



ERG (09) 40

ERG Report
on
Transition from sector-specific regulation
to competition law

October 2009

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Executive Summary

If a NRA finds that on a relevant market there is no longer significant market power (SMP) exerted by one or several operator(s), but effective competition, *ex ante* regulatory obligations in place must be withdrawn. This transition from sector-specific regulation to competition law is an important feature of the electronic communications regime. The role of transition, and its effects on the market, is likely to become more prominent as, on the basis of the 2007 Commission Recommendation the list of markets that are candidates for *ex ante* regulation has been significantly reduced.

However, intervention by NRAs in electronic communications markets is not limited to intervention where SMP is exercised. Indeed, the European regulatory framework embodied provisions that enable NRAs, when necessary and in specific circumstances, to oversee markets (regulated, unregulated or deregulated) with respect to other objectives than SMP regulation. For example, the framework provides some flexibility for NRAs to monitor unregulated markets on the basis of Article 5 of the Framework Directive.

This Report explores the issues that may arise in the context of transition from sector-specific regulation to competition law. This set of issues is referred to as “transitional issues” in the Report and covers:

- on the one hand issues that may arise during the “transition period” foreseen under Article 16(3) of the European regulatory framework that enables a progressive withdrawal of SMP obligations once effective competition has been declared in the considered markets (Section 4) ;
- on the other hand issues that may arise after the “transition period”, once NRAs no longer intervene on account of significant market power regulation (Section 5).

With regard to the first issue, referred in the Report as “transition period”, the Report provides a number of indicators that may be of assistance to NRAs when determining what constitutes an appropriate period of notice in a context of the withdrawal of SMP obligations.

With regard to the second issue, the Report refers to a number of instruments that are available to NRAs (such as information rights, symmetric obligations or voluntary commitments), if necessary and if appropriate, to deal with a potential need for market monitoring, in the specific context of transition from *ex ante* to *ex post* regulation. The Report explores for instance the possibilities of enhanced cooperation between NRAs and NCAs to ensure the expedient application of the competition law rules to the electronic communications markets.

The Report also notes that it cannot be ruled out that future developments in a deregulated market may lead NRAs to consider in the future re-imposing remedies on the basis of an SMP finding, an occurrence that the European regulatory framework expressly allows for. Nevertheless we note that such re-imposition of remedies is only likely to happen in exceptional cases.

1. Introduction

On 17 December 2007, the European Commission adopted the 2007 Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications and services (2007/879/EC)¹ (the “2007 Recommendation”). The 2007 Recommendation replaced the earlier Recommendation adopted back in 2003 (the “2003 Recommendation”) and reduced the list of markets deemed by the Commission to be susceptible to *ex ante* regulation from 18 to 7. These 7 markets have been identified on the basis of three cumulative criteria set out in the 2007 Recommendation. In summary, these are:

- (i) the presence of high and non-transitory barriers to entry;
- (ii) a market structure which does not tend towards effective competition; and
- (iii) insufficiency of competition law alone to adequately address the market failures concerned.

The 2007 Recommendation highlighted the issue of transition from *ex ante* sector-specific regulation² to *ex post* competition law for National Regulatory Authorities (“NRAs”) and National Competition Authorities (“NCAs”) alike. As noted a substantial number of markets included in the 2003 Recommendation that were made subject to *ex ante* regulation by NRAs, on the basis of the first round of market analyses conducted between 2003 and 2007, is no longer included in the 2007 Recommendation. This means that in relation to imposing *ex ante* regulation for the markets not listed any more in this Recommendation, the NRAs should apply the three criteria test. Depending on each NRA’s assessment, it is likely that certain markets of the Recommendation will be deregulated and that markets not listed will be regulated.

One purpose of this Report is to identify relevant issues that are likely to arise in relation to the transition from sector-specific regulation to competition law, in particular when the markets that will be de-regulated remain linked with regulated markets (upstream and downstream markets or horizontally correlated markets).

One of those issues relates to the application of the three criteria test as a precondition for *ex ante* regulation of markets no longer included in the Recommendation. This topic has however already been covered in the ERG Report on Guidance on the application of the three criteria test³, and will therefore not be discussed here.

However, the Report adopts a more global approach, tackling two distinct types of transitional issues, and in particular (i) issues arising once a decision has been made

¹ OJ L344/25 of 28 December 2007.

² For the purposes of this document, sector-specific regulation is meant to be *ex ante* regulation that has been imposed by an NRA on one or several SMP operators on the basis of the EC electronic communications legislative framework (see in particular article 7 as well as articles 15 and 16 of the Framework Directive; articles 8 and ff. of the Access Directive; article 16 and ff. of the Universal Service Directive). Withdrawal of “sector-specific” regulation, understood in these terms, does not obviously imply the non-applicability of the rest of the electronic communications rules to operators.

³ ERG (08) 21, June 2008.

by an NRA not to subject a market to *ex ante* regulation, but where transition measures related to SMP regulation are still in place; and (ii) issues arising once SMP regulation has been totally withdrawn.

For this purpose, the Report deals with the following aspects:

- First, and by means of introduction, the Report explores the links between *ex ante* (sector-specific) and *ex post* (application of competition law) rules;
- Second, reference is made to the reasons why transitional issues may appear, and the role that NRAs have to play in the regulation and deregulation process of electronic communications markets;
- Third, the Report considers the possible issues arising during the transition period before full de-regulation;
- Last, the Report considers the possible issues arising once SMP regulation is no longer required and hence not implemented in the market.

In these last two sections, the Report considers the tools available to NRAs to deal with transitional issues. Experiences at Member State level have been gathered via the submission of a questionnaire to NRAs, which is attached as Annex 1.

Regulatory background

The present regulatory framework for electronic communications networks and services entered into force on 25 July 2003. The framework is designed to create harmonised regulation across Europe and is aimed at reducing entry barriers promoting effective competition for the benefit of consumers. The basis for the regulatory framework is five EU Directives (together, the “Framework”):

- Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (“Framework Directive”);
- Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (“Access Directive”);
- Directive 2002/20/EC on the authorisation of electronic communications networks and services (“Authorisation Directive”);
- Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (“Universal Service Directive”); and
- Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (“Privacy Directive”).

Article 16 of the Framework Directive requires each NRA to carry out an analysis of the relevant markets as soon as possible after the adoption of the Recommendation on relevant product and service markets susceptible to *ex-ante* regulation or any updating thereof. On the basis of Article 16, the Commission adopted the 2003 and 2007 Recommendations referred to above.

Each market review is carried out in three phases:

- a definition of the relevant market or markets (product and geographic scope); including the three criteria test;
- an assessment of competition in each market, in particular whether any undertakings have significant market power (“SMP”) in a given market; and
- an assessment of the appropriate regulatory obligations which should be imposed where there has been a finding of SMP.

2. Links between sector-specific and *ex post* regulation (application of the competition law rules)

The Commission Guidelines on market analysis and the assessment of significant market power (SMP) under the Community regulatory framework for electronic communications networks and services⁴ (the “Guidelines”) focus on the differences between *ex ante* and *ex post* regulation.

The Guidelines state that, under the new regulatory framework, markets and SMP should be assessed by applying the same methodologies as under competition law to ensure consistency with competition case-law and practice. The Guidelines however stress (§§ 26-27) that “markets defined under Articles 81 and 82 EC Treaty are generally defined on an ex-post basis. In these cases, the analysis will consider events that have already taken place in the market and will not be influenced by possible future developments. [...] On the other hand, relevant markets defined for the purposes of sector-specific regulation will always be assessed on a forward looking basis, as the NRA will include in its assessment an appreciation of the future development of the market. [...] The starting point for carrying out a market analysis for the purpose of Article 15 of the framework Directive is not the existence of an agreement or concerted practice within the scope of Article 81 EC Treaty, nor a concentration within the scope of the Merger Regulation, nor an alleged abuse of dominance within the scope of Article 82 EC Treaty, but is based on an overall forward-looking assessment of the structure and the functioning of the market under examination” (emphasis added).

With regard to merger law, the Guidelines indicate (§ 28) that “although merger analysis is also applied ex ante, it is not carried out periodically as is the case with the analysis of the NRAs under the new regulatory framework. A competition authority does not, in principle, have the opportunity to conduct a periodic review of its decision in the light of market developments, whereas NRAs are bound to review their decisions periodically under Article 16(1) of the framework Directive. This factor can influence the scope and breadth of the market analysis and the competitive assessment carried out by NRAs, [...]” (emphasis added).

Ex ante sector-specific regulation is thus characterized by the prospective (forward-looking) nature of the review, which must be undertaken on a periodical basis. *Ex ante* reviews do not therefore look at conduct which has already taken place in the marketplace⁵ (as it is the case with agreements or unilateral conduct that may have an anticompetitive nature), nor is it triggered (as it is the case with merger law) by

⁴ OJ C165/6 of 11 July 2002.

⁵ Although past conduct can be a factor that is integrated in the NRA’s *ex ante* assessment of the markets potentially subject to regulation.

corporate activity that brings about a structural change to the market. *Ex ante* regulation is a particular feature of the process of liberalizing former monopoly markets (particularly network industries), including the electronic communications sector, on which basis – and due to the fragile nature of competition, especially in the first stages of liberalization – NRAs are empowered to adopt preventive measures, to enable the creation of a level-playing field amongst operators.

Interaction between *ex ante* regulation and *ex post* rules is an important feature of the electronic communications sector. As will be further detailed in this Report, both regimes co-exist with regard to regulated markets where an SMP designation has been made. On the other hand, withdrawal of *ex ante* regulation does not of course mean non-application of the competition rules. While most NRAs are not conferred powers to apply competition law rules directly, national competition authorities (NCAs) retain the power to enforce national and EU competition laws. In addition, it is worth noting that some NRAs do have direct or indirect powers regarding the application of the competition rules⁶.

In view of the differences between *ex ante* regulation and *ex post* competition law, transitional issues assume further significance once *ex ante* obligations are withdrawn. The Commission's Explanatory Note⁷ accompanying the 2007 Recommendation refers to the complementary nature of *ex ante* regulation to the competition law regime, and notes the fact that in some instances regulatory obligations necessary to remedy a market failure may not be available under competition law (e.g. access obligations) or that *ex ante* intervention may in some cases be unavoidable if the compliance requirements of an intervention to redress a market failure are extensive or frequent and timely intervention is indispensable⁸.

Taking this into account, the importance of ensuring a smooth transition from the full applicability of an *ex ante* regime (complementary to the competition law regime) to the sole application of the competition law rules should not be underestimated.

This does not imply that transition between *ex ante* regulation and competition law should be seen as an "indirect" cure by a NRA of the potential drawbacks of no longer being able to impose *ex ante* regulation. In particular, when setting a transition period, NRAs will need to carefully strike an adequate balance in which the risks of extending regulation for too long are measured against the risks of a period of transition (and thus the phase out of regulation) that is too short to safeguard the interests of the market players that have been relying on SMP regulation and ultimately consumers.

⁶ For instance, in the UK, OFCOM is competent for the application of both *ex ante* and *ex post* rules (excluding mergers) in the electronic communications sector. The same situation prevails in other jurisdictions, such as Estonia and Ireland. The German Telecommunications Act contains a clause that is similar to that of Article 82 EC Treaty, and on which basis BNetzA can intervene to prevent the abuse of significant market power (so-called ex-post regulation).

⁷ Commission's Explanatory Note (Accompanying document to the Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services), SEC (2007) 1483 final.

⁸ Section 2.2 (iii) of the Explanatory Note.

3. Transitional issues

In the Report, “transitional issues” correspond to all relevant issues that may occur between the full applicability of an *ex ante* regime to the sole application of the competition law rules on a market. As such, the major issue identified by the Report is the setting foreseen by the European regulatory framework of a transition period by the NRA between a SMP regulated market situation and a deregulated market situation. A second set of issues identified by the Report corresponds to deregulated markets situations where it appears that beyond the transition period there is still a monitoring role for the NRAs.

It should be noted that transitional issues are relevant only once the considered market has been declared to be effectively competitive. In these instances, intervention on the market can only take place via the application of the competition law rules. Transitional issues (transition period or continuous monitoring) should under no circumstances lead to direct or indirect introduction of regulatory obligations to the former SMP operator(s) absent a new market analysis in which the three criteria test and SMP requirements are satisfied.

A. Transition period

If a market is found to no longer fulfil the three criteria test set in the 2007 Recommendation, or where those provisions are met, there is no evidence of SMP, which means that the market is deemed to be effectively competitive, existing and corresponding SMP regulation imposed by NRAs must be withdrawn. In this situation, there are a number of measures that NRAs may adopt and that may facilitate the transition period from a regulated environment to a purely commercial (non-regulated) environment. In particular, according to Article 16 of the Framework Directive, an appropriate period of notice shall be given to the parties affected by the withdrawal of *ex ante* obligations.

A role of NRAs is then to design a transition period that is reasonable enough to allow alternative operators to adapt to the new market circumstances, in which they will compete absent *ex ante* obligations⁹. The issues regarding the setting of such a period will be further explored in section 4 of this report.

B. Beyond transition period

In addition, when NRAs withdraw regulation from a market, there may be a need to monitor market evolution and upstream regulation closely to identify novel competitive problems not foreseen in the market analysis and which potentially could draw back the competitive level achieved and require intervention by the NRA.

Such a monitoring of electronic communications markets evolution finds rationale in specificities related to a network economy (network effects, economies of scope and scale creating structural barriers to entry, overall tendency to vertical integration and concentration...) that are, although compatible with a competitive environment, susceptible to contribute to rapid and significant changes on markets. Even in the case where the three criteria test is not fulfilled for a particular market, i.e. when effective competition is declared on this market, such specificities remain observable.

⁹ An appropriate period of notice for the withdrawal of ex-ante obligations may also be no notice in which case there would be no need for a transition period.

Transitional issues may then be associated with new market structures and players' behaviour on which NRAs do not yet have experiences. Therefore, despite the fact that relevant market analysis concluded to no regulation, NRAs should be able to continue to monitor market developments beyond the transition period. Obviously, the uncertainty that could follow the de-regulation of a market does not imply the revision of this market, but it becomes necessary to at least ensure that unforeseen or unexpected effects resulting from the withdrawal of obligations do not reduce competition and that NRAs and NCAs have the instruments available to deal with these issues.

This Report identifies a number of situations – described below – where a close monitoring by the NRA could be necessary to assess that competition is not being diminished as a consequence of the withdrawal of *ex ante* regulation:

- Implementation of upstream regulation. It should be underlined that often, effective competition on retail and even wholesale (de-regulated) markets depends significantly on efficient regulation of the enduring bottlenecks upstream (termination, local loops, ducts). In these cases, the SMP operator's behaviour is a key factor which will determine the competitive development of downstream markets. Assessment by the NRA of potential instances vertical leveraging in this context may be necessary during the transition period but also a role that they should continue to play, even after *ex ante* obligations in a downstream market have been withdrawn, which might go beyond the transition period.
- NGN/NGA development. Due to the economics of NGA with increased scale and scope, deployment of next generation networks in Member States, that should contribute to foster infrastructure competition, may however arise simultaneously with some concentration issues on the corresponding markets¹⁰ - Wholesale Physical Network Infrastructure Access (WPNIA) and Wholesale Broadband Access (WBA) markets, likely to require continuation of regulation. Indeed such investments – aside from those by the SMP (incumbent) operator – may be made by few alternative operators looking – among other – for technical and economic independence from the SMP (and most of the time incumbent) operator, bypassing the up to date enduring bottleneck on the typically copper but also other technologies access network, and finally adopting a vertical integration movement, becoming active on the whole value chain, from the end users to the core network.

These investments will eliminate some bottlenecks but rely most of the time on the alternative operators' access to the SMP (incumbent) operator's passive and/or active infrastructure, managed by the market 4's and/or market 5's regulation. In case of two or more operators co-operating in the roll-out, some of which having no SMP and therefore being not regulated via market 4, NRAs may have to guarantee that such co-operations grant non-discriminatory access for third parties as otherwise the degree of competition reached with market 4's regulation could be reduced. As pointed out by the European Commission in the context of the article 7 procedure¹¹, NGA networks structures could modify

¹⁰ See for an extensive analysis the NGA Report – Economic analysis and regulatory principles, ERG (09) 17 – June 09

¹¹ See for instance *Case UK/2007/0733*, *Case AT/2008/0757*.

the competitive levels already reached in broadband markets (in particular, in the wholesale broadband access market¹²).

- Oligopolistic competition. Oligopolistic market structures are not problematic in themselves, and may be the equilibrium market structure in the electronic communications sector. However economic theory shows that there is a large spectrum of oligopolistic markets results ranging at one end an outcome similar to a monopoly result (in case for example of collusion) to the other end where the outcome approaches a perfectly competitive result (in case of pure price or Bertrand competition). In oligopolistic market structures, NRAs may analyse whether the three criteria test determining a market susceptible to *ex ante* regulation is fulfilled and potentially whether joint dominant positions arise in the absence of regulation.

In conclusion, monitoring might be necessary both during and after the transition period, to ensure that the competitive level achieved in the electronic communications markets is preserved.

As highlighted in this Report, there are a number of measures that NRAs may adopt and that may facilitate the transition from a regulated environment to a purely commercial (non-regulated) environment. Moreover, after the transition period NRAs should continue to monitor market evolution and upstream regulation closely to identify any emerging competition problems not foreseeable in the market analysis and which potentially could undermine the effectiveness of competition in the market.

To continue monitoring de-regulated markets, if necessary, article 5 of the Framework Directive enables NRAs to access some information from the electronic communications networks and services operators on the fringe of SMP status, when stressing that: *“Member States shall ensure that undertakings providing electronic communications networks and services provide all the information, including financial information, necessary for national regulatory authorities to ensure conformity with the provisions of, or decisions made in accordance with, this Directive and the Specific Directives. These undertakings shall provide such information promptly on request and to the timescales and level of detail required by the national regulatory authority. The information requested by the national regulatory authority shall be proportionate to the performance of that task. The national regulatory authority shall give the reasons justifying its request for information”* (emphasis added).

4. Issues arising during the transition period (before full de-regulation)

According to Article 16(3) of the Framework Directive, *“where a national regulatory authority concludes that the market is effectively competitive, it shall not impose or maintain any of the specific regulatory obligations referred to in paragraph 2 or this Article. In cases where sector specific regulatory obligations already exist, it shall withdraw such obligations placed on undertakings in that relevant market. An*

¹² However – as the ERG pointed out in its response to the 2nd Draft NGA recommendation of the Commission - each market must be assessed on its own merits (I/ERG’s response to the 2nd Draft NGA recommendation, ERG (09) 16rev3 – July 09).

appropriate period of notice shall be given to parties affected by such a withdrawal of obligations" (emphasis added)¹³.

The Revised ERG Common Position on the approach to appropriate remedies in the ECNS regulatory framework¹⁴ provides further insight on this issue, when noting (§ 5.6.2) that *"when considering the removal of an obligation, it is of course necessary to take into account whether removal would cause a material adverse effect on competition in the relevant market. It is equally necessary to consider the effect of that obligation in related markets, especially downstream. It would not be appropriate to remove obligations which were a pre-requisite for effective competition in the related markets."*

Before concluding that an existing SMP remedy should be removed or replaced by a different one, NRAs should consider the disruptive effects on the market players of changing remedies and the consequential risk to achievement of the objectives of the framework. As above, NRAs should consider not only the effects in the market in which SMP has been established but in all related markets.

When an NRA removes an obligation or replaces one obligation with another, it should give an appropriate period of notice before the change takes effect, in order to avoid undue disruption to the market players".

In line with ERG's Common Position, a number of issues pertaining to the setting of a transition period are worth reflecting upon. Thus, after a brief consideration of the objectives that may be pursued during the transition period, the factors that may be relevant for the setting of an "appropriate period of notice" will be discussed. After that other issues that could be considered during the transition period are discussed.

A. Objectives pursued by the setting of a notice period

As a preliminary point, it is important to highlight the regulatory objectives that may be fulfilled via the setting of a period of notice.

The primary aim of the transition period is to set, as is evident from Article 16, an appropriate timeframe that allows electronic communications operators or other stakeholders to adapt to the new regime (absent regulation). In this sense, the transition period offers an opportunity to maintain some or all of the existing obligations for an additional (to the timeframe and validity period of the previous market analysis) but appropriate period of time, ensuring that all stakeholders involved adapt to the new circumstances, prior to full de-regulation.

The ERG Common Position on the approach to appropriate remedies in the ECNS regulatory framework¹⁵ (§ 5.6.2) also stresses that *"where the effects of removal or replacement are not fully predictable, a period of monitoring of such effects would be appropriate to ensure the validity of the assumptions made by the NRA which led to the removal or replacement"*.

¹³ Both the Guidelines and the Commission's Explanatory Note also refer to this issue. According to the Guidelines (§ 113), *"where the NRA proposes to remove existing regulatory obligations, it must give parties affected a reasonable period of notice"*.

¹⁴ ERG (06) 33, final version May 2006.

¹⁵ ERG (06) 33 Revised ERG Common Position on the approach to appropriate remedies in the ECNS regulatory framework.

Major divergences between the expected outcome and the real market scenario may, lead to the need for the re-introduction of *ex ante* regulation in the market, subject to the application of the three criteria test. The practical implications of this approach are covered in the section that discusses the options available to NRAs regarding re-introduction of sector specific regulation (Section 5 below).

B. Factors that may be relevant when setting an “appropriate period of notice”

Withdrawal of *ex ante* obligations by an NRA can bring an important change to the marketplace, depending, amongst other things, on the nature of regulatory remedies imposed before deregulation. In particular, alternative operators that have been relying on the remedies imposed in the context of the *ex ante* assessment will no longer be able to rely on such remedies (e.g. mandatory access).

The setting of a period of notice prior to introducing full de-regulation of a market is a mechanism foreseen by the Framework in order to facilitate the transition from *ex ante* regulation to the sole application of the competition rules. For instance, alternative operators may need some time to adapt their existing access agreements with the (former) SMP operator to commercial conditions, or in case of potential discontinuance of the service, find alternative sources of supply (or start self-supplying the relevant input) or manage exit from the market.

On the other hand, once the market has been deemed to be effectively competitive, an inappropriate notice period may limit the ability of the (former) SMP operator to operate on an equal footing with its competitors.

An NRA can also already set a period of notice if it still finds SMP in the current regulatory period, but expects that – if competition develops as expected and with respect to the evaluation of the second criteria of the three criteria test - in a next regulatory period there will be effective competition. The conditions under which withdrawal of regulation in the future is likely can be put in a sunset clause. In that case an additional period of notice, once the NRA indeed has found the market competitive, may no longer be necessary¹⁶.

A number of factors may be taken into account by NRAs when deciding what constitutes an “appropriate” period of notice (as set by Article 16(3) of the Framework Directive).

It must be noted that, in some Member States, national law has predetermined what constitutes the (minimum) period of notice, something that will have to be factored in by the NRA when making its decision. In any event, NRAs retain some discretion when deciding what should be the appropriate period of notice.

The following factors may be taken into consideration by NRAs:

- In general, it would normally be unreasonable to set a transition period that is so long that, in essence, would amount to the maintenance of the *ex ante* obligations for the whole period that should have been covered by the review.

¹⁶ For example, OPTA states in its market analysis decision on the wholesale fixed telephony market of 19 December 2008 that it expects that in the current regulatory period (2009-2011) competition on the residential market will develop in such a way that in a next regulatory period (2011-2014) regulatory obligation on the wholesale residential fixed telephony market will no longer be appropriate.

NRAs are required to conduct their market analyses periodically (e.g. every 2 or 3 years). A transition timeframe that covers that same period would therefore normally not be considered an appropriate period of notice.

- On the other hand, and depending on national law, in some instances the immediate withdrawal of obligations upon publication of the market analysis (thus, without setting a period of notice) may be found to be “reasonable” depending on the factual circumstances. An example of this might be if the existing obligations on the SMP operator had no direct or immediate effects on alternative operators, then consumers should not be adversely affected by the removal of the obligations. Another example might be when the existing obligations are “soft” as the proportional result of competitive market problems.
- In some markets, transition towards de-regulation may be particularly challenging, due to the nature of the market and the effects of the obligations that will be withdrawn. In this context, for some markets NRAs may anticipate that dispute resolution among operators¹⁷ regarding e.g. the precise nature of their relationship under the new, non-regulated environment will be unavoidable¹⁸. If that is expected to be the case, the transition period set by the NRA may take account of this process.

Introducing a period of time that could take account of the time necessary for an NRA to solve the potential conflicts arising during the first months after a decision to de-regulate a market has been adopted, and if not possible on the basis of other legal provisions, may assist alternative operators, who would be able to continue relying on the (still enforceable) SMP obligations while the conflict is being resolved (but obviously only until the transition period lapses).

Keeping this in mind, account may be taken of the Framework Directive, which stresses that NRAs should to the extent possible resolve the disputes among operators within four months¹⁹. In markets where conflicts are anticipated, NRAs may therefore want to consider introducing a transition period of e.g. six months, to take due account of the prospects of a dispute resolution process being triggered, as referred to above²⁰.

- The period of notice may normally be shorter when the obligations that were imposed on the (former) SMP operator only indirectly affect alternative operators (e.g., in cases where no access obligations were imposed). For instance, in the case of the markets relating to telephone services provided at a

¹⁷ As foreseen by Article 20 of the Framework Directive.

¹⁸ Note that disputes can generally be raised in relation to a breach of a regulatory obligation of one party. Where obligations imposed as a result of SMP are withdrawn (due to the market being effectively competitive) the scope for disputes to be raised regarding any breach of such obligations will be lessened. For example, if regulation is to be withdrawn but there is a ‘sunset period’, any dispute during this time would need to have regard to the remaining period within which obligations are still active. Furthermore, the length of time to deal with a dispute will also be relevant.

¹⁹ Article 20 of the Framework Directive.

²⁰ Of course, dispute resolution may be triggered among operators at any given time, regardless of the existence of *ex ante* regulation or not and regardless of whether such regulation is still applicable or not. The particular role of dispute resolution as foreseen in this section relates to the “safety net” that *ex ante* regulation – still applicable on a transitional basis - may provide to alternative operators prior to the resolution of their dispute with the alternative operator regarding the new conditions that will apply to their relationship once *ex ante* regulation has been definitively lifted.

fixed location (markets 3-6 of the 2003 Recommendation) some NRAs (CMT, ARCEP) have imposed obligations on retail market segments (such as *ex ante* communication to the NRA of the commercial offers of the SMP operator) that only indirectly affect alternative operators, i.e. when competing for customers with their own retail offers. The situation is thus different from that existing in wholesale markets, where normally an access obligation will have been imposed, leading to the signing of contracts between the SMP and other players that may have to be revised in the light of the new market conditions.

- Likewise, the different competitive dynamics of the residential and non-residential segments may also have to be factored in when determining – for each of the segments – what constitutes an appropriate period of notice. For instance, due to the tailored nature of the contracts, NRAs might find that an extra-time is necessary for users of the non-residential segments to adapt their agreements to the new market circumstances.
- Particular care may be needed in cases where despite a relevant market being de-regulated, closely related markets are kept under *ex ante* regulation, or where de-regulation only affects some portions of the national territory (for example in case of geographic segmentation of the national market). For instance, de-regulation (or partial de-regulation) of market 5 (wholesale broadband access) in a Member State will normally imply that regulation in the market situated upstream, that is, market 4 (wholesale (physical) network infrastructure access at a fixed location) is continued and effective. A certain amount of time, depending on the competitive situation in the markets concerned, may thus be necessary to ensure the shift by alternative operators from regulated bitstream means of access to commercial bitstream, LLU or other access forms foreseen by market 4.
- Factors such as the ones discussed above (Section 3) when dealing with transitional issues may also be relevant for the fixing of an appropriate period of notice. Thus, in order to avoid unwanted outcomes resulting from de-regulation, NRAs may want to consider the likelihood and scale of any undesired consequences of the removal of SMP conditions, and integrate such assessment in their decision as to what constitutes an appropriate period of notice. In these instances, NRAs should also integrate in their analyses the likelihood and significance of any unintended consequences of the transitional measures that have been proposed.
- A further factor which may worth adding is the time required for alternative operators to arrange new sources of wholesale supply in the event that the newly unregulated operator decides to withdraw supply. This is mentioned in the following case study.

Case study: different temporary scope of the obligations.

Depending on the circumstances, it may be appropriate to maintain some of the existing obligations for a longer amount of time than other obligations having a lesser impact on alternative operators.

For instance, in its *Review of the wholesale broadband access markets* (May 2008), OFCOM has maintained in the local exchanges deemed to be competitive a requirement to provide to existing customers network access for a 12-month period,

while immediately withdrawing other obligations previously imposed on BT²¹. The 12-month period was justified as, in OFCOM's view, it was necessary for customers that had existing contracts with BT to be able to continue to operate in the same way as they did prior to de-regulation of the competitive local exchanges, also allowing for sufficient time to make alternative arrangements. On the other hand, according to OFCOM, immediate withdrawal of the other obligations was intended to give BT some flexibility in order to compete for new customers.

Similar conclusions were reached by ANACOM in its analysis of market 5, where for competitive areas some obligations (such as the price control mechanism) were immediately removed, while other obligations will remain in place for a transition period of one year, and should only be removed after a previous notice of 6 months. Similar conclusions were also reached by OPTA in its market analysis leased lines in 2005. OPTA found that the wholesale terminating segment >2Mb was competitive, but imposed the obligation on the incumbent to continue the supply of MDF-backhaul connections to current customers for at least 9 months. These 9 months should be sufficient for customers to switch to an alternative operator.

In December 2008 OPTA found no longer SMP on the retail business fixed telephony market, but decided that obligations will remain in place for a transition period of one year.

C. Other issues to be considered during the transition period

The setting of a transition period has, as a consequence, an impact on some or all of the obligations that were imposed in the first place. These would still apply on the former SMP operator. This means that, during the transition period, the *ex ante* rules remaining in force and competition rules will co-exist, similarly to when the market was subject to *ex ante* regulation²².

It is worth recalling that even in a de-regulated market, non-compliance by the former SMP operator with the remedies (that are still in force) would constitute a breach of the obligations as set in the NRA's decision, and could lead – on the basis of national law – to an enforcement action against the former SMP operator for non-compliance.

As noted by some NRAs in the answers to the Questionnaire, owing to the implications deriving from the withdrawal of the obligations once a market is de-regulated, the issues pertaining to product and geographic market definition may become even more relevant.

For instance, with regard to leased lines, the distinction between what constitutes a terminating segment and what constitutes a trunk segment may not have been so prominent when both markets were regulated (former markets 13 and 14 of the 2003 Recommendation). The precise boundaries between both markets may however be

²¹ Including the requirement not to unduly discriminate; the requirement to notify charges, terms and conditions; transparency as to quality of service; and the requirement to notify technical information.

²² It is worth noting that NRAs may reach the conclusion that, for the transition period, the situation of existing customers (who have been making use of the regulated services) is not the same as the situation of new customers, and may adapt the regulation during the transition period on the basis of such differentiated circumstances (by e.g. limiting access on a regulated basis during the transition period only to existing customers of the SMP operator). In this scenario, only *ex post* competition law rules would be applicable to new customers also during the timeframe set for transition.

critical if (in line with the 2007 Recommendation) it is decided that only terminating segments of leased lines should be regulated. To ensure that the new regulatory landscape – and the authority that will be empowered to intervene – is fully understood by third parties affected by de-regulation, it would be desirable that such questions are clarified during the market analysis stage. We note however that during any subsequent period, including the transition period, it is possible that these questions might be challenged and need to be further clarified (e.g. in the context of dispute resolution).

On the other hand, as it will be explored in more detail below, the fact that a NRA decides to withdraw a relevant market from sector-specific regulation does not necessarily imply that – on the basis of a new market review – the market could not be made subject again to *ex ante* regulation in the future. This might arise for instance if the assumptions on which basis the withdrawal of obligations was decided prove to be inaccurate or if there is a significant change in prevailing market conditions.

5. Issues arising in the absence of sector-specific regulation

A. The role of NRAs in a de-regulated environment

The Framework makes it clear that an NRA's primary role and powers to introduce regulation and obligations are in relation to markets where the NRA finds that an undertaking has SMP. Where an NRA determines that there is no SMP any more in a market, it is required to de-regulate the market by withdrawing regulation imposed in order to address any anti-competitive effects arising as a result of SMP. Recital 27 of the Framework Directive highlights this where it states that *"it is essential that ex ante regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power, and where national and Community competition law remedies are not sufficient to address the problem"*.

The Framework sets out the scope of a continued role for NRAs, even where there is de-regulation. At an overarching level, the Framework Directive sets out a clear mandate for NRAs in terms of policy objectives and regulatory principles. NRAs for example are required to *"promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services"* through a number of means, including *"ensuring that there is no distortion or restriction of competition in the electronic communications sector"*²³.

In a de-regulated environment, this mandate is expressed in a number of ways concerning the role of NRAs, including among others:

- According to Article 16 of the Framework Directive, NRAs continue to have an obligation to review decisions periodically. A key part of the NRA's role will therefore be to ensure that the three criteria test is not passed and that any previous finding of no SMP in a relevant market, and any consequent withdrawal of regulation, remains valid. NRAs should therefore retain an oversight or monitoring of market conditions, facilitated through their information gathering powers.

²³ Article 8 of the Framework Directive.

- Article 20 of the Framework Directive requires NRAs to resolve disputes between undertakings connected to obligations arising under the Framework or associated Directives. Recital 32 of the Framework Directive calls upon each NRA to resolve disputes that might arise between undertakings in its Member State.
- Under Article 5 of the Access Directive, NRAs have powers and responsibilities to encourage and ensure adequate access and interconnection, and the interoperability of services.

B. Relationship between NRAs and NCAs in a de-regulated environment

Most EU members have separate entities performing the role of National Regulatory Authority and National Competition Authority²⁴. In general, NRAs should promote competition in the provision of electronic communications networks and services (ECN and ECS). NCAs are in general responsible, among other things, for applying *ex post* competition law across all sectors of the economy. In a de-regulated environment or market, where effective competition is generally established, identifying and remedying any competition concerns would normally fall within the NCA applying *ex post* competition regulation. However, given the remit and tasks of NRAs and NCAs within the ECN and ECS sector, this distinction is not necessarily absolute and raises the question of the relationship between NRAs and NCAs in a de-regulated environment.

In promoting competition, Article 8 of the Framework Directive states that NRAs should ensure “*that there is no distortion or restriction of competition in the electronic communications sector*”. In particular, the Framework and associated Directives require that NRAs should also determine whether electronic communications operators have SMP, and that they are able to impose obligations on undertakings aimed at remedying the effects of an SMP designation. In carrying out these tasks, NRAs will for example define relevant markets. Concerning wholesale markets where SMP has been found, NRAs are able to impose obligations: obligations of transparency, non-discrimination, accounting separation, price controls and access to specific network facilities. Concerning retail services, under Article 17 of the Universal Services Directive NRAs also have additional powers to place additional obligations on undertakings where such undertakings are deemed to have SMP, provided that the relevant objective cannot be achieved by imposing conditions at the wholesale level. Moreover, NRAs may require provision of relevant information to operators.

This configuration of duties, tasks and powers could raise a number of possible approaches and roles for NRAs and NCAs in the event that a competition issue in the ECN or ECS sector is identified in a de-regulated environment. One approach for example could be for the NRA to find that an operator has regained SMP and to decide to re-impose SMP obligations under its powers under the Framework (as long as the three criteria test is passed). Another approach is that an NCA investigates the issue under Article 81 or 82 EC Treaty or national competition laws.

Moreover, some NRAs have some powers that overlap quite directly with NCAs in terms of *ex post* approaches to competition. Some NRAs are empowered by national

²⁴ However, as noted, there are some exceptions. For example, in the UK, OFCOM is the sectoral regulator for the UK communications sector. It also has the power to apply directly *ex post* competition laws (Articles 81-82 of the Treaty and Chapters I and II of the UK Competition Act 1998).

law, for example, to investigate and remedy alleged abuses of dominance and anti-competitive agreements in ECN and ECS markets.

Such possibilities highlight the issue of concurrent jurisdiction and the need to identify ways to reconcile approaches of NRAs and NCAs. Some form of coordination of NRA and NCA involvement in competition issues arising in a de-regulated environment is imperative. Such coordination could also minimise any risk of an undertaking being subject to 'double jeopardy'; that is, being subject to scrutiny and possible remedies by both bodies. It could also minimise risks of inconsistent approaches to similar types of competition issues that might be dealt with by either body.

We note in this context that NRAs will have considerable expertise and knowledge of the ECN and ECS sector. So, in de-regulated environments where the NCA takes the lead in considering any competition issue, the transmission and utilisation of NRA expertise could be very helpful. The ways in which this knowledge is used and the form of cooperation and collaboration between NRAs and NCAs therefore becomes important.

A number of countries already have formal agreements or provisions by national law. On the basis of the information provided by NRAs, the following have signed Protocols of Cooperation / Memoranda of Understanding ("MoU") with the respective NCAs. To the extent that such Protocols / MoU exist at Member State level, they may be referred to as a complementary tool to deal with the transitional issues that are discussed in this Report:

Country	Date of adoption
Finland	14 March 2003
Germany	By national law
Ireland	15 May 2007
Italy	27 January 2004
Malta	20 May 2005
Netherlands	24 June 2004
Norway	28 February 2005 (updated 17 December 2008)
Portugal	26 September 2003
Romania	14 July 2004
Slovenia	8 September 2009
Spain	18 June 2008
Sweden	March 2006
United Kingdom	1 May 2004

On the basis of the practical experience to date regarding the cooperation between NRAs and NCAs, it may be helpful to set out in the Protocol of Cooperation / MoU:

- how expertise or staff of one Authority might be accessed or used by the other;
- how information might best be exchanged, and confidentiality preserved.

and in the case of overlap between the powers of NCAs and NRAs:

- the intention of the NRA and the NCA to keep the other party informed about any intention to pursue a case, and in such cases agree who is best placed to pursue it;
- ways in which any dispute concerning who is best placed to pursue the case are dealt with; ways in which the case might be transferred between the NRA and the NCA.

Article 3(5) of the Framework Directive also indicates that NRAs and NCAs should provide each other with the information necessary to apply the provisions of the Framework. The receiving authority should ensure the same level of confidentiality as the originating authority.

C. The role of symmetric regulation²⁵

Symmetric regulation follows directly from the statutes of the Framework, and may in certain instances – without prejudice to the application of competition law – allow monitoring by NRAs of particular segments or services. Symmetric regulation is a specific feature of the electronic communications regulatory regime that is not a substitute or an alternative to SMP regulation. Symmetric regulation is a form of market oversight, which is independent of SMP regulation, and which is therefore implementable on a deregulated market.

The Framework provides in a number of instances for the possibility of imposing regulatory obligations to electronic communications operators, regardless of the existence of an SMP finding. This is *inter alia* the case in relation to obligations concerning access to conditional access systems, obligations to interconnect to ensure end-to-end interoperability, and access to application program interfaces and electronic programme guides to ensure accessibility to specified digital TV and radio broadcasting services (articles 5 and 6 of the Access Directive); obligations relating to co-location and facility sharing (article 12 of the Framework Directive); obligations for accounting separation on undertakings providing electronic communications services who enjoy special or exclusive rights on other sectors (article 13 of the Framework Directive); or obligations imposed in order to comply with international commitments.

In particular, article 5 of the Access Directive allows NRAs to impose access and interconnection obligations to undertakings to the extent that it is necessary to ensure end-to-end connectivity in an independent process to the market analysis exercise. From the answers to the questionnaire, it seems that very few NRAs have intervened on markets by referring to this article. Such a reference often results from dispute settlements between operators that failed to negotiate their reciprocal access and interconnection conditions. ARCEP has recently referred to this article on an *ex ante* basis, to intervene on the “value added” services market, specifying obligations

²⁵ By symmetric regulation it is meant regulatory measures imposed to all operators on a market, independently of SMP status.

imposed on every operator - whatever its degree of market power - that controls end users access for the conveyance of communications to value added services²⁶.

National law may also give NRAs competence to impose symmetric obligations.

This is (for example in France and Spain) currently the case in the context of NGA developments, in particular obligations (such as access, transparency and reasonable pricing) regarding the sharing of in-house wiring by operators that deploy FTTH. Indeed, bottleneck issues inside buildings may arise regardless of whether it is the incumbent operator or alternative operators who are the first to deploy fibre inside a building, thus making SMP regulation inappropriate to address the potential creation of local monopolies (ARCEP, CMT). In a more global context, some national laws allow for sharing of infrastructures under specific conditions (RTR, OPTA).

D. The role of voluntary commitments

The finding that no undertaking in a market has SMP and the associated removal of *ex ante* regulation aims at protecting customers' long term interests through the promotion of competition and its development. Nevertheless, the transition from a regulated to a non-SMP and de-regulated environment will generally occur under the following circumstances or raise issues, such as:

- short term concerns from alternative operators that the removal of regulation of the (former) SMP undertaking will introduce uncertainty; and that
- in the short term, competitive conditions may be more uncertain for some customer groups than for others.

In such circumstances, NRAs might consider seeking voluntary commitments from the former SMP operator. Such commitments could provide one way of addressing such shorter term considerations during the transition from a regulated to a de-regulated market.

Voluntary commitments have been utilised by for example the Danish and UK NRAs (NITA and OFCOM respectively) concerning their decisions to de-regulate relevant markets. However, it should be noted that the ability to accept such commitments may be provided for under national laws in these Member States but may not be available in others.

- In Denmark, for example, prior to the decision to find the market for transit services in the fixed public telephone network (former market 10) competitive and without SMP, the incumbent operator TDC in a dialogue with NITA voluntarily agreed to act in a specific manner such that competition was not impeded. That is, TDC informed NITA that TDC would not impede competition by insisting on transporting traffic itself from its own retail customers directly to third party providers, provided that transport from a competing operator is done based on reasonable terms. In this way, it will be possible for an operator competing with TDC to act as single-point-of-contact to and from a third providers' network.
- In the UK, OFCOM reviewed the retail and wholesale markets for leased lines in the UK and found in December 2008²⁷, among other things, that no operator

²⁶ Decision # 07-0213 (April 2007).

had SMP for two relevant wholesale markets in a particular geographic area²⁸. Remedies applying in these markets were therefore immediately removed. BT, the operator formerly identified as the operator with SMP in these markets, nevertheless agreed to provide a public reassurance that it had no plans to change materially the terms and conditions of its supply of the relevant wholesale products within the relevant geographic markets over the six months immediately subsequent to the finding of no SMP.

In general, at the time of deregulation the former SMP operator may offer a commitment to continue to price products in the relevant market or act in some specified manner for some period of time following de-regulation. An operator might for example give assurances in respect of the treatment of particular customer groups.

Voluntary commitments might also reflect the particular statutory duties of the regulator and any other regulations or obligations that might offer protections to customers or citizens. It is possible for example that the regulator must have special regard for particular customer groups and so might seek out particular voluntary commitments from the operator that aim at meeting such duties.

However the context in which any such commitment is made, should also be taken into account. Article 16 (3) of the Framework Directive allows NRAs, which have found that a previously regulated market has become effectively competitive, to keep remedies in place for a transitory period in order to ensure a smooth transition from a regulated regime to an unregulated situation. Commitments relating to timing and/or content of regulation should under no circumstances be accepted outside this legal context. Furthermore, it should also be borne in mind that differently from regulatory remedies; commitments cannot be enforced in a large number of Member States. From that viewpoint, they are a much "weaker" tool to cover any transition period than in the context of a "traditional" (with respect to the SMP regulation framework) remedy.

As regards transparency of commitments given in the context of Article 16 (3) of the Framework Directive, the existence and reasoning for the acceptance of any voluntary commitments by the NRA from the former SMP operator, as well as higher level details concerning the applicable mechanisms and objectives of any commitment would in general need to be made available and discussed through the usual consultation processes existing in each Member State. It would run counter the transparency principles of the Framework Directive enshrined in Article 6 and 7 of the Framework Directive to keep such commitments secret.

The duration of voluntary commitments might reflect the nature of the issues that are to be addressed through such commitments. They might for example be linked to the length of existing contractual arrangements between the operator and its customers such that customers have time to enter into alternative arrangements.

Voluntary commitments could offer advantages where regulators wish to remove regulation in order to promote competition, but at the same time keep some form of interim protection for customers. They might have a further advantage where there would be a reputational risk to the operator if it broke a commitment and a consequent

²⁷ See OFCOM: Business Connectivity Market Review, Statement and Consultation December 2008, available at: <http://www.ofcom.org.uk/consult/condocs/bcmr08/>

²⁸ The two markets were defined as: High bandwidth Traditional Interface Symmetric Broadband Origination (TISBO) above 8 Mbit/s up to and including 45 Mbit/s in the Central and East London Area; and Very high bandwidth 155 Mbit/s TISBOs in the Central and East London Area.

risk that it would not be trusted either by the regulator or consumers in the future. However, it is very likely that the use of such a motivation to justify commitments is outside the competences which Article 16 (3) of the Framework Directive confers to NRAs.

Other downsides include risks that voluntary commitments turn out to be overly onerous on the operator, or distort competition in some manner, such as by revealing information to competitors that they would not otherwise have had. Voluntary commitments on pricing might unduly distort the operator's prices relative to competitors or other products. However this risk is mitigated by the fact that the commitment is, by definition, voluntary. It should be lastly noted that NRAs have no formal powers to enforce voluntary commitments and this is also a potential downside. An exception is in Italy²⁹ where AGCOM has the power to accept formal commitments which are legally enforceable under Italian law.

Therefore, even if voluntary commitments are a means to smoothly phase out *ex ante* regulation they should be used with great caution:

Article 16 (3) of the Framework Directive, last sentence, provides NRAs with the legal basis to keep remedies in place for an appropriate period of time to allow the undertakings affected by the removal of remedies to adapt to the future less extensively regulated or un-regulated situation. The phasing out of remedies or transitory remedies can be implemented after consultations under Article 6 and 7 of the Framework Directive have been carried out. While such remedies are enforceable, voluntary commitments in many Member States are not.

Against this background there seems to be no room for the acceptance of voluntary commitments which contain information which is kept secret, as this would be a clear deviation from the principle that regulatory measures need to be publically consulted and therefore transparent.

E. The role of obligations existing in related markets

Ex ante regulation cannot be seen as an isolated exercise, in which each market is considered individually, but should be assessed in its overall context, taking due account of the objectives pursued by NRAs.

Consideration of obligations that have already been imposed in related markets is part of the own essence of market analysis process, as explained in the 2007

²⁹ Italian law 248/2006 empowered the Italian NRA (AGCOM) to accept commitments offered by operators. In particular, according to Article 14 bis of Law 248/06 operators may offer commitments not only within the limits of infringement proceedings, but also within the limits of proceedings aimed at promoting competition in the provision of electronic communication networks, electronic communication services and associated facilities and services. In case those commitments are found suitable, AGCOM, by decision, can make them binding on the operators. AGCOM Resolutions aimed at regulating the procedures to be followed when evaluating commitments provide that, in case of breach of commitments, AGCOM will apply sanctions.

According to such a law, in June 2008 Telecom Italia offered Commitments within the limits of proceeding of analysis of market 1, 4 and 5. These Commitments are now being analysed more specifically by AGCOM to define the remedies in markets 1, 4 and 5 that AGCOM will notify to the Commission.

Recommendation. For example, Recital 15 of the 2007 Recommendation³⁰ indicates that, before regulating a retail market, NRAs should look as to whether the imposition of measures at wholesale level is sufficient to prevent competition problems from arising in the first place at the retail level. Due to the “holistic” nature of market reviews, wholesale obligations generally have an impact in retail regulation, just like upstream regulation (e.g., of market 4) has an impact on closely adjacent wholesale markets (e.g. market 5).

Prior to regulating a market (or, in the alternative, prior to deciding to de-regulate a market) NRAs must therefore take into full consideration the specific role that remedies in related markets may play.

NRAs should assess for example the effectiveness of upstream obligations for the development of competition downstream, also taking into account the means by which introduction of higher or better capacities or qualities of the regulated upstream service, or the existence of an effective process for access to inputs, may assist in the development of competition even absent regulation in the downstream market.

In this context, the effective application of the principle of non-discrimination can play a critical role in ensuring a coherent overall regulatory scheme despite the absence of regulation in a given market. The non-discrimination obligation, as set in article 10 of the Access Directive, ensures in particular *“that the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners”*.

As noted in ERG’s Common Position on best practice in wholesale unbundled access (including shared access) remedies imposed as a consequence of a position of significant market power in the relevant market³¹, NRAs may include as part of the non-discrimination obligations a requirement to publish key performance indicators (including indicators relating to downstream services) which allow the service to third parties to be compared with the service provided to the SMP player’s own business. By the same token, the SMP operator may be required to publish its internal protocols for the self-provisioning of the wholesale services to its retail arm. Ensuring compliance with the principle of non-discrimination may also be facilitated via the development of codes of conduct or other soft law instruments, on which basis an NRA may shed light on the way it intends to apply such principle, for instance with regard to the monitoring of the conditions of access (including the setting of tariffs by the SMP operator to prevent potential abuses).

NRAs may also require in a wholesale market (such as market 5) the *ex ante* communication of the retail offers of the SMP operator, to assess their compatibility

³⁰ *“Regulatory controls on retail services should only be imposed where national regulatory authorities consider that relevant wholesale measures or measures regarding carrier selection or carrier pre-selection would fail to achieve the objective of ensuring effective competition and the fulfilment of public interest objectives. By intervening at the wholesale level, including with remedies which may affect retail markets, Member States can ensure that as much of the value chain is open to normal competition processes as possible, thereby delivering the best outcomes for end-users [...]”*(emphasis added).

³¹ ERG (06) 70 Rev 1. See also ERG’s Common Position on best practice in bitstream access remedies imposed as a consequence of a position of significant market power in the relevant market, ERG (06) 69 Rev 1.

with the prices set for the wholesale inputs necessary for providing the retail service, and prevent instances of margin squeeze³².

All these regulatory tools, applicable to upstream markets, may assist an NRA in its conclusion that a related downstream market is competitive and thus is not a candidate market for *ex ante* regulation. As noted in the 2007 Recommendation, the regulatory framework is flexible enough to allow for remedies that may affect related markets. In this context, the correct design of the regulatory obligations applicable at the upstream level, as well as strong enforceability of the obligations imposed in such upstream markets, may become critical to ensure that de-regulation does not pose threats in the long run to the full development of competition.

On a related basis, it is worth noting that on occasions, de-regulation of a given market may likewise have an influence over the remedies imposed on a related upstream market. This is particularly the case with regard to geographic segmentation of the markets.

For instance, conclusions on the geographic segmentation of a market (leading to de-regulation of specific zones) may lead in turn to the NRA's decision to strengthen the obligations prevailing in the geographic areas that have not been de-regulated. Geographic segmentation of market 5 (wholesale broadband access) may for example lead the NRA to consider imposing stricter regulation of the bitstream services that would still be available in non-competitive areas, e.g. via imposition of stricter cost-orientation requirements. This could be the case if the NRA arrives to the conclusion that, for the non-competitive areas, the prospects (and thus, potential for promotion) of alternative infrastructure competition are low (in contrast to the whole of the national territory, where LLU may be a real alternative), thus justifying the imposition of stricter cost-orientation requirements for those specific portions of the national territory.

F. Re-enactment of sector-specific regulation

Once a market is de-regulated, it will generally be assumed that the conditions of competition are sufficiently strong to ensure that there is no further need for *ex ante* intervention, neither during the period covered by the review or in subsequent periods. This is however not an immutable rule, as in certain circumstances – albeit exceptional – a market that has been de-regulated may warrant the re-introduction of *ex ante* rules.

In at least two instances, the outcome of a market analysis on which basis obligations are withdrawn may have to be re-assessed:

- The first case is triggered by the fact that, according to the Recommendation, the three criteria test and the SMP analysis should be performed on the basis of a modified Greenfield approach³³. Therefore, the application of upstream *ex ante* measures and their effectiveness according to a forward looking approach are critical to determine if a downstream market is effectively competitive. Taking this into consideration, unforeseen problems in the provision of the relevant wholesale services may affect the conclusions initially reached by NRAs regarding the

³² With regard to issues arising from NRA's intervention in margin squeeze cases, reference is made to ERG's Report on price consistency in upstream broadband markets, ERG (09) 21, June 2009.

³³ In the context of a "modified Greenfield approach", NRAs are to perform their market analyses assuming the absence of regulation in the market under scrutiny but including regulation which exists in related markets (e.g. in the context of the market 5 review, NRAs would take into account the obligations already imposed in market 4, but not the obligations applicable to the market under assessment).

downstream markets and the level of competition therein. This could justify, on the basis of a forward-looking assessment, subsequent intervention in the downstream markets, despite the initial finding by the NRA of the existence of effective competition.

Case study: need to take into account changes in the competitive landscape.

Some of the issues commented above are mentioned by the European Commission in its assessment of the Portuguese notification of markets 4-5³⁴. In that case, the European Commission notes – while approving the Portuguese decision to de-regulate specific geographic portions of the market from wholesale broadband access obligations – that *“fibre roll-outs may significantly change the competitive landscape, especially if MDFs will be closed down. Even as early as in the phase of announcements and planning, these developments may be liable for halting competitive tendencies. This is especially relevant in the Portuguese situation where the competitiveness of the retail broadband market and the WBA market are – to a large extent – conditioned by the availability of sufficient inputs in the LLU market. Should wholesale inputs in market 4 necessary to compete on the retail market become unavailable, the competitive tendencies might well be reversed”*³⁵. Later on, the European Commission further underlines the need for ANACOM *“to closely monitor the overall level of wholesale competition and the provision of wholesale broadband access services in Portugal to ensure that both business and residential users are adequately protected by effective wholesale competition over the timeframe of its review”*.

On a related basis, it is also worth referring to OPTA’s second round analysis of market 5 (former market 12). The SMP operator’s announcement to progressively shut down some of its local exchanges due to the move to an all-IP environment, led to suspension of some roll-out plans by alternative operators and thus to the need to reconsider the viability and effectiveness of MDF-access regulation. On that basis, OPTA decided, in line with the Commission’s Recommendation on relevant markets, to regulate the market for low quality copper-based WBA (a market which in first round had previously been deemed as not susceptible to *ex ante* regulation).

- The second case is when beliefs about the development of the market that underpinned the finding of effective competition are reversed on the basis of market developments. For instance, in the context of the application of the three criteria test, an NRA may initially conclude that the relevant market satisfies the second criterion (tendency towards effective competition), this leading to the withdrawal of obligations. Further monitoring may however suggest that the conclusions reached in the market analysis are not in line with actual (ex post) market developments (based, this time, not on a forward-looking assessment but on empirical evidence), thereby implying the need for intervention, if justified on the basis of a forward-looking assessment. This could be for instance the case if technological, legal or economic factors bring about developments into the market that will necessarily lead to a change in the conclusions initially reached by the NRA.

The 2007 Recommendation also implicitly allows for re-consideration of the competitive dynamics in a previously de-regulated market, when it notes that NRAs should analyse the product and service markets identified in the Annex to the Recommendation. That

³⁴ See comments letter of 5 January 2009 in *Cases PT/2008/0850 and PT/2008/0851*.

³⁵ Similar comments are made in other notifications relating to market 5, see in particular *Case UK/2007/0733*.

is, regardless of whether in the first round analysis the market was deemed to be competitive at national level, the fact that it is again included in the 2007 Recommendation should lead to re-assessment of that market by the NRA³⁶.

Keeping this in mind, the issue of whether the re-introduction of regulation requires a higher burden of proof merits discussion. It is clear that, in order to justify departure from its earlier findings, the NRA will have to duly substantiate the reasons for its revised approach. In particular, if a market was removed from *ex ante* regulation on the basis of non-fulfilment of any of the three criteria listed in the 2007 Recommendation, the NRA should explain why the three cumulative conditions set therein to justify sector-specific regulation are now satisfied. This should probably be the case even for markets that are still listed in the 2007 Recommendation (whereby in principle NRAs are not required to prove fulfilment of the three criteria test). The same conclusion will logically be predicated in the event that an earlier finding of absence of SMP has to be reversed.

As considered in other sections of this Report, in cases where there are major divergences between the expected outcome and the real market developments, the empirical evidence available on the existence of such divergences –comparing the data contained in the original market review and the final outcome - should assist NRAs in justifying the reasons why re-enactment of regulation is required.

The considerations set above are in line with the regulatory principles of reasonableness and proportionality set in Article 8 of the Framework Directive. They however do not imply that a higher burden of proof needs to be satisfied in these instances. In ERG's view, the burden of proof that will have to be met to justify *ex ante* regulation should be the same regardless of whether regulatory obligations have been maintained in line with earlier notifications or whether they constitute a departure from earlier conclusions³⁷.

6. Conclusion

Transition from sector-specific regulation to competition law raises important challenges for NRAs, which are likely to become more prominent as the electronic communications markets evolve towards more competitive outcomes. While the ultimate aim of *ex ante* regulation is its removal once competitive conditions are satisfactory – thus limiting the scrutiny of electronic communications markets to classic *ex post* control - it must be recognized that abrupt withdrawal of (all) *ex ante* regulation may have undesirable market effects and implications for operators and ultimately, consumers.

In this Report, particular attention has been paid to two specific instances where NRA involvement is critical: (i) the point in time in which a decision to de-regulate a market is taken, but some transitional measures are still deemed necessary; (ii) the point in time

³⁶ In this regard, the European Commission Recommendation of 15 October 2008 on notifications, time limits and consultations (OJ L301/23 of 12 November 2008) provides for the use of the short notification form with regard to “*draft measures concerning markets which, while included in the Recommendation on relevant markets in force, had been found to be competitive in a previous market review, and remain competitive*”.

³⁷ For an in-depth discussion of the issues linked to the burden of proof and interaction between the three criteria and SMP, see ERG's Report on Guidance on the application of the three criteria test, ERG (08) 21, June 2008.

in which full withdrawal of *ex ante* regulation (including transitional measures) takes place.

In both instances, it has been noted that NRAs may still have a fundamental role to play. This includes the application of transitional measures or symmetric sector-specific regulation and the direct or indirect involvement of the NRA in the market (e.g. through monitoring, or cooperation with the NCA once *ex ante* regulation is no longer available).

With regard to transition issues, NRAs should carefully assess – as noted in ERG’s Common Position on the approach to appropriate remedies in the ECNS regulatory framework – the factors that may justify the setting of a longer (or shorter) period of notice, as well as the effects of de-regulation in related markets. Beside that full (SMP) de-regulation of a market does not necessarily imply that the market stays competitive forever and that *ex ante* regulation, following a subsequent market review, may not be appropriate again in the future, for instance if market developments lead to different outcomes than those initially forecasted.

Last, the possibilities afforded by Article 5 of the Framework Directive regarding the submission of information by operators active in the electronic communications sector are worth considering, as they may assist NRAs in fulfilling essential tasks such as:

- conducting the three criteria test;
- ensuring the sufficiency of the wholesale remedies;
- ensuring an adequate degree of retail market competition;
- ongoing monitoring of markets;
- and, globally, monitoring the sustainability of effective competition.

ANNEX 1³⁸

QUESTIONNAIRE ON TRANSITION FROM SECTOR-SPECIFIC REGULATION TO COMPETITION LAW

1. Please indicate whether the NRA is empowered by your national legislation to apply directly the *ex post* competition rules (i.e. Articles 81-82 EC Treaty and its national equivalents).
 - a. If you are not directly empowered to apply the *ex post* competition rules, please indicate the extent to which you can cooperate with the National Competition Authority in the detection of anticompetitive conduct (e.g. via reporting of suspected anticompetitive practice, submission of non binding reports...)
 - b. Please indicate whether the NRA has signed any kind of Protocol of Cooperation with the National Competition Authority of your country. If that is the case, please provide a copy of the said Protocol of Cooperation.
 - c. In case the NRA and NCA have not signed any Protocol of Cooperation, please indicate the methods of cooperation that are usually followed between both agencies.
2. In the context of the second round of market analyses, please complete the table below, indicating which markets originally covered by the 2003 Recommendation are no longer subject to *ex ante* regulation on the basis of your new analysis of the markets.
 - a. For each of the markets listed, please indicate whether you have set a transition period (period of notice) before full de-regulation enters into force, as well as which factors were taken into account in order to set that period of notice.
 - b. In addition, please specify whether for the transition period changes to the previously existing remedies were made (e.g. immediate withdrawal of some obligations, or imposition of new remedies for the transition period prior to de-regulation)
 - c. Please specify whether in your final decision you have included any additional provisions regarding transition (e.g. reference to voluntary commitments proposed by SMP operator, etc.)

Market # (and date of adoption of Decision)	Comments letter of EC (reference #)	Period of notice (timeframe and factors considered)	Changes to the previously existing remedies during transition period	Other provisions re. transition (e.g. voluntary commitments)
Market... (DATE)				
Market ... (DATE)				
Market ...				

³⁸ The NRAs of the following Member States have provided responses to the Questionnaire: Austria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Ireland, Italy, Lithuania, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and United Kingdom.

(DATE)				
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3. With regard to the transition period set prior to full de-regulation, please indicate whether instead of setting a fixed period of time, for a given market you have proposed instead de-regulation only if a number of conditions (e.g. evolution of market trends) are previously fulfilled.
4. With regard to retail markets that have been de-regulated, please indicate whether such de-regulation has led to reinforcement of the existing obligations in the related upstream markets.
 - a. If that is the case, please specify the means by which the wholesale obligations were reinforced.
 - b. Please indicate whether, in addition to wholesale obligations, you have included with regard to the regulated upstream market provisions regarding control of the (de-regulated) downstream markets, such as *ex ante* communication of retail offers, etc.
5. Please refer to your experiences (if any) with regard to the imposition of symmetric obligations³⁹ to electronic communications operators, e.g. on the basis of Article 5 Access Directive. In particular:
 - a. To what extent was the imposition of symmetric obligations used to address a problem that may not have been covered by *ex ante* (SMP) regulation?
 - b. Were there specific reasons for imposing symmetric obligations instead of attempting to regulate *ex ante* the market?
6. Please indicate whether, for a de-regulated market, you later decided (or may decide in the near future) that the market again requires *ex ante* intervention.
 - a. If that is the case, what were the factors considered to justify re-enactment of regulation? Was the market re-regulated during the transition period initially set or afterwards (i.e. once full de-regulation was in place)?
 - b. Please refer to any problems (complaints, etc.) that you have faced in a market once it was de-regulated and that may justify consideration of the market as subject again to *ex ante* intervention.
7. Please mention any other elements that, in your opinion, are relevant for the scope of the report on transitional issues from *ex ante* to *ex post* regulation from the NRA's point of view and that the present questionnaire did not address.

³⁹ That is, obligations that were imposed on all operators indistinctively of their consideration as SMP operators or not, as foreseen e.g. by articles 5 and 6 of the Access Directive, or article 12 of the Framework Directive.