

Draft joint ERG and Commission Services approach to  
**REMEDIES** under the New Regulatory Framework,  
5th December 2003

## **Telekom Austria's Position**

## I. INTRODUCTION

### Principles of the new regulatory framework

Among the most important principles of the new regulatory framework for electronic communications are the principles of **flexibility**, of **technological neutrality** and that regulatory action should be **proportional, appropriate and in accordance with the principles of competition law**<sup>1</sup>. In addition, it should be born in mind **that general competition law is appropriate to deal with most competition problems**<sup>2</sup>.

Telekom Austria agrees with the ERG assumption according to which flexibility is "*the strength of the new regulatory framework*"<sup>3</sup>, and would like to refer to the guidelines that underline the "well-established" **principle of proportionality** and emphasise that this principle requires, "*the means used to attain a given end should be no more than what is appropriate and necessary to attain that end*"<sup>4</sup>. Moreover, the guidelines elaborate, that "*in order to establish that a proposed measure is compatible with the principle of proportionality, the action to be taken must pursue a legitimate aim, and the means employed to achieve the aim must be both necessary and **the least burdensome**, i.e it must be the **minimum necessary to achieve the aim***"<sup>5</sup>.

Telekom Austria calls on the responsible parties to bear this in mind, even more because the New Framework now provides NRA's – as it is stated in the ERG's draft document - with "*more margin of manoeuvre*", more than within the previous regulatory framework.

Any disproportional application of remedies would not only be a disrespect but also a violation of the core principles of the New Framework and would itself cause cost intensive market failures, at the expense of innovation, further investments and competition in the long run. None of these would be in line with the ambitious goals of the commission as indicated by Erkki Liikanen who emphasized, that "*regulatory action should be taken only when strictly necessary, and at the smallest possible cost to enterprises and society as a whole*"<sup>6</sup>, neither was it the intention of the draftsmen of the new regulatory framework who were already committed "removing obligations in the existing framework which are no longer necessary, and building mechanisms into the new framework to reduce regulation further where policy objectives are achieved by competition"<sup>7</sup>.

<sup>1</sup> Article 15(1) Framework Directive. See Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108 , 24.4.2002 . This approach is confirmed by the SMP Guidelines in Paragraph 24. Paragraph 70 of the SMP guidelines adds that, in applying the new definition of SMP, NRAs will have to ensure that their decisions are in accordance with the Commission's practice and the relevant jurisprudence of the Court of Justice and the Court of First Instance on dominance. This is in particular true for the finding of dominance in the case of leveraging of market power to neighbouring markets.

<sup>2</sup> Even where regulation is necessary, sector specific forms of regulation are undesirable if general competition law is adequate to deal with the problem. Contribution by the EUROPEAN COMMISSION to ITU SG 3 meeting June 2002 COM 3-D 24-E May/2002

<sup>3</sup> Compare ERG "Public call for input on regulatory remedies", p.1

<sup>4</sup> Guidelines 118, C 165/22 Official Journal of the European Communities, 11.7.2002

<sup>5</sup> Community regulatory framework for electronic communications networks and services", 118, C 165/22 Official Journal of the European Communities, 11.7.2002

Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services", 118, C 165/22 Official Journal of the European Communities, 11.7.2002

<sup>6</sup> Erkki Liikanen, speech at the eleventh Eurochambres Congress: Innovation key to EU growth" Liikanen London, October 15 2003, (BusinessEurope.com)

<sup>7</sup> COM (1999) 539, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS: Towards a new framework for Electronic Communications infrastructure and associated services; The 1999 Communications Review: 1999 vi "Wettbewerbsregeln", Viii "Nun müssen flexible Mechanismen eingebaut werden, um die Regulierung bei zunehmendem Wettbewerb zu reduzieren und auf einen sich rasch wandelnden Markt zu reagieren".

## II. EVALUATION of the DRAFT DOCUMENT

Telekom Austria feels that the document in some instances goes against the purpose of a goal-oriented and proportionate use of regulatory remedies. For example, due to an extensive use of the economic concept on leveraging, remedies might be imposed in markets, which were determined in the market analysis as competitive markets. Such an approach clearly contradicts the political goal of the review package according to which "Regulations will not be warranted if there is effective competition on these markets"<sup>8</sup>. A possible "backdoor" regulation by means of remedies in such markets should be avoided completely.

Moreover, Telekom Austria feels that the ERG-draft on remedies does not give appropriate attention to the proper application of the methodology as intended in the framework. We therefore are particularly concerned about the following issues:

### No solid distinction between market definition, market analyses and application of remedies

- Telekom Austria would like to emphasize, that the question whether the ex-post application of competition law would suffice is not to be answered at the stage of market definition but has to be determined **after having finished** the market analysis for each single market. Unfortunately, in the current draft the two steps market analyses and remedies are mistaken as the following conclusion in the ERG-paper shows  
*"Moreover, because the question whether the ex-post application of competition law would suffice is answered at the stage of market definition already, abuses that can be remedied in that manner have already been screened out"*<sup>9</sup>.
- As outlined in the ERG-paper, there are three separate steps<sup>10</sup> which are according to the framework/guidelines not to be confound or combined with each other. The Guidelines clearly point out that the **action** that could be taken **has to follow an analysis**<sup>11</sup>.
- This fact prevents NRAs from resorting to a thorough basis of market information which is prerequisite for a proper and adequate choice of remedies. Anything but a diligent choice of remedies will cause further market failure and would clearly undermine one of the principles in the new framework - proportionality - as it is indicated in the ERG paper:  
*"When imposing a remedy the NRA must demonstrate it is appropriate to address the underlying competition problem, proportionate and justified in the light of the basic regulatory objectives of promoting competition, contributing to the development of the internal market and promoting the interests of EU citizens"*<sup>12</sup>.

### Application of remedies has to be appropriate

- It is a prerequisite that the application of remedies should reflect **realities** in the market rather than **expected** anti-competitive behaviour. The focus on the expected behavior of dominant players even where no inherent barriers can be found appears to be very theoretically and may lead to over intrusive interventions.
- In addition, before imposing remedies must first be proved that ex-post competition law is not sufficient to deal with the alleged behavior.
- In this context Telekom Austria would also like to refer to the danger of disproportionate regulatory burden, as *"it also has a cost and can affect the ability of enterprises to compete, to*

<sup>8</sup> European Commission, Recommendation on Relevant Product and Service Markets within the electronic communication sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services OJ C 497 v. 11.02.2003, Art. 20.

<sup>9</sup> Page 21, last 4<sup>th</sup> paragraph

<sup>10</sup> p.8

<sup>11</sup> Commission Guidelines on market analysis and assessment of significant market power under the Community regulatory framework for electronic communications networks and services", 107

<sup>12</sup> p.11

*grow and to create jobs". As Mr. Liikaanen has underlined, „Cumbersome administrative procedures often add to the regulatory burden and divert companies' efforts away from what they are supposed to do: provide goods and services to society in an efficient way<sup>13</sup>.*

#### **economic concept on leveraging<sup>14</sup>**

- One of the prior issues the paper is dealing with is leveraging issues<sup>15</sup>. Yet leveraging issues are subject to market analyses and should not be analyzed at the stage of discussing remedies as it is now drafted in the ERG-paper<sup>16</sup>.
- As the case decided by the ECJ have shown, the criteria drawn upon to assess leveraging effects must be evaluated very carefully.<sup>17</sup>
- Finally, Telekom Austria fears that an extensive or inappropriate use of the leveraging-concept erodes the basic goals targeted by the European Commission through this new framework: to boost innovation in Europe, and to promote high-power, affordable information and communications technologies for the customers.

#### **Bitstream access - the market equals the remedy; lack of technologic neutrality<sup>18</sup>**

- Again, this is a confusion of market definition and remedy. Bitstream access **is not a market in itself** from a customers perspective but the (non-discriminatory) provision of bitstream access is **a possible remedy** on the wholesale broadband access market. The same is valid for unbundled local loops which are not a separate market but unbundling of local loops is a possible remedy for wholesale physical access markets (including all kinds of technology used that establishes access to the customer).
- From the Recommendation we understand that bitstream access rather is the market for wholesale broadband access which means that application of remedies shouldn't go beyond what is needed to resolve structural competition problems in the retail market as defined by the Recommendation.
- Also, the concept of technological neutrality is not reflected in bitstream access (and unbundling as well) as the focus should not be on xDSL solutions for broadband access but all possible ways of broadband connections including cable TV, satellite or WLAN services.

#### **Lack of criteria for assessing the effect of remedies other than rearrangement of market shares:**

- It is not clear how the impact of remedies is monitored other than through an extensive market analysis. This may be inadequate if the remedy in fact is ineffective and puts undue costs on the regulated company.

#### **Emerging markets concept/first mover advantages:**

- Although the Framework Directive highlights the fact that emerging markets should not be regulated in order to stimulate the continuous growth of the sector, the Document's executive summary (p.12) indicates that an emerging market will be extremely difficult to define. At the same time it is said that first mover advantages will be curtailed (p. 13 bullet 3) so the regulatory forbearance in emerging markets may be difficult to realize.

<sup>13</sup> SPEECH/03/463, Erkki Liikanen "A more innovative, entrepreneurial Europe" Opening address at the XI Congress of Eurochambres Rome, 9 October 2003

<sup>14</sup> According to paragraph 70 of the SMP guidelines, in applying the new definition of SMP, NRAs will have to ensure that their decisions are in accordance with the Commission's practice and the relevant jurisprudence of the Court of Justice and the Court of First Instance on dominance. This is in particular true for the finding of dominance in the case of leveraging of market power to neighbouring markets.

<sup>15</sup> Case 1, 4.2, p. 76 ff

<sup>16</sup> According to the Framework Directive leveraging of market power as one of the possible competition problems leads to the existence of significant market power and has to be identified solely in course of the market analysis by the NRAs.

<sup>17</sup> See Tetra/LAVAL

<sup>18</sup> S. 88

- Telekom Austria is concerned, the draft of the ERG/EC document on remedies is seeking for arguments supporting regulations that are not intended by the new regulatory package for the electronic communications network and services. In addition we would like to stress, the telecommunication market is highly dynamic and new technologies revolutionise possibilities of communication.

### III. Comments on the ERG questions

#### **Chapter 1: Typology**

1. *Do you agree that the description of the competition problems provides the requisite level of detail? If not, please highlight areas where you would like more detail to be included in the final document.*

A legal framework is too vague to discuss **general possibilities**. From the point of view of Telekom Austria the classification of the competition problems should be aligned to competition law principles which is also true for the "cause-and-effect" dimension of competition problems.<sup>19</sup> We regret that the ERG/EC document lacks this discussion.

#### **Chapter 3: Principles for imposing remedies**

4. *Are there any further principles, in addition to those set out in Ch. 3, that you wish to propose? If so, please justify them on the basis of the Directives.*

Every intervention in the market implies costs. There is a necessity that the means have to be the least burdensome, i.e. **the minimum necessary** to achieve the aim and this implies undertaking a cost/benefit analysis of the different options.

Furthermore, as one of the results of the principle of flexibility, each remedy could be imposed by itself. Unfortunately, despite this principle of the New Framework, chapter 2 of the draft ERG paper explicitly underlines the **need to combine one obligation with a number of other obligations** in order to make the remedy effective and to prevent hypothetical (future) market failures.

Such an automatically applied matrix of obligations - **for each competition problem almost all available remedies** - clearly undermines the principles of flexibility of and the imperative to impose the minimum and the least burdensome of obligations.

As for the issue of efficiency, the question is left open on how the efficiency on an undertaking will be measured and quantified.<sup>20</sup> Telekom Austria recommends in the case efficiencies have to be assessed – in order to be coherent with EC Competition law – to apply the same methodology as in the merger and/or Article 81(3) procedures.

6. *Do you think that there are any trade-offs between short-run service competition and long run infrastructure competition? If yes, please highlight potential areas and provide relevant examples. In this context, what are your views on the approach that NRAs should take in relation to (short term) business failures?*

Infrastructure competition always is a means to and a pre-requisite for promotion of service competition. Moreover, there is no infrastructure competition without service competition.

Also, there is "little" evidence so far that infrastructure competition emerges from the application of remedies to resolve competition problems if these remedies focus on installation of service competition in the form of access obligation. See also answer 11.

<sup>19</sup> There is clear guidance in the case law of the European Communities how to assess these effects.

<sup>20</sup> On page 52 the ERG draft makes a reference to Article 8 of the Universal Directive with the obligation and the need to promote efficiency.

*7. Do you agree with the proposed treatment of emerging markets? If not, please provide details.*

If innovation is an objective to be pursued, the document should make clear **that new investments should not be subject to ex ante regulation**. But Telekom Austria fears that the principles for application of remedies to emerging markets in chapter 3 rather paves the way for intervention because there are no clear limits of what are the elements involved in "legacy infrastructure", or what is considered a "necessary input" in point 3.3.2.

#### *Chapter 4: Matching problems and remedies*

*9. Do you agree with the description of problems and related remedies? If not please provide an alternative analysis.*

The Document clearly states that its aim is to identify 'standard competition problems' in order to match these problems with the requested remedies (see Executive summary p.4). This appears to be in line with the idea of applying competition law directly whenever possible or indirectly through an assessment of the competitive level of any market. However in its introduction the aim stands out as the identification of market failures (p.18), the remedies are meant 'to redress a market failure' (p.21).

It seems that the two concepts 'competition problems' and 'market failures' are actually equivalent, partially overlapping or simply confusing. Both in practical and theoretical terms, they are dealing with different issues. Competition law refers in Article 81 - broadly speaking - to agreements between undertakings that restrict competition and which might be exempted under Article 81(3) whereas Article 82 refers to the abusive behaviour of a dominant undertaking. In contradiction to competition law, a market failure is a situation where demand and supply do not meet on equal terms.

*11. Does the document provide sufficient guidance on which particular cost accounting methodology would be appropriate for those competition problems for which NRAs may consider price regulation? If not, please highlight those areas where you would wish to see more guidance provided.*

Telekom Austria has provided the ERG already with an extensive comment<sup>21</sup> on its specific consultation on the bitstream access working document. According to our point of view also the Remedies Document should elaborate on the possible drawbacks of the LRIC methodology.

*13. Does the document provide sufficient guidance with the text boxes on bitstream, re-selling access lines and international roaming in Ch. 4?*

Concerning bitstream Telekom Austria has provided the ERG with an extensive comment<sup>22</sup> on the ERG specific consultation on its bitstream access working document.

Moreover we note that the ERG document discloses uncertainty whether bitstream access is a market or a remedy<sup>23</sup> (e.g.); an uncertainty that goes back to the draft recommendation on relevant markets<sup>24</sup>:

Referring to the Recommendation, we understand that bitstream access is rather the market for wholesale broadband access which means that application of remedies should not go beyond what is needed to resolve competition problems in this market as defined by the Commission. In addition, we would like to stress the point again that if effective competition on the retail market is

<sup>21</sup> AUGUST 2003 – Telekom Austria Reflection Document on ERG Consultation on FLRAIC

<sup>22</sup> AUGUST 2003 – Telekom Austria Reflection Document on ERG Consultation on Bitstream Access

<sup>23</sup> p. 59

<sup>24</sup> "...to impose an access obligation acc. to Art. 12 AD and mandate a bitstream access product as a proportionate remedy (p.88)"

available a careful analysis should take place to investigate whether remedies on the wholesale level are needed at all.

Furthermore, access remedies may have adverse effects on competition. They could lower the incentives of both, the incumbent and other market players, to invest in new technologies if it is quite easy to enter an established network. The incentive for "cherry picking" is increased. The result would be that the incumbent is left with unprofitable areas whereas other companies can focus on profitable areas like business clients or areas with a higher population density.

This undesirable effect on competition might become intensified if remedies are imposed, although in many segments of the markets (regional areas or specific technologies) competition is already effective. Such a remedy would annul investment incentives for the incumbent in those sectors where a replication of assets is unlikely to happen for the simple reason that they are not profitable.

*14. Do you agree that the principles developed also apply in cases of joint dominance? Do you have observations regarding specific remedies that may be appropriate in situations of joint dominance?*

Joint or collective dominance is an economic concept applied in EC competition law. The standard of proof as required by the EC Courts is demanding. That means that – accordingly to the ECJ's requirements - in practice only a few cases occur where the concept is applied.

#### **Other comments**

*16. Please provide a concise description of any other issues that you believe the document should address or a critique of any other aspects of the document that you consider relevant. In doing so please refer to actual or potential problems encountered in electronic communications markets, as well as to relevant case law and other precedents.*

The telecommunication directives package of the European Union constitutes a new stage not only for the Austrian communication markets. It has not only set off a transition from sector specific regulation to general competition law but, in adding the principle of proportionality, the Commission has put its commitment to promote innovation and to strengthen Europe's economy into a new legal mold:

*"When imposing a remedy the NRA must demonstrate it is appropriate to address the underlying competition problem, proportionate and justified in the light of the basic regulatory objectives of promoting competition, contributing to the development of the internal market and promoting the interests of EU citizens"<sup>25</sup>.*

In the new regime investments remain crucial and are „clearly a critical enabler of productivity growth, and, for that matter, also of innovation" as Mr. Liikanen, has underlined.<sup>26</sup> Yet there are risks to investments. In his speech "Innovation key to EU growth" in October 2003, Erkki Liikanen said „Europe's regulatory regime is currently too tight, a fact which focuses entrepreneurs efforts in the wrong direction and could put people off starting up"<sup>27</sup>.

Telekom Austria therefor likes to emphasise, that within the new regulatory regime NRAs now have the possibility and the legal obligation to select remedies that also balance different national requirements. Please mind that by stimulating investments in innovation and infrastructure the aim of a modern telecommunications infrastructure and quality of location remains. Telekom Austria shares the view of the European Commission, according to which, regulatory action therefore

<sup>25</sup> p. 11

<sup>26</sup> SPEECH/03/588; Mr Erkki Liikanen, Member of the European Commission, responsible for Enterprise and the Information Society; "Broadband and the Renewal of Europe's Economy", ETNO Conference 2003, Brussels, 2 December 2003

<sup>27</sup> Erkki Liikanen, speech at the eleventh Eurochambres Congress: "Innovation key to EU growth" London, October 15 2003, (BusinessEurope.com)

"should be taken only when strictly necessary, and at the smallest possible cost to enterprises and society as a whole "<sup>28</sup>.

According to Mr. Liikanen „Innovations will only emerge where the market offers incentives to introduce new products and production methods. It is well understood that if we succeed, we will give certainty to investors, and generate greater competition” which – as Liikanen underlined, “is key to stimulate innovation while yielding lower prices and greater choice for consumers”.<sup>29</sup>

The way the remedies are applied, will turn the balance. If not applied in a diligent manner, in line with the deserving commitment of the Commission to promote affordable information and communications technologies, all efforts of the Commission will remain an exercise in futility. This is the reason why Telekom Austria is concerned about the extensive or inappropriate use of the leveraging-concept which would erode those goals targeted by the European Commission<sup>30</sup>.

The telecommunication sector, according to the European Commission „one of the main contributors to European productivity growth”, will „not only impact on the performance of our economies”, as Liikanen emphasized, but will be an indicator to measure how the European Union defines its economic status vis a vis the USA and Asia.

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<sup>28</sup> SPEECH/03/588; Mr Erkki Liikanen, Member of the European Commission, responsible for Enterprise and the Information Society; "Broadband and the Renewal of Europe's Economy", ETNO Conference 2003, Brussels, 2 December 2003

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<sup>30</sup> The CFI required the Commission to consider the extent to which the incentives of a merged entity to leverage its market power from one market (e.g. carton) into a neighboring market (e.g. plastic) may be reduced, or even eliminated, given that such conduct may be illegal under Community or national law. The Commission believes that this requirement is impossible to meet in practice. EC Press Release, Commission appeals CFI ruling on Tetra Laval/Sidel to the European Court of Justice DN: IP/02/1952, Date: 20/12/2002