



INITIATIVE
EUROPÄISCHER
NETZBETREIBER

IEN · Dorotheenstrasse 54 · 10117 Berlin

E-mail: info-b1@cec.eu.int

European Commission
Regulatory Framework Unit (B1)
DG Information Society

B-1049 Brussels

Forthcoming Review of the EU regulatory framework for electronic communications and services including the review of the Recommendation on relevant markets

Comments of the Initiative of European Network Operators (IEN)

Executive Summary

IEN welcomes the opportunity to comment on the forthcoming Review of the EU regulatory framework for electronic communications and services including the review of the Recommendation on relevant markets. IEN generally believes that the three overarching objectives of the framework to promote competition, to protect consumers and to promote a single market have proved to be effective and remain valid.

The requirement for Member States to notify market analyses and findings of SMP has imposed a discipline on Member States that has increased the rigour of their work in respect of the notified market analyses. IEN is convinced that it is of utmost importance to continue with this framework for a harmonized approach for regulation of communications markets in the Member States.

IEN furthermore believes that the implementation of the framework in the Member States has only started to deliver results and as such, it is too early for a revision of the fundamentals of the regulatory framework. IEN however recognizes the need for selective changes and far more effective enforcement.

As regards the issue of convergence, IEN believes in the context of the relation between the Recommendation and emerging markets concept that any “emerging markets” related test should not create loopholes or uncer-

Berlin, den

31.01.2006

MITGLIEDER

Airdata
BT
Cable & Wireless
Colt Telecom
Tiscali
Verizon Business
Versatel

SITZ UND BÜRO

Dorotheenstrasse 54
10117 Berlin

GESCHÄFTSFÜHRER

RA Jan Mönikes

VORSTAND

Salomon Grünberg
Sabine Hennig
Andreas Schweizer
Dr. Jutta Merkt
Felix Müller

KONTAKTE

Telefon +49 30 3253 8066
Telefax +49 30 3253 8067
info@ien-berlin.com
www.ien-berlin.com

tainty. IEN takes the view that the NRAs – when regulating allegedly ‘emerging’ markets as well as any other market – should allow an adequate return on any investment made reflecting the risks taken.

IEN considers the Art 7 procedures as an efficient, independent, transparent and fair instrument to support harmonization and the achievement of a level playing field. This also comprises the work of the Commission’s Art 7 Task Force that encourages the regulators to work out their market notification procedures. IEN is aware that the relatively slow market review process is being carried out by Member States and not by the Commission’s services and would like to point out the lack of obliging timeframes within the regulatory framework.

The current framework requires NRAs to promote competition and encourage efficient investment in infrastructure. With focus on the provisions of the Directives that deal with access regulation IEN believes that they only start to become effective in many Member States and thus, should not be changed fundamentally. In addition, IEN recognizes that the current discussion on potential rewards for investment plays an important role in order to find an answer to the question of efficient investment stimulation but should not be relevant in regards to the question of imposing remedies.

IEN considers the Commission’s recommendation on relevant markets as being of fundamental importance for the future development of telecoms markets and the achievement of harmonization. IEN however believes that the recommendation of markets only starts to deliver results. Consequently, IEN recommends that a withdrawal of markets should be postponed until the currently recommended markets have shown some effects. IEN considers the 3 criteria test as accurate and providing adequate tests to determine whether markets should be susceptible to ex ante regulation. As such, no credit should be given to arguments aiming to raise the bar for ex-ante regulation.

EP AND COUNCIL DIRECTIVES

1. General Topics

How can the framework contribute further to the Lisbon goals of growth and jobs?

An innovative and competitive ICT sector is vital to achieving Europe’s “Lisbon” goals of growth and competitiveness. The sector itself is subject to rapid changes in technology and consumer expectations and competition is developing at different speeds across the EU. The current Framework has proved itself able to meet most of these challenges. As such, IEN does not

see a case for a major revision, but does see the need for selective change, and far more effective enforcement.

The overall point of reference for the objectives set out in the Framework should be the goals of competitiveness, growth and employment - the so-called "Lisbon agenda". Such a regime would best secure the wider interests of the citizens of the European Union by recognizing the key role of communications in securing economic well being.

The objective of strengthening the internal market should be reinforced and made more explicit. Similar remedies ought to be in place in different Member States where the conditions of competition are alike.

What are the strengths and weaknesses of the framework?

IEN welcomes the opportunity to comment on the effectiveness of the framework in general. IEN believes the three overarching objectives of the framework – to promote competition, to protect consumers and to promote a single market – have proved effective and should remain the critical aim of the Directives.

The conceptual strength of the Framework is its flexible and sophisticated approach to ensuring that regulation is applied where needed, and rolled back when no longer justified.

The framework has provided a common approach to market analysis across all Member States. The requirement for Member States to notify market reviews and findings of SMP has imposed a discipline on Member States that has increased the rigour of their work in respect of the notified market analyses.

The weakness of the Framework is that there has been a wide variation in the extent to which market reviews have been conducted, in the time taken by the NRAs to complete the process and in the quality and consistency of the remedies imposed. Unjustifiable variation has also been a result in some Member States of appeals processes which have directly or indirectly held up implementation of the new regime. These weaknesses suggest that some institutional reform is required.

What impacts has the framework produced to date? To what extent has the framework achieved its objectives?

IEN however believes the framework – which has been described as "theoretically elegant" in its early days – does only start to deliver results these days and only slowly starts to deliver on its objectives.

It is the sole and exclusive merit of the framework that NRAs across Europe develop consistent views on market problems in same or similar form in many Member States. The harmonization effect induced is beneficial to competition as it indeed levels investment conditions and thereby reduces competitive distortions among Member States.

IEN however feels it should be pointed out clearly that Europe is just at the beginning of this process and has not even started to reap the dividend of this harmonization – last but not least because persistent implementation failures caused by Member States and their administrative bodies contradict the objectives of the framework.

How can the framework be improved?

IEN does not share the criticism that the framework in itself was cumbersome or inert. It was the framework that forced previously tardy NRAs to at least look at issues that were successfully avoided during the first six years of liberalisation, e.g. Bitstream Access, Mobile Regulation, Partial Private Circuits.

IEN is well aware that some Member States including Germany criticise publicly that the framework was too rigid to meet the requirements of Member States to provide for solutions tailor made to their respective marketplace, and that the Art 7 process should be removed as it did not pay respect to special market situations in certain Member States. IEN however feels that such criticism is unfair, unfounded and driven merely by the desire of some Member States to retrieve the ability for a truly national policy making.

IEN in general believes that it is far too early for a fundamental review of the framework, and this is supported by the assumption that there is no whatsoever legal obligation to fully review every single element of the Framework.

Additionally, the results of the existing framework that have been achieved to date do not justify a call upon the Commission for a full review of the Framework.

Many Member States have not completed their market reviews despite the intention set out in Art 16 FD to kick off these reviews immediately after adoption of the Directives, which could be a sign that such important obligations as the determination of the exact starting point of regulatory actions should be defined strictly enforceable by the framework. Even worse, some including Germany have man-made separated market analyses from remedy decision which now artificially hinders timely adoption of measures to remove market failure.

Where market analyses have been carried out by NRAs to date, these have not revealed major factual, visible market developments that would, at this point in time, justify a major overhaul of the framework, and especially not of the list of markets contained in the Annex of the Recommendation.

Many NRAs have not yet completed the market definition/market analysis procedure, and it is not realistic to expect that the full range of distinct national situations in Member States will have materialised by early 2007.

IEN however accepts that this is an indication of a relatively slow market review process carried out by Member States (not by Commission services!) and suggests addressing this shortcoming by increasing its effectiveness, e.g. by making procedural rules clearer in the sense of clear time-frames for NRAs.

As such, IEN recommends refraining from any fundamental review of the framework as there is no pan-european expertise on the strengths and weaknesses of the framework, but is in favour of tweaking the framework to enable it becoming fully effective.

2. Specific Topics

Scope and objectives

Do changes in technology, markets and society call into question the scope of the EU regulatory framework as set out in the Framework Directive? Do the current objectives need to be changed or prioritised?

The Framework Directive has the following objective: *“This Directive establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services. It lays down tasks of national regulatory authorities and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the Community.”*

To achieve this, the Framework Directive makes use of a list measures and principles, such as:

1. Independence of National Regulatory Authorities (FD No 11),
2. Right to appeal (FD No 12),
3. Right of the market participants to comment before decisions are taken (FD No 15),
4. Notification on draft decisions by NRAs with the EU Commission for those that affect trade between Member States (FD No 15, example of pan-european products that strictly require level playing field in each country to ensure that consumers will take the benefits of competition at national and European level)
5. Technological neutrality (FD No 18)

6. SMP concept as necessary criterion to impose ex-ante obligations (FD No 25)
7. Absence of effective competition (SMP one ore two undertakings, competition law remedies are not sufficient to resolve the problem) as sufficient (essential) criterion to impose ex-ante obligations (FD No 27)
8. European Regulators' Group (ERG) and coordination between NRAs (FD No 36, 37)
9. Review driven by changing technological and or market conditions (FD No 39)

All these concepts were already well established, either at the level of national markets regulation, or at the level of national or community competition law. IEN is convinced that it is of utmost importance to continue with this framework for a harmonised approach for regulation of communications markets in the Member States.

- The effects of the 2002 Framework Directive and its specific directives still need to materialise in most of the Member States' telecommunications markets. IEN believes that it is far too early to change the fundamentals of the regulatory framework. Even more, there is a high risk of disincenting efficient investments in the markets if the Review 2006 will push the sector again in a phase of too high legal uncertainty.
- Although technology is changing in telecoms business, none of it has the strength to induce a fundamental change in the underlying economics of the market (economies of scale, economies of scope, switching costs).
- With focus on the demand side, IEN observes a further emergence of the information society in the EU, particularly with regards to the increased importance of broadband applications. However, this trend does not show any signs of an exogenous shift but rather seem to be a market development that is also facilitated by increase in competition and improvement of services on the supply side.

IEN is convinced that any changes in the underlying regulatory paradigm, such as proposed by the Ministry of Economics in Germany (*Bundwirtschaftsministerium*) are not substantiated by exogenous changes in technology and market. For the time being there is no room for further phasing out ex-ante regulation beyond the current level.

Convergence and technological development

Does the regulatory framework allow technological development and convergence to be adequately accommodated (bearing in mind the current review of the Recommendation on relevant markets)? What adjustments to the framework could be made?

One of the fundamental principles of the 2002 Regulatory Framework is technological neutrality. Its consistent application and correct economic interpretation ensures that the concept of ex-ante regulation will not interfere into the dynamics of the market forces in deciding about the winning and losing technologies. As pointed out above, the IEN believes that all technological changes are no surprises to the market today and do not cause any fundamental changes. However, in case such technological changes would occur, the 2002 Regulatory Framework allows the concept of “emerging markets” to be applied. Nevertheless, a valid case for this concept has not been proofed so far.

The rollout of VDSL infrastructures, as announced by the German Deutsche Telekom in second half of 2005, became a prominent example for the importance of technological neutrality. VDSL is not a market but rather a different technology in using existing infrastructure in the local loop. Only the concept of technological neutrality will allow a technology to emerge in the market to the extent that it proves efficiency to serve end-users increasing demand for bandwidth.

Furthermore, IEN welcomes the opportunity to comment on the relation between the Recommendation and emerging markets concept and believes that any “emerging markets” related test should not create loopholes or uncertainty.

Emerging markets arguments are increasingly used by dominant operators to argue that investment or products should be carved out of the scope of regulation because as regulation discourages investment and innovation and as such was disproportionate. Conversely, IEN believes independent research suggests that effectively regulated environments that allow competition to flourish achieve the best outcomes in terms of innovation and investment.

A threat exists however that this issue (and in particular the threat that every service upgrade will be met with demands for an ‘emerging market’ exemption) could continue to haunt regulators and market players in future creating considerable uncertainty and undermining investment plans.

The uncertainty is partly due to the ERG common position on remedies (ERG (05) 70 rev 1) which is currently under consultation that combines the discussion of emerging markets with that of new infrastructure, noting that these are “related issues” without actually spelling out the basis of the relevant relationships. Nor does any guidance exist on the circumstances when the use of new infrastructure rather than existing one is likely to be determinative for regulatory policy. Without more clarity from the Commission, IEN believes that confusion in regulatory discussion of this area will continue.

IEN would thus propose that the following principles will be enshrined in Commission guidance and possibly in a recital to the text of the Framework.

Seite 8 | 18
31.01.2006

- The assessment whether ex ante regulation is warranted should be based on the key criteria whether the market is subject to high entry barriers which prevent the development of competition in a reasonable timeframe (criteria 1 and 2 of the 3 criteria test).

However, in most genuinely emerging contestable markets it would be hardly possible to assess the existence of high and persistent barriers to entry. Rather, the opposite could be expected, i.e. that the initial high market share of the first mover, as it would be due to innovation, would in time be eroded as others eventually entered the market.

- Non-replicable services will pass the 3 criteria test and as such, suggest the underlying market should be susceptible to ex ante regulation. Conversely, in markets where high entry barriers exist (e.g. due to infrastructure that relies on historic inputs such as ducts, street-boxes or the permission to establish set-top boxes) a fair likelihood exists that any apparently new and 'emerging' services may in fact result from exploitation of historic advantages that are not available to other operators.

IEN would therefore like to stress that a need for access regulation and prevention of incontestable monopoly remains where infrastructure is unlikely to be replicable. In such cases, the 3 criteria test (high entry barriers and no dynamic towards competition) should be passed, as a market with high and persistent entry barriers will tend, in the absence of regulation, to be controlled and foreclosed by the infrastructure owner resulting in delays to innovation and absence of competition and choice.

- With regard to infrastructure replicability, IEN believes that this is likely to be an issue at the access level (raw capacity or infrastructure elements) rather than at the retail level and it becomes increasingly acute as the network extends further towards customers and in low density areas. Apparent advances in product offerings such as increased bandwidths in these markets may at least be partly due to structural factors which award control over upgrades to infrastructure owners. This opposes to the type of innovation that would arise in a contestable market, where the opportunity to innovate and invest would be open to all players. For instance, xDSL allowed increased bandwidths through an upgrade to equipment, but was under the control of historic incumbents due to their ownership of the local loop infrastructure.

- In addition, IEN is convinced that competitors should have the same opportunities to create emerging retail markets as the owners of facilities which are uneconomic to replicate. Otherwise, an inevitable control of infrastructure by the dominant operator will limit the pace at and extent to which innovative products could be launched. The implication of this is that wholesale product markets should not be defined solely on the basis of the dominant infrastructure owner's existing or planned retail products but also on the basis of wholesale demand from other operators which may have their own – different – retail plans in mind.

Policy makers should not try to second-guess influence of 'disruptive' technologies on competition and design the framework on the assumption of a particular solution or market structure – the framework is technologically neutral and as such should focus on breaking down any barriers to competition. If competition emerges due to disruptive technologies, then the fact of competition will be sufficient to deliver deregulation.

IEN takes the view that the NRAs – when regulating allegedly 'emerging' markets as well as any other market – should allow an adequate return on any investment made reflecting risks taken. This is an element of flexibility built into the current framework already as it is up to the NRAs to decide which level of ROCE is an appropriate reward for investment.

Single market aspects

**Would deepening or strengthening the single market aspects of the framework contribute to investment in, and growth of, the sector?
What are the remaining barriers towards consolidating the single market in eCommunications?**

IEN believes that the internal market deserves continued focus on ensuring a minimum level of harmonization.

The increased importance of the internal market can not be read as a sign for relieving the level of harmonization in the European Union. Particularly in the telecommunications industry, network operators and thus, end-users were struggling with a lack of harmonization of regulations between Member States. This became particularly obvious with the launch of Voice over IP products of many of the IEN members. While many NRAs consider VoIP as a critical technology for emergence of converged products and for the lowering of costs of communication to end users, they have resisted from developing concise policies concerning VoIP. Furthermore, though IP technology is inherently supranational, it is one of the issues where regulations tend to be much more nationally focused compared to other markets. Any attempts by the European Union to create an even regulatory environment for VoIP have failed so far.

IEN takes the view that investment in the telecommunications sector has suffered in those Member States where regulation has failed to tackle dominant operators, whilst countries that have opened their markets to competition by imposing effective regulation have improved. A substantial part of the variation between investment levels can be explained by the quality of the regulatory environment. IEN recognizes that monopolies and protectionism in any form lead to poor economic performance and would therefore like to point out the recent developments in Germany where it is intended to grant dominant operators a regulatory moratorium for certain infrastructures. This would offer them the opportunity to further strengthen their position in the market and drive out competition. Consequently, IEN stresses the necessity of ensuring independent regulators, efficient appeals systems, and effective economic regulation in all Member States to achieve higher investment levels and take a further step towards harmonization.

Article 7 procedures (Framework Directive)

What are the strengths and weaknesses of the current Article 7 consultation procedures, under which NRAs notify to the Commission the results of their market analyses? To what extent has this procedure served to improve harmonisation of the way in which markets are regulated? What could be improved?

IEN welcomes the opportunity to comment on the current Article 7 consultation procedures. IEN considers the Art 7 procedures as an independent, transparent and fair instrument to support harmonization and the achievement of a level playing field. This also comprises the work of the Commission's Article 7 Task Force that encourages the national regulators to work out their market notification procedures.

IEN does not share the criticism of some Member States describing the Art 7 procedures as cumbersome and rejects the pleading for its removal as the procedures did not pay respect to special market situations in certain Member States. IEN is aware that the relatively slow market review process is being carried out by Member States and not by the Commission's services. To date, the limited number of market reviews more indicates insufficiencies of NRAs than nuisances in the Art 7 consultation procedures. IEN is concerned about the cumbersome and overcautious approach of some NRAs – not only because uncertainty about the framework of business is a natural hurdle for investment but also because the different pace of the NRAs across Europe distorts the reach of a level playing field and common market. IEN however would like to point out the lack of obliging timeframes within the regulatory framework. It is of high importance that binding timeframes for the national market reviews will be set out in the Framework Directive to increase the effectiveness of the procedure. As such, IEN would like to suggest the implementation of a time limit that provides the obligation to the NRAs to notify their market reviews within 12 months. In addition, IEN believes that the Commission should be empowered to carry

out execution by substitution as regards to national market reviews. These substitutions however should remain valid until the NRA has notified the respective market review.

With reference to the proposal of some Member States to simplify national market reviews, IEN strongly underlines the importance and necessity of the elaboration of detailed market analyses that comprises all specifications of the respective markets. The consideration of the functioning of NRAs in other Member States proves that elaborated market reviews are accomplishable within considerable time. The duration of the national proceedings could not be ascribed to the Art 7 Task Force, but to the national regulators. In fact, IEN believes as one principle reason for the delays is that some NRAs decided to separate the notifications of the market definition and SMP assessment and the notification of decision on possible remedies. Therefore, IEN would like to suggest that the framework is clarified in regards to an obligation of NRAs to notify the entire market review package, including the remedy decision. In this context, IEN also recognizes the necessity to enlarge the Commission's rights to enforce the functioning of the Art 7 procedures in the manner of implementing the power of veto for remedy decisions.

IEN generally appreciates the pre-notification meetings of NRAs with the Commission as serving as an effective mechanism for the market notification process for supporting an accelerated market review. IEN however would like to point out, that these meetings must not be misused as an instrument to laminate delays in the notifications to the Commission. This however could also be ensured by implementing timeframes for the notification process, as stated above.

Spectrum management

What are the changes required to the current regulatory package concerning the management of the radio spectrum in the Community, so as to consolidate the internal market for wireless electronic communication services and equipment and to optimise the use of this resource?

IEN believes that spectrum trading and liberalization are the best tools to use spectrum efficiently. These tools allow the value of spectrum to be realised in a market based trading environment in which spectrum users will seek to acquire and manage, in an efficient manner, the quantity of spectrum used, and the application to which it is put.

In general, regulators should apply technological neutrality where possible to the management of spectrum. Technological decisions made by regulators often restrict the ability of the industry to innovate and create effective propositions for the market. The choice of technology should be industry-led which should work to resolve compatibility and interworking issues. In

general equipment manufacturers would be unlikely to support a standard that was not adopted across the industry or resulted in incompatibility with other standards. Similarly, interoperability and harmonization can be addressed through industry-led standardization and should not be the basis of a regulator mandating specific technologies.

When managing spectrum, NRAs should also bear in mind spectrum is a scarce resource that needs to be made available to interested market participants without unreasonable delay. IEN accepts the need to consult on spectrum allocation questions but ultimately feels such consultations should not be carried out to an extent that equals non-allocation of spectrum for the foreseeable future. As such, IEN recommends provisions to be made in the framework whereby all consultations on Spectrum Management must be concluded within one year after one market participant demands such a consultation.

Much else needs to be considered in order to ensure a market based trading environment can work effectively, such as complete clarity of rights which attach to any tranche of spectrum. We believe that such issues can be resolved in many cases, and that a well functioning spectrum market can be created. This will ultimately provide significant benefit to citizens of the EU.

Competition and access regulation

The current framework requires national regulatory authorities to promote competition in networks and services, and to encourage efficient investment in infrastructure. Should there be any changes in the provisions of the Directives that deal with access and related regulation, in order to achieve these objectives?

IEN generally welcomes the goal of the current framework to promote competition in networks and services. We also appreciate that the work of the NRAs should be driven by the goal to encourage efficient investment in infrastructure.

IEN feels that the provisions of the Directives that deal with access and related regulation should not be changed fundamentally for only starting to become effective in many Member States. Moreover, the members of IEN have experienced in the past that these two important goals of the current framework are foiled by the delaying dilatoriness of the national NRAs, especially in Germany, the home country of IEN.

IEN believes that

- ex-ante regulation is still necessary as anti-trust rules are not designed to cope with structural problems and competition law,
- The lack of effective competition is the right test to trigger measures under the framework, as this is consistent with competition law,

- The current discussion on potential rewards for investment plays an important role in order to find an answer to the question of efficient investment stimulation but should not be considered as a question of the appropriateness of remedies that are imposed under the framework.

IEN is opposed to the idea that the question of new investments might become the sole criteria when it comes to defining new markets. From IEN's point of view, market definitions are mainly driven by purely legal facts whereas potential future investments in these markets have to be recognized but shall not be considered as the key factor for such decisions.

Furthermore, the members of IEN have the impression that this discussion has to be considered as shadow boxing. Even according to today's current framework the remedy decision must be suitable, necessary and reasonable. These terms guarantee that remedy decisions take important factors such as rewards for investment into account. Especially the amount being invested and the risk, linked to this investment are essential criteria within the scope of the remedy decision when it comes to answer the question whether a single remedy measure is reasonable to remedy the ascertained market failures. The answer to this question and therefore, the consideration of the investments being made in this context is already today in the sole discretion of each NRA.

As a result, IEN does not recognize the need to alter the current framework on this particular issue. IEN may only accept to restrengthen the focus again on the above mentioned criteria when it comes to the remedy decision making.

Authorisations and rights of use

Is the current system of national authorisations an appropriate model going forward? Is there a need for further harmonisation in the management of numbering, naming and addressing and radio spectrum resources? To what extent does the existing model affect the emergence of transnational, Europeanwide services?

IEN is fully supporting the system of national authorisations. However, as the Commission is suggesting, there is in our view a need for further harmonization, e.g. in the management of numbering. The regulations Member States apply to numbering differ in such a way, that a launch of a pan-European Voice over IP product turns out to be extremely difficult. Areas of divergence are sub-allocation, geographical link, number portability and many more.

Consumer protection, citizens' interests and users' rights

Should the existing provisions on consumer protection and users rights be extended or strengthened in any areas, in particular with regard to disabled users? Do foreseeable market and technological developments (eg next generation networks) threaten or enhance freedom of choice for users?

IEN generally acknowledges consumer protection and users rights as an essential key to the development of a truly European information society that grants quality of service and refrains from the danger of digital divide. IEN would however like to note that the framework must ensure that national solos do not distort competition between Member States as they hampered running telecommunications businesses in one member state as compared to other Member States. Furthermore, the danger exists that quality regulation measures as an element of centrally planned economy pre-empted certain market results and thereby hinder competition and innovation. IEN believes that quality should prevail due to competition but not due to regulatory enforcement.

Privacy and security

Do current provisions provide an adequate legal framework to protect citizens' privacy and security, and to promote consumer trust and confidence in the information society while contributing to the development of the internal market? What improvements could be made?

Actually, IEN is concerned about the current developments in the EU Commission with regard to the issue of data retention. Although IEN respects and supports all reasonable means to fight terrorism and serious crimes, we would like to note that the impact on the involved entities as well as especially the impact on the citizens using telecommunications services should be considered when the directive, the EU parliament recently agreed on, will be transformed into national law.

In addition to that, IEN realizes by the new concept of data retention, that citizens are concerned about their privacy and more often complain with their telecommunications service providers about the quality and amount of data being stored. However, operators are required by law to store the data and shall, according to the latest directive, be obliged to store even more extensive data on all of their customers. IEN, therefore, regrets that operators are blamed for something which they are not responsible for.

IEN considers the best solution to promote consumer trust on the one hand and development of the internal market on the other hand would be to let citizens act in their virtual lives as anonymous and free of surveillance than they could act in their real lives. Resulting from this, operators and service providers would also benefit from this as citizens would feel safer using telecommunications services. Without concerns about their privacy, citizens would be interested in a more frequent use of telecommunications services.

Finally, IEN does not mistake that the frequent use of telecommunications services such as internet access might create new forms of cyber-crimes. However, they can be fought without further modifications of the framework but with the help of well-equipped and trained law-enforcement agencies. An additional burden on the market player's legal obligations or the lowering of citizen's privacy rights does not seem to be appropriate in this case.

Leased Lines

Should the minimum set of leased lines (see Art 18 of the Universal Service Directive) be retained, modified, or withdrawn?

IEN maintains the time has not come yet to carry out a fundamental review of the framework and as such believes the "minimum set of leased lines" as set out and described in Art 18 USD should be retained, especially since the underlying market problem – which is the absence of corresponding wholesale products – has not significantly changed since 2002 in many Member States. However, IEN recognizes that customer demand has changed over the past years. If the Commission were to overhaul what is described in Art 18 USD, it should be considered to increase the maximum bandwidth available under the minimum set to meet customer's demands. In the interest of customers, it should also be considered to include Ethernet services into the minimum set.

Institutional aspects

Are the mechanisms designed to ensure harmonisation between the Member States (Communication Committee, Radio Spectrum Committee, Radio Spectrum Policy Group, European Regulators Group) working efficiently with respect to the development of the internal market? What could be improved?

IEN generally considers the European boards as efficient to ensure harmonization between the Member States but recognizes lacks in the national implementations. It is of fundamental importance to prevent national solos and as such, IEN recommends that European boards increase their cooperation.

IEN would however like to stress that in the event of implementing a European regulator, the Commission should ensure that such implementation does not lead to regulatory deficiencies or delays. Moreover, such regulator must be capable of work within reasonable time.

Other aspects of the framework:

Appeals Procedure

IEN welcomes the opportunity to comment also on other aspects of the framework than the issues already mentioned. The appeals procedures in

some Member States give raises to concern in regards to duration and suspensive effects.

Pursuant to Art 4 of the Framework, concerned parties may take demand judicial review against NRA decisions in front of the courts. Despite efforts to make judicial reviews of NRA decisions quicker, IEN observes that in regards to the German market, it is still normal that final decisions on the German NRA rulings take years. This generally hampers a new entrant who before a decision becomes final have to invest on an uncertain basis and – where rates decisions are under dispute – have to make accruals for potential late supplementary claims that add over the time of the proceedings. Additionally, the length of review proceedings impacts the dynamic of the market negatively as innovation is easily delayed simply by challenging the NRA decision mandating the innovative service.

Additionally, the *de facto* practice of suspensive effect is in breach of Art 4 sec. 1 of the Framework Directive. Despite this provision which essentially states that decisions of the NRAs shall stand, unless the appeal body decides otherwise, in Germany the implementation in Section 137 TKG is a mere lip service as the practice of the Administrative Court is opposite: Where the Court sees itself not able to quickly decide on granting suspensive effect under the statutory framework of Section 80 sec. 5 VwGO by means of injunction, the court issues “adjourned game” decisions whereby suspensive effect is restored until an injunction decision is made. This effectively turns the idea of Art 4 Para 1 FD upside down and even worse encourages slow decision processes.

Having said that, IEN notes that some countries have relatively efficient national appeal processes whilst other countries such as Germany have systems that suspend or effectively suspend regulatory decisions for very lengthy periods. The Commission’s 10th Implementation Report states at page 13: *“It has to be considered whether in some Member States (Germany, France, Poland, Denmark, Sweden and Italy) the length of appeal procedures has undermined the effective application of the regulatory framework...”*

IEN feels that the answer to this challenge probably lies in streamlining appeals procedures among Member States by including wording in new Directives which contain explicit limits on the time which national courts can take to determine appeals against NRA decisions, contain limits on the number of levels of national appeal (only one court should examine both facts and law) and tighten thresholds for interim relief against regulatory decisions, especially to ensure that suspensive effect is not granted unless the plaintiff demonstrates irreversible harm. IEN believes these proposals do fall within the powers of the Community and also respect fundamental rights and proportionality as general principles of EU law.

RECOMMENDATION ON RELEVANT MARKETS

Are there markets listed in the Recommendation which should be withdrawn or modified?

IEN considers the Commission's recommendation on relevant markets as being of fundamental importance for the future development of telecoms markets and the achievement of harmonization.

IEN however believes that the recommendation of markets only starts to deliver results on the telecoms markets. Regardless of the intention of the Framework Directive to begin the market reviews as a first step of the implementation process immediately after adoption of the Directives, to date, many Member States have not completed their reviews, and as stated before, some NRAs have separated market analyses from the decision on remedies. In the event that market analyses have been carried out, they have not achieved visible market developments that could deliver any outcome concerning efficiencies and practical experiences. As such, at this point in time, any revision of the list of markets contained in the Annex of the Recommendation could not be justified.

IEN is well aware that national dominant operators call for a limitation of the list relevant markets to accomplish deregulation and decrease bureaucracy. IEN however would like to stress that it was the general intention of the market review to revise the recommendation of markets in the event that the listed markets could be sourced with meaningful market data. In view of the current status of the national market review procedures such data can not be denominated. Consequently, IEN recommends that a withdrawal of markets should be postponed until the currently recommended markets have shown some effects at all.

Are there markets which should be added to the list in the Recommendation?

IEN believes that the Recommendation of relevant markets should comprise a forward-looking approach. IEN would therefore like to point out that the list in the recommendation should be enlarged to new emerging markets whereas IEN agrees that investment and risk should be considered in any regulation. It dissents from the emerging markets arguments used by dominant operators who argue that investment or products should be disregarded from the scope of regulation without any review and thus, the list of markets, because regulation would discourage investment and innovation and as such was disproportionate. IEN holds the view that independent research suggests that effectively regulated environments where competition is allowed to flourish achieve the best outcomes in terms of innovation and investment. As such, IEN suggests for instance the adoption of Ethernet Access.

Should the 3 criteria, which are used to determine which markets may warrant ex-ante regulation, be adjusted?

IEN strongly believes the 3 criteria test is accurate and provides adequate tests to determine whether markets should be susceptible to ex ante regulation. As such, no credit should be given to arguments aiming to raise the bar for ex-ante regulation, especially concepts such as “superdominance” or “essential facility”.

As noted above, IEN does not believe that the time is ripe for an update or review of the Recommendation, which includes the 3 criteria contained in Recital 9 of the Recommendation remain unchanged as they currently are.

IEN however takes that certain interested parties, including the European Commission and other actors, have identified the 3 criteria test as a potential area for revision. As a matter of precaution – not to kick off any debate about this test as such –, IEN would like to share a number of observations in this respect.

As regards the first criterion (*Presence of high and non-transitory entry barriers, whether of structural, legal or regulatory nature*), IEN believes this criterion is sound, and should certainly not be modified.

The second criterion (*Markets, the structure of which does not tend towards effective competition within the relevant time horizon*) is sound too, but the Commission should consider that the definition of the element “relevant time horizon” has in the past created some uncertainty. IEN takes the view this refers to the time horizon of the market analysis (which can be one to three years depending on Member State legislation and administrative practice) and urges the Commission not to allow hypotheses about long-term industry trends or other considerations as an element of the “relevant time horizon”.

As regards the third criterion (*Application of competition law alone would not adequately address the market failure concerned*) IEN believes this is a necessary element of the test; however in IEN’s opinion the application of the test and recent proposals from policy makers in Member States such as Germany hint that the forward-looking element could be abused to “guess” for competitiveness. As such, IEN suggests the European Commission recognises explicitly that any finding in this respect must be based on facts, i.e. the objective historical track record of the application of competition law in the telecommunications sector at national level and at EU level, including an impact assessment. IEN firmly believes this means the third criterion can not possibly be applied prospectively.

Berlin, 31 January 2006