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The evolution from sector-specific regulation towards competition law in EU telecom markets from 1997 to 2011: Different effects in practical implementation

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The evolution from sector-specific regulation towards competition law in EU telecom markets from 1997 to 2011 - Different effects in practical implementation

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[1] The opinions expressed in this presentation are the personal views of the authors and do not prejudge decisions of the Austrian regulatory authorities.

Abstract:

The telecommunications markets in the European Union have gone through a period of rapid technological as well as economic change. After the market opening in the late 1990s, the approach to regulate these markets has likewise changed over time. Whereas a sector-specific framework dominated the phase from 1998-2002, a more prominent role of competition law regulating telecommunications markets has become visible within the last years. The two reviews of the regulatory framework (2002 and 2010) have seen sector-specific measures being scaled back and competition law measures gaining a more prominent role.

This paper tries to analyse the development from sector-specific regulation towards competition law in its application to telecommunications markets in the EU. It draws conclusions from the changes in the different reviews and demonstrates how these modifications of the framework have taken place. Additionally, the practical implementations are analysed with respect to two countries. Despite the fact, that EU member states are following a joint approach (EU framework), there are still differences on the national level as regards the application of regulatory instruments and the regulation of specific markets. This can be demonstrated by looking at how national regulatory authorities conduct the process of for example market definition, market analysis, SMP designation and levying of remedies. In the paper Germany and Austria are analysed, two neighbouring countries, with similar principles in the transposition of EU frameworks into national legislation, but with strongly different outcomes as regards specific regulatory measures in terms of e.g. market analysis, price regulation, organisation of the regulatory authorities etc. Thereby we demonstrate that although the EU framework tends to achieve harmonisation, there are still a number of differences between member states in practical implementation.

The paper is organised as follows: after the introduction in section 1, section 2 draws the picture of the development of the most important elements of the EU regulatory framework over time. Thereby. we specifically look at the issues of market definition, analysis and dominance designation but also issues of access and interconnection are analyzed. This encompasses conclusions regarding the overall trends of development in the design of the EU regulatory framework. Section 3 analyses the corresponding developments in the Austrian and the German telecommunications act, especially with respect to the “balance” between the role of sector-specific regulation and competition law in national legislation. This is done be looking at some specific topics such as

- market definition and analysis
- organization of the regulatory authority
- potential conflicts between regulatory authority and competition authority regarding competences and responsibilities,
- possibilities of enforcement, and
- the treatment of margin squeeze

Section 4 contains our conclusions with respect to the practical implementation in member states against the overall goal of harmonisation and demonstrates differences in the way EU legislation has been transposed to national legislation in a comparison between Germany and Austria.

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1 Introduction

The topic of this paper stems from the increasing competitiveness of telecommunications markets after more than a decade of competition in the EU as of today. As incumbents have lost market shares and alternative suppliers gain an increasing foothold, the question arises whether the legal and regulatory framework is following these trends by scaling back the sector-specific regulation and increasing the applicability of competition law.

Given the fact that telecommunications markets have always been influenced by the concepts that are derived from sector specific regulation and competition law one can ask whether and to which extent the relevance of sector specific regulation decreases when competition becomes sustainable. A further question is then whether this is a trend in all EU countries and thus if the relevant EU frameworks are implemented in a similar fashion by transposition into national legislation or whether discrepancies remain.

The history of telecommunications regulation and liberalisation of markets in Europe started more than 25 years ago in the late 1980s. The relationship between sector-specific regulation and competition law emerged when the telecommunications markets in the EU member states were opened to competition, first in the mobile sector and (in most countries) as of 1998 also in the fixed network. The process was initiated by the EU (starting with a green paper in 1993) which used its main mechanisms such as directives and recommendations in order to abolish special rights of public enterprises and to open up markets to competition. The first major process was the "1998 package" which served to "manage the transition from monopoly to competition".[2]

A major revision came in 2003 with a new policy framework replacing the 1998 package and taking into consideration the competitive developments in the meantime. It comprised a package of directives which addressed specific aspects of importance for the sector especially with regard to issues like access[3], general authorizations[4] as well as the conditions

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[2] Details on the applicable initiatives and documents from the time are archived at http://www.ec.europa.eu/information_society/policy/ecomm/doc/history/index_en.htm

[3] Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), OJ L 108, 24.4.2002, pp. 7–20

[4] Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), in: OJ L 108, 24.4.2002, p. 21–32.

which were compiled in the Framework Directive.[5] Already at that time especially also with the introduction of the recommendation on relevant product and services markets[6] which served as a "sample" of how to approach the definition and analysis of markets the framework started to take into account the achieved competitive status in the EU. The most recent process of reforming the rules started in 2006 with the communication on the review of the EU regulatory framework for electronic communications and services[7]. This was followed by several studies as well as an impact assessment which in the end of 2007 led to the first proposals on the revision of the regulatory framework.[8] One of the main conclusions was that the achievements in terms of competition as well as investment had been brought about by sector specific regulation, a statement that was intensively debated throughout the sector.

Over time, an especially important aspect thereby was the balance between sector-specific regulation and competition law. This was already an issue in the 1998 package, but became more relevant in 2003 with the first recommendation on relevant product in services markets as well as the explanatory memorandum of the recommendation. This related to the "Commission Guidelines on Market Analysis"[9]. In this recommendation, the approach to market definition and analysis is contained and also a discussion about the approach to market analysis based on competition law principles. This recommendation has been modified in 2007, a process resulting in a reduction in the number of markets susceptible to ex-ante regulation from 18 to 7 – which in itself is a sign that sector specific regulation could be scaled back. It is in this context an analysis of the future sharing of roles and balance between sector specific regulation and competition law comes into play.

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[5] 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), in: OJ L 108, 24.4.2002, pp. 33–50

[6] Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications 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, in: OJ L 114 , 08/05/2003 pp. 45 - 49

[7] See http://www.eur-lex.europa.eu/LexUreServ.do?uri=CELEIX:52006dc0334:en:not

[8] In this respect especially the studies related to the review of the recommendation on markets subject to ex ante regulation (Stumpf, Cave, Valletti), "Preparing the Next Steps in Regulation in Electronic Communications – a Contribution to the Review of the Electronic Communications Regulatory Framework" (Hogan & Hartson and Analyses) and "An Assessment of the Regulatory Framework for Electronic Communications: Growth and Investment in the EU E-Communications Sector" (London Economics, PriceWaterhouseCoopers) were cornerstones in developing the framework, see: http://www.ec.europa.eu/information_society/policy/econm/library/ext_studies/index_en.htm.

[9] Commission Guidelines on Market Analysis and the Assessment of Significant Market Power under the Community Regulatory Framework for Electronic Communications Networks and Services, see: Official Journal C165, 11.7.2002, pp. 6-31.

2 Development of the EU Regulatory Framework (1998-2011) with respect to sector specific regulation vs. competition law

The purpose of this section is to look at the EU frameworks and cornerstones of their contents as they developed from 1998 via 2002 to 2010 and to focus on the aspect of the role of competition law in the telecommunications sector where sector specific regulation exists.

2.1 The 1998 framework

2.1.1 Main elements of the regulatory framework and assessment of balance between sector specific regulation vs. competition law

The 1998 framework was directed towards the initial market opening in most EU member states as of January 1, 1998 in the so-called "core area" of telecommunications, the fixed network. This package comprised different documents addressing a large number of areas such as data protection[10], licensing[11], open network provision, the adaptation to a competitive environment and telecommunications[12], interconnection[13], as well as number portability, carrier preselection, furthermore recommendations on interconnection and accounting separation, and additionally frameworks on leased lines (directive 94/44/EEC) and voice telephony (directive 98/10/EC).[14] At the time there was a clear picture that due to the monopolistic character of the markets, it would be necessary to take specific measures to introduce competition and this comprised to apply sector-specific regulation and not to rely to a large extent on competition law as this was deemed inappropriate.

Most of the documents relevant at the time and framing the overall picture of the 1998 package did not specifically address the issue of sector-specific regulation versus competition law but directly started to discuss sector-specific measures to open up the markets. The ultimate

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[10] Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector, in: OJ L 24, 30.1.1998, pp. 1–8

[11] Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services, in: Official Journal L 117 , 07/05/1997, pp. 15 - 27

[12] http://ec.europa.eu/archives/ISPO/infosoc/telecompolicy/en/dir97-51en.pdf

[13] Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP), (31997L0033) Official Journal L 199, 26/07/1997 pp. 32 - 52

[14] All referenced documents can be found here: http://ec.europa.eu/archives/ISPO/infosoc/telecompolicy/en/Main-en.htm

goal was to achieve full competition and the selected measures are directed towards that goal.[15] However, there is also reference to the competition rules of the EU which apply in parallel.[16]

Looking at the literature and analysis, the relationship between sector specific regulation and competition law has always existed in the scientific analysis. The debate started already in 1997 when the sector specific framework was effectively introduced. According to Riehmer[17] the ONP rules as applied for the telecom sector cannot be regarded as competition rules which are applicable on the behaviour of governments or enterprises. The ONP rules and the competition rules thus are two different, though not conflicting set of rules. Thus, competition rules apply even if the ONP rules are fulfilled. In a review of more than a decade of open markets Lehofer[18] concludes that there is no clear trend from sector specific regulation to competition law but rather that competition law applied identically in all phases of the market, i.e. before, during or after a scaling back of sector specific regulation. Klotz is of the opinion that competition law and sector specific regulation are two sides of the same medal. Sector specific regulation tries to avoid negative consequences and abuse of market power in advance whereas competition law tries to correct developments which have taken place but have moved in the wrong direction.[19]

2.1.2 Design of key regulatory parameters between sector specific regulation and competition law

The treatment of markets and consequences of “strong” market positions of single market players has been a relevant topic for decades not only in telecommunications.

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[15] In terms of access and interconnection, a commission recommendation was passed with two parts which described how interconnection pricing should take place and how accounting separation and cost accounting should be done. The idea was to allow for certain instruments which enable competition to flourish and the measures were all sector-specific.

[16] One of the measures was that member states had to notify the EU commission every 6 months about the enterprises which enjoyed significant market power according to Article 18 of the Interconnection directive on one of the predefined markets (voice telephony (access / services), mobile telephony, leased lines and (later) interconnection). The publication of the list of SMP operators can be found at the archived EU homepage: http://ec.europa.eu/archives/ISPO/infosoc/telecompolicy/en/comm-en.htm#misc.

[17] See Riehmer: EG Wettbewerbsrecht und Zugangsvereinbarungen in der Telekommunikation – Die neue Mitteilung der Europäischen Kommission, in: Multimedia und Recht (MMR), 1998, p. 355.

[18] Lehofer, H.P.: Der Weg vom Sektorrecht zum allgemeinen Wettbewerbsrecht im Lichte der nationalen Rechtsprechung, Notizen zu einem Vortrag beim 11. Salzburger Telekom-Forum, 27.8.2010, p. 9.

[19] Klotz, R.: Wettbewerb in der Telekommunikation: Brauchen wir die ex-ante-Regulierung noch?, in: ZWeR no. 3/2003, pp. 283-313.

2.1.2.1 Market definition, analysis and dominance designation

Significant market power has not been the same as the concept of dominant position used in competition law. Significant market power was an ONP concept used to decide in which cases an organisation should be subject to specific obligations, under specific ONP Directives. An organisation was presumed to have significant market power if it had a share of more than 25% of the relevant market. Typically, organisations needed to have much greater market share than this before they were considered as having a dominant position on a market. A company may have been designated as having significant market power under ONP legislation but not be considered to have a dominant position for the purposes of competition law; or a company may have a dominant position in a particular market segment but not be considered to have significant market power in the sense of the ONP concept.

The major differences between the ONP approach and competition law concern the way the relevant market was defined, and the extent of an organisation's influence on that market.[20]

The relevant market was always defined in terms of the product/service and the geographical market. The regulations based on Article 81 and 82 of the EC-Treaty[21] laid down the following definitions to describe the relevant product market and the relevant geographical market.[22] The relevant product market was defined as follows[23]

> *"A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."*

The relevant geographical market was defined as follows[24]:

> *"The relevant geographic market compromises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area."*

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[20] Determination of organizations with Significant Market Power (SMP) for implementation of the ONP Directives

[21] See e.g. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, http://europa. eu/legislation_summaries /competition/firms/l26092_en.htm

[22] The relevant market within which to assess a given competition issue is therefore established by the combination of the product and geographic markets.

[23] Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03)

[24] Ibid

To define the relevant market some basic principles had to be taken into consideration. Firms are subject to three main sources of competitive constraints: demand side substitutability, supply side substitutability and potential competition. From an economic point of view, for the definition of the relevant market, demand side substitution constituted the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions. Basically, the exercise of market definition consisted of identifying the effective alternative sources for the customers of the undertakings involved, in terms both of products/services and of geographic location of suppliers.

Supply-side substitutability may also have been taken into account when defining markets in those situations in which its results had been equivalent to those of demand substitution in terms of effectiveness and immediacy.[25]

Despite of the fact that a market share of more than 25% presumed significant market power, a market share of over 50% was usually sufficient to demonstrate dominance although other facts also will be examined. The meaning of the general principle that a market share of more than 25% presumed significant market power, has been shown in the Interconnection Directive[26]. Article 4 defines significant market power as follows:

> *"An organisation shall be presumed to have significant market power when it has a share of more than 25% of a particular telecommunications market in the geographical area in a Member State within which it is authorized to operate."*

Therefore, the relevant product market was the particular telecommunications market and the relevant geographical market should be the area in a Member State in which the organisation is authorized to operate. While the definition for the geographical market created no problem, the "particular telecommunications market" needed to be defined in more detail in those days.[27] The initial Interconnection Directive (97/33) identified different markets: (1) fixed public telephone network and fixed public telephone services, (2) leased lines services, (3) public mobile telephone network and public mobile telephone services. The parameters for measuring markets and market shares are not laid down in specific Directives.

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[25] This means that suppliers are able to change production to more relevant products / markets quickly without incurring significant additional costs or risks in response to small and permanent changes in relative prices.

[26] Initially 97/33/EG

[27] Nowadays the definition of the telecommunications market does not need to be discussed anymore as there are straight standards given by the European Commission.

2.1.2.2 Access and Interconnection

Competition in telecommunications can in principle work based on services or on infrastructure. Service based competition (i.e. several market players offering services on the infrastructure of one operator) can be achieved reasonably quickly, however, only infrastructure based competition can be regarded as sustainable as it builds on separate physical infrastructure which strategically guarantee independence.

As long as it is not realistic to expect independent infrastructure to be available due to the time lag from market opening until investment is undertaken and new networks are deployed and due to the fact that not all infrastructures may be realistically replicable, the EU framework contained rules on access and interconnection. Access is the more encompassing and generic term comprising any one sided form of connecting networks including access to facilities whereas as interconnection is a two-sided form of access aiming at exchanging traffic between two networks to enable communication between end users. The EU framework gave specific attention to this by ensuring that interconnection should be available, by defining interconnection as a separate market and by passing recommendations on cost accounting and cost calculation for interconnection services. The original EU framework did not contain an obligation for unbundling. This was implemented in a number of member states, but the EU did not introduce such an element before the year 2000.[28]

2.2 The 2002 Review

2.2.1 Main elements of the regulatory framework and assessment of balance between sector specific regulation vs. competition law

In the period starting in 1998, market change became visible stepwise. Competitors gained market shares and markets started to perform better in terms of matching demand and supply. Also technical progress took place. In 2002, the framework was updated, to take account of developments in this fast-moving field. The frontiers that were gradually overcome referred to the separated markets for (voice) telephony, internet, and broadcast which had more and

[28] See Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop, Official Journal L 336 , 30/12/2000 P. 0004 – 0008; http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000R2887:EN:HTML

more common aspects. Market fragmentation through borders between countries remained highly relevant and the goal of the EU was to contribute to more harmonization.

> *"The EU's regulatory framework aims to promote free and fair competition, which will boost Europe's economy by supporting every area of activity which relies on telecoms, and create a strong telecoms industry in Europe. Consumers will be the ultimate beneficiaries."*[29]

The consideration of more competition included ideas of how to better take account of the specificities of markets which exhibit more characteristics of competition. The idea was to do so by specifying the methods of defining and analysing markets in line with competition law. To that end, the EU commission started to prepare guidelines for market analysis according to competition law principles already in 2001

> *"The intention of the Guidelines will be to ensure that the use by NRAs of competition law principles in an ex-ante environment is consistent with the approach of the Commission and national competition authorities (NCAs) in the enforcement of Community competition law. The Guidelines are expected to draw upon the following documents: the "Guidelines on the application of EEC competition rules in the telecommunications sector", the "Commission Notice on the definition of relevant market for the purposes of Community competition law", and the "Notice on the application of competition rules to access agreements in the telecommunications sector". The Guidelines will be based on the existing jurisprudence of the European Court of Justice and the Court of First Instance in competition law. More particularly, the appraisal of effective competition will be done using the principles of Community competition law, under Article 82 of the Treaty, and Article 2 of the Merger Control Regulation. The Commission and NCAs will continue to apply competition law retrospectively under Article 82 of the EC Treaty, or prospectively under the Merger Control Regulation. The use by NRAs of the same principles and methodology as the Commission and NCAs will have no effect on market definitions used by the Commission and NCAs in competition cases, and vice-versa."*[30]

This led to Draft Guidelines on market analysis and the calculation of significant market power in March 2001.[31]

Telecommunications regulation also received an increased attention in the scientific literature. De Streel describes the process that is being applied on the telecommunications sector after the EU 2002 review especially with respect to the designation of significant market

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[29] See http://ec.europa.eu/information_society/policy/ecomm/current/index_en.htm

[30] See Outline of Guidelines on market analysis and the calculation of market power to be adopted under Article 14 of the proposed Directive on a Common Framework for Electronic Communications Networks and Services; http://ec.europa.eu/archives/ISPO/infosoc/telecompolicy/en/101-24-mktgl.pdf

[31] See http://ec.europa.eu/archives/ISPO/infosoc/telecompolicy/en/com2001-175-5en.pdf

power based on market definition and followed by market analysis. Especially the concept is compared to the understanding of SMP in competition law and the author concludes*:*

> *"Even though the new concept of significant market power has been aligned on the anti-trust concept of a dominant position, competition law and sector-specific regulation do not coincide and should not be confused with each other. In general, they should be seen as complementary and not as substitutes. The objectives of both instruments tend to converge towards the pursuit of effective competition. The scope of both instruments overlap as sector regulation applies to market structures where anti-trust will be inefficient and competition policy applies the board to all types of market structure. On the other hand, the conditions of intervention vary according to the instruments. The SMP regime is limited to the market fulfilling certain criteria and then applies generally each time there are dominant operators. Competition law is triggered by specific behaviour of the firms (abuse of dominant position, agreement on concerted practice, concentration) that should be proved to be anti-competitive. Therefore, the burden of proof for an NRA is fairly high in selecting a market but becomes quite low to intervene. It is certainly lower than other competition law as there is no need to show any specific anti-competitive behaviour."*[82]

In analyzing competitive developments over time, Möschel[33] concludes that sector specific regulation may only be required in the future for monopolistic bottlenecks as well as termination monopolies but can be phased out via sunset clauses otherwise. Previously, the author[34] argued already in 2004 that due to the competitive developments sector-specific regulation had surpassed its peak and should be substituted by general competition law. He sees a need for regulation, justified on the basis of competition policy considerations, such as the abolition of discrimination-free access to the relevant resource but this type of regulation need not be sector-specific or necessarily ex-ante.[35]

In light of the review of the EU Framework in 2007 Psarakis argues that sector-specific regulation *"will not be phased out since it can not be perfectly substituted by generic competition*

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[32] De Streel, A.: The New Concept of "Significant Market Power" in Electronic Communications: The hybridisation of the sectoral regulation by competition law, in: European Competition Law Review, 2003, Vol. 24/10, p. 539

[33] See Möschel, W.: Der zukünftige Ordnungsrahmen für die Telekommunikation: Allgemeines Wettbewerbsgesetz statt sektorspezifischer Regulierung!, in: Multimedia und Recht (MMR), 2008, pp. 503.

[34] See Möschel, W.: Regulation and deregulation in telecommunications, in: European Business Organization Law Review, 2004, pp. 353-361

[35] See Möschel, W.: The future regulatory framework for telecommunications: General competition law instead of sector-specific regulation – A German perspective, in: European Business Organization Law Review, 2009, p. 158. Knieps (see Knieps, G.: Sektorspezifische Regulierung: Transitorisch oder ad infinitum? in: IFO Schnelldienst, Nr. 21/2007, p. 7 ff) argues for a phase out of sector-specific regulation. He claims to consider network specific significant market power as the only threshold in criterion for regulation. He furthermore claims that regulatory mandates which lack position in the end lead to an over-regulation.

law".[36] It is interesting to see that the author compares the two concepts on the one hand by stating that they have reached a partial convergence and by stating that competition law contains a number of ex-ante elements whereas sector-specific regulation also *"has assimilated some of the ex-post deterrence attributes"* (p. 457). In concluding the author sees that there is a parallel application of the two legal frameworks and that this can rather be complementary than conflicting, despite some crucial elements that need to be addressed.

Klotz[37] addresses the impact of the new (at that time) recommendation on relevant product and service markets. He discusses the relevance and strength of sector-specific regulation vs. competition law and concludes that competition law had a limited role in the past and was only applied as a complement in few cases. As one of the identified problems, the duration of competition proceedings is mentioned. Due to this and other considerations from the practical application of competition law he wonders how competition authorities can assume that their toolbox is sufficiently effective to handle relevant cases

Cave and Crowther[38] focus on the transition from regulation to competition law based on the EU 2002 reform in the EU. Thereby the process of market definition, market analysis and SMP designation is described as well as some cases are quoted. The authors conclude:

> *"The question of the respective roles of competition law and regulation, and the related (but identical) question of the appropriated areas for ex-post and ex-ante interventions will remain a key policy question in regulated industries. Through a discussion of a number of cases, the previous sections have attempted to access the continued importance of the relevance of the conventional distinction. In the case of electronic communications services, a new regime has been devised to impose the distinction with ex-ante regulation limited to a subset of markets, "recommended" by the commission, with opportunities for the NRAs to add to that list, subject to meeting the three criteria noted above to the Commission´s satisfaction (…). Where dominance is found in the market, subject to ex-ante regulation, NRAs can choose remedies from an improved list (…). The sector specific communications legislation has explicit policy objective on which NRAs and the commission can rely in formulating interventions. These include the "promotion of competition". Articles 81 and 82 are associated with no such explicit objectives, and this might lead to the adoption of alternative approaches when competition law is applied in regulated sectors"* (p. 488).

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[36] See Psarakis, G.**:** Sector-specific regulation and competition law in the electronic communications sector against the backdrop of the internal market, in: European Competition Law Review (ECLR), 2007, Volume 28 (8), p. 457.

[37] Klotz, R.: Zu den Folgen und Nebenwirkungen der Deregulierung: Fragen Sie Ihre Regulierungs- und Wettbewerbsbehörde. in: Multimedia und Recht (MMR), 2008, p. 709.

[38] Cave, M., Crowther, P.: Pre-emptive competition policy needs regulatory anti-trust, in: European Competition Law Review, 2005, Vol. 26/9, pp. 481-490.

The authors nevertheless are optimistic about the interrelationship because they believe that the EU Commission has been prepared to negotiate pro competitive outcomes and thus that the market parties will adapt to this procedure but at the end they raise some questions which refer to the interrelationship and the use of competition law.

2.2.2 Design of key regulatory parameters between sector specific regulation and competition law - Market definition, analysis and dominance designation

In July 2000, the European Commission submitted the proposal for a Directive of the European Parliament and the Council on a Common Regulatory Framework for Electronic Communications and Networks Services[39] for adoption[40]. This proposed Directive contains, in its Article 13 a new definition about significant market power. Pursuant to this definition

> *"an undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimate consumers."*

Significant market power is not any longer to be assessed on the basis of percentages of market share. This definition is rather unspecific and leaves a number of questions open, e.g. how "a position of economic strength" is to be defined?[41] Likewise new is the definition in Article 13, paragraph 3,

> *"if an undertaking has significant market power on a specific market, it may also be deemed to have significant market power on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking".*

Also new is the market analysis procedure described in Article 14 where the European Commission planned to issue a document on relevant product and service markets, addressed to the member states. In the annex a list of markets can be found which has to be

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[39] COM (2000) 393; 2000/0184 ; see also Verrue, R./Grussmann, W.-D.: Electronic Communications – die Informationsgesellschaft im Übergang zu einem neuen Rechtsrahmen, in Kaspar/Rübig, e-wwworld>2000, Telekommunikation 3 (Wien, 2000)

[40] In the foreground on this Directive are political aims as well as principles, which should be realised within national level, see Huppertz, C.: "Der institutionelle Rahmen des Telekommunikationsrechts in der EU", in Kommunikation&Recht 8/2001, p. 402.

[41] The wording of the Directive has already been changed. The Member States themselves have criticized the unspecific wording. – see Documents of the European Council 7326/1/01, 28.3.2001 and 8208/01, 11.5.2001 under http://europa.eu.int.

included in the initial Commission's decision on product and service markets. This decision is regularly reviewed by the European Commission[42] and identifies those product and service markets within the electronic communications sector, the characteristics of which are such as to justify the imposition of regulatory obligations set out in the specific measures, without prejudice to markets that are defined in specific cases under competition law.

Presumably due to the unspecific definition in Article 13 about significant market power and because of the intention of the European Commission to be in conformity with the case law of the Court of Justice and the Court of First Instance of the European Community it is foreseen in Article 14 that the European Commission publishes Guidelines on market analysis and the calculation on market power.[43]

The Guidelines have been designed for national regulatory authorities to be used for the following purposes: (1) to identify the geographical dimension of those product and service markets identified in the Commission Decision under Article 14 of the Directive; (2) to identify relevant product and service markets other than those identified in the Commission's Decision, and this in agreement with the Commission; (3) to analyze the characteristics of competition in both the markets identified in the Commission Decision and in markets that national regulatory authorities identify themselves and (4) to identify undertakings in a relevant market with significant market power and to impose ex ante measures consistently with the terms of the Directives.

The analysis of these Guidelines shows that their intentions would lead to consistency as well as legal security and therefore fulfilling the aims of balanced regulation.[44] At the end it is the question about the legal nature of these Guidelines and thus of their enforcement. If there is no legal way to enforce these Guidelines, national regulatory authorities may not use them or only where they seem to be suitable. This means on the one hand that against the as-

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[42] See also Feiel, W.: Zur Diskussion über das EU-Reformpaket im Bereich der elektronischen Kommunikation, in: Medien und Recht Nr. 3/2001, who explains the different criteria for assessing „joint dominance" in the sense of the Framework Directive.

[43] http://ec.europa.eu/archives/ISPO/infosoc/telecompolicy/en/com2001-175-5en.pdf; In a certain way the European Commission is authorized to issue directives to the national regulatory authorities. This could lead to a centralisation of decision-making power by European Law instead of National Law; see Huppertz, C., "Der institutionelle Rahmen des Telekommunikationsrechts in der EU", in Kommunikation&Recht 8/2001, p. 402

[44] Within two months of the date of adoption of the Decision or any updating thereof, national regulatory authorities shall carry out an analysis of the product and service market identified in the Decision of the European Commission, in accordance with the Guidelines. Member States shall ensure that national competition authorities are fully associated with that analysis

sumed intention of the European Commission there would be no legal security and on the other hand the individual undertaking can't refer to these Guidelines.

Also in Article 14 a procedure by which national regulatory authorities must undertake market analysis in order to assess whether competition is effective on particular markets is described. Where competition is not effective, national regulatory authorities designate relevant undertakings as having significant market power and maintain or impose ex-ante obligations on those undertakings in order to promote a competitive market. Where competition is found to be effective on a specific market, national regulatory authorities must withdraw any such obligations. The meaning and consequences of this provision will be discussed in Section 3.

Because of the requirement of the proposed Directive on a Common Regulatory Framework for Electronic Telecommunications Networks and Services where the European Commission issues a decision on relevant product and service markets as well as Guidelines on market analysis some words should be spent on the Commission's own practice[45]:

The Commission has adopted a number of decisions under Regulation No. 17 and Regulation No. 4064/89[46] relating to the telecommunications sector. In these decisions the Commission has identified a number of relevant markets which may be of particular relevance for the national regulatory authorities when applying Article 13 of the Framework Directive.

In the opinion of the European Commission there are two relevant markets within the telecommunications sector:

- the market of services provided to end users (service market) and

- the market of access to facilities necessary to provide such services (access market).

Within these two broad markets definitions further market distinctions may be made depending on demand and supply side patterns.

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[45] See Commission Working Document, COM (2001) 175, 28.03.2001, p. 14

[46] Regulation (EEC) no 4064/89 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, p.1, as last amended by Council Regulation (EC) no 1310/97 of 30. June 1997, OJ L 180, 9.7.1997, p.1 (hereafter, the "Merger Control Regulation).

As regards the fixed services market, the European Commission has defined the relevant market as being the market for domestic and international voice and data communications services with further segmentation between the voice market and the data market[47]. In the market for fixed telephony retail services, the Commission had distinguished various services: the initial connection, the monthly rental, local calls and long distance calls. These services are offered to two distinct classes of consumers, namely, residential and business users, the latter can be distinguished into two submarkets, one for professional, small firms costumers and another for large businesses. With regard to the fixed telephony retail services offered to residential users, demand patterns seem to indicate that two main services are being offered, traditional fixed telephony services (voice and narrowband data transmissions) on the one hand, and high speed communications services (in the form of xDSL services as a description of different forms of broadband connections) on the other hand[48].

The Commission has found that within the mobile telecommunications sector from a demand-side point of view, mobile services and fixed telephony services constitute separate markets. Within the mobile market, evidence gathered from the Commission has indicated that the market for mobile telecommunications services encompasses both GSM 900 and GSM 1800 and possibly analogue platforms[49].

Specifically, the Commission has made references in its decisions to the existence of the following main markets: (1) international voice-telephony services[50]; (2) advanced telecommunications services to corporate users[51]; (3) standardised low-level packet-switched data-communications services; (4) resale of international transmission capacity[52]; (5) audio-conferencing; (6) satellite services[53]; (7) enhanced global telecommunications services[54]; (8)

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[47] See Commission decision of 20 May 1999, *Cégétel + 4* (OJ L 218, 18.8.1999), par. 22.

[48] See Commission Working Document, COM (2001) 175, 28.03.2001, p. 17

[49] Cae No IV/M.1430 – *Vodafone/Airtouch*, Case No IV/M.1669, *Deutsche Telecom/One2One*, par 7. Whether this market can be further segmented into a carrier (network operator) market and adownstream service market should be decided on a case-by-case basis, so the European Commission; see Case No IN/1760, *Mannesmann/Orange*, paras. 8-10, and Case No COMP/M.2053 – *Telenor/BellSouth/Sonofon*, paras 9-10.

[50] Case No IV/M.856 – *BT/MCI (II)*, OJ L 8.12.1997, para. 13.

[51] Case No IV/35.337, *Atlas* (OJ L 239, 19.9.1996) paras. 5-7, Case No IV/35617, *Phoenix/Global/One* (OJ L 239, 19.6.1996), par. 6, Case IV/34.857, *BT-MCI* (OJ L 223, 27.8.1994), Case No IV/M.802 – *Telecom Eireann*, par. 22.

[52] Case No IV/M.975 – *Albacom/BT/ENI*, par. 24.

[53] Case IV/350518 – *Iridium*, OJ L 16, 18.1.1997.

[54] Case No IV/M.570 – *TBT/BT/TeleDanmark/Telenor*, Case No IV/M.900 – *BT/TELE DK/SBB/Migros/UBS*, par. 25.

directory-assistance services[55], (9) internet-access services to end users[56]; (10) seamless pan-European mobile telecommunications services to internationally mobile customers[57]

Although the Commission wants to ensure that its decision about the product and service market and its assessment of significant market power corresponds with the case law of the Court of Justice and the Court of First Instance of the European Communities, the just mentioned list of markets is not complete in the sense that all relevant constellations are covered.

The Commission has decided that all types of infrastructure that can be used of the provision of a given service can be counted as "access-market". Whether the market for network infrastructure should be divided into as many separate submarkets, as there are existing categories of network infrastructure, depends on the degree of substitutability among such (alternative) networks and should be decided on a case-by-case basis. Thereby it should be taken out in relation to the class of users to which access to the network is provided. A distinction should be made between provision of infrastructure to other operators (wholesale level) and provision to end users (retail level). At the retail level, a further segmentation may take place between business and residential customers[58].

Article 13 paragraph 3 of the Framework Directive says:

> *"Where an undertaking has significant market power on a specific market, it may also be deemed to have significant market power on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of undertaking."*

This provision is intended to address a market situation comparable to the one that gave rise to the Court's judgement in Tetra Pak II[59]. In that case the Court decided that an undertaking that had a dominant position in one market, and enjoyed a leading position on a distinct but closely associated market, was placed as a result in a situation comparable to that of holding

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[55] Case No COMP/M.1957 – *VIAG Interkom/Telenor Media*, par 8.

[56] Case No IV/M.1439 – *Telia/Telenor*, Case No COMP/JV.46 – *Blackstone/CDPQ/Kabel Nordrhein/Westfalen*, par. 26, Case No COMP/M.1838 – *BT/Esat*, par. 7.

[57] Case No COMP/M.1975 – *Vodafone Airtouch/Mannesmann*, Case No COMP/M.2016 – *France Telecom/Orange*, para. 15.

[58] In applying these criteria, the European Commission has found that, as far as fixed infrastructure is concerned, demand for the lease of transmission capacity and the provision of related services to other operators occurs at wholesale level; M.1069 – WorldCom/MCI, OJ L 116, 4.5.1999, p.1.

[59] Case C-333/94 P, Tetra Pak v Commission [1996] ECR I-5951.

a dominant position on the markets in question taken as a whole.[60] This is often the case in the telecommunications sector, where an operator has a dominant position on the infrastructure market and a significant presence on the downstream, services market. Under such circumstances, a national regulatory authority may consider it appropriate to determine that such operator has significant market power on both markets taken together.

Under Article 82 of the EC Treaty, a dominant position can be held by one or more undertakings ("collective dominance"). Article 13, paragraph 2, of the Framework Directive also provides that an undertaking may enjoy significant market power, that is, it may be in a dominant position, either individually or jointly with others.

The Commission has applied the concept of collective dominance in relation to oligopolistic markets. The structure which was considered, is conducive to co-ordinated effects on the relevant market, which was adopted in a number of decisions based on the Merger Control Regulation. In applying the term of collective dominance, the Commission has examined, taking into consideration decisions adopted under Regulation 4064/89 in the telecommunications sector, whether any of the notified transactions could give rise to a finding of collective or oligopolistic dominance.

To sum up, an incumbent will find it difficult to get away from the regulatory regime regarding SMP regulation. Because of the different market structures an incumbent can have significant market power on one market as well as – under special circumstances – it can be designated as having significant market power on associated market(s) also.

[60] Thanks to its dominant position on the first market, and its market presence on the associated, secondary market, an undertaking may thus leverage the market power which it enjoys in the first market and behave independently of its customers on the latter market. Close associated links, within the meaning of the Court's case-law, will most often be found in vertically integrated markets.

2.3 The 2010 Review

2.3.1 Main elements of the regulatory framework and assessment of balance between sector specific regulation vs. competition law

As described above, the 2010 review was initiated in 2006 with a number of different documents published. The major developments in the 2010 framework are that the framework directive and the access directive are revised and integrated into the directive "better regulation"[61] whereas the authorisation directive, the universal service directive and the data protection directive are revised and summarized as the new directive "Citizen's Rights".[62]

In between the 2002 and the 2010 framework the recommendation on relevant product and services markets has been revised and in 2007 a new recommendation was published.[63] Thereby, due to the achievements and the progress of competition, the number of markets susceptible to ex-ante regulation has been reduced to 7 thus demonstrating the growing relevance of competition in practice. With respect to the framework and the access directive, the rules and the structure of the approach towards regulating markets and the balance between sector-specific law and competition law in principle remains the same, the major changes come from the process of market definition, analysis and dominance designation whereas a smaller number of markets is relevant and from access and interconnection.[64]

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[61] Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services, in: OJ L 337, 18.12.2009, pp. 37–69

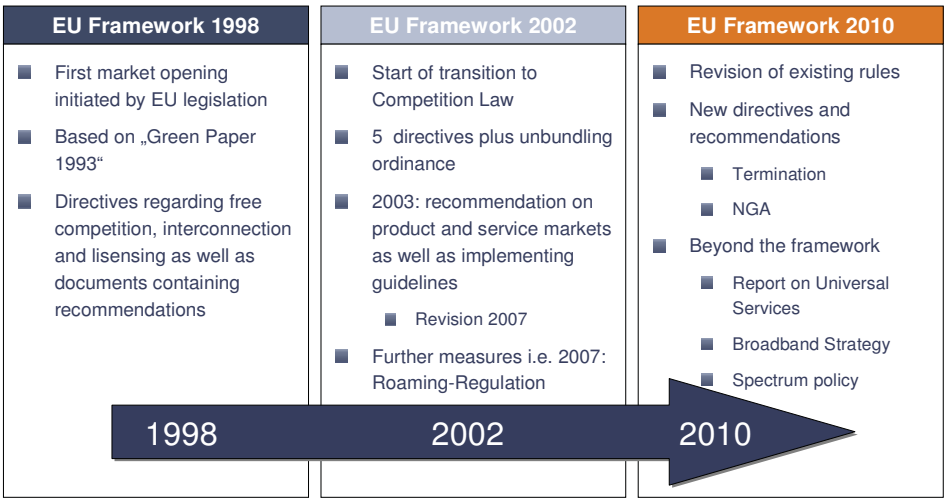
[62] Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, in: OJ L 337, 18.12.2009, pp. 11–36

[63] Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications 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 communications networks and services (notified under document number C(2007) 5406), in: OJ L 344, 28.12.2007, p. 65–69

[64] Haucap and Uhde conclude that the frontiers between competition law and competition policy on the one hand and regulation on the other hand are increasingly becoming unblurred. An important aspect is whether competition law and sector-specific regulation are complementary or competing approaches. The authors hold the position that the two measures and approaches complement each other or at least in theory should complement each other. However, they also find evidence for the opposite, see Haucap, J.; Uhde, A. (2008): Regulierung und Wettbewerbsrecht in liberalisierten Netzindustrien aus Institutionen ökonomischer Perspektive, in: ORDO Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft, Vol. 59, pp. 237-262. There are major differences between competition law and regulation as regards political goals, the threshold for intervention, the frequency of interventions, information and transparency, the use of certain instruments and the cultural ap-

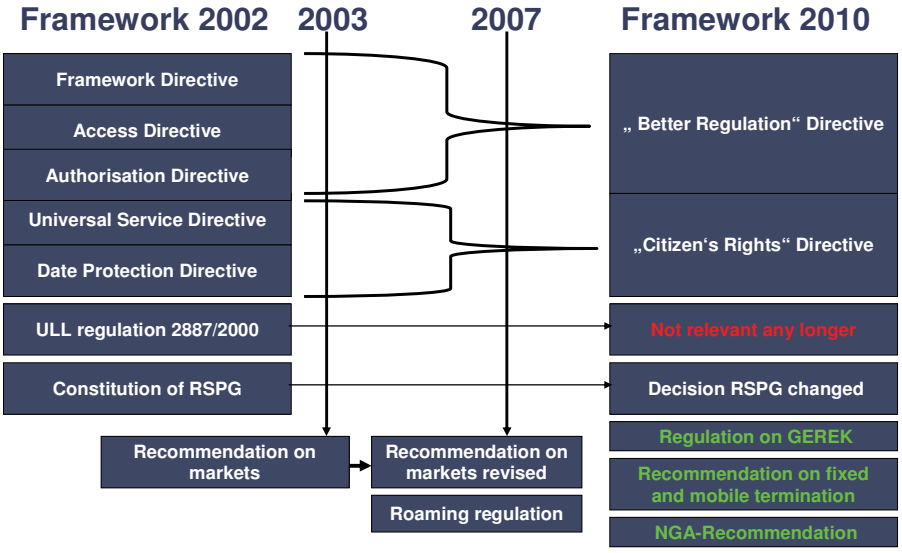
The changes from the framework in 2002 to the revised framework in 2010 can be summarized as follows showing the elements that changed over time.[65]

Fig. 1: The development of the EU framework



This change in the approach implied changes and revisions of a large number of documents.

Fig. 2: Documents of the EU framework



Literature post the decision to adopt the 2010 package has not yet been published to a large extent. Comments so far have focused on the goals and scope of the revised rules.[66] Clearly,

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proach of authorities. In order to overcome the dichotomy between these two "poles", the authors suggest an intermediate approach which they call the "ladder of remedies", p. 257.

65 Source for figures: SBR Juconomy Consulting.

sector specific regulation is not that prominent any longer when looking at the fact that e.g. access and interconnection issues are now well established and many markets tend towards competition.

2.3.2 Design of key regulatory parameters between sector specific regulation and competition law

2.3.2.1 Market definition, analysis and dominance designation

The main aspect of the 2010 framework is that formally, the directives are condensed (see above). The revision in detail shows that the focus of the framework in the telecom sector moves from a system which regulates competing interests between different operators which provide networks and services to a different degree towards a system of managing existing competition. The overarching principle is not to create competition any longer but to develop the market under competitive conditions. This can also be derived from the fact that the directives were accompanied by a great number of programmes and initiatives focusing on the digital agenda, broadband strategies and spectrum policies. Thus, the EU Commission has taken a generic view on the overall markets and amongst others chosen an approach for a converging and competitive environment.

The impact on market definition, analysis and designation is less clear. There are no principle changes in the approach to conduct market definition and analysis except for procedural matters in the national consultation and international coordination mechanism. This may be due to the fact that market definition based on the recommendation on relevant product and service markets already follow competition law principles.

2.3.2.2 Access and interconnection

The revised framework does not contain a significant set of additional provisions on interconnection and access in the “Better Regulation” directive (e.g. on Co-location and sharing of network elements and associated facilities for providers of electronic communications networks), however, there is secondary legislation which is highly relevant. The EU commission

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[66] See e.g. Ettmayer M., Das EU-Telekompaket 2009 – Auswirkungen auf Österreich, M&R 5/2010; Forgó N, Otto G., Zu den Änderungen des europäischen Rechtsrahmens für die elektronische Kommunikation, M&R 5/2010.

published a recommendation on the calculation of interconnection rates implementing a "pure LRIC" approach[67] which – similar to 1998 in detail determines how termination rates (which form only a part of all interconnection services whereas the other services (origination and transit) are no longer markets defined and susceptible to ex-ante regulation) shall be calculated. Furthermore, a recommendation on next generation access networks has been made effective which in great detail describes the regulatory approach to access in the new types of access networks (FttX).[68] Both documents demonstrate that despite competitive development in calls' and access' markets sector specific regulation still plays a crucial role and increases the degree of detail by which it intervenes.

[67] Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU - C(2009) 3359 final, in: OJ 124/67, 20.5.2009, see http://eur-lex.europa.eu/Lex UriServ/LexUriServ.do?uri=OJ:L:2009:124:0067:0074:EN:PDF

[68] 2010/572/EU: Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA), OJ L 251, 25.9.2010, pp. 35–48, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32010H0572:EN:NOT

3 National Implementation

3.1 Austria

Austria moved from monopoly, based on the "Fernmeldegesetz" to competition by transposing the measures agreed on the European level into national legislation with the Telecommunications act (TKG) in 1997. This law entered into effect on 1 August 1997, slightly ahead of the date of full liberalisation. It was amended several times in the subsequent years.[69] The 2002 European regulatory framework for communications was transposed in Austria by means of the Telecommunications Act 2003 (TKG 2003) which took effect on August 20, 2003 as member states had 15 months to transpose the new EU framework into national legislation. With this act, regulation has developed from sector-specific regulation towards general competition law. In the TKG 2003, the regulatory authorities have been assigned new tasks, such as, for example, a number of authorisations to issue ordinances.[70] The discussion on the implementation of the 2010 framework is ongoing when this paper was prepared. The transposition into national legislation is expected towards the end of 2011.

3.2 Germany

In Germany, the Telecommunications 1996 prepared for liberalisation and market opening on 1 January 1998. The EU framework revision contained in the 2002 package was transposed into national law in Germany in 2004, 15 months after the deadline. Currently, the transposition of the 2010 package in a new Telecommunications Act 2011 is in progress.

The relationship between sector specific regulation and competition law has always been an issue.[71]. Ludwigs[72] in discussing the question of parallelism of the two schools goes back to 1996 where the Telecommunications Act states that competition legislation is not affected by the then new Telecommunications Act. In the 2004 Telecommunications Act is more specific

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[69] See Ruhle, E.-O., Freund, N., Kronegger, D., Schwarz, M.: Das neue österreichische Telekommunikations- und Rundfunkrecht, Verlag medien und recht, Wien, 2004, pp. 14.

[70] See http://www.rtr.at/en/tk/Institutionen

[71] See Piepenbrock, H.-J., Schuster, F.: GWB und TKG: Gegeneinander, Nebeneinander oder Miteinander?, in: Computer und Recht 2/2002, p. 98-107.

[72] See Ludwigs, M.: Die Rolle der Kartellbehörden im Recht der Regulierungsverwaltung, in: Wirtschaft und Wettbewerb (WuW), Nr. 5, 2008, p. 435-550

and states that competition legislation applies besides the Telecommunications Act unless the Telecommunications Act defines specifically final rules.

3.3 Specific topics

3.3.1 Market definitions and market analysis

3.3.1.1 Austria

3.3.1.1.1 Significant market power in the Telecommunications Act since 1998

While so far the approach of the European Commission has been described, now the implementation of these rules into the Austrian Telecommunication act will be presented, and likewise how the Austrian regulatory authority interpreted the Telecommunication act together with the rules of the European Commission.[73]

It was assumed that an undertaking had significant market power if it had a share of more than 25% of the relevant product/service or geographical market. However the regulatory authority could stipulate that an enterprise with less than 25% of the relevant market had significant market power. It could also stipulate that an enterprise with a share of more than 25% of the relevant market did not have significant market power.

The regulatory authority should, at the request of an undertaking stipulate by application of a company whether it had a significant market power within the meaning of the Telecommunications Act. The regulatory authority could also do this on its own initiative.

These determinations were corresponding exactly to the determinations of the Interconnection Directive. Once per year the regulatory authority should investigate the market position. Therefore, the national regulatory authority decided in several decisions about the significant market position of Telekom Austria, Mobilkom and max.mobil on the four different markets listed below, however, not every market has been analyzed each year.

The national regulatory authority in Austria at that time defined 4 product markets wherein it investigated whether significant market power existed. These markets were:

[73] The following remarks concern the Telecommunications Act 1998. This one is revised by the Telecommunications Act 2003 and will be shortly amended again.

1. Market for public voice telephony over a fixed network
2. Market for public voice telephony over a mobile network
3. Market for public leased lines over a fixed network.
4. Market for interconnection

The results of the different decisions can be summarized as follows:

Fig. 3: Companies with SMP according to regulatory decisions

Market / Procedure	M1 / 98	M1 / 99	M1 / 01
Market for public voice telephony over a fixed network	Telekom Austria	Telekom Austria	Telekom Austria
Market for public voice telephony over a mobile network	Mobilkom Austria	Mobilkom Austria max.mobil	---
Market for public leased lines over a fixed network	Telekom Austria	Telekom Austria	Telekom Austria
Market for interconnection	Telekom Austria Mobilkom Austria	Telekom Austria Mobilom Austria	Telekom Austria

The market share was calculated by the Austrian regulatory authority out of the turnover of the enterprise by multiplying the traffic volumes (for voice, mobile and interconnection) by the respective price and by the total turnover for leased lines. Also the physical connections (number of customer access lines, number of retail mobile customers, number of 64 kbit/s equivalents for leased lines) were taken into account but not decisive for the judgement of the national regulatory authority[74].

3.3.1.1.2 Significant market power in the Cartel Law

Market dominance (Cartel Court): The first determination concerning criminal sanction against price rigging could be found in the Austrian Criminal Law 1803 as well as in the Austrian Criminal Law 1852. In 1951 the first anti-trust law was enforced. Followed by many amendments the anti-trust law 2005 was enforced on the 1st of January 2006.

European Guidelines: In 1972 a free trade agreement was entered into between Austria and the EWR (in those days). Concerning competition law especially the determinations of arti-

[74] As is will be shown further on the European Commission uses another method for assessing significant market power as the Austrian regulatory authority.

cles 101 and 102 are essential.[75] Regarding the Directive 1/03 article 101 and 102 of the Treaty must be applied effectively and uniformly in the Community in order to establish a system which ensures that competition in the common market is not distorted. In article 3 of this directive the precedence of the European law and the application of the national determinations is stated.[76] Article 16 ensures a common level of protection within the member states.[77] Those provisions have to be applied by the European Commission as well as national courts and national office of fair trading. Furthermore, articles 11 to 14 determine a stronger cooperation between European Commission and the national (competition) authorities. Therefore, a duty of information and the duty of transferring all national draft texts of decisions to the European Commission is foreseen. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.

National Law (Antitrust Law): First of all it is necessary to underline that not the dominant position by itself imposes any sanctions; it is the abuse of such a position that makes sanc-

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[75] Once Art 81 and 82.

[76] Relationship between Articles 81 and 82 of the Treaty and national competition laws
1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty.
2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.
3. Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.

[77] Uniform application of Community competition law
1. When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty.
2. When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.

tions necessary. As long as there is just one undertaking on a market no competition can be imposed there, although the undertaking has a dominant position. On the other hand a dominant position can also be imposed if there is only less competition on a certain market.

If two or three undertakings are active on the same national market, each undertaking has a dominant position, if its share of this market is more than 5%. For the calculation of the market share it is necessary to define the relevant market. Basically the assessment has to be made between the markets of supply and demand as well as between the relevant market concerning factual, geographical and temporal aspects. Therefore, following the “concept of substitutability” the same factual market can be assumed if a good or service can be replaced. This test has to be done by the user of the possible goods or services.

The Austrian Antitrust Law also contains the notion of “joint dominance”. This is the fact if a small group of undertakings is active on the same market. In any of these cases, if one of the undertakings is one of the four biggest and together they have a share of more than 80%, but the share of each one is above 5%.

Furthermore, the Austrian Antitrust Law encompasses a so called “superior” dominant market position. Here, just the performance of the undertaking is the determining factor. For this fact it does not matter if the undertaking has a dominant market position on the relevant market.

Following the Austrian Antitrust Law the court has to take any abuse into account. The abuse can have its reasons within unfair costs or in enforcing business transactions. Furthermore the law encompasses the following facts which indicate an abuse: restriction of producing, of sales or technical development if it is a mischief for the customers; disadvantages of business partner, selling products under the acquisition price.

Due to a request of an undertaking the court has to remedy the abuse. The court can assign the undertaking to stop a certain performance; but the court can as well assign the undertaking to set a certain action. Besides that, the cartel court can impose a fine. The court can take corrective actions even if the abuse is already over as long as there is qualified interest.

3.3.1.1.3 SMP according to the Telecommunications Act 2003

The Telecommunications Act 2003 (TKG 2003) determines that before an undertaking can be qualified as one with significant market power the regulatory authority has to identify the relevant national markets subject to sector-specific regulation according to the national circumstances, in accordance with the principles of general competition law, taking into account the requirements of sector-specific regulation. This has to be done within an ordinance, which shall be reviewed regularly, however, at two-year intervals at the latest.

If the regulatory authority intends to define markets of service/product or geographical relevance that differ from those defined in the recommendation of the European Commission, it shall follow the procedures referred to in §§ 128 and § 129 TKG 2003.[78]

Following the TKG 2003 an undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.[79]

Two or more undertakings may be found to be in a joint dominant position if, even in the absence of structural or other links between them, they operate in a market the structure of which is considered to be conducive to coordinated behaviour[80].

Where an undertaking enjoys significant market power on a specific market, it may also be deemed to have significant market power on a horizontally and vertically or geographically

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[78] The latest ordinance as well as the defined markets herein can be looked up under http://www.rtr.at/en/tk/RelevanteMaerkte.

[79] In making an assessment of significant market power of an undertaking the regulatory authority shall consider, in particular, the following criteria: (1) overall size of the undertaking, its size in relation to that of the relevant market as well as the changes in the relative positions of the market players in the course of time; (2) high barriers to entry as well as the resulting extent of potential competition, (3) extent of countervailing buying power, (4) extent of elasticity of demand and supply; (5) the respective market phase; (6) technological advantages; (7) any advantages in the distribution and sales networks; (8) economies of scale, economies of scope and density; (9) extent of vertical integration; (10) extent of product differentiation; (11) access to financial resources; (12) control of infrastructure not easily duplicated; (13) general behaviour on the market, such as pricing, marketing policy, bundled products and services or establishment of barriers.

[80] In making an assessment of joint dominance of two or more undertakings the regulatory authority shall use, in particular, the following criteria:1. extent of market concentration, the distribution of the market shares and their change in the course of time;2. barriers to market entry, the resulting extent of potential competition; 3. extent of countervailing buying power;4. existing market transparency; 5. the respective market phase; 6. homogeneous products; 7. underlying cost structures; 8. extent of elasticity of demand and supply; 9. extent of technological innovation and degree of maturity of the technology; 10. absence of excess capacity; 11. informal or other links between the market players; 12. retaliatory mechanisms; 13. extent of incentives for price competition.

related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking.

If the regulatory authority identifies in this procedure one or more undertakings as having significant market power on the relevant market and that, thus, there is no effective competition, it shall impose appropriate specific obligations as referred to in § 38 to § 46 or § 47 (1) on such undertakings. The specific obligations are: Obligation of non-discrimination (§ 38 TKG 2003), obligation of transparency (§ 39 TKG 2003), accounting separation (§ 40 TKG 2003), access to network facilities and network functions (§ 41 TKG 2003), Price control and cost accounting for access (§ 42 TKG 2003), Regulatory controls on retail services (§ 43 TKG 2003), provision of leased lines (§ 44 TKG 2003), obligations of undertakings with significant market power as to retail tariffs (§ 45 TKG 2003), carrier selection and carrier preselection (§ 46 TKG 2003). Specific obligations on undertakings already imposed for the relevant market shall be amended or maintained by the regulatory authority according to the results of the procedure, taking account of the regulatory objectives.

What do the Austrian Telecommunication Law and German the Antitrust Law have in common, where are the differences? We first present a tabular overview on Austria which will be followed by the section on Germany.

Fig. 4: Features of the Austrian Telecommunications Act with respect to market definition, analysis and remedies

Subject	Telecommunications Act	Antitrust Law
Market definition	The Telecommunications Act 2003 (TKG 2003) determines that before an undertaking can be qualified as one with significant market power the regulatory authority has to identify the relevant national markets subject to sector-specific regulation according to the national circumstances, in accordance with the principles of general competition law, taking into account the requirements of sector-specific regulation. This has to be done within an ordinance, which shall be reviewed regularly, however, at two-year intervals at the latest. (§ 36 TKG 2003)	Within the Antitrust Law is no similar proceeding as within the TKG concerning the market definition / demarcation. Moreover, the court has to find the demarcation in a given case. Herein the court has to distinguish between the service/product, geographical and temporal market. In contrast to the Telecommunications Act the market demarcation has to be done from the perspective of the opposing market side.
Market dominance	An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers (§ 35 (1) TKG 2003)	An undertaking has significant market power 1. if there is no or less competition or 2. if this undertaking has an overwhelming position on the market in comparison to other undertakings on the same market. If an undertaking has 1. a market share of 30% at least or 2. if the market share is more than 5% and there are no more than 2 other undertakings on the same market or 3. if the market share is more than 5% and this undertaking has together with 4 other undertakings a market position of at least 80% - in all these cases the undertaking has to make evident that it has no dominant position (change of burden of proof)
Method of calculation	The TKG specifies criteria when an undertaking can be qualified as one with significant market power. Not all of the given criteria have to be fulfilled. (§ 35 TKG 2003)	The Antitrust Law also contains criteria to define an undertaking as one with significant power. However, the provisions of the TKG cannot be compared with those of the Antitrust Law as the latter has to be applied on all kind of different economic sectors whereas the TKG has to be applied on the telecommunications market only.

Ex ante / ex post	If the regulatory authority identifies one or more undertakings as having significant market power on the relevant market and that, thus, there is no effective competition, it shall impose appropriate specific obligations on such undertakings. Specific obligations on undertakings already imposed for the relevant market shall be amended or maintained by the regulatory authority according to the results of the procedure, taking account of the regulatory objectives. (§ 37 TKG 2003) Following a decision of the Austrian Higher Administrative Court decisions regarding the assessment of a significant market power can only be done ex ante. That means if the Higher Administrative Court overturns such a decision there will be no definitions for this period as the NRA cannot decide for a period which is in the past.	The dominant position by itself imposes no sanctions after the Antitrust Law; it is the abuse of such a position that makes sanctions necessary. In comparison to the TKG regulatory procedures will be taken ex post based on the Antitrust Law.

By comparing the method of defining an undertaking enjoying a dominant market position the different effects of the Telecommunications Act and the Antitrust Law can be seen. First of all, which has to be underlined is that the Antitrust Law just sanctions a dominant market position if there is an abuse. The focus of the Antitrust Law is to protect competition whereas the focus of the TKG is to create and ensure competition. Therefore the TKG determines that it is up to the NRA to impose certain obligations when an undertaking is having significant market power.

Furthermore, the Antitrust Law has to deal with all different kind of economic sectors whereas the TKG is just for issues concerning telecommunication relevant. The matter of different impact of ex ante and ex post is enormous.

3.3.1.2 Germany

3.3.1.2.1 Overview

The German Telecommunications Act has transposed the EU framework contents of 2002 on market definition, analysis and dominance designation into national law. The relevant pro

visions are the sections (§) 10-15 of the Telecommunications Act. Additionally, there is a § 9a which deals with "the new markets" but which has been found to be in violation of the EU framework after an infringement procedure at the EU level[81]. As prescribed by EU legislation the process of regulating specific markets is separated into the steps of market definition, market analysis and the levying of remedies (in case significant market power is found to exist). Thereby, sections 10-12 of the German Telecommunications Act encompass that market definition and analysis has to be undertaken according to the principles of General Competition Law. In case significant market power is found, the regulatory authority has to levy at least one of the obligations of the access / framework directive upon the dominant operator.

In general competition law, the Federal Cartel Office is responsible for avoiding that a company can abuse a dominant position. To that end, it conducts merger control but also monitors if organic growth can lead to a strong market position. Section 19 GWB (Gesetz gegen Wettbewerbsbeschränkungen; Act against restraint of competition) lists a number of possibilities of abusive behaviour which the Federal Cartel Office tries to avoid. When investigating whether an enterprise may enjoy significant market power, the Federal Cartel Office applies a number of different criteria. One of them is market shares where – simply speaking – 1/3 is seen as indicator (threshold value) for single dominance, and 50% for joint dominance (of three or less enterprises) as well as 2/3 of market shares for 5 or less enterprises (according to section 19 para 3 GWB). Except for market shares, the Federal Cartel Office also considers criteria like financial strength, access to input and downstream markets, interrelationships with other enterprises, legal or factual barriers to entry, existing or potential competition etc. as relevant when determining whether significant market power exists.

3.3.1.2.2 Regulation of SMP

The German Telecommunications Act differentiates between ex-ante und ex-post regulation in the following fashion. There is a methodological perspective as well as a time-perspective. Ex-ante and ex-post are first to be differentiated according to the time at which regulation intervenes. Ex-ante means regulatory intervention or decision before a certain action takes place (e.g. in approval procedures where an SMP operator may not launch a specific product

[81] See http://www.telemedicus.info/urteile/Telekommunikationsrecht/936-EuGH-Az-C-42407-Regulierungsferien-9a-TKG.html. As Germany will abolish this §9a in the TKG revision 2011 nothing will materialize from the infringement procedure.

before it receives explicit approval by the authority) whereas ex-post refers to any regulatory action which takes place after such trends / actions are visible on the market. From a methodological point of view however, ex-ante (especially in price regulation) refers to a situation where measures are being undertaken which apply a stricter approach for example to the determination of costs and prices. In section 29 et seq of the Telecommunications Act which describes the approach to price and tariff regulation, ex-ante refers usually to cost orientation as a principle and long run average incremental costs as a methodology to determine costs. With respect to ex-post measures, the "reasonable" prices are the standard approach (section 38 TKG). This again also has links towards general competition law and the principles applied there.

Summarizing the different approaches in the two sectors leads to the following overview:

Fig. 5: Features of the German Telecommunications Act with respect to market definition, analysis and remedies

	Telecommunications Act (TKG)	Competition Law (GWB) / Antitrust law
Market definition	According to the EU recommendation on relevant product and service markets susceptible to ex-ante regulation. Application of competition law principles in market demarcation and definition	Within Antitrust Law there is no similar proceeding as within the TKG concerning the market definition / demarcation. The Federal Cartel Office has to find the demarcation in a given case.
Market Dominance & Significant Market Power	An enterprise which alone or with others enjoys a position similar to dominance, i.e. a position which allows to act to an appreciably extent independent of competitors and end users (section 11 TKG)	No or no significant competition or enjoying a superior market position (section 19, para 2 GWB)
Method of calculation/ Calculation of Market Shares	According to volumes (access lines, minutes,) or sales (revenues). No threshold values that exactly trigger regulatory action	1/3 for single dominance, 50 % for joint dominance of <= 3 enterprises, 2/3 for <= 5 enterprises
Ex-ante vs. ex-post	According to time (before and after a specific action has occurred) or according to methodology (cost orientation vs. reasonable prices)	According to topic (merger control = ex ante) but also ex-post intervention possible

3.3.1.3 Comparison

The design of the sector specific regulation in the telecommunications sector and general competition law with respect to the subject of market definition, analysis and regulation of SMP is somewhat different in Austria and Germany despite a harmonized EU framework. The following differences can be mentioned

- The German telecommunications act conducts market definition and analysis according to the list of markets given be the EU commission in the recommendation on product and service markets susceptible to ex-ante regulation whereas the Austrian telecommunications act transposes that recommendation into an ordinance issues by the regulatory authority which forms the basis for market definition and analysis in Austria;

- Both countries have ex-ante and ex-post measures to be applied if SMP is found to exist, however, the German system has two facets of ex-ante (time as well as methodology) whereas the Austria telecommunications act only looks at one of these dimensions.

- In competition law, Austria has allocated the tasks to the Cartel Court (despite the fact that there is a competition authority, BWB) whereas in Germany an independent authority (Federal Cartel Office) is responsible for applying competition law.

- The market shares as threshold values according to which the relevant legislation assumes single or joint dominance to exist vary between the countries.

3.3.2 Organisation of regulatory authorities

3.3.2.1 Austria

3.3.2.1.1 RTR and TKK

Regulatory authorities in Austria are Telekom-Control-Commission (TKK), Rundfunk und Telekom Regulierungs-GmbH [RTR-GmbH], KommAustria and Telecommunications Offices.

In the following only the TKK and the RTR-GmbH as the relevant bodies for the telecommunication sector will be discussed:

The Telekom-Control-Commission shall – according to the Telecommunications Act – consist of three members who are appointed by the federal government. One member shall belong to the judiciary. In appointing this member, the federal government shall consider three candidates suggested by the president of the Supreme Court. The other two members shall be appointed at the proposal of the Federal Minister of Transport, Innovation and Technology. In this respect, it shall be considered that one member shall have relevant technical and the other shall have legal and economic expertise. The term of office of the Telekom-Control-Commission shall be five years. Reappointment shall be permitted.[82]

The Federal Minister of Transport, Innovation and Technology shall appoint a substitute member for each member. The substitute member shall take the place of a member if the member is prevented from fulfilling his duties.[83] The Telekom-Control-Commission shall take decisions at the highest instance. Its decisions shall not be subject to quashing or modification by administrative action. A decision by the Telekom-Control-Commission may be appealed by filing a complaint to the Administrative Court.[84] The competences of the Telekom-Control-Commission is concluded listed in the Telecommunications Act 2003[85]

The Telekom-Control-Commission shall be based with Rundfunk und Telekom Regulierungs-GmbH (RTR). The Telekom-Control-Commission shall be managed by Rundfunk und Telekom Regulierungs-GmbH. Within the framework of their activities on behalf of the Telekom-Control-Commission the staff of Rundfunk und Telekom Regulierungs-GmbH shall be bound by the instructions of the chairperson or the member designated in the rules of procedure.[86]

Rundfunk und Telekom Regulierungs-GmbH shall perform all duties conferred to the regulatory authority by this Federal Act and the ordinances issued under this Federal Act unless the Telekom-Control-Commission or KommAustria have competence.[87]

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[82] § 118 (1) TKG 2003.
[83] § 118 (2) TKG 2003.
[84] § 121 (5) TKG 2003.
[85] § 117 TKG 2003.
[86] § 116 (2) TKG 2003.
[87] § 115 TKG 2003.

3.3.2.1.2 Cartel Court

In Austria the Higher Regional Court acts as cartel court for the whole federal territory. It is organised in civil senates. Within a senate works a judge who has the chair, another judge and two lay judges. Decisions of the cartel court can be appealed at the Supreme Court.

At the cartel court a public trial will only be held if one party applies therefore. The Public Attorney for Cartel Matters [Bundeskartellanwalt] as well as the Federal Competition Authority [Bundeswettbewerbsbehörde] are involved in a trial even if they are not an applicant party.

The Federal Competition Authority (Bundeswettbewerbsbehörde, BWB) is organised at a government department (Ministry of Economy). As advisory body a commission is organised at the Federal Competition Authority.

Under the focus of Antitrust Law the Federal Competition Authority has to ensure competition as well as compatibility of the European Community Law and the decisions of the NRAs. Therefore, it has the possibility to apply at the Cartel Court. The Federal Competition Authority should only intervene when the court is not responsible.

The Public Attorney for Cartel Matters is also organised at a government department (law). It is the representative of all public interest concerning competition at the cartel court. The main part of leading a case should be in the hand of the Federal Competition Authority whereas the Public Attorney for Cartel Matters has a “corrective role”; its main focus is to ensure the application of the law.

The Commercial Court is as well as the Cartel Court a court which applies civil law. The judges at the Commercial Court decide mainly as judge sitting singly. Against decisions of the Commercial Court the Supreme Court can be invoked.

The Commercial Court applies the Act Against Unfair Competition. This law following the court can be invoked (besides others) for any disputes between business partners which result out of their cooperation. Hence, the court can be invoked in cases when out of the action another law is impinged. So it comes that the Commercial Court might have to deal with issues concerning telecommunications law.

3.3.2.2 Germany

3.3.2.2.1 Federal Network Agency

The responsibility for sector-specific regulation in the German telecommunications sector rests with the Federal Network Agency (Bundesnetzagentur; BNetzA). This is an authority which is an independent regulatory body but from an organisational point of view is under the Federal Ministry of Economics. Its organisation as well as its tasks and its responsibilities are laid down in the Telecommunications Act, specifically in the section 116 et seq. The roles and possibilities with respect to interventions in the market are contained in section 126 et seq. The decisions of the Federal Network Agency are taken by so-called Ruling Chambers which are organised according to the topics that the authority deals with (telecommunications, postal issues, electricity, gas, railways). The Federal Network Agency has a council which contains the representatives of the 16 Federal States. Furthermore, it also has a scientific council which supports the work of the Federal Network Agency from a scientific perspective. Decisions of the Regulatory Authority can be appealed at the Administrative Courts.

3.3.2.2.2 Federal Cartel Office

In general competition law the decision making body is the Federal Cartel Office (Bundeskartellamt). It deals with matters relating to the issues of competition law and investigates cases with respect to the abuse of significant market power respectively merger control. Like BNetzA, the Federal Cartel Office is an independent authority, but organisationally is situated in the area of responsibility of the Federal Minister of Economy.

The Federal Cartel Office takes its decisions in a similar fashion as BNetzA, by ruling divisions (in German language the BNetzA has “Beschlusskammern” whereas the BKartA has “Beschlussabteilungen”) There are 12 ruling divisions in the Federal Cartel Office.

3.3.2.3 Comparison

Looking at the organisational structure of the regulatory system the following can be noted

- Austria has integrated the regulation of telecommunications and broadcasting on an institutional level at RTR as a think tank. In Germany, these two industries and their regulation are wide apart, however, Germany has integrated

energy (power and gas) as well as railways into one “Network Agency”. These are still separate regulators in Austria. However, in Germany, broadcasting issues are being dealt with separately on the state level.

- Austria works with Courts in competition law despite the fact that there is a competition authority. In Germany, the Federal Cartel Office has a more prominent role in applying the relevant legislation.

3.3.3 Potential conflicts of competence

3.3.3.1 Austria

As demonstrated above not only the NRA can be called upon matters concerning telecommunications law, in certain cases also the Cartel Court or the Commercial Court can be invoked. As a consequence out of this the following abstract analyses if there can be a jurisdictional conflict.

For the question if there is a jurisdictional conflict it is relevant that there is the same request. This can be possible in the case of the abuse of a dominant market position. Basically, justice and administration are separated after the principle of separation of power. Nevertheless, the Constitutional Court stated that in general it is impossible that the decision of a court will be controlled by an administrative organ and vice versa. But this does not mean that a court and an administrative organ cannot judge the same question.

Contrarily the Supreme Court stated that it is prohibited that a court and an administrative organ judge the same question.

In general, it has to be distinguished between a positive and a negative jurisdictional conflict. A positive jurisdictional conflict is on hand if two or more authorities think they are responsible; whereas a negative jurisdictional conflict is on hand if no authority claims its responsibility.

In Austria the Constitutional Court is responsible to clarify a jurisdictional conflict. Therefore it is decisive that the subject is identical. The law does not contain any further explanations for this term. Although it has to be proven within each case it can be said that a subject is identical if the same legal provision has to be applied to the same facts and circumstances. That

means if the complainant has the same request at the NRA, the cartel court and the commercial court. Therefore, it cannot be the same subject if a case has to be proofed against the background of different legal provisions. However, this is the fact if the NRA, the cartel court or the commercial court investigate a certain case – for example the abuse of a dominant market position. Even if the request is the same the different authorities investigate the case from different angles - not least because the provisions, the focus of the investigation, the legal consequences and the enforcement are different.

As there is no jurisdictional conflict between the NRA, the Cartel Court and the Commercial Court another question should be analysed. It is the question if there is a commitment effect between the decisions of the NRA, the Cartel Court and the Commercial Court.

The Supreme Court repeatedly stated that the court is bound to notifications of an administrative authority. The court can interrupt a proceeding if a preliminary question comes up. It is a prerequisite, however, that the preliminary question is already pending in an administrative proceeding. In the contrary case, that means if there is no administrative proceeding already dealing with the preliminary question for the trial at court, the court itself has to decide even this question.

Nevertheless, a commitment effect can only be affirmed concerning administrative acts which are legally binding. Furthermore, within the administrative proceeding as well as at the court the same litigants are a requirement for the commitment effect.

3.3.3.2 Germany

From the German constellation it cannot be excluded that a specific topic is viewed differently by the competition authority and BNetzA each in applying the relevant legislation. To avoid this, section 123 of the Telecommunications Act prescribes that the two regulatory authorities are to work towards a unified approach and decision making process. This should limit conflicts with respect to decision making. A possibility can be found in the case that BNetzA declares itself non responsible and that the Cartel Office steps in to investigate the case.

Furthermore, the relationship between the contents of the Telecommunications Act and competition law is addressed in section 2 of the Telecommunications Act.[88]

3.3.3.3 Comparison

As a result of the explanations above it seems that there is no major difference between Austria and Germany concerning this issue.

3.3.4 Enforcement

3.3.4.1 Austria

Unless otherwise provided by the TKG 2003, the Telekom-Control-Commission shall apply the General Administrative Procedures Act 1991 [Allgemeines Verwaltungsverfahrensgesetz]. That means that each proceeding closes with a notification. There are more than one possible ways to enforce a notification of the NRA:

1. TKG 20003

Regarding § 109 (2) Z 9 TKG 2003 those who violate an ordinance or a notice issued under this Federal Act shall be guilty of an administrative offence and shall be punished by a fine of up to Euro 8,000.--. Furthermore, any person who contrary to the market analysis process did not take part in the defined way shall be guilty of an administrative offence and shall be punished by a fine of up to Euro 58,000.--.

If the regulatory authority establishes that an undertaking has gained economic advantage due to an unlawful act in violation of this Federal Act or the provisions of an ordinance or a notice issued under this Federal Act, the regulatory authority may file apply to the Cartel Court to fix an amount and skim it off. In the process, the Cartel Court shall be bound by the regulatory authority establishing the existence of an unlawful act. The amount to be skimmed off shall depend on the extent of the economic advantage and may be set by the Cartel Court to be up to 10% of the undertakings turnover of the preceding year. The regulatory authority shall be a party to these proceedings.

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[88] See Schuster, F.: Commentary on section 2 para 3 of the German Telecommunications Act, in: Beck'scher TKG Kommentar, 3rd edition, Munich 2006, pp. 157

2. Law administration enforcement

The law foresees the enforcement of act or default with substitute performance or coercive enforcement penalty. The law determines an amount of only EUR 726,- for such a penalty. The imposition of the sanction can be brought into question.

3. Execution

A notification can only be executed if the execution itself is assigned to the court by law. As there is no appropriate determination in the Telecommunications Act 2003 decisions by the NRA cannot be executed by the court.

4. Civil Law

There is the possibility to claim for damages. Therefore a damage has to be established. This might be the most difficult part.

Besides that the Cartel Court has the possibility to impose a fine in specific cases. The highest fine which can be imposed is by 10% of the turnover a year ago respectively 5% of the average daily sales.

3.3.4.2 Germany

With respect to the enforcement of regulatory decisions, applicants respectively parties to a case in which the Federal Network Agency has ruled and which are trying to enforce their rights have (in case the other party of the case does not fulfil its obligations) two possibilities. They can bring up the case again at the Federal Network Agency which then is in a position to decide upon penalties for parties which do not act in accordance with the Telecommunications Act (section 149 TKG) or specific decisions of the Federal Network Agency or they can launch a civil dispute at the regular courts against a party which does not fulfil its obligations.

The powers of the Federal Cartel Office are laid down in section 32 GWB and cover preliminary measures, the possibility to levy specific obligations, the revocation of a previously granted merger, and sector investigations. In addition, the Federal Cartel Office may impose fines for violations of competition law of up to 10% of annual worldwide turnover of the undertaking concerned. A violation of obligations levied according to section 32 GWB can imply further measures such as e.g. compensation according to section 33 GWB.

3.3.4.3 Comparison

As well as in Austria also in Germany decisions of the NRA can be enforced. In both countries it seems to be a question of the effectiveness of the sanction measures. It gives the impression that the legislator didn't focus on the enforcement of decisions of the NRA from the outset.

3.3.5 Margin Squeeze

As competition problems can arise from discriminatory behaviour of vertically integrated operators discriminating their wholesale customers by margin-squeezes, these are of high importance to sector-specific regulation and competitions law as well as regulatory authorities. The following paragraph compares the approaches by the Austrian and German regulator regarding the prevention of margin-squeezes, respectively.

3.3.5.1 Germany

The German regulatory authority started a discussion on the matter based on the Telecommunications Act of 2004. The German act contains a provision in article 27 which requires price regulation to be consistent. According to section 27 article 1, price regulation shall avoid abuse, discrimination of end users and competitors through measures of enterprises enjoying significant market power. This is done through BNetzA's consistency check in section 27 article 2, i.e. a mechanism by which BNetzA ensures that price regulation measures are all done according to similar methodology and principles as applicable. The regulatory authority has published several papers on the way it applies the section 27, inter alia considering consistency between wholesale and retail prices, consistency between different business models (consistency of different wholesale prices as a prerequisite for alternative business models) and consistency in relation to technological change[89].

Subsequent to the provision on a generally spoken consistent regulation of prices, the German Telecommunication Act also contains a more specific provision with respect to price-cost-squeeze. This is embedded in section 28 addressing abusive behaviour of SMP operators. Article 1 defines abusive behaviour. Article 2 then addresses margin squeeze (the act

[89] See Bundesnetzagentur: Hinweise zur konsistenten Entgeltregulierung i.S.d. § 27 Abs. 2 TKG, Endfassung, 4.11.2009, see www.bnetza.de.

uses the German term: price cost squeeze) by saying that there is an abuse if SMP operators charge a price for a wholesale service whereby the difference between this wholesale price and the respective retail price is not sufficient to allow an efficient enterprise to earn a reasonable return on investments in the end user market.[90]

Based on Section 28, article 2, the German regulatory authority has published some information and observations[91] which can be regarded as position papers but which are no formal decisions. Thereby, it discusses a number of relevant aspects including e.g. the definition of an efficient competitor and the determination of its costs and revenue situation. Another aspect discussed is the outcome on regulation depending on whether the relevant retail prices are regulated or not.[92] Further discussions deal with the question of how to compare retail and wholesale prices. Due to the fact that on the wholesale level there are a large number of different wholesale products, the competitor is able to "produce" retail services using a varied set of wholesale products (product bundles in the retail markets based on one single wholesale offer). As the German Telecommunications Act also contains a provision regarding ex-post control of abuse (in section 38), this approach needs also to be taken into consideration. Some major conclusions of BNetzA are:

1. Relevant for the margin-squeeze assessments are the costs of an efficient competitor and thereby the cost situation of the competitor shall be taken into consideration, however, the term "efficient competitor" is not to be interpreted in the sense of "efficient business model". The goal of the approach is to allow competition on a nationwide scale through efficient competitors, however, this does not imply that every business model needs to be "safeguarded" against competition by SMP operators.[93]

2. BNetzA is reluctant to assume that an efficient competitor will have higher costs in the long run than the incumbent operator. Despite differences in scale (and scope), there

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[90] For a broader discussion of the subject see Rädler, P.: Die Preis-Kosten-Schere im Kartell- und Regulierungsrecht, in: Computer und Recht (CR), Nr. 12/2010, pp. 780. which discusses the impact of sector specific regulation and general competition law on situations with price cost squeezes.

[91] See „Hinweise zu Preis-Kosten-Scheren i.S.d. § 28 Abs. 2 Nr. 2 TKG", 14.11.2007, www.bnetza.de

[92] Due to the increased competition in a number of markets, several retail markets have already been liberalised in Germany and thus, operators on these markets are free to set retail prices without any regulatory intervention. There is a significant difference as to whether price-cost-squeezes are analysed against the background of regulated or non-regulated prices.

[93] As cost analysis of competitors are difficult to undertake, a proxy for competitors costs are the wholesale prices / costs of the SMP operators. In the end this means that the efficiency of the SMP operators is transposed towards the competitor.

may also be cost advantages due to the use of more modern technology. Therefore, the analysis of the competitive effects needs to be undertaken in a long term perspective. When assessing margin-squeezes so far, the BNetzA has generally, but not exclusively used the costs of the incumbent.[94]

3. BNetzA considers it necessary to decide on a case by case basis whether or not price-cost-squeeze tests shall be applied to specific markets or to tariffs applicable across markets.

4. In cases of bundles which contain regulated and non-regulated prices, a simple price-cost-squeeze test is not applicable.

BNetzA has dealt with margin-squeeze tests within several regulatory procedures to approve regulated prices, mostly related to Bitstream Access prices. Thereby, BNetzA has mainly relied on the costing information provided by the incumbent, but has e.g. also regarded the costs of the competitors for IP-Peering/Transit. These price squeeze tests have only regarded the access to internet with or without shared access of the local loop. Hence, the bundles including voice products have not been looked at. In all cases regarding bitstream access, the BNetzA has not found any margin-squeeze based on the tariffs it has approved.[95]

As can be seen, these issues and strategies of BNetzA with respect to price cost squeeze are described in a rather generic way. It is left to each single case which is brought to BNetzA to be analysed specifically and the decisions then to be taken by the regulatory authority. The number of cases in which margin squeeze considerations where decisive for price regulation is relatively small although many expert opinions were submitted to BNetzA. Rather, BNetzA has used the principle of cost orientation as the guiding rule for setting prices.

3.3.5.2 Austria

In Austria margin squeeze tests have had more influence as they have been a decisive element in specific regulatory decisions for a number of years. Due to significant price decreases in various fixed markets the authority realised early on that there is a discrepancy between the retail prices on one hand and the related costs and wholesale prices on the other.

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[94] BNetzA Decision BK3-09-044
[95] Ibid.

When the incumbent operator started to significantly reduce its prices for vice broadband bundles in 2007 it became obvious that the retail prices (on the basis of the copper access network) were lower than the overall costs. Therefore, the regulatory authority moved towards determining the prices for unbundled local loops on the basis of margin squeeze tests, which resulted in lower margin squeeze free prices than what would have been the case if prices had set based on forward-looking long run average incremental costs (FL-LRAIC) or fully allocated costs (FAC). The result was inter alia a reduction in the price for unbundled local loops from 10,70 Euros to approximately six Euros per month (further reduced later on). Other elements that triggered a stronger relevance of margin squeeze were e.g. the prices for bitstream access where retail minus has already been applied to determine prices previously.

The legal basis for price regulation is article 42 of the Austrian Telecom Act which allows the regulatory authority to levy obligations upon SMP operators with respect to cost coverage and price control incl. the obligation to offer cost oriented prices. Such obligations can be levied in case the SMP operator is in a position to charge excessive prices and/or to practice price discrimination and margin-squeeze.

In 2009, an additional provision was introduced in section 42 article 1 of the law which states that the investment of the operator are to be taken into account enabling a reasonable return on the investments under consideration of the associated risks and future market developments. Specifically, costs and risks for new communications networks are to be considered. Section 42 article 2 then contains the provision of cost orientation for SMP operators, using the principle of the costs of efficient service provision. The regulatory authority may also use (cost) data independent from the regulated operator. Further obligations which can be imposed regards the cost calculation method which can be levied (section 42 article 3).

For the Austrian regulator margin squeeze tests are at the borderline between sector specific regulation and general competition law. In the area of sector-specific regulation margin squeeze tests are used in an ex-ante manner based on forecast volumes, costs and revenues (fully allocated costs). It is not only checked whether individual products cover their avoidable cost (plus the wholesale price) but also if the sum of products (e.g. all broadband products) cover total costs (plus the wholesale price). In the area of general competition law margin squeeze tests are used ex-post to assess potential discrimination considering the

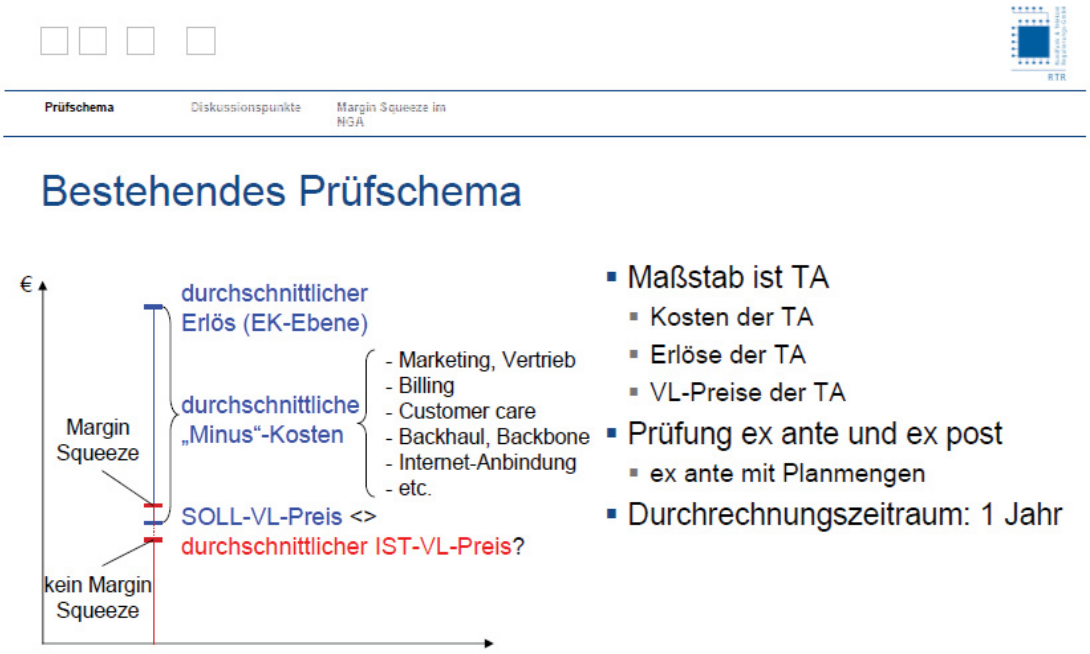
avoidable costs, calculated based on realized costing data, revenues, transfer charges and volumes.

The Austrian regulatory authority organised a symposium on the matter in May 2010 where the general aspects of the margin-squeeze calculation were discussed. It showed that the Austrian regulatory authority already has in depth looked at a number of issues in certain proceedings and that is also an element of its practical work. The following aspects shall be mentioned[96].

1. Use of the “as efficient” competitor test versus the “reasonably efficient competitor” test.

2. Development of a calculation methodology and calculation principles to determine whether or not margin squeeze can be found[97].

Fig. 6: Price Cost Squeeze tests in Austria



[96] See Solé, E.: Margin Squeeze – bisherige Überlegungen der TKK, and Schwarz, A.: Margin Squeeze – (neue) Herausforderungen, both retrieved from www.rtr.at (6 December 2010)

[97] See Schwarz, A., p. 4.

The Austrian regulatory authority conducts margin squeeze tests on an ongoing basis following the principles and methods described above.[98] The Austrian regulatory authority has also started to consider relevant issues with respect to future topics[99].

With respect to next generation access networks, the Austrian regulatory authority has already been considering several topics such as the fact that one specific wholesale service can be used for the provision of several retail services. Furthermore, the issue of consistency (called "congruence" in the RTR paper) between wholesale and retail prices is being discussed e.g. with respect to the (1) possibility to differentiate prices for wholesale services, (2) flatrates on the wholesale level and (3) deregulation respectively margin squeeze tests not to be applied any longer where sustainable competition exists. With respect to consistency in terms of NGA, the relevant issues focus on physical unbundling on various levels of the value chain (MDF, street cabinet etc.), virtual unbundling, access to ducts and dark fibre, bitstreaming as well as potential unbundling of fibre optical access networks. This means that in terms of next generation access networks the relevance of margin squeeze tests will increase and new questions will arise, especially with respect to new technologies and their costs, as well as the bundling of products and services and the high share of joint and common costs. On this matter the Austrian regulatory authority also published a paper[100] showing that the Austrian regulatory authority has taken a strong role in determining issues with respect to margin squeeze.

3.3.5.3 Comparison

When comparing the two countries regarding margin squeeze approaches by the regulatory authority, the following springs to mind

- The German Telecommunications Act contains a specific provision on price cost squeeze and BNetzA has developed a policy paper. When it comes to regulatory de-

[98] Based on its own experience and case law from the European Union, the following guidelines are being applied by the Austrian regulatory authority: (1) The costs and prices of the operator with significant market power is the relevant benchmark; (2) For short term promotions, variable costs are representing the absolute minimum threshold; (3) For the calculation of the relevant period, this is decided on a case by case basis. This is specifically relevant for the calculation of one time costs which are then distributed over a longer period of time; (4) Analysis of bundled products and product moves are specifically allowed.

[99] See Schwarz, A.: Margin Squeeze – (neue) Herausforderungen, see www.rtr.at

[100] See RTR: Margin-Squeeze-Überprüfungen in der sektorspezifischen Ex-ante-Regulierung der Telekommunikationsmärkte – kritische Punkte und neue Herausforderungen, see www.rtr.at

cisions, the relevance of price cost squeeze tests has been limited to the regulation of bitstream access, where the margin squeeze tests have had a limited influence on the regulated prices.

- The Austrian Telecommunications Act does not contain provisions regarding price cost squeeze, however, numerous decisions of the authority are guided by the application of this principle.

- Both authorities have published papers ("policies") on price cost squeeze whereby some deviations can be found e.g. with respect to the applicability of the "as efficient competitor" test. Also, we find that the Austrian authority has developed specific rules for calculation purposes and also has in mind the potential price cost squeeze issues arising from NGA whereas the German authority uses general policy statements and leaves the specific application to cases it has to decide.

In summary, the price cost squeeze concept is more relevant in Austria and thus also the competition law principle that goes along with it, which is a consequence of the fact that a larger number of markets have been freed from regulation due to the finding of effective competition.

4 Conclusions: harmonisation vs. national implementation

After a detailed overview on specific items in the German and Austria legislation as regards the telecommunications sector and its regulation and the relevance of competition law the following general conclusions can be drawn

- In sector specific regulation for electronic communications as well as for competition law, EU member states have defined a unified approach to be applied. The relevant EU framework has been transposed into national legislation

- The analysis of the rules in Germany and Austria shows that despite this harmonization on the EU level, national implementation can be quite different. Such differences between Germany and Austria can be found with respect to the following items

    i. Market definition and market analysis as well as the finding of SMP follow a principle pattern but the details of implementation are quite different e.g. as regard the legal basis and the procedures that are being followed.

    ii. The organization of the regulatory authorities differs substantially. There are differences in terms of institutional convergence (Austria combines telecoms, postal (rather recently) and broadcasting (but not energy or railways), Germany combines telecoms, postal matters (since the beginning), energy, railways (but not broadcasting) and also the process of decision making is quite different.

    iii. Regarding margin squeeze there are some common approaches but the legal grounds as well as the implementation of margin squeeze tests displays differences.

    iv. With respect to competition law, the two countries apply different systems with respect to responsible institutions and also the approach e.g. with respect to joint dominance is not identical.

- As one can find these differences one may ask to which degree this affects market developments. Obviously, the markets have developed competition in the telecoms sector, with different results so. This may also be impacted by the legal and regulatory environment. At least the analysis shows that a common and harmonized EU framework by no means is a guarantee of a harmonized implementation on the level of member states. It also shows that competition law continues to be highly relevant despite changes in sector specific legislation in a dynamic sector. In this sense, one could support Lehofer's hypotheses with respect to the continued relevance of competition law irrespective of whether sector specific regulation is becoming more or less important.