



**PUBLIC CONSULTATION ON THE DRAFT JOINT ERG AND COMMISSION SERVICES APPROACH TO
REMEDIES UNDER THE NEW REGULATORY FRAMEWORK**

SUBMISSIONS BY PORTUGAL TELECOM (PT)

General considerations

According with the new regulatory framework that should have been transposed into national law by 24 July 2003 national regulatory authorities (NRAs) have the power to impose *ex ante* regulatory “remedies” on operators that have been designated as having “significant market power”, or “SMP”, in a specific market. On the contrary, NRAs may not impose such measures in markets that are effectively competitive, and must in fact withdraw any existing measures whenever such markets reach a sufficient degree of competition.

The Framework Directive describes how to arrive at the decision as to whether a particular operator has SMP in a specific market. Where an NRA defines a market that differs from those set out in the Markets Recommendation or where an SMP designation is concerned, the Commission may veto such an NRA decision pursuant to Article 7(4) of the Framework Directive. There is no such veto power regarding the choice of remedies and this is a cause of concern for undertakings.

However, in its comments on the proposed exclusion of the fixed-to-mobile market from the scope of remedies applicable for mobile termination on individual networks the Commission criticized the NRA approach for a number of reasons, in particular, the discrimination between fixed network operators and mobile network operators, the violation of the principle of technological neutrality and the denial of the right of interconnection and access to operators of fixed networks.



This means, that where proposed remedies are incompatible with EC Law the Commission may exercise scrutiny. Whilst having no direct powers to invalidate such remedy provisions, the Commission must therefore use the Framework Directive to express its views about the compatibility of national measures and act accordingly, engaging infringement procedures where it may be considered appropriate.

NRAs actions on remedies are also constrained by the Community law principle of proportionality. Under the new regulatory framework NRAs must first identify relevant markets lacking effective competition and situations where general competition law alone will not suffice to remedy market failures. Only where these two conditions are met can the NRAs take reasonable and proportionate measures aimed at achieving the objective of promoting competition.

Thus NRAs must carefully analyse the nature and possible consequences of competition problems in each relevant market, and demonstrate that the remedy chosen will contribute to the promotion of competition, the development of the internal market and the protection of EU citizens. They must also demonstrate that competition law review does not provide an adequate solution to the problems faced, that the chosen remedy is reasonable and proportionate and that the least onerous remedies were chosen, taking also in consideration also costs inherent to such remedies.

PT does not subscribe the approach that once the market definition has been closed available competition law remedies should be neglected in view of establishing particular *ex ante* obligations. As a matter of fact this would mean that only regulatory remedies could be available to deal with dominated markets. This approach is hardly compatible with the proportionality principle. *Ex ante* obligations available to NRAs should only be acceptable where potential market failures and specific types of abuse can only be properly addressed and remedied by means of regulation.



Typology

In relation with the proposed definition of “structural barriers” and in particular with the issue of creating asymmetric conditions between incumbents and new entrants impeding or preventing market entry of the latter, it should be observed that in order to those barriers to be relevant they must, by its own nature, be strong enough to oppose the entry of any new competitor under market conditions. The new regulatory framework is not designed to protect competitors but to enhance competition.

The purpose of a concept such as “competition problem” seems to be rather ambiguous. Competition problems are currently evaluated and solved by competition authorities. As a rule competition authorities are best suited to deal with competition problems, such as practices aimed either at driving competitors out of the market or at preventing them from entering the market. On the other hand, competition authorities often face serious difficulties in dealing with exploitative abuses, in particular when they target consumers. These are the ones that should be considered the main task for NRAs. So, taking in consideration the proportionality rule, competition problems for the purposes of the new regulatory framework should be those that would be preferably dealt by the NRAs. As a rule, the access issues can be properly addressed by competition authorities. On the other hand, price control and cost accounting obligations are remedies that regulators are best suited to enforce.

The description of the competition problems made in the consultation document may be considered detailed and basically correct. However in a certain number of important cases it is ambiguous, it does not take into account basic insights from economic analysis, nor does it provide a balanced answer to the real need of competition policy intervention. For instance, to outlaw tying and bundling because it results in foreclosure of a downstream market or in a monopolisation of another market may be considered overly simplistic. In what concerns access to essential facilities and all types of refusal to deal it is crucial to distinguish where the holder of the facility has a genuine



stranglehold on the relevant market and not just a legitimate competitive advantage. Price discrimination and discounts by dominant firms is another case that deserves caution. It is certainly ill-conceived to require discounts to be based on cost savings. As a matter of fact, only on a case by case approach it is possible to distinguish competitive and anti-competitive discount programs. All these issues require therefore a more balanced judgement.

Remedies

The description of remedies available could, in certain cases be more detailed and improved. This is particular true in relation with price controls and cost accounting obligations

The concept of non-discrimination raises the usual doubts. What does “equivalent circumstances” mean? As a rule, price differences never apply to similar circumstances. A remedy expressed in such a general terms gives rise to unacceptable uncertainty about what it actually means.

The burden of proof imposed on the operator to demonstrate that charges are the result of costs including a reasonable rate of return on investment constitutes a regrettable deviation from competition law principles according to which such burden lies on competition authorities.

Principles for imposing remedies

As to the principles related with the selection of remedies, NRAs should act carefully when assisting the replication of the incumbent’s infrastructure since the outcome may in most cases be only a fiction of a sustainable competitive market.



NRAs should therefore in all cases produce reasoned decisions in a transparent manner that respect the principle of proportionality. These decisions must be preceded by the same accuracy and analysis which is associated with the work of many competition authorities.

Proportionality requires that when there is a choice between a series of appropriate measures the least onerous must be chosen. This means that when competition law provides sufficient remedy NRAs should refrain from imposing *ex ante* obligations.

Matching problems and remedies

In relation with access price issues and in particular with price control, simplified pricing rules like “retail-minus” should be considered inappropriate since they involve a substantial risk of inefficiency and, moreover, they have unsuited consequences on non regulated retail prices. Cost accounting methodologies should therefore be subject of a deeper evaluation and discussion in order to provide more guidance to NRAs and to the undertakings. Different approaches and systems by NRAs without proper monitoring from the Commission should be avoided.

The consultation document makes a particular reference to wholesale line rental as a general alternative remedy to obligations such as unbundled local loop and carrier selection and pre-selection. This issue deserves a more detailed analysis. Wholesale line rental has been considered by some NRAs as a remedy under the past regulatory framework in relation with fixed origination market. The use of such remedy as a general solution for access problems under the new regulatory framework must be preceded of a careful evaluation since it may constitute a competitive disadvantage for dominant operators. It is quite difficult to understand such a remedy. We do not know any economical sector where such measure exists.



Access price regulation, transparency and accounting separation provide sufficient constraints on SMP undertakings in order to deal with price discrimination, cross-subsidisation and predatory pricing.

Non price competition problems (discriminatory use or withholding of information, delaying tactics, bundling/tying, undue requirements, quality discrimination, strategic design of product, undue use of information about competitors) are typical issues to be dealt by competition authorities on a case by case basis, taking in consideration actual or potential anti-competitive effects, unless they can be considered as clear violation of an existing obligation of transparent access.

We understand that the consultation document conclusion on bundling, tying and cross-subsidisation, as a means of horizontal leveraging, suggests that these issues should be treated on a case by case basis. These seem to be issues that demonstrate a certain degree of failure of available *ex ante* obligations such as price controls and that should preferably be dealt by competition authorities.

As to single market dominance problems such as contract terms, the consultation document seems to recognise the right of NRAs to impose *ex post* obligations in situations that are the normal subject matter of competition law. This approach breaches the balance that should be kept between NRAs and competition authorities. *Ex ante* transparency obligations serve the sole purpose of providing sufficient information to competitors and customers and do not allow NRAs to change offers. They are entitled to do it on the basis of specific and appropriate remedies only. The same reasoning applies to exclusive dealing. Therefore, as a rule, reference offers can only be modified by NRAs in order to insure compliance with correspondent *ex ante* obligations.

In relation with productive inefficiencies and in particular with excessive costs it is certainly true that NRAs may calculate prices on methods independent of those used by



the undertakings. However, this does not mean that NRAs should be allowed to considered desirable costs as real costs for the purposes of price controls.

The use of price control and cost accounting obligations in order to deal with excessive termination prices should be avoided as much as possible since it may lead to discrimination between competitors and to impose disproportionate competitive disadvantages on more efficient operators. Experience tells us that legal obligations are easy to impose and difficult to withdraw.

Joint dominance deriving from explicit collusion should be monitored by competition authorities. The principles developed may, in particular circumstances apply to joint dominance resulting from tacit collusion.

Other comments

The consultation document provides improper guidance on the issue of the relations between regulation and competition law. The approach seems to be that competition problems deriving from an established SMP must only be solved by NRAs, by means of listed remedies. Such approach may jeopardise the purpose of the new regulatory framework and may contribute to ease evaluation requirements and assessment discipline by competent authorities.

We are very much concerned that the approach presented by ERG leads to more regulatory uncertainty and to unharmonised application of the new regulatory framework.

Finally, we notice that there are no indications about the way we should progress towards the application of the “*sunset clauses*”

Lisbon, January 19th 2004