What does the Review of the New Regulatory Framework for Electronic Communications Really Reveal?

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Foreword
For almost fifteen years I have been working as a lawyer in the telecoms industry, focusing among other things on telecoms regulation, both the sector specific regulation as well as the general competition law regulation, data protection and consumer protection.

In this article I would like to look closer at the Review of the New Regulatory Framework of the EU for Electronic Communications\(^1\) (hereinafter referred to as “Review”), the actual need for it and also the changes that it brings. Besides publicly presented goals of the Review I have identified a few more facts between the lines which I think are worth sharing.

I would like to point out that this article presents only my personal points of view, and does not represent the opinion of T-Mobile Czech Republic a.s.

A BRIEF HISTORICAL EXAMINATION OF THE SECTOR SPECIFIC REGULATION IN THE EU

The key change in the regulatory approach towards the electronic communication sector (hereinafter referred to as “telecoms”) was started on the EU level on 1 January 1998. By this date all the Member States were supposed to open up their respective telecoms markets for competition. In other words any persisting exclusive rights granted to the old state monopolies were supposed to cease to exist.

The main goal of the sector specific regulation at this stage was to liberalize the existing telecoms markets and to lay down new conditions for further development of the service–based competition in these markets. The EC legislation for that period was very fragmented and chaotic. It is usually referred to as the Regulatory Framework 98.

This “opening up” phase was followed by what can be called the “consolidation phase”, the aim of which was clearly to replace the existing chaotic Regulatory Framework 98 by

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\(^1\) The NRF Review consists of:
- REGULATION (EC) No 1211/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office
a transparent legal framework generally called the New Regulatory Framework of the EU for Electronic Communications (hereinafter also referred to as “NRF”). As the liberalization of the telecoms markets across Europe had been finished, the aim of the NRF was more ambitious heading towards the development of economic competition in the telecoms markets accompanied by a declared shift from the sector specific regulation towards the general competition regulation. The main evidence of this trend was the introduction of the “significant market power” (SMP) concept, equivalent to the “dominance” under the general competition law principles.

From my point of view the NRF brought out a lot of positive changes and did create a complex and transparent legal framework for the electronic communication sector. The sector specific regulation was based on brand new competition law principles, a proportionate level of harmonization of the regulation on the EU level was ensured. NRF placed the emphasis newly on the “tailor made” regulation, abandoning the idea of the “one fits all” model in order to minimize any necessary market distortions. The ex ante regulation is only imposed in relationship to the identified relevant markets stipulated in the Recommendation on Relevant Markets in connection with Art. 15 (1) of the Framework Directive 2002/21/EC.

NRF calls on the Member States to quickly review existing regulation implemented under the clumsy Regulatory Framework 98 and implement the newly defined flexible regulation under the NRF. NRF expects the National Regulatory Authorities (hereinafter

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2 NRF is created by:
- Directive (2002/21/EC) on a common regulatory framework
- Directive (2002/19/EC) on access and interconnection
- Directive (2002/20/EC) on the authorisation of electronic communications networks and services
- Directive (2002/22/EC) on universal service and users' rights relating to electronic communications networks and services
- Directive (2002/58/EC) on privacy and electronic communications
- Directive (2002/77/EC) on competition in the markets for electronic communications services
- Regulation (2000/2887/EC) on unbundled access to the local loop

3 Contrary to the very formalistic SMP concept under the old Directive 97/33/EC (called “Open Network Provision” Directive) defining in Art. 4 (3) the SMP organization as follows: “3. An organization shall be presumed to have significant market power when it has a share of more than 25 % of a particular telecommunications market in the geographical area in a Member State within which it is authorized to operate…”


5 In this context the Framework Directive 2002/21/EC in Art 16 states following:

„Market analysis procedure
1. As soon as possible after the adoption of the recommendation or any updating thereof, national regulatory authorities shall carry out an analysis of the relevant markets, taking the utmost account of the guidelines. Member States shall ensure that this analysis is carried out, where appropriate, in collaboration with the national competition authorities.
2. Where a national regulatory authority is required under Articles 16, 17, 18 or 19 of Directive 2002/22/EC (Universal Service Directive), or Articles 7 or 8 of Directive 2002/19/EC (Access Directive) to determine whether to impose, maintain, amend or withdraw obligations on undertakings, it shall determine on the basis of its market analysis referred to in paragraph 1 of this Article whether a relevant market is effectively competitive.
3. Where a national regulatory authority concludes that the market is effectively competitive, it shall not impose or maintain any of the specific regulatory obligations referred to in paragraph 2 of this Article. In cases where sector specific regulatory obligations already exist, it shall withdraw such obligations placed on undertakings in that relevant market. An appropriate period of notice shall be given to parties affected by such a withdrawal of obligations.
referred to as “NRA”) in Member States to use general competition tools for analyzing the level of competition in the relevant markets. To become a “relevant market” under the NRF, such market has to pass the “three criteria test”:

The Relevant Market has to suffer from (i) the existence of the entry barriers (ii) which are not only of a temporary nature and (iii) general competition law is not sufficient to deal with the identified market dysfunction.

This new point of view on the sector specific regulation presented the sector specific regulation as something gradually being replaced by the general competition law.

For a moment we, as market players, believed that sector specific regulation would in the future only deal with regulation of scarce resources – typically frequencies, numbers and addresses, and all other *ex ante* regulation would be gradually replaced by the *ex post* competition law regulation. The shift from the formalistic approach of the Regulatory Framework 98 in favour of a light touch flexible regulation, considering the dynamics of the market developments over time by using the general competition law tools for market analysis, seemed to be a step in the right direction. Also the claim for close cooperation between the NRA and the National Competition Authority looked very positive. The connection between the NRF and the general competition law principles was clearly declared in Art. 24 of the commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications sector and services (hereinafter referred to as “Guidelines”) which states that “Under the regulatory framework, markets will be defined and SMP will be assessed using the same methodologies as under competition law…” The value of this statement was somehow contested by Art. 30 of the Guidelines stating that: “The designation of an undertaking as having SMP in a market defined for the purpose of *ex-ante* regulation does not automatically imply that this undertaking is also dominant for the purpose of Article 82 EC Treaty or similar national provisions…” Art. 30 brought a lot of questions into the whole new concept of the sector specific regulation as well as on the declared connection between NRF and competition law.

4. Where a national regulatory authority determines that a relevant market is not effectively competitive, it shall identify undertakings with significant market power on that market in accordance with Article 14 and the national regulatory authority shall on such undertakings implose appropriate specific regulatory obligations referred to in paragraph 2 of this Article or maintain or amend such obligations where they already exist.

5. In the case of transnational markets identified in the Decision referred to in Article 15(4), the national regulatory authorities concerned shall jointly conduct the market analysis taking the utmost account of the guidelines and decide on any imposition, maintenance, amendment or withdrawal of regulatory obligations referred to in paragraph 2 of this Article in a concerted fashion.

6. Measures taken according to the provisions of paragraphs 3, 4 and 5 of this Article shall be subject to the procedures referred to in Articles 6 and 7.”

6 Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications sector and services states in Art. 135: “Article 16(1) of the Framework Directive requires NRAs to associate NCAs with the market analyses as appropriate. Member States should put in place the necessary procedures to guarantee that the analysis under Article 16 of the framework Directive is carried out effectively. As the NRAs conduct their market analyses in accordance with the methodologies of competition law, the views of NCAs in respect of the assessment of competition are highly relevant. Cooperation between NRAs and NCAs will be essential, but NRAs remain legally responsible for conducting the relevant analysis. Where under national law the tasks assigned under Article 16 of the framework Directive are carried out by two or more separate regulatory bodies, Member States should ensure clear division of tasks and set up procedures for consultation and cooperation between regulators in order to assure coherent analysis of the relevant markets…”

7 Nowadays Art. 102 of the Treaty on the Functioning of the European Union (TFEU)
I believe that by using the same tools to analyze identical relevant markets we can hardly get to two different conclusions regarding the dominant or SMP position in the market in question under the sector specific regulation and competition law.

The initial optimism was definitely ruined by the decision in case Deutsche Telecom AG v Commission. In this case the operator was found guilty from abusive pricing under the Article 82 of the EC Treaty by applying the prices regulated by the NRA.

This case proved that just following the remedial measures imposed by the NRA is not sufficient, moreover, it brought clear evidence that the competition regulation is actually not gradually replacing the sector specific regulation, but rather, they run in parallel. In other words any entity being subject to sector specific regulation can, by respecting the imposed remedial measure by the NRA, still commit a breach of the competition law.

The aforementioned case brought a brand new light on the functioning of the NRF and its ideas.

Still there were many positive features of the NRF, certainly the newly introduced openness and public accountability of the NRA and its decision-making activities under the NRF was something new and without any doubt very good - the obligation to run a public consultation regarding any proposed regulatory measures having a significant impact on the market under Art. 6 of the Framework Directive. As I have already mentioned, there was also a harmonization role of the European Commission in the field of the relevant market stipulation and its analysis and SMP determination (including the veto right) and in the process of remedies imposition by the NRA (no veto right of the European Commission though) under Art. 7 of the Framework Directive.

However, as mentioned above, the Commission did not enforce the veto right on remedies which persisted from the European Commission point of view as a very weak point of the NRF.

How can we briefly evaluate the described valid and still effective NRF?

From my point of view it presents a transparent and clear set of rules, bringing a new and flexible look at telecoms regulation considering its dynamics and also positively declaring the shift from the sector-specific regulation to general competition law principles. I also evaluate very positively the fact that the European Council did not enforce the veto right of the European Commission on remedies which would contribute to the trend of a full and borderless harmonization of the regulation on the EU level, which is in my opinion in contradiction to the declared aim of imposing the ex ante regulation that shall be, according to Art. 8 (4) of the Access and Interconnection Directive 2002/19/EC, based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC. Considering the fact that the European Union consists of 27 different Member States, the proportionate ex ante regulation can never be fully harmonized because that would simply ruin any realistic chance to consider specific national conditions in the process of imposition of remedies on market players being found SMP in a relevant market.

On the other hand, the declared intentions of the NRF has not been always put into practice. The implementing period proved that actually the addressees of the regulation are subject to two regulations – sector specific as well as competition law regulation - running in parallel instead of gradually replacing each other. Also the split of competencies between the NRA and National Competition Authority stayed unclear.

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8 Case C-280/08 P and T-271/03 – Deutsche Telekom AG v European Commission
9 Nowadays Art. 102 of the Treaty on the Functioning of the European Union (TFEU)
NRF REVIEW

In June 2005 the European Commission introduced within the renewed Lisbon Strategy the “i2010 Initiative”. The aim of the Initiative was to create conditions for the Single European Information Space growth as a main pillar of the Initiative. The European Commission called for the improvement of the sector-specific regulation in order to create a single market. This has not been achieved by the NRF therefore the Commission feels a need for an NRF Review in the following sense:

i. Review of the existing NRF with a special focus on Framework Directive, setting out the aims and goal of the regulation;

ii. Creation of the European Electronic Communications Market Authority;

iii. Issuing the Impact Assessment and Communication.

After four years of discussions, the European Parliament and the Council of Ministers approved on 4 November 2009 a Review of the NRF. The Member States now have to transpose the changes to the NRF into national laws by May 2011.

The main declared changes are as follows:

1. The right of European consumers to change, in 1 working day, fixed or mobile operator while keeping their old phone number.

2. Better consumer information.


4. New guarantees for an open and more "neutral" net.

5. Consumer protection against personal data breaches and spam.

6. Better access to emergency services, 112.

7. National telecoms regulators will gain greater independence.

8. A new European Telecoms Authority that will help ensure fair competition and more consistency of regulation on the telecoms markets.


10. Functional separation as a means to overcome competition problems.

11. Accelerating broadband access for all Europeans.

12. Encouraging competition and investment in next generation access networks.

This is the way the changes to the EU laws are officially presented. Working in the telecoms industry for many years, and being able to watch the Review process and its result, I find more between the lines.


THE RIGHT TIMING?

First of all I would like to point out that in my personal opinion, there was no need for any NRF Review, but rather the opposite, even though the European Commission was supposed to regularly review the NRF according to Art 25 of the Framework Directive 2002/21/EC. As I have mentioned above, the NRF brought out many changes, actually the whole concept of *ex ante* regulation had been changed. All NRAs around the EU had first of all transpose the NRF into national legislation, and after that implement the NRF – define relevant markets, analyze them, impose remedies on significant market players, set up public consultation rules… It has been a lot of work and I suspect that not all Member States are very comfortable with the new rules.

Before we all – NRAs as well as market players – managed to live with the new rules, they are significantly changed again - and we face again the new transposition period, and the implementation. Not mentioning the recently introduced roaming regulation\(^\text{12}\) which was on top of NRF implementation certainly not easy to implement for any mobile market player.

In my opinion the sector could comfortably live with the NRF without any changes for a few more years, which would create enough space for setting out the relevant processes and procedures as well as the decision-making practice and bring a sufficient level of legal certainty on the market players’ side. On the other hand the Review presented a good opportunity for the European Commission to come back to the issues it did not manage to put through within the process of enactment of the current NRA:

- Typically, the much-discussed veto right of the European Commission on remedies, which was denied by the Member States when the current NRF was being approved by the European Council, was opened up again without any major success because Member States were still not ready to give up their sovereignty over the sector regulation completely. I find the fact that the regulation withstood the pressure and was left mainly on the national level very positive. Fully harmonized regulation would not meet the declared aims of being proportionate and justified in the light of specific national conditions. What I find very negative is the fact that the already clumsy notification procedure under Art. 7 of the Framework Directive has been actually made even more sophisticated and time consuming by adding one more step in the form of newly consulting the BEREC. Under the revised rules of the notification procedure under the new Art. 7a of the Framework Directive, the time for the imposition of a regulatory remedy by the National Regulatory Authority might take an unbelievable 6 months. In other words, the European Commission has no veto right over the remedy chosen by the National Regulatory Authority but can effectively block the imposition procedure. For a better understanding I am enclosing a chart of the individual steps of that procedure:

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\(^{12}\) Regulation (EC) No 717/2007 on roaming on public mobile telephone networks within the Community, as amended
### Notification of a proposed remedy under Art. 7a of the Framework Directive

<table>
<thead>
<tr>
<th>Time Period</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 month</td>
<td>Intended measure notification by NRA</td>
</tr>
<tr>
<td></td>
<td>Objections of EC announced to NRA and BEREC</td>
</tr>
<tr>
<td>“Blockage period” 6 weeks</td>
<td>Within six weeks after the beginning of</td>
</tr>
<tr>
<td>3 months after EC objections</td>
<td>EC objections BEREC issues opinion</td>
</tr>
<tr>
<td></td>
<td>Before the 3 months “blockage period” expiration can NRA</td>
</tr>
<tr>
<td></td>
<td>- withdraw its proposal</td>
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<tr>
<td></td>
<td>- leave its proposal unchanged</td>
</tr>
<tr>
<td>1 month</td>
<td>EC issues a recommendation for a change of the intended measure</td>
</tr>
<tr>
<td></td>
<td>NRA announces the final measure adopted.</td>
</tr>
<tr>
<td>1 month</td>
<td>Where the NRA decides not to amend or withdraw the draft measure on the basis of the recommendation issued, it shall provide a reasoned justification</td>
</tr>
</tbody>
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Considering the dynamics of the telecoms sector there is no doubt that a regulatory measure being imposed after 6 months of discussions about its appropriateness will certainly not help to remedy the identified market distortion because after 6 months the market situation will be completely different from the one when the regulator finished the analysis of the market in question;
The other very popular issue was certainly the aim to create a central European Regulatory Body and shift the regulation from a national level to the European (fully harmonized) level. The intention to create a European Electronic Communications Market Authority was not supported by the Member States either, and ended up taking the shape of a compromised solution to create a BEREC (Body of European Regulators). Interestingly enough, the repeatedly presented and discussed shape and goal of the “European Regulator” helped to rediscover the existence of the European Network and Information Security Agency (hereinafter referred to as “ENISA”). ENISA was established in March 2004 for an initial period of five years by Regulation (EC) No. 460/2004 and existing comfortably in Crete but had been forgotten about long ago for all practical purposes, and even the NRF did not take its existence into account;

Similarly unpredictably I assess the amendment to the NRF newly authorizing the European Commission with the power to issue under Art. 19(1) of the Framework Directive the “harmonization decision”. I consider this authorization as another step towards the gradual shift of the performance of the regulatory powers from the Member States to the European level and especially towards the full harmonization of sector specific regulation.

There is no doubt that there are positive changes brought out by the Review. Things like the transfer of the individual rights to use frequencies, or stricter controls regarding the effective use of spectrum will certainly help to ensure the effective use of scarce resources and help to deliver the latest services and applications to demanding customers in the field of wireless communication. As a step in the right direction I also assess the authority of the BEREC under Art. 16(7) of the Framework Directive to help the National Regulatory Body to conduct a market analysis in case it fails to do so in time, which can stop the obstruction on the regulators side made either willingly or just due to a lack of competence.

TO SUM UP…

To sum up what has been said, especially looking at the points presented as the aims of the Review at the beginning of this article:

- I don’t think that there was an urgent need for ensuring the European consumers right to change, in 1 working day, fixed or mobile operator while keeping their old phone number. I am convinced that any customer can comfortably wait for changing its telecoms operator for 2 or even 3 working days. I personally believe that European customers can even wait for one week. I do believe that consumers get sufficient information based on the current legal regime, and also have sufficient access to the emergency services free of charge under the current NRF.

- I do not understand the presented aim to give to National Telecoms Regulators greater independence. I cannot find any evidence in the whole Review on that, but rather the opposite - I can trace over the last year a clear tendency to

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13 REGULATION (EC) No 1211/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office

14 In this regard Art. 19(1) of the Framework Directive States: “Without prejudice to Article 9 of this Directive and Articles 6 and 8 of Directive 2002/20/EC (Authorisation Directive), where the Commission finds that divergences in the implementation by the national regulatory authorities of the regulatory tasks specified in this Directive and the Specific Directives may create a barrier to the internal market, the Commission may, taking the utmost account of the opinion of BEREC, issue a recommendation or a decision on the harmonised application of the provisions in this Directive and the Specific Directives in order to further the achievement of the objectives set out in Article 8.”
gradually overtake NRA responsibilities by the EC or another central European Regulatory Authority.

- I do not agree with the proclamation that the European Telecoms Authority that will help to ensure fair competition and more consistency of regulation on the telecoms markets. It will certainly obstruct the process of market remedies imposition and take away any dynamics of it.

- I deliberately did not comment on the imposition of a new remedy - functional separation – because it would deserve a separate article to comment on it. I just comment on it briefly; I don’t think that to impose the obligation on a private entity to separate itself functionally is the magic solution to overcome competition problems, but it certainly presents a very intrusive intervention into the undisturbed execution of ownership rights.

- I find useful the idea of accelerating broadband access for all Europeans but don’t believe it is necessary to review the EU law in order to do that. The market analysis together with the process of SMP determination and regulatory remedies imposition are sufficient tools to accelerate the broadband access across Europe\(^\text{15}\).

In closing, I think that the Review was untimely and will in reality slow down the process of development of economic competition in the telecoms market in general. The originally declared aim of coming from “regulation to competition” by reducing the regulatory burden on companies providing information society services, has unfortunately been in my opinion fully abandoned\(^\text{16}\).

Alice Selby graduated from the Charles University, Faculty of Law in 1994. In 2001 she successfully completed Telecoms Management studies at the Cable & Wireless College in Malta and the United Kingdom. Subsequently she cooperated with the College as a lecturer of the Telecoms Regulation module. In 2009 she graduated from the Masaryk/Nottingham University LL.M. - Commercial Law. Currently is studying a Ph.D. program at the Charles University in Prague.

T-Mobile Czech Republic has been operating in the Czech market since 1996. As of 31\(^{\text{st}}\) March 2010, almost 5.5 customers were using T-Mobile mobile services.

T-Mobile operates a public mobile communications network on the GSM standard in the 900 and 1800 MHz bands and is also authorized to operate a UMTS network. Since 1 January 2008, T-Mobile has been providing high-speed internet connection services based on ADSL technology and offering voice services via a public fixed-line electronic communications network. At the end of 2009, T-Mobile extended its portfolio to include ICT services.

T-Mobile is a member of the international telecommunications group Deutsche Telekom. Thanks to the group’s international presence, customers can count on the worldwide availability of their favourite services and take advantage of unified, favourable prices of calls when abroad.

\(^{15}\) http://ec.europa.eu/information_society/policy/ecommtomorrow/index_en.htm

\(^{16}\) http://europa.eu/pol/infsociety/index_en.htm