

Telecoms: the 'Article 7' procedure and the role of the Commission – Frequently Asked Questions

What is the 'EU-wide consultation mechanism' on regulatory measures in the telecoms sector, also referred to as the 'Article 7' procedure?

Article 7 of the Framework Directive of the EU telecoms rules ([2002/21/EC](#)) is the legal basis for the EU-wide consultation mechanism on regulatory measures in the telecoms sector, the principal instrument for telecoms regulation in the single market. Under Article 7, national regulatory authorities are required, in consultation with industry, to analyse their national telecoms markets, propose regulatory measures to address market failures where one or more players is dominant (or has 'significant market power' (SMP)), and then notify the European Commission and the other national regulators of their findings and proposed measures. This mechanism ensures a consistent regulatory approach within the EU and legal certainty for market players wanting to invest in telecoms across borders. It helps to make the single market competitive to the ultimate benefit of the consumer in terms of lower prices and more choice.

How does the 'Article 7' procedure work in practice?

The Commission assesses the majority of proposed national regulatory measures in a one-month "phase one" procedure, during which it may choose to endorse the proposed measures, sometimes with comments of which national regulators must take utmost account. If the Commission considers that the proposed measure would create a barrier to the single market, or has serious doubts about its compatibility with EU law, it opens a "phase two" investigation and the procedure's deadline is extended for a further two months. Following this investigation, the Commission may, if its concerns are confirmed, require the national regulator to withdraw its proposed measure. This veto power can only be exercised in relation to the proposed market definition or SMP analysis. National regulators have discretionary powers for their proposed remedies but the Commission may make comments.

The new EU Recommendation, adopted by the Commission today, on the rules of procedure for the EU-wide consultation mechanism on regulatory measures reduces national regulators' administrative requirements for this procedure. Regulators can now notify certain categories of draft regulatory measures through short standard notification forms, which summarise the proposed measure. The Commission will in principle endorse these kinds of regulatory measures. This will further simplify and speed up the consultation mechanism. It will also free resources and focus on markets where bottlenecks persist and effective competition still needs to be accompanied by regulatory oversight.

What are the benefits for telecoms operators?

'Article 7' procedures:

- give market players legal certainty as to how and under what circumstances operators will be regulated. EU-wide rules, and co-operation among national regulators, help to ensure that regulatory practice is consistent across the EU,

- give market players the confidence that they need to plan their investments in a consistent and predictable EU market,
- make it easier to do business across the EU, as similar remedies are applied to similar market failures across the Member States,
- enable new players to enter the market and compete as regulatory measures break traditional telecoms monopolies and open up networks for competitors.

What are the benefits for consumers?

'Article 7' procedures help to:

- stimulate competition, which results in cheaper products and services, and
- stimulate investment, which leads to more and better products and services.

How is the 'Article 7' procedure affected by the proposed reform of the EU telecoms rules?

The current EU telecoms rules aim to promote competition, encourage investment, cut unnecessary costs and remove obstacles to cross-border business in the EU. These objectives have been strengthened by the telecoms reform proposed by the Commission in November 2007 ([IP/07/1677](#)). Lighter, more transparent and predictable regulation that stimulates investment and innovation is needed to keep pace with market developments and to deal with remaining competition bottlenecks (particularly in broadband) and make sure that cross-border competition is not hampered by 27 partly inconsistent regulatory systems. The Commission's telecoms reform proposals therefore extend its current oversight powers under the 'Article 7' procedure to national regulators' remedies, allowing it to more effectively and swiftly intervene when it considers that a proposed measure could create a barrier to the single market or is not in line with EU law. The Commission has also proposed to create a European Telecoms Agency, a new office gathering national regulators in a venture equipped to consolidate Europe's fragmented telecoms markets in line with technologies that know no national borders.

The Commission took a first step in this direction by adopting the revised Recommendation on relevant markets in November 2007. This reduced the number of markets subject to regulatory scrutiny from 18 to 7, refocusing regulatory efforts on markets where competition is not yet effective and which are crucial for Europe's competitiveness and simplifying the regulatory environment by reducing the burden on both regulators and industry.

How has the 'Article 7' procedure been changed today?

Today the Commission has adopted a revised Recommendation on rules of procedure for the EU-wide consultation mechanism on regulatory measures. Until now, national regulators had to notify all draft regulatory measures in full to the Commission. As of today, part of them may be submitted in a short standard notification form containing a summary of the main elements of the proposed regulatory measure. The Commission will in principle endorse such measures without further comments to the national regulator. Furthermore, with a view to reducing delays in the implementation of regulation and consolidating the single telecoms market, national regulators are invited to notify their market analyses and proposed remedies simultaneously.

The simplified notification procedure will apply to:

- Decisions to withdraw regulation on markets which the Commission presumes no longer need sector-specific regulation (markets no longer contained in the Recommendation on relevant markets as of November 2007, [IP/07/1678](#)).
- Decisions not to regulate markets where the Commission presumes sector-specific regulation to be appropriate but remain effectively competitive in the Member State concerned.
- Amendments to technical details of a previously imposed remedy (e.g. delivery times, or the extension of reporting obligations).
- Extension of existing measures to another market player in a similar situation (particularly in call termination markets).

What exactly is covered by the EU telecoms rules?

The EU telecoms rules cover all communication via electronic means: fixed line or mobile telephony, fax, internet, cable, satellite; they are not limited to particular technologies so as to embrace future technological developments such as Next Generation Networks ([IP/08/1370](#)). This open definition takes account of the principle of technology neutrality, one of the most fundamental principles of the EU telecoms rules.

Does the Commission have sole power to define telecoms markets, or can Member States do it too?

National regulators are expected to analyse the markets listed in the Commission Recommendation on relevant markets, taking into account their national circumstances. However, if a national regulator considers that there is persistent market failure in an unlisted market, it may impose regulatory measures if justified in that specific situation by predefined criteria.

EU telecoms rules have paved the way for effective competition in many of the 18 markets that were predefined as susceptible to ex ante regulation in the 2003 Recommendation on relevant markets. In November 2007, the Commission therefore removed 10 markets from the list and merged two of the [remaining markets](#) ([IP/07/1678](#)). Today only 7 telecoms markets are subject to mandatory regulatory scrutiny:

- Access to the fixed telephone network (formerly Market 1 and 2)
- Call origination on the fixed telephone network (formerly Market 8)
- Call termination on individual fixed telephone networks (formerly Market 9)
- Wholesale access to the local loop (formerly Market 11)
- Wholesale broadband access (formerly Market 12)
- Wholesale terminating segments of leased lines (formerly Market 13)
- Voice call termination on individual mobile networks (formerly Market 16)

Most retail markets are deregulated once regulation at wholesale level combined with regular competition law protects retail users. This allows the Commission and national regulators to refocus their efforts on markets where competition is not yet effective and which are crucial for Europe's competitiveness, such as broadband.

Why is broadband access often mentioned as one of the remaining competition bottleneck markets?

National regulators have generally found the incumbent operator for the public telephone network in their country to be dominant on the broadband access market. This is because before the liberalisation of telecoms markets only the incumbent had rolled out infrastructure that reached end-users. When the networks were upgraded to provide broadband services, the dominant operators largely maintained their dominant position, preventing alternative operators from competing – a bottleneck market. Physical access obligations imposed on incumbents, i.e. obligations to grant access to the 'last mile', have in principle made it possible for alternative operators to offer wholesale broadband access services. However, few provide wholesale broadband access services to other alternative operators.

EU broadband penetration is currently on average 20%, though as market leaders Denmark (35.6%) or Finland (34.6%) demonstrate, there is much room for growth.

Broadband access is put in a new context by the on-going rollout of new broadband infrastructures, the Next Generation Networks (NGN), which will facilitate the development and use of converged services. Such new broadband services require a coordinated adjustment of regulatory approach to maintain or enhance the level of competition already achieved and ensure that a maximum of consumers can benefit from such services. On 18 September the Commission presented a draft recommendation on next generation access for public consultation (see [IP/08/1370](#)).

Who defines a new market when a new technology or service is launched?

Regulation under the current EU telecoms rules is based on competition law principles. In practice, this means that whenever a new technology is introduced, the national regulator has to analyse whether this technology is used to provide services comparable to existing services or whether this technology provides a totally new service, i.e. clearly distinguishable from existing services or products. Only in the second case can regulation of a new market be justified.

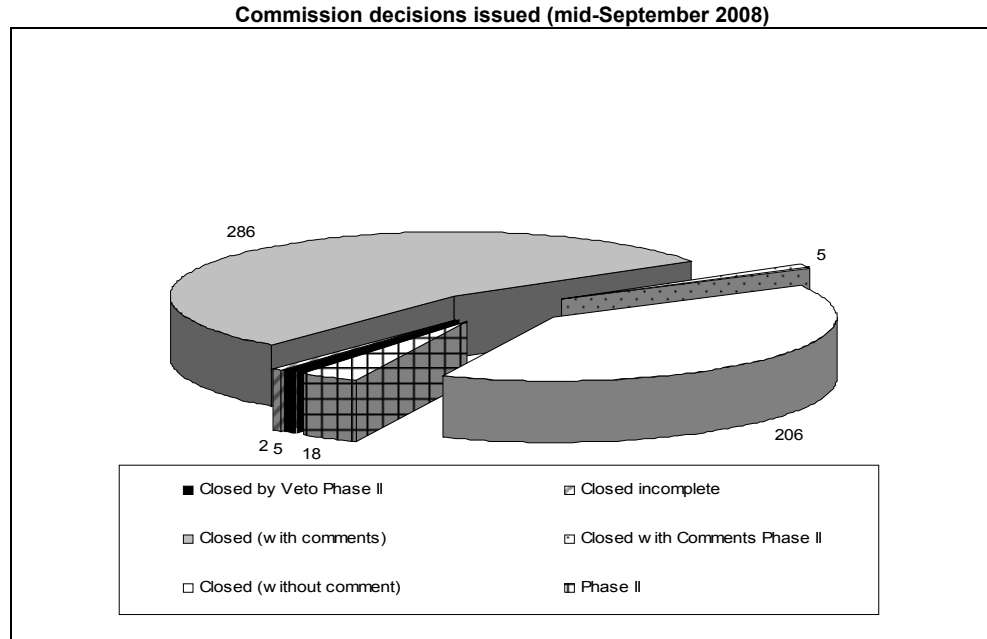
What kind of market failures do regulators have to tackle, and how?

The following remedies to market failures are available to national regulators in the EU telecoms package: the obligation to not charge excessive prices or unsustainably low prices that act as barriers to market entry or restrict competition; separation of accounts between various levels of business (accounting separation); requirements to provide access to the SMP operator's network (to prevent denial of access); and an obligation prohibiting discriminatory treatment of customers.

In its reform proposals on the current EU telecoms rules, which were voted by the European Parliament on 24 September ([MEMO/08/581](#)) and which will be discussed by the Council in November, the Commission included the remedy of [functional separation](#) in the toolbox of national regulators. This remedy will allow regulators to set conditions for access to the infrastructure of the dominant market player, in particular where non-discrimination behaviour cannot be ensured by the other existing remedies.

How many national regulatory measures has the Commission assessed?

By 22 September 2008 the Commission had received 800 notifications from the Member States. The national regulatory authorities of 15 Member States are currently in the process of carrying out second round market analyses. In all cases, the Commission assessed the notifications within the 1-3 month 'Article 7' deadlines and issued a total of 522 decisions.



How often has the Commission exercised its power to veto draft regulatory measures?

So far, the Commission has issued 5 vetoes:

- **Finland – international calls (Case FIN/2003/0024):** Ficora, the Finnish regulator, considered on the basis of its analysis that this market was characterised by effective competition since it did not identify any market players with significant market power. The Commission, however, found that Ficora arrived at this conclusion by taking into account regulation to tackle potential competition problems already in place and did not provide sufficient evidence to support its findings.
- **Finland – mobile access market (Case FIN/2004/0082):** Ficora concluded that one operator had SMP mainly on the basis of its high market share (>60%). However, according to competition law practice, market shares alone are not necessarily sufficient to establish dominance and Ficora failed to consider sufficiently market developments that would have rebutted the presumption of dominance.

- **Austria – transit services (Case AT/2004/0090):** the Austrian Regulator stipulated that a transit market includes the services provided by a network operator to other operators (or itself) to convey calls across the network. The Commission disagreed with the Austrian regulator's view that operators who were supplying such services only to themselves (in particular, mobile operators) could also supply them to others on a commercial basis. The national regulator's approach led to a significant and unjustified reduction of the dominant market player's (Telekom Austria) market share. Furthermore, the regulator failed to assess the impact of deregulation on small operators.
- **Germany – wholesale call termination on fixed networks (Case DE/2005/0144):** the Commission challenged the German regulator's findings that only the incumbent operator, Deutsche Telekom, was found to be dominant on its individual network in this market. The national regulator did not consider any of the other operators to be dominant, despite the fact that each had a market share of 100%. The German regulator felt that any power on the part of these alternative operators was curtailed by the purchasing power of Deutsche Telekom. On the basis of legal and economic considerations, the Commission considered that Deutsche Telekom could not exercise such power.
- **Poland – access to the fixed public telephone network for residential and non-residential customers (Cases PL/2006/0518 and PL/2008/0524 respectively):** the Commission concluded that the evidence provided by the Polish regulatory authority, UKE, did not support its product market definition including retail broadband access products in the relevant market. The Commission invited UKE, when re-identifying the markets for access to the fixed public telephone network, to carefully analyse the substitutability of the products in terms of their functionality and prices.

Do you have any real evidence that the EU – or Member States – can create competition by regulating markets?

In the 1980s traditional telecoms monopolies controlled all forms of telecommunications, both voice and data. Starting with handsets in 1988 and progressively adding services until 1998, the EU liberalised all telecoms services.

Since the entry into force of the EU telecoms rules of 2002, national regulators have been analysing their telecoms markets and have imposed regulatory remedies such as access obligations and price controls on operators with significant market power. This has allowed existing operators to enter each other's markets, new entrants to invest in alternative infrastructure and services and consumers to benefit from more, better and cheaper communication services.

Today, the numbers speak for themselves. The [13th Single Telecoms Market Progress Report](#) (2007) shows that investment by operators in the European Telecoms sector has increased by 16.33% over the past 5 years and exceeded €50 billion in 2007. This is similar to the US and higher than China and Japan put together. The number of fixed broadband access lines was nearly 100 million as of 1 January 2008, up from 80 million in January 2007. The mobile sector continued to grow by 3.8% in 2007 reaching €137 billion, thus remaining the largest segment in the telecoms market, and prices for mobile telephony dropped by up to 14% in 2007. Consumers have also benefited from increased platform competition such as mobile broadband and higher-speed fixed services, particularly over fibre ([IP/08/460](#)).

However, there is still more to do. A consistent regulatory approach across the Member States' telecoms markets is crucial to a well functioning, competitive single market. Today, however, only 30% of major operators' EU business is active outside their home market. The Commission took this into account in its proposed reform of the EU telecoms rules. The new EU Telecoms Package will probably come into effect in the Member States in the course of 2010. In the meantime the Commission is seeking to further enhance the competitiveness of Europe's telecoms sector through Recommendations targeting specific markets that require a more consistent or efficient regulatory approach. It plans to adopt early next year a Recommendation on the regulation of termination rates ([IP/08/1016](#)) and one on Next Generation Access ([IP/08/1370](#)).

Do you have a target date for fully effective competition in all markets?

Effective competition is not achieved by setting deadlines. Appropriate regulation helps to create conditions for competition to develop. Nonetheless, we are still far from seeing effectively competitive telecoms markets throughout Europe.

For example, in 2007, only 13.5% of subscribers in Member States across the EU used an alternative provider for direct access to the fixed telephone line. In 12 Member States they are even less than 5%, which shows that there is still a lack of direct access competition, despite the availability of new technologies and services such as Voice over the Internet Protocol, carrier selection and carrier pre-selection. Incumbent operators of public telephone network still own 46% of the broadband lines. Mobile termination rates remain high in Europe, and distort competition between fixed and mobile networks.

What happens once all the markets identified by the Commission for regulation are deemed “effectively competitive”?

Successful regulation means that sector-specific regulation can gradually be dismantled as and when the EU telecoms market becomes competitive. At that time, commercial behaviour in the marketplace will be governed by competition law, as in other sectors.

For more information on the 'Article 7' procedure:

http://ec.europa.eu/information_society/policy/ecommm/implementation_enforcement/article_7/index_en.htm