29th Conference on Postal and Delivery Economics

Gdansk, Poland

1st Sept. 2021 – 4th Sept. 2021

Abstract

Review of the EU regulatory framework for postal services – what can be learnt from the evolution of the EU telecommunications framework?

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With its 1985 Whitepaper „Completing the Internal Market"[2] the European Commission initiated the liberalisation of network industries that were formerly deemed legal (and natural) monopolies. Thus the telecommunications, energy, and postal markets were – to different degrees – opened to competition as of 1998. This legal opening was coupled with economic regulation to ensure that market entrants were enabled to make effective use of the new possibilities thus pushing the formerly monopolized markets towards competition.[3]

The original Postal Services Directive (97/67/EC) dates back more than 20 years. It was last updated in 2008 (2008/6/EC, hereafter PSD).[4] In those 20 years the postal markets underwent major changes. Equally the telecommunications markets changed tremendously which was reflected in three major overhauls of the original regulatory framework or Open Network Provision (ONP) framework[5] which opened fully the telecommunications markets as of 1998. The ONP framework was replaced in 2002 by the Electronic Communications Networks and Services (ECNS) framework[6] which was amended in 2009[7]. Lately, the telecommunications

[1] The views expressed in the paper are entirely those of the author and do not necessarily reflect BNetzA's views. All figures (exc. Fig. 6 + Fig. 16) were developed by me, sometimes based on other sources.
[2] COM(85)310_final.
[3] Cf. e.g. *Groebel*, Competition policy and pro-competitive regulation in network industries – avoiding overkill and gaps, in NIQ, Vol. 13 (2011), pp. 7.
[4] In 2010 the European Commission set up the European Regulators Group for Postal Services (ERGP) with Decision 2010/C 217/07 of 8 Aug. 2010 as an advisory group to the Commission and for cooperation among European postal regulators. For an overview of the ERGP and the ERGP documents see https://ec.europa.eu/growth/sectors/postal-services/ergp_en.
[5] The ONP Directive 90/387/EEC was at the core of the market opening. The ONP framework consisted of ar. 20 directives which were reduced to 6 directives in 2002.
[6] The ECNS framework consisted of the Framework Directive (2002/21/EC), the Authorisation Directive (2002/20/EC), the Access Directive (2002/19/EC), the Universal Service Directive (2002/22/EC) and the Data Protection Directive (2002/58/EC) as well as the Liberalisation Directive (2002/77/EC).
[7] The 2009 overhaul consisted of the Better Regulation Directive (2009/140/EC) amending the 2002 Framework, Authorisation and Access Directives and the Citizens' Rights Directive (2009/136/EC) amending the 2002 Universal Service and Data Protection Directives. A new Regulation came into force establishing the Body of European Regulators of Electronic Communications (BEREC) and the BEREC Office (Reg. (EU) 1211/2009).

framework was updated by the 2018 Connectivity package consisting of the European Electronic Communications Code (EECC) (2018/1972/EU)[8] and the BEREC Regulation (2018/1971/EU)[9].

In 2015 the European Commission published the communication „A Digital Single Market Strategy for Europe“[10] which took account of the dynamics and the convergence of markets brought about by the digitalization. It foresaw actions in three areas[11] to create the digital single market in Europe. It can be seen as a similarly important communication as the 1985 Whitepaper. Among other things it also contained the action „Measures in the area of parcel delivery“ which ultimately led to the Regulation on Cross Border Parcel Delivery Services (Reg. (EU) 2018/644)[12] reflecting the cross-border nature of e-commerce.

In 2018 the ERGP worked on a report reflecting the ”Developments in the postal sector and its implication for regulation“ which was published in 2019.[13] Based on this report describing the principle changes in the postal markets the ERGP published its „Opinion on the review of the regulatory framework for postal services“[14] advocating a ”‘greenfield‘ approach in establishing a new regulatory framework“.[15] The ERGP believes that „it is necessary to maintain sector specific regulation for the postal sector“[16] and calls for a „reorientation from universal service provision to a proper functioning of the postal market and of competition as the main focus of a fit for purpose regulatory framework“[17] to cope with the changes of the sector with an adequate regulatory framework including the necessary tools for regulators.

In view of the upcoming review of the PSD[18] this paper will analyse the changes impacting the postal markets, the (non-) suitability of the current regulatory framework and its outcome relating in particular to competition. Given that the telecommunications sector had seen similar unprecedented changes and a very high market dynamic which had led to three overhauls of the regulatory framework, the paper will describe the major principles and elements

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[8] The EECC is a recast directive which comprises the 2009 Framework, Authorisation, Access, and Universal Service Directives. The Data Protection Directive is (partly) replaced by the General Data Protection Regulation (Reg. (EU) 2016/679). The draft e-privacy regulation is still in the legislative process.
[9] The BEREC Regulation is now called the BEREC and the Agency for Support for BEREC (BEREC Office) Regulation.
[10] COM(2015)192_final
[11] Better Access for consumers and businesses to digital goods and services across Europe; Creating the right conditions for digital networks and services to flourish; Maximising the growth potential of the Digital Economy.
[12] OJ L 112 of 2nd May 2018.
[13] ERGP (18) 49.
[14] ERGP (19) 12.
[15] Op. cit., p. 17.
[16] Op. cit., p. 17.
[16] Op. cit., p. 8.
[17] Op. cit., p. 6, 17.
[18] On 2nd March 2020 the European Commission published the Roadmap „Evaluation of the Postal Services Directive and launched a public consultation on the evaluation on 13 July 2020 which lasted until 9 November 2020, https://ec.europa.eu/growth/content/postal-services-commission-opens-consultation-needs-eu-postal-sector_en. A factual summary of the public consultation on the evaluation of the Postal Services Directive dated 22 December 2020 was published together with the contributions received, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11965-Report-on-the-Application-and-Evaluation-of-the-Postal-Services-Directive/public-consultation. The Commission aims to adopt the evaluation report in the second quarter of 2021, which is later than originally foreseen in the adjusted 2020 Work Programme of the European Commission (COM(2020)440_final) published on 27 May 2020. It is now expected that the evaluation report will be published in autumn 2021.

of the telecommunications framework and how regulators were able to deal with the evolving markets with the updated tools provided for by the different regulatory frameworks of 2002, 2009, and by the 2018 framework[19]. It will assess the suitability of these components of the telecommunications regulatory framework such as the SMP[20] regime, the remedies toolbox[21] etc. to deal with the changes in the postal markets and discuss how these components can be used to build a new regulatory postal framework bearing in mind the necessity of adjustments for the specificities of the postal sector.[22]

Furthermore, the paper will take a look at the legislative proposals of a Digital Markets Act (DMA) and a Digital Services Act (DSA) recently published by the European Commission.[23] Both widen the scope of economic regulation to digital markets and services and introduce elements of ex ante regulation (obligations) for digital platforms which might (partially) overlap with the PSD review and have therefore to be taken into account as well.

The paper will end with conclusions drawn from the analysis and the comparison of the EU regulatory frameworks.

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[19] The latter still being transposed into national law in most Member States, even though the two-year transposition period ended on 21 December 2020.

[20] SMP stands for **S**ignificant **M**arket **P**ower which is the telecommunications framework‘s pendant of *dominance* in competition law.

[21] The NRA has a number of regulatory tools at its disposal which he imposes on an operator designated as SMP operator such as transparency, non-discrimination, accounting separation, access and price control obligations.

[22] Unlike *Möller Boivie et al.* the author thinks that the concepts of the telecommunications framework can be transferred to the postal framework. Cf. *Möller Boivie et al.*, Additional EU Mail & Parcel Regulation: What Evidence To Look For?, Copenhagen Economics (2019).

[23] The European Commission published on 15 December 2020 the proposal for a Digital Markets Act and a Digital Services Act, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en and https://ec.europa.eu/digital-single-market/en/digital-services-act-package.

I. Introductory overview – The concepts of liberalisation and regulation

In 1985 the European Commission published its landmark White Paper „Completing the Internal Market“[24] which laid down the principles of market opening, i.e. **liberalising** formerly monopolized sectors such as network industries. This led subsequently to legal frameworks liberalising the telecommunications, energy, and postal markets[25] and opening them for competition as of 1998 – albeit to different degrees. The telecommunications markets were fully opened whereas the postal markets were opened only partially as a so-called „reserved area“ was still allowed until 31st December 2010[26]. In order to complete the internal market the White Paper laid down as a second equally important rationale the **harmonisation** of national rules as competition must not be distorted by barriers established by different national rules. Both liberalisation of markets[27] and harmonisation of rules[28] are essential for the achievement of a **competitive single market** building on competitive national markets and are interacting with each other linking the EU level with the Member States level.

The thinking behind the paradigm shift of allowing entry in formerly monopolized markets was that also in network industries competition between different providers was considered possible and creating an increase in welfare ultimately bringing benefits to users – both consumers and businesses. However in order for the legal market opening to work **sector specific regulation** is needed.[29] Economic regulation ensures that new entrants can make **effective use** of their possibilities by creating a **level playing field** with various obligations imposed **ex ante** on the former monopolist (incumbent operator) as he usually enjoys a dominant position stemming from the ownership (operation) of the network[30] and its large customer base[31]. Without such **asymmetric regulation**[32] the incumbent operator would use its dominant position to prevent new entrants to enter successfully the market and squeeze them out before they can compete effectively for customers. Thus by imposing ex ante obligations such as an obligation to grant access to the network or parts thereof at cost-oriented prices the regulator balances off the (structural) advantages of the incumbent operator and enables competition on an equal footing ensuring that the benefits resulting from competition

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[24] COM(85)310_final. The White Paper induced the Single European Act (OJ L 169 of 29 June 1987), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11986U/TXT&from=DE.

[25] The liberalisation of railway markets followed later (starting with the first Railway Package in 2001, https://ec.europa.eu/transport/modes/rail/packages_en); as in the postal sector it was also a gradual market opening.

[26] And for some Member States until 31st Dec. 2012. The (negative) effect of this gradual market opening will be described later on.

[27] Based on Art. 86 TEC (= Art. 106 TFEU).

[28] Based on Art. 95 TEC (= Art. 114 TFEU).

[29] General competition law alone is not enough to solve the structural imbalance in formerly monopolized markets, i.e. competition will not evolve on its own.

[30] And the economies of scale and scope associated with it which provide cost advantages that act as (economic) entry barriers.

[31] The advantage resulting from a large customer base is the so-called *network effect*, which is equally observed for digital platforms, i.e. customers want to be on the network (here: the platform) that has most users to interact with.

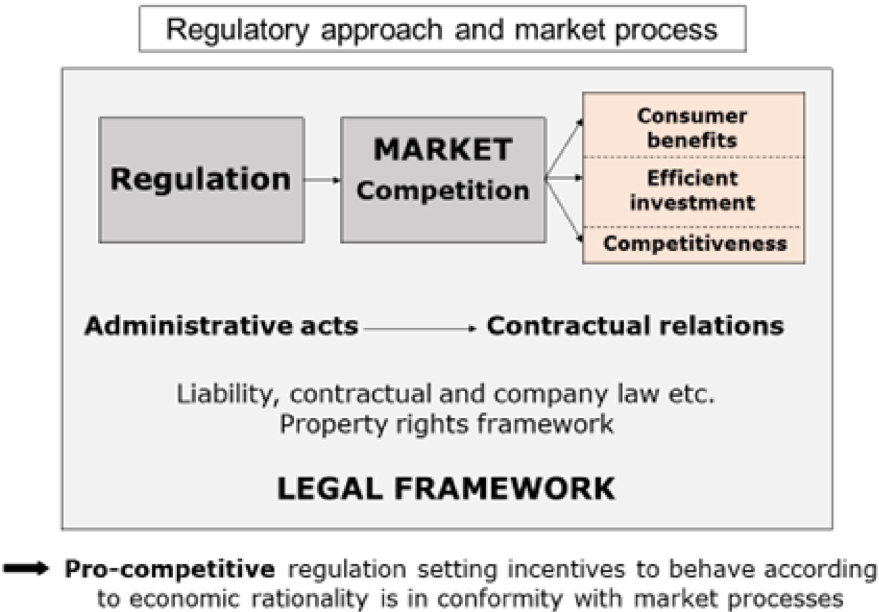
[32] The term “asymmetric” is used when one (dominant) operator is regulated stricter than other operators, in the energy and rail sector *all network operators* are regulated as networks are considered non-replicable, i.e. the *infrastructure* as such is regulated whereas in the telecommunications sector (and as will be shown this is similarly applicable in the postal sector) product and service *markets* are regulated as networks are considered replicable, i.e. infrastructure (facilities-based) competition is feasible.

are passed on to consumers (and business users). We can also say that the regulatory pressure acts as competitive pressure steering the market towards a competitive equilibrium. In that sense the role of the regulator can be described as initiating the competitive process, i.e. setting the market on track towards competition. This requires an **independent regulator** that can exercise its discretion based on the legal, economic and technical expertise of its professional staff and is **predictable** in its regulatory decisions.

This modern understanding of regulation of promoting competition by mimicking competition[33] is often called **pro-competitive regulation** and is the opposite of „micromanagement" or old-style utility regulation. Thus **liberalisation** as the legal market opening[34] and **economic regulation** to incentivise competition[35] are the two sides of the medal.[36]

Figure 1 displays how pro-competitive regulation is embedded in the general legal framework and shows the logic of the approach.

Figure 1 Pro-competitive regulation



The European framework that makes the close link between (general) competition law and (sector specific) regulatory law[37] most obvious is the "Electronic Communications Networks

[33] "simulate competition to stimulate competition".
[34] Lifting legal barriers (exclusive rights) to market entry.
[35] By preventing the abuse of economic barriers to market entry.
[36] Cf. e.g. *Groebel*, Competition policy and pro-competitive regulation in network industries – avoiding overkill and gaps, in NIQ, Vol. 13 (2011), pp. 7. Lifting the legal barriers is the necessary, but not sufficient condition, to introduce/promote competition ex ante economic regulation is required. The third institutional step to open formerly monopolized markets effectively to competition is privatization of state-owned operators (which however is better done or at least started before the market is liberalized – "privatize before you liberalize").
[37] As sector specific regulation is applied ex ante it goes beyond competition law which is applied ex post (except for merger control). Sector specific regulation promotes competition (in formerly monopolized markets), general competition law maintains competition in markets where competition is the default situation. For a wider discussion of sector specific regulatory law and general competition law see also *Alexiadis/Pereira Neto*, Competing Architectures for Regulatory and Competition Law Governance, FSR Research Report – June 2019.

and Services“ (ECNS) framework of 2002[38] which explicitly incorporates competition law principles. It establishes the market analysis process and the finding of dominance – or as it is called in the Framework Directive (2002/21/EC) – the finding of **Significant Market Power** (SMP) as the condition that triggers the imposition of at least one regulatory obligation from a so called **toolbox of obligations** ("remedies") spelled out for the wholesale markets in the Access Directive 2002/19/EC and for the retail markets.in the Universal Service Directive 2002/22/EC. The ECNS framework provided NRAs with the **flexibility** to choose the most appropriate (set of) remedies to solve the competition problem identified in the market analysis. The flexibility is framed as acc. to Art. 8 Access Directive (AD) remedies have to be based on the nature of the problem, proportionate and justified in the light of the objectives of Art. 8 Framework Directive (FD) and only be imposed following consultation in accordance with Art. 6 (national consultation) and Art. 7 (consolidation) FD.[39]

It is important to retain that the regulatory approach consists of the **market analysis** based on **competition law principles** which as consequence in case of the designation of an **SMP operator** in a **relevant market susceptible to ex ante regulation**[40] is followed by the ex ante imposition of **effective regulatory obligations** chosen from the toolbox. This pro-competitive regulation worked successfully for the telecommunications markets as it enabled NRAs to deal with changing market structures and boundaries in a dynamic environment[41] by providing them with the flexibility to **tailor the remedies** to their national market situations swiftly reacting to evolving competitive dynamics.

A competitive internal market requires uniform competition rules which are given by Art. 101/102 TFEU and harmonised national rules based on Art. 114 TFEU consistently implemented by national authorities after transposition into national law.

30 years after the White Paper the Commission published on 6th May 2015 the Communication „A Digital Single Market Strategy for Europe“[42] and on 28th October 2015 the Communication „Upgrading the Single Market: more opportunities for people and business“[43].

Again five years later on 19th February 2020 the Commission published the Communication "Shaping Europe's digital future"[44] and on 10th March 2020 followed the Communication „A

[38] The 2002 ECNS framework was updated in 2009 keeping the fundamental principles outlined, i.e. drawing on competition law principles and providing NRAs with the flexibility to choose the most appropriate (set of) remedies from the toolbox.
[39] These principles are carried forward in Art. 68 of the European Electronic Communications Code (EECC), Directive (EU) 2018/1972, OJ L 321 of 17 Dec. 2018.
[40] The list of relevant product and service markets within the electronic communications sector susceptible to ex ante regulation (i.e. having passed the so-called **3-criteria-test** and defined following competition law principles) is laid down in the corresponding **Commission Recommendation** on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation, see below for more details.
[41] Due to technological developments that entail new business models.
[42] COM(2015)192_final, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192&from=EN.
[43] COM(2015)550_final, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0550&from=EN.
[44] COM(2020)67_final, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age_en#documents; see also https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/shaping-europe-digital-future_en and https://digital-strategy.ec.europa.eu/en.

New Industrial Strategy for Europe“[45] as well as the Communication „Identifying and addressing barriers to the Single Market“[46] in which the Commission explicitly refers to the White Paper of 1985.

In the next chapter the evolution of the European electronic communications frameworks and its main features/characteristics will be described and analysed as a model for the postal sector and the possible review of the European postal service framework.

II. Evolution of the EU telecommunications regulatory frameworks and sector evolution

1. 2002/2009 Electronic Communications Networks and Services Framework

In 2002 the Electronic Communications Networks and Services (ECNS) framework replaced the so-called 1998 Open Network Provision (ONP) framework with which the telecommunications markets were opened completely[47]. However, as it turned out soon after market opening the technological development led to convergence of networks, services, terminal equipment and brought about new business models as well as rapidly changing market structures and boundaries, the remit was widened to cover *all* electronic communications networks and services (not only the traditional telecommunications sector). This evolution implied new market dynamics including different competitive situations.[48] This is turn required a new more flexible regulatory framework that enabled NRAs to intervene faster and more effectively.[49] Therefore the 2002 ECNS framework was based on the principle of **technological neutrality** (to deal with convergence caused by the technological developments), **competition law principles** (to deal with the changing market and competitive dynamics) and providing NRAs with the **flexibility** to choose the most appropriate (set of) remedies from a toolbox of regulatory obligations. In order to achieve the internal communications market a consolidation (Art. 7 FD) and in 2009 a co-regulation (Art. 7a FD) procedure was introduced to ensure a consistent implementation of the regulatory framework by NRAs.

The following figures provide the main principles, the steps of the regulatory process and the regulatory balance between the European and the national level of the ECNS framework.

[45] COM(2020)102_final, https://ec.europa.eu/info/files/commission-communication-new-industrial-strategy-europe_en.
[46] COM(2020)93_final, https://ec.europa.eu/info/files/commission-communication-identifying-and-addressing-barriers-single-market_en.
[47] In one go (“big bang scenario”).
[48] E.g. tendency towards broadband access, competition between “traditional” telco operators and cable operators (that were able to also offer broadband lines) etc..
[49] Instead of the rigid obligations defined in the ONP Directive to be “automatically” imposed on the “historic operator” necessary at the beginning, i.e. immediately after market opening, but this static approach is less suitable in a rapidly evolving environment requiring timely and tailored regulatory intervention on relevant *markets*, i.e. a more flexible and dynamic approach.

Figure 2 ECNS Framework – General principles

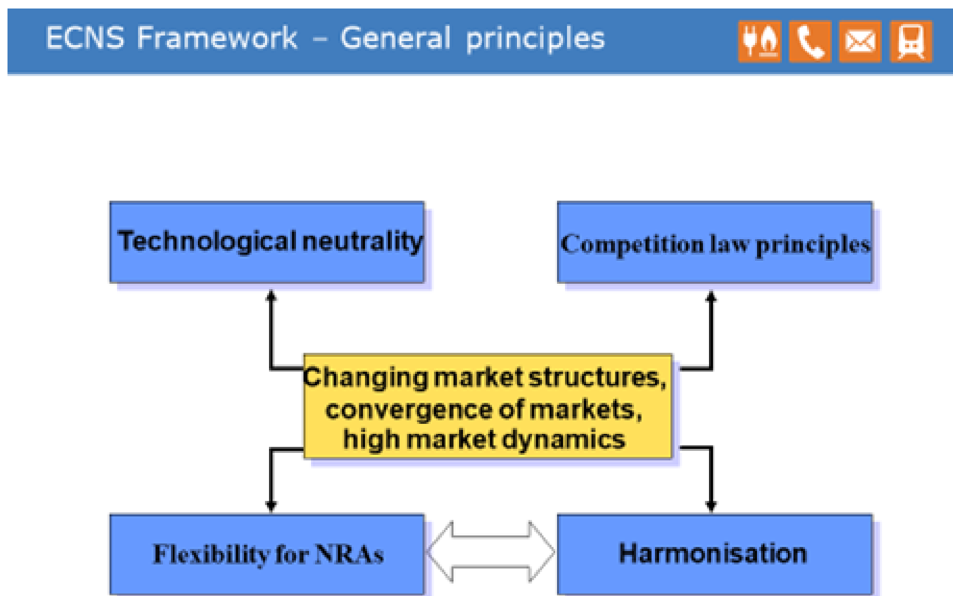


Figure 3 ECNS Framework Regulatory Process (1)

ECNS Framework - Regulatory Process (1)

- **3 Stages:**
  - market definition: relevant market (list of 7 markets; 2014: 5 markets)
  - market analysis: designation of SMP operator(s)
  - choice of remedy: imposition of regulatory obligation(s)
- Rec. on relevant markets susceptible to ex-ante regulation: **3 criteria test**
- If an operator is found to be dominant (either individually or jointly), at least one specific regulatory obligation must be imposed, which must be **proportionate** to remedy the problem, justified in the light of the Art. 8 FD objectives and **based on the nature of the problem** (Art. 8 AD)
- Instead of the former automatism, NRAs are now given the **flexibility** (*discretion*) to choose the **appropriate** remedy: **increased role** for NRAs
- Remedies must be **effective**: solve the competition problem
- Remedies are to be chosen from the list in the AD/UD ("*toolbox*")
- Remedies on the retail level to be applied only in case wholesale obligations do not work (concept of the **priority** of strict wholesale reg.)
- Notification (consolidation/co-regulation) procedure acc. to Art. 7/a FD: **Veto power** on stages 1 + 2 (market definition + SMP), but **no veto power** on the application of remedies (stage 3), only comments and the recommendation addressed to the NRA which have to be taken into *utmost account* by the NRAs when adopting the final measures

Figure 4 ECNS Framework Regulatory Process (2)

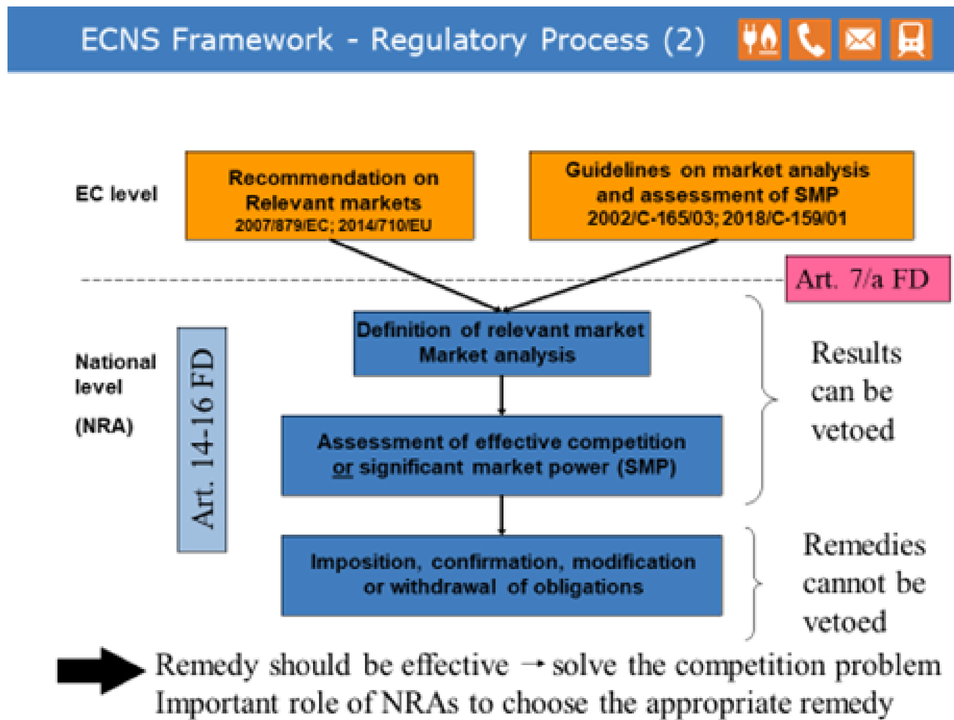
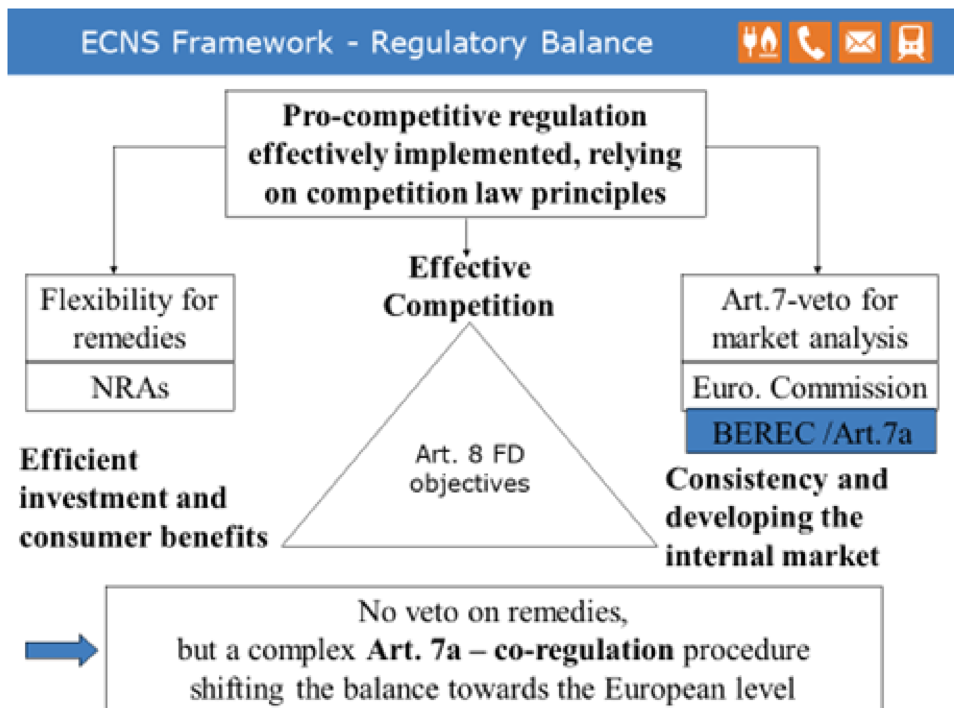


Figure 5 ECNS Framework – Regulatory Balance



In the following section the main elements (including the update of the relevant documents) are recapped to show the evolution since 2002 of the telecommunications framework and how it was adapted to deal effectively with the evolution of the highly dynamic sector.

(i) Market definition and Commission Recommendation on relevant markets susceptible to ex ante regulation

In the original 2002 ECNS framework the **list of relevant markets susceptible to ex ante regulation** was annexed to the Framework Directive and comprised 18 relevant markets (Annex 1)[50]. It contained 7 retail and 11 wholesale markets which were defined following competition law principles, mainly supply and demand side substitutability, i.e. determining a substitutability gap to define a relevant market.[51] To identify whether a relevant market is susceptible to ex ante regulation the Commission applied from a **forward-looking** perspective the so-called **three criteria test** (3CT)[52]:

- High and non-transitory entry barriers over the time horizon considered;
- No tendency towards effective competition over the time horizon considered;
- Competition law alone is insufficient to adequately address market failures.

If all three criteria are **cumulatively** met, the relevant market as defined according to competition law principles is deemed susceptible to ex ante regulation, i.e. requiring the imposition of one or more regulatory obligations *ex ante* on an SMP operator as in this case the market would not move alone to the competitive equilibrium in case of market failure.

In 2007 the Commission updated the list for the first time which was annexed to **the Recommendation** of relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC (2007/879/EC)[53]. Taking into account since 2003 market developments it contained only seven relevant markets, one retail market[54] and six wholesale markets.

In 2014 the Commission updated the list for the second time. The Commission Recommendation of relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC (2014/710/EU)[55].

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[50] The list was also published in 2003 as annex of the first Commission **Recommendation** on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC (Recommendation 2003/311/EC, OJ L114 of 8 May 2003).

[51] 2003/311/EC, Recital 7; described in more detail in the Explanatory Memorandum published with the Recommendation 2003/311/EC.

[52] 2003/311/EC, Recitals 9-16; described in more detail in the Explanatory Memorandum published with the Recommendation 2003/31/EC. Until 2018 (EECC) the 3CT was laid down only in the Recommendations on relevant markets susceptible to ex ante regulation.

[53] OJ L 344 of 28 Dec. 2007; the Commission also published an Explanatory Note (SEC(2007)1483_final explaining the details of its analysis. A second edition was published as SEC(2007)1483/2 on 13 Nov. 2007.

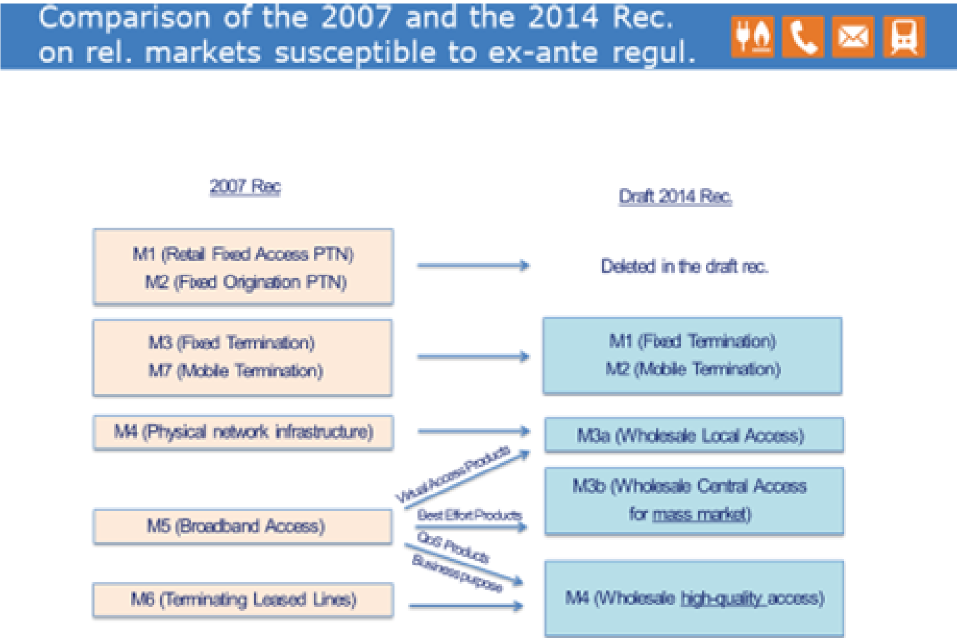
[54] Taking out retail markets is a consequence of successfully introducing service competition on the retail level with strict regulation on the wholesale (network access) level.

[55] OJ L 295 of 11 Oct. 2014; the Commission also published an Explanatory Note (SWD(2014)298) explaining the details of its analysis.

The list of relevant markets was further reduced and contained only four[56] wholesale markets. This reflected market developments since 2007.[57] The Commission has to regularly review the recommendation (Art. 15 FD) to always adapt the list of relevant markets to the latest developments in terms of competitive and market dynamics.

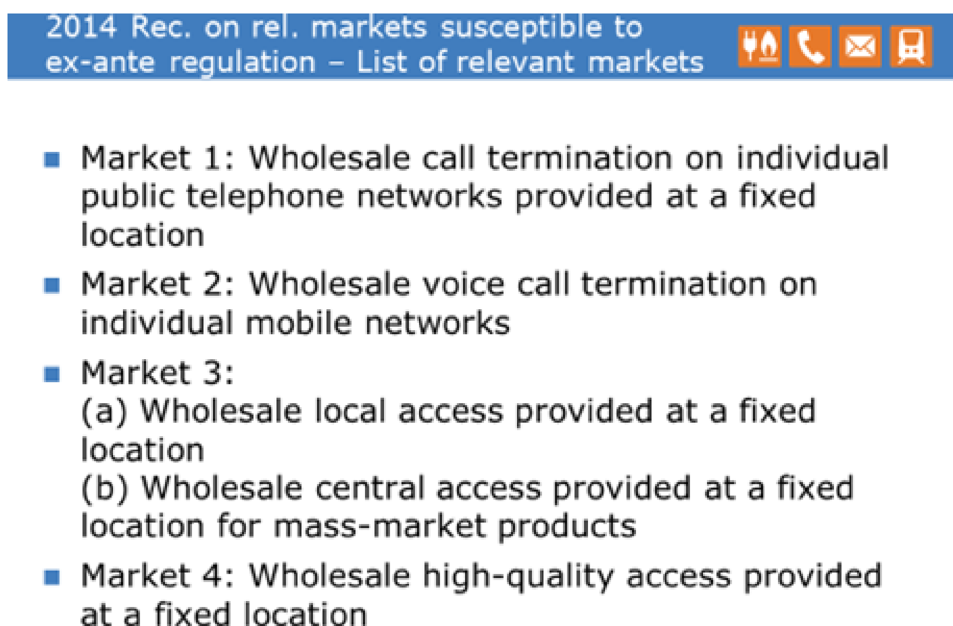
The following two figures provide a comparison of the 2007 and the 2014 Recommendation on relevant markets and show the 2014 list of relevant markets reflecting e.g. that more different virtual access products were introduced.[58]

Figure 6 Comparison of the 2007 and the 2014 Rec. on relevant markets[59]



[56] As one of the markets was in fact split in two, it effectively contained five markets (see Figure 6).
[57] And is also a result of the implementation of the "ladder of investment" approach to wholesale access regulation, see below.
[58] The 2020 update of the Recommendation on relevant markets will be dealt with below when describing the 2018 Code (Directive (EU) 2018/1972).
[59] Source: BEREC.

Figure 7 2014 List of relevant markets susceptible to ex ante regulation



When carrying out their market reviews according to Art. 15 – 16 FD, NRAs have to take the Commission's Recommendation on relevant markets susceptible to ex ante regulation into utmost account for defining relevant markets appropriate to national circumstances, in particular relevant geographic markets (see also Figure 4 above). They also have to take into utmost account the Commission SMP Guidelines.

(ii) Market analysis and assessment of SMP – SMP Guidelines

According to Art. 16 FD NRAs shall carry out a market analysis, i.e. an assessment of whether or not the relevant market according to the list is effectively competitive or whether one (or several) operators have SMP, in which case they are designated either individually or jointly as SMP operator(s). **SMP** is defined in Art. 14 FD as "enjoy[ing] a position **equivalent to dominance**, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers" (emphasis added). Thus the concept of dominance established in case law on Art. 81/82 ECT, now Art. 101/102 TFEU is incorporated in the ECNS and NRAs have to follow general competition law principles in the market analysis procedure. For this analysis the Commission issued the so-called **SMP Guidelines** in 2002[60] which were updated in 2018[61] to take into account competitive developments in telecommunications markets.

Since 2009 NRAs have to carry out a market review every three years of the relevant markets susceptible to ex ante regulation listed in the Recommendation, in the 2002 framework the period was not specified.

[60] 2002/C-165/03, Guidelines on the market analysis and the assessment of SMP under the Community regulatory framework for ECNS.
[61] 2018/C-159/01, Guidelines on the market analysis and the assessment of SMP under the EU regulatory framework for ECNS; the Commission also published an Explanatory Note (SWD(2018)124_final) explaining the details.

The following three figures summarize the (revision of the) **SMP Guidelines** and show the criteria stated in the SMP Guidelines that should be used by NRAs when assessing whether an operator has SMP or not in a relevant product or service market susceptible to ex ante regulation.

Figure 8 SMP Guidelines

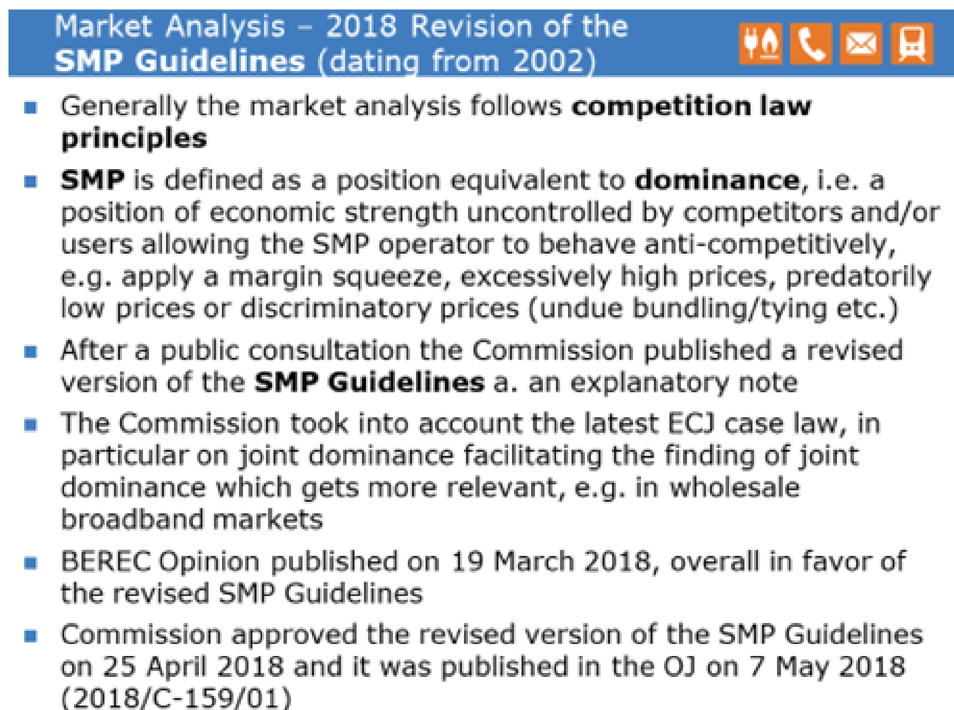


Figure 9 SMP Guidelines – Criteria for the assessment of SMP (1)

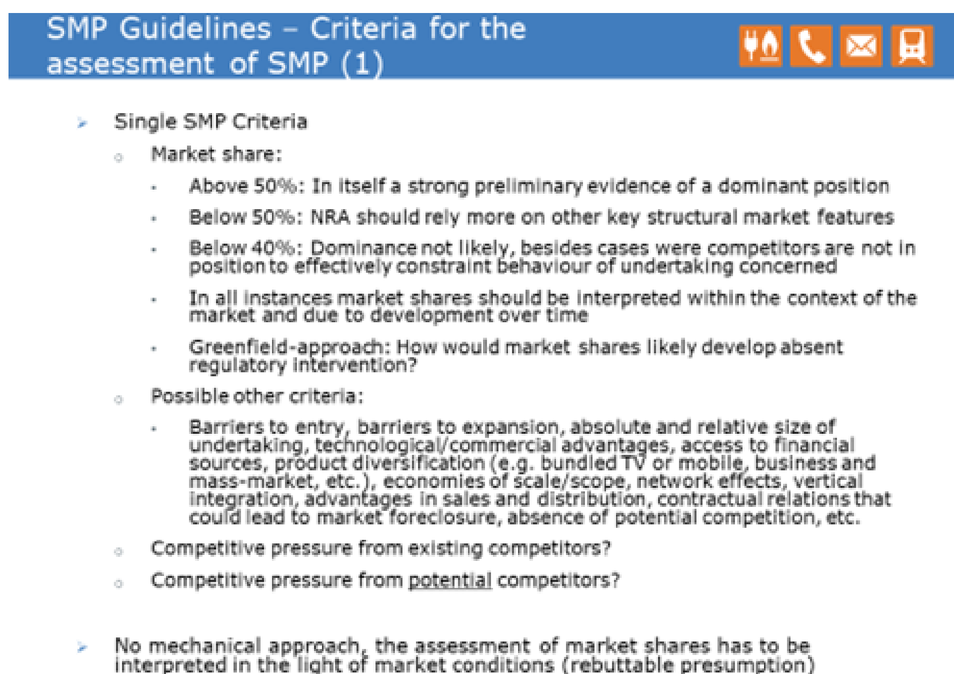
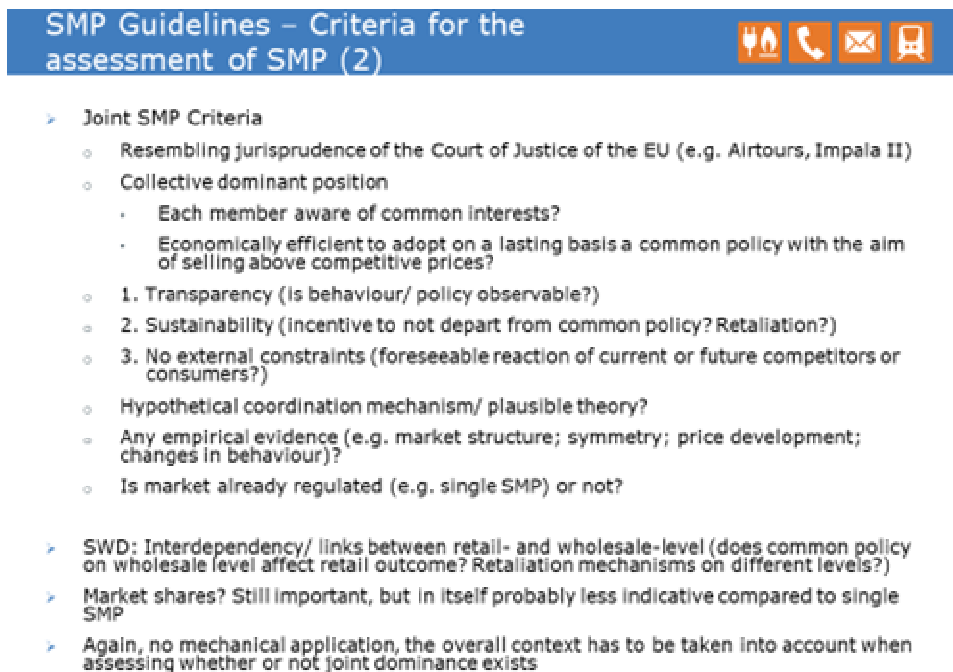


Figure 10 SMP Guidelines – Criteria for the assessment of SMP (2)



As stated above in case of a finding of SMP, at least one regulatory obligation has to be imposed on the SMP operator ex ante[62] to solve the competition problem identified in the market analysis.[63] The regulatory obligations are laid down in the "remedies toolbox" of the Access Directive (AD) for the wholesale markets and the Universal Service Directive (UD) for the retail markets.

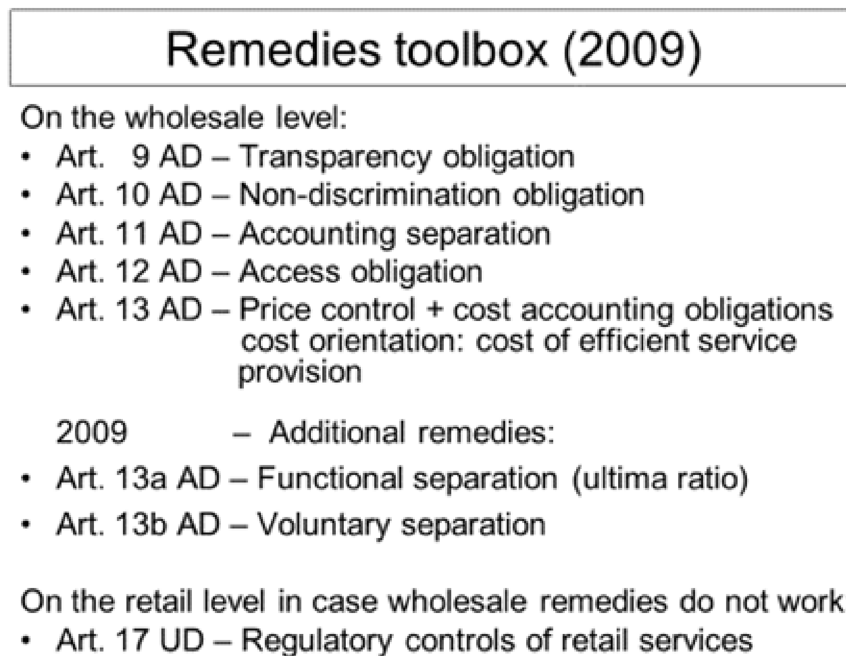
(iii) Imposition, amendment or withdrawal of regulatory obligations ("remedies toolbox")

When imposing regulatory obligations NRAs have to follow the **principles** laid down in Art. 8 AD, i.e. obligations imposed must be based on the nature of the problem identified, proportionate and justified in the light of the objectives of Art. 8 FD (in particular promoting effective competition (and where appropriate infrastructure-based competition) for the benefit of consumers; promoting efficient investment and innovation in new and enhanced infrastructures, contribute to the development of the internal market). Following these principles, NRAs are given the power (discretion) to **choose** the most appropriate (set of) **remedies from the toolbox**. This **flexibility** enables them to **tailor** the (set of) **remedies** to their national market situations thus intervening in the most effective way in a highly dynamic environment. Thus, the role of the NRAs was increased compared to the role in the previous ONP framework.

[62] Unlike in competition law cases, the regulator does not have to proof the abuse of SMP, but imposes the appropriate (set of) remedies exactly to *prevent* the abuse *before* it happens as the relevant market is susceptible to ex ante regulation, i.e. the regulator cannot risk the abuse happening as the market would not move towards a competitive equilibrium.
[63] In case the competitive situation has changed, the (set of) remedies will be adapted accordingly, e.g. if compared to the previous market analysis the competitive situation has improved (but still an operator with SMP is found), the remedies can be relaxed; in case an operator is no longer designated as SMP operator, the market is effectively competitive and the obligations have to be withdrawn.

The following figure shows the remedies of the toolbox as listed in Art. 9 – 13 AD and Art. 17 UD[64] (2009 ECNS framework).

Figure 11 Remedies toolbox (2009)



As can be seen the list starts with the least intrusive remedy (transparency obligation), moving via the non-discrimination and accounting separation obligation to the most intrusive access (to and use of specific network facilities) and price control obligations. Imposing and tailoring access and pricing obligations according to Art. 12 and 13 AD aims at promoting effective competition as well as efficient investment in new and enhanced infrastructures as competition drives investment. The underlying concept is the so-called "*ladder of investment*" which says that by imposing an access obligation to the network or parts thereof of the SMP operator along the value chain[65] allows alternative operators at the same time to compete with the SMP operator on the retail level[66] as well as investing in own infrastructure *stepwise* in parallel with the growing customer base which in turn leads to more competition. The approach is built on promoting both access-based and infrastructure (facilities-based) competition of all operators with efficient business models.

For this it is crucial to set the access price at the level of the **cost of efficient service provision**[67] as this is the price prevailing in a competitive market and to ensure that between different wholesale access products the space (between the rungs) reflects the cost difference between investing in more own infrastructure to provide an incentive to all operators to climb up the ladder to the next rung when they are economically able, i.e. ensuring that there is no

[64] As the retail remedies are only applied in case wholesale remedies do not work and that the 2014 Recommendation on relevant markets susceptible to ex ante regulation does not include a retail market any more, they are not dealt with here in more detail.
[65] I.e. a suite of wholesale access products.
[66] By completing the service, e.g. access to the unbundled local loop (Market 4/2007 and 3a/2014) allows the alternative operator to complete it and thus offer a broadband line (internet access) to consumers.
[67] Cost standard.

margin squeeze (neither on the wholesale level nor with the retail level). At the same time such an access price reflects the opportunity cost of the SMP operator and provides – as a consequence of increasing competitive pressure on the retail market – an incentive to also invest in new and enhanced infrastructure and operate the network efficiently.[68] Thus all providers have an incentive to behave rationally, i.e. as if the market were competitive.

Also for the **imposition and tailoring of remedies** a number of soft law documents were issued since 2009 by the Commission and BEREC to give guidance to NRAs which have to take both the Commission's recommendations as well as BEREC's common positions into utmost account when imposing regulatory obligations, in particular acc. to Art. 10, Art. 12 and Art. 13 AD (see Fig. 11). The most important recommendations are listed hereafter in chronological order:

- 2009 – Termination rates Recommendation[69];
- 2010 – NGA Recommendation[70];
- 2013 – Non-discrimination obligations and costing methodologies Recommendation[71].

In particular with regard to the remedies related to the wholesale broadband access markets[72] BEREC published three common positions (CP) on best practice in broadband wholesale access remedies in 2012[73] and a further common position in 2016:

- BoR (12) 126 – Wholesale Leased Lines;
- BoR (12) 127 – Wholesale Local Access;
- BoR (12) 128 – Wholesale Broadband Access;[74]
- BoR (16) 162 – Layer-2 Wholesale Access Products.[75]

Following the publication of the Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (NDCM) BEREC published the BEREC Guidance on the regulatory accounting approach to the economic replicability test (i.e. ex-ante/sector specific margin

[68] i.e. both static and dynamic efficiency are observed.
[69] Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (2009/396/EC), OJ L 124 of 20 May 2009. As acc. to Art. 75 the termination rates were set with a Delegated Act uniformly across the EU ("*Eurorates*") the Termination Rates Recommendation is no longer relevant and will therefore not be looked at. Commission Delegated Regulation (EU) 2021/654 setting a single maximum Union-wide mobile voice termination rate and a single maximum Union-wide fixed voice termination rate, OJ L 137 of 22 April 2021, see also below.
[70] Commission Recommendation on regulated access to Next Generation Access networks (NGA) (2010/572/EU), OJ L 251 of 25 Sept. 2010.
[71] Commission Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (2013/466/EU), OJ L 251 of 21 Sept. 2013, the Recommendation is applicable for Markets 4 and 5 of Recommendation 2007/879/EC (later Markets 3a and 3b of Recommendation 2014/710/EU).
[72] Markets 4, 5, and 6 of Recommendation 2007/879/EC, later Markets 3a, 3b and 4 of Recommendation 2014/710/EU (see above Fig. 6 and 7).
[73] All BEREC documents can be found on www.berec.europa.eu.
[74] BEREC monitored the implementation of the CPs in three phases from 2014 – 2016 (Reports: BoR (14) 171 (Phase 1); BoR (15) 199 (Phase 2); BoR (16) 219 (Phase 3) and published in 2018 a Report on the assessment for a need to review the 3 broadband CPs of 2012 (BoR (18) 24).
[75] In 2018 BEREC published a Report on L2 Wholesale Access Products (BoR (18) 120).

squeeze tests)[76] which provided (specific) guidance to NRAs on the application of the **economic replicability test (ERT)** as provided for in the Commission's NDCM Recommendation as BEREC was doubtful regarding the use of the ERT.

The 2010 NGA Recommendation and the 2013 NDCM Recommendation took into account the latest developments in terms of NGA deployment at the time as well as the importance of encouraging the roll-out of high-speed internet networks to reach the targets of the Digital Agenda for Europe (DAE).[77] In that way the objective of Art. 8.5 lit. d) FD of promoting efficient investment and innovation in new and enhanced infrastructures was linked to the DAE targets. Besides recommending the use of a bottom-up analytical cost model of a modern efficient access network (i.e. an NGA network) capable to reach the DAE targets to calculate forward-looking the long run incremental costs plus an appropriate mark-up for common costs (BU-LRIC+)[78] at current costs (CCA)[79], it recommended under narrowly defined conditions[80] the use of an ex ante ERT providing price flexibility for the relevant wholesale access products to the SMP operator, i.e. lifting the price control obligation, but maintaining the access obligation. This type of "price control obligation" is now included in Art. 74 EECC.[81]

(iv) Regulatory process of SMP regulation in the ECNS framework

The **three stage process of SMP regulation** according to the ECNS framework requires NRAs to carry out regularly a market review of the listed relevant markets and imposing obligations where an operator is found to have SMP. The regulatory process (see also Figures 3 and 4) is clearly structured and starts with the national consultation(s) of the findings of the market analysis and the proposed remedies decision (Art. 6 FD) ensuring transparency and participation of all affected parties. Following the national public consultation(s) the NRAs have to "consult" the draft decisions ("measures") acc. to Art. 7/a FD on the European level in a formalized procedure described hereafter.

To ensure that NRAs make use of the toolbox consistently and in general **implement** the **regulatory framework consistently** thus contributing to the development of the internal market, a **consolidation procedure** for the first two stages (related to market definition and analysis) was introduced, i.e. NRAs had to notify their draft decisions according to Art. 7 FD to the Commission, the other NRAs and since 2009 also to BEREC. The Commission could veto the draft decision in case it considered that it would create a barrier to the internal market or has serious doubts on its compatibility with Community law. For the remedies draft decisions which can be notified separately by the NRA the Commission has no veto power, but according to Art. 7a FD the so-called **co-regulation procedure** applies, i.e. the Commission

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[76] BoR 814) 190.
[77] Cf. Whereas 1 and 2 of the 2010 NGA Rec and 2013 NDCM Rec.; Commission Communication "A Digital Agenda for Europe", COM(2010)245_final, 19 May 2010.
[78] With LRIC as the cost allocation method the characteristic cost advantages stemming from economies of scale and scope are captured and costs are distributed over the whole service (the "increment") provided in addition to other services offered. LRIC include a reasonable rate of return on capital employed, i.e. the weighted average cost of capital (WACC). All costs *efficiently* incurred are covered (principle of cost recovery) and allocated according to the principle of cost causality.
[79] With CCA as the cost base the right (undistorted) price signal for the make-or-buy decision is given incentivizing efficient investment.
[80] Namely the imposition of strict non-discrimination (equivalence of input, EoI), technical replicability conditions, and a demonstrable retail price constraint, cf. Recommendations 48/49 and 56 NDCM Rec.
[81] See below.

can issue a recommendation addressed to the individual NRA (that notified the draft remedies decision) asking the NRA to amend or withdraw its draft decision or in case the NRA maintains its draft decision, the NRA has to provide an explanation ("justification"). BEREC has to provide an opinion and may or may not share the Commission's serious doubts. So while the final remedies decision remains with the NRA, its discretion is narrowed by the co-regulation procedure introduced in 2009 (see for the regulatory balance between the national and the EU level also Figure 5).

It is important to retain that SMP regulation according to the ECNS framework is a multi-stage process with clearly assigned roles and responsibilities on the national and the EU level. NRAs are to carry out the market reviews regularly and impose remedies on an SMP operator. Following the national proceedings, NRAs have to notify the draft decisions to the Commission, the other NRAs and **BEREC** in the Art. 7/a FD consolidation and co-regulation procedure to ensure consistency of regulation on the EU level contributing to the development of the internal market. This interaction between the national and the EU level aims at ensuring that effectively regulated national markets develop towards the internal market of electronic communications, i.e. balancing flexibility of NRAs with consistency of application of the ECNS framework.

2. 2018 European Electronic Communications Code (Connectivity Framework)

In 2018 the ECNS framework was replaced by the **European Electronic Communications Code (EECC)** which comprised the 2009 Framework, Access, Authorisation and Universal Service Directive. As Art. 3 EECC explicitly states "**connectivity**"[82] as an objective (besides the three objectives known from Art. 8 FD[83], see above), and also a number of additional remedies[84] to promote in particular connectivity[85] were newly included, it is also called "Connectivity Framework". The connectivity objective is described in more detail in the Commission's 2016 Communication "Connectivity for a Competitive Digital Single Market – Towards a European Gigabit Society"[86] that replaces the DAE targets[87] and states that "Gigabit connectivity is to be understood as cost-effective symmetrical Internet connectivity offering a downlink and an uplink of at least 1 Gbps".[88]

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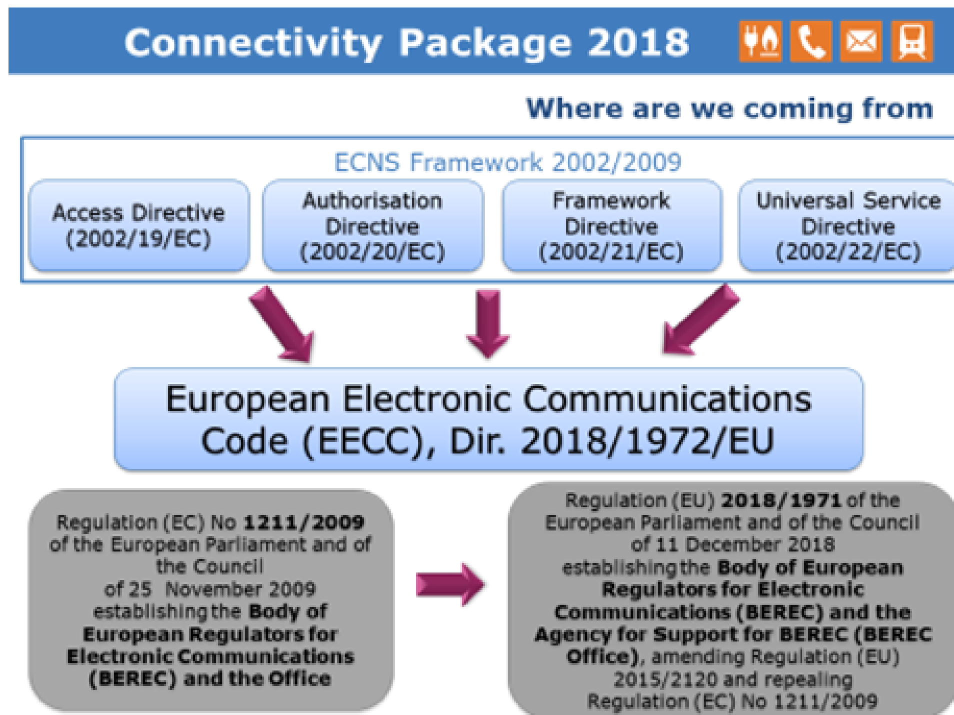
[82] Art. 3.2 a) „promote connectivity and access to, and take-up of, very high capacity networks, ….".
[83] Albeit they do not compare 1:1.
[84] See below for more details.
[85] Furthermore, other new remedies were introduced to take account of the changing market structure, in particular the fact that a new type of operators occurred more often – the wholesale-only operators, see further below.
[86] COM(2016)587_final, containing the EU 2025 Gigabit Society objectives, published on the same day as the Connectivity package (the legislative package including the proposal of the Code and the BEREC Regulation) on 14 Sept. 2016. The Commission also published a SWD(2016)300_final. https://digital-strategy.ec.europa.eu/en/library/communication-connectivity-competitive-digital-single-market-towards-european-gigabit-society.
[87] See above, the 2010 DAE contained the connectivity targets for 2020: universal availability of 30 Mbps lines and subscriptions at 100 Mbps by at least 50% of European households.
[88] COM(2016)587_final, footnote 19.

Besides the Code (Directive (EU) 2018/1972)[89] also the **BEREC Regulation** (EU) 2018/1971[90] was adopted repealing the BEREC Regulation (EC) No. 1211/2009. The succession from the ECNS framework to the Code is shown in the figure below.

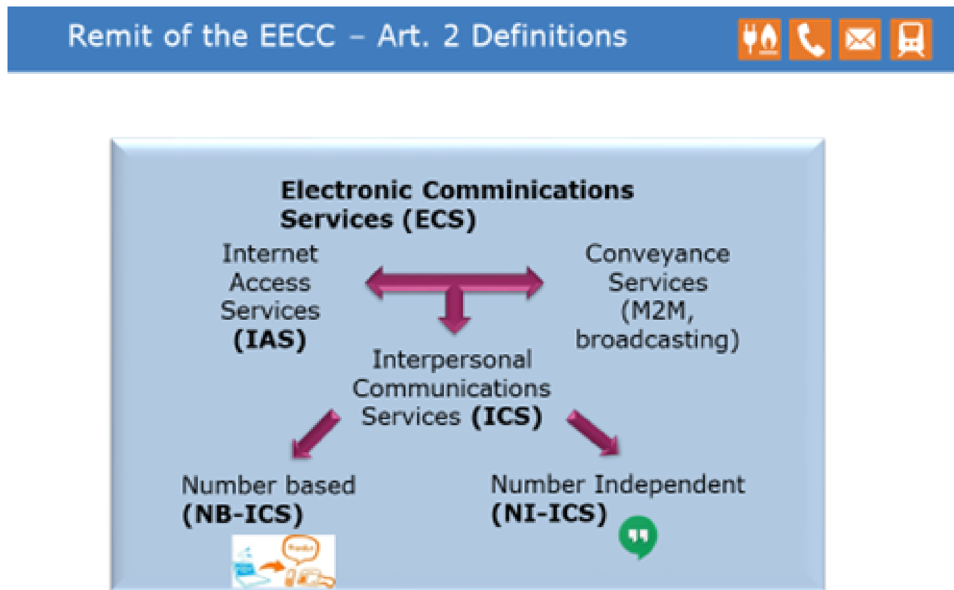
Figure 12 Moving from the ECNS Framework to the Code (2018)



The Code[91] puts emphasis on the objective of connectivity and also reflects important developments of electronic communications markets stemming from an ever faster digitalization by **adapting the definition** of electronic communications services (ECS) which now also include the so-called "number-independent interpersonal communications services (NI-ICS), which are services such as messenger services or e-mail that were not covered under the ECNS framework with its "traditional" understanding that an ECS requires the conveyance of a signal. As these new services (also called Over-the-top-1 services, OTT1) are more and more seen as substitutes by consumers (e.g. using a messenger service instead of sending an SMS), the definition had to be widened/expanded. The new "taxonomy" of ECS acc. to Art. 2 EECC is shown in the figure below.

[89] OJ L 321 of 17 Dec. 2018.
[90] Regulation establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009, OJ L 321 of 17 Dec. 2018.
[91] Which had to be transposed into national law by 20th December 2020.

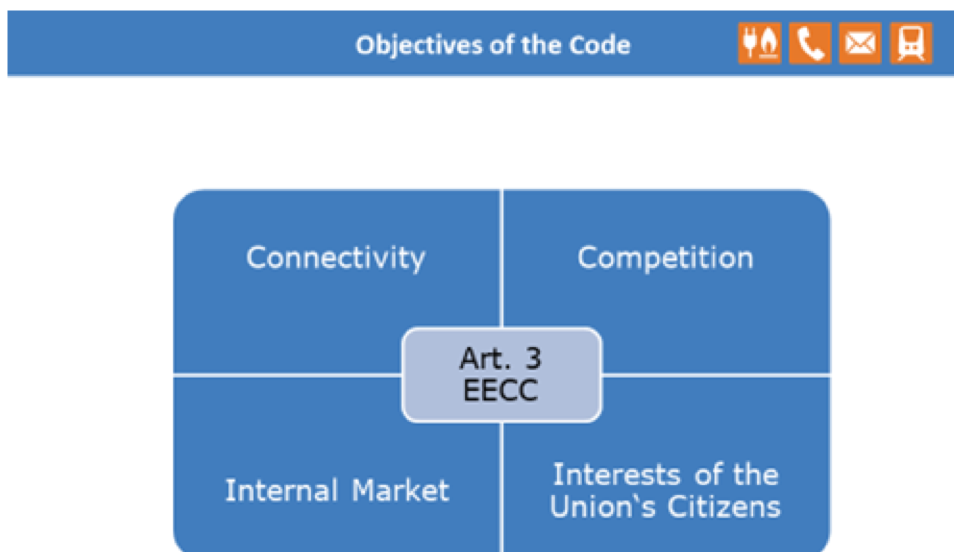
Figure 13 Adapting the definition of ECS in the Code



Thus, the Code has a **broader remit** than the ECNS due to changing boundaries of the electronic communications sector and now covers also "the new kids on the block".

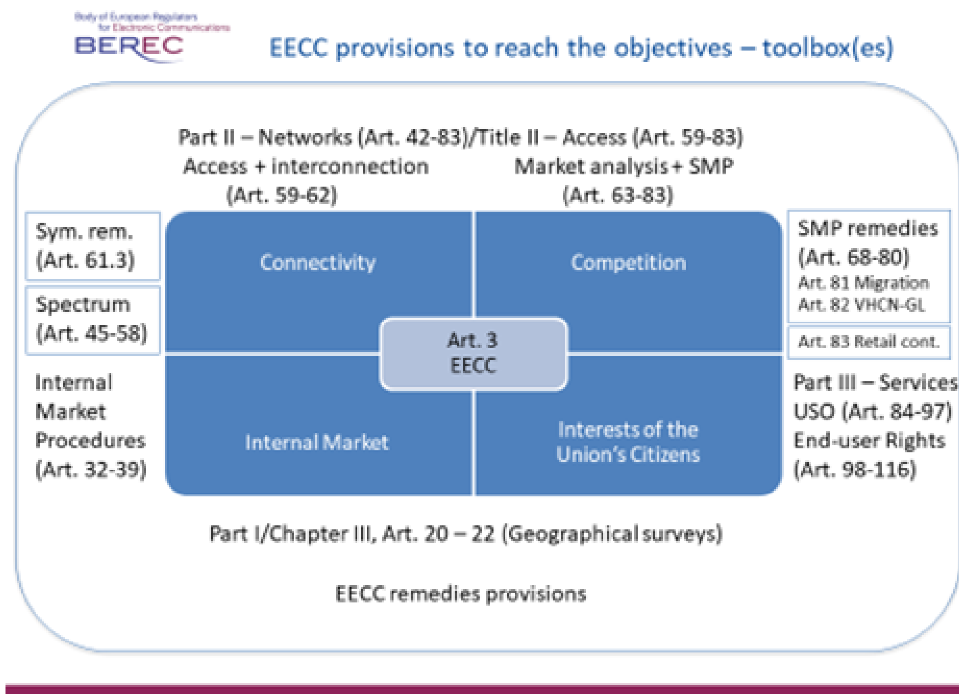
As briefly mentioned above the Code states in Art. 3 that the following four general **objectives** shall be pursued:

Figure 14 Objectives acc. to Art. 3 EECC



In order to enable NRAs to reach the objectives and in particular the objective of connectivity, they were equipped with an **enlarged toolbox of remedies** which includes new SMP remedies as well as symmetric remedies, i.e. remedies that apply regardless of SMP to all operators (no market analysis needed). The following figure provides an overview of all remedies (including spectrum and end-user related provisions).

Figure 15 Overview of remedies in the Code



For comparison reasons the following explanations will focus on the "market regulation remedies", which comprise both SMP and symmetric remedies.[92]

The "novelty" is the introduction of so-called **symmetric remedies** in Art. 61.3 EECC, i.e. NRAs "may impose obligations, upon reasonable request to grant access to wiring and cables and associated facilities inside buildings or up to the first concentration or distribution point as determined by the NRA, where that point is located outside the building on electronic communications providers or on the owners of such wiring and cables and associated facilities where those owners are not providers of electronic communications networks". Thus no market analysis is required and the access obligation may be imposed on any operator, even non-ECN operators. The idea behind this approach is that these elements are not replicable, but are needed for the provision of very high capacity connectivity services to end users and therefore should be made available to promote the roll out of very high capacity networks everywhere. Under certain circumstances, symmetric access obligations may acc. to Art. 61.3 sub-para (2) EECC on fair and reasonable terms even be imposed *beyond* the first

[92] To be noted that also the provisions regarding the universal service were updated to serve better the connectivity objective.

concentration or distribution point. Regarding the assessment of the extent of the extension, BEREC published guidelines[93] which have to be taken into utmost account by NRAs.[94]

The provisions regarding the **SMP regulation** can now be found in Art. 63, 64, 67 EECC (market definition and analysis) and for the SMP remedies in Art. 68 – Art. 74 EECC, as well as Art. 76 – 80 EECC which add some new SMP remedies.

Art. 63 EECC provides for the SMP definition, and Art. 64 for the market definition (incl. that the Commission shall review the Recommendation on relevant markets susceptible to ex ante regulation of 2014 (see above) by 21 December 2020 and regularly thereafter and identifying the list of relevant markets applying the **three criteria test** which is now also included in the Code (Art. 67.1 EECC), i.e. "upgraded" compared to up to now. Finally, Art. 67 EECC covers the market analysis procedure. The previous provisions of Art. 14 – 16 FD are by and large carried over (albeit not one by one), i.e. as previously the market definition and analysis stage is based on competition law principles as explained above in more detail. The review cycle was extended from three to five years to provide longer planning certainty to operators.

In the following figure the **updated Recommendation on relevant markets susceptible to ex ante regulation**[95] is shown in comparison to the 2014 Recommendation[96]. Observing overall trends in the Union[97] the Commission reduced the list of relevant markets to two[98]:

Market 1/2020 – Wholesale local access provided at a fixed location;

Market 2/2020 – Wholesale dedicated capacity.

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[93] BEREC Guidelines on the consistent application of Art. 61.3 EECC (BoR (20) 225).
[94] The Code foresees that BEREC publishes Guidelines on a number of most important regulatory tools which have to be taken into utmost account. For an overview of this new instrument see https://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/.
[95] Commission Recommendation (EU) 2020/2245, OJ L 439 of 18 Dec. 2020. The Commission also published on 18 Dec. 2020 an Explanatory Note, SWD(2020)337_final.
[96] Cf. also Figure 6 and 7 above.
[97] Cf. also WIK Report Future electronic communications product and service markets subject to ex ante regulation, study for the Commission, published March 2021, https://digital-strategy.ec.europa.eu/en/library/study-future-electronic-communications-product-and-service-markets-subject-ex-ante-regulation. The WIK Report also discussed a separate "physical infrastructure access (PIA) market which ultimately was not taken up by the Commission in the 2020 Recommendation.
[98] In its Opinion BEREC critizised the removal of Market 3b/2014 (Wholesale central access provided at a fixed location for mass market products) as premature given that the majority of NRAs still regulates this market, BEREC Opinion on the draft Recommendation on relevant markets, BoR (20) 174.

Figure 16 Comparison of the 2014 and the 2020 Rec. on relevant markets[99]

Review of the 2014 Rec. on relevant markets

MAIN LINES OF THE (DRAFT) 2020 RECOMMENDATION

- Removal of Termination Markets (M1-2/2014) in relation to the Eurorates Delegated Act. Guidance on application of other provisions in the EECC for non-price issues
- Market 3a: Wholesale Local Access (maintained in the list (now market 1/2020)
- Market 3b: Wholesale Central Access – removed based on technological trends
- Market 4: Wholesale High Quality Access - in the list: Changed to Dedicated Capacity (now market 2/2020)
- Market on Physical Infrastructure Access (PIA): Not in the list, but guidance provided

1 FTR
2 MTR
3a WLA
3b WCA
4 HQA
1 WLA
2 WDC
2007
2014

As the SMP Guidelines were revised only in 2018[100], they were not updated and the **2018 SMP Guidelines** remain applicable by NRAs.

As regards the **SMP remedies**, the principles according to which to choose the most appropriate (set of) remedies to solve the competition problem identified in the market analysis stay the same, Art. 68 EECC is with minor adaptions identical to Art. 8 AD. Of course, the reference to the objectives to be reached is now Art. 3 EECC instead of Art. 8 FD previously, which implies that the objective of connectivity has to be taken into account explicitly. The "classical" SMP remedies of Art. 9 – 13 AD were transferred to Art. 69 – 74 EECC with the following modifications:

Art. 69 Transparency obligation, no material change, but BEREC is tasked to publish "Guidelines on the minimum criteria for a reference offer"[101];

Art. 70 Non-discrimination obligation now foresees equivalence of input (EoI) as the default form whereas Art. 10 AD foresaw equivalence of output (EoO), which is a milder form of the non-discrimination obligation;

Art. 72 A "stand-alone" access to civil engineering infrastructure (CEI) obligation is introduced whereas previously the CEI access was generally imposed as an annex to the network access obligation of the relevant wholesale access market;

[99] Source: BEREC.
[100] See above.
[101] BoR (19) 238.

Art. 73 Obligations of access to, and use of specific network elements and associated facilities is similar to Art. 12 AD, but NRAs have to examine whether the imposition of an access obligation acc. to Art. 72 alone would be proportionate;

Art. 74 Includes the above mentioned provision of providing pricing flexibility in case an ERT is in place, i.e. to consider *not* imposing or maintaining [other, i.e. cost orientation] price control obligations acc. to Art. 74.

In particular the provision related to the ERT and abstaining from imposing/maintaining an obligation of cost orientation resembles the "forbearance" approach known from the USA telecommunications regulation. While there are safeguards built-in[102] and the access obligation is retained, the idea of "abstaining" from imposing or maintaining a price control obligation[103] on an SMP operator is not straightforward.

Similarly, the new SMP remedy of Art. 76 EECC (Regulatory treatment of new very high capacity network elements) introduces a new logic which does not follow the regulatory ratio applied so far, but rather uses the instrument of "commitments" known from general competition law in merger cases. Art. 76.2 EECC foresees that in case of **co-investment commitments** by the SMP operator for the deployment of new very high capacity networks and after a "market test" following the commitment procedure of Art. 79 EECC, NRAs shall make the commitments binding and "shall not impose any additional obligations pursuant to Art. 68". This indicates a shift in the importance placed on the objective of connectivity compared to the objective of promoting competition. This implicit weighting of the objectives creates a trade-off where there is none given that – as shown above – competition drives investment. Also for this provision BEREC published "Guidelines to foster the consistent application of conditions and criteria for assessing co-investments in new very high capacity network elements (Art. 76.1 and Annex IV EECC)"[104] to be taken into utmost account by NRAs.[105] With regard to the definition of very high capacity networks (VHCN) Art. 82 EECC tasked BEREC with the development of "Guidelines on Very High Capacity Networks"[106].

Art. 77 EECC transfers the ultima ratio obligation "functional separation" nearly without changes compared to Art. 13a AD. Regarding the "voluntary separation by a vertically integrated undertaking" in Art. 78 EECC more changes are included compared to Art. 13b AD.

Art. 80 EECC provides for a new tool for "**wholesale only undertakings**" taking account of a new type of operator which is active <u>only</u> on the wholesale level where therefore the set of remedies to be applied to this kind of operators (in case SMP is found) need to be different, namely lighter as the risk of discriminating a competitor on the retail market is by definition non-existent.

Finally, Art. 81 EECC contains a new provision relating to "migration from legacy infrastructure" which foresees that NRAs shall ensure a transparent process for the decommissioning or replacement of legacy infrastructure of an SMP operator.

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[102] Acc. to Art. 74.1 sub-para. (3) EECC these are a demonstrable retail price constraint and any obligation imposed in accordance with Ar. 69 – 73, in particular an ERT imposed in accordance with Art 70.

[103] In the sense of cost-orientation.

[104] BoR (20) 232.

[105] Again, the conditions and criteria are intended to provide sufficient safeguards for competition.

[106] BoR (20) 165.

Before all market regulation remedies of the EECC are shown in an overview table, Art. 75 EECC should be briefly mentioned. Art. 75 EECC foresees that termination rates (TR) are regulated uniformly across the EU as of 2021 with a delegated act (DA) of the Commission setting a single maximum Union-wide mobile voice termination rate and a single maximum Union-wide fixed voice termination rate ("Eurorates") and no longer by NRAs.[107] This clearly contradicts the principle of flexibility explained above and replaces termination rates set by NRAs by a single EU-wide rate following directly from a legislative act and is thus an anomaly[108] disregarding the benefits of the approach of tailoring remedies to the national market situations.

The following figure provides an overview table of all EECC market regulation remedies in comparison to the ECNS remedies. As explained above, the SMP remedies were not transferred one-by-one, but modified. Additionally, new SMP remedies were included and the toolbox enlarged with symmetric regulation.

Figure 17 Overview and comparison of remedies acc. to ECNS 2009 and EECC 2018

Overview + Comparison of remedies acc. to: ECNS 2009 – EECC 2018

Obligation	ECNS 2009	EECC 2018
SMP remedies regulation	Art. 8 AD	Art. 68 EECC
Transparency	Art. 9 AD	Art. 69 EECC
Non-discrimination	Art. 10 AD	Art. 70 EECC
Accounting separation	Art. 11 AD	Art. 71 EECC
Access (to CEI; networks)	Art. 12 AD	Art. 72-73 EECC
Price control + cost accounting	Art. 13 AD	Art. 74; Art. 75 TR
Functional separation	Art. 13a AD	Art. 77 EECC
Voluntary separation	Art. 13b AD	Art. 78 EECC
Retail regulatory controls	Art. 17 UD	Art. 83 EECC
Co-investment commitments		Art. 76, Art. 79
Wholesale-only undertakings		Art. 80 EECC
Migration f. legacy infrastruct.		Art. 81 EECC
Symmetric regulation		Art. 61.3 EECC

As briefly described already above the Code foresees as a new form of soft law that BEREC develops **guidelines** on the most relevant regulatory provisions to ensure a **consistent application** of the new tools, namely Art. 76 EECC and Art 61.3 EECC as well as for a number of other important provisions.[109] As Commission recommendations NRAs have to take BEREC guidelines into **utmost account**.

[107] The Commission Delegated Regulation (EU) 2021/654 setting a single maximum Union-wide mobile voice termination rate and a single maximum Union-wide fixed voice termination rate was published in 2021, OJ L 137 of 22 April 2021.
[108] I.e. falling back into ONP approach of rigid obligations imposed "automatically" (see above).
[109] For a list of all BEREC Guidelines see https://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/.

For Art. 76.2 EECC and Art. 61.3 sub-para (2) EECC also a new internal market procedure[110] is introduced in Art. 33.5 lit. c) EECC – the so-called **double lock veto** where the Commission in case BEREC shares its serious doubts can request the concerned NRA to withdraw the draft measure. In these two specific cases where NRAs have a wider margin of discretion given the different options of the remedy in question and where at the same time these decisions are likely to have a considerable effect on the internal market making a consistent application particularly relevant, the Commission exceptionally has a veto right also on remedies provided BEREC shares its serious doubts. The double lock veto aims at newly balancing the national and the EU level[111] for these two new remedies. Thus, it can be said that on the one side the toolbox was enlarged to allow NRAs to take account of the different developments in terms of connectivity and competition on national markets appropriately while at the same time their margin of discretion was (again) narrowed in two cases by the double lock veto in order to ensure that a consistent application of the Code by NRAs contributes to the development of the internal market.[112]

The following figure provides an overview of the existing **soft law** both from the Commission as well as from BEREC guiding NRAs' decision making. The Commission is working on a review of the two access recommendations, the 2010 NGA Recommendation and the 2013 NDCM Recommendation and announced to issue a new access recommendation referring to the Code rather than the previous framework in 2022.[113]

Figure 18 Overview of EECC remedies and related soft law acts

BEREC — EECC remedies and soft law acts

Obligation (Art. EECC)	Recommendation	BEREC-GL
SMP remedies regulation		
Transparency (Art. 69)		GL on minimum criteria f. RO
Non-discrimination (Art. 70)	NDCM Rec.	
Accounting separat. (Art. 71)		
Access (Art. 72-73)	NGA Rec.	
Price control + CA (Art. 74)	NDCM Rec. WACC Notice	WACC parameters Report
EU-wide TR (Art. 75)	DA on EU-wide TR	
Functional separation (Art. 77)		
Voluntary separation (Art. 78)		
Retail regulatory controls (Art. 83)		
Co-investment (Art. 76 / Art. 79)		GL on co-investment
Wholesale-only undertakings (Art. 80)		
Migration f. legacy infrastructure (Art. 81)	NGA Rec.	
Symmetric regulation (Art. 61.3)		GL on Art. 61.3

[110] The consolidation procedure can now be found in Art. 32, the co-regulation procedure in Art. 33 EECC, both have been updated, but – with the exception of the double lock veto – not changed substantially.
[111] For the regulatory balance between the national and the EU level see also Figure 5 above.
[112] Albeit it gives NRAs a saying as BEREC has to share the Commission's serious doubts, which adds a new dimension to the process.
[113] BEREC provided a response to the Commission's consultation, BoR (20) 169.

In 2019 the Commission issued the non-binding "Notice on the calculation of the cost of capital for legacy infrastructure in the context of the Commission's review of national notifications in the EU electronic communications sector[114] and the Commission Staff Working Document (SWD)[115] accompanying the WACC Notice which describes the methodologies in more detail. According to the so-called WACC Notice BEREC calculates the parameters of the WACC following the Notice as closely as possible and publishes each year a report with the results. The idea behind the WACC Notice and the BEREC WACC parameters Report[116] is "to ensure a consistent approach of NRAs thereby contributing to the development of the internal electronic communications market"[117].

3. Summary of the main elements of the 2002/2009 ECNS and the 2018 EECC framework for the electronic communications sector

In sections 1 and 2 of this chapter it was demonstrated that the main principles of the 2002/2009 ECNS and 2018 EECC framework:

- Technology neutrality;
- Competition law principles;
- Flexibility of NRAs to tailor remedies

And the overall regulatory market based approach:

- SMP regulation (definition of relevant markets susceptible to ex ante regulation, market analysis and finding of effective competition or of an SMP operator, flexibility of NRAs to tailor remedies to their national market situations to solve the competition problem identified based on the principles of proportionality, justified in the light of the objectives and based on the nature of the problem);
- Plus specific SMP remedies to promote connectivity in particular (such as co-investment commitments) added with the 2018 framework;
- Symmetric regulation added with the 2018 framework (imposing in particular cases obligations on all operators regardless of SMP) also to promote connectivity;
- Internal market procedures (consolidation, co-regulation, double lock veto) to ensure that a consistent application of the framework contributes to the internal market

Contributed to reaching the objectives:

- Promoting effective competition;
- Promoting efficient investment;
- Contributing to the development of the internal market;
- Promoting the interests of the EU citizens (benefits for consumers);

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[114]OJ 2019/C 375/01 of 6th Nov. 2019, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC1106(01)&from=EN – the Notice..

[115] SWD(2019) 397_final, https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=62834, the SWD.

[116] BEREC published the first WACC parameters Report in 2020 (BoR (20) 116) and the second in 2021 (BoR (21) 86).

[117] BEREC WACC parameters Report 2021, p. 2.

- Promoting connectivity (added explicitly in the 2018 framework)

And allowed to deal adequately with various factual developments:

- New technological developments (such as convergence, digitalization);
- New market players (incl. with new business models);
- Changing market boundaries;
- Changing market structures and
- Changing competitive landscapes and dynamics

Requiring swift reactions, i.e. timely and tailored regulatory intervention by NRAs that have the **flexibility** to choose the right set of remedies in the right moment and the right level of intervention. Overall, the pro-competitive regulatory approach proofed to work well in adapting regulation dynamically to a rapidly evolving environment. It requires an independent regulator that has the power to collect for monitoring purposes data across all markets of the sector as defined in the remit of the regulatory framework which should cover the whole sector (and not only parts of it).

After briefly outlining the evolution of the EU postal regulatory framework, the major developments reshaping the postal sector fundamentally will be described and the ensuing requirements for an overhaul of the postal regulatory framework presented in the next chapter.

Subsequently, it will be shown how the pro-competitive regulatory approach of the EU framework for electronic communications can be transferred to the postal sector framework and applied similarly in postal market regulation as the postal sector is now at a similar crossroad as the telecommunications sector was in 2002/2009 and 2018 with digitalization changing the postal sector dramatically.

III. Evolution of the EU postal regulatory framework and sector evolution

1. Assessment of the gradual opening of postal markets in the EU by the First (1997), Second (2002), and Third (2008) Postal Services Directive

The opening of the postal sector started with the Postal Services Directive 97/67/EC[118]. Unlike the telecommunications sector, the postal sector was not opened completely in 1998, but retained a so-called “reserved area” for some services, namely the standard letter, which was subsequently reduced in several steps. This happened firstly in 2002 with the Directive 2002/39/EC[119] and was completed with the Directive 2008/6/EC[120] which foresaw full market opening until 1st January 2011[121]. The justification for the reserved area was that this was the only way to ensure a sustainable **provision of the universal service**, which was (and still is)

[118] OJ L 15 of 21st Jan. 1998, Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service.
[119] OJ L 176 of 5th July 2002, Directive 2002/39/EC amending Directive 97/67/EC with regard to the further opening to competition of Community postal services.
[120] OJ L 52 of 27th Febr. 2008, Directive 2008/6/EC amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services.
[121] 11 Member States were granted the possibility to postpone the full market opening until 1st January 2013, Art. 3 of 2008/6/EC.

the main aim of the regulatory framework. Only the 2008 PSD recognized that a sustainable provision of the universal service can be secured *without* maintaining a reserved area.[122] Instead, the **completion of the internal market** for postal services *fully* open to competition came to the fore as the long period since (partial) market opening was considered sufficient for the universal service providers (USP) to prepare with restructuring and modernization measures for the introduction of effective competition.[123] It was considered that the growth potential of the completed internal market for postal services would ensure the efficient provision of the universal service.

With the internal market for postal services fully open to competition, the 2008 PSD also provided for more instruments to foster competition, namely that "transparent and non-discriminatory access conditions are available to the elements of the postal infrastructure or services provided within the scope of the universal service" (Art. 11a), i.e. introduced an access obligation.[124] From this, it follows that the addressee of such an obligation is by default the USP as he is the one operating the relevant postal infrastructure.[125] Also, in Art. 12 regarding the principles of tariff regulation for each service part of the universal service a new principle was added, namely that "prices shall be cost-oriented *and give incentives for an efficient universal service provision*"[126] and Art. 14 regarding cost accounting systems and separation was aligned to reflect the abolishment of the reserved area.

All these provisions however relate only to the universal service, i.e. the focus is very narrow and consequently the remit of NRA's powers is limited to predominantly regulating the universal service provision.[127] Overall, the focus of the postal regulatory framework is still placed on the sustainable provision of the universal service and as the wording of Recital 1 PSD shows "competition" and the "sustainable provision of the universal service" are seen as opposing key components that have to be "reconciled". In other words, the effect of competition on the sustainable provision of the universal service is considered to be negative ("cherry picking fear") whereas the positive effects of competition for the sector as a whole by bringing benefits to users via realizing efficiency gains and productivity growth are not sufficiently taken into account. Moreover, the distortive effect the universal service provision/financing can have on competition[128] is largely left out. In other words the "risks" of competition are

[122] Recital 11 – 13 PSD.
[123] Recitals 12 – 13 PSD.
[124] However, it is designed restrictively (compared e.g. to the Art 12 AD or Art, 72/73 EECC access obligation), and specific provisions regarding the access pricing are missing, see also below.
[125] I.e. the trigger is being the USP. Art. 11a PSD provides further that Member States can "adopt measures to ensure access to the postal network under transparent, proportional and non-discriminatory conditions" which is without (explicit) reference to the universal service, but it has to be stated that Member States did not or only hesitantly make use of the provisions and overall, the transposition of Art. 11a PSD is diverse. The possibility laid down in Art. 11 PSD of adopting "harmonization measures [acc. to Art. 47(2), 55 and 95 of the Treaty] to ensure that users and postal service provider(s) have access to the postal network under conditions which are transparent and non-discriminatory" which is also without reference to the universal service, has not been used by the EU legislator.
[126] Emphasis added.
[127] With a few exceptions.
[128] Due to cross-subsidization.

overestimated while the chances of competition are underestimated. The result of this misjudgment is effectively a regulatory gap[129] that leads to foregoing the potential of competitive markets, and underestimates (systematically) dynamic efficiency.[130]

In the end, gradual market opening and the regulatory gap slowed down the process considerably and hampered the development of an effectively competitive market for postal services.

It is a contradiction in terms to on the one side acknowledge economies of scale and scope for parts of the postal network, preventing or at least impeding market entry at national level, i.e. competition in this scenario is limited a priori to local markets (certain areas) while at the same time assuming on the other side nationwide competition will develop without promoting it.[131] In other words it is a "false negative"[132] that competition law alone will be enough in these circumstances. Rather on the contrary, the letter market[133] is susceptible to ex ante regulation as will be shown hereafter by applying the **three criteria test** (3CT, see above):

- High and non-transitory entry barriers over the time horizon considered;
- No tendency towards effective competition over the time horizon considered;
- Competition law alone is insufficient to adequately address market failures.

The fact that sunk costs are less compared to other network industries such as telecommunications, energy or railway that require significant investment to deploy physical network infrastructure that cannot be replicated economically, does not mean that there are no high and non-transitory entry barriers as e.g. the Recommendation (EU) 2020/2245 spells out in Recital 9 that these structural barriers to entry "may also be found, for instance, when the market is characterised by absolute cost advantages or substantial economies of scale and/or network effects, capacity constraints and/or high sunk costs".[134]

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[129] As described above, market opening requires both legal market opening (lifting exclusive rights) and *economic* regulation ensuring new entrants can effectively use the possibilities. Given the restrictively designed access obligation (Art. 11a) and the absence of specific access pricing provisions, the second part – economic regulation in the sense of pro-competitive regulation – is de jure (access pricing rules) and de facto missing.

[130] In fact the misjudgment leads indirectly to a prolongation of "monopoly regulation" as the focus on guaranteeing the sustainable provision of the universal service and considering that competition law alone would be sufficient provides the dominant designated universal service provider (USP) with too much room for anticompetitive behavior (such as e.g. a margin squeeze), i.e. to de facto foreclose the market just opened or to leverage its dominance to other areas limiting, hampering or even preventing new entrants to compete on an equal footing at national level.

[131] Cf. e.g. *Geradin*, Is mandatory access to the postal network desirable and if so at what terms?, European Competition Journal, Vol. 11:2-3 (2015), pp. 520 – 556; or *De Bijl/Van Damme/Larouche*, Light is Right: Competition and Access Regulation in an Open Postal Sector, Tilburg University 2005.

[132] Not regulating where regulation is required.

[133] as the relevant market corresponding to the universal service (leaving out the universal service parcel [postal package up to 10 kg, Art. 3.4, second indent PSD] as belonging to a separate relevant market); for a more in-depth definition of the relevant letter market(s) see MCA (MT), Market Analysis of the provision of postal services in Malta, Definition, assessment of SMP & regulation of relevant markets, Ref. MCA-POL/kc/19-3703 (2019), available at https://www.mca.org.mt/sites/default/files/mca_decision_postal%20markets%20in%20Malta_18%2011%202019.pdf; and previously Market Review for the Postal Sector: Letter Mail Markets, Ref. MCA/D/13-1783 (2013), available at https://www.mca.org.mt/sites/default/files/decisions/131030%20Postal%20Market%20Review%20-%20Letter%20Mail%20Markets_%20Final%20Decision.pdf.

[134] In other words the first criterion of the 3CT can be interpreted as setting a lower threshold for regulatory intervention as it does not require the existence of an "*essential facility*" to be met. Cf. for the application of the 3CT also SWD(2020)337, Section 2.2, pp. 11.

Generally, the existence of economies of scale and scope is acknowledged for parts of the postal network – at least for the delivery network and thus constitutes a structural barrier.[135] It can therefore be left open whether the focus on the provision of the universal service and the priority given to ensuring sustainability by at the same time leaving out the distortive effects on competition[136], amounts to a legal or regulatory barrier preventing or impeding market entry. Having demonstrated the existence of a structural (economic) barrier, it can be concluded that the first criterion of the 3CT is met.

Given that the existence of these economies of scale and scope prevent that competitors that enter will be able to gain sufficient scale to compete on an end-to-end basis nationwide[137], it follows that there is no tendency towards effective competition[138], i.e. the second criterion is also met.

The starting point to assess the third criteria – competition law is insufficient to adequately address market failures – is that the market was left to competition law governance, which was considered sufficient.[139] However, this was proven to be insufficient by the evidence that competitors rarely have a market share higher than 10% - 15%[140] in 2019 (after nearly 10 years of full market opening) which is a clear indication that competition law alone is not sufficient to limit effectively the room for anticompetitive behavior left to the USP in the current set-up. Thus, the third criterion is also met.

Given that the 3CT has been passed, it can be concluded that the letter market is susceptible to ex ante regulation.[141] This implies that competition on a nationwide scale will not develop without sector specific (economic) regulation in the sense of pro-competitive regulation as

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[135] Cf. e.g. *De Bijl/Van Damme/Larouche*, Light is Right: Competition and Access Regulation in an Open Postal Sector, Tilburg University 2005, p. 4 – albeit with a different conclusion.
[136] As explained above.
[137] Only in densely populated countries such as The Netherlands full-scale entry might exceptionally be possible (still involving considerable sunk costs) as the example of *Sandd* shows (see also below).
[138] Assuming as is the case for the universal service that the market is a national market.
[139] In light of the absence of pro-competitive regulation, competition law was not only used as a safety net.
[140] Cf. e.g. ERGP Report on Core Indicators for Monitoring the European Postal Market, ERGP PL II (20) 23 (2020), pp. 37 (Fig. 20 + 22). This is true even for markets where regulators have more powers with regard to mandating access as due to the restrictive design the potential for competition could only be evoked to a limited extent, i.e. was inadequate to fulfill the purpose of promoting competition. For an excellent overview of the state of competition and access regulation see also: ERGP Report on recommendations and best practices in regulation for access to the postal network of the incumbent operator (in terms of price and quality of service), ERGP (17) 38 (2017); ERGP Report on the development of end-to-end competition and access regulation across the EU Member States in the light of recent jurisprudence concerning discount regimes in the postal sector, ERGP (16) 41 (2016); ERGP Report on end-to-end competition and access in European postal markets, ERGP (13) 38rev1 (2014); and ERGP Report on access to the postal network and elements of postal infrastructure, ERGP (12) 36 (2012); see also more recently ERGP Report on the application in access regulation of the principles of transparency, non-discrimination and proportionality as incorporated in the PSD, ERGP PL (18) 27 (2018).
[141] ACM (NL) had carried out the 3CT in 2017 for the Dutch market for (the transport of) 24-hour bulk mail and also concluded that the market was susceptible to ex ante regulation and as a result of the market analysis designated PostNL as dominant (SMP) operator. ACM imposed non-discriminatory access at cost oriented prices to PostNL's nationwide postal network (needed for the transport/delivery of the bulk mail) for competitors. The market analysis incl. access, tariff, and transparency obligations decision (Market analysis 24-hour business mail decision, Ref. ACM/TVP/2017/204337_OV of 27 July 2017) was annulled by the Court in September 2018, but the access obligation was later maintained as part of the license for the entity resulting from the merger of PostNL with its biggest competitor *Sandd* (March 2020). Cf. also ERGP (17) 38 (2017).

described above. This requires the introduction of **effective regulatory tools**, in particular the power for regulators to impose ex ante an access obligation at cost-oriented prices on the dominant operator[142] specifically addressed to competitors[143] to the dominant operator's network or parts thereof as without having access to the *nationwide* postal network, new entrants will not be able to compete on an equal footing at *national* level (on downstream markets). In this way the access obligation is (re)configured and strengthened to serve effectively the promotion of competition.[144] The important point is that competition at the national level will thus be sustained by a mix of access-based[145] and end-to-end competition[146] including hybrid forms to gain scale, i.e. competitors using access (incidental services or work-sharing arrangements) complementarily to their own network as well as competitors cooperating among each other to ensure nationwide coverage.[147]

It could be demonstrated with the generic analysis above that the concept of SMP regulation stemming from the EU electronic communications framework is applicable to the postal sector.[148] Thus, instead of linking regulation to the USP/provision of the universal service, it should be linked to a finding of SMP (as the trigger for ex ante regulation). To overcome the limitations of the current postal services framework the missing elements of the **pro-competitive regulatory approach** would need to be introduced covering the postal sector as a whole[149] in the amended (better recast) directive:

- A list of relevant markets susceptible to ex ante regulation, i.e. the Commission would define and identify the relevant markets susceptible to ex ante regulation by applying forward-looking the 3CT which regulators need to review regularly;

[142] In the current terminology the USP, but in case the access obligation is no longer restricted to the universal service and its provider, the imposition will have to be based on a finding of dominance (SMP using the concept of the electronic communications framework) following a market analysis based on competition law principles of the relevant market susceptible to ex ante regulation (identified with the 3CT) as described in detail above (and a market share of ar. 85% is well beyond any threshold of dominance). In case it is considered preferable to mandate access directly by law (comparable to the rigid access obligation of the ONP framework described above), the obligation also has to be stringently designed as a regulatory tool to effectively promote competition. Also, an explicit access pricing rule has to be added.
[143] I.e. a separate wholesale access (in its own right) with a clearer distinction between access for competitors and for large business customers (as ACM did in the 2017 Decision on 24-hour business mail, Ref. ACM/TVP/2017/204337_OV), and not linked/restricted to the universal service only as is now the case in Art. 11a PSD.
[144] Fulfilling its genuine purpose.
[145] By consolidators.
[146] Competitors with their own (regional) networks.
[147] According to the concept of the ladder of investment this requires that all access points are properly priced, i.e. that the access price is set in line with the cost of efficient service provision (and no margin squeeze exists between the rungs) which also ensures an undistorted price signal for the make-or-buy decision, so that all efficient business models can compete in the market, see the statements on the concept above.
[148] Cf. also *Parcu/Silvestri*, Lessons from the Postal Sector to Telecommunications and Vice Versa, in The Changing Postal and Delivery Sector – Towards a Renaissance (2017), Editors: *Crew/Parcu/Brennan*, pp. 17 – 33 and ERGP (17) 38, p. 67.
[149] As there can be only one regulatory regime for the sector as a whole, all postal items must fall under the same regulatory regime. Even if not all postal markets were identified as susceptible to ex ante regulation in the first place, the regulator needs to have the "power of initiative", i.e. the power (to decide) to carry out a market analysis, and be equipped with effective regulatory tools to intervene ex ante in case he finds the relevant market to not be effectively competitive (instead of "waiting" for a competition law intervention occurring only ex post which comes too late) spanning across the sector. This is particularly relevant from a forward-looking perspective (see further below).

- The market analysis procedure to determine whether a relevant market is effectively competitive or whether an operator has SMP;
- Effective regulatory tools to promote competition, in particular an access obligation and explicit access pricing rules which also implies that
- Regulators have the power to impose and the flexibility to tailor these regulatory obligations ("remedies") effectively to solve the competition problem identified in the market analysis following the principles of proportionality and predictability;
- Finally, for regulators to be able to intervene ex ante requires that they have the power to collect data across all relevant markets[150] to monitor the development of the markets and of competition (or risk of market failure which is to be prevented ex ante).

Access-based competition is particularly relevant for declining markets. But in the future it can also be relevant for packets (up to 2 kg) [151] if they "are considered for regulatory purposes as bulk mail"[152] and would – following this logic – be seen as part of the letter market[153], even though they are used more and more in e-commerce for sending small items. If included in a wider letter market, small packets can be relevant for a stable[154] market where competition can be fostered with a particular access (only) for consolidators to this market (segment). This "dual use"[155] at (and across) the intersection of the letter and the parcel market also shows the tendency caused by **e-commerce** of blurring market boundaries – within the postal sector[156] as well as with other sectors such as communications and logistics.[157]

2. Major drivers of change in the sector and impact on postal markets

In the following section the main factors (trends) driving the fundamental change of the postal sector will be briefly described and their impact on the sector explained. These are:

- Digitalization, leading to:
- E-substitution (decline of the letter market);
- E-commerce (growth of the parcel market);
- Platformisation (reshaping markets, new players / new business models);
- Changing users' needs (change from a sender to a receiver oriented model).

In the next step the regulatory implications of these changes will be assessed. The final step is to present a future-proof regulatory solution by matching the regulatory requirements of the

[150] Incl. adjacent markets (see below).
[151] The next category being parcels (up to 20 kg) and express packages, cf. *Gori/Silvestri*, E-Commerce of Goods: Testing the European Single Market, in The Contribution of the Postal and Delivery Sector – Between E-Commerce and E-Substitution (2018), Editors: *Parcu/Brennan/Glass*, pp. 129 – 143.
[152] *Gori/Silvestri*, op. cit., p. 134.
[153] The current practice regarding the categorization of packets varies across Member States.
[154] Compensating partially the decline in letter volumes/revenues due to e-substitution.
[155] As illustrated by terms such as „letter parcel".
[156] Which implies that letter and parcel markets cannot be seen in isolation.
[157] It further indicates that the postal definitions need to be updated to take into account these developments; see also below.

reshaped postal sector with the conclusions drawn from the analysis of the applicability of the SMP regime to the traditional postal sector[158].

i) Digitalization

Digitalization is changing substantially the value chains and the way services are produced in all sectors.[159] The use of digital technology and software (algorithms, data) driven operational processes allows more flexible processes as they can be split into several small parts along the value chain offering possibilities for providers with data driven business models optimizing a specific part which is coupled with efficiency gains reducing costs (specialization). At the same time digitalization allows more (direct) interaction between the providers and users at various levels of the value chain translating into transaction cost savings (intermediation). Generally, it can be said that digitalized processes imply more cross sectoral interaction, i.e. low entry barriers lead to market entry of new players from other sectors specialized in the provision of the particular part of the value chain and innovative business models develop. This implies blurring market boundaries and rapidly changing market dynamics. Depending on the degree to which the "traditional" way of providing a service or product will be superseded by digital provision leading to a new composition in terms of traditional and digital elements, the sector will be more or less transformed.

Digitalization of the postal sector can be broken down into to two major trends – e-substitution and e-commerce.

ii) E-substitution

E-substitution refers to the fact that users are more and more replacing letter communications with e-mails or other means of electronic communications. This leads to an appreciable (in some countries drastic) decline in letter volumes and also in revenues.[160] Thus the letter market is declining since several years and this trend is likely to continue in the foreseeable future. In some instances the arrival of "hybrid" products such as the e-letter combining traditional letters with features of electronic mail can be observed which often comes along with market entry from providers of the electronic communications sector.

iii) E-commerce

Whereas e-substitution has a negative effect on the postal sector, e-commerce has a positive effect as more and more users order goods online[161] which have to be delivered physically. This leads to a remarkable growth of parcel volumes and revenues.[162] Thus the parcel market is growing since several years and this trend is likely to continue in the foreseeable future. Further, insofar as letter products are used for sending small items[163] instead of correspondence, the boundary between letter and parcel markets is blurring as the two are com-

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158 See next chapter.
159 Cf. BNetzA Report Digital transformation in the network sectors – Recent developments and regulatory challenges, Summary (2017), available at https://www.bundesnetzagentur.de/SharedDocs/Downloads/EN/BNetzA/PressSection/ReportsPublications/2017/DigitalTtransformationNetworkSectors.pdf?__blob=publicationFile&v=2.
160 Cf. e.g. ERGP Report on Core Indicators for Monitoring the European Postal Market, ERGP PL II (20) 23 (2020), pp. 41 (Fig. 24 + 35), the decrease in revenues is less marked.
161 And during the COVID-19 pandemic, the trend was reinforced further.
162 Cf. op. cit. ERGP PL II (20) 23 (2020), pp. 41 (Fig. 24 + 35).
163 See above.

ing closer to each other. Another important trend is that e-commerce being more cross-border requires more cross-border parcel delivery services.[164] Finally, the development of e-commerce is closely related to the platformisation.

iv) Platformisation

Platformisation describes the data driven business model of setting-up electronic market-places "bringing together demand and supply in e-commerce."[165] Platformisation thus changes substantially the relations between market participants both on the demand and supply side as well as among suppliers and with providers of delivery services. Markets are reshaped completely and also new players such as e-retailers enter the market. Originally, the online platforms[166] started as "simple match-making intermediaries", but are integrating vertically into full service providers including offering delivery themselves (instead of via a postal operator), i.e. moving (extending) into the "traditional" postal area.[167] Hence, e-commerce provides chances for postal providers (increase in parcel volumes/revenues) but also challenges when online platforms enter into the postal area by offering delivery services.

v) Changing users' behavior

As indicated above digitalization changes the behavior and preferences of users, namely they substitute letters by e-mails sending less letters and order more goods online receiving more parcels. I.e. within the postal sector a shift from sending communication/correspondence to receiving goods/parcels is observed or in other words a change from a sender-oriented to a more receiver-oriented model takes place. This does not only change the position of users in the postal markets, but also requires looking at the universal service which should correspond to users' needs, i.e. when their needs change, the universal service needs to change as well, i.e. be adapted accordingly.

vi) Cumulative impact

The following diagrams display in a stylized manner[168] the drivers of change and the cumulative impact on the postal sector to show its reshaping.

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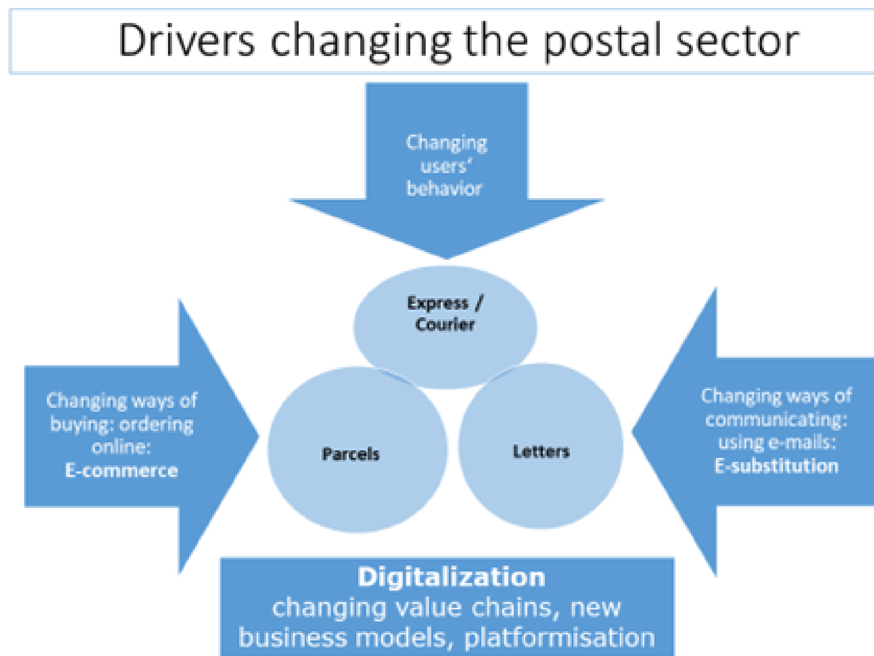
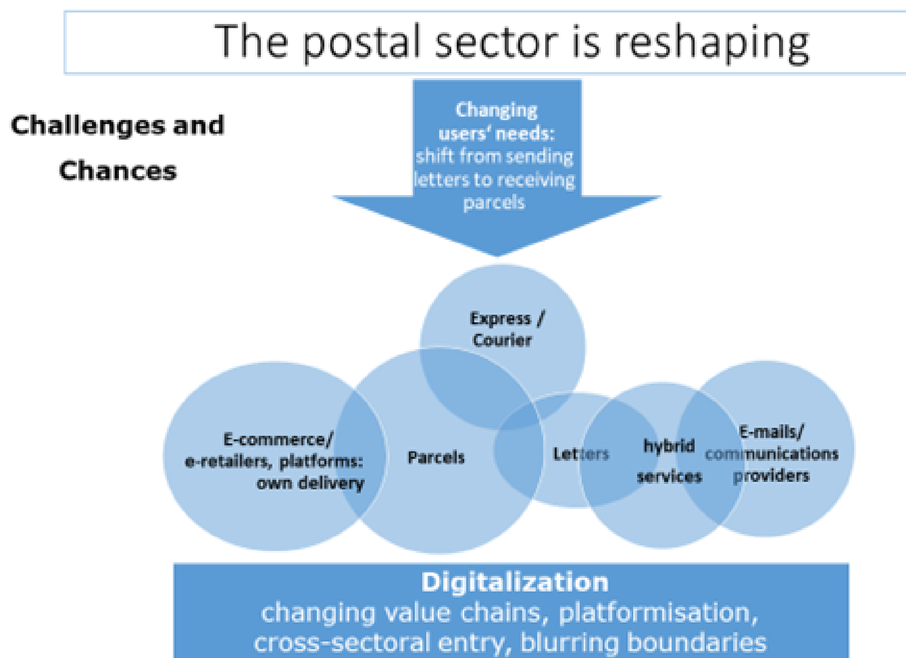
[164] This trend is taken up with the definition of an "e-commerce parcel" (up to 31.5 kg) in the Cross Border Parcel Delivery Services Regulation (EU) 2018/644 sitting along the definitions of the PSD. Generally the Cross Border Parcel Delivery Services Regulation aims at contributing to the development of cross-border e-commerce by inter alia foreseeing a price comparison overview for better transparency on cross-border parcel prices to consumers and small enterprises; also the market monitoring of NRAs is broadened taking account of new developments; ERGP is regularly compiling reports, see lately ERGP Report on the evaluation of cross-border parcel delivery services, ERGP PL II (20) 24 (2020; on the cross-border nature see also WIK Report Development of Cross-border E-commerce through Parcel Delivery, study for the European Commission (2019) and below.
[165] ERGP Response to the Public Consultation on the PSD Evaluation, ERGP PL (20) 27 (2020), p. 3.
[166] Sometimes also referred to us „gatekeepers" (see below Ch. V).
[167] Cf. Op. cit. ERGP PL (20) 27, p. 3 and ERGP Response to the Digital Services Act (DSA) Public consultation, ERGP (20) 16 (2020), p. 2.
[168] Looking purely at the economic effects derived from the analysis made.

Figure 19 Drivers changing the postal sector



Source: Author

Figure 20 Cumulative impact on the postal sector



Source: Author

3. Assessment of regulatory implications and conclusions for a future-proof regulatory solution for the postal sector

In this section, the regulatory implications of the main changes and their impact on the postal sector will be analyzed and conclusions for a future-proof regulatory solution drawn. The assessment relies on several ERGP documents, mainly the

- ERGP Response to the Public Consultation on the PSD Evaluation[169];
- ERGP Response to the Digital Services Act (DSA) Public consultation[170];
- ERGP Report on Postal Definitions[171];
- ERGP Report on Key Consumer Issues[172];
- ERGP Opinion on the review of the regulatory framework for postal services[173].

As the definitions in Art. 2 PSD do not reflect the fundamental changes the postal sector is undergoing, the **definitions** need to be **updated** taking into account that digitalization and technical progress transformed the way postal services are produced.[174] Therefore, ERGP considers that "any postal service provision needs to include processing physical items with the objective of their delivery at a specified address or location"[175], i.e. a postal service is characterized by entailing "at least a physical component"[176] thus distinguishing postal services from digital services produced entirely digitally.[177]

Furthermore, the definition of a "postal parcel" needs to be updated to reflect its importance for e-commerce, i.e. the relevance stems from the commercial rather than the universal service aspect which now determines the regulatory tools as explained above. Given the cross-border nature of e-commerce, the definitions in an amended directive and the 2018 Cross-border Parcel Delivery Services Regulation[178] need to be fully aligned.

The update of the postal definitions is incomplete without **clearly defining** the **scope** of the **postal sector** as due to digitalization and e-commerce causing more interaction with other sectors and cross sectoral entry, the scope of the postal sector has to be clearly delineated from other sectors to ensure that all providers of postal services (as updated) are covered, e.g. also platforms providing delivery services and are subject to the same regulatory regime as otherwise the level playing field between the different market participants will be distorted hampering fair competition in the postal sector. The scope of the sector also determines the regulatory responsibility which has to cover the sector as a whole (and not only part of it), as otherwise the regulator would not be able to react to blurring market boundaries within the sector and across sectors. Insofar as markets and/or sectors are converging, regulatory frameworks of the different sectors must be consistent with each other.

[169] ERGP PL (20) 27 (2020).
[170] ERGP (20) 16 (2020).
[171] ERGP PL II (20) 7 (2020).
[172] ERGP PL II (20) 8 (2020.
[173] ERGP PL I (19) 12 (2019).
[174] See above for a reference the adaption of the definition of "electronic communications services" in Art. 2 EECC reflecting the effects of digitalization.
[175] ERGP PL I (19) 12 and ERGP (20) 16, p. 3.
[176] ERGP PL II (20) 7, p. 26.
[177] Cf. also ERGP PL (20) 27 and more in detail ERGP PL II (20) 7.
[178] Art. 11 of Regulation (EU) 2018/644 foresees an evaluation report by 23 May 2020, but the work has been delayed by the COVID-19 pandemic. ERGP has published its Report on ERGP Report on the evaluation of cross-border parcel delivery services, ERGP PL II (20) 24 (2020.

As outlined above platformisation reshapes the postal markets by altering the relations between market participants and providing for more (direct) interactions between and among them (intermediation). This involves **rapidly changing market structures** and more dynamic markets. In order to be able to intervene timely and flexibly in case of actual or potential market failures, regulators need to have the powers to carry out an analysis of all relevant markets of the postal sector to prevent market failures as much as possible and steer the market towards a competitive outcome.

To achieve this **ERGP**[179] considers a **greenfield approach** is needed and advocates a **reorientation** moving from the static universal service focused approach to **pro-competitive regulation** covering a clearly defined postal sector as a whole from a forward-looking holistic perspective. This requires powers to carry out a **market analysis**. It further requires powers to intervene ex ante by imposing **effective regulatory obligations** by choosing from a toolbox[180] the most appropriate and proportionate (set of) remedies for regulators enabling them to deal adequately with the challenges of rapidly changing markets in a flexible and timely manner.[181] To complete the picture, regulators must have **data collection** and **market monitoring** powers across all markets of the clearly defined postal sector incl. adjacent.

The last but certainly not least element of the reorientation is the **modernization** of the **universal service**, i.e. to bring it in line with the changing users' needs as the universal service should correspond to the needs of users and if these needs change, the universal service must be adapted accordingly.[182] This mainly implies taking into account the shift away from sending postal items of communication/correspondence to receiving goods/parcels. It is important to point out that the pro-competitive approach and the universal service complement each other, i.e. both – effective competition and a sustainable universal service adapted to the needs of users – are delivering benefits (value) to users and should therefore not be considered (implicitly) as opposing each other as is currently the case.[183] Besides adapting the universal service, it is also worth stating that **consumer protection** in general needs to reflect the evolution from a sender-oriented to a more **receiver-oriented model** taking account of the "triangular nature of delivery services in e-commerce transactions (e-retailer, postal operator, e-buyer)".[184]

In summary ERGP advocates a reorientation from the universal service centric approach towards **pro-competitive regulation**[185] to deal adequately with the changes of and resulting

[179] As said ERGP is an advisory group to the European Commission and for cooperation among European postal regulators in order to ensure a consistent application of the postal framework thereby contributing to the development of the internal market for postal services.
[180] Comprising the transparency, non-discrimination, accounting separation, access, and price control and cost accounting obligations described above for the electronic communications framework.
[181] Cf. ERGP PL I (19) 12 and ERGP PL (20) 27.
[182] This is built in already in Art. 5.1, fifth indent PSD which says "it [the US] shall evolve in response to the technical, economic and social environment and to the needs of users", but in practice often not operationalized.
[183] See above and ERGP PL (20) 27. Thus, the objectives of promoting effective competition and maintaining a sustainable provision of the universal service are given the same weight instead of the hierarchy built in the current framework which values the sustainable provision of the universal service over the promotion of competition.
[184] ERGP Report on the contractual situation of consumers of postal services, ERGP PL I (21) 10 which is publicly consulted until 1st Oct. 2021, available at https://ec.europa.eu/docsroom/documents/46052; cf. also ERGP PL II (20) 8.
[185] Cf. ERGP PL (20) 27, p. 9.

chances[186] as well as challenges for the postal sector described above, among other things the shift away from delivering postal items of communication/correspondence to delivering goods/parcels. ERGP considers sector specific regulation of a clearly defined postal sector is still needed, but proposes a modern future-proof flexible concept as explained in detail above:

- Updated (and clarified) postal definitions (to take account of the changes in the way the postal services are provided and used);
- Defining clearly the scope of the postal sector given the changes (blurring market boundaries) and regulatory responsibility for the whole sector (not only part of it);
- Pro-competitive regulation (react swiftly in case of actual or potential market failures; powers to intervene ex ante);
- Data collection and market monitoring powers across all postal markets (incl. adjacent);
- Modernize the universal service and adapt to changing needs of users.

The following table summarizes the assessment and conclusions for future postal sector regulation required to deal effectively with the more dynamic markets of a reshaped postal sector.

[186] For competition.

Table 1 Summary of assessment and conclusions for future postal sector regulation[187]

Main Drivers	Impact on the sector/markets	Regulatory implications	Regulatory solution
Digitalization, leading to:	Twofold:	Updated (and clarified) **postal definitions** (to take account of the changes in the way the postal services are provided and used)	**Pro-competitive regulation** (react swiftly in case of actual or potential market failures)
E-substitution	Decline of the letter market		
E-commerce	Growth of the parcel market		Powers to intervene ex ante
Platformisation	Reshaping markets, new players / new business models Blurring market boundaries	Defining clearly the **scope** of the postal sector to catch developments + same regulatory regime for the whole sector	Regulatory responsibility for the whole sector (not only part of it)
	Rapidly changing markets	Data collection and market monitoring across all postal markets (incl. adjacent)	Powers for data collection and market monitor
Changing users' needs: change from a sender to a receiver oriented model	Shift from sending correspondence to receiving goods/parcels	Universal service to be adapted to correspond to changing needs of users	Modernized universal service complementing pro-competitive regulation

IV. Matching the requirements of a future-proof postal framework with the insights from the implementation of the framework for electronic communications

In the previous chapter the necessity for the postal sector of moving towards pro-competitive regulation given that

- markets are more dynamic (requiring timely intervention with tailored remedies) and
- converging (blurring boundaries, e.g. within the postal sector between letter and parcel markets [small items] and cross-sectoral [communications and logistics]),
- changing market structures (due to platformisation, online platforms penetrating the postal area)

[187] The table does not reflect that the different drivers and the implications interact with each other and that each driver has several effects.

has been established. In addition, the applicability[188] and suitability[189] of the SMP regime of the electronic communications sector[190] to and for the postal sector had been demonstrated. Consequently, the conclusion to be drawn is that both **match**, i.e. the pro-competitive regulatory concept of the SMP regulation constitutes the reference model for a future-proof postal framework encompassing the reshaped sector as a whole. It follows that in order to ensure chances for competition can[191] be seized and challenges of more dynamic markets can be addressed adequately, the **pro-competitive approach**[192] complemented by a **modernized universal service** corresponding to users' needs is considered to be the most appropriate regulatory solution for a future-proof postal framework.[193] As outlined above this requires strengthening and completing the powers[194] of regulators which need to be **independent** to implement effectively sector specific regulation. Moreover, given the interaction with other sectors (namely communications and logistics) the regulatory frameworks must be **consistent** with each other to ensure a level playing field for all market participants and avoid "regulatory arbitrage".

In light of the trends described above the letter market can forward-looking not be seen in isolation, i.e. without the growing links to the parcel market. Given further that it was concluded that the letter market is susceptible to ex ante regulation[195] and now moving closer to the parcel market which itself is evolving constantly, it follows from a holistic forward-looking perspective that the postal sector as a whole will fall under the same (stricter) regulatory regime, i.e. pro-competitive regulation covers all postal items. Thus, the chances of more competitive markets are realized *throughout* the postal sector and not foregone as was[196] the case in the past, since pro-competitive regulation can prevent leverage of market power by the dominant operator to more competitive markets[197] and ensure on the other hand that the dynamic of more competitive markets can spill over or be spread to less competitive markets. This is achieved by effective ex ante intervention with tailored remedies chosen from a toolbox of stringently designed regulatory obligations such as e.g. an access obligation for consolidators to promote competition.

[188] Exemplified for the letter market (3CT, see above), but relevant in particular forward-looking for the whole sector given the link between letter and parcel markets which is going to get stronger in the future due to the closer interaction between both.
[189] Since its components fulfill the requirements identified for the regulation of a reshaped postal sector.
[190] The framework for the electronic communications sector is explained in depth in Chapter II.
[191] And will.
[192] As described.
[193] This is without prejudice to the application of general competition law as a safety net.
[194] Incl. data collection and market monitoring powers.
[195] Having passed the 3CT, see generic analysis above.
[196] And still is.
[197] By effectively limiting the room for anticompetitive behavior.

V. Overview of the DMA and DSA proposals and possible interaction with a PSD review

On 15th December 2020 the European Commission published its two proposals[198] related to digital markets and digital services:

- the Digital Markets Act (DMA)[199];
- the Digital Services Act (DSA)[200].

The **DMA proposal** addresses problematic behavior of "gatekeepers", i.e. very large digital platforms[201] with the "ability to leverage data across markets" and aims at ensuring the "contestability" and fairness of digital markets. It introduces **ex ante regulation** as the overwhelming view of academics, policy makers, public bodies, stakeholders and the European Commission is that competition law intervention comes too late (ex post) to effectively address anticompetitive behavior.

It applies an **asymmetric approach** as only gatekeepers with more than 45 million users[202] and control of gateways for business users to reach their customers"[203] are subject to ex ante regulation. These so called core platform services (CPS) are e.g. search engines (e.g. Google), app stores (e.g. Apple), social media or social networking sites (e.g. Facebook), operating systems, online intermediation services, and e-commerce platforms (e.g. Amazon). The obligations are imposed directly by law[204] in the form of a list of "do's" and "don'ts"[205]. The DMA proposal foresees that the compliance with the obligations is monitored and enforced by the European Commission.

The **DSA proposal** addresses several areas of digital services, which have developed considerably since 2000, namely e-commerce, illegal content and free flow of information which relates to fundamental questions of democracy, freedom of expression and the right of participation in the public discourse. The DSA proposal aims for a safe, predictable and trusted online environment for all EU citizens and follows a **symmetric approach**, i.e. all service providers active in the markets are subject to regulation as the DSA proposal foresees "binding obligations on all digital services connecting consumers to goods, services or content"[206].

An area particularly relevant for the postal sector is the update of the **E-commerce Directive** (Directive 200/31/EC).[207] The principles of the E-commerce Directive are carried over and

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198 Based on Art. 114 TFEU as digital services are by essence cross-border.
199 Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020)842_final, https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608116887159&uri=COM%3A2020%3A842%3AFIN.
200 Proposal for a Regulation on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020)825_final, https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608117147218&uri=COM%3A2020%3A825%3AFIN.
201 Defined as "software-based facility offering two- or multi-sided markets where providers and users of content, goods and services can meet", PPMi Report "Analysing EU consumer perceptions and behavior on digital platforms for communication, Report for BEREC, BoR (21) 89 (2021).
202 As an indicator for the size of network effects. Further criteria to measure the impact due to size are turnover, market capitalisation where certain thresholds are set.
203 Commission Q&A, Digital Markets Act: Ensuring fair and open digital markets, 15 Dec. 2020.
204 Comparable to the "rigid ONP obligations", see above.
205 E.g. an interoperability obligation in certain situations or access to data.
206 Commission Press Release, Europe fit for the Digital Age: Commission proposes new rules for digital platforms, 15 December 2020.
207 Given the connection with the 2018 Cross Border Parcel Delivery Services Regulation.

updated where necessary. The other point of relevance for the postal sector are the rules proposed in the DMA for the ex ante regulation of gatekeepers as e-commerce platforms such as Amazon play an important role for and in the postal sector.

Before the publication of the DMA and DSA proposals the Commission published and consulted in June 2020 several so-called "Inception Impact Assessments (IIA)". At the time of the consultation the package under the heading "Digital Services Act" foresaw only one legal act including a so-called "New Competition Tool". As can be seen from the final proposals, the package was split in two where the "New Competition Tool" dealing with competition problems caused by problematic behavior of large platforms ended up considerably modified in the DMA proposal and the part relating to problems in the provision of digital services in the DSA proposal.

The following figure provides an overview of the various documents and elements of the public consultation(s).

Figure 21 The "DSA Package" (as consulted)

As was described, e-commerce platforms such as Amazon are not only active as intermediaries but are also entering with own delivery services into the postal sector. Therefore, **ERGP** participated in the public consultation and provided a response that any regulation of gatekeepers need to be consistent with the postal framework. "To ensure effective regulation, where it is required, both regulations [of gatekeepers and postal sector regulation] should be consistent with neither overlaps nor gaps being created"[208]. More generally, all relevant regulatory frameworks (PSD, Cross Border Parcel Delivery Services Regulation, E-Commerce Directive, P2B Regulation, future DMA/DSA) must be consistent with each other and take into account the interfaces. Moreover, the new horizontal frameworks targeting digital platforms should not pre-empt the review of the PSD as a sector specific regulatory framework. Equally, a PSD review (see above) needs to bear in mind the interaction between the postal

[208] ERGP Response to the DSA Public Consultation, ERGP (20) 16 (2020), p. 4.

sector and the regulations as well to ensure a **level playing field** between postal operators and e-commerce platforms such as Amazon.

The more general conclusion that can be drawn from the example of the DMA and the DSA proposal is that even highly dynamic markets may need ex ante regulation when general competition law turns out not to be sufficient any longer to deal with structural (entrenched) competition problems arising from very large platforms acting as gatekeepers that had grown over time beyond expectations and are now able (and willing) to exert their intermediation power. The other interesting aspect to point out is that the proposed regulation is ex ante, but not sector specific as it applies to gatekeepers that can leverage data *across* markets, i.e. a new form of economic (or intermediation) power is observed.

BEREC also responded to the DSA consultation[209] and published several other documents on digital platforms.[210] BEREC agrees with the necessity of ex ante regulation of digital gatekeepers, but makes several proposals for a more effective intervention. This relates to the nature of the proposed obligations. These are imposed directly by the legal act which may be problematic insofar as markets and practices evolve. In these cases the obligations may no longer fit the situation over time. Therefore, BEREC suggests to complement the direct obligations with the possibility of imposing tailored remedies which are more suitable to handle rapidly changing market situations.[211] In other words, BEREC is transferring the tool of remedies tailoring successfully implemented with electronic communications sector regulation to a new area with the same argument used above for the transferal of the tool to the postal sector, namely its flexibility which is needed to intervene effectively in dynamically evolving markets without distortive effects caused by a too late, too heavy or too light intervention.

Another important aspect draws attention to it, namely the problem of overlap. As BEREC analyses in its Report on the interplay between the EECC and the Commission's proposal for a DMA concerning number-independent interpersonal communication services[212], the DMA proposal overlaps with regard to number-independent interpersonal communication services (NI-ICS) with the EECC as these NI-ICS are covered already in the EECC[213]. This risks to create legal uncertainty and may lead to double and/or inconsistent regulation. To avoid such an unsatisfactory outcome, BEREC suggests to specify the provisions of the DMA proposal with regard to NI-ICS in order to more clearly distinguishing the DMA and the EECC. This shows again the need for consistency of regulatory frameworks when cross-sectoral or cross-market interactions and entry occur.

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[209] BEREC Response to the DSA Package and the New Competition Tool, BoR (20) 138 (2020).
[210] BEREC Draft Report on the *ex ante* regulation of digital gatekeepers, BoR (21) 34 (2021); For a swift, effective and future-proof regulatory intervention: BEREC Opinion on the Commission's proposal for a DMA, BoR (21) 35 (2021); BEREC Report on the interplay between the EECC and the Commission's proposal for a DMA concerning number-independent interpersonal communication services (NI-ICS), BoR (21) 85 (2021); BEREC proposal on the set-up of an Advisory Board in the context of the DMA, BoR (21) 93 (2021); BEREC proposal on remedies-tailoring and structured participation processes for stakeholders in the context of the DMA, BoR (21) 94 (2021.
[211] See BEREC proposal on remedies-tailoring and structured participation processes for stakeholders in the context of the DMA, BoR (21) 94 (2021.
[212] BoR (21) 85 (2021).
[213] See above Figure 13.

VI. Conclusions

In the first part of the paper the evolution of the EU frameworks for the electronic communications sector was described in detail and the rationale of the pro-competitive concept of the SMP regulation explained. This approach has proven its value to promote competition and to deal with rapidly changing market structures in a flexible way. Its key components are a market analysis procedure based on competition law principles and the power to intervene effectively ex ante by imposing regulatory obligations ("remedies") chosen from a toolbox of remedies. Regulators have the flexibility to tailor the (set of) remedies to their national market situations. Remedies must be based on the nature of the competition problem identified in the market analysis, proportionate and justified in the light of the objectives.

In the second part of the paper the evolution of the EU framework for the postal sector was presented and shortcomings identified by applying the analytical tools known from the framework for the electronic communications sector. As a result of the analysis it can be stated that the current postal framework does not provide sufficient regulatory powers to intervene effectively where ex ante regulation is required. Thus, the regulator cannot promote competition. The reason for this is that the current framework is static and puts the focus on the sustainable provision of the universal service.

Following this analysis, the major drivers changing and reshaping the postal sector were explained and the regulatory implications assessed. The main conclusions are that digitalization, e-commerce and platformisation as well as changing users' needs transform the postal sector fundamentally, i.e. the markets become more dynamic, market boundaries are blurring, new business models and players are entering the markets, which interact more with other sectors such as communications and logistics. In order to be able to deal adequately with these changes and more dynamic markets an update of the current postal sector framework dating from 2008 is needed enabling timely and flexible regulatory interventions tailored to the market situation.

Pulling together the results of the assessments, the third part concludes that the updated regulatory framework for the reshaped postal sector must enable the regulator to react swiftly to changing market structures, blurring boundaries and more dynamic markets and to intervene effectively ex ante where required, i.e. when after carrying out a market analysis the regulator finds a relevant market is not effectively competitive. For this purpose, the regulator must be equipped with effective regulatory tools, i.e. have the power to choose the most appropriate (set of) regulatory obligations from a toolbox of remedies to set a level playing field for all participants promoting fair competition across all postal markets. All of this can only be achieved with a forward-looking **pro-competitive approach** encompassing the whole postal sector. As shown the pro-competitive regulatory concept of **SMP regulation** as enshrined in the electronic communications sector framework constitutes the reference model for a future-proof postal framework. The key components are a forward-looking market analysis based on competition law principles, and a finding of SMP triggers the imposition of the most appropriate (set of) regulatory obligations of the toolbox – transparency (reference offer), non-discrimination, accounting separation, access, price control and cost accounting obligations[214]

[214] Setting a cost-oriented price according to the cost standard of the cost of efficient service provision.

to effectively address the competition problem identified in the analysis of the relevant market (susceptible to ex ante regulation).[215]

The task of the regulator is to keep pace with dynamic markets and keep them open and on track with pro-competitive regulation promoting competition for the **benefit to users**. In a future-proof postal framework the pro-competitive approach is complemented by a **modernized universal service** corresponding to changing users' needs. Finally, it is worth recalling that an **independent regulator** endowed with the **powers** to intervene **ex ante** as described comprehensively above (including the data collection and market monitoring power) is key for a **successful implementation** of sector specific regulation which needs to be **predictable**.

The paper also includes a brief look at the **DMA and DSA proposals** introducing ex ante regulation for digital markets and services and compared the proposed components with the framework for electronic communications and the framework for a reshaped postal sector. Differences and communalities were touched upon. Also, as digital platforms play an increasingly important role for and in the postal sector, the principle of **consistency** of the different regulatory frameworks of interacting sectors was pointed out. Furthermore, it was stated that the DMA and DSA proposals show that even highly dynamic markets may need ex ante regulation where competition law is no longer sufficient to deal with structural competition problems arising from very large platforms acting as gatekeepers exerting their intermediation power.

To conclude it can be stated that future regulatory frameworks and competition law need to take into account the closer **interplay** between the sectors in a digitalized economy with gatekeepers that can leverage data *across* markets, i.e. can exert a new form of economic (intermediation) power. This implies also that another layer of interrelations between the different frameworks is added as illustrated in Figure 22.

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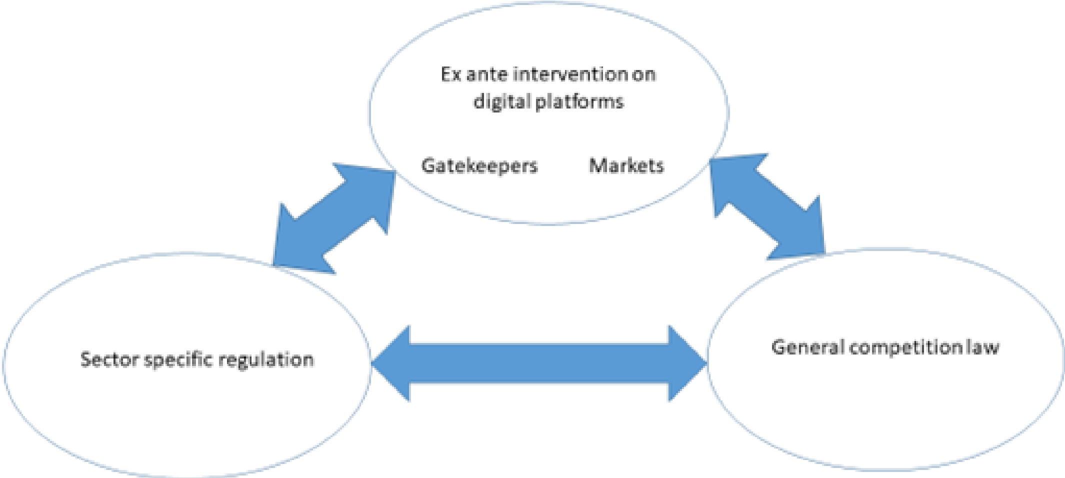
[215] Remedies must be based on the nature of the problem, proportionate and justified in the light of the objectives.

Figure 22 Interrelations of different frameworks



Interrelations of sector specific regulation, ex ante intervention on digital platforms and general competition law in a digitalized economy

Source: Author