

The Emerging EU Regulatory Framework: An Innovative Response to Convergence

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The opinions expressed are my own, and do not necessarily reflect
the views of the FCC or any of its commissioners.



The Challenges of Technology and Industry Convergence

- Technological and market convergence pose difficult challenges to regulators everywhere.
- In the U.S., those challenges are likely to be with us for a long time.
- The European Union recently adopted a new regulatory framework in an effort to deal with convergence.
 - General consistency across member states
 - Economic analysis by regulators rather than statutory definitions
 - Technology neutrality



In the beginning...

- Telephony over telecommunications networks.
 - Broadcast services over broadcast media.
 - Cable services over cable.
- ➔ The network and the service were one.



Today, we have...

- Telephony over cable networks.
 - Telephony over the Internet over a wide range of transmission media.
 - The emergence of broadcast services over the Internet over a range of transmission media.
- ➔ The network and the service are increasingly independent of one another.



Definitions from the Telecommunications Act

Telecommunications - “the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.”

Telecommunications Service - “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”

Information service - “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”



New European Union Framework

- The European Commission identifies markets using concepts borrowed from competition law.
- National Regulatory Authorities (NRAs) identify who, if anyone, has Significant Market Power (SMP) within those markets (unilateral or coordinated effects).
 - ◆ NRAs *impose* remedies *ex ante* from a list of possible options where one or more firms are found to have SMP.
 - ◆ NRAs *eliminate* restrictions absent SMP.
- Attempts to address convergence by using fluid market definitions rooted in economic analysis instead of enshrining technology-based definitions within the law.



Decisions are Based on Facts

- European Commission and NRAs can use article 11 authority to obtain information from industry, much as they would in a merger proceeding.
- Information sharing is envisioned between the Commission and the NRAs, and among NRAs.
- Commission and NRAs must ensure confidentiality of competitive information.
- Findings of competition authorities (Commission and NCAs) should be reflected in regulatory market and SMP findings.



Identifying the Relevant Market

- SNIPP test: Would a hypothetical monopolist comprised of all firms in the potential market find it profitable to make a small, non-transient increase in price?
- What is the Relevant Geographic Market?
 - ◆ Global?
 - ◆ Trans-national?
 - ◆ National?
 - ◆ Regional?
 - ◆ Metropolitan?
 - ◆ The individual consumer's home or building?
 - ◆ If the relevant geographic market is too small, analysis may be impractical.



Who Has Significant Market Power?

- Do one or more firms in the relevant geographic market have Significant Market Power (SMP)?

“...[a]n undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys 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.” (Framework Directive)

- Collective dominance treated differently in Europe than in the US.



Consequences?

- What remedies are NRAs likely to impose on SMP operators?
- What degree of consistency is to be expected among the Member States?
- How effective are those remedies likely to be?



Strengths and Weaknesses of the EU Framework

- Ambitious, logical and holistic effort to address convergence.
- Potentially simpler and more flexible than the US regulatory system.
- Ultimate effectiveness unknown and unknowable until fully implemented.
- Significant risk of hidden pitfalls.
 - ◆ Potential tension between the Commission and the NRAs.
 - ◆ Handling of emergent or nascent services.



Potential Relevance to the U.S.

- It appears that the new E.U. framework should generally lead to conclusions similar to those that we reach in the U.S.
- The E.U. framework appears to provide a simpler and more flexible approach to convergence.
- Using the European approach to stimulate thought and discussion in the U.S. may shed light on implications and likely consequences.
- The E.U. framework merits close study. There may be valuable lessons for the U.S.

