Centre on Regulation in Europe
Improving network industries regulation

An Integrated Regulatory Framework for Digital Networks and Services

A CERRE Policy Report

Appendix 1: Living up to lofty ambitions - EU electronic communications & content regulation in the 21st century

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1. Introduction

This paper, part of CERRE's work on the review of EU electronic communications and audiovisual media services regulation, seeks to look back at the development of EU regulation of electronic communications and audiovisual media services since 2002.

2. The 2002 Framework and the AVMS Directive

At the end of the 1990s, as telecommunications were being liberalised, the European Commission set out to recast the applicable regulatory framework. In the wake of the 1997 Convergence Green Paper, the overarching architecture was laid, with a single framework applicable horizontally to all electronic communications networks and services, and a set of more specific directives – chiefly the Television Without Frontiers and e-commerce directives – to govern the content circulating on such networks and services. In 2002, the set of directives comprising what is now known as the electronic communications regulatory framework (the '2002 Framework') were adopted – including Directive 2002/19 (Access Directive), 2002/20 (Authorization Directive), 2002/21 (Framework Directive) and 2002/22 (Universal Service Directive).

The 2002 Framework was intended to replace the rapid succession of legislative enactments from the 1990s with a coherent construction that could remain stable despite the rapid evolution of the regulated industry. Accordingly, it relied on a number of principles of regulatory design. First of all, in order to avoid the need for constant legislative revision, a more elaborate vertical decision chain model was adopted. EU legislation (and national law implementing it) would remain more general and concentrate on principles. That general legislation would be further developed in subsidiary, non-legislative, soft-law instruments, and finally National Regulatory Authorities (NRAs) would be in charge of implementing and applying the law to operators and firms in the market. Secondly, on substance, stability was sought in eschewing technological categories in favour of technological neutrality. Thirdly, instead of technological categories, legislation was articulated around economic and functional categories, and accordingly economic analysis became central to the life of the regulation.

In substance, the key elements of the 2002 Framework are:

- A trilogy of overarching objectives: the promotion of competition, the development of the internal market and the promotion of the interests of citizens;
- A liberalised market entry regime left under the control of each Member State (without a single home-country control system), yet without individual licenses. However, the use of scarce resources – including frequencies – can be made conditional on obtaining rights of use;
- Light symmetric regulation at wholesale level, coupled with a robust regime of asymmetric regulation, attached to operators holding Significant Market Power on certain relevant markets selected by the Commission;
- Limited retail regulation, to ensure the provision of a narrowly-defined Universal Service basket, together with some consumer protection measures.

In many respects, the 2002 Framework was a pioneering venture, on par with the modernisation of competition law, in seeking to substitute a more integrative, principled,

and multi-disciplinary approach to regulation, for the more formalistic, legalistic, separation-based approach typically used under EU law until then.[1]

In comparison, content regulation remained more technology-based and compartmentalised. In 2008, the Television Without Frontiers Directive was itself revised to account for technological developments, and became the Audiovisual Media Services (AVMS) Directive. Yet that revision was mainly characterised by the introduction of additional technology-based categories, such as 'linear' and 'non-linear' services, in an attempt to extend the scope of regulation to newer services that were technologically different from, but economically competitive with, broadcasting. The AVMS Directive embodies a wide-ranging regime of home-country control for providers of audiovisual media services, with a set of harmonised regulatory requirements relating to, among others, the promotion of European content, the regulation of advertising and the protection of minors.

[1] Hancher / Larouche, de Visser

3. The implementation and application of the 2002 Framework

3.1 General developments

The implementation of the 2002 Framework was a major effort for Member States, many of which had to significantly upgrade their regulatory capacities, in order for their respective NRAs to be able to deal with the tasks entrusted to them under the Framework. In the process, they also evidenced a fair amount of creativity in institutional design, with Member States introducing multi-sectoral NRAs,[2] horizontal NRAs dealing with all network industries,[3] NRAs holding concurrent powers over competition law,[4] or even super-authorities combining sector-specific and competition law jurisdiction.[5]

These NRAs became involved in the implementation and enforcement of the 2002 Framework, with most of their time and energy being consumed by the SMP regime. The Commission issued a first Recommendation on Relevant Markets in 2003,[6] tasking NRAs with the analysis of 18 relevant product markets. That number was reduced drastically to six markets with the second Recommendation in 2007,[7] and then four markets with the third one, issued in 2014.[8] On that account, the 2002 framework appears to be delivering on its promise of a progressive reduction in sector-specific regulation, although it is difficult to see how the number of relevant markets can be reduced further than four. Yet upon closer inspection, the real size and scope of the SMP regime becomes clearer. Across the EU, NRAs presided over some 1800 market analysis proceedings since 2002.[9] In most of these proceedings, the stakes were high, since the outcome of the proceedings would have a direct impact on the bottom line of the operators involved. Accordingly, and unsurprisingly, SMP proceedings have spawned a large industry, with lawyers, economic consultants and other advisors turning them into expensive and expansive affairs, including eventual appeals to national courts.

[2] Where jurisdiction over electronic communications was combined with jurisdiction over posts (in many Member States) or broadcasting (as in Italy or the UK, for instance).
[3] As is the case in Germany with the BNetzA.
[4] As is the case in the UK with Ofcom.
[5] As is the case in the Netherlands with the ACM.
[6] Recommendation 2003/311 of 11 February 2003 [2003] OJ L 114/45.
[7] Recommendation 2007/879 of 17 December 2007 [2007] OJ L 344/65.
[8] Recommendation 2014/710 of 9 October 2014 [2014] OJ L 295/79.
[9] As of September 2015, the Commission had received 1776 notifications under the Article 7 (of Directive 2002/21) procedure, whereby NRAs must notify their draft SMP decision.

3.2 The 2002 Framework before the ECJ

For all the discussion that its implementation generated, the 2002 Framework itself proved remarkably solid in court. Throughout its case-law, the ECJ has shown that it understood the choices made by the EU institutions, and it sought to uphold and even strengthen them. Nowhere is this clearer that in *Commission* v. *Germany*, concerning German legislation introducing regulatory holidays.[10] In finding Germany to have infringed EU law, the ECJ insisted upon the central position of the NRA in the 2002 Framework, and the need to preserve its independence and its competences in pursuing the objectives of the Framework in the course of SMP proceedings. By directly instructing, via legislation, the NRA to grant a regulatory holiday, Germany had deprived the NRA of its powers and thus breached EU law. Indeed, in its *ENISA* ruling, the ECJ had already established that the creation of independent agencies with discretionary powers (here at EU level) – as opposed to a direct and detailed harmonisation of substantive rules – was a valid use of EU harmonisation powers.[11] Similarly, in a roundabout manner, the ECJ enshrined the essential features of NRAs – competence, independence, impartiality, transparency and effective appeal to an independent body – from which Member States may not detract, however they set up their respective NRAs.[12]

It is also striking to note that, in 'boundary' cases, the ECJ chose the interpretation that gave the broadest and most solid foundation to the 2002 Framework. For one, in *UPC/Hilversum*, the ECJ refused to indulge in minute delineation of the boundaries of "electronic communications networks/services" and instead used a principal/accessory reasoning, so as to affirm that the 2002 Framework applies to the whole of an offering, even if accessory parts of it may not constitute electronic communications.[13] Similarly, the ECJ removed restrictions on standing in judicial review proceedings, in order to ensure the effectiveness of the 2002 Framework.[14]

The Court also perfectly understood the articulation between the limited regime of symmetric access rights and obligations, at Article 3-5 of the Access Directive, and the heavier set of obligations that might be imposed on SMP operators pursuant to Articles 6-13a of that Directive.[15] It sought to give full effect to the SMP regime, when it emphasises that the set of facilities for which access obligations could be imposed was open-ended.[16]

[10] ECJ, Case C-424/07, *Commission* v. *Germany* [2009] ECR I-{…}.
[11]
[12] ECJ, Case C-389/08, *Base* [2010] ECR I-{…}.
[13] ECJ, Case C-518/11, *UPC/Hilversum* [2013] ECR I-{…}. See also ECJ, Case C-475/12, *UPC DTH* [2014] ECR I-{…}.
[14] ECJ, Case C-426/05, *Tele2 Telekommunication GmbH* [2008] ECR I-{…} and Case C-282/13, *T-Mobile Austria*, Judgment of 22 January 2015, not yet reported.
[15] The Court found against Member States that had sought to extend the symmetric regime beyond its narrow confines, in Case C-227/07, *Commission* v. *Poland* [2008] ECR I-{…} and Case C-192/08, *TeliaSonera* [2009] ECR I-{…}.
[16] ECJ, Case C-556/12, *TDC* [2014] ECR I-{…}.

This brief review of ECJ case-law shows that the ECJ has a clear view of the foundations that underpin the 2002 Framework. The ECJ generally refuses to endorse 'shortcuts' taken by Member States in the implementation or application of the 2002 Framework, even in the face of arguments that this would still be in line with the overarching goals relating to the internal market, competition or consumer interests. The ECJ seems to understand fully that the 2002 Framework was momentous, the outcome of in-depth reflections and discussions on regulatory design, and that it is one of most coherent pieces of EU secondary legislation.

3.3 Critical views – Institutional architecture

If anything, the one EU institution that most undermined the whole framework, through its initiatives, is the Commission itself. With the Roaming Regulation,[17] the Commission sidestepped the 2002 Framework to propose the enactment of a separate piece of legislation that directly regulated roaming prices, in contradiction with the 2002 Framework. Whilst it might have been politically expedient to do so, the same result could have been achieved via the 2002 Framework.[18] Ruling that the Regulation was valid, the ECJ was at pains to narrow down the Regulation, since it addressed a perceived limitation of the 2002 Framework with "a different conceptual approach".[19] More recently, the Commission evidenced once again a disregard of the 2002 Framework when it proposed a stand-alone Regulation for a Connected Continent,[20] here as well apparently out of political expediency. Irrespective of whether these Regulations were desirable or not in substance, the Commission, in proposing them, appeared to turn its back on its own work and therefore to endorse some of the most common criticisms levelled at the 2002 Framework in general, namely the fragmentation of outcomes between Member States (and NRAs), and the heaviness of the procedures. Each of these will be reviewed in turn.

Ever since the early days of liberalisation, there has been a constant debate about whether the implementation of EU regulation should be carried out at EU level – through the Commission directly or, as most prefer, through an EU-level regulatory authority – or at national level, through NRAs.[21] In line with basic principles of EU law, the latter choice has prevailed.

The benefits of decentralised implementation and enforcement are well known. They are twofold. First of all, decentralisation allows for the specific circumstances of each Member State to be better taken into account, for more effectiveness. The experience of the 2002 Framework has shown, however, that the optimal level of decentralisation is not necessarily the Member State. Wholesale broadband access regulation, for instance, might end up at a high level of granularity, since the competitive landscape can vary from one locality to the

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[18] Article 19 of Directive 2002/21 makes room for harmonisation measures to correct fragmentation in NRA decision-making.

[19] ECJ, Case C-58/08, *Vodafone* [2010] ECR I-{…}.

[20]

[21] The Commission itself regularly commissioned studies on this issue.

other.[22] Secondly, decentralisation allows for a measure of experimentation, as Member States attempt diverse solutions, and the optimal solution emerges out of practice; experimentation is particularly relevant in the electronic communications and media sectors, where considerable technological and commercial uncertainty reigns. While hopes were voiced for experimentation, in practice the Commission and the NRAs did not allow it to happen.[23]

Instead, the 2002 Framework heralded many innovations in the coordination of NRA decisions, in order to ensure some consistency at EU level, especially as regards the SMP regime. First of all, Commission Guidelines and Recommendations steer the work of NRAs. Secondly, the Article 7 procedure allows the Commission to review and in certain cases veto NRA decisions, in order to ensure the integrity of EU law and prevent internal market distortions.[24] The ECJ acknowledged both the role and the centrality of that procedure in its case-law.[25] Thirdly, the cooperation between NRAs at EU level has been institutionalised, first in the ERG, then in BEREC.

Nevertheless, many commentators – including voices within the Commission – deplore the lack of uniformity in regulatory outcomes across the EU, focusing in particular on the divergence in the remedies imposed under the SMP regime (where the Commission holds no veto against NRA decisions) and the alleged ineffectiveness of BEREC, even after the 2009 reforms.

In the opinion of the author, the present system has served its objectives well, considering the trade-offs inherent in the balance between central and decentral implementation and enforcement. If any change is to be made, such change must take place within a more elaborate analysis that would also encompass the material scope of regulation (object) and the assignment of jurisdiction (more on this below). In addition, any cost-benefit analysis must take into account some of the experience gained since 2002. For instance, even if NRAs are faulted for lack of coordination on SMP remedies, their local expertise and rootedness proved very valuable, and remains unchallenged, in other areas of the 2002 Framework (universal service, consumer protection). Furthermore, the reform of financial supervision shows that, even if a decision is made to bring the regulatory authority to an EU level, not all the work can be carried out at EU level and national authorities retain a role. Finally, in any event, competition law enforcement remains decentralised, and therefore the risk of fragmentation is not entirely removed by centralising sector-specific regulatory enforcement at EU level.

[22] As recognised in the Ofcom proceedings.
[23]
[24] Directive 2002/21, Art. 7 and 7a. Since the entry into force of the 2002 Framework, the Commission has issued 13 veto decisions under Article 7, as well as (since 2009) 23 recommendations under Article 7a, urging NRAs to reconsider the remedial parts of their draft decisions.
[25] ECJ, Case C-3/14, *Telefonia Dialog*, Judgment of 16 April 2015, not yet reported.

3.4 Critical views – the heaviness of the SMP procedure

With respect to the heaviness of regulatory procedures, in particular as regards the SMP regime, fairness commands that one point out that part of the problem stems from the considerable time and resources invested by regulated firms in these procedures, so that the work of the NRAs in processing submissions and arguments exploded.[26] Here as well, there is a trade-off between procedural simplicity and economy on the one hand, and accuracy and quality of decision-making on the other hand.

Beyond that, even assuming procedural restraint on the part of the regulated firms, the application of the SMP regime has become conceptually intricate over the years. The 2002 Framework, certainly as far as the SMP regime was concerned, heralded a move away from the technological categories of the previous ONP framework, towards economic and functional categories, in order to make regulation sustainable in the face of technological change. This move towards economic categories was presented as the introduction of competition law into sector-specific regulation; it was apparent from the outset that this was an inaccurate reduction, and that there is more to economic analysis than competition law analysis.[27] This is best exemplified by the rise of the 3-criteria test[28] as the leading guide for the selection of markets to be analysed by NRAs. That test does not truly belong to competition law analysis, yet it is based on economics, and it certainly captures the essence of the SMP regime better than the claim that the selection of markets resembles relevant market definition. Yet paying lip-service to competition law entails complication and costs: once it has been decided that each network is to be analysed separately for the purposes of call termination regulation,[29] it follows that each network operator will hold SMP. Conducting an elaborate market definition and SMP/dominance assessment does not add much. Hence, the SMP regime, at the core of the 2002 Framework, would benefit from abandoning the pretence that just because economics are used, the analysis must be taking the form of competition law analysis.

Furthermore, despite the principle of technological neutrality and the choice in favour of economic and functional categories, the Commission and NRAs found it hard – if not impossible – to exclude technological categories entirely from the implementation and application of the 2002 Framework, and in particular of the SMP regime. Conceptually, once economic analysis is conducted more qualitatively than quantitatively, it becomes easier for technological categories to creep in. For instance, if market definition/selection relies on 'product characteristics and use', the outcome can easily be framed in technological categories: broadband access can differ, from the customer (demand substitutability) point of view, according to whether it is delivered via cable, DSL, fiber or wireless networks. Furthermore, behind the recurring and agonising debates since 2002, on whether fixed and

[26] Not to mention the resources invested by all parties in subsequent judicial review proceedings.
[27] Larouche (2001), A Closer Look
[28] Now given a central place in the 3rd Relevant Market Recommendation.
[29] More on this below.

wireless communications belong to the same market, or whether cable and DSL broadband access are on one single market, there lurked difficult policy decisions, since larger markets are likely to spell the absence or disappearance of SMP and thus the end of regulatory intervention. In addition, in practice there is no denying that, among the authorities involved, most officials find it easier to work with technological categories than with economic analysis. Here as well, it would help – certainly in the perception of the actors involved – to drop the pretence that economic analysis means a fully-fledged competition law analysis. Moreover, this would pave the way for greater reliance on meaningful functional categories that are largely technology-independent, such as termination, access, etc. Ultimately, the principle of technological neutrality could be understood to mean that technological categories should come in, if at all, at the latest possible stage in the regulatory assessment, so that the assessment can most easily be reviewed in the light of technological change, if needed.

If the above critique of the heaviness of the SMP regime appears more incremental than revolutionary, it is because radical alternatives are not obviously preferable to the current setup. In particular, moving detailed decision-making back into legislation, or re-introducing technological categories at the core, would entail significant losses, even in the shorter term. It suffices to look at the history of the Roaming Regulation – enacted in 2007 and already amended twice – or in related network industries such as energy, to see that regulatory performance is not improved by keeping the legislature busy with technological upgrades.

3.5 Specific areas under the SMP regime

When looking back at the operation of the SMP regime in more detail, the focus should be on those markets that are still on the list of the 3rd Relevant Market Recommendation, and in particular on call termination markets and on broadband access.

Call termination

Call termination was on the regulatory radar screen from the outset, because of perceived collusive tendencies amongst mobile operators (termination being one of the least competitive areas in mobile communications) as well as concerns over distributional issues between mobile and fixed consumers in the case of termination on fixed networks. As for collusion, neither Article 101 TFEU (agreement or concerted practice) nor Article 102 TFEU (by way of collective dominance) offered a viable solution. The decisive step came with the First Market Recommendation, where the Commission endorsed an innovative approach to market definition, whereby each network would be a separate market (by way of aggregation from individual lines). Hence, every network operator would enjoy SMP over its network and could therefore be subject to remedies under the 2002 Framework. That analytical breakthrough opened the door to regulation of termination rates, fixed (FTR) and mobile (MTR), throughout the EU, which endures to this day. Nevertheless, over the years, some cracks appeared in that façade.

First of all, the logic of each-network-forms-a-market leads to symmetric regulation, since every operator holds SMP, however small its network.[30] In principle, as the Commission indicates, it should be possible for small operators to escape a finding of SMP by showing that they face countervailing buyer power. In practice, as the case of fixed termination in Germany showed, the Commission will not easily accept such an argument, insisting instead that all operators be found to have SMP and that small operators be accommodated via lighter remedies. For smaller mobile operators, in particular, this is problematic, since it deprives them of a valuable entry strategy, whereby they would rely on high termination rates to fuel aggressive retail penetration pricing.[31]

Secondly, almost all termination cases lead to FTR or MTR regulation as a remedy. As is well known, price regulation is not an exact science; under the 2002 Framework, the Commission steadfastly insists that regulated rates be cost-oriented, and furthermore that cost-orientation be determined using an exacting cost accounting standard (Bottom-Up Long-Run Incremental Cost or BULRIC), which is designed to return relatively low rates (within the range of standards that could conceivably qualify as cost-oriented).[32] In support of this approach, the Commission invokes the avoidance of cross-subsidies as between customers, as well as the prevention of internal market distortions that would follow from different cost accounting standards from one Member State to the other. While defensible, that approach also ignores that efficient Ramsay pricing could also be at work. Furthermore, by pushing for cost-orientation at BULRIC across the board,[33] the Commission prioritises lower consumer prices over longer-term considerations, such as the ability of operators to derive sufficient revenue to finance long-term investments in new infrastructure. As a result, significant tensions have arisen between the Commission and a number of NRAs, which have chosen to stray from BULRIC and allow operators to charge higher termination rates, ostensibly to finance investment in infrastructure.

Wholesale broadband access

Wholesale broadband access also provides a case-study in how policy decisions have influenced regulatory outcomes, despite the apparent neutrality of the 2002 Framework. Through the successive Relevant Market Recommendations, the Commission has been very careful to define markets narrowly. For instance, the Commission was not inclined to consider that cable and DSL-based wholesale solutions were on the same market. Similarly, the Commission placed physical solutions, such as unbundled local loops, on a different market than non-physical solutions, such as bitstream. Even in the recent 3rd Relevant Market Recommendation, despite some openings, the Commission prefers to leave cable-based networks out of the analysis, and to retain a distinction among local and central

[30] In addition, the regulated termination rates are generally symmetrical as well.
[31] Irrespective of underlying costs.
[32] See the Recommendation 2009/396 of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU [2009] OJ L 124/67.
[33] Especially when seen together with the efforts to reduce roaming rates and ultimately eliminate roaming altogether.

wholesale offerings (WLA and WCA). As a result, wholesale broadband regulation has until now essentially remained on incumbent fixed-line operators, and has extended to the full range of offerings. In addition, as operators have moved to upgrade their networks to fiber, the Commission insisted that NRAs continue to impose the provision of broadband access products at cost-oriented prices, even on Next Generation Access networks (NGAs).[34] Room for flexibility, if any, comes via geographical differentiation: in local areas where multiple infrastructures are competing, wholesale access regulation can be relaxed if the wholesale market is competitive.

NGA access regulation is the focal point for critics of the 2002 Framework. Regulated firms resent having to grant access to brand new facilities on regulated terms, arguing that this removes any incentive to invest in upgrading infrastructure. Often, EU regulation is adversely compared to US regulation on this point: since the US lifted access regulation on new infrastructure in 2005, the argument goes, the US has enjoyed higher investment in infrastructure. To be complete, one should also add that consumer tariffs have tended to be higher in the US, and that nonetheless the deployment of fiber in the US has not necessarily been profitable.[35] More fundamentally, in the current environment, with competitive markets and technological and commercial uncertainty as to the take-up of new services, it is understandable that firms are upset to have to face yet another source of uncertainty when investing, this time coming from regulation. Indeed the regulatory outcome depends not just on the behaviour of the regulated firm, but also on the decisions of its competitors and of its customers, in a way that is unpredictable and creates uncertainty. At the same time, it is not obvious that society is better served under all circumstances by removing that regulatory uncertainty from the shoulders of firms and letting it fall on the general public (leading to e.g. exposure to harmful firm behaviour in cases where market power would arise and persist).

In the end, this review of how the SMP regime was applied to FTR/MTR and to wholesale broadband access indicates that the main source of the criticism levelled at EU regulation lies not in the 2002 Framework as such, but rather in the decisions that were made in the course of implementing and applying it, for example in the two Commission Recommendations mentioned in the previous paragraphs, on termination rates and NGAs. As the ECJ pointed out in *TDC*, the 2002 Framework is perfectly amenable to a consideration of investments made in infrastructure when deciding on regulated prices, with a view to preserving incentives to invest.[36]

[34] Recommendation 2010/572 of 20 September 2010 on regulated access to Next Generation Access Networks (NGA) [2010] OJ L 251/35. The Commission makes room for deviations from cost-orientation in order to add a risk premium to the regulated price.
[35] As many consumers have moved to 4G and LTE as their primary or only means of connectivity. For a stunning illustration, see A. Bernasek, "Why Verizon Wanted It all", New York Times (29 September 2013).
[36] *Supra* {…}.

3.6 Market entry and supervision

In 2002, as in previous legislative rounds, the EU institutions did not pursue a one-stop-shop authorisation scheme – such as a home-country control scheme – that would have allowed providers to fall under the supervision of a single NRA. Instead, Directive 2002/20 leaves it to each Member State to apply its law to providers active on its territory. At the same time, Directive 2002/20 seeks to minimise the burden of compliance with various national laws, first and foremost by preventing Member States from requiring that providers obtain individual licenses before entering the market.[37] Nevertheless, market players have been complaining that the general authorisation requirements still diverge considerably from one Member State to the other, and that compliance costs – while not threatening – remain high. The case-law of the ECJ illustrates well that Member States find it difficult to resist the temptation to extract revenue from the market players via various fees and taxes.[38]

Directive 2002/20 offered the hope that the lack of one-stop-shopping is compensated by a light-touch authorisation scheme. That hope was quickly dashed, however, by a significant shortcoming of the 2002 Framework, as far as market entry is concerned, namely that each Member State retains the power to require operators to obtain individual rights of use for scarce resources, including not only numbers and rights of way, but also spectrum. In practice, considering that spectrum and other scarce resources will usually be needed for operations, this is functionally equivalent to an individual license requirement. It is well known that Member States are reluctant to give up what they perceive as core sovereign prerogatives, certainly as far as spectrum is concerned (and the ensuing revenues to be achieved via auctions). The EU was not able to achieve enough coordination in spectrum policy to minimise the impact of remaining Member State powers, and hence the EU telecom sector hobbled along through the cacophony of national spectrum auctions. The British and German 3G auctions in 2000 were originally seen as successful models, but as it turned out soon thereafter, the proceeds were inflated due to the dotcom boom still ongoing at the time. Furthermore, it can be argued that the disorganised manner in which the various auctions proceeded meant that the UK and Germany, as first mover and largest market, respectively, drained most of the funds available for bidding across the EU. Subsequent 3G auctions were far more modest. The lack of coordination persisted for 4G auctions, which by some accounts were held too late and contributed to the EU falling behind the US for mobile communications.[39]

[37] The scheme of the Directive is well explained and well understood by the ECJ in *UPC DTH*, *supra*, where the ECJ also indicates that, even though Directive 2002/20 is not a full harmonisation directive, the application of the TFEU, outside of the coordinated field of Directive 2002/20, will be informed by the spirit of the Directive, i.e. restrictions on the free movement of services will not be easy to justify.

[38] Which the ECJ found in breach of EU law, when they did not comply with the narrow conditions of Article 12 of Directive 2002/20: see ECJ, Joined cases C-228/12 at al., *Vodafone Omnitel* [2013] ECR I-{…}, Case C-55/11, *Vodafone España* [2012] ECR I-{…} and Case C-71/12, *Vodafone Malta* [2013] ECR I-{…}.

[39] It can also be argued that the US made a strategic choice to leapfrog 3G and jump quickly to 4G.

At this juncture, it is paradoxical that, for all the efforts being poured into trying to further align regulatory outcomes under what is a largely harmonised SMP regime, EU institutions do not dedicate more will and energy to achieving greater coordination and harmonisation on spectrum policy, where the benefits are much clearer.

3.7 Universal service and consumer protection measures

Compared to the rest of the 2002 Framework, Directive 2002/22 on Universal Service has always been the poor cousin. It remains technology-based: the universal service basket, as well as many of the consumer protection measures, harks back to the heydays of the PSTN.

In addition, as the ECJ held repeatedly, Directive 2002/22 does not fully harmonise the law in this area.[40] Accordingly, the provisions of the Directive must co-exist with other consumer protection measures, as they may be found in autonomous national law or via other EU law instruments.[41]

On the basis of the above, one could conclude that the universal service provisions should be updated and that Directive 2002/22 should be further developed, to achieve complete harmonisation. That would be too quick a conclusion. There are virtues in both these apparent shortcomings.

First of all, it is not clear that the universal service provisions need a major overhaul: by all accounts, the evil they seek to prevent (exclusion through unavailability of communications services) is not raging at the moment. Furthermore, the ECJ already intervened in a number of cases to prevent Member States from using universal service provisions to give an advantage to the fixed-line incumbent.[42] Broadening the universal service basket to include – as is often mooted – broadband Internet access – would therefore create the potential for significant interference with, and distortion of, markets at a point where it is not clear that markets are failing to deliver on that service. The anticipation of public intervention could chill out private investment, leading to a self-fulfilling prophecy; public investment could even crowd out private investment, leading to a level of State involvement in the operations of the communications sector not seen since the pre-liberalisation era.

Secondly, the interplay between the consumer protection provisions of Directive 2002/22 and more general consumer protection law cuts both ways: instead of further harmonising sector-specific consumer protection law, maybe one could rely more on general law.

[40] ECJ, Case C-522/08, *Telekomunikacja Polska* [2010] ECR I-{…} and *UPC DTH*, *supra*.
[41] See *Telekomunikacja Polska*, *ibid.* (prohibition of bundled sales) or ECJ, Joined cases C-317/08 et al. *Alassini* [2010] ECR I-{…} (obligation to conduct out-of-court settlement procedure).
[42] See ECJ, Case C-222/08, *Commission* v. *Belgium* [2010] ECR I-{…}.

4. The AVMS Directive

Whilst the implementation of the AVMS Directive did not give rise to the same frenzy as the 2002 Framework, with the SMP regime, it still gave rise to a number of issues, which prompted the Commission to open up a review of AVMS, with its Green Paper of 2013.[43]

4.1 The perils of technological categories

In 2007, after a long review process, what was then the Television Without Frontiers directive was significantly amended, and even renamed to become the AVMS Directive.[44] The aim of the review exercise was to adapt the directive to the new social and economic reality, where much audiovisual media content is made available to viewers outside of the traditional broadcasting channels. Eight years later, the outcome remains underwhelming. The approach chosen by the Commission was to introduce a new category of "on-demand" (or non-linear) services, next to broadcasting, and put them both under the umbrella category of "audiovisual media services". Broadcasting regulation was extended and transposed, as far as possible, to these new non-linear services. Accordingly, during the review exercise, most energies were dedicated not to reconsidering the appropriateness and the manner of regulation in a converged environment, but rather to chisel away at the definition of "broadcasting" (or linear) and "on-demand" (or non-linear) audiovisual media services in order to position certain services within one or the other box, or outside of them altogether.[45]

The result is an intricate system of pigeonholes, with "electronic communications services",[46] "Information Society services" (falling under the e-commerce Directive)[47] or "audiovisual media services" (the latter being further subdivided into "linear" and "non-linear" services).[48] In principle, these pigeonholes should be exclusive, but there is overlap between non-linear AVMS and Information Society Services.[49] Considering the rapid rate of innovation in this sector, such a pigeonholing approach forces firms to navigate around the

[43] "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values" COM(2013) 231 (24 April 2013).
[44] The amendments were made by Directive 2007/65 [2007] OJ L 332/27. The directive has now been recast as Directive 2010/13 of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L 95/1.
[45] Directive 2010/13, ibid., Art. 1(a), (e) and (g), as well as Directive 2007/65, ibid., Rec. 16-25.
[46] Directive 2002/21, supra, Art. 2(c).
[47] Directive 2000/31, supra, Art. 2(a).
[48] Directive 2010/13, supra, Art. 1(a).
[49] Whilst the ECJ, in Case C-89/04, *Mediakabel* [2005] ECR I-{…}, found that the mere fact that a service was not an Information Society service did not automatically mean that it fell under the TWF Directive, the amendments made with the AVMS largely filled that gap and in fact created overlap between the two directives.

definitions to seek the preferred regulatory regime, instead of simply ensuring that their activities are in line with public policy objectives as they may be articulated in regulation.

There is widespread recognition, amongst commentators, that the watered-down provisions on European content, advertising regulation, etc. that were extended to the new category of 'non-linear AVMS' were not that powerful on paper, and proved largely ineffective in practice.

The European content provisions, in particular, need to be rethought, and in this respect there is much to be gained by including the must-carry rules – now covered in Directive 2002/22 – in the review process, since by all account the most promising direction lies not so much in restrictions on what consumers view, but rather in regulation that influences what is offered to consumers, and ensures that European content has at least a fair chance of being chosen by consumers.[50]

4.2 Independence of NRAs

On some issues, EU electronic communications and AVMS regulation can more easily be compared. While on the one hand, as will be seen in greater detail below, the AVMS directive includes the kind of strong one-stop-shop supervision scheme that has eluded electronic communications so far, on the other hand, electronic communications regulation contains far stronger and more sophisticated provisions concerning the setup of the NRA, and in particular its independence.

The perceived lack of NRA independence that follows from that weakness in the AVMS Directive plagued AVMS regulation since the beginning. There are many examples of government interference with NRA activities, ranging from the disappointing to the egregious. To their credit, NRAs in this sector took a leaf from the playbook of other network industries, and sought to bolster their respective positions at national level, in the absence of EU legislation, through collaboration at the EU level, within EPRA.

If the proper functioning of markets, given the economic stakes, justified the legislative effort to make NRAs independent of the executive and legislative powers, for electronic communications, then *a fortiori* the fundamental rights aspects of AVMS regulation would dictate that the same kind of legislation be extended to NRAs in the AVMS sector as well.

[50] The must-carry provisions of Directive 2002/22 have also not had such a disciplining effect as was anticipated, in part because the ECJ interpreted these provisions in a relatively permissive way, certainty when compared to its case-law regarding other elements of the 2002 Framework: see ECJ, Case C-336/07, *KabelDeutschland* [2008] ECR I-{…}.

5. The broader landscape

Simultaneous review exercises for both electronic communications and AVMS regulation offer an opportunity to revisit their interplay, and perhaps learn from their respective experience.

5.1 The network / content distinction

Currently, electronic communications and AVMS regulation are separated by the network / content distinction introduced in the late 1990s, which is meant to be watertight. Only a few gateways are present, including the must-carry rules of Directive 2002/22.

Over the past 15 years, the inadequacy of the hermetic line drawn in the 1990s was exposed repeatedly. On the side of electronic communications regulation, the network / content distinction means that content providers[51] are in the same position as any other user of electronic communications networks and services. No account is taken of their special function and significance in today's technological and market environment. In the network neutrality debate, for instance, it proved impossible to bring the relationship between content providers and network operators under the 2002 Framework. One could argue that the definitions did not allow this, and in any event, the Commission was reluctant to select additional markets so as to bring the network neutrality discussion under the 2002 Framework. By many accounts, save for these definitional issues, the 2002 Framework could have allowed for the imposition of obligations upon network operators regarding blocking and non-discrimination, such as would have addressed a large part of the cluster of concerns falling under network neutrality. Instead, the EU is issuing, as part of its Connected Continent Regulation, a set of detailed rules, negotiated in a politically charged atmosphere devoid of regard for existing regulation. Similarly, the very existence of the current discussion on the regulatory treatment of OTTs stems from the inflexibility of the network / content distinction, which allows OTT providers to position themselves on the content side of the divide and thereby escape the application of the 2002 Framework.

More subtly, from the AVMS side, the strict network / content distinction has destabilised AVMS regulation. The original TWF Directive was concerned not with content alone, but with broadcasting, i.e. a specific method of content distribution via a specific network setup (point-to-multipoint, unidirectional, simultaneous transmission). When network regulation was moved to the 2002 Framework, a regulatory basis was created for a vertically separated business model, that of non-linear AVMS. Part of the ineffectiveness of the 2007 reform stems from the fact that linear and non-linear AVMS are treated similarly at the transmission level (under the 2002 Framework), whereas the distinction between the two is based largely on factors that arise from the transmission model chosen, as opposed to the content as

[51] Being understood broadly as providers of content, services or applications falling under the definitions of AVMS or Information Society Services, or both.

such. In other words, linear and non-linear services compete with one another, yet the AVMS Directives treats them differently, but without any regulatory leverage to deal with the competitive impact of this difference in regulatory treatment, since that leverage would have to be exercised at the network regulation level, which is where the distinction between linear and non-linear AVMS exists in practice.

5.2 Think global, act local

The time might therefore be ripe to revisit the network / content distinction. As was indicated above with respect to the debate between central and decentral implementation of the 2002 Framework, the consideration of these issues might benefit from a more global analysis.

The following paradox can serve as a backdrop to the discussion. On the one hand, the regulatory experience of this century indicates that it is difficult, if not counter-productive, to seek to draw clear legal or regulatory lines through what is for all accounts an integrated sector, technologically, economically and commercially. Ranging from physical infrastructure to the production of content, from single users to large firms, etc. the relationships between the various players are such that it is almost impossible to consider some of them in isolation from the rest. On the other hand, most commentators agree on the following: the regulation of physical networks is highly dependent on the local context and accordingly should best be conducted by local authorities, whilst content production is more and more global, and hence should be regulated with a more global take. So the various actors are spread all over the spectrum and closely linked with one another, yet the preferred regulatory models for each end of the spectrum are in opposition with one another. Add to this the fact that under EU law the current jurisdictional approaches – each Member State over its territory under the 2002 Framework, one-stop-shop under the AVMS and e-commerce Directives – are incompatible.

Taking as a starting point that the hermetic separation between the 2002 Framework and the AVMS Directive is to be overcome, the following suggestions could be put forward, in the light of the experience of the past 15 years:

1. The 2002 Framework and the AVMS Directive should not be exclusive of one another, but rather should be conceived as overlapping. They would each be concerned with different policy priorities: the 2002 Framework with the proper functioning of markets (in line with the current objectives) and the AVMS Directive with public policies concerning content. Accordingly, it might be appropriate to shift certain elements from one to the other;
2. The 2002 Framework as it is now should continue to apply to what are now ‘electronic communications networks’ when they involve physical infrastructure. In that case, it would be applied by NRAs, each having jurisdiction over its own territory and working together within BEREC, as is the case today;

3. The 2002 Framework should also apply to 'platforms' that do not involve control over physical infrastructure. 'Platforms' would here be understood as multi-sided platforms, bringing together two or more different classes of users in such a way that there are mutually reinforcing network effects.[52] In this case, however, a one-stop-shop scheme would apply, with only one NRA having jurisdiction over a given platform, depending either on an objective factor such as location or on the choice of the platform operator. This would lead to a simplification of compliance for firms and a reduction of divergence across the EU, through a process of bottom-up convergence that would offer a single answer across the EU for each firm, yet leave room for some experimentation between NRAs.
4. Similarly, the AVMS would also apply to 'platforms' that deal with content, keeping its one-stop-shop scheme.
5. The application of the 2002 Framework and the AVMS Directive would differ in that the most onerous part of the 2002 Framework, the SMP regime, would not be applied to all platforms, but only to those that meet a prior test. In this respect, the current 3-criteria test appears difficult to apply outside of the context of physical infrastructure.[53] Furthermore, as was seen above, it would be useful to try to frame a test that immediately points to SMP and does not pretend that market definition and SMP assessment exist independently of that test. It is beyond the scope of this paper to develop such a test, but a range of possibilities exists. A shorter-term version of the test would come close to the current state of competition law analysis, looking at whether the platform has a large market share, whether it has direct competitors, etc. A longer-term version of the test would also look at how long the platform has maintained its position, and whether it is under competitive threat (actual or potential) from other players that can disturb the position of the platform through disruptive innovation.

The above suggestions, which need to be further fleshed out, would offer a solution both to the debate on central vs. decentral implementation and enforcement, and to the inadequacy of the network / content distinction.

5.3 Interplay with competition law

In all of this, the interplay with competition law must not be forgotten. In the 21st century, competition law has not been used as bluntly as it was in the 1990s, in order to support liberalisation efforts. Nevertheless, it has played a large role. In electronic communications, a string of ECJ cases concerning price squeeze[54] firmly anchored the competence of the

[52] The function of the 'platform' concept is to capture situations where a firm puts itself in a position that resembles that of the operator of physical infrastructure (where the operator can control a bottleneck or be in a gatekeeper role), without control over such infrastructure.
[53] Indeed the 3-criteria test makes most sense when it is considered against the background of physical infrastructure, where the first two criteria are most likely to be met.
[54] Deutsche Telekom, TeliaSonera, Telefónica

Commission and NCAs to engage in a detailed examination of the pricing schemes of incumbent network operators. TeliaSonera, in particular, is worrisome, in that the ECJ held that NCAs can apply a price squeeze test even if the wholesale offering is neither regulated, nor a service based on legacy infrastructure. In that sense, the short-term focus of electronic communications regulation, as discussed above with reference to the Commission Recommendations on termination rates and on NGA networks, is exacerbated by the application of competition law. The Commission and NCAs put themselves in a position to step in with retail price regulation, at a time when the 3rd Relevant Market Recommendation puts an end to it under the 2002 Framework.

It is also interesting to note that the application of Article 102 TFEU, via price squeeze cases, may not entirely be in line with the application of State Aid law, as reflected in the Commission Guidelines on State Aid for broadband networks.[55] Competition law puts pressure on network operators to keep their prices close to cost, in order to avoid price squeezes, thereby adversely affecting investment incentives.[56] At the same time, under State Aid law, Member States are encouraged to let markets work as much as possible, and not to commit public funds to broadband infrastructure projects unless the market fails to do so.

Similarly, for AVMS, the application of competition law has influenced the markets for content. In a string of Article 101 TFEU cases, the Commission in practice laid down the rules for broadcasting licenses for major sport events.[57] Under State Aid law, the Commission also set out the main lines of what is effectively the regulatory framework for public broadcasting in the Member States.[58] In contrast to the application of competition law to electronic communications, however, there is no serious tension between these cases and the AVMS Directive.

Since competition law is and remains applicable next to any sector-specific regulatory framework, the success of any regulatory reform will depend to a significant extent on whether competition authorities 'pick up the signal' from regulatory reform – especially if the reform would go in the direction of creating more incentives for infrastructure investment, potentially at the expense of short-term concerns such a lower prices.

[55] Guidelines for the application of state aid rules in relation to the rapid deployment of broadband networks [2013] OJ C 25/1.
[56] As exemplified in *TeliaSonera*, where TeliaSonera is effectively punished for having voluntarily offered a wholesale bitstream product, albeit at conditions that were not sufficiently good from the perspective of the NCA.
[57] UEFA Champions League, Bundesliga, Premier League cases.
[58] As now summarised in the Communication on the application of State aid rules to public service broadcasting [2009] OJ C 257/1.

6. Conclusions

This paper sought to provide a critical assessment of the application of the 2002 Framework and the AVMS Directive, as the Commission embarks in a review exercise. In places, some forward-looking suggestions were also made.

In summary, a number of conclusions arise from that assessment.

First of all, and perhaps most obviously, the idea that sector-specific regulation – especially the SMP regime found in the 2002 Framework – would vanish over time, leaving room to competition law alone, now appears unrealistic. Rather, the challenge now is to stay true to the minimalist regulatory spirit of the reforms undertaken at the turn of the century, whilst acknowledging the changed environment. In particular, both the 2002 Framework and the AVMS Directive were primarily conceived from an internal market perspective, with a view to replacing antiquated monopolistic structures with competitive markets. This induced a fair amount of short-termism in their application; we might be in need of a rebalancing of short-term and long-term objectives now.

This is not to say that the 2002 Framework and the AVMS Directive are both entirely outdated. They should not be dismissed entirely. Their respective strengths must be preserved.

In the case of the 2002 Framework, these strengths are the institutional structure (with general legislation focusing on principles, and a set of independent NRAs in charge of implementation and application), technological neutrality and the reliance on economic analysis. There is no obviously superior alternative to these. Dissatisfaction with the 2002 Framework can be traced back to the policy choices made in implementation and application, in particular the focus on short-term gains in prices, at the expense of investment. These can be altered without endangering the strengths of the Framework.

In the case of the AVMS Directive, the one-stop-shop scheme has worked very well. Difficulties have arisen from the failed attempt to deal with technological and commercial changes through a formalistic response.

In many respects, both the 2002 Framework and the AVMS Directive would benefit most by learning from the strengths of the other.

From a broader perspective, in the end, the major challenge is to make regulation sustainable in the face of rapid technological and commercial evolution. In that environment, top-down *a priori* regulation, whereby the legislature tries to foresee the future, will not perform well. Rather, legislation might move in the direction of a set of principles to be applied flexibly by a regulatory authority, and that authority itself will unavoidably become more of a rapid action force, under a set of parameters for intervention, than an omnipresent supervisor. The current EU regulation – the 2002 Framework and the AVMS Directive – already constitute steps in the right direction, and the upcoming review exercises offer the opportunity to continue moving in that direction.