

IEN position on Review of the EU regulatory framework for electronic communications and services

Overview

I. Regulatory approaches – Innovation and investment

1. Framework generally successful

IEN believes that the three overarching objectives of the framework remain valid – to promote competition, to protect consumers and to promote a single market. The framework itself has started to deliver on these objectives. The conceptual strength of the framework is its flexible and sophisticated approach to ensure 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 certain amount of discipline on Member States and generally increased the rigour of their work and the thoroughness of their market analyses.

IEN however believes the implementation of the framework has only started to deliver results in some member states and as such, it is too early for a revision of its fundamentals. IEN predominantly recognizes a need for selective changes and a far more effective enforcement.

2. Clear relation between investment and effective regulation – ladder of investment works

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 the sector has improved in countries that have opened their markets to competition by imposing effective remedies.

There is, however, a great variation among member states regarding the effectiveness of the framework, and 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 such as the granting of a regulatory moratorium lead to poor economic performance. IEN therefore agrees better performing regulatory regimes contribute to higher investment levels, as measured by the OECD Regulatory Index, or other studies provided by the Commission (or the ECTA Scorecard).

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. Europe should not regulate differently – Europe should regulate better.

3. Maintain three criteria test – not relevant whether market is ‘emerging’ – technical neutrality successful

IEN considers particularly the “three criteria test” as accurate. It provides adequate tests to determine whether markets should be susceptible to ex ante regulation. Consistent application of the test ensures that the concept of ex-ante regulation does not interfere with the dynamics of the market forces, which are to decide about the winning and losing

technology. As such, the test helps successful competitors to prevail while adhering to technological neutrality.

IEN believes the existing framework provides NRAs with sufficient flexibility to reward innovative and risky investments. IEN believes that current technological changes are no surprises to the market today and do not cause any fundamental changes. As such, any specifics of “emerging” markets can be addressed by the framework today, without having to change the three criteria test.

That said, the possibility of new investments should not be used as criteria for market definitions. From IEN’s point of view, market definitions are mainly driven by legal and economic factors whereas potential future investments in these markets have to be recognized at the remedies side but shall not be considered as the key factor for such decisions.

II. Spectrum Management

IEN believes that spectrum trading and liberalisation 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. 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.

III. Consolidating the single market

1. Veto over remedies

IEN considers the consolidation of a single market as the key issue to grant the effectiveness of the Framework and to attract investment.

In this context, IEN 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. NRAs across Europe have not always applied a similar set of remedies to similar market failures. In addition, some NRAs have imposed remedies that solved only part of the identified competition problem. IEN considers a veto over remedies could be appropriate to help address these shortcomings.

2. Appeals mechanisms

As regards national appeals, IEN considers both timing and expertise of courts as problematic. In some Member States, the average timeframe between the filing of an appeal and the final decision of the court is several years. Furthermore, market participants have complained about the judicial practice of routinely suspending NRA decisions despite the provisions of Art. 4 of the Framework Directive. In this context, IEN appreciates the intention to ensure courts in the member states use legal criteria based on European case law which when deciding whether to suspend an NRA decision on appeal. IEN agrees suspensive effect should not be granted unless the plaintiff demonstrates irreversible harm.

3. Enforcement mechanisms

With focus on enforcement mechanisms, market participants face the problem that it takes extensively long for the implementation of the remedies decisions such as wholesale agreements or reference offers. IEN would like to remind all stakeholders involved that the existence of a remedies decision does not in itself solve market problems – it is the implementation and enforcement of the remedies that matter. As such, NRA work only starts when the remedies are served.

While IEN appreciate NRAs consult both market participants and the incumbent with a great level of detail, IEN feels many lengthy discussions could constructively be abbreviated by NRAs setting forth the specific obligations in greater detail in the remedy decisions.

IEN furthermore suggests to strengthen the enforcement provisions. The current measures that empower NRAs to impose fines have failed to provide adequate compliance with the regulatory requirements. IEN therefore generally supports the Commission's proposals to empower NRAs to impose sanctions including the ability to apply deterrent penalties from the time of breach.

The Commission could also consider the possibility of execution by substitution. In that event, Substitution actions taken by the Commission should remain valid until the NRA has notified the respective market review.

4. Authorization of services with pan-European or internal market dimension

Pan-European markets are the ultimate objective of the consolidation of the internal market. There may be customer groups at retail level that procure across borders and have pan-European demand. However IEN believes this is widely irrelevant as regulation should be primarily focused at wholesale/access level – and at access level, the demand side buys locally, not across borders.

IV. Strengthening consumer protection and user rights and improving security

Whilst acknowledging strengthening consumer protection and user rights as well as improving security are key to development of a truly European information society, IEN would like to raise the concern that national solos distort competition between member states as they hamper running cross-border businesses. Additionally, there is danger that quality regulation measures as an element of centrally planned economy pre-empt market results and thereby hinder competition and innovation. IEN therefore states that quality should prevail through competition but not through regulatory enforcement.

V. Streamlining Art 7 procedure

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 view expressly comprises the excellent work of the Commission's Article 7 Task Force which encourages NRAs to carry out rigorous and robust analyses. IEN does not share the criticism of some Member States describing the Art 7 procedures as cumbersome and rejects the pleading for its removal on the basis it did not pay respect to "special market situations" in certain Member States. IEN is fully aware that the relatively slow speed of market reviews is due to NRAs and not due to Commission services. If at all, changes should be limited to the following:

- Binding timelines for market analyses to be completed
- Shortening of timeframe for reviews by forcing member states to notify analysis and remedies proposals simultaneously
- Commission right to foster harmonization, e.g. through veto over remedies

VI. Other Issues

1. Structural Remedies

As regards the imposition of structural remedies IEN believes that they should be at the avail of the NRAs as an option – not as a measure to take easily but certainly as the ultimate remedy. Samples from different network industries – railways, electricity, but also telecommunications – show that the mere existence of structural remedies can significantly encourage integrated undertakings to trade at fair and non-discriminatory terms and to grant competitors equivalence of access.

2. Institutional Aspects

With focus on institutional aspects IEN agrees that institutional centralization of market reviews and remedies could support harmonization of remedies beyond a mere veto, and IEN would not object. Doubts however remain whether a European Regulatory Authority would be a working model in terms of resource and lead time. For example, the simple definition of location of office could already take years.

IEEN considers ERG as an efficient to foster 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.
