: Market screening (as systematised by market failures)

	Structural/non-strategic	Behavioural/strategic
Excessive market power	<i>Cell 1: fixed broadband</i> - High and sunk fixed with uncertainty - Absolute cost advantages (switching costs, legal barriers)	<i>Cell 4</i> -Exploitative abuses: excessive prices -Exclusionary abuses: vertical and horizontal leveraging: anti-competitive price squeeze
Externality	<i>Cell 2: fixed and mobile termination</i> - Network effects - Two-sided markets	<i>Cell 5</i> - Strategic network effects like loyalty program or tariff mediated externality
Information asymmetry	<i>Cell 3: mobile international roaming</i>	

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2. Scope of regulation: Commission Recommendations of 2003 and 2007

Fixed Voice	Fixed Bb data	Fixed leased lines	Mobile Voice/sms	Broadcasting
<u>1. Access residential</u> <u>2. Access non-residential</u> 3. Local/n'al resid 4. Int'al resid 5. Local/n'al non-residential 6. Int'al non-residential		7. Minimum set of leased lines		
<u>8. Call origination</u> <u>9. Call termination</u> 10. Transit	<u>11. Unbundling local loop (or equivalent)</u> <u>12. Wholesale broadband access</u>	<u>13. Terminating segments</u> 14. Trunk segments	15. Access and call origination <u>16. Call termination</u> 17. Int'al roaming	18. Broadcasting transmission services

3. Regulatory remedies

- NRAs should choose proportionate remedies among a list of five (behavioural ones)
 - Transparency
 - Non-discrimination
 - Accounting separation
 - Compulsory access
 - Price control and cost accounting

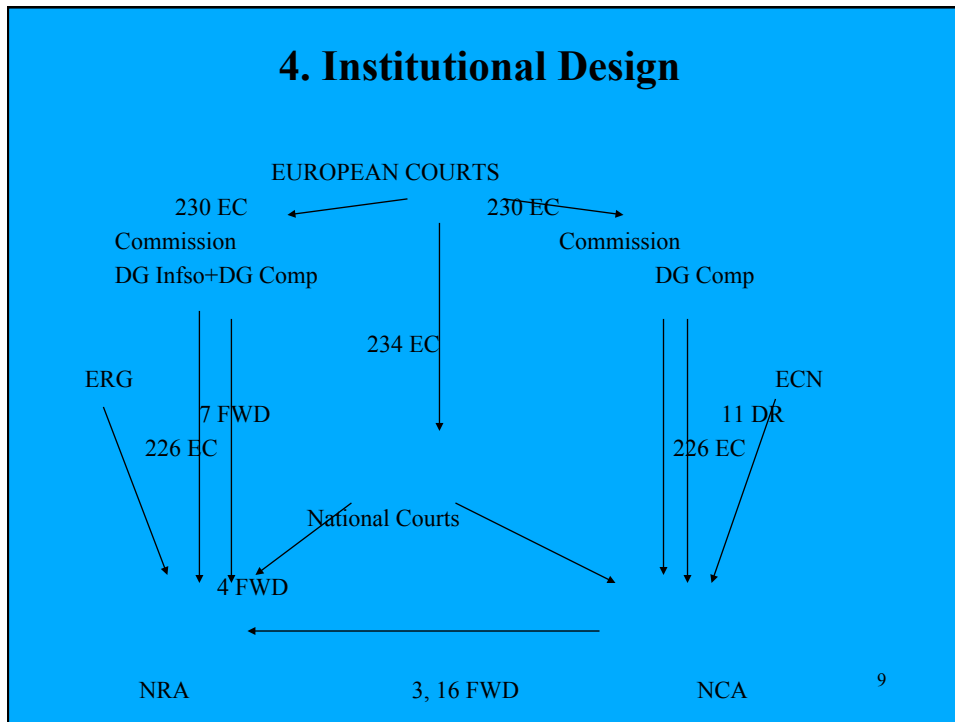
NRAs should take into account the (methodological) Common Positions of European Regulators Group

CP are general or on specific issues (M9 and M16 Call termination, M12 Wholesale Broadband Access, M13 Wholesale Leased lines, ...)

- NRA may go outside the list with the prior agreement of the Commission

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4. Institutional Design



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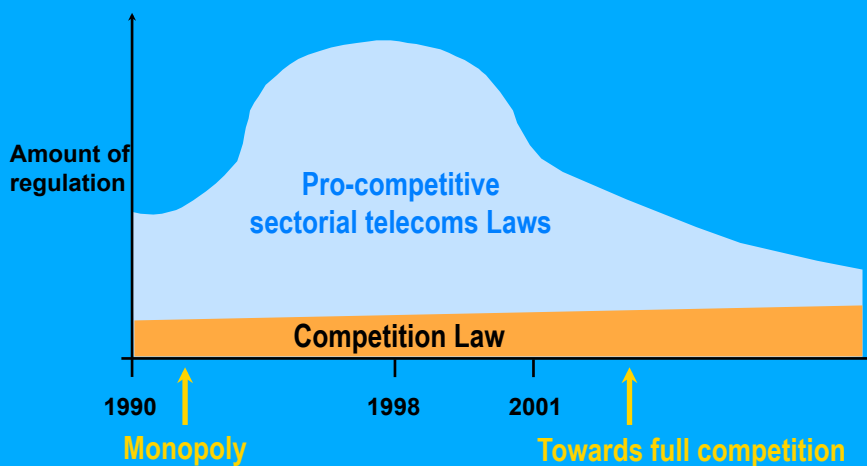
Six good governance principles

Good, but not enough

- Proportionate regulation:
 - Diverging studies London Economics (2006) v LECG (2007) and ESMT (2007)
 - More wholesale regulation contrary to deregulatory rhetoric
- Legal certainty: NO
- Objectivity and technological neutrality: In progress
- Flexibility: OK
- Transparency: OK
- Harmonisation: In progress, but not sufficient
 - But provides neither the benefit of decentralisation (regulatory competition) nor the benefit of centralisation (account of countries externalities)

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The regulatory framework was deemed to lead to less regulation



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BUT it leads to more regulation in practice (as of August 2008)

	AT	BE	BU	CY	CZ	DK	EE	ES	FI	FR	DE	EL	HU	IRL	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	UK
1	a	a		a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a
2	a	a		a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a
3	a	a		a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a
4	a	a		a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a
5	a	a		a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a
6	a	a		a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a
7	a	a		a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a
8	a	a		a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a
9	a	a		a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a
10	a	a		a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a
11	a	a		a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a
12	a	a		a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a
13	a	a		a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a
14	a	a		a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a
15	a	a		a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a
16	a	a		a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a
17	a	a		a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a
18	a	a		a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a	a

1. Objectives

- No clear objective and no balancing
 - Stimulate broadband as in i2010 Action Plan (industrial policy) *or* just ensure markets are functioning properly (neo-classical model)
 - Antitrust hybridisation does not evacuate policy choice and may create additional difficulties

2. Scope of regulation

- A regulatory model that is not enough emancipated from antitrust law
- Regulation has a broader set of objectives and lower burden of proof to intervene than competition law
- Thus, sector regulation should apply to hard-core market power: structural market failure (non replicable assets and network effects)
 - Complex test for regulation: 3 steps (three criteria test, market definition, dominance assessment) to answer 1 question (where sector regulation has an added value compared to antitrust law)

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3. Regulatory remedies

- Remedies are too much linked with Art. 82 EC remedies
- Remedies chosen are not always the most efficient to solve the market failure
 - Tendency to chose behavioural remedies (in particular price control) instead of structural or technological ones
 - Paradoxical for a regulation aiming a solving structural problems to rely mainly on behavioural remedies

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4. Institutional design

- Incentives of the NRAs are not always aligned to maximization of citizen's welfare:
 - Tendency to over-regulate
 - View too static: price and market share, less on innovation
- Inefficient checks and balance
 - National Competition Authority: may have incentive to extend antitrust principle
 - Appeal bodies: may be slow with easy suspension of the NRA's decision
 - Commission Article 7 review: the role (internal market or European appeal) and the legal value of Commission decisions are not clear (insufficient accountability and risk of politization)
- No correct understanding of harmonization
 - Should focus on cross countries externalities
 - And not directly on consistency of approaches or results per se
- NRA do not have enough commitments devices

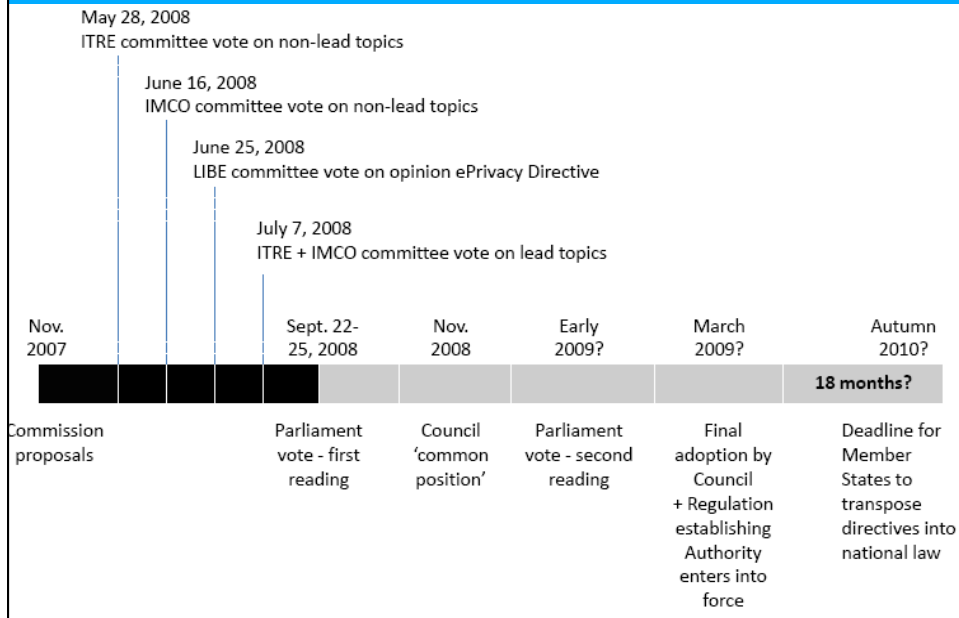
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Timeline for the 2007 Review



1. Objectives

- The Commission does not propose much changes
On balance, no need to clarify or prioritize Article 8 of the Framework Directive
- *Whereas*, clarity should be increased (to the extent feasible)
 - Significant Market Power regime should aim at maximising long term consumer welfare (see Australian law)
 - With more precise indications: encourage investment, dynamic efficiency outweighs static efficiency
 - To be translated in a management plan for each of the 27+ NRAs
 - Recognising the industrial policy: Do we want policy and entry support? If yes, what kind?

2. Scope of regulation

- The Commission does not propose much changes
- *Whereas*, there is a need to emancipate regulation from antitrust principles and methodologies:
 - Higher relevance for the three criteria test (and lower relevance for market definition and SMP assessment)
 - Include them in the Framework Directive
 - Should be conducted by the NRAs in all cases
 - Cluster of markets approach

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3. Regulatory remedies

- The Commission proposes
 - Additional possibilities to impose symmetrical regulation
 - Functional separation will be added to the list, with appropriate safeguards (and more than currently):
 - *Normal remedies have failed and would failed on a persistent basis*
 - *Important and persisting market failures identified in several markets*
 - + Impact analysis and prior agreement of the Commission
- *Whereas*, it could have gone further to allow and encourage NRAs to think outside the box
 - Wholesale Bill and Keep and retail Receiving Party Pays to solve the (fixed and mobile) termination
 - Ensure that NRAs should always explain how the imposed remedy will solved the identified problems
 - Possibility of settlement: agreed with the regulated operators

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4. Institutional design

(1) National regulatory authorities

- The Commission proposes some changes
 - Independence of second generation: from operators and also from government (BUT what about the Commission ?)
 - Adequate financial and human resources
 - More enforcement mechanisms by enlarging the power to fine
- *Whereas*, more is needed to ensure that the NRAs' incentives are aligned on long term citizens' welfare
 - Training (at a European level)
 - More dynamic view of the market and reporting on dynamic indicators (Ofcom)
 - External evaluation, on the basis of their management plans (OPTA)
 - Alleviate forum shopping and duplication of procedures: clarify the division of tasks with NCA (cf. the Dutch mobile termination saga) and the Commission (cf. *Deutsche Telekom* and *Telefonica* Decisions)

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4. Institutional design

(2) National Courts

- The Commission proposes
 - Two harmonised and strict conditions for suspension of NRAs' decision (urgency because of serious and irreparable harm + balance of interests, inspired by the case-law on Article 242 EC)
 - Reporting on subjects, number and duration of appeals as well as suspension
- *Whereas*, there is a need of more radical reforms
 - Better training
 - Commission Recommendation on good practices drawing on expert studies: BICCL 2005, Cullen 2006
 - No internal appeal; only one level on the merits, judicial deference, speed, clear rules for *locus standi* (Case C-426/05 *Tele2UTA/TKK*)
 - Devices of the antitrust decentralisation:
 - Possibility for the Commission to be asked (Article 10 EC) and to give opinion (*amicus curiae*)
 - A European advisory panel?

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4. Institutional design

(3) European Commission

- The Commission proposes to extend and streamline its review of the NRAs' decisions
 - Extension veto power on remedies
 - Possibility of simplified notification (for stable markets or only minor changes of remedies), and of notification exemption (for cases deemed unlikely to raise competition concerns)
- Whereas, there is a need for more clarifications
 - Clarify the role of the Commission: just an internal market check, not a full EU appeal
 - Tighter view of 'affecting trade between Member States" (Case C-376/98 *Tobacco Advertising Directive*)
Not just different of approach and harmonization for the sake of it (German veto market 9)
 - Align due process on the legal force of the Commission review decision (to alleviate politization)
 - Clarify standard of review

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4. Institutional design

(4) Euro-regulator

- The Commission proposes the creation of EECMA
- This proposal is radical and appropriate but should be qualified
 - Should be limited on specific issues where it may internalise cross-country externalities (like international roaming, mobile communications on board aircrafts, MTR and competitiveness of national companies, VoIP, spectrum)
 - Accountability should be guarantee: Transparency, appeal
- However, it is not supported by the other EU institutions
 - Council want to maintain ERG
 - Parliament wants a ERG++ (BERT)

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Conclusion

- No major shift (except on spectrum)
 - End of the end of regulation: Confirm the paradigm change introduced in 2003 Framework: BERT, functional separation, tight oligopolies
- The reform should have go further
 - Objectives: long term consumer welfare
 - Substantive law: an 'adult' regulation: not more opposed, nor aligned to antitrust law
 - Test of regulation and choice of remedies
 - Institutional design: procedural harmonisation following substantive harmonisation
 - More efficient checks and balances

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