REGULATORY FRAMEWORK OF THE SECTOR-SPECIFIC AND COMPETITION RULES IN THE TELECOMMUNICATIONS SECTOR IN TURKEY IN THE LIGHT OF THE EU LAW

A THESIS SUBMITTED TO
THE GRADUATE SCHOOL OF SOCIAL SCIENCES
OF
MIDDLE EAST TECHNICAL UNIVERSITY

BY

DUYGU AYDEMİR

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR
THE DEGREE OF MASTER OF SCIENCE
IN
THE DEPARTMENT OF EUROPEAN STUDIES

MAY 2008

Approval of the Graduate School of Social Sciences

_____

Prof. Dr. Sencer Ayata
Director

I certify that this thesis satisfies all the requirements as a thesis for the degree of Master of Science.

_____

Assist. Prof. Dr. Galip Yalman
Head of Department

This is to certify that we have read this thesis and that in our opinion it is fully adequate, in scope and quality, as a thesis for the degree of Master of Science.

_____

Assist. Prof. Dr. Gamze Aşçıoğlu-Öz
Supervisor

Examining Committee Members

Assist. Prof. Dr. Gamze Aşçıoğlu-Öz (METU, ADM) _____

Assist. Prof. Dr. Galip Yalman (METU, ADM) _____

Assist. Prof. Dr. Gül Efem (ÇANKAYA, LAW) _____

I hereby declare that all information in this document has been obtained and presented in accordance with academic rules and ethical conduct. I also declare that, as required by these rules and conduct, I have fully cited and referenced all material and results that are not original to this work.

Name, Last name : Duygu Aydemir

Signature :

ABSTRACT

REGULATORY FRAMEWORK OF THE SECTOR-SPECIFIC AND COMPETITION RULES IN THE TELECOMMUNICATIONS SECTOR IN TURKEY IN THE LIGHT OF THE EU LAW

Aydemir, Duygu
M.S., Department of European Studies
Supervisor: Assist. Prof. Dr. Gamze Aşçıoğlu-Öz
May 2008, 189 pages

This thesis examines the role of the sector-specific rules and competition rules in the liberalized telecommunications markets. It aims to analyse the design of the legal and institutional framework of these two sets of rules in the liberalized telecommunications sector in Turkey in the light of the EU law. To this purpose, the thesis initially compares and contrasts the main characteristics of and shared responsibilities between the sector-specific and economy-wide competition rules and institutions in the post-liberalization and post-privatization period. Then, the thesis explores the EU approach on the balance of influence between these two sets of rules and institutions. Against this background, the thesis examines role, design and interaction of the sector-specific and competition rules and institutions in the recently liberalized Turkish telecommunications markets. It, also, analyses some important competition law cases concluded by the Competition Authority.

The thesis has two main arguments. Firstly, it argues that liberalization and privatization in the telecommunications sector does not automatically lead to the competitive environment in the sector. Competitiveness of the markets after the post-liberalization and post-privatization period critically depends on the existence of a robust, coherent, and transparent regulatory framework ensuring a smooth balance between the sector-specific and the competition rules and institutions. Second argument is that sector-specific rules have a transitional character. As telecommunications markets move towards effective competition, sector-specific regulation will be reduced and the role of the competition rules in those markets will increase.

Key Words: Sector-Specific Rules, Competition Rules, Antitrust, Regulatory Authorities, Liberalization, Privatization, Telecommunications Sector

ÖZ

AB HUKUKU IŞIĞINDA TÜRKİYE'DE
TELEKOMÜNİKASYON SEKTÖRÜNDE SEKTÖRE ÖZGÜ KURALLAR VE
REKABET KURALLARININ DÜZENLEYİCİ ÇERÇEVESİ

Aydemir, Duygu
Yüksek Lisans, Avrupa Çalışmaları Bölümü
Tez Yöneticisi: Yrd. Doç. Dr. Gamze Aşçıoğlu-Öz
Mayıs 2008, 189 sayfa

Bu tezde, serbestleşen telekomünikasyon piyasasında sektöre özgü kurallar ile rekabet kurallarının rolü ele alınmıştır. Tezin amacı AB hukuku ışığında telekomünikasyon sektöründe sektöre özgü kurallar ve rekabet kurallarının Türkiye'deki yasal ve kurumsal çerçevesinin nasıl düzenlenmiş olduğunu incelemektir. Bu amaçla, öncelikle, sektöre özgü kurallar ve kurumlar ile genel rekabet kuralları ve kurumlarının temel özellikleri ve serbestleşme ve özelleştirme sonrası dönemde paylaştıkları sorumluluklar karşılaştırmalı olarak incelenmiştir. Daha sonra, Avrupa Birliği'nin bu iki ayrı kurallar bütünü ve kurum arasındaki dengeye ilişkin yaklaşımı değerlendirilmiştir. Bu açıklamalar ışında, bu tez, yeni serbestleşen Türk telekomünikasyon piyasasında sektöre özgü kurallar ve kurum ile rekabet kuralları ve kurumunun rolünü, tasarlanışını ve birbirleriyle etkileşimini analiz etmiştir. Tezde, ayrıca, Rekabet Kurumunun vermiş olduğu birtakım önemli kararlar da incelenmiştir.

Tezin iki önemli savı vardır. Birincisi, bu tezde, telekomünikasyon sektöründe serbestleşme ve özelleştirmenin otomatik olarak sektörde rekabetçi bir ortam yaratmadığı ileri sürülmektedir. Serbestleşme ve özelleştirme sonrası dönemde pazarların rekabet edebilirliği önemli ölçüde, sektöre özgü kurallar ve kurumlar ile rekabet kuralları ve kurumları arasında pürüzsüz bir denge sağlayan güçlü, tutarlı ve şeffaf bir düzenleyici çerçevenin varlığına bağlıdır. İkinci olarak, bu tezde, sektör kurallarının geçici karakterli olduğu ileri sürülmektedir. Telekomünikasyon piyasası etkin rekabete doğru yol aldıkça, sektöre özgü düzenlemeler azaltılacak ve rekabet kurallarının rolü artacaktır.

Anahtar Kelimeler: Sektöre Özgü Kurallar, Rekabet Kuralları, Antitröst, Düzenleyici Otoriteler, Serbestleşme, Özelleştirme, Telekomünikasyon Sektörü

To Demircan,

My Dear Little Brother…

My Little Wonder…

ACKNOWLEDGMENTS

First of all, I would like to express my deepest gratitude to my advisor and my role model Assist. Prof. Dr. Gamze Aşçıoğlu-Öz for her academic guidance, kindness and moral support throughout my studies. This thesis could not have been written without her who not only served as my supervisor during my graduate study but also encouraged me throughout my academic life since my undergraduate degree.

I would also like to thank to the other members of my examining committee: Assist. Prof. Dr. Galip Yalman and Assist. Prof. Dr. Gül Efem for their precious comments and scholarly guidance.

I would also like to express sincere gratitude to Mr. Danilo Leonardi and other scholars of the Program in Comparative Media Law and Policy (PCMLP) in the University of Oxford/Centre for Socio-Legal Studies, for their valuable guidance on socio-legal research theory and methods during my three-months academic visit.

Many thanks to all my dear cousins, friends, and colleagues who did not deprive me of their patience and support during my studies.

My special thanks is for a great man deserving forever love, for my prospective spouse Okan Yardımcı who made my life precious. This study could not have been completed without his support, motivation, and most importantly, his invaluable love. His mother Hamdiye Yardımcı and his father Mahmut Yardımcı also deserve a special thanks for their sincere love and understanding.

Most importantly, I would like to thank to those who have the greatest share in my life and in my heart: thanks to my self-sacrificing mother Hacer Aydemir, my great father Hüseyin Aydemir, my dear sisters Emel Aydemir and Elif Aydemir, my lovely brother Demircan Aydemir who joined us in December 24, 2004, for their never-ending love and self-denying support in every phase of my life.

TABLE OF CONTENTS

LIST OF TABLES

LIST OF ABBREVIATIONS

CA	Competition Authority
CFI	Court of First Instance
COCOM	Communications Committee
CPS	Carrier pre-Selection
CS	Carrier Selection
DG	Directorate General
E-communications	Electronic Communications
EC	European Commission
ECJ	European Court of Justice
EECMA	European Electronic Communications Market Authority
ENISA	European Network and Information Security Agency
ERG	European Regulators Group
EU	European Union
GSM	Global System for Mobile Communications
ICT	Information and Communications Technologies
ICN	International Competition Network
ISP	Internet Service Provider
MoT	Ministry of Transport
MS	Member States
NCAs	National Competition Authorities
NRAs	National Regulatory Authorities
NRF	New Regulatory Framework
OECD	Organisation for Economic Cooperation and Development
PSTN	Public Switched Telephone Network

PTT	Posts, Telegraph and Telephone
SMP	Significant Market Power
TA	Telecommunications Authority
UK	United Kingdom
US	United States
VOIP	Voice over Internet Protocol

CHAPTER 1

INTRODUCTION

'Telecommunications' or 'electronic communications', which is one of the prominent example of network industries, is a crucially important sector for society as it enables individuals and institutions to interact with eachother.[1] It creates a platform of communications necessary for the social and economic development, and provides infrastructure for various industries.

Until recently in most countries, all telecommunications networks and services were state-owned and operated by a state-owned monopolistic operator. This market organization was justified on the basis of four main rationales, namely, natural monopoly characteristics, network externalities, public-service obligation, and strategic importance of the sector. Those rationales justified the monopoly of the stated-owned operator. However, in order to prevent this monopolistic operator from abusing its monopoly power, certain requirements, such as; on prices and quality of services were imposed on it.

In the last two decades, the rationales lying behind the regulated public monopolies for the provision of telecommunications services were challenged mainly due to the technological developments and increasing demand of the information society for a range of higher quality, and lower priced services.

In the late 1980s and early 1990s, telecommunications environment in most of the developed and developing countries has witnessed striking policy reforms. National

[1] The terms "electronic communications" and "telecommunications" are used interchangeably in ensuing discussion throughout the thesis. However, it is important to note that to use the terms 'electronic communications services' and 'electronic communications networks' rather than the previously used terms 'telecommunications services' and 'telecommunications networks' is a response to convergence phenomenon by bringing together under one single definition all networks and services which are concerned with the conveyance of signals by various electromagnetic means (i.e. fixed, wireless, cable television, satellite networks). Most of the contemporary legislation replaced the term 'telecommunications networks and services' by 'electronic communications networks and services'.

operators were privatized, new operators and new services were allowed to enter the telecommunications markets. Over the past two decades, an increasing number of countries have opened their telecommunications markets to competition.

Due to these structural changes in the telecommunications markets, the nature of regulatory framework has also changed. To ensure that users are provided with services which they demand at the lowest possible prices, the main regulatory concerns in the liberalised telecommunications markets has become to ensure sustainable competition in the telecommunications markets.

Under the previous monopolistic model, the rules imposed on state-owned monopolistic operator were sector-specific, and aimed at to prevent the abuse of monopoly power. On the other hand, 'competition rules or antitrust rules'[2] were disregarded during the monopolistic period. However, as the telecommunications markets had been gradually liberalized, the role of competition policy in the sector was considered.

Prior to the liberalization of and privatization in the telecommunications sector, regulatory functions were carried out by the related governmental body. There was not an independent authority regulating the sector as it was not deemed necessary. Operational, policy-making and regulatory functions were all concentrated in a single governmental body.

Through 1980s onwards, as the telecommunications sector in most of the developed and developing countries has experienced liberalization and partial or full privatization, the respective roles of sector-specific and competition rules on the one hand and institutions on the other hand were reassessed in order to set an appropriate regulatory framework for the liberalized markets and privatized incumbent operator.

Despite certain exception, such as; *ex-ante* merger and acquisition controls and *ex-ante* competition advocacy, competition law tends to be *ex-post* as competition authorities generally intervene after an anticompetitive practice was occurred. On the

[2] The terms 'competition rules' and 'antitrust rules' are used interchangeably in ensuing discussion throughout the thesis.

other hand, sector-specific telecommunications regulation tends to be *ex-ante* as regulators intervene prior to certain actions in order to prevent anticompetitive practice.

"The regulatory framework for telecommunications adopted at different times by different countries reflects different balances between antitrust and sector-specific approaches. Among the countries fully liberalizing their telecommunications sector, some have chosen to rely mainly on sector-specific rules, often applied by sector-specific institutions, while others have depended on economy-wide antitrust rules and institutions to control market power." [3]

Against this background, *the aim of this thesis is to understand why liberalization does not remove regulatory intervention to liberalised markets, and to examine the scope of sector-specific and economy-wide antitrust regulation in liberalized Turkish telecommunications markets in the light of EU law.*

Overall, the questions addressed by the thesis are:

- Why liberalised markets still need regulatory intervention?
- What are the key regulatory objectives?
- What are the necessary tools to accomplish regulatory objectives?
- How those tools, namely, economy-wide competition rules and sector-specific rules are designed?
- What the respective roles of these rules should be to maximize the efficiency of economic regulation in telecommunications?
- How the regulatory framework of the sector-specific and competition rules in telecommunication is designed and implemented by EU?
- What is the EU future perspective on the role of the sector-specific and competition rules in telecommunications?
- How the regulatory framework of the sector-specific and competition rules in telecommunications is designed and implemented in Turkey?

[3] Geradin, D., Kerf, M. and Neto, I. (2005) *"Antitrust vs. Sector Specific Regulation in Telecom: What Works Best?"*

- What is the Turkey's current level of alignment with the EU acquis with regards to the design of sector-specific and competition rules in telecommunications?
- What is the Turkey's future perspective on the role of the sector-specific and competition rules in telecommunications?

In this regard, this study is structured as follows:

The *Chapter 2* of the thesis provides an overview of telecommunications sector and the global liberalization, privatization trends and convergence in the sector. It compares and contrasts the main characteristics of and shared responsibilities between the sector-specific and economy-wide competition rules and institutions.

Until around 1980s, telecommunications networks and services in the European Union (EU) were characterized by national public monopolies, often carried out with postal services. This has begun to change in the early 1980s with the privatization and the introduction of gradual competition in some Member States. Since the full liberalization on 1 January 1998, EC competition law has played a major role in shaping the telecommunications sector. Moreover, competition law concepts and principles are at the core of the new electronic communications regulatory framework though sector-specific regulation has maintained its importance especially during the early years of the liberalization.

"European rules on electronic communications are more elaborated than those adopted for other public service-related sectors. To many observers, given the degree of legal coverage and complexity achieved, the EU electronic communications framework could serve to a substantial extent as a model for further rules to be adopted in these other sectors."[4]

The *Chapter 3* provides an analytical insight to the EU electronic communications legislation, and analyses the EU approach on the balance of influence between sector-

[4] Nihoul, P. and Rodford, P.(2004). "*EU Electronic Communications Law.*"

specific and competition regulation in the new electronic communications regulatory framework.

Appropriate regulation safeguards competition in the markets while creating certainty needed for the innovation, investment and growth in the sector. For this reason, as technology and market dynamics evolve so thus the regulatory framework. Outdated provisions should be removed.

EU has been revising its regulatory framework at certain intervals in order to keep it updated. *Chapter 3*, also, explores the 2007 Reform Proposals of the Commission for the revision of the current EU electronic communications framework. The repercussion of those reform proposals on the role of the sector-specific and antitrust rules in the sector are dealt with in the third chapter.

As in the EU memberstates, in Turkey, the main telecommunications service and network provider traditionally was a state-owned monopolistic operator. Parallel to global trends, and with the accelerating impact of the EU-Turkey accession process, Turkish telecommunications sector have witnessed significant structural changes through the widespread liberalization and privatization movements in recent years.

Chapter 4, firstly, summarizes these structural changes, and then examines the design, role and the interaction of the sector-specific and the antitrust regulation in the recently liberalized Turkish telecommunications markets. This chapter, also, points out the criticism concerning the cooperation and coordination mechanism between Telecommunications Authority and Competition Authority. Additionally, within the context of regulatory framework of the sector-specific and competition rules, this chapter also analyses the current level of alignment with the EU acquis. This chapter, additionally, deals with the Turkey's future perspectives on the telecommunications regulatory framework.

Chapter 5 summarises the objectives of and outcomes derived from the study.

CHAPTER 2

REGULATORY FRAMEWORK OF THE LIBERALIZED TELECOMMUNICATIONS SECTOR

Regulatory framework covers both the institutions responsible for the regulation and the rules that lay down the rights and duties of both market players and regulatory institutions.

This chapter aims to provide the background necessary to understand developments behind the regulatory reform carried out for the liberalized telecommunications markets. As part of that background, this chapter gives brief information about the structure of telecommunications sector, and then explains why more than a century telecommunications sector has been controlled by state monopolies. In this sense, this chapter discusses the rationale lying behind the control of telecommunications sector by state monopolies.

Then, this chapter explains why monopolistic character of the telecommunications has been questioned in early 1980s which, in turn, the state-owned monopolies progressively replaced by private operators functioning in a competitive environment. In this regard, this chapter talks about the global trends in telecommunications sector, namely liberalization, privatization and convergence.

The transition from monopoly to competition, from state-owned operators to the private ones and convergence of the different platforms opened a new era not only in economic, technological and social terms but also in "regulatory" matters. Restructuring of the electronic communications landscape has played a significant role in shaping the regulatory frameworks.

Liberalization and privatization did not automatically result in competitive telecommunications markets. In this sense, main objective of the regulatory reform in the liberalized telecommunications markets is to ensure strong and sustainable competition through the controlling of incumbents continuing market power and

removal of market barriers for new entrants. It is believed that effective competition encourages private investment, attract new entrants, facilitate the introduction of new technologies and services, and maximize consumer benefits.

In most of the countries, effective competition is tried to be ensured through concurrent enforcement of sector-specific rules and competition law. In most of the countries, these regulations are implemented, respectively, by a sector-specific regulator and a competition authority entrusted with the enforcement of competition law.

Sector-specific telecommunications regulations tend to be *ex-ante* as sector-specific regulators intervene prior to certain actions in order to prevent anticompetitive practice. Competition rules or antitrust rules, in general, tend to be *ex-post* as competition authorities are generally required to intervene after an anticompetitive practice was occurred. However, competition rules may be enforced *ex-ante* as in the case of merger and acquisitions calling for the prior authorisation of the competition authorities, and as in the case of competition advocacy aiming prior elimination of competition-distorting disposals and transactions of the governmental bodies.

This chapter examines these main instruments of the market regulation, their role and their interaction with eachother. Then, this chapter examines the instutional settings that are entrusted with handling sector-specific rules and antitrust rules.

2.1 An Overview of the Telecommunications Sector

> "Telecommunications can be defined as the service of enabling electronic transfers of information from one point to another or from one point to multiple points. Telecommunications is a prominent example of network industries (electricity, gas, railways, postal services etc.) in the sense that a substantial part of the products it produce consists of transport from one destination to another *via* a network. Similar to the other network industries, telecommunications sector consists of multiple segments some of which are operated by incumbent undertakings that often perform as *de*

facto monopolies, while some others are operated in a competitive sense."[5]

Until recently, in most of the countries, telecommunications sector was characterized by state-owned monopolies performing also postal services. That means competing providers did not operate in the telecommunications markets. This approach was based on several rationales explained below.

Natural Monopoly Characteristic: A natural monopoly exists when the market demand can be served at a lower average cost by a single firm, rather than competing firms. It means any amount of output is always produced more cheaply by a single firm. In other words, the cost of production is lowest when one firm serves the entire market.

Economies of scale and economies of scope are shown as the main reasons for natural monopoly.

"Economies of scale occur when a firm's average cost decreases when it increases its volume of production. For example, economies of scale occur where a firm has high fixed costs of production. By increasing production, the firm can reduce its average cost per unit of output. (Provided that variable costs are relatively low, and/or do not increase quickly as production increases.)"[6]

"Economies of scope arise when different products have significant shared fixed costs, so that a single firm can produce them using a common facility. In this situation, it is more economical to produce these two services together and pay only once for the shared resources, than to produce the services separately."[7] In other words, "economies of scope means it is cheaper to provide different services (such as local, long distance and international calls; or access and transmission services) together

[5] Ünver, M. B. (2004). "*Essential Facilities Doctrine under EC Competition Law and Particular Implications of the Doctrine for Telecommunications Sectors in EU and Turkey."* pp.61-66

[6] http://www.ictregulationtoolkit.org/en/Section.2167.html (Available on. March 2008)

[7] http://www.ictregulationtoolkit.org/en/Section.1673.html (Available on. March 2008)

over a single network owned by a single firm rather than separately through different networks owned by different firms."[8]

It was believed that telecommunications industry was a natural monopoly as it subject to large economies of scale and scope. In other words, the large necessary investments for setting up national telecommunication network and decreasing costs as becoming a provider of multiple services justified the belief that the highest degree of efficiency could be ensured with just one operator in the market.

Network Externalities: "In order for a telecommunications network to function effectively, a high degree of co-operation is required from all parties involved. Investment in one part of the network creates potential benefits across the whole network and similarly, blockages and deficiencies in one part of the network can create bottlenecks, increased cost and reduced revenue in other parts of the network."[9] This interdependence of the network components reflects either as 'network effects' or as'network externalities' on networked industries. "Network externalities occur when the welfare obtained from the consumption of a good or a service increases with the number of other consumers of that good or service. In the context, it is difficult for new operators or operators with a small subscriber base to attract new subscriptions from existing or potential subscribers in the presence of network externalities."[10]

Public Service Obligations: Monopoly right was granted in return for the public utilities to provide certain services accepted as "basic services" that every citizen should have. "That is, monopoly right was granted to the state-owned operators in return for the provision of certain services throughout the territory (including loss-making areas), to all customers (including unprofitable ones), with a given level of quality and without discontinuity, thereby ensuring social and geographic cohesion.

---

[8] Atiyas, İ. (2006). *"Competition and Regulation in the Turkish Telecommunications Industry."* p.2

[9] William H. Melody, *"Telecom Reform: Principles, Policies and Regulatory Practices"*, (2001), p.49. cited in Ünver, M. B. (2004). *"Essential Facilities Doctrine under EC Competition Law and Particular Implications of the Doctrine for Telecommunications Sectors in EU and Turkey."* p.67

[10] Atiyas, İ. (2006). *"Competition and Regulation in the Turkish Telecommunications Industry."* p.25

Monopolistic service provider financed these services by cross-subsidizing profitable services with loss-making ones."[11]

Strategic Importance of the Sector: Telecommunications is an important sector for society. It enables individuals and institutions to interact with eachother. It creates a platform of communication necessary for the development of social cohesion and economic activity. It is a sector which constitutes an infrastructure for other sectors, such as; transport. Telecommunications, in this regard, was dedicated a great importance because of strategic, economic and political reasons. "It was accepted that there is a need, strategically, to control basic infrastructures in case of war or major crisis. Economically, this industry employs millions of workers and represents a significant part of the GDP. Political importance is that state monopolies were often part of the administration or had closed links with public authorities."[12] Therefore, telecommunications as a kind of network industry was consolidated in one firm owned by state.

In addition to these "given its status as a critical public utility, telecommunications has been regarded as an integral part of a country's sovereignty."[13] "Especially after World War II there was a wave of nationalisation across Europe. It was thought that some industries were too important to be left to private ownership and control."[14]

In the late 1970s, the natural monopoly characteristic of the telecommunications markets has been eroded as the technological developments reduced the costs of services. "Equipment costs have declined and building networks with much higher capacity and more intelligence have become possible. These changes have reduced the extent of economies of scale, scope and density and facilitated the introduction of competition."[15] It was argued that while some market segments in telecommunications network maintain natural monopoly characteristics, others have become competitive

[11] Geradin, D. (2006).*"The liberalization of network industries in the European Union: where do we come from and where do we go?"* pp.8-.9
[12] Ibid.
[13] http://www.ictregulationtoolkit.org/en/Section.1695.html (Available on. March 2008)
[14] Nicolaides, P. *"Regulation of Liberalized Markets: A New Role for State? (or How to Induce Competition Among Regulators)"* in Geradin, D., Munoz, R., and Petit, N. (2005). *"Regulation Through Agencies in the EU. A New Paradigm of European Governance."* p.24
[15]Atiyas, İ. (2006). "*Competition and Regulation in the Turkish Telecommunications Industry."* p.2

as a result of these technological developments. "For instance, while the local loop, the 'last mile' of copper wires, could hardly be duplicated by new telecommunications entrants and would thus, at least for some years, remain monopolized by the incumbent, a number of other market segments, such as; the provision of services were potentially competitive."[16]

The other main technological driver of the telecommunications reform was the *convergence*. "…with the advent of digital technology, services that were once seen as unrelated are being provided over the same network, leading to a convergence between traditional telecommunications industry and cable TV, broadcasting, and the computer industry (or between voice telephony, data and content/entertainment) further creating opportunities for competition."[17]

It was also argued that the provision of basic telecommunications services did not necessarily require the maintenance of public monopolies. New methods could have been developed for the financing and provision of the basic telecommunications services in the liberalized markets to everyone within the territory. For instance, 'universal service obligation'[18] has been developed and 'universal service fund'[19] has been created to this aim.

---

[16] Geradin, D., (2006). *"The liberalization of network industries in the European Union: where do we come from and where do we go?"* pp.8-9. "The 'local loop' is the physical twisted metallic pair circuit in the fixed public telephone network connecting the network termination point at the subscriber's premises to the main distribution frame or equivalent facility. The local access network remains one of the least competitive segments of the liberalised telecommunications market. New entrants do not have widespread alternative network infrastructures and are unable, with traditional technologies, to match the economies of scale and the coverage of operators designated as having significant market power in the fixed public telephone network market. Additionally, it would not be economically viable for new entrants to duplicate the incumbent's metallic local access infrastructure in its entirety within a reasonable time. These results from the fact that these operators rolled out their metallic local access infrastructures over significant periods of time protected by exclusive rights and were able to fund investment costs through monopoly rents." See.Regulation (EC) No 2887/2000.

[17] Atiyas, İ. (2006). "*Competition and Regulation in the Turkish Telecommunications Industry."* p.2

[18]Universal Service Obligation means the provision of a defined minimum set of telecommunications services to all end-users at an affordable price. For further information concerning Universal Service in Telecommunications see. Aydemir, D. (2008). *"Telekomünikasyon Sektöründe Evrensel Hizmet: Avrupa Birliği ve Türkiye'de Evrensel Hizmet Kapsamının Genişletilmesi Üzerine Bir İnceleme."*

[19]A type of financing mechanism composed of market players' certain amount of financial contributions to cover the net cost of universal service obligation. The net cost of universal service obligations may also be covered by general budget or by taxation.

Additonally, "industry organizations started to argue that network industries had to be liberalized as competition would bring lower prices and better quality of service. Consumer organizations also started to argue that competition was the best way for lower prices, to improve quality of service and stimulate innovation."[20]

It is also argued that:

> "The telecommunications revolution is tied into the wider development of the information economy. In particular, the demand for new equipment and new data and value-added services has expanded dramatically as companies have become increasingly dependent for their efficient performance on the quality of their information. Companies have wanted to use new telecommunications services or to develop their own internal corporate communications network on a global scale or to sell communications services. Together, they have been a new source of pressure on governments to relax entry and operating conditions in the telecommunications sector."[21]

Also, "in the 1960s and 1970s the focus changed slightly. Public policy shifted from controlling national industries to promoting national champions. In the 1980s, there was another but this time radical policy shift. As a result of the dissatisfaction with the performance of nationalised industries and in an attempt to rid them of continues political meddling in their financial and operational decisions and also to earn badly needed revenue for public coffers, privatization became the buzz word."[22]

As a result of these developments and arguments, the rationales behind the state-owned monopoly model for the provision of telecommunications networks and services started to be challenged.

Restructuring in the communications landscape was initiated by structural separation of the post and telecommunications. They became separate corporations. Next step was the liberalization of the telecommunications sector.

---

[20] Geradin, D. (2006). *"The liberalization of network industries in the European Union: Where do we come from and where do we go?"* p.21

[21] Kenneth, D., and Peter, H. (1990). "*The Political Economy of Communications: International and Europan Dimensions."* pp. 229-243

[22] Nicolaides, P. *"Regulation of Liberalized Markets: A New Role for State? (or How to Induce Competition Among Regulators)"* in Geradin, D., Munoz, R., and Petit, N.(2005) *"Regulation Through Agencies in the EU. A New Paradigm of European Governance."* p.24

"Liberalization process of the telecommunications markets which was initiated by the US and followed by the UK convinced other European countries and countries worldwide that the liberalization model was workable and could provide positive economic results."[23] This process also promoted by the international organizations, such as; World Trade Organization.

Competition was introduced gradually in the sector. Telecommunications equipment (i.e. handsets and facsimile machines) market was the first liberalized market in the telecommunications sector. The market for long distance services was opened up to competition before basic local services. Competition is more common in the recently emerging markets, such as; mobile telephony and Internet services.[24]

"By 2005, over 60 percent of the 184 countries for which data are available have either full or partial competition in the telecommunications sectors. Competition in mobile and Internet services is extremely high compared to fixed services. In many countries the provision of fixed services (i.e. domestic long distance and local call services) is still a monopoly."[25]

The following table summarizes the level of competition in six key sectors. For each sector, the table shows the number of countries worldwide with monopoly, duopoly, partial competition and full competition.

[23] Geradin, D. (2006). *"The liberalization of network industries in the European Union: where do we come from and where do we go?"* p.9
[24] http://www.ictregulationtoolkit.org/en/Section.2197.html (Available on. March 2008)
[25] http://www.ictregulationtoolkit.org/en/Section.1931.html (Available on. March 2008)

TABLE-1	Local Service	Domestic Long Distance	International	Mobile	Internet Services	Leased Lines
Monopoly	68	65	63	20	8	51
Duopoly	2	1	1	1	0	2
Partial competition	34	31	37	55	21	25
Full competition	76	72	77	88	119	77

Source: http://www.ictregulationtoolkit.org/en/Section.1671.html

This table shows that competitive telecommunications markets have become an arising alternative to the old monopolistic model.

The introduction of competition in the sector has been accompanied by the partly or fully privatization of the former state-owned monopolistic operators. In Europe, United Kingdom pioneered the privatization of the state-owned operators in early 1980s. British Telecom was privatized in 1984.

In the following decade, private sector participation in the telecommunications sector increased dramatically in also other European countries. Telecommunications sector's poor performance under public ownership was regarded as the main driver of privatization. It is stated that "since the international telecommunications market place is becoming increasingly competitive it will prove harder for a government monopoly to stay competitive in the absence of necessary incentives provided by the free markets and private ownership."[26]

Transfer of ownership to a private undertaking is expected to lead more effective management of the company, to contribute output growth, network expansion, better allocation of resources, increased efficiency, increased labor productivity, increase choice, decreased costs, etc.

[26] Aybar, B., & Güney, S., & Süel, H. "*Privatization and Regulation in Turkish Telecommunications, A Preliminary Assessment."* p.4

However, one should keep in mind that privatization of a telecommunications monopoly will result in the above-mentioned positive effects *if and only if* it is supported by a sound regulatory framework that is conducive to competitive environment. "That means privatization of a state-owned monopoly does not automatically lead to a competitive telecommunications markets. An effective regulatory regime addressing numerous issues (i.e.service quality, protection of the customers), at least until competition in those markets is established, is essential and crucial in achieving a competitive environment in the industry. A policy of privatization, in the absence of a well thought regulatory framework, would likely to end up in a chaotic market situation."[27]

> "There are two common privatization strategies: First strategy entails incremental public offerings over a few years that reduce the government stake step by step to negligible levels with a final goal of full divestment. In this option, there is no immediate change in the management of the firm. Telecommunications monopolies in most developed countries such as Deutsche Telecom, Telefonica of Spain, France Telecom, NTT of Japan; British Telecom etc. were privatized step by step without significant management shakeouts.
>
> The second option, block-sale strategy, requires block sale of shares to a strategic partner that is followed by a sequence of public offerings. Public offerings ensuing the block sale are intended to reduce the government share gradually while capitalizing on enhanced efficiency and reputation building in the post privatization period. In strategic sales, governments seek transfer of managerial know-how, technological infusion and capital injection by the strategic partner. In general, strategic partners are given substantial managerial control in order to be able to implement sound commercial strategies free from political interference. Telecommunications privatizations in South Africa, Peru, Mexico, Venezuela, Belgium, Hungary, and Slovakia resulted with transfer of full managerial control to the strategic partner despite minority ownership of the strategic partner (less than 50%). In some other cases, such as Ireland, Latvia and Cuba strategic partners were rendered limited managerial control."[28]

In Turkey, the policy-makers preferred the block-sale of the 55% shares of the state-owned operator that will be followed by a sequence of public offerings of the remained 45% of the shares. The first phase of the public offerings was initiated on

[27] Ibid. p.30
[28] Ibid. pp.22-23

April 2008. Public offerings ensuing the block sale are intended to reduce the government share gradually in the TTAS.

In last decade, another dramatic change has been the increasing *convergence* of neighbouring markets, namely, telecommunications, media and information-based networks and technologies. "The broadcasting, telecommunications and information technology markets are rapidly converging towards a single multi-media market in which TV operators supply voice telephony, telecommunications companies supply video images, and where the Internet is delivering both basic voice telephony and moving pictures on a commercial basis."[29] In this regard, convergence leads to the regulatory framework evolving from a traditional telecommunications-oriented framework to a more flexible framework that regulates all electronic communications infrastructure and associated services under a single framework. That is, due to the convergence in the technologies, the related regulation is also converging.

2.2 Key Regulatory Objectives in the Liberalized Sector

Competition is accepted as the main driver of the innovation, customer focused services, lower prices, higher productivity, and more service choices. Competitive environment, through stimulating the more investment and innovation, is believed to serve best to the public interest.

Prior to the liberalization of and privatization in the telecommunications sector, telecommunications services together with the postal services were provided by state-owned monopolistic operators. Regulatory functions were also carried out by the related governmental body. There was not an independent authority regulating the sector as it was not deemed necessary. Operational, policy-making and regulatory functions were all concentrated in a single governmental body.

[29] Cowie, C. and Marsden, C. T. (1998). *"Convergence, Competition and Regulation"*. International Journal of Communications Law Policy, p. 1. in Ünver, M. B. (2004). *"Essential Facilities Doctrine under EC Competition Law and Particular Implications of the Doctrine for Telecommunications Sectors in EU and Turkey."* p.125

Through 1980s onwards, the telecommunications industy in almost all countries has been experiencing liberalization and partial or full privatization.

"Liberalization and privatization does not automatically lead to competitive environment."[30]

> "The previously state-owned incumbent operators involve serious problems of remaining monopoly power due to the accreted advantages conferred upon them by their history. In particular, these newly privatized companies benefit from having:
> - 100 percent share of the market at the time of privatization and thus 100 percent control of customers
> - The accumulated assets, economies of scale, and experience of the telecommunications market
> - Ownership of vital networks to which competitors must have access if they are to be able to compete" [31]

As a result of these advantages, at the very beginning of the liberalization, the incumbent operator goes on to maintain its dominant position in the market. Due to its dominat position, unless the regulatory authorities take action, the incumbent can distort competition in the market or prevent entry on the market through a variety of practices some of which are mentioned below.[32]

- The incumbent may *refuse to supply 'essential facilities'* to the competitors.

Essential facilities are the essential network elements that required by the new entrants from the incumbent as competitor cannot obtain these elements in question elsewhere and duplication of these elements is not economically feasible for new entrants. Non-competitive segments of networks are potentially able to be an essential facility.[33] In the telecommunications sector, for example, the local loop connecting end users to the

---

[30] Aybar, B., & Güney, S., & Süel, H. "*Privatization and Regulation in Turkish Telecommunications, A Preliminary Assessment."* p.30

[31] Walden, I. and Angel J. (2005). *"Telecommunications Law and Regulation."* p.24

[32] For further information on the Common Forms of Anti-Competitive Conducts See. http://www.ictregulationtoolkit.org/en/Section.1714.html (Available on. March 2008)

[33] For further information on Essential Facility Doctrine See. Gürzumar, O. B. (2006). *"Zorunlu Unsur Doktrinine Dayalı Sözleşme Yapma Yükümlülüğü."* See. Ünver, M. B. (2004). "*Essential Facilities Doctrine under EC Competition Law and Particular Implications of the Doctrine for Telecommunications Sectors in EU and Turkey."* See. Tekdemir, Y. (2003) "*AT Rekabet Hukukunda AnlaşmaYapmayı Reddetme Sorunu ve Zorunlu Unsur Doktrini: Anlaşma Yapma Yükümlülüğü ya da Sözleşme Serbestisinin Sınırları."*

network is often regarded as an essential facility. Incumbent firms may attempt to prevent competitors from entering the market by refusing to provide access to the local loop.

- The incumbent may *charge a high price* for the essential input.
- The incumbent may *refuse to interconnect*.

Interconnection enables the users of one operator to communicate with users of another operator. Without interconnection, a subscriber cannot communicate with subscribers on other networks. In this sense, regulation of interconnection is important for the facilitation of competition in the telecommunications networks and services.

- The incumbent may *provide a lower quality interconnection service*.
- The incumbent may *practice abusive pricing* in order to force the new entrants out of the market.
- The incumbent may practice *tying and bundling* by which the sale of one product or service is made conditional upon the purchase of a second product or service.

Those practices of the incumbent may create entry barriers for potential entrants. In this regard, some argues that "telecommunications policies after liberalization are difficult to be said as efficacious as liberalization policies. Though legal obstacles have been removed, bottlenecks problems have still prevailed and *de jure* monopolies have simply been replaced with their new *de facto* equivalents.[34] "Without efficient entry and growth of new rivals or the threat of entry, competitive disciplines on the newly privatized incumbent firms would not be exerted and hence these firms would be able to exploit their dominant position at the expense of consumers."[35]

In this sense, "the first crucial regulatory objective is the controlling the market power in liberalized telecommunications markets where incumbents usually remain dominat

[34] Ünver, M. B. (2004). "*Essential Facilities Doctrine under EC Competition Law and Particular Implications of the Doctrine for Telecommunications Sectors in EU and Turkey."* p.63
[35] Walden, I. and Angel, J. (2005). *"Telecommunications Law and Regulation."* p.24

for some time after the opening of the market to competition."[36] The major concern in this regard is to guarantee access the essential facilities. "Given the market imperfections and the risks to competition, most governments have taken the decision to intervene directly in the sector in order to guarantee access to essential facilities and networks controlled by the incumbent operators."[37]

Secondly, as competition increases, new regulatory priorities *(e.g.* market entry regulation) emerge. Competition cannot develop without regulatory intervention by relevant authorities because increasing number of market players required the policy-makers to handle the issues regarding the licensing procedures, interconnection, access to essential facilities, tariffs, universal service obligations, privacy etc. It is evident that the new game could not be played by the old rules. As a result, accompanying rules were accordingly adopted after the introduction of competition to the telecommunications markets.

'Access'[38] issue is the main aspect of the liberalized telecommunications markets. "In a converged environment, where the traditional boundaries between the neighbouring markets, such as; broadcasting and telecommunications has been removed, there are additional access issues because there are additional 'gateways' both technical and economic."[39] "Service providers need access to content and content providers need access to customers, both of which may establish some form of economic gateway."[40] In this context, convergence has had major implications required to be addressed in the regulatory framework of the telecommunications.

---

[36] Geradin, D. and Kerf, M. (2003). *"Controlling Market Power in Telecommunications: Antitrust vs Sector-specific Regulation."* pp.6-11

[37] Ünver, M. B. (2004). "*Essential Facilities Doctrine under EC Competition Law and Particular Implications of the Doctrine for Telecommunications Sectors in EU and Turkey."* p.62

[38] Access means making facilities and services available to another operator for the purpose of providing electronic communications services under defined conditions. It includes, among other things; physical interconnection; access to network elements and associated facilities (i.e., local loop); access to physical infrastructure, including buildings, ducts, and masts; access to software systems, including operational support systems; access to numbering translation; access to fixed and mobile networks; access to conditional access systems, and; access to virtual network systems.See.http://www.ictregulationtoolkit.org/en/Section.2110.html

[39] Ünver, M. B. (2004). "*Essential Facilities Doctrine under EC Competition Law and Particular Implications of the Doctrine for Telecommunications Sectors in EU and Turkey"*.p.66

[40] http://www.ictregulationtoolkit.org/en/Section.3118.htm (Available on. March 2008)

Another regulatory objective is to guarantee the provision of basic telecommunications services to everyone within the country that would not be provided if profit-seeking competing operators were granted complete freedom of action.

"The new regulatory set up, in liberalized industries, opts for 'deregulation' that refers to the decreasing influence of the state over the sector and letting competitive forces to drive the markets. However, deregulation has accompanied by re-regulation which is used to illustrate that the amount of rules and regulations actually increases when rules have to be made explicit with liberalization and the externalization of regulation in relation to policy-making and operation."[41]

In most of the developed and developing countries, all these regulatory objectives can be achieved through two distinct sets of rules and institutions: *economy-wide antitrust* rules and institutions and *sector-specific* rules and institutions. The relationship between these two sets of rules and institutitions has been devoted considerable importance in the telecommunications regulatory agenda. The next part will talk about the *sector-specific* and *antitrust* components of the regulatory framework and their respectives roles in the liberalized telecommunications markets.

2.3 Main Regulatory Instruments

In the broader sense, regulation means "the application of continuous and focused control by a public agency, drawing upon its legal authorisation obtained by legislation, on activities deemed to be necessary and desirable by the society."[42]

As stated above, the reason for regulating the liberalised electronic communications markets is that they are still warrant structural competition problems. The aim of regulation on these markets is thus to improve competition up to a point in which sustainable competition is ensured. The objective of 'competition policy' is to foster the expansion of the market, technological innovation, a wider choice of goods and services, and the accessibility of lower-cost higher-quality services to the public.

[41] http://www.ictregulationtoolkit.org/en/Section.1322.html (Available on. March 2008)
[42] Karabudak, H., B. (2006). *"Competition Policy and Regulated Markets: Experience of Turkey."*

"Broader concept 'competition policy' is used so as to encompass all types of government policies *inter alia* sector-specific rules and competition law principles, etc. which are directed to enhance competition in field of telecommunications."[43] In the telecommunications sector, such rules include general competition law principles, such as; prohibitions of anti-competitive behaviour, abuse of market dominance, and mergers or acquisitions that would hinder reduce competition; or telecommunications specific rules aimed at to encourage competition in the sectors, such as; access and interconnection requirements.

As to be understood, the liberalised markets may be accompanied by concurrent enforcement of sector-specific regulations and economy-wide competition law to ensure sustainable competition.

> *"*In economic terms, both sector-specific rules and competition law principles are based on common welfare foundations such as *allocative, productive* and *distributional efficiencies*. According to the allocative efficiency, resources must be allocated so as to produce the maximum benefits to consumers, that is, the economy must maximise allocative benefits. As to the productive efficiency, the resources must be produced at the minimum cost so that they can be released to satisfy others' demand, that isi the economy must maximise productive efficiency. In the context of distributional efficiency, the resources must be distributed to maximise distributional efficiency."[44]

Legal and institutional sector-specific and economy-wide antitrust regulatory instruments will be examined below.

[43] Ünver, M. B. (2004). "*Essential Facilities Doctrine under EC Competition Law and Particular Implications of the Doctrine for Telecommunications Sectors in EU and Turkey."* p.89
[44] Ibid.

2.3.1 Legal Instruments

During the monopolistic period, in order to prevent state-owned monopolistic operator from abusing its monopoly power, sector-specific remedies, such as; tariff approval and service quality standards were imposed on this operator. Competition law remedies were disregarded during this period. However, as states move towards liberalization, the role of competition policy in the sector was considered. Liberalized markets have been accompanied by sector-specific regulations which are implemented by a sector-specific regulator on the one hand and competition law which are enforced by economy-wide competition authority, on the other hand.

Competition law tends to be *ex-post* as competition authorities are generally required to intervene after an anticompetitive practice was occured. On the other hand, sector-specific telecommunications regulations tend to be *ex-ante* as regulators are authorized to intervene prior to certain actions in order to prevent anticompetitive practice. In other words, *ex-ante* remedies are generally imposed through sector-specific regulation. However, there are certain exceptions where *ex-ante* enforcement of antitrust rules is realized. The first case where *ex-ante* enforcement of antitrust rules is realized is the clearance of a merger and acquisition of the telecommunications operators. The second example for *ex-ante* competition regulation is the competition advocacy aiming at the modification or elimination of competition-distorting disposals and transactions of governmental bodies.

2.3.1.1 Sector-Specific Rules

Ex-ante sector-specific regulation in teleceommunications is mainly concerned with the entry conditions (e.g. authorization procedures, access and interconnection rates, and tariffs etc.) and aims to avoid anti-competitive behaviours, such as; excessive pricing, refuse to supply essential facilities, refuse to interconnect, discriminatory treatment.[45]

A few examples for e*x-ante* sector-specific remedies to be imposed are:

[45] MEMO/07/107. Brussels. 16 March 2007

- supply of access (essential facilities, interconnection, local loop unbundling, carrier selection, carries pre-selection)
- transparency,
- non-discrimination,
- cost account and account separation,
- vertical separation between different market segments,
- approval of tariffs and access and interconnection rates,
- service quality standards,
- number portability,
- universal service obligation.

2.3.1.2 Competition Rules

"If a country has selected *markets* as the primary basis for organizing its economic system and if it wants those markets to function well it needs to protect the competitive process."[46] "Competition law and policy plays a vital role in this process and indeed in the process of privatization and liberalization of state owned/regulated markets, it serves as an indispensable tool for taking measures to ensure that competitive markets are created and protected."[47]

"Generally speaking, the term "competition law" encompasses instruments that address government economic and regulatory policies, and private sector restrictive business practices that significantly distort the competitive process; thereby undermining the efficient functioning markets. Competition law aims to protect competition in markets for goods and services in order to contribute to social welfare by ensuring the most efficient allocation of resources."[48]

---

[46] Blumenthal W. (2006). "*The Relationship Between Competition Agencies and Other Units of Government."* Remarks before the Ministry of Commerce, Asian Development Bank and OECD, International Seminar: Review of Anti-Monoply Law 19 May 2006 in Öz-Aşçıoğlu, G. (2006). *"The Role of Competition Authorities and Sectoral Regulations: Regional Experiences."* p.3

[47] Öz-Aşçıoğlu, G. (2006). *"The Role of Competition Authorities and Sectoral Regulations: Regional Experiences."* p.4

[48] Khemani, S., R. (2006). *" Competitiveness, Investment Climate and Role of Competition Policy in Turkey."* pp.6-19

In this regard, competition law would prohibit anti-competitive agreements, decisions and concerted practices in all industries, such as; cartels, tying agreements, or practices that impede new firms to enter into the market. Competition law would also prohibit abuse of dominant position, such as; predatory pricing, and mergers and acquisitions creating or strengthening a dominant position. "It would also expose state-owned enterprises to these same antitrust rules, and would not grant exemptions from antitrust except where justified by market failures. In other words, in the broader sense, competition laws would entail all aspects of the proposition that neither governments nor commercial enterprises shall stand in the way of market competition."[49]

Common features of Competition Law are:[50]

- *Internationalization:* Same competition law principles apply in different jurisdictions (US, Korea, Canada, Turkey, India, even China)
- *Criminalization:* Criminal law sanctions; from fines to imprisonment
- *Civil Law Enforcement:* Compensation of damages caused as result of anticompetitive practices and this serves as a tool for competition authorities to set their priorities
- *Due Process and Judicial Supervision:* Wide powers for the competition authorities strong judicial review, checks and balances through judiciary
- *Competition Advocacy:* The relations of the competition authorities with sectoral regulatory agencies. Competition advocacy may replace government barriers; where as for some markets/jurisdictions it is just the other way around.

2.3.1.2.1 *Ex-ante* Competition Rules

Regulatory authorities may impose *ex-ante* competition remedies on a merged firm, where the merger would otherwise be anti-competitive. The objective of *ex-ante* enforcement of competition rules is to prevent the merger of two or more enterprises or acquisition by an undertaking or by a person which would create or strengthen

[49] Karabudak, H., B. (2006). *"Competition Policy and Regulated Markets: Experience of Turkey."*

[50] Öz-Aşçıoğlu, G. (2006). *"Regional experiences and lessons learnt in fostering competition in regulated sectors, focusing on the link between competition agencies and regulated bodies."* p.4

dominant market position, and impedes competition significantly in market for goods or services within the country.

2.3.1.2.2 *Ex-post* Competition Rules

Except the regulation of 'mergers and acquisitions', competition law or antitrust law is *ex-post* regulation. "Under the *ex-post* approach, a remedy is imposed if and only if an illegal conduct is first proven."[51] In this sense, "antitrust regulation aim to promote efficient competition by penalizing or undoing conduct that hinders competition in the market. If regulatory authority proves the misconduct, it may impose a series of ex-*post* remedies, such as; fines, injunctions, and bans."[52]

2.3.1.2.3 Competition Advocacy

"Competition may not only be hindered by private anticompetitive conduct, such as; anticompetitive mergers, vertical arrangements in restraint of competition and abuse of dominant positions, but also, in certain circumstances, by public regulatory intervention and rulemaking in the sense that regulatory intervention may go beyond what is strictly necessary and may impede competition in those sectors."[53]

Furthermore, "empirical experience suggests that private sector anticompetitive business practices are often rooted in poorly conceived and implemented public policies. Such situations especially arise when policy-makers and regulators are 'captured' by politically connected firms, engaged in self-serving rent-seeking behavior."[54]

> "In countries with a competition law in force private anticompetitive conduct can effectively be combated with the *enforcement* of such laws. In contrast, public regulatory intervention is perfectly legal as a rule, and therefore harder to be influenced. What competition authorities can do in such cases is advocating with the relevant government agencies for the

[51] Geradin, D. and Sidak, J. G. (2003). "*European and American Approaches to Antitrust Remedies and the Institutional Design of Regulation in Telecommunications."* p.2
[52] http://www.ictregulationtoolkit.org/en/Section.1665.html (Available on. March 2008)
[53] ICN. (2002). *"Advocacy and Competition Policy."* Executive Summary.
[54] Khemani, S., R. (2006). *"Competitiveness, Investment Climate and Role of Competition Policy in Turkey."* p.7

> rejection of unnecessarily anticompetitive regulatory measures, or at least for the adoption of measures as competition friendly as possible. In other words, it is no longer enforcement powers but convincing arguments that matter." [55]

"Despite the fact that the essential task of competition agencies is the implementation of competition rules, an effective competition policy cannot be implemented only through the *enforcement* of competition rules, without an appropriate advocacy policy."[56]

"Competition advocacy comprises all activities of competition authorities promoting competition, which do not fall in the enforcement category. In this context, competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition."[57]

In other words, "competition advocacy refers specifically to "the ability of the competition authority to provide advice, influence and participate in government economic and regulatory policies in order to promote more competitive industry structure, firm behavior and market performance."[58]

"Competition advocacy has two important pillars. The *first* one is the formation of a competition culture through carrying out a variety of awareness rising activities, such as; symposium, seminar, conference and educational activities, for business representatives, lawyers, academicans, etc. on specific competition issues, the publication of annual reports and guidelines and so on."[59] Establishment of the NGOs,

---

[55] Ibid.
[56] http://www.rekabet.gov.tr/erekabetsavunuculugu.html (Available on. May 2008)
[57] ICN. (2002). *"Advocacy and Competition Policy"*. Executive Summary.
[58] ICN. (2005). *"Competition Advocacy Review Case Studies on Regulated Sectors."* pp.4-5
[59] See. Cantürk, İ. (2005). *"Rekabet Ortamı ve Rekabet Kültürü Nasıl Sağlanır."* See. Efem, G. (2001). *"Rekabet Etiği."* See.Öz-Aşçıoğlu, G. (2007) *"Türkiye'de Rekabet Hukuku ve Politikası: Eğitim ve Öğretimi Üzerine Görüşler."* See. Atasayar, K. (2007). *"Rekabet Savunuculuğu ve Rekabet Derneği*." See. Türkkan, E. (2005). *"Rekabet Savunuculuğu ve Rekabet Enstitüsü İhtiyacı."*

institutes devoted to the competition advocacy also crucially contributes to the establishment of the competition culture.

"All those activities contribute to establish a competition culture which is best characterized by the awareness of economic agents and the public at large about competition rules. Thus, all efforts on behalf of competition authorities to make these rules known and understood are positive contributions to the competition culture."[60]

"The second pillar is concerned with the attempts by competition agencies aiming at the modification or elimination of competition-distorting disposals and transactions of governmental bodies which are not deemed an undertaking."[61]

> "That requires competition authorities to become involved in competition-related regulatory proceedings. The competition agency is probably well suited to understand the economic impact of regulation on competition and therefore is best positioned to provide such guidance to other agencies. A country's competition regulatory body needs to be aware of competition-related developments in regulated sectors such as energy, telecommunications, financial services and postal services as part of an effective competition advocacy program."[62]

> "Competition lawpolicy is a 'general policy of general application', that is it covers or should cover all sectors of the economy. It is applied on a case-by case basis. The cases usually arise from complaints received from individual firms or customers. A particular action by the competition authority may, therefore, resolve anticompetitive behavior by one or more firms in the situation at hand, but may or may not have a sector or economy wide impact…However, successful competition advocacy activities are more likely to have wider impact at the sector or economy level."[63]

"In this regard, competition advocacy has become the "essential facility" for the competitiveness of the markets and the protection of the consumer."[64]

---

[60] ICN. (2002). *"Advocacy and Competition Policy."* Executive Summary
[61] http://www.rekabet.gov.tr/erekabetsavunuculugu.html (Available on. May 2008)
[62] ICN. (2005). *"Competition Advocacy Review Case Studies on Regulated Sectors."* pp.5-6
[63] Khemani, S., R. (2006). *"Competitiveness, Investment Climate and Role of Competition Policy in Turkey."* p.8
[64] Öz-Aşçıoğlu, G. (2006). *"The Role of Competition Authorities and Sectoral Regulations: Regional Experiences."* p.4

2.3.1.3 Sector-Specific Rules vs. Competition Rules

Major distinction between two set of rules is that differs from sector-specific regulation, competition law apply the same rules across all sectors. "That means, competition rules are applied sector independent. This makes them more flexible in comparison to sector-specific rules which include more complex and detailed regulatory principles that apply exclusively to one sector."[65]

"Ex-ante sectors-specific regulation is an anticipatory intervention to prevent socially undesirable actions or outcomes in markets, direct market activity towards socially desirable ends."[66]

> "Under the ex-ante approach, a remedy is imposed before any specific finding of illegal conduct. The rationale for this prophylactic approach may be one or more of the following considerations:
> • The probability of anticompetitive behavior in the absence of the prior restraint is high;
> • The magnitude of the harm from such behavior would be great;
> •The likelihood and magnitude of offsetting efficiency justifications for the behavior are low; and
> • The danger of false positives is small."[67]

> *"S*ector-specific regulation sets forward-looking expectations for firm behaviour and avoids damage from anti-competitive behaviour by anticipating and preventing it. *Ex-ante* sector-specific regulation provides certainty for market participants, by setting out clear rules in advance. Regulators and affected parties know in advance the types of information required for regulatory proceedings. However, excessive implementation of *ex-ante* sector-specific regulations may create undesirable restrictions which may have a negative impact on the market expansion, new investments and consequently on the growth of new businesses."[68]

"On the other hand competition regulation has been more flexible and is not as interventionist as *ex-ante* sector-specific regulation because it relies on market forces

---

[65] Ünver, M. B. (2004). "*Essential Facilities Doctrine under EC Competition Law and Particular Implications of the Doctrine for Telecommunications Sectors in EU and Turkey."* p.89

[66] http://www.ictregulationtoolkit.org/en/Section.1678.html (Available on. March 2008)

[67] Geradin, D. and Sidak, J. G. (2003). "*European and American Approaches to Antitrust Remedies and the Institutional Design of Regulation in Telecommunications."* p.2

[68] http://www.ictregulationtoolkit.org/en/Section.1677.html (Available on. March 2008)

unless abuses are committed. *Ex-post* competition rules are imposed after the conduct of an anticompetitive practice. However, *ex-post* antitrust remedies may be too slow to adapt in a rapidly evolving communications environment where cases take years to decide."[69]

As mentioned in the previous parts, the incumbent operators have incentives to hinder competition through a series of practices, such as; refuse to supply essential facilities, refuse to interconnect, excessive pricing. In such cases *ex-post* competition regulations are insufficient to restrain incumbents from conducting anti-competitive practices. Additionally, *ex-post* antitrust rules do not ensure the provision of certain basic telecommunications services to all citizens regardless of their geographical location, at an affordable price with a defined quality (universal service obligation).

> "A lax competition law-policy may prevent effective competition from occurring and impede the structural reform process. Inefficient incumbent firms may become entrenched and insulated from the pressures to reduce costs, invest and innovate. In contrast, an overly strict application of competition law-policy may inhibit pursuit of legitimate business strategies such as vigorously competing on basis of superior economic performance, or exploiting available efficiencies by acquiring less productive firms. Thus, right balance between such situations should be ensured."[70]

It is important to point out that competition rules and sector-specific regulations are not mutually exclusive. They are complementary measures to ensure the development of competition and prevention of monopoly abuse. The intensity of sector-specific regulation is generally high in the early phase of liberalization when the competition in the markets is at its infancy. As competition develops, the need for sector-specific regulation will diminish.[71] However, to remove sector-specific regulation from a market proving effective competition does not mean that market becomes completely deregulated. Once *ex-ante* sector-specific regulation phases out, *ex-post* antitrust rules will continue to safeguard the competition in those markets.

---

[69] http://www.ictregulationtoolkit.org/en/Section.1689.html (Available on. March 2008)

[70] Khemani, S., R. (2006). *"Competitiveness, Investment Climate and Role of Competition Policy in Turkey."* p.10

[71] Atiyas, İ. (2006). *"Competition and Regulation in the Turkish Telecommunications Industry."* p.4

2.3.2 Institutional Instruments

"Sector-specific rules and competition rules are typically designed and implemented through regulatory authorities. These authorities are often organized as administrative agencies with varying degrees of operational and financial independence from the ministries, which until liberalization had executive authority over the sector."[72]

> There are different possibilities to model the institutional structuring:[73]
> - combine technical regulation (i.e. privacy and safety rules) and economic regulation (i.e. tariffs) in a sector-specific regulator and leave competition law enforcement purely in the hands of the competition authority,
> - combine technical and economic regulation in a sector-specific regulator and give it some or all competition law enforcement functions limited to the sector,
> - organise technical regulation as a stand-alone function for the sector-specific regulator and include economic regulation within the competition agency,
> - rely solely on competition law enforced by the competition authority,

"For the success of regulation, regulatory institutions must be staffed with qualified attorneys, economists and engineers etc. Top-level administrators must have substantial knowledge and experience related to the industry with no organic links to the regulated entities. There should always be an appeal process open to regulated firms in case of potential grievances following the rulings of the regulator."[74]

2.3.2.1 Sector-Specific National Regulatory Authorities (NRAs)

Sector-specific regulators cover a particular sector (e.g.telecommunications, energy, banking etc.) alone or a small number of sectors where the government believes the public interest would not be adequately advanced merely by relying on private markets supervised by a competition agency.[75]

---

[72] Atiyas, İ. (2006). *"Competition and Regulation in the Turkish Telecommunications Industry."* p.4

[73] Karabudak, H., B. (2006). *"Competition Policy and Regulated Markets: Experience of Turkey."*

[74] Aybar, B., & Güney, S., & Süel, H. "*Privatization and Regulation in Turkish Telecommunications, A Preliminary Assessment"*.

[75] Karabudak, H., B. (2006). *"Competition Policy and Regulated Markets: Experience of Turkey."*

Sector-specific regulatory authority regulates and implements sector-specific rules, such as; telecommunications-specific rules mentioned before.

Sector-specific regulatory authorities established mainly owing to the need for sector-specific technical expertise to deal with some key issues in the transition from monopoly to competition (e.g. access and interconnection, authorisation) and to apply *ex-ante* remedies to avoid potential anti-competitive practises.

Their functions, among the others, may include:

- authorisation of market players,
- approval of tariffs,
- setting up quality and technical standards,
- imposing administrative sanctions if necessary,
- monitoring the provision of services and operating of infrastructure,
- imposing universal service obligations,
- resolving disputes between market players and
- addressing consumer complaints

2.3.2.2 National Competition Authorities (NCAs)

The competition authories are generally economy-wide in coverage in the sense that they regulate all the sectors in an economy by enforcing competition law. They are entrusted with the task of promoting competition or controlling the market power in all sectors of the economy. The transition of the telecommunications market from monopoly to competition resulted in involvement of competition authorities in this sector.

They can be entrusted with various types of responsibilities including:

- reviewing potentially anti-competitive behaviours
- reviewing transactions (mergers and acquisitions)
- prosecuting anti-competitive behaviours

- imposing sanctions upon parties committed anti-competitive actions

In other words, "these agencies administer framework laws primarily intended to protect consumer interests by prohibiting firms from reducing competition through colluding or merging with their rivals, or seeking to eliminate competitors by means other than offering superior products to consumers. Intervention by the agency is focused on the maintenance of competition as a process, rather than on the survival of individual competitors."[76]

2.3.2.3 NRAs vs. NCAs

"Regulatory authorities have wider control rights than competition authorities, given the fact that competition law rules challenge the lawfulness of conduct, while regulatory authorities engage in detailed regulation of wholesale and retail prices, profit sharing, investments, etc."[77] "Besides, regulatory authorities are more at ease with *quantitative* evidence, which they often use to set very detailed regulations, as in the case of cost-based pricing rules. In contrast, competition authorities are in shortage of detailed data, being usually more at ease with cases based on *qualitative* evidence (price discrimination, price fixing, vertical restraints, etc.)"[78]

"Establishing the proper relationship between these two agencies is a significant and ongoing challenge in most countries. The issue has been discussed and debated in international fora in recent years. No single solution has emerged. Different jurisdictions have different approaches and even within a single jurisdiction the approach to the relationship can vary."[79] The reason is that "the allocation of work in between these institutions does not only depend on the best models of competition

---

[76] Karabudak, H., B. (2006). *"Competition Policy and Regulated Markets: Experience of Turkey."*

[77] Jean-Jacques Laffont and Jean Tirole, "Competition in Telecommunications", The MIT Press, (Fourth Ed.), 2002, p. 277. in Ünver, M. B., "*Essential Facilities Doctrine under EC Competition Law and Particular Implications of the Doctrine for Telecommunications Sectors in EU and Turkey."* p.89

[78] Jean-Jacques Laffont and Jean Tirole, "Competition in Telecommunications", The MIT Press, (Fourth Ed.), 2002, p. 278. in Ünver, M. B., "*Essential Facilities Doctrine under EC Competition Law and Particular Implications of the Doctrine for Telecommunications Sectors in EU and Turkey."* p.89

[79] Blumenthal W.; Presentation to the International Symposium on the Draft Anti-Monopoly Law of the People's Republic of China (23-24 May 2005) in Öz-Aşçıoğlu, G. (2006). *"The Role of Competition Authorities and Sectoral Regulations: Regional Experiences."* p.6

policy and regulation and the capabilities of the institutions but it is also shaped under the limitations of the legal and administrative systems and sometimes even bureaucratic culture and traditions of the country concerned."[80]

That means there is not an one-fits all model. The regulatory framework reflects different balances between antitrust and sector-specific approaches in different countries. For instance; "in Australia there is an antitrust authority with telecommunications group. UK has a sector-specific regulator with antitrust powers. In the US there is distinct sector-specific regulator and antitrust authorities. In New Zealand, there was just an antitrust authority before 2001. Since 2001, an antitrust authority with telecommunications commissioner exists."[81] "In Denmark, sectoral regulator has to ask a vinculative opinion from the competition authority, where as in France and Germany there is just a duty of informing the other party. In Italy and Sweden, competition authorities have the primary role and receive opinion from the other SRAs and in Netherlands there is explicit coordination between the sectoral regulator and the competition authority."[82]

> "In most countries, sector-specific regulatory authorities with mandates to promote competition in the industry co-exist with competition authorities that execute general competition law. This situation raises crucial questions to answer: How authority to intervene the sector should be divided between them? How the two authorities should interact? How disagreement between their proceedings should be resolved? For example, should the sector- specific authority have the mandate to conduct *ex-post* investigations on infringement of competition? Should the competition agency have the authority to investigate complaints about access charges (as an extreme example, say, even when those are determined or approved by the sector-specific regulator)?"[83]

---

[80] Öz-Aşçıoğlu, G. (2006). *"The Role of Competition Authorities and Sectoral Regulations: Regional Experiences."* p.6

[81] Geradin, D., Kerf, M. and Neto, I. (2005). *"Antitrust vs. Sector Specific Regulation in Telecom: What Works Best?"and "Antitrust vs. Sector Specific Regulation in Telecom: The Impact on Competitiveness."*

[82] Barros, P.P. (2004*)."The Relationship Between sectoral Regulators and Competition Authorities- Incentives For Action."* Lecce. 8 September 2004. p.6 in Öz-Aşçıoğlu, G. (2006). *"The Role of Competition Authorities and Sectoral Regulations: Regional Experiences."* p.11

[83] Atiyas, İ. (2006). *"Competition and Regulation in the Turkish Telecommunications Industry."* p.6

When there are separate entities enforcing sector-specific and competition rules, ensuring the cooperation and coordination among them is a key element in ensuring the clear-cut regulatory framework for market players and users.

As mentioned above "the model preferred varies from one legal system to another, and sometimes even in the same country the relations of various sectoral regulatory agencies with the competition authority may be different from one another. With respect to specific industries the activities in which are within the authority of sectoral regulatory agencies, competition considerations and regulatory functions can be reconciled through different mechanisms."[84] For instance;

i) "Competition law and sectoral law may operate in parallel, with competition authority overseeing competition considerations and sectoral regulatory agencies dealing with regulatory considerations. This refers to the conventional *ex-ante* and *ex-post* control and supervision of the markets. Therefore the sectoral regulatory agencies shall be vested with *ex-ante* control powers (i.e. compliance with licensing requirements) whereas the competition authority shall be given the *ex-post* authority (control of the anticompetitive practices). Or for example approval of prices should be within the *ex-ante* authority of the regulator unless the prices are claimed to be excessive or predatory which then may require an *ex-post* review by the competition authority."[85]

ii) Competition authority and sectoral regulatory agencies may have shared jurisdiction over competition considerations and in this option those agencies have a concurrent jurisdiction.

iii) If the sectoral regulatory agencies are assigned under their governing law with sole authority over competition, in addition to the regulatory powers, the sectoral regulatory agencies here are also vested with exclusive authority to also deal with competition issues.

iv) Finally in some jurisdictions competition law may be expressly exempted or impliedly repealed as a result of the law governing sectoral regulation and thus the industry/market in question is immune from the application of competition law.

"Despite their clearly defined roles respectively, as noted above, it is not easy to identify a recipe on the relationship of competition authority and sectoral regulatory agencies. The relationship between them highly depends on the particular

[84] Öz-Aşçıoğlu, G. (2006). *"The Role of Competition Authorities and Sectoral Regulations: Regional Experiences"*.p.7

[85] Laurence I; Relationship between antitrust agencies and sectoral regulators – Subgroup 2 "Who should regulate, and how should they regulate?" Bonn/ICN/7th June. in Öz-Aşçıoğlu, G. (2006). *"The Role of Competition Authorities and Sectoral Regulations: Regional Experiences"*.pp.7-8

characteristics of the country in question, the level of liberalization, the experience, the limitations of the legal and administrative systems, and even bureaucratic culture and traditions of the country, the maturity or capability of the regulatory bodies."[86]

2.4 Conclusion

The technological developments combined with the users demands asking for lower prices, increased choice and better quality of services led to a fundamental change in the provision of the telecommunications networks and services from state-owned monopolistic service provision to a competitive, market-based model.

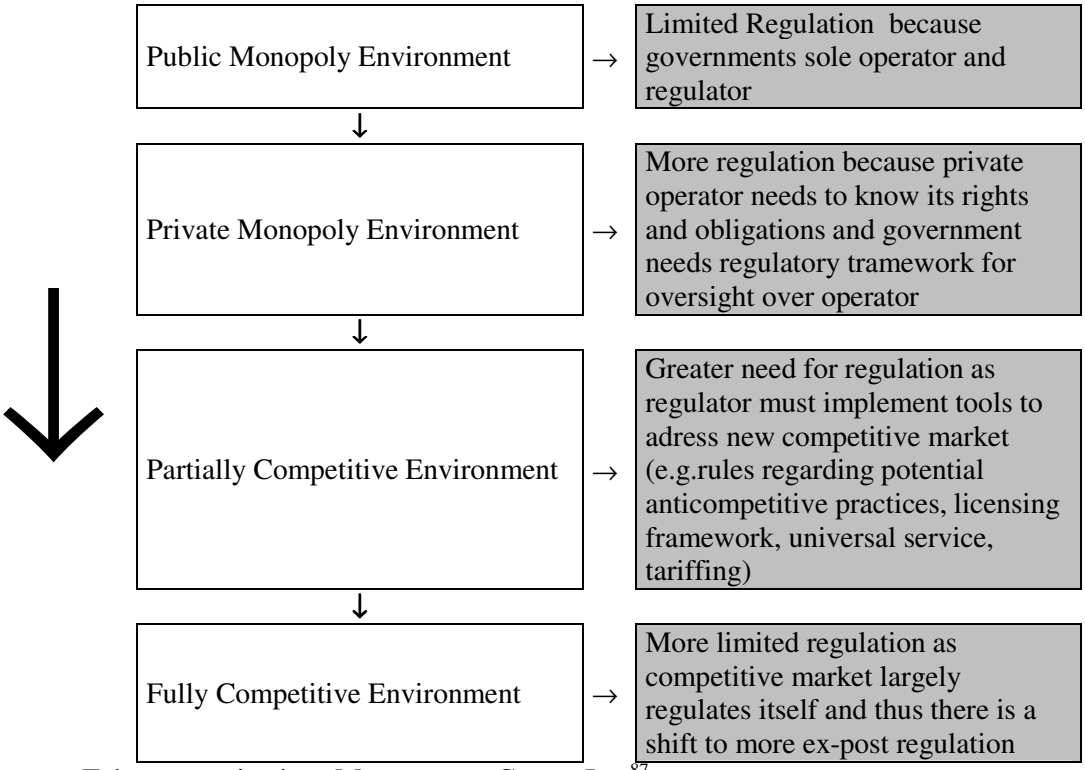
The overall trend in telecommunications policies in most of the countries worldwide for the last two decades has been to liberalize the telecommunications markets and to partially or fully privatize the state-owned operators. These substantial structural changes combined with the convergence of the telecommunications, broadcasting and information-based services led to a new regulatory paradigm focussed on the discussion of the role of the sector-specific and antitrust rules in the liberalized telecommunications markets.

In this new regulatory environment, the creation and protection of competition have been one of the main target of the regulatory process and, accordingly, sector-specific and competition rules and authorities were attributed certain duties to accomplish this target.

This chapter examined the regulatory framework of the sector-specific regulation and economy-wide competion rules. Upon this examination, need for *ex-ante* sector-specific and *ex-post* enforcement of competition regulation summarized as follows:

[86] Öz-Aşçıoğlu, G. (2006). *"The Role of Competition Authorities and Sectoral Regulations: Regional Experiences."* pp.7-8

TABLE – 2 – Need for Regulation



Source: Telecommunications Management Group, Inc.[87]

The intensity of *ex-ante* regulation is generally high in the early phase of liberalization when the competition in the markets is at its infancy. As competition develops, the need for *ex-ante* regulation will diminish. In a fully competitive environment, there is a more limited need for *ex-ante* sector-specific regulation in the sense that *ex-post* antitrust rules will safeguard the competition in the markets. However, regulatory authorities still have a critical role to play, particularly given the dynamic role of the sector and the unsettled issues that new technologies may introduce into the regulatory environment.[88] For this reason, the cooperation and coordination among them is a key element in ensuring the clear-cut regulatory framework for market players and users.

However, there is not one-fits all model concerning the the cooperation and coordination between sectoral regulators and economy-wide competition regulator. The cooperation and coordination between these institutions depend on the particular

[87] http://www.ictregulationtoolkit.org//en/Section.1686.html (Available on March 2008)
[88] http://www.ictregulationtoolkit.org//en/Section.1687.html (Available on March 2008)

characteristics of the country in question, the level of liberalization, the experiences, the limitations of the legal and administrative systems, and even bureaucratic culture and traditions of the country, the maturity or capability of the regulatory bodies.[89]

There are three suggested method in order to regulate the activity in a market where both competition authority and sectoral regulatory agencies already exist.[90]

> 1. There can be a clear *allocation of roles* according to the issue (*ex-ante* V *ex-post*)
>
> 2. There can be *shared/concurrent juristiction of competition* regulators and sector-specific regulators. However, there are certain advantages and disadvantages of shared/concurrent juristiction of two sets of authorities.
>
> As regards advantages; each agency avails itself of the other's experience, important synergies may be created if constructive cooperation is facilitated. High level of technical knowledge meets with high standard competition considerations. As regards disadvantages; increased costs (can be mitigated to a certain extent by early and regular contact), different standards applied by the competition and sectoral regulators which may result in inconsistent outcomes, time and resources spent should worth the outcome.
>
> 3.A framework for a *cooperation* between the two authorities can be built. There are various mechanism for cooperation, such as; to build a legal framework for this cooperation or to leave it purely informal depends on the legal system and the administrative traditions.

It should not be forgotten that beside the *ex-post* application of competition law, there is *ex-ante* enforcement of competition law as well. Reviewing of the mergers and acquisitions is an example of *ex-ante* enforcement of competition law. Competition advocacy is also a invaluable type of *ex-ante* enforcement of competition law and policy.

---

[89] Öz-Aşçıoğlu, G. (2006). *"The Role of Competition Authorities and Sectoral Regulations: Regional Experiences."* p.6

[90] Öz-Aşçıoğlu, G. (2006). "Regional experiences and lessons learnt in fostering competition in regulated sectors, focusing on the link between competition agencies and regulated bodies".

CHAPTER 3

EU APPROACH TO THE REGULATORY FRAMEWORK of the SECTOR-SPECIFIC and COMPETITION RULES in the TELECOMMUNICATIONS

Against the background examined in the previous chapter on the restructuring of the telecommunications landscape and its implications on the telecommunications regulatory frameworks, this chapter analyses the current state of sector-specific and antitrust rules in the telecommunications regulatory framework of the EU.

The relationship between sector-specific rules and competition policy varies among the countries due to the variety of reasons, such as; countries' level of economic development, regulatory and institutional structuring, the level of competition in the marketplace etc. Likewise, EU regulatory framework has been shaped as a response to the developments in the telecommunications markets. In this context, this chapter, firstly, provides an overview of the evolution of the telecommunications markets, then, talks about the regulatory framework of the sector-specific and antitrust rules which were designed to regulate this new environment.

An appropriate regulatory framework safeguards competition in the markets while creating certainty needed for the innovation, investment and growth in the sector. Appropriate regulation should be dynamic in order to respond technological and market developments because there is a close relationship between regulation and competition. The Commission study explores that those countries with a poor record of regulatory reform have less investment and innovation in the sector."[91]

As technology and market dynamics evolve so thus the regulatory framework. Outdated provisions should be removed. Electronic communications is a rapidly evolving sector with lots of technological and market developments. EU has revised its electronic communications regulatory framework at certain intervals in order to keep it updated. In this regard, this chapter explores the problems identified by the

[91] COM(2006) 334 final, SEC(2006) 816, 28 June 2006

Commission concerning regulatory framework and its implementation, and the 2007 Reform Proposals of the Commission for the revision of the EU current electronic communications framework. Among the 2007 Reform Proposals, those having repercussion on the role of the sector-specific and antitrust rules in the telecommunications sector are focussed on.

EU regulatory framework makes reference to 'electronic communications services' and 'electronic communications networks' rather than the previously used terms 'telecommunications services' and 'telecommunications networks'. These new definitions response to convergence phenomenon by bringing together under one single definition all electronic communications networks and services which are concerned with the conveyance of signals by wire, radio, optical or other electromagnetic means (i.e. fixed, wireless, cable television, satellite networks).

3.1 Market Overview

3.1.1 Historical Background

Until around 1980, telecommunications in the EU was characterized by national public monopolies, often run in conjunction with postal services. All forms of telecommunications (i.e. voice and data) were controlled by traditional telecoms monopolies. This environment began to change in the early 1980s, with privatization and the introduction of limited competition in some Member States. The liberalization of telecommunications and privatization of state monopolies was first observed in the United Kingdom in the early 1980s in Europe.

Starting with handsets in 1988 and progressively adding services until 1998, the EU liberalised all telecoms services. "By 2001, all telecommunications markets in the EU had been opened to competition and liberalization process was complete. In fact, the last date for full liberalization was determined as 1 January 1998. Most Member States liberalized their telecommunications markets by 1 January 1998, but Member States with less developed networks were granted derogations to enable them to make

necessary structural adjustments."[92] "Portugal and Greece benefit from derogations until 1 January 2000 and 31 December 2000 respectively."[93] The introduction of full competition was completed by 1 January 2001 in the all Member States.

"Opening up formerly monopolistic markets led to dramatically lowered prices and improved services for both consumers and business, boosting Europe's communications industry and creating economic growth."[94] "Due to the full liberalization the number of fixed-line operators doubled between 1998 and 2003. Big operators began entering each others' markets, new entrants invested in services and infrastructure, and consumers got a better deal all round. On average, for the same telecoms services, consumers spent about 30% less of their income in 2002 than they did in 1996. The affordability index for average income users in all Member States sank to a record low in 2002."[95]

3.1.2 Current Market Situation

"Information and Communications Technologies (ICT) contributes to the productivity growth and increased competitiveness of the European economy as a whole, and thus is a factor in growth and job creation."[96] Electronic communications sector as an important component of the ICT is a key element for the EU strategy for growth and employment. Electronic communications constitutes an infrastructure for other sectors in the economy. "ICT sector is responsible for a quarter of total growth in Europe. The sector has an annual turnover of 650 billion euros with electronic communications accounting for about 45% or 290 € billion."[97]

"The sector continues to be highly dynamic. New players, such as internet companies, are entering the market for IPbased telephony and are leveraging their large and rapidly growing customer bases to gain competitive advantages. Fixed and mobile operators are upgrading existing infrastructures to enable higher data speeds and

[92] Walden, I. and Angel J. (2005). *"Telecommunications Law and Regulation"*.pp.646-647
[93] *The 1999 Communications Review"*. COM (1999) 539
[94] http://www.ictregulationtoolkit.org/en/Section.2085.html (Available on March 2008)
[95] MEMO/07/107, Brussels, 16 March 2007
[96] COM(2006) 334 final of 29.6.2006
[97] Viviane Reding's Speech, Düsseldorf, 12 June 2007

delivery of converged products. The barriers between the previously well-defined markets within the electronic communications sector continue to blur."[98]

"Since 1996 the cost of telecommunications services has on average fallen by about 30%. The Commission' latest data from 2006 shows that consumers continue to profit from falling prices for most communications services. For example, across the EU, the costs of mobile telephony services are still falling fast – by nearly 14% between 2005 and 2006 – as a result of intense competition. The availability and affordability of communications services has improved quite considerably."[99]

Growing competition, especially in retail markets, is bringing increased consumer benefits and the outlook for innovation and investment within Member States and across borders is positive, says the European Commission's latest "12th Report on European Electronic Communications Regulation and Markets.

"At EU level, thanks to competition and investments, "broadband penetration rate, which measures the number of broadband lines per 100 populations, is 18.2%, up 3.3 percentage points from 14.9% a year ago. Incumbent fixed operators provided 46.5% of these lines, continuing the downward trend recorded since 2003. This figure was 55.9% in July 2004, 51.5% in July 2005 and 48.1% in July 2006."[100]

"Mobile phone penetration has now reached almost 93% and exceeded 100% in eight Member States."[101]

However, "in Europe, infrastructural competition covers only 20% of the market, as compared to 60% in the USA."[102] "Only about 20% of Europe's telecom markets have full infrastructure competition in the access networks. The rest have no choice but to connect using the incumbent's local loop, in practice this means that 90% of European subscribers are on the incumbent's local access network. That is why access

[98] Viviane Reding's Speech, Brussels, 5 March 2007
[99] Viviane Reding's Speech, Düsseldorf, 12 June 2007
[100] COCOM07-50 FINAL
[101] MEMO/06/84 Brussels, 20 February 2006
[102] Viviane Reding's Speech, Düsseldorf, 12 June 2007

regulation, in particular the process of unbundling access loops, has been so important".[103]

3.2 Regulatory Framework for the Liberalized Electronic Communications Networks and Services

"Regulatory framework for electronic communications networks and services is an essential building block of a wider EU policy aimed at developing a knowledge based society, that enables everyone to have access to information and entertainment, to get in touch with others regardless of where they are and, by many different means, to search for services and products and buy them on-line, to have access to government services, to education and health services."[104] "Regulatory framework guides the work of national regulators and of the European Commission in the 27 EU Member States."[105]

> "Legal basis of the telecommunications policy is found in Articles 81-89 (competition), Articles 47 and 55 (right of establishment and services) and Article 95 (internal market harmonisation) of the Treaty establishing the European Community. The former articles have been primarily used to open up of national markets to competition; whilst the latter has primarily addressed competition issues between national markets, through harmonization measures. Initiatives within each area have been the responsiblity of different departments of the European Commission. Harmonization measures are originated within the Directorate General of Information Society and liberalization issues reside primarily with Directorate General of Competition. A third Directorate General, Internal Market, has also been responsible for some initiatives relating directly or indirectly to the telecommunications sector. The Court of Justice has also played a central role in the development of European telecommunications law."[106]

> "EU regulation of the liberalized electronic communications sector can be divided into two discrete phases: transitional market regulation and mature market regulation. The first phase covers the period 1987 to 2001, during, which a series of directives and regulations were adopted to regulate the shift from monopoly to full competition. This regulatory framework is known as the *1998 package* referring to the date of full market liberalization. In 2002, the EU issued a new package of directives

[103] Viviane Reding's Speech, Brussels, 29 January 2008
[104] http://ec.europa.eu/information_society/policy/ecomm/about/index_en.htm#factsheet (Available on March 2008)
[105] Viviane Reding's Speech, Athens, 11 October 2007
[106] Walden, I. and Angel J. (2005). *"Telecommunications Law and Regulation"*.p.108-109

designed to regulate now fully liberalized and increasingly mature electronic communications markets, known as the *2002 package*."[107]

3.2.1 Historical Background: 1998 Regulatory Framework

Historically, European telecommunications sector was characterized by state-owned monopolies running in conjunction with postal services owing to the rationales stated in the second Chapter. The liberalization of telecommunications, which was first observed in the United States in the late 1960s and in the United Kingdom in the early 1980s, became one of the main concerns of the European Commission in the late 1980s.

European Commission launched an investigation as to whether telecommunications monopolies were in breach of the EC Treaty as they restricted the freedom to provide services in Member States. Commission investigation was based on Article 86. Article 86 of the Treaty gives the Commission power to require the removal of 'exclusive rights'[108] or 'special rights'[109] granted to undertakings by Member States where other Treaty rules are broken as a result. "In the telecoms sector, the Commission considered that giving certain public enterprises special and exclusive rights to produce telecommunications equipment, or to provide telecommunications services and operate networks breached Treaty competition and internal market rules."[110]

As a result, "Commission advocated widespread sector reform. These reforms were of two types: 'liberalization' initiatives designed to open up telecommunications markets to full competition, and 'harmonization' initiatives designed to introduce a common approach to telecommunications regulation across the European Union."[111]

---

[107] Ibid. p.646

[108] 'exclusive rights' mean the rights that are granted by a Member State to one undertaking through any legislative, regulatory or administrative instrument, reserving it the right to provide an electronic communications service or to undertake an electronic communications activity within a given geographical area; See. *Commission Directive 2002/77/EC*

[109] 'special rights' mean the rights that are granted by a Member State to a limited number of undertakings through any legislative, regulatory or administrative instrument which, within a given geographical area. See. *Commission Directive 2002/77/EC*

[110] http://ec.europa.eu/information_society/policy/ecomm/history/index_en.htm (Available on March 2008)

[111] Walden, I. and Angel J. (2005). *"Telecommunications Law and Regulation"*.pp. 646-647

In this context, 1998 Regulatory Package was composed of a sequence of directives laying down the rules for progressive removal of market barriers and the encouragement of competition, as well as the harmonization of telecommunications regulation throughout the EU.

> "The liberalization directives adopted a phased approach to market liberalization, abolishing exclusive rights and requiring Member States to permit the provision of competing services progressively across all market segments. Liberalization began with the market for terminal equipment, and was followed sequentially by markets for data and value-added services, satellite services, service provision over cable tv networks infrastructure, mobile services, and finally fixed voice telephony and network provision."[112]

There has been no requirement for privatization.

> "In paralel with these liberalizing measures, the harmonization directives required Member States to adopt a common approach to telecommunications regulations, on the basis that the establishment of pan-European networks and services would best be promoted by the rapid introduction of consistent regulatory frameworks across the EU. The regulatory principles in the harmonization directives were designed to control anti-competitive conduct by the incumbent, and to manage the transition from monopoly to full competition. These directives mainly sought to ensure was 'open network provision', which emphasized that access to and use of public telecommunications networks and services should be unrestricted, except where limited by non-economic reasons in the general interest such as network integrity and security. Specific requirements were laid out in a series of directives relating to interconnection, leased line availability, ISDN, and voice telephony (covering universal service, tarif controls and the availability of public payphones)."[113]

3.2.2 Current Framework: 2002 Regulatory Framework

1998 regulatory framework was primarily designed to manage the transition from monopoly to competition and was therefore focused on the creation of a competitive market and the rights and obligations of new entrants. By 2001, all telecommunications markets in the EU had been opened to competition and liberalization process was complete. In the light of competiting and maturing

[112] Ibid.
[113] Ibid.

telecommunications markets, the EU adopted a new regulatory package in 2002 designed to respond to the dynamic communications markets by revising and simplifying 1998 regulatory framework with the aim of encouraging more competition and greater transparency of regulation in this crucial sector of the European economy.[114] The more harmonised and simplified regulations (i.e. less onerous authorization procedures) were believed to stimulate the development of new pan-European communications networks and services.

The objectives of the new framework are to foster competition in all market segments, particularly at local level, to reinforce investment and innovation in the electronic communications markets, to improve the functioning of the single market, to guarantee provision of basic services that would not be guaranteed by market forces, to protect the consumer by laying down legal obligations in the areas of privacy and data protection, universal service and user rights.[115] Additonally, the regulatory framework aims to "meet the objectives laid down in the i2010 Agenda, the Commission's strategy to boost growth and jobs in the communications sector, and the relaunched Lisbon agenda on growth and employment."[116]

In light of increasing convergence of telecommunications, media and information-based networks and technologies the regulatory framework has evolved from a traditional telecommunications-oriented framework to a more flexible framework that regulates all electronic communications infrastructure and associated services in a consistent manner. The EU in its new regulatory framework adapted certain definitions in order to reflect the impact of the convergence of telecommunications, media and information-based industries. Additionally, the wording of certain provisions has been changed and certain terms replaced with new ones. For example; EU in its regulations uses the term 'electronic communications services' and 'electronic communications networks' rather than the previously used terms 'telecommunications services' and 'telecommunications networks'. Thus, the Directive adopts a notion of electronic communications that is broader than that of telecommunications alone. These new definitions bring together all electronic

[114] COM (1999) 539. "*The 1999 Communications Review"*.
[115] http://ec.europa.eu/information_society/policy/ecomm/todays_framework/overview/index_en.htm (Available on March 2008)
[116] COM(2006) 28 final of 06.2.2006

communications services and networks which are concerned with the conveyance of signals by wire, radio, optical or other electromagnetic means (i.e. fixed, wireless, cable television, satellite networks) under one single definition. In other words, all transmission networks and services that transmit communications electronically, whether it is wireless or fixed, carrying data or voice, Internet based or circuit switched, broadcasting or personal communication are all covered by the EU regulatory framework for the electronic communications networks and services, so called 2002 Regulatory Framework.[117] New regulatory framework that went into effect in July, 2003 consists of one general and four *Specific Directives*.[118] These are:

- *Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)*

This Directive establishes a new harmonised framework for the regulation of electronic communications sector that seeks to respond to convergence trends by covering all electronic communications networks and services within its scope. It lays down the objectives of a regulatory framework to cover electronic communications networks and services in the Community, including fixed and mobile telecommunications networks, cable television networks, networks used for terrestrial broadcasting, satellite networks and Internet networks, whether used for voice, fax, data or images. It lays down tasks of national regulatory authorities and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the Community. It aims to to reduce *ex ante* sector-specific rules progressively as competition in the market develops.

In the directive, *Electronic Communications Service* is defined as 'a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using

[117] http://ec.europa.eu/information_society/policy/ecomm/about/index_en.htm#factsheet (Available on March 2008)
[118] 2002/19/EC, 2002/20/EC, 2002/21/EC, 2002/22/EC (OJ L 108, 24.4.2002, p. 7) These four Directives became applicable on 25 July 2003. 2002/58/EC (OJ L 201, 31.7.2002, p. 37)

electronic communications networks and services'. It does not include information society services, which do not consist wholly or mainly in the conveyance of signals on electronic communications Networks. (Article 2/c)

Electronic Communications Networks means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed; (Article 2/a)

- *Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive)*

- *Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive)*

- *Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)*

- *Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)*[119]

[119] Directive 97/66/EC on the processing of personal data and protection of privacy is repealed by Directive 2002/58/EC

These four Directives are refered as '*Specific Directives'*[120] in the Framework Directive.

In addition to these major Directives, there are other supplementary instruments such as; adopted by the Commission that play an important role in the functioning of the EU framework.[121] Among those measures the followings are important in the context of this study:

Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (Competition Directive)[122]

Competition Directive is a consolidation of related existing texts which consolidates the legal measures based on Article 86 of the Treaty that have liberalised the telecommunications sector over the years.

Commission Guidelines 2002/C165/03 on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (the "Guidelines")[123]

The Guidelines sets out a common methodology and principles for the national regulatory authorities charged with these tasks.

Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex-ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services (notified under document number C (2003) 497) (Text with EEA relevance) (2003/311/EC) (the Recommendation)[124]

---

[120] Same wording will be used throughout the thesis.
[121] All legislation in force concerning e-communications is accesible at: http://ec.europa.eu/information_society/policy/ecomm/info_centre/documentation/legislation/index_en.htm#dec_2002_676_ec (Available on March 2008)
[122] OJ L 249, 17.09.2002, p. 21
[123] OJ C 165, 11.7.2002, p. 6. 7
[124] OJ L 114, 8.5.2003, p. 45

Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop[125]

Commission Recommendation of 23 July 2003 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services[126]

Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision) [127]

Commission Decision of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services (2002/627/EC)[128]

EU in NRF has separated the regulation of transmission from the regulation of content. Content of services remained outside the scope of the new framework. New regulatory framework does not cover the content of services delivered over electronic communications networks using electronic communications services, such as; broadcasting content, financial services and certain information society services. The content of services is subject to other rules at EU level.[129] However, "2002 regulatory

[125] OJ L 336, 30.12.2000, p. 4
[126] Notified under document number C(2003) 2647) (Text with EEA relevance) (2003/561/EC)
[127] OJ L 108, 24.4.2002, p. 1.
[128] OJ L200/38
[129] The content of television programmes is covered by Council Directive 89/552/EEC of 3 October 1989. Information society services are covered by Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (e-commerce Directive). 'Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules of information society services' spans a wide range of economic activities which take place on-line. Most of these activities are not covered by NRF because they do not consist wholly or mainly in the conveyance of signals on electronic communications networks. The same undertaking, for example an Internet service provider, can offer both an electronic communications service, such as access to the Internet, and services not covered by NRF, such as the provision of web-based content.

framework gives NRAs powers to deal with uncompetitive markets in situations where content services are bundled with electronic communications services."[130]

In addition to content of services, NRF does not cover 'radio and telecommunications terminal equipment' which fall into the scope of Directive 1999/5/EC[131]. "This separation between terminal and network dates back to the early days of the liberalization of the telecommunications sector, when Commission Directive 88/301/EEC opened up to competition the market for telecommunications terminal equipment. On the other hand, the regulatory framework does have provisions for consumer 'terminal' equipment used for digital television, since this was never subject to monopoly supply in the same way as telecommunications equipment."[132]

3.2.2.1 Basic Principles of the 2002 Regulatory Framework

EU regulatory framework stands for the objectivity, transparency, 'non-discrimination'[133], and regulatory independence during the implementation of regulations in order to guarantee the conditions for fair and effective competition. Among the others, key principles underlying the Directives of the EU regulatory framework for electronic communications networks and services are summarized below. These principles are important since they have repurcussions on the regulatory framework of the sector-specific and competition rules.

3.2.2.1.1 Minimizing Regulatory Burdens

"2002 Regulatory Framework designed to reinforce competition by increasing market freedom. In particular, the new package creates a regulatory 'exit strategy' through

[130] COM(2006) 334 final of 29.6.2006
[131] Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity (R&TTE Directive)
[132]Commission considers this situation as an anomaly that should be addressed. According to Commission addressing this anomaly will require changes in both the R&TTE Directive and the electronic communications framework. COM (2006) 334 final, SEC (2006) 816, 28 June 2006. pp.24-25
[133]The principle of non-discrimination ensures that undertakings with market power do not distort competition, in particular where they are vertically integrated undertakings that supply services to undertakings with whom they compete on downstream markets. See. (2002/19/EC)

which national regulatory authorities are authorized to 'roll back' many of the detailed regulatory controls in the 1998 package once a market is perceived to have effective competition."[134] The framework is therefore builds upon general concepts of competition law.

> "Regulation is regarded as a temporary phenomenon, required to make the transition from the formerly monopolistic telecommunications industry to a fully functioning market system. New market entrants need regulatory support to gain access to the networks of incumbent operators and to provide the benefits to end users which the market would offer if it were effectively competitive. However, as the sector evolves, operators will increasingly build their own infrastructures and compete more effectively. As normal market conditions develop, regulation can be rolled back, and competition law, as applied to industry in general, will replace sector-specific intervention."[135]

"The EU 2002 package is based on the premise that regulation should be imposed only where necessary as it may create a significant burden for market participants. Sector-specific regulation should therefore be progressively reduced once there is effective competition. The principle underlying the EU model is that regulation should be 'two-tiered', that is, greater regulatory controls should be placed on carriers that have significant market power."[136]

3.2.2.1.2 Independent Regulatory Authorities

Central to the EU model is the establishment of a national regulatory authority (NRA), independent of market participants. NRA should be independent to ensure the impartiality of their decisions. NRA should be in possession of all the necessary resources, in terms of staffing, expertise, and financial means, for the performance of their tasks.

Three main objectives are attributed to the NRA in the regulatory framework. These are: [137]

---

[134] Walden, I. and Angel J. (2005). *"Telecommunications Law and Regulation"*.pp.653-659
[135] MEMO/06/84, Brussels, 20 February 2006
[136] Walden, I. and Angel J. (2005). *"Telecommunications Law and Regulation"*.pp.653-659
[137] 2002/21/EC, Framework Directive, Article 8

- to promote competition in the provision of electronic communications networks and services, associated facilities and services
- to contribute to the development of the internal market
- to promote the interests of the citizens of the European Union

Various tasks are identified for NRA to accomplish each of these objectives, such as; to encourage efficient investment in infrastructure and promote innovation; to remove remaining obstacles to the provision of electronic communications networks and services; to contribute to the development of consistent regulatory practice; to ensure all citizens have access to a universal service etc.[138]

3.2.2.1.3 Minimizing Barriers to Market Entry

1998 Regulatory Framework opted for the use of individual licences which are specific to an individual operator and require the operator to seek an explicit authorisation from a regulator before it can begin operating. This degree of control on market entry creates administrative barriers which may be disproportionate, and has contributed to large variations in licence regimes in the EU.[139]

"The EU 2002 package seeks to minimize barriers to market entry by simplifying licencing procedures, and keeping licensing documents as straightforward and short as possible with no limit on license numbers unless required by radio spectrum constraints. As a general principle, the lower the barriers to market entry, the more likely that competition will take root and flourish."[140] Those aims are believed to be best achieved by '*general authorisation*'[141] of all electronic communications networks and services without requiring any explicit authorisation by the NRA before providing services and by limiting any procedural requirements to notification only.[142] Electronic communications services and networks are provided on the basis of a general

[138] 2002/21/EC, Framework Directive, Article 8 (2),(3), (4)
[139] COM (1999) 539. *"The 1999 Communications Review"*.
[140] Walden, I. and Angel J. (2005). *"Telecommunications Law and Regulation"*.pp.653-659
[141] General authorisation means a legal framework established by the Member State ensuring rights for the provision of electronic communications networks or services and laying down sector-specific obligations that may apply to all or to specific types of electronic communications networks and services. See. 2002/20/EC, Authorization Directive, Article 2
[142] 2002/20/EC, Authorization Directive

authorisation and not on the basis of a license any more. Specific authorisations remain necessary for the use of radio spectrum and numbering resources.

General authorization aims to ensure the freedom to provide electronic communications networks or services to all undertakings demanding it, except where to prevent an undertaking from providing electronic communications networks or services is necessary for public policy, public security or public health.[143] As a result, "a general authorisation procedure for operators to enter new markets replaces individual licences. This drastically cuts red tape for enterprises, which no longer face frustrating delays as national regulators check compliance with licence conditions."[144] "This deregulated, harmonised framework reduces the current variation in licence regimes for telecommunications across the EU, which is holding back innovation competition and the provision of pan-European services."[145]

3.2.2.1.4 Regulatory Consistency

This principle refers to a stable regulatory environment, consistent and predictable throughout the EU's single market allowing the companies to operate on a scale which only a Europe wide market can provide. In order to ensure that market players in similar circumstances are treated in similar ways in different Member States, harmonised application of the provisions of the regulatory framework is important.

In order to ensure the necessary coherence within the regulatory process at European level the regulatory framework establishes collaboration mechanism among the NRAs of the Member States and between national authorities and the Commission. NRA, where necessary, is required to cooperate with eachother, with the regulatory authorities of other Member States and with the Commission in a transparent manner to ensure consistent application of the provisions of regulatory framework. [146]

[143] Treaty Establishing the European Community, Article 46 (1)
[144] MEMO/06/84, Brussels, 20 February 2006
[145] COM (1999) 539. *"The 1999 Communications Review"*.
[146] 2002/21/EC, Framework Directive, Article 7

The cooperation with the regulatory authorities of other Member States could take place, inter alia, in the Communications Committee (COCOM)[147] or European Regulators Group[148].

3.2.2.1.5 Technological Neutrality

The EU regulatory framework for electronic communications networks and services is based on regulation of markets, not regulation of technologies. Viviane Reding, Commissioner for Information Society and Media, states that "EU Framework is based on networks and services competing with each other in a technologically neutral way. If telephony and broadband are the basic products sought by consumers, then whether they are delivered over metallic or fibre loops is largely irrelevant to the analysis. What is relevant is the state of competition on that market."[149]

These markets are defined and analysed in accordance with competition law principles, based on general demand and supply side considerations, and are independent of changes in the underlying technology.[150] The NRF is intended to be technology neutral, leaving behind such concepts as voice telephony and the distinctions between fixed and mobile communications previously relied upon by the EU for its telecommunications liberalization process during the 1990s.[151]

"The market based approach is a response to convergence of the telecommunications, media and information technology sectors, and allows inter-platform competition to be fully taken into account, avoiding the technology-specific regulation that is inherent in

[147] The Communications Committee has been established under the new regulatory framework in 2002, with a view to replace the ONP Committee and the Licensing Committee which are instituted under the 1998 regulatory package for telecommunications. The committee assists the Commission in carrying out its executive powers under the new regulatory framework. The committee furthermore provides a platform for an exchange of information on market developments and regulatory activities. http://circa.europa.eu/Public/irc/infso/cocom1/home

[148] The European Regulators Group for electronic communications networks and services has been set up by the Commission to provide a suitable mechanism for encouraging cooperation and coordination between national regulatory authorities and the Commission, in order to promote the development of the internal market for electronic communications networks and services, and to seek to achieve consistent application, in all Member States, of the provisions set out in the Directives of the new regulatory framework. See.http://www.erg.eu.int/

[149] Viviane Reding's Speech, Brussels, 28 November 2007

[150] COM(2007) 401 final of 11.7.2007

[151] http://www.ictregulationtoolkit.org/en/Section.1652.html (Available on March 2008)

the regulation of assets."[152] Technology neutrality is regarded essential to provide the necessary flexibility to deal with emerging technologies.

New framework uses the term "electronic communications" instead of "telecommunications" in order to point out its intention to regulate all electronic communications transmission networks whether fixed, mobile, satellite, Internet, or broadcasting transmission consistently. "The theory underpinning this approach is that, in a converged world, distinctions between techologies and transmission structures are artificial and distort incentives for investment. This approach also avoids confusion as to which regulatory framework- telecommunications, broadcasting, or information services- apply to new 'hybrid' services such as video conferencing, cable television, video-on-demand, or Internet services."[153]

The Framework Directive requires that national regulatory authorities should make technologically neutral regulation in order that it neither imposes nor discriminates in favor of the use of a particular type of technology. However, it is important to point out that technological neutrality does not preclude member states from promoting specific services where this is justified, for example digital television as a means for increasing spectrum efficiency.

3.3 Legal Framework of the Sector-Specific and Competition Rules

Long-run state-owned monopolies in the Europe's telecommunications sector leaved a legacy of imperfect competitive conditions especially during the early periods of liberalization. As a result, extensive sector-specific regulation was needed to ensure a level playing field for new market entrants during the first years of liberalization.

"The 2002 regulatory framework for electronic communications, however, involved a major overhaul in regulatory approach, linking sector-specific regulation and competition law in a novel way. The previous, more mechanistic approach to regulation was replaced by an economic approach where regulation is based on

[152] COM(2006) 334 final, SEC(2006) 816, 28 June 2006
[153] Walden, I. and Angel J. (2005). *"Telecommunications Law and Regulation"*.pp.653-659

competition law principles."[154] In other words, according to EU new regulatory framework aiming at fostering competition in the electronic communications networks and services, regulation should be based on the principles of competition law. Framework Directive states that *ex- ante* regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power and where national and Community competition law remedies are not sufficient to address the problem. The framework requires the removal of *ex-ante* regulation as and when competition becomes effective. In this context, in order to analyse the existence of competition in a market, the first thing to do is to define the *relevant markets*. The purpose of market definition is to determine the boundaries of a given market.

"Under the 1998 regulatory framework, several areas in the telecommunications sector are subject to *ex-ante* regulation. These areas have been delineated in the applicable directives, but are not always 'markets' within the meaning of competition law and practice. NRF requires the Commission to define markets in accordance with the principles of competition law. The Commission has therefore defined markets in accordance with competition law principles."[155]

After the identification of markets, next step is to conduct *market analysis* in the defined markets in order to analyze the degree of competition in the market and the possibility for particular firms to exercise market power. Only after the market analysis, it is possible to determine whether a particular market should be regulated or not.[156]

As a result of market analysis, if NRA finds one or more undertakings to have '*Significant Market Power (SMP)'* -equivalent to 'dominance' under competition law- on that market, it must impose appropriate regulation. That means, "*ex-ante* regulation is regarded as necessary as long as there are companies on the telecommunications

[154] COM(2006) 28 final of 06.2.2006
[155] 2003/311/EC, Commission Recommendation on relevant service and product markets
[156]The European Commission has adopted "Guidelines on Market Analysis and the Assessment of Significant Market Power (2002/C 165/03)" setting out the principles that NRAs will use to define markets and analyse effective competition. The Guidelines were developed on the basis of existing case law and the Commissions practice in the enforcement of EU competition law.

markets with significant market power. Where such market power exists, a level playing field for new market entrant can essentially only be ensured by means of *ex-ante* regulation."[157]

If NRA analyses the non-existence of competition in the market analysed in which an operator has SMP, it decides the appropriate remedies to impose on it. "The regulatory framework provides NRAs with a 'tool kit' of remedies (i.e. account separation, transparency etc.) which leaves them with the flexibility to design appropriate remedies to tackle any market failures observed." [158] These remedies will be analysed in detailed in the following parts.

Conversely, if NRA finds out that no undertaking has SMP in the market analysed and effective competition exits, it does not impose regulation, or withdraw existing regulation.

Any party who is the subject of a decision by a national regulatory authority should have the right to appeal to a body that is independent of the parties involved. This body may be a court.[159]

The market review process is subject to scrutiny by the Commission under the Community consultation mechanism established under *"Article 7"* of the Framework Directive.[160]

Market definition, market analysis and the assesment of SMP, and Article 7 Procedure are central to the procedure in deciding markets and operators that will be subject to *ex-ante* or *ex-post* regulations. In the subsequent parts, these concepts will be examined in detailed.

Legal basis of the market definition, market analysis and the assesment of SMP, and Article 7 Procedure under the regulatory framework for electronic communications networks and services are;

[157] Viviane Reding's Speech, Düsseldorf, 12 June 2007
[158] MEMO/07/107, Brussels, 16 March 2007
[159] 2002/21/EC, Framework Directive
[160] COM(2006) 28 final of 06.2.2006

- Framework Directive 2002/21/EC Article 6, 7, 14, 15 &16
- Commission Recommendation on relevant product and service markets
- Commission Guidelines on market analysis and SMP
- Commission Recommendation on Article 7 notification

3.3.1 Market Definition and Relevant Markets

The definition of the relevant market is crucially important since effective competition and existence of an undertaking having SMP can only be assessed by reference to a defined market.

In the electronic communications sector, there are at least two main types of relevant markets to consider: markets for services or products provided to end users (retail markets), and markets for the inputs which are necessary for operators to provide services and products to end users (wholesale markets). These aspects need to be taken into account when considering the identification and definition of markets, as they can affect both the way markets are defined. Within these two types of markets, further market distinctions may be made depending on demand and supply side characteristics.[161]

The main product and service markets whose characteristics may be such as to justify the imposition of *ex-ante* regulatory obligations are identified in the Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex-ante* regulation[162]. It is considered that markets which are not identified in the Recommendation will not warrant *ex-ante* sector-specific regulation set out in the '*Specific Directives*'[163]. Therefore, in practice, the task of NRAs is to define the geographical scope of the relevant market. However, exceptionally, "NRAs have the possibility to define markets other than those listed in the Recommendation."[164] For markets not listed in this Recommendation NRAs should apply the three-criteria test, mentioned below, to the market concerned.

[161] 2003/311/EC, Commission Recommendation on relevant service and product markets.
[162] 2003/311/EC,Commission Recommendation on relevant service and product markets.
[163] 2002/19/EC, 2002/20/EC, 2002/22/EC, 2002/58/EC
[164] Article 15(3) of the Framework Directive

Furthermore, NRA should define an additional or different relevant market in accordance with the Article 7 procedure of the Framework Directive.

3.3.1.1 Criteria for Defining the Relevant Markets

Under the NRF, markets that could be subject to regulation are selected on the basis of EC competition law principles by taking into account the principle of technology neutrality. In identifying markets in accordance with competition law principles, the following "three criteria" test was developed[165]:

1) the presence of high and non-transitory barriers to entry
2) the market has characteristics such that it does not have tendency towards effective competition (in the absence of regulation) over time
3) the insufficiency of competition law by itself to address the market failure

As regards the *first criterion***,** there are two types of entry barriers structural barriers and legal or regulatory barriers. Structural barriers to entry result from original cost or demand conditions that create asymmetric conditions between incumbents and new entrants impeding or preventing market entry of the latter. For instance, economies of scale and/or economies of scope and high sunk cost are examples of structural barriers. To date, such barriers can still be identified with respect to the provision of local access networks to fixed locations. A related structural barrier can also exist where the provision of service requires a network component that cannot be technically duplicated or only duplicated at a cost that makes it uneconomic for competitors.

Legal or regulatory barriers result from legislative, administrative or other state measures that have a direct effect on the conditions of entry of operators on the relevant market. Examples of legal or regulatory barriers are price controls or other price related measures imposed on undertakings, which affect not only entry but also the positioning of undertakings on the market.

[165] 2003/311/EC, Commission Recommendation on relevant service and product markets. In conducting periodic reviews of the markets identified in the Recommendation, again, the three criteria should be used.

Second criterion refers to those markets the structure of which does not tend towards effective competition within the relevant time horizon. The application of this criterion involves examining the state of competition behind the barriers of entry. That means, given the dynamic character and functioning of electronic communications markets, possibilities to overcome barriers within a relevant time horizon have also to be taken into consideration when carrying out a prospective analysis to identify the relevant markets for possible *ex ante* regulation. In other words, whether the market is prospectively competitive, and thus whether any lack of effective competition is durable should be analysed by taking into account expected market developments over the course of a reasonable period.

The *third criterion* points out the absence of *ex-ante* regulation and requires the application of competition law alone would not adequately address the market failure(s) concerned. That means, the decision to identify a market as justifying possible *ex-ante* regulation should depend on an assessment of the sufficiency of competition law in reducing or removing such barriers or in restoring effective competition.

Any market which satisfies the three criteria in the absence of *ex-ante* regulation is susceptible to *ex-ante* regulation. The application of the three criteria limits the number of markets where *ex-ante* regulatory obligations are imposed and thereby contribute to the aim of the regulatory framework to reduce *ex ante* sector-specific rules progressively as competition in the markets develops.[166]

These criteria should be applied cumulatively, so that failing any one of them means that the market should not be identified as susceptible to *ex-ante* regulations.

For the 18 product and service markets identified in retail and wholesale level, it is accepted that these 3 criteria requirements have been satisfied. As a result, these 18 product and service markets are accepted as susceptible to *ex-ante* sector-specific

[166] C(2007) (5406) (Text with EEA relevance) (2007/879/EC)

regulation. NRAs are recommended to analyse the level of competition in these markets, and, if necessary, propose appropriate remedies. These markets are:[167]

Retail level

1. Access to the public telephone network at a fixed location for residential customers.
2. Access to the public telephone network at a fixed location for non-residential customers.
3. Publicly available local and/or national telephone services provided at a fixed location for residential customers.
4. Publicly available international telephone services provided at a fixed location for residential customers.
5. Publicly available local and/or national telephone services provided at a fixed location for non-residential customers.
6. Publicly available international telephone services provided at a fixed location for non-residential customers.
7. The minimum set of leased lines

Wholesale level

8. Call origination on the public telephone network provided at a fixed location.
9. Call termination on individual public telephone networks provided at a fixed location.
10. Transit services in the fixed public telephone network.
11. Wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services.
12. Wholesale broadband access.
13. Wholesale terminating segments of leased lines.
14. Wholesale trunk segments of leased lines.
15. Access and call origination on public mobile telephone networks
16. Voice call termination on individual mobile networks.

[167]. 2003/311/EC, ANNEX Commission Recommendation on relevant service and product markets

17. The wholesale national market for international roaming on public mobile networks.
18. Broadcasting transmission services, to deliver broadcast content to end users.

The identification of those product and service markets as susceptible to *ex-ante* regulation does not, necessarily, mean that regulation in these markets is always warranted or that these markets will be subject to the imposition of regulatory obligations set out in the *Specific Directives.* On the contrary, regulation will not be imposed if there is effective competition on these markets. Once these markets are deemed effectively competitive they will be subject to competition law like in other sectors.

NRAs are expected to define the geographical scope of these markets within their territory. It is only when the geographical dimension of the product or service market has been defined that a NRA may properly assess the conditions of effective competition in these 18 markets.

> "According to established case-law, the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which area the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different. The limits of the geographic market are defined on the basis of demand and supply-side substitution in response to a relative price increase. Accordingly, with regard to demand-side substitution, NRAs should assess mainly consumers' preferences as well as their current geographic patterns of purchase. As far as supply-side substitution is concerned, where it can be established that operators which are not currently engaged or present on the relevant market, will, however, decide to enter that market in the short term in the event of a relative price increase, then the market definition should be expanded to incorporate those 'outside' operators."[168]

Due to the range of different demand and supply patterns in the national markets, if the NRA considers that a market not listed among these 18 markets is relevant for regulation as it is characterised by persistent market failure, it may identify a new

[168] 2002/C 165/03, Commission Guidelines on market analysis and the assessment of SMP. Section 2.2.2

market differs from those 18 markets. Any market identified by national regulatory authorities should be based on the competition principles and satisfy the three criteria mentioned above, and be consistent with the Commission Guidelines on market analysis and the assessment of SMP.

Since the imposition of *ex-ante* regulation on a market could affect trade between Member States, the identification of any market that differs from those identified in the Recommendation is subject to the procedure set out in Article 7 of the Framework Directive. According to the Article 7 Procedure, NRA before defining the markets that differ from those defined in the recommendation should seek the comments of Commission and the NRAs in other Member States on its proposal. Failure to notify a market which affects trade between Member States may result in infringement proceedings being taken.

"So far, NRAs have defined the majority of markets in line with the Recommendation, but in a number of instances they have defined markets more narrowly or more broadly. The Commission has not objected to such diverging market definitions provided that each individual market definition and SMP analysis is in line with EC competition law principles. The Commission has also verified whether the sum of markets analysed by NRAs covers the entire scope of the corresponding markets of the Recommendation."[169]

Transnational markets susceptible to *ex-ante* regulation will, where appropriate, be identified by the Commission in a decision on relevant transnational markets pursuant to Article 15(4) of the Framework Directive (The Decision on transnational markets).

The Guideline states that newly emerging markets, where de facto the market leader is likely to have a substantial market share because of 'firstmover' advantages, should not be subject to inappropriate *ex-ante* regulation. As emerging markets are so new and fast-moving, it is premature to decide whether they satisfy the three criteria for *ex-ante* regulation identified.[170] Premature imposition of *ex-ante* regulation may unduly influence the competitive conditions taking shape within a new and emerging market.

[169] COM(2006) 28 final of 06.2.2006
[170] Commission Staff Working Document on the Recommendation on relevant markets

NRAs should ensure that they can fully justify any form of early, *ex-ante* intervention in an emerging market. [171]

The Commission accepts that a mere upgrade of an existing service delivered via a new technology does not in itself constitute a new market. "Whenever a new technology is introduced, the NRA has to analyse whether this technology is used to provide services comparable to existing services or whether this technology provides a totally new service. Only in the second case, that is when the service is clearly distinguishable from existing services or products, may it become justifiable to define a new market."[172]

In 2007, Commission has revised its Recommendation on relevant markets to phase out *ex-ante* regulation.[173] Commission stated that "of 18 specific telecoms markets regulated until now, only 7 still need to be subjected to regular scrutiny by the National Regulators and the Commission."[174] Commission removed 10 markets from the list of relevant markets in the Recommendation. Two of the remaining markets were merged, so that the list of markets regulators have to analyse falls from 18 to 7. The Commission proposes to focus regulation on those 7 markets where there is no trend towards effective competition, such as broadband access. The new Recommendation will be analysed detailed in part 3.5.1.2 under this Chapter.

3.3.1.2 Relationship with Competition Law

Under the 1998 regulatory framework, the market areas of the telecommunications sector that were subject to *ex-ante* regulation were distinct from those identified for competition-law purposes, since they were based on certain specific aspects of end-to-

[171] 2002/C 165/03, Commission Guidelines on market analysis and the assessment of SMP
[172] MEMO/07/107, Brussels, 16 March 2007
[173]Commission Recommendation on relevant service and product markets numbered 2003/311/EC was repealed by "Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex-ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services". (notified under document number C(2007) 5406) (Text with EEA relevance) (2007/879/EC).
[174] Factsheet 64. "Why Europe's Telecoms Reform concerns you….". 1 December 2007.

end communications rather than on the demand and supply criteria used in a competition law analysis.[175] Contrary to 1998 package, under the new regulatory framework, the markets to be regulated are defined in accordance with the principles of European competition law.[176]

"Defining markets in accordance with the principles of competition law means that some of the market areas identified comprise a number of separate individual markets on the basis of demand side characteristics. This is the case of products for retail access to the public telephone network at a fixed location and for telephone services provided at a fixed location. The market area referring to wholesale leased lines is defined as separate markets for wholesale terminating segments and wholesale trunk segments on the basis of both demand side and supply side characteristics." [177]

Commission guidelines on market analysis and the assessment of significant market power are based on:

(1) existing case-law of the Court of First Instance and the European Court of Justice concerning market definition
(2) the notion of dominant position within the meaning of Article 82 of the EC Treaty and Article 2 of the 'Merger Control Regulation'[178]

The use of the same methodologies ensures that the relevant market defined for the purpose of *sector-specific* regulation will in most cases correspond to the market definitions that would apply under competition law.[179]

NRAs are required to be consistent with competition case-law and practice while defining the geographic scope of markets identified, define the product and services

[175] 2003/561/EC, Commission Recommendation on notifications, time limits and consultations provided for in Article 7
[176] 2002/C 165/03, Commission Guidelines on market analysis and the assessment of SMP
[177] 2003/311/EC, Commission Recommendation on relevant service and product markets
[178] Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.01.2004, p. 1-22
[179] 2002/C 165/03, Commission Guidelines on market analysis and the assessment of SMP

markets outside those identified in the Recommendation, and assess the effective competition.

In some cases, markets defined by the Commission and competition authorities in *competition cases* may differ from those identified in the Recommendation and/or from markets defined by NRAs. There are two basic reasons behind those potential differences.

> Firstly, "Markets defined under Articles 81 and 82 EC Treaty are generally defined on an *ex-post* basis. In these cases, the analysis considers events that have already taken place in the market without influenced by possible future developments. Conversely, under the merger control provisions of EC competition law, markets are generally defined on a forward-looking basis. Relevant markets defined for the purposes of sector-specific regulation are also assessed on a forward looking basis, as the NRA includes in its assessment an appreciation of the future development of the market. However, NRAs' market analyses, also, take into account the past evidence when assessing the future prospects of the relevant market. The starting point for carrying out a market analysis is not the existence of an agreement or concerted practice within the scope of Article 81 EC Treaty, nor a concentration within the scope of the Merger Regulation, nor an allege abuse of dominance within the scope of Article 82 EC Treaty, but is based on an overall forward-looking assessment of the structure and the functioning of the market under examination."[180]

> Secondly, "although merger analysis is also applied *ex-ante*, it is not carried out periodically as is the case with the analysis of the NRAs under the new regulatory framework. A competition authority does not, in principle, have the opportunity to conduct a periodic review of its decision in the light of market developments, whereas NRAs are bound to review their decisions periodically. This factor can influence the scope and breadth of the market analysis and the competitive assessment carried out by NRAs, and for this reason, market definitions under the new regulatory framework may in some cases be different from those markets defined by competition authorities." [181]

As a result of these differences, markets defined for the purposes of competition law and markets defined for the purpose of sector-specific regulation may not always be identical. However, the markets defined by NRAs for the purpose of *ex-ante* regulation are without prejudice to those defined by NCAs and by the Commission in

[180] 2002/C 165/03, Commission Guidelines on market analysis and the assessment of SMP
[181] Ibid.

the exercise of their respective powers under competition law in specific cases.[182] Likewise, markets defined under competition law are without prejudice to markets defined under sector-specific regulations as the context and the timeframe within which a market analysis is conducted may be different.

> "Competition authorities carry out their own market analysis and impose appropriate competition law remedies alongside any *sector-specific* measures applied by NRAs. However, it must be noted that such simultaneous application of remedies by different regulators would address different problems in such markets. *Ex-ante* obligations imposed by NRAs on undertakings with SMP aim to fulfill the specific objectives set out in the relevant directives, whereas competition law remedies aim to sanction agreements or abusive behaviour which restrict or distort competition in the relevant market." [183]

3.3.2 Market Analysis and the Assessment of Significant Market Power

Ex-ante regulatory obligations should only be imposed on those markets whose characteristics may be such as to justify sector-specific regulation and in which there are one or more operators with SMP. In respect of each of the above-mentioned relevant markets, NRAs will assess whether the competition is effective. Existence of effective competition on a relevant market means that there is no operator enjoying a single or joint dominant position on that market.

Where NRAs conclude that the market is effectively competitive, it does not impose or maintain any of the specific regulatory obligations. In cases where sector specific regulatory obligations already exist, NRAs should withdraw such obligations placed on undertakings in that relevant market.[184]

When NRAs conclude that a relevant market is not effectively competitive, they will designate undertakings with SMP on that market, and will either impose appropriate specific obligations, or maintain or amend such obligations where they already exist. The purpose of imposing *ex-ante* obligations on undertakings designated as having

[182] Ibid.
[183] Ibid.
[184] 2002/21/EC, Framework Directive, Article 16 (3)

SMP is to ensure that undertakings cannot use their market power either to restrict or distort competition on the relevant market, or to leverage such market power onto adjacent markets.[185] Regulatory obligations imposed must be appropriate, proportionate and be based on the nature of the problem identified.

NRAs should carry out the analysis of the relevant markets, where appropriate, in collaboration with the NCAs.

"As of 30 September 2005, sixteen EU Member States had found no effective competition on one or more of the 18 electronic communications markets defined by the EU and had taken steps to boost competition on the markets concerned. Five Member States had found only partial competition on one or more of these markets and had imposed remedies where it was lacking. But nine Member States had yet to notify the Commission of their analyses of any of the 18 markets. Of the analysed markets (152 out of 450), 123 were not competitive, 19 fully competitive, and 10 partially competitive."[186]

3.3.2.1 Criteria for Assessing SMP

Under the 1998 regulatory framework, NRAs had the power to designate undertakings as having SMP when they possessed 25 % market share. Open Network Provision Directive (97/33/EC) stated that 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. National regulatory authorities may nevertheless determine that an organization with a market share of less than 25 % in the relevant market has significant market power. They may also determine that an organization with a market share of more than 25 % in the relevant market does not have significant market power. In either case, the determination shall take into account the organization's ability to influence market conditions, its turnover relative to the size of the market, its

[185] 2002/C 165/03, Commission guidelines on market analysis and the assessment of SMP intends to guide NRAs in the analysis of markets and effective competition and assessing SMP. The major objective of these guidelines is to ensure that NRAs use a consistent approach in applying NRF and especially when designating undertakings with SMP.

[186] http://ec.europa.eu/information_society/policy/ecomm/tomorrow/roadmap/index_en.htm#new_framework (Available on March 2008)

control of the means of access to end-users, its access to financial resources and its experience in providing products and services in the market. [187]

97/33/EC ONP Directive states that a high market share does not necessarily infer market power. Firms may gain high market shares through means other than market power. A firm's market share may increase, at least temporarily, due to a successful new invention or better customer service. Alternatively, for example, incumbent telecommunications operator may have a high market share for historical reasons. As competition emerges, an incumbent's market share cannot guarantee it the ability to charge prices higher than its competitors. Market share in itself is not sufficient for market power. Firms with high market shares may be constrained from raising prices by a range of factors, including competition from other suppliers already in the market, the potential for competition from new entrants.[188]

Framework Directive states that the definition of SMP in the ONP Directive has proved effective in the initial stages of market opening as the threshold for *ex-ante* obligations. However, it should be adapted to suit more complex and dynamic character of electronic communications markets. So, Framework Directive provided a new definition of undertakings with "significant market power" equating SMP in the new regulatory framework with the concept of dominance under Article 82 of the EC Treaty. In other words, threshold for SMP on the competition law concept of "dominance" replaced the previous automatic threshold for *ex-ante* regulation, which was based on a fixed market share (25%).

New Regulatory Framework stress that the existence of a dominant position cannot be established on the sole basis of large market shares. The existence of high market shares simply means that the operator concerned *might* be in a dominant position. Therefore, NRAs should undertake a thorough and overall analysis of the economic characteristics of the relevant market before coming to a conclusion as to the existence

[187] Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (Article 4)
[188] http://www.ictregulationtoolkit.org/en/Section.1711.html#Dominance (Available on March 2008)

of SMP. In that regard, the following criteria can also be used to measure the power of an undertaking to behave to an appreciable extent independently of its competitors, customers and consumers. These criteria include amongst others[189]:

- overall size of the undertaking,
- control of infrastructure not easily duplicated,
- technological advantages or superiority,
- absence of or low countervailing buying power,
- easy or privileged access to capital markets/financial resources,
- product/services diversification (e.g. bundled products or services),
- economies of scale,
- economies of scope,
- vertical integration,
- a highly developed distribution and sales network,
- absence of potential competition,
- barriers to expansion.

A dominant position can derive from a combination of the above criteria.

According to Article 14(3) of the Framework Directive, 'where an undertaking has significant market power on a specific market, it may also be deemed to have significant market power on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking'.[190] This may be found in vertically integrated telecommunications markets where an operator often has a dominant position on the infrastructure market and a significant presence on the downstream, services market. However, in practice, it is only after when the imposition of *ex-ante* obligations on an undertaking which is dominant in the (access)

[189] 2002/C 165/03, Commission Guidelines on market analysis and the assessment of SMP

[190] A market situation comparable to this one was addressed by the Court's judgment in *Tetra Pak II Case* (Case C-333/94 P, *Tetra Pak* v *Commission* [1996] ECRI-5951). "The Court decided that an undertaking that had a dominant position in one market, and enjoyed a leading position on a distinct but closely associated market, was in a position comparable to that of holding a dominant position on the markets in question taken as awhole." See. 2002/C 165/03, Commission Guidelines on market analysis and the assessment of SMP

upstream market would not result in effective competition on the (retail) downstream market that NRAs should examine whether Article 14(3) may apply.

According to the Article 14(2) of the Framework Directive an undertaking may enjoy significant market power, that is, it may be in a dominant position, either individually or jointly with others.[191] Two or more undertakings can be found to be in a joint dominant position even in the absence of structural or other links between them. Without prejudice to the case law of the Court of Justice on joint dominance, criteria to be used by NRAs in making an assessment of joint dominance are are set out in Annex II of the Framework Directive. These criteria are:

- mature market,
- stagnant or moderate growth on the demand side,
- low elasticity of demand,
- homogeneous product,
- similar cost structures,
- similar market shares,
- lack of technical innovation, mature technology,
- absence of excess capacity,
- high barriers to entry,
- lack of countervailing buying power,
- lack of potential competition,
- various kinds of informal or other links between the undertakings concerned,
- retaliatory mechanisms,

[191] Similarly, under Article 82 of the EC Treaty, a dominant position can be held by one or more undertakings are legally and economically independent of each other. "Until the ruling of the ECJ in *Compagnie Maritime Belge* and the ruling of the CFI in *Gencor,* a finding of collective dominance was based on the existence of economic links, in the sense of structural links, or other factors which could give rise to a connection between the undertakings concerned. The question of whether collective dominance could also apply to an oligopolistic market, that is a market comprised of few sellers, in the absence of any kind of links among the undertakings present in such a market, was first raised in Gencor. The CFI's ruling in Gencor was later endorsed by the ECJ in Compagnie maritime belge, where the Court gave further guidance as to how the term of collective dominance should be understood and as to which conditions must be fulfilled before such finding can be made." Joined cases C-395/96 P and C-396/96 P, *Compagnie maritime belge and others* v *Commission* [2000] ECRI-1365. Case T102/96, *Gencor* v *Commission* [1999] ECRII-753. See. 2002/C 165/03, Commission Guidelines on market analysis and the assessment of SMP

- lack or reduced scope for price competition.

"The above is not an exhaustive list, nor is the criteria cumulative. Rather, the list is intended to illustrate only the sorts of evidence that could be used to support assertions concerning the existence of joint dominance."[192]

In the case of transnational markets, the NRAs concerned jointly conduct the market analysis and decide on any imposition, maintenance, amendment or withdrawal of regulatory obligations in a concerted fashion.[193]

3.3.2.2 Relationship with Competition Law

Under the new regulatory framework, in contrast with the 1998 framework, the Commission and the NRAs rely on competition law principles and methodologies to define the markets to be regulated *ex-ante* and to assess whether undertakings have SMP on those markets.

As stated before, according to NRF "an undertaking is 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."[194] This is the definition that the Court of Justice case-law ascribes to the concept of dominant position in Article 82 of the Treaty.

The new framework has aligned the definition of SMP with the Court's definition of dominance within the meaning of Article 82 of the Treaty. However, the application of the new definition of SMP, *ex-ante*, calls for certain methodological adjustments to be made regarding the way market power is assessed. In particular, when assessing *ex-ante* whether one or more undertakings are in a dominant position in the relevant market, NRAs are, in principle, relying on different sets of assumptions and

[192] 2002/21/EC, Framework Directive, Annex II
[193] 2002/21/EC, Framework Directive, Article 16 (5)
[194] 2002/21/EC, Framework Directive, Article 14 (2)

expectations than those relied upon by a competition authority applying Article 82, *ex-post*, within a context of an alleged committed abuse. [195] For this reasons;

> "the designation of an undertaking as having SMP in a market identified 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. Moreover, the SMP designation has no bearing on whether that undertaking has committed an abuse of a dominant position within the meaning of Article 82 of the EC Treaty or national competition laws. It merely implies that, from a structural perspective, and in the short to medium term, the operator has and will have, on the relevant market identified, sufficient market power to behave to an appreciable extent independently of competitors, customers, and consumers. In applying *ex-ante* the concept of dominance, NRAs resort to its discretionary powers correlative to the complex character of the economic, factual and legal situations that will need to be assessed."[196]

> "The notion of 'essential facilities', which is mainly relevant with regard to the existence of an abuse of a dominant position under Article 82 of the EC Treaty, is less relevant with regard to the *ex-ante* assessment of SMP within the meaning of the NRF. In particular, the doctrine of 'essential facilities' is complementary to existing general obligations imposed on dominant undertaking, such as the obligation not to discriminate among customers and has been applied in cases under Article 82 in exceptional circumstances, such as where the refusal to supply or to grant access to third parties would limit or prevent the emergence of new markets, or new products, contrary to Article 82(b) of the Treaty. It has thus primarily been associated with access issues or cases involving a refusal to supply or to deal under Article 82 of the Treaty, without the presence of any discriminatory treatment. Under existing case-law, a product or service cannot be considered 'necessary' or 'essential' unless there is no real or potential substitute. Whilst it is true that an undertaking which is in possession of an 'essential facility' is by definition in a dominant position on any market for that facility, the contrary is not always true. The fact that a given facility is not 'essential' or 'indispensable' for an economic activity on some distinct market, within the meaning of the existing case-law does not mean that the owner of this facility might not be in a dominant position. For instance, a network operator can be in a dominant position despite the existence of alternative competing networks if the size or importance of its network affords him the possibility to behave independently from other network operators. In other words, what matters is to establish whether a given facility affords its owner significant market power in the market without thus being necessary to further establish that

[195] 2002/C 165/03, Commission Guidelines on market analysis and the assessment of SMP
[196] Ibid.

> the said facility can also be considered 'essential' or 'indispensable' within the meaning of existing case-law."[197]

To sum up, the doctrine of the 'essential facilities' is less relevant for the purposes of applying *ex-ante* Article 14 (undertakings with SMP) of the Framework Directive than applying *ex-post* Article 82 of the EC Treaty.

3.3.3 Imposition, Maintenance, Amendment or Withdrawal of Sector- Specific Regulatory Obligations

Effective competition means that there is not dominant undertaking on the relevant market. In other words, if a relevant market is found to be effectively competitive, it means that there is neither single nor joint dominance on that market. Conversely, if a relevant market is found not effectively competitive it means that there is single or joint dominance on that market.

If an NRA finds that a relevant market is effectively competitive, it is not allowed to impose specific obligations on any operator on that relevant market. In cases where sector-specific regulatory obligations already exist, NRA must withdraw such obligations and may not impose any new obligation on that undertaking(s). In case of the withdrawal of the existing regulatory obligations, NRAs must give a reasonable period of notice to parties affected by such a withdrawal of obligations.[198]

If an NRA finds that competition in the relevant market is not effective because of the existence of an undertaking(s) in a dominant position, it must designate the undertaking(s) having SMP and impose appropriate regulatory obligations on the undertaking(s) concerned. NRAs must impose at least one specific regulatory obligation on an undertaking that has been designated as having SMP. [199] When a NRA determines the existence of more than one undertaking with dominance (i.e. joint dominance) it should also determine appropriate regulatory obligations to be imposed, based on the principle of proportionality.[200]

---

[197] 2002/C 165/03, Guidelines on market analysis and the assessment of SMP
[198] 2002/21/EC, Framework Directive, Article 16(3)
[199] 2002/21/EC, Framework Directive, Article 16(4)
[200] 2002/C 165/03, Section 4.1.Guidelines on market analysis and the assessment of SMP

The specific regulatory obligations which may be imposed on SMP undertaking(s) can apply both to wholesale and retail markets. In principle, the obligations related to wholesale markets are set out in Articles 9 to 13 of the Access Directive. The obligations related to retail markets are set out in Articles 17 to 19 of the Universal Service Directive.

The obligations set out in the Access Directive are: transparency (Article 9); non-discrimination (Article 10); accounting separation (Article 11), obligations for access to and use of specific network facilities (Article 12), and price control and cost accounting obligations (Article 13). Where NRAs intend to impose other obligations for access and interconnection than those listed in Article 9 to 13, they must submit a request for Commission approval of their proposed course of action. Commission takes a decision, after seeking the advice of the Communications Committee, as to whether the NRA concerned is permitted to impose such obligations.[201]

The obligations set out in the universal service Directive are: regulatory controls on retail services (Article 17), availability of the minimum set of leased lines (Article 18 and Annex VII) and carrier selection and preselection (Article 19).

These obligations should only be imposed on undertakings which have been designated as having SMP in a relevant market, except in certain defined cases, where similar obligations may be imposed on operators other than those that have been designated as having SMP. These exceptional cases, listed in Article 8(3) of the Access Directive, are as follows:

- obligations covering *inter alia* access to conditional access systems, obligations to interconnect to ensure end-to-end interoperability, and access to application program interfaces and electronic programme guides to ensure accessibility to specified digital TV and radio broadcasting services.[202]

[201] 2002/19/EC, Access Directive, Article 8
[202] Article 5(1), 5(2) and 6 of the Access Directive

- obligations that NRAs may impose for co-location where rules relating to environmental protection, health, security or town and country planning deprive other undertakings of viable alternatives to co-location.[203]
- obligations for accounting separation on undertakings providing electronic communications services who enjoy special or exclusive rights in other sectors.[204]
- obligations relating to commitments made by an undertaking in the course of a competitive or comparative selection procedure for a right of use of radio frequency.[205]
- obligations to handle calls to subscribers using specific numbering resources and obligations necessary for the implementation of number portability.[206]
- obligations based on the relevant provisions of the data protection Directive.
- obligations to be imposed on non-SMP operators in order to comply with the Community's international commitments.

3.4 Institutional Framework of the Sector-Specific and Competition Rules

The implementation of the regulatory framework in a consistent manner is crucially important for development of the internal market. Such consistency is believed to be only achieved by close coordination and cooperation with other NRAs, with NCAs and with the Commission. [207] Under the new regulatory framework for electronic communications networks and services, NRAs have an obligation to contribute to the development of the internal market by cooperating with each other, and with the Commission in a transparent manner to ensure the development of consistent regulatory practice and the consistent application of the Directives making up the new regulatory framework.[208] This section talks about mechanism and procedures to ensure effective cooperation between NRAs and NCAs at national level, and among NRAs

[203] Article 12 of the Framework Directive
[204] Article 13 of the Framework Directive
[205] Condition 7 in Part B of the Annex to Authorisation Directive as applied by virtue of Article 6(1) of that Directive
[206] Articles 27, 28 and 30 of the Universal Service Directive
[207] 2003/561/EC, Commission Recommendation on notifications, time limits and consultations provided for in Article 7
[208] 2002/21/EC, Framework Directive, Article 7

and between NRAs and the Commission at Community level. In particular this section deals with the exchange of information between those authorities.

3.4.1 Cooperation among NRAs

"In the EU, NRAs play an important role in enhancing competition in national telecommunications markets through sector-specific policies, as they are required to promote competition in the provision of electronic communications networks and services."[209]

NRAs should exchange information directly between each other, as long as there is a substantiated request.[210] This cooperation is particularly necessary where a transnational market needs to be analysed. In regard to the transnational markets, NRAs concerned jointly conduct the market analysis and decide on any imposition, maintenance, amendment or withdrawal of regulatory obligations.[211] In practice, the European Regulators Group is believed to provide a suitable forum for such cooperation. In all exchanges of information, the NRAs are required to maintain the confidentiality of information received.

3.4.2 Cooperation between NRAs and NCAs

As the NRAs conduct their market analyses using the methodologies of competition law, the views of NCAs in respect of the assessment of competition are highly relevant. In this sense, although the NRAs remain legally responsible for conducting the relevant analysis, cooperation between NRAs and NCAs are essential. NRAs are required to associate NCAs with the market analyses as appropriate. Member States are required to put in place the necessary procedures to guarantee that the market analysis is carried out effectively.[212] Additionally, Member States should ensure clear

[209] http://www.ictregulationtoolkit.org/en/Section.1690.html (Available on March 2008)
[210] 2002/21/EC, Framework Directive, Article 5(2)
[211] 2002/21/EC, Framework Directive, Article 16(5)
[212] 2002/21/EC, Framework Directive, Article 16(1)

division of tasks and set up procedures for consultation and cooperation between regulators in order to assure coherent analysis of the relevant markets.[213]

NRAs and NCAs should provide each other with the information necessary for the application of the regulatory framework, and the receiving authority must ensure the same level of confidentiality as the originating authority.[214]

Information that is considered confidential by an NCA, in accordance with Community and national rules on business confidentiality, should only be exchanged with NRAs where such exchange is necessary for the application of the provisions of the regulatory framework. The information exchanged should be limited to that which is relevant and proportionate to the purpose of such exchange.[215]

3.4.3 Cooperation between NRAs and the Commission

In the European Commission, there are two separate directorates dealing with competition and electronic communications matters: the Competition Directorate General (DG Competition), and the Information Society and Media Directorate General (DG InfoSoc). "The DG Competition is responsible for designing and enforcing general competition rules under the EU's Community Treaties, and ensuring that competition of the EU market is not distorted. Its four main areas of action with respect to competition policy are antitrust and cartels, merger control, liberalization in monopolistic sectors, and state aid control. DG InfoSoc is responsible for developing Information Society initiatives and harmonization efforts."[216]

For the efficient and effective implementation of the NRF, it is vital that there is a high level of cooperation between the Commission and the NRAs. Cooperation is crucially important especially for minimising the divergences in approach between different NRAs, in particular divergent remedies to deal with the same problem. In order to safeguards internal market objectives regulatory decisions adopted by the NRAs are reviewed by Commission at EU level. This mechanism established under

[213] 2002/C 165/03, Section 5.3.Guidelines on market analysis and the assessment of SMP
[214] 2002/21/EC, Framework Directive, Article 3 (5)
[215] 2002/C 165/03, Section 5.3.Guidelines on market analysis and the assessment of SMP
[216] http://www.ictregulationtoolkit.org/en/Section.1690.html (Available on March 2008)

Article 7 of the Framework Directive so-called 'Article 7 Consultation Mechanism'[217] aims to:

- promote consistent regulation across the EU on the basis of competition law principles;
- limit regulation to markets where there is a persistent market failure;
- bring more transparency in the regulatory process

3.4.3.1 Article 7 Consultation Mechanisms

Article 7 consultation mechanism requires close cooperation between the Commission and NRAs, in order to safeguards the internal market by helping to ensure the consistency of *ex ante* regulation across the EU. In this context, Member States NRAs notify their markets analyses findings and proposed measures for a particular market to the Commission.

"However, before submitting a notification, NRAs may meet informally with the Commission to present the key elements of their analysis. Such pre-notification meetings enable the Commission and NRAs to identify and discuss issues of particular concern at an early stage. During these occasions, the Commission may also provide guidance to the NRAs concerning the information required to support their conclusions. "[218]

Once a NRA notifies the Commission of its proposed measure, the case is registered, and an *ad hoc* case team is composed including the officials of the Information Society and Media and Competition Directorates General.[219] The case team analyses the notification and may ask the NRA concerned to provide some further information or clarification for the purpose of conducting the assessment. The NRA has to respond to such a request in the three working days. The team must carry out its assessment in one month ("phase one" investigation). At the end of one month, if Commission

[217] Some of the procedural elements of the Article 7 procedure are contained in the Framework Directive and others are in a (non-binding) Commission Recommendation C(2003) 2647 of 23 July 2003. COM(2006) 28 final of 06.2.2006
[218] COM(2006) 28 final of 06.2.2006
[219] NRAs have the right to withdraw a notification at any time during the procedure.

assesses that the notified measure does not raise problems concerning the compatibility with Community law Commission may decide to make comments on the appropriateness of the proposed measures.

If Commission has serious doubts concerning the compatibility of the proposed measures with Community law, the Commission's investigation period is extended by a further two months ("phase two" investigation) during which the NRA may not adopt its proposed measure. During these two months, the case team makes further examination on the case and invites third parties to make known their views. After exchange of information between all interested parties (including the NRAs and industry players) and all data provided and views expressed are carefully considered by the Commission. At the end of the investigation period, the Commission may withdraw its serious doubts (in which case the NRA may adopt the draft measure), make comments (of which the NRA must take utmost account when implementing the draft measure).[220] If the Commission considers that the proposed measure would create a serious barrier to the single market, or it is not compatible with Community law, it exercises its right of veto, thereby requiring the NRA to withdraw its proposed measure. It is important to point out that, this veto power can only be exercised in relation to the proposed market definition or SMP analysis. As regards proposed remedies, NRAs have discretionary powers and the Commission has no power of veto over remedies. However, Commission may make comments on remedies which NRAs must take utmost into account these comments.

"Since the current regulatory framework introduced the so-called Article 7 notification procedure, more than 700 national *ex- ante* regulatory measures have been notified to the Commission. The mechanism has greatly increased transparency and consistency in regulatory decisions, particularly in identifying in the first place where regulation is needed and then who is to be regulated."[221]

[220] MEMO/07/107, Brussels, 16 March 2007
[221] Viviane Reding's Speech, Brussels, 28 November 2007

3.4.3.2 Commission Comments on Remedies

As stated in the previous parts, where SMP is found in the market analyses, NRAs must impose remedies on the operator(s) having SMP. However, before imposing the remedies, NRAs should notify poposed remedies to the Commission. At the end of "phase one" investigation, if Commission assesses that the notified measure does not raise problems concerning the compatibility with Community law it may decide to make comments on the appropriateness of the proposed measures. As regards proposed remedies, NRAs have discretionary powers and the Commission has no power of veto over remedies. However, Commisison may make comments on remedies which NRAs must take utmost into account these comments. "The Commission considers whether these remedies are appropriate on the basis of the nature of the problem identified, proportionate and justified in the light of the policy objectives set out in the Framework Directive."[222]

> "The Commission also must be notified of the measures adopted in order to monitor how Member States have taken account of the comments made, and acts accordingly. A significant proportion of the Commission's comments so far have related to the *appropriateness of the remedies proposed.* The Commission has commented on remedies which i.e. appeared to be inadequate or solved only part of the competition problem identified. If the enforcement of a proposed remedy requires additional time (e.g. because an appropriate cost model is still to be developed), NRAs should already provide in the notified draft measure for temporary remedies addressing the competition failure identified."[223]

3.4.3.3 Commission Veto Power

At the end of the "phase two" investigation, if the Commission considers that the proposed measure would create a serious barrier to the single market, or it is not compatible with Community law, it exercises its right of veto, thereby requiring the NRA to withdraw its proposed measure. It is important to point out that, this veto power can only be exercised in relation to the proposed market definition or SMP analysis. As regards proposed remedies, NRAs have discretionary powers and the

[222] COM(2006) 28 final of 06.2.2006
[223] COM(2006) 28 final of 06.2.2006

Commission has no power of veto over remedies. However, Commisison may make comments on remedies which NRAs must take utmost into account these comments.

Such 'veto' decisions ensure that no measures that would be incompatible with Community law are taken nationally. The Commission vetoed draft measures where it disagreed with the market definition adopted by the national regulator or where it did not share the NRA's findings regarding the existence of SMP

So far, "the Commission has issued five veto decisions where it has found the evidence supporting a market definition or SMP analysis not to be sufficient. Additionally, there have been 29 cases where National Regulatory Authorities have decided to withdraw their proposed measures to avoid a veto decision. These five veto decisions are:"[224]

> *Veto decision in case PO/2006/518-524 concerning its analysis of retail access markets (Poland):*
>
> The Commission issued a decision requiring the Polish telecom regulator to withdraw its draft measures for regulating retail access services. The Commission argues that Polish telecom regulator has failed to justify why it intends to regulate broadband access services in addition to regulating retail narrowband access.
>
> *Veto decision in case DE/2005/0144 concerning wholesale call termination on fixed networks (Germany):*
>
> 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 NRA did not consider any of the other operators in respect of their individual networks to be dominant, despite each having a market share of 100%.
>
> *Veto decision in case AT/2004/0090 concerning transit services (Austria):*
>
> 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 NRA's approach leads to a significant unjustified reduction of the dominant market player's market

[224] MEMO/07/107, Brussels, 16 March 2007

share (Telekom Austria). Furthermore, the regulator failed to assess the impact of deregulation on small operators.

Veto decision in case FIN/2004/0082 concerning the mobile access market (Finland):

Finnish Regulator concluded that one operator had SMP mainly on the basis of high market share (>60%). However, according to competition law practice, market shares alone are not necessarily sufficient to establish dominance and Finnish Regulator failed to consider sufficiently market developments that would have rebutted the presumption of dominance.

Veto decision in case FIN/2003/0024 concerning international calls (Finland):

As the Finnish regulator could not identify any market players with SMP, it analyses that international calls market was characterised by effective competition. Commission argues that the regulator did not provide sufficient evidence underpinning its findings to enable the Commission to confirm the NRA's conclusions.

3.4.3.4 Infringement Procedures

Some NRAs have been late in notifying the Commission of their market analyses. In October 2005, the Commission launched infringement procedures again seven EU Member States (BE, CZ, EST, CY, LV, LUX, and PO), for failing to notify it of their market analyses. By the end of January 2006, Luxembourg and Cyprus had started their notifications to the Commission. Although, as of 7 February 2006, four Member States were still missing, more time and effort will clearly be needed for all markets to be analysed exhaustively and before the full benefits of liberalization are felt throughout the EU. Before the end of 2007 the Commission expects all National Regulatory Authorities to have finished the first round of their market analyses, except Bulgaria and Romania. Four Member States have started their second round of market analyses.[225]

3.4.4 Other Interested Parties

It is important that NRAs consult all interested parties on proposed decisions and take account of their comments before adopting a final decision.

[225] MEMO/07/107, Brussels, 16 March 2007

> "The regulatory framework provides for "national" consultation, during which all interested parties are given an opportunity to comment on the NRA's analysis and proposals for regulation. The NRA informs the Commission of the view of third parties. Only when circumstances so require, Commission directly receives submissions from or meet with stakeholders (normally on request). As a matter of standard practice in "second phase investigations", the Commission invites interested third parties to comment directly. Although the Community consultation mechanism formally involves the Commission and the NRAs only, it seeks to ensure transparency for all interested parties. Such transparency helps to ensure greater quality and objectivity in the NRAs' analysis. Non-confidential versions of all notifications, and the NRAs' final measures, are published on the Commission's dedicated website. The Commission also publishes non-confidential versions of comments, no comments and veto decisions. Most NRAs conduct the national consultation prior to Community consultation. This allows them to reflect the views of market players in the Community notification and to avoid the need for a second Community notification where the results of the national consultation lead the NRA to amend its draft measure. The Commission strongly supports this approach."[226]

3.5 Future Perspectives for the New Regulatory Framework

As stated before in previous chapters, the EU regulatory framework for telecommunications was set up at the end of 1990s to open up the monopolistic national markets to competition and to create single telecommunications market.

In the light of the full liberalization in 1998 and converged technologies, 1998 regulatory framework was followed by 2002 regulatory package which is still in effect.

"The EU rules are considered to have been quite successful in opening up national telecommunications markets to competition, stimulating investment and innovation by both new entrants and incumbents, and increasing choice at lower prices and better quality for business and private consumers throughout Europe."[227] However, it is argued that "the job of making this network industry a market with fully effective

[226] COM(2006) 28 final of 06.2.2006.p.4
[227] COM (2007) 696 final. p.4

competition is not yet achieved everywhere." Much still remains to be done.[228] Additionally, "new developments in the telecoms sector have left the current regulatory framework in need of updating."[229]

In keeping with "better regulation" principles, the current framework requires the Commission to report regularly on the functioning of the regulatory framework. Review procedure of the regulatory framework was set up under Article 25 of Directive 2002/21/EC as follows:

" The Commission shall periodically review the functioning of this Directive and report to the European Parliament and to the Council, on the first occasion not later than three years after the date of application referred to in Article 28(1), second subparagraph. For this purpose, the Commission may request information from the Member States, which shall be supplied without undue delay."

3.5.1 Review of the Current Regulatory Framework

The Commission was launched a public consultation, at the end of 2005, on whether a reform of the EU Electronic Communications rules, in force since 25 July 2003, is needed and how a single electronic communications market could be achieved. This was a 'call for input' phase (Phase I). [230]

"In the light of technological and market developments, especially improved competition in some areas, but also continued dominance by one or a few operators on a number of key markets as well as a continued lack of a single market for electronic communications and increasing divergence of regulatory approaches in the enlarged

[228] Factsheets. "*2007 EU Telecoms Reform #10. A more effective regulatory system"*. November 2007

[229] http://ec.europa.eu/information_society/policy/ecomm/index_en.htm (Available on March 2008)

[230] This phase has resulted in around 160 written submissions. These views were taken into account in the preparation of the Commission Communication of June 2006 on the Review, the accompanying Staff Working document and the Impact Assessment. See. COM(2007) 696 final, Brussels, 13.11.2007

EU, a substantial reform of the regulatory framework is considered necessary by the Commission."[231]

Reform proposals (hereinafter the 2007 Reform Proposals) are based on the results of the Phase I consultation. Following the Phase I, Phase II of the public consultation on policy options for updating current electronic communications regulatory framework was launched on 29 June 2006 ran until October 2006. [232] Phase II included a public workshop hold between November 2006 and February 2007 aiming a regulatory dialogue to explore regulatory options to overcome bottlenecks in the sector.[233]

The four documents released by the Commission for Phase II public consultation were a Communication[234], a Staff Working Document[235], an Impact Assessment[236] that identifies the main policy options under consideration, and a draft Recommendation[237] on relevant markets.

---

[231] COM(2007) 696 final, Brussels, 13.11.2007.

[232]A total of 224 responses were received, from inside and outside the EU. 52 industry associations, 12 trade associations and worker's unions, and 15 user associations submitted written comments, as did 18 EU Member States and the ERG, which comprises the 27 NRAs. See. COM(2007) 696 final, Brussels, 13.11.2007

[233] COM(2007) 696 final, Brussels, 13.11.2007

[234] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the *"Review of the EU Regulatory Framework for electronic communications networks and services"* Brussels, 29.6.2006 COM(2006) 334 final {SEC(2006) 816} SEC(2006) 817}. This Communication reports on the functioning of the five directives of the regulatory framework for electronic communications networks and services, as required by these directives.

[235] Commission Staff Working Document Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the *"Review of the EU Regulatory Framework for electronic communications networks and services"*. {COM(2006) 334 final} Proposed Changes, Brussels, 28 June 2006 SEC(2006) 816

[236] Commission Staff Working Document Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the *"Review of the EU Regulatory Framework for electronic communications networks and services"*. {COM(2006) 334 final} Impact Assessment, Brussels, 28 June 2006. SEC(2006) 817

[237] The revised Recommendation on relevant markets was entered into force on 17 December 2007. Commission Recommendation of 17 December 2007 on *relevant product and service markets within the electronic communications sector susceptible to ex-ante regulation* in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services *(*notified under document number C(2007) 5406) (Text with EEA relevance) (2007/879/EC)

All of these Commission's proposals for reform were subjected to public consultation. Taking account of the comments received during the consultation, the Commission presented finalized reform proposals to Parliament and Council on the 13 November 2007.

Commission proposals for a new regulatory framework will be debated by the European Parliament and the Council of Telecoms Ministers. Parliament and Council will decide about the 2007 Reform Proposals following the 'co-decision procedure.'[238] "The reform package consists of several legal instruments. While some, such as the Recommendation on relevant markets or the Regulation setting up the new Telecom Market Authority, become directly applicable once adopted, some have to be transposed into national laws. The procedures vary from Member State to Member State, but a time limit for transposition sets out in the Directives adopted by Parliament and Council.[239]In this context, the revised Commission Recommendation on Relevant Markets became applicable after it was adopted and published by the Commission on 17 December 2007.[240] This Recommendation replaces Commission Recommendation 2003/311/EC.

The entry into force of the new regulatory framework will depend on the speed of the legislative process, but the Commission expected them to become law by the end of 2009 and to be fully transposed into national laws by 2010.[241]

---

[238] "Under the co-decision procedure, EU legislation is adopted jointly by the European Parliament and Council (in which Ministers from Member States' governments meet). The EU's two advisory bodies, the European Economic and Social Committee and the Committee of the Regions are also expected to deliver opinions on the proposals. The procedure means that both Parliament and Council have to agree on the exact wording of the legislation". See. http://ec.europa.eu/information_society/policy/ecomm/tomorrow/next/index_en.htm (Available on March 2008)

[239]http://ec.europa.eu/information_society/policy/ecomm/tomorrow/next/index_en.htm (Available on March 2008)

[240] MEMO/07/458. "The EU Telecoms Reform proposes a Single Market for 500 million consumers – Frequently Asked Questions", Brussels, 13 November 2007

[241] IP/07/1677 Brussels, 13 November 2007 IP/06/874, Brussels, 29 June 2006

3.5.1.1 Problems Identified

Main message of the 2007 Reform Proposals is that Europe does not yet have a single market for electronic communications networks and services. "A pan-European telecom industry needs pan-European consistency in its economic regulation."[242] "There are no technological barriers to providing pan-European services. However, there is a clear consistency problem in regulation".[243]

"Since the current EU rules introduced the so-called Article 7 notification procedure, more than 700 national *ex ante* regulatory measures have been notified to the Commission. The mechanism has greatly increased transparency and consistency in regulatory decisions, particularly in identifying in the first place where regulation is needed and then who is to be regulated. However, on the crucial question of 'how' to regulate, the mechanism has proved considerably less satisfactory."[244] There are 27 fragmented approach to regulation implemented via 27 separate national regulatory systems. As a result, there are inconsistencies in the speed of implementation of the rules; in the appeals procedures and also in the remedies applied. Similar competition problems are not being addressed by similar remedies in different Member States.[245]

"The problem of regulatory consistency appears evident in the case of mobile termination markets. There are substantial differences concerning the level of the termination rates and the methodologies used to determine those rates across the EU. For instance; the cost of mobile termination ranges from 16.49 eurocents to 2.25 eurocents across the EU."[246] "Such differences cannot be justified by differences of the underlying cost of services provision, network or national characteristics. Another substantial regulatory inconsistency appears in Voice over IP. It is regulated in very different ways across the 27 EU Member States. Some regulators follow the "light touch" approach advocated by the Commission; others have resorted to varying regulatory measures. As a result, regulatory fragmentation makes it almost impossible

[242] Viviane Reding's Speech, Brussels, 5 March 2007
[243] Factsheets. "2007 EU Telecoms Reform #10. A more effective regulatory system", November 2007
[244] Viviane Reding's Speech, Brussels, 28 November 2007
[245] Viviane Reding's Speeches, Brussels, 29 January 2008 & Brussels, 5 March 2007
[246] Viviane Reding's Speech, Budapest, 26 November 2007

to roll-out Voice over IP services on a pan-European scale. This is not a good sign for competition, and not a good sign for consumers who could profit from a widespread availability of Internet telephony offers."[247]

"Regulatory effectiveness also varies considerably among member states. For example; five NRAs took over nineteen months to complete a market analysis; accounting separation has been implemented effectively in a few countries only; nondiscrimination remains ineffectively enforced."[248]

In addition to this, some regulators are not fully independent from political pressure in some Member States, not all have sufficient resources and staff to be fully effective. There are delays in applying remedies, as well as problems caused by inefficient remedies.[249]

These regulatory problems are serious obstacles for the development of a competitive internal market which benefits cross-border business interests and consumers. Inconsistencies in regulatory approaches create uncertainties and extra costs for investors, which in turn, distort competition, investment and innovation.[250]

Regulatory consistency will reduce uncertainty. Increased certainty is a necessary precondition for large-scale investments, especially if you are venturing into a new market. It means reduced risk and that means reduced capital costs.[251]

In addition to the regulatory inconsistency, there are still competition problems on Europe's electronic communications markets. For instance, "in fixed voice telephony market, infrastructure competition is still very low with an average 87.8% of subscribers still using the incumbents' network for direct access. Alternative operators for direct access are used rarely."[252]

---

[247] Viviane Reding's Speech, Brussels, 28 November 2007
[248] Viviane Reding's Speech, Brussels, 5 March 2007
[249] Viviane Reding's Speech, Brussels, 29 January 2008
[250] Viviane Reding's Speech, Brussels, 5 March 2007
[251] Viviane Reding's Speech, Budapest, 26 November 2007
[252] MEMO/07/458, Brussels, 13 November 2007

3.5.1.2 Proposals for Reform

European Commission on its Communication on *"Market Reviews under the EU Regulatory Framework* (12nd report) *Consolidating the Internal Market for Electronic Communications"* concluded that there are still obstacles to the full exploitation of the potential of the open and competitive internal market."[253] For this reason, not only for the telecommunications but also for the given the maturing of the single market, new approaches are needed. These new approaches pointed out by the Commission also constituted a basis for the new perspective in electronic communications networks and services. These are[254]:

> *More impact-driven and result-oriented approach:* Traditionally, single market policy was aimed at removing cross border barriers, mainly through regulatory means. New approach is to act when markets do not function well due to the lack of competition. This requires closer monitoring of market functioning and performance, both at a sectoral and economy-wide level, including through sector-specific enquiries.
>
> *Pro-active enforcement of competition rules*
>
> *More decentralised and network-based approach:* It is understood that in order to have an effective single market, the efforts of the institutions at EU level is not enough. All relevant actors should involve in the process. To this end, the role of the NRAs may be strengthened or the cooperation and networking of Member States' administrative, judicial and regulatory authorities may be improved.

Next parts analyses how these new approaches reflect on the Commission proposals for the future of electronic communications regulatory framework and how they shape the role of *sector-specific* and *antitrust regulations* in the sector.[255]

[253] COM(2007) 401 final of 11.7.2007
[254] COM (2007) 60 final of 21.2.2007, A single market for citizens
[255] Among the Commission' reform proposals, the thesis deals with those having implications on the role of the sector-specific and antitrust rules in the telecommunications sector. Details of the main policy changes proposed by the Commission can be found in the Commission's legislative proposals and associated Impact Assessment.

3.5.1.2.1 Market Deregulation

As stated in the previous chapters, the EU current regulatory framework requires the Commission to define markets in accordance with the principles of competition law. It is for national regulatory authorities to define relevant markets appropriate to national circumstances, in particular relevant geographic markets within their territory.[256]

"The definition of relevant markets can change over time as the characteristics of products and services evolve and the possibilities for demand and supply substitution change."[257]

Article 15(1) of Directive 2002/21/EC requires the Commission to review regularly the Recommendation on *relevant product and service markets* within the electronic communications sector susceptible to *ex ante* regulation.

Commission Recommendation dated 2003 identifies eighteen markets that may warrant ex-ante regulation. NRAs define the relevant markets and determine the boundaries of a given market. Then, NRAs conduct market analysis in order to determine whether there is a SMP in the market. The existence of SMP warrants *ex-ante* regulation in the market.

Article 7 consultation mechanism established under the Framework Directive requires Member States NRAs notify their markets analyses findings and proposed measures for a particular market to the Commission in order to safeguards the internal market by helping to ensure the consistency of *ex ante* regulation across the EU.

"Based on experience with this system over the last four years (with over 600 notifications), the Commission suggested in June 2006 simplifying the notification procedures in the system of markets review and removing most retail markets from the list, on the grounds that effective wholesale regulation would be sufficient to protect retail users."[258] The Commission has revised its Recommendation on relevant markets

[256] 2002/21/EC, Framework Directive, Article 15(1)
[257] 2007/879/EC, Commission Recommendation of 17 December 2007 on *relevant product and service markets* within the electronic communications sector susceptible to *ex-ante* regulation
[258] COM(2007) 696 final.p.5, Brussels, 13.11.2007

to phase out *ex-ante* regulation.[259] Commission states that "of 18 specific telecoms markets regulated until now, only 7 still need to be subjected to regular scrutiny by the National Regulators and the Commission."[260] Commission removed 10 markets from the list of relevant markets in the Recommendation. Two of the remaining markets were merged, so that the list of markets regulators have to analyse falls from 18 to 7. Most retail markets were being deregulated and removed from the list as it is believed that effective wholesale markets - *end-user markets*- regulation will protect retail users. Normal competition law will then apply to these markets. The Commission proposes to focus regulation on those 7 markets where there is no trend towards effective competition, such as broadband access. This simplifies the regulatory environment and reduces the burden on regulators and industry and allows the National Regulators and Commission to focus their attention on just the remaining problem areas.[261]

"Reduction in the list of markets means that the Commission believes in many areas competition has developed significantly under the current regulatory framework and a shift towards competition law oversight can be made where appropriate. By allowing national regulators to target *ex ante* regulation on core problems, regulators' ability to deal with issues of greatest priority will be strengthened. However, the withdrawal of a market from the Recommendation does not indicate that the Commission believes that there are no problems on that market anywhere in the EU. The exercise that the Commission has just carried out was conducted by looking across all 27 Member States and does not attempt to capture the specifics of those Member States where factors facilitating effective competition are inhibited. The EU rules require individual national regulators to take account of national circumstances. So, it remains open to national regulators to justify interventions in markets that have been removed where they can make a convincing case that ex ante regulation is still needed."[262]

---

[259] Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and service markets was repealed by Commission Recommendation 2007/879/EC of 17 December 2007

[260] Factsheet 64, "Why Europe's Telecoms Reform concerns you….", 1 December 2007

[261] Factsheets, "2007 EU Telecoms Reform #9 From 18 to 7 regulated markets", November 2007

[262] Viviane Reding's Speech, Brussels, 28 November 2007

Remaining Markets on where Commission believes competition is not yet effective and NRAs shoul focus on are:

Retail level

1. Access to the public telephone network at a fixed location for residential and non-residential customers. (formerly Market 1 and 2)

"Making and/or receiving telephone calls and related services (such as faxes and dial-up internet) over fixed telephone lines. Previously two markets - business and residential - it will now become just one."[263]

Wholesale level

2. Call origination on the public telephone network provided at a fixed location. (formerly Market 8)

"Call origination is taken to include call conveyance, delineated in such a way as to be consistent, in a national context, with the delineated boundaries for the market for call transit and for call termination on the public telephone network provided at a fixed location."[264]

"Wholesale call origination enables alternative operators to offer retail users fixed telephone services, including dial-up internet connections."[265]

3. Call termination on individual public telephone networks provided at a fixed location. (formerly Market 9)

"The wholesal call termination is the wholesale service offered by one operator to another that allows calls between operators."[266]

"Call termination is taken to include call conveyance, delineated in such a way as to be consistent, in a national context, with the delineated boundaries for the market for

[263] Factsheets, "2007 EU Telecoms Reform #9 From 18 to 7 regulated markets"
[264] 2007/879/EC, Commission Recommendation
[265] Factsheets, "2007 EU Telecoms Reform #9 From 18 to 7 regulated markets"
[266] Ibid.

call origination and the market for call transit on the public telephone network provided at a fixed location."[267]

4. Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location. (formerly Market 11)

"It is the market for wholesale access to the local loop of the public fixed telecommunications network connecting the subscriber to the local exchange and to the main network. Once access is granted, new market entrants can provide both voice and data services over the so-called local loop rented from the incumbent operator."[268]

5. Wholesale broadband access. (formerly Market 12)

"IT enables new market entrants to offer broadband access services using their own network and the "local" parts of the incumbent's network. It is also known as "bitstream."[269]

"This market comprises non-physical or virtual network access including 'bit-stream' access at a fixed location. This market is situated downstream from the physical access covered by market 4 listed above, in that wholesale broadband
access can be constructed using this input combined with other elements."[270]

6. Wholesale terminating segments of leased lines, irrespective of the technology used to provide leased or dedicated capacity. (formerly Market 13)
"Operators use leased lines - dedicated communication links - to complete their own network infrastructure or to offer services. The lines are made up of terminating segments, the final part, and trunk segments, the rest."[271]

7. Voice calls termination on individual mobile networks. (formerly Market 16)

---

[267] 2007/879/EC, Commission Recommendation
[268] Factsheets, "2007 EU Telecoms Reform #9 From 18 to 7 regulated markets".
[268] Ibid.
[269] Ibid.
[270] Commission Recommendation. 2007/879/EC
[271] Factsheets. "2007 EU Telecoms Reform #9 From 18 to 7 regulated markets".

"The wholesale service offered by one operator to another that allows consumers to call users on different networks"[272]

"From today onwards, the Commission and national regulators will be refocusing their efforts on those markets where competition is not yet effective and where consumer benefits are still largely lacking."[273]

That does not mean that those 7 product and service markets will always be subject to the imposition of regulatory obligations set out in the specific Directives. In particular, regulations must be withdrawn if there is effective competition on these markets. In other words, regulation cannot be imposed if no operator has significant market power within the meaning of Article 14 of Directive 2002/21/EC.[274]

Similarly, NRAs may identify markets that differ from those 7 markets mentioned above provided that they act in accordance with Article 7 of Directive 2002/21/EC. However, markets other than those should satisfy the three criteria cumulatively.

Removed markets on where Commission believes competition is effective and consumer demands are satisfied, thus, no *ex- ante regulation* is warranted are:

1- Wholesale trunk segments of leased lines. (Market 14)
2- Publicly available local and/or national telephone services provided at a fixed location for residential customers. (Market 3)
3- Publicly available international telephone services provided at a fixed location for residential customers. (Market 4)
4- Publicly available local and/or national telephone services provided at a fixed location for non-residential customers. (Market 5)
5- Publicly available international telephone services provided at a fixed location for non-residential customers. (Market 6)
6-The minimum set of leased lines (which comprises the specified types of leased lines up to and including 2Mb/sec (Market 7)

[272] Ibid.
[273] Press Release. "Commission acts to reduce telecoms regulation by 50% to focus on broadband competition". IP/07/1678, Brussels, 13 November 2007
[274] 2007/879/EC, Commission Recommendation

7- Transit services in the fixed public telephone network (Market 10)

8- Access & call origination on public mobile telephone networks (Market 15)

9- The wholesale national market for international roaming on public mobile networks. (Market 17)

10- Broadcasting transmission services, to deliver broadcast content to end users. (Market 18)

"For these markets, the Commission no longer sees an *a priori* case for *sector-specific ex-ante* regulation by NRAs. These markets should now be primarily dealt with by competition authorities using *ex-post* instruments. That means role of the NCAs was increased. On the other hand, it remains possible for a NRAs, by a market analysis, that in its country, competition is still seriously hampered on one of the above markets. Under such circumstances, *telecoms-specific* regulation could be continued. This could be especially relevant for some of the EU's newest Member States."[275]

3.5.1.2.2 Additional Remedies for NRAs

Functional separation is proposed as an additional remedy for NRAs to tackle persistent competition problems.

"In the 80% of Europe, there is no real chance of head-to-head competition between fixed infrastructures." [276] "Only 10,5% on average of the direct access market is today in the hands of alternative providers which provide their services via their own network, via cable lines, unbundled lines or wireless access. 89.5% on average of direct access is however still dominated by the former incumbents. This means that ex-ante regulation continues to play a crucial role in maintaining competition and protecting consumers by setting conditions for access to the incumbent's infrastructure."[277] "In the EU current regulatory framework there are many tools that can be used to promote equality of access to the networks. But regulators are still confronted with by delays and denials by incumbents which slow down competition."

[275] Press Release. "Commission acts to reduce telecoms regulation by 50% to focus on broadband competition". IP/07/1678 Brussels, 13 November 2007

[276] Viviane Reding's Speech, Brussels, 5 March 2007

[277] Viviane Reding's Speech, Brussels, 28 November 2007

[278] "Assuring equivalence of access can prove difficult where network operators are vertically integrated service providers, especially as regards non-price discrimination. In cases where such discrimination is persistent and cannot be resolved by behavioural remedies, functional separation is proposed as a new additional remedy that NRAs may impose to tackle persistent discrimination. [279] In other words, Commission proposes to provide NRAs with the power to force companies to separate their network assets from the provision of services.[280]

"Functional seperation is expected to ensure that the unit responsible for the network is not giving the service unit of its own mother company a more favourable treatment than other operators."[281] Functional seperation will ensure non-discriminatory conditions that all market players are given access to the basic infrastructure on equitable commercial terms. "It gives new entrants a fair chance to build services using the incumbent's existing infrastructure."[282]

Differs from structural separation, in functional separation overall ownership remains unchanged. "Functional separation would not go as far as full divestiture of assets, but it would create a clear dividing line between the part of the organisation that is managing the network and the part that is competing with the other operators using the network."[283]

"Functional separation entails changes to an incumbent operator's organisation including setting up information barriers between the access and services part of the business, but it does not force the operator to sell off assets."[284]

"This remedy should be imposed where the existing remedies are insufficient. NRAs should apply this extra tool of functional separation where there are persistent structural competition problems."[285] "Functional separation should only be used when all other regulatory tools have proved to be inadequate. To be imposed, functional

[278] Viviane Reding's Speech, Brussels, 5 March 2007
[279] Viviane Reding's Speech, Brussels, 28 November 2007
[280] Viviane Reding's Speech, Brussels, 5 March 2007
[281] Viviane Reding's Speech, Brussels, 28 November 2007
[282] MEMO/07/458, Brussels, 13 November 2007
[283] Viviane Reding's Speech, Brussels, 5 March 2007
[284] Viviane Reding's Speech, Brussels, 28 November 2007
[285] Ibid.

separation requires the approval of the Commission and needs to take into account the effect on investment by the incumbent as well as by new market entrants."[286]

UK OpenReach model is the first example of functional separation in Europe. British Telecom has been operated functionally separated since September 2005. As a result, there has been a substantial increase in the volume of orders for access from alternative providers."[287] "The imposition of similar measures is also being considered in Italy, Sweden and Poland Ireland and Spain. However, the Dutch national regulator considered that at the moment, functional separation would be inappropriate for The Netherlands, in view of evolving infrastructure competition between DSL and cable."[288]

Viviane Reding, Commissioner for Information Society and Media, states in her speech that "the possibility of full structural separation should not be excluded in the electronic communications markets. For dominant companies that wish to reduce the intensity of regulation on electronic communications markets, full structural separation could be envisaged as a voluntary price to pay for reducing ex-ante-regulation."[289]

3.5.1.2.3 Community-wide NRA

Viviane Reding, Commissioner for Information Society and Media, states that the current institutional set up does not allow achieving a consistent application of remedies by NRAs. The Commission has no real say on remedies under 2002 framework, while the European Regulators Group lacks the institutional capacity to arrive at timely and ambitious common positions.[290]

To overcome this problem several policy options were being considered. "One possibility was to strengthen the internal market powers of the Commission in order to have a definitive say on remedies. Another option was to transform the ERG into a

[286] MEMO/07/458, Brussels, 13 November 2007
[287] Viviane Reding's Speech, Brussels, 28 November 2007
[288] MEMO/07/458, Brussels, 13 November 2007
[289] Viviane Reding's Speech, Brussels, 5 March 2007
[290] Viviane Reding's Speech, Brussels, 29 January 2008

'federal system' of National Regulators (possibly modelled on the European System of Central Banks)."[291] Among these options, instead of centralising telecoms regulation in the hands of the European Commission, Commission proposed that a new European Electronic Communications Market Authority (EECMA) should be established to ensure NRAs can work more effectively together on the basis of common principles.

"The Authority would include the heads of national telecom regulators who each have the knowledge of their own national markets and work under the clear responsibility of the European Commission."[292]

Regulatory consistency across the EU is indispensible prerequisite to achieve single market. The EECMA is believed to ensure regulatory consistency, more robust, timelier and more transparent decisions, effectiveness and coherence across the Community electronic communications markets.[293] "EECMA is believed to ensure that important communication services (such as internet broadband access, data roaming, mobile phone usage on planes and ships and cross-border business services) are regulated more consistently across the 27 EU Member States. The EECMA will combine the functions of the current European Regulators Group (ERG) and of the current European Network and Information Security Agency (ENISA)."[294] "So far the loose form of cooperation currently tested inside the European Regulators Group (ERG) has failed to result in concrete regulatory responses to cross-border and has been criticised by industry for its "lowest common enominator" approach. On an important cross-border issue such as international mobile roaming charges, the intervention of the European Commission was finally needed to ensure a result in the interest of fair competition and lower consumer prices."[295]

"EECMA would provide consistent, clear and quick decisions that would lower the cost of capital for service providers."[296] "The EECMA would replace today's loose cooperation among NRAs inside the ERG by a more efficient, more authoritative and

[291] Viviane Reding's Speech, Brussels, 5 March 2007
[292] Telecom Reform Glossary http://ec.europa.eu/information_society/index_en.htm (Available on March 2008)
[293] Viviane Reding's Speech, Brussels, 29 January 2008
[294] Press Release, IP/07/1677, Brussels, 13 November 2007
[295] MEMO/07/458, IP/07/1445 and IP/07/870
[296] Viviane Reding's Speech, Brussels, 28 November 2007

more accountable system. It will advise the Commission and will be accountable to the European Parliament."[297] "The Commission's role will be to ensure that the expert advice given by the new Authority can be turned into decisions that have legal power throughout the Union."[298]

The new Authority would:[299]

• reinforce the coherent and consistent the application of the EU rules across the EU by making better use of the combined expertise of national regulators in the Community system.
• deliver an expert opinion to the Commission on proposals notified by NRAs, or formulate its own proposals. This will allow the Commission to take informed decisions on the basis of the regulators' knowledge of national market conditions.[300]
• assist the Commission in cross-border regulatory issues i.e. international roaming, VOIP
• take over the functions of the ENISA and and coordinate EU-wide responses to network security threats. A Chief Network Security Officer will be in charge in the new Authority for this task.
• look after the interests of Europe's consumers and end-users on information security issues.

As stated previous section, new Commission Recommendation identified 7 markets that may warrant ex-ante regulation. In those 7 markets significant consistency problems may arise. For instance; "Remedies applied in one country may be quite different to those in another, despite similar market conditions; implementation timetables differ."[301] In this context, the EECMA expected to ensure greater consistency among NRAs applications, both in the types of remedy used and in the timescales applied.

[297] COM(2007) 696 final, Brussels, 13.11.2007, Summary of the 2007 Reform Proposals
[298] Viviane Reding's Speech, Brussels, 29 January 2008
[299] COM(2007) 696 final, Brussels, 13.11.2007, Summary of the 2007 Reform Proposals
[300] Factsheets. "2007 EU Telecoms Reform #10. A more effective regulatory system". November 2007
[301] Ibid.

"In the proposed reform the new EECMA will not replace NRAs. On the contrary, the EECMA will work closely with the NRAs to benefit from their experiences and their deep understanding of their own national markets. The EECMA will also work closely with the European Commission. The EECMA will contribute to the effective cooperation between the Commission and NRAs."[302] "The EECMA will help the Commission, with the joint expertise of NRAs, to ensure faster implementation and greater consistency of regulation across Europe."[303] "The new regulatory system will combine the expertise of NRAs via the Authority with the single market instruments of the Commission."[304]

The Commission is required to take careful account of the opinions of the Authority, before taking its decisions. The Commission's role will be to ensure that the expert advice given by the new Authority can be turned into decisions that have legal power throughout the Union.[305]

3.6 Conclusion

EU current regulatory framework aims to simplify existing rules, removing those deemed no longer necessary, and to achieve greater harmonization within the EU. Regulatory framework relies on competition law principles and methodologies to define the markets to be regulated *ex-ante* and to assess whether undertakings have SMP on those markets. Current '2002 Regulatory Framework' introduced the competition law concept of dominance as the threshold for *ex-ante* regulation, to ensure that regulation is imposed only on firms with SMP.

The main idea is that *ex-ante* sector-specific regulatory obligations should be imposed only on operators with SMP and in case of lack of competition in the relevant market. In other words, *ex-ante* regulation should always address structural competition problem. As electronic communications markets tend towards effective competition, existing regulations should be removed. "Regulators should not intervene in markets

[302] MEMO/07/458, Brussels, 13 November 2007
[303] Factsheets. "2007 EU Telecoms Reform #10. A more effective regulatory system". November 2007
[304] Ibid.
[305] Viviane Reding's Speech, Brussels, 29 January 2008

where competition ensures low prices, high quality and innovative services for consumers."[306]

Regulatory framework also requires the close cooperation between NRAs, NCAs, Commission and other related parties in order to ensure effective and harmonised applications of regulatory intervention across Europe.

The EU current regulatory framework is believed to have produced considerable benefits for citizens and enterprises so far through the strenghtening of open markets across the EU and increased choices. However, main message of the EU 2007 Reform Proposals is that there are still obstacles to the full exploitation of the potential of the open and competitive internal market due to the lack of consistency in the way the common EU rules are applied between 27 Member States. Those inconsistencies distort the competition between operators of different countries. The Commission therefore proposes an independent European Electronic Communications Market Authority as a tool to achieve a true single market in electronic communications, which, together with the Commission, will help level the regulatory playing field in Europe.

"The EU Reform Proposals sends a strong *deregulatory* signal, particularly through the changes made to the Commission's Recommendation on Relevant Markets. The lists of markets that the Commission considers are suitable for *ex-ante* regulation is reduced from 18 to 7 markets.[307]" 2007 Reform Proposals argues to *deregulate* telecommunications markets as far as possible in places where effective competition has already been established, and to *focus ex-ante regulation* on markets where competition is still not effective and to make such regulation more effective and more consistent across the EU. The Commission proposes to enhance competition in the remaining bottlenecks, by for example introducing the new remedy of functional separation.

Overall aim of the 2007 EU Reform Proposals is less but more effective and consistent regulation.

---

[306] Press Release, IP/06/874, Brussels, 29 June 2006
[307] Viviane Reding's Speech, Brussels, 28 November 2007

CHAPTER 4

TURKISH APPROACH ON THE REGULATORY FRAMEWORK of the SECTOR-SPECIFIC and COMPETITION RULES in the TELECOMMUNICATIONS

Liberalization of the Turkish telecommunications sector is a recent event influenced by the developments in other countries, especially those in the European Union. Turkey's ongoing accession process to the EU has also accelerated the liberalization process in the previously monopolistic telecommunications markets.

Similar to the European countries, liberalization process in Turkey was accompanied by certain institutional and legal regulatory reforms necessary for a liberalized telecommunications market. As a result of these reforms, Telecommunications Authority as a *sector-specific* independent regulator was established in 2000. On the other hand, Competition Authority enforcing economy-wide competition rules has been functioning in Turkey since 1997.

After a brief history of the Turkish telecommunications sector, this chapter examines the design, role and the interaction of the *sector-specific* and the *antitrust* regulation in the recently liberalized Turkish telecommunications markets. This chapter points out the criticism concerning the cooperation and coordination mechanism between two authorities. This chapter analyses main telecommunications-related cases investigated by Competition Authority in order to exemplify the interaction of the two regulatory authorities.

The current level of alignment with the EU acquis within the context of regulatory framework of the sector-specific and competition rules in telecommunications is also studied under this Chapter. This chapter also deals with the legal studies to keep pace Turkey's electronic communications framework with the technological and market developments.

4.1 Market Overview

The Turkish telecommunications sector and the related legislation have gone through a number of significant changes since the last quarter of the 90's.

4.1.1 Historical Background

Legal and institutional restructuring of the global telecommunications markets affected Turkey as well. The first segment of the telecommunications sector restructured has been the telecommunications equipment segment with the privatization of PTT's (Posts, Telegraph and Telephone) equipment manufacturer subsidiaries, Netaş and Teletaş, in the late 1980s and early 1990's.[308]

As it was the case in many other countries, Turkey's telecommunications networks and services have been carried out by state-owned PTT monopoly, a public economic enterprise performing also postal services, until 1994. Legal basis of the system was the Telegram and Telephone Law no. 406 dated 1924 and the Postal Law no. 5584 dated 1950.

The first major step towards the liberalization of the telecommunications sector was the separation of the PTT into two different organizations with enactment of Law no. 4000 in June 1994. PTT was divided into General Directorate of Posts to provide postal and telegram facilities and services and Turkish Telecommunications Inc. (Turk Telekom A.Ş.) as a public economic enterprise to provide telecommunications services with some regulatory power (e.g. to propose issuing licences to private sector firms). Other regulatory functions were kept within the Ministry of Transport. As a result, telecommunications services freed from the direct involvement of the government.[309]

---

[308] For further information See. Çakal, R. (1996). "*Doğal Tekellerde Özelleştirme ve Regülasyon*".pp.113-114

[309] For further background information on the Turkish telecommunications sector See. OECD Reviews of Regulatory Reform. (2002).*"Regulatory Reform in Turkey: Regulatory Reform in the Telecommunications Industry"* & Çakal, R. (1996). "*Doğal Tekellerde Özelleştirme ve Regülasyon."* pp.98-138

A further step towards liberalization was the liberalization of the value added telecommunications service market. "The Law no. 4000 allowed the Ministry of Transport to issue licenses to private enterprises on conditions that would not lead to monopolies."[310] In this context, liberalization of the mobile telecommunications services occured in 1994 when the two GSM 900 mobile operators, Turkcell and Telsim, started to operate under revenue-sharing agreements with Turk Telekom. Revenue sharing agreements of the two mobile operators were transformed to 25-year licences (concession agreements)[311] issued by the Ministry of Transport on 28.04.1998.[312] "The revenue-sharing agreements stipulated that Turk Telekom would obtain 67 percent of the revenues, and the rest would be retained by the operators. All infrastructure investment was to be undertaken by the operators themselves. After the revenue-sharing agreements had been replaced with 25-year licenses, competition and investment incentives increased in the sector."[313]

Due to the increased demand in mobile communications two GSM 1800 licences were tendered in April 2000 by the Ministry of Transport. However, Is Bankasi-Telecom Italia consortium (Aria) was the only successful applicant as the consortium bid high

---

[310]Atiyas, İ. (2006). *"Competition and Regulation in the Turkish Telecommunications Industry"*.p.5

[311] There are four types of authorization in Turkish legislation setting out the rights and obligations between Telecommunications Authority and contracting party.These are; authorization agreement, concession agreement, telecommunications license, general authorization. *Authorisation agreement* is contract between the TA and a state owned entity. *Concession agreement,* required by tendering, is a contract between the TA and capital stock company. This type of authorisation is used when authorisation involves the allocation of scarce resources, such as; frequency, satellite position and numbers, when granting special rights and obligations to each operator is necessary or when the service in question has to be offered by a limited number of operators, and fot nation-wide networks. *Telecommunication license:* There are two types of telecommunications license: 1st Type is granted for limited number of operators at regional or local level. For 2nd Type, there is no limitation for number of operators. It is granted for services specified in Additional Article 18 of the Telegraph and Telephone Law. *General authorisation:* There is no limitation for number of operators. It was granted for services not specified in Additional Article 18 of the Telegraph and Telephone Law. If the application is complete, operator can start activities after sending to the Authority bank receipt related to authorisation fee. In Turkey, an undertaking in order to perform telecommunication services and/or operate telecommunications infrastructure should be authorized by one of these. See. Law no.406 Article 1. For further detailed information from legal point of view See. Ulusoy, A. (2000*)."Telekomünikasyon alanındaki Son Yasal Düzenlemeler ve Uygulamaların Değerlendirilmesi"*. pp.60-70

[312] 500 million USD for each license was obtained. See. T.C.Ulaştırma Bakanlığı. "*1995-2005 Ulaştırma ve Haberleşme"*.p.63

[313]Yılmaz, K. (2000). *"Türk Telekomünikasyon Sektöründe Refom: Özelleştirme, Düzenleme ve Serbestleşme"*.p.47 in Izak Atiyas. (2006). "*Competition and Regulation in the Turkish Telecommunications Industry"*.p.21

enough to prevent any application for the fourth GSM licence whose minimum bid had to be the successful bid of the third licence. Revenue obtained from GSM 1800 tendering, Aria, was, approximately, 3 billion US Dolar included VAT. Then, Turk Telekom (Aycell) was granted a GSM 1800 licence, in August 2000, at the same price paid for Aria's licence. Aria and Aycell actually started business in 2001.[314]

Aycell and Aria were merged in 2004. The new operator, Avea, started to operate on 19 February 2004.[315]

Another striking change to the Turkish telecommunications sector was introduced with the enactment of the Law no. 4502 dated January 2000. Until 2000, Turk Telekom acted both as an operator, and, somehow, a regulator in the sector. Law no. 4502 amending Law no. 406 separated the policy-making, regulatory and operational functions of the government by establishing Telecommunications Authority (TA), the first independent sector-specific regulatory authority in Turkey.[316] Regulatory functions of the Ministry of Transport (MoT) and Turk Telekom were transferred to the TA, and the General Directorate of Radiocommunications (Telsiz Genel Müdürlüğü)[317] was abolished and all of its duties were transferred to the TA. Furthermore, Turk Telekom released from being a public economic enterprise and has become a commercial entity that is subject to private law. MoT maintained its policy-making rights in the sector. MoT was also authorized to issue licenses for the new entrants.

In 2001, all telecommunications services were liberalised except national and international voice telephony services provided through fixed telecommunications infrastructure. "In 1997 Turkey made commitments under the GATS agreement on basic telecommunications services to liberalise the Turkish basic telecommunications

[314] TC.Ulaştırma Bakanlığı. "*1995-2005 Ulaştırma ve Haberleşme"*.p.63
[315] www.turktelekom.com.tr (Available on April 2008)
[316] Amended Article 5 of Wireless Law no. 2813 dated 5.4.1983 (amended by the Article 14 of the Law no. 4502) states that "The Telecommunications Authority having public legal personality, and administrative and financial autonomy was established in order to implement the rights and obligations set out by Laws. The Authority is independent while performing its duties. The Authority shall be related to Ministry of Transport."
[317] A public institution in charge of the management of the radiocommunications systems under the Radiocommunications Law no.2813 dated 1983.

service market by 2006."[318] On the other hand, the Law no. 4502 set out the end of monopoly rights of Turk Telekom by the end of 2003.[319] However, Law no. 4673 stated that Turk Telekom monopoly rights abolish before 31.12.2003 *in case of* a decrease in public share below the 50% in TTAS.

The monopoly of the Turk Telekom over fixed line infrastructure and national and international voice services has been terminated on 31 December 2003. That was a major step towards the full liberalization in the sector.

Another important development in the telecommunications sector was brought out by the enactment of the Law no. 4673 dated 12.5.2001. Under the Law no.4502 dated 2000, the authorisation responsibility was in the hands of Ministry of Transport. However, according to the amending Law No.4673, the right to issue all kind of authorization (general authorization, telecommunications license, authorization agreement or concession agreement) transferred from the Ministry of Transport to the Telecommunications Authority.[320]

Monopoly rights of the Turk Telekom (incumbent operator) over national and international fixed line voice services and establishment and operation of telecommunications infrastructure were abolished on 01.01.2004. That means the full liberalization of all telecommunications networks and services. In addition to this development, the foreign ownership restriction on Turk Telekom was abolished by Law no. 5189 dated 16.06.2004.

"Even though the monopoly of the incumbent state-owned telecommunications operator, Turk Telekom, over fixed line voice services ended by January 1, 2004, new entry into the long distance and international calls has been delayed owing to delays in issuance of licenses and in reaching interconnection agreements. First authorisations on long distance telephony service were granted 17 May 2004."[321]

---

[318] http://www.ubak.gov.tr/tr/hgm/index_eng.htm (Available on April 2008)
[319] Law no.406, Article 2/c that was amended by the Law no.4502, Article 2
[320] Law no.4673, Article 7
[321] Atiyas, İ. (2006). *"Competition and Regulation in the Turkish Telecommunications Industry."* p.19

The last significant change in the telecommunications sector was the privatization of the Turk Telekom. There have been various attempts to privatize Turk Telekom since 1994, but these attempts failed due to legal, constitutional and political challenges.

> "In its initial privatization attempts, Turkish government adopted a two-stage privatization strategy. First stage would start with a 20% block sale to a strategic partner along with 5% and 10% allocations to employees and the general directorate of postal office funds, respectively. A 14% public offering would complete the divestment of 49% of the Turk Telekom. Government would retain 51% ownership. However, lack of interest from qualified consortia including foreign multinational operators forced the government to reconsider the size of the share to be offered to the strategic partner and council of ministers increased it to 33.5% in December 2000. Proposed allocations to employees and the general directorate of postal system funds were not revised. Recognizing the difficulty of privatizing Turk Telekom under current market conditions, the government started to consider divesting 51% of the company."[322]

The necessary legal changes were made for the privatization of the 51% share of the TTAS.

Last privatization attempt of Turk Telekom was initiated in 2004 and completed in 2005 in spite of considerable challenges mainly on the basis of national security concerns and employment concerns.

The policy-makers preferred the block-sale of the 55% shares of the state-owned operator that will be followed by a sequence of public offerings of the remained 45% of the shares owned by Undersecretariat of Treasury. Public offerings ensuing the block sale are intended to reduce the government share gradually in the TTAS shares.

The decision of Council of Ministers dated 15.10.2004 agreed on to launch a tendering process for the block sale of 55% shares of Turk Telekom that were owned by the Turkish Treasury. Submitting a tender process was launched on 25.11.2004 and ended 24.06.2005. Among the four offers, the highest bid of 6.550.000.000 US Dolar was offered by the Oger Telecoms Joint Venture (a consortium led by Saudi Oger and

[322] For further background information concerning the privatization of Turk Telekom See. Aybar, B., & Güney, S., & Süel, H. "*Privatization and Regulation in Turkish Telecommunications, A Preliminary Assessment"*.pp.7-10 & See. Ulusoy, A. (2000). *"Telekomünikasyon alanındaki Son Yasal Düzenlemeler ve Uygulamaların Değerlendirilmesi"*.pp.86-88

Telecom Italia), second highest bid, 6.500.000.000 US Dolar, was offered by Etisalat-Çalık Consortium. Following the approval of the results by the Competition Authority, block sale of the 55% shares of Turk Telekom to the Oger Telecoms was approved by the Decision no. 2005/9146 of the Council of Ministers dated 25.07.2005. The acquisition was concluded in 14.11.2005.[323] As a result of the privatization 55% share of the Turk Telekom owned by a foreign company Oger Telekomünikasyon Inc.

The first phase of the public offerings was initiated on April 2008. 15% of the share owned by Undersecretariat of Treasury was offered to public.

"Crucial point in the liberalization and the privatization strategies is the design of post-liberalization and privatization regulatory famework because liberalization and the privatization do not automatically lead to competitive telecommunications markets."[324]

Liberalization and accompanying privatization in Turkish telecommunications sector may lead more effective management of the TTAS, to contribute output growth, network expansion, better allocation of resources, increased efficiency, increased labor productivity, increase choice, decreased costs, etc. However, one should has to keep in mind that those positive outcomes can be realized *if and only if* liberalization and accompanying privatization process is supported by a sound regulatory framework and market structure that is conducive to competitive environment.

Policy-makers, in Turkey, could not manage the post-liberalization and privatization period effectivelly in terms of setting a sound, transparent and a well-defined regulatory framework that will reduce uncertainty for new market players, related regulatory authorities, TTAS's staff, and customers, and so on.[325] Certain major

---

[323] For further information on the tendering process See. Web-site of the Privatization Administration www.oib.gov.tr (Available on May 2008)

[324] Aybar, B., & Güney, S., & Süel, H. "*Privatization and Regulation in Turkish Telecommunications, A Preliminary Assessment"*.p.30

[325] After the privatization, two types of employment contract, namely, Contract Type 1 and Contract Type 2, were offered to the staff. Contract Type 1 is signed by those employees who accepted to drop their right of return to public institutions, and bound themselves to the company. The company offered salary increases and certain guarantees such as, job security. Contract Type 2 is signed by those employees who are considered in a transition period for five years and their status will be maintained for up to five years. There has been a raising number

decision (such as; granting of infrastructure licences, local loop unbundling, CS, CPS) that were crucial for the competition in the markets were delayed.

The privatization of the Turk Telekom as being the most long-standing issue in the Turkish telecommunications policies and post-privatization period deserves noteworthy attention. However, as the privatization is not main focus, this study does not go into detail of the privatization and post-privatization period. However, this study proposes that the following questions are worthwhile to study:

- Did Turkey have a consistent privatization strategy since mid 1990s onwards?
- Did Turkey have a well-defined regulatory framework for the post liberalization and privatization period? What are the main deficiencies?
- What are the major implications of the liberalization and privatization in the telecommunications sector over the rest of the economy (i.e. over employment, foreign investment, etc.)?

Competition Board Decision no.04-57/797 dated 2.9.2004 concerning the requirements that has to be taken into account during the privatization of at least 51 % share of the Turk Telekom is a prominent example of competition advocacy. This decision identifies the requirements in order to ensure a more competitive telecommunications market structure after privatization. Further details of the decision are given under the sub-section 4.5.4.

In accordance with the opinion of the Competition Authority, Cable TV network was separated from Turk Telekom prior to privatization as it was accepted as an alternative competitive infrastructure to Turk Telekom's infrastructure.[326] Today, Cable TV infrastructure is being operated by the Turksat Inc.[327] First cable platform licenses granted by TA in 2006.

---

of dissatisfaction for these Contract types. See. Nebil, F. (2007). *"15 Months After the Privatization."* An interview with CEO of the TTAS, Paul Doany. Available at: http://turk.internet.com (Available on May 2008)

[326] Law no.5335 dated 21.05.2005

[327] Turksat Inc. was established by Law no.5189 dated 16.06.2004 as a publicly owned and privately managed company.

Internet service providers (ISPs) started to operate in the second half of the 1990s under revenue-sharing agreements with Turk Telekom. TA began to authorize ISPs in 2002. Turk Telekom's internet subsidiary, TTNet, was launched to operate in 1998. TTNet both operates the internet backbone and provides internet access services (dial-up, ADSL) to end users. TTNet legally separated from Turk Telekom in 2006. From 2006 onwards, TTAS has been providing *wholesale* internet access services through operating internet infrastructure while its subsidiary TTNet has been providing *retail* internet access services. That means that internet service provider TTNet is the competitior of the other ISPs in the sector.

Directory enquiry services previously provided by Turk Telekom were liberalized in 2006.[328] Today, Turk Telekom, GSM operators and seven company authorized by TA are performing directory enquiry services.

Taking into account the characteristics of the telecommunications sector, those operators entered into the market can conduct their telecommunications services whenever they can access to telecommunications infrastructure. Therefore, liberalization process should be accompanied by tight rules guaranteeing the access to infrastructure. Nonetheless, even the access to the telecommunications infrastructure is guaranteed, it is not enough to talk about full realization of competition, as long as an infrastructure remains as monopoly. If competition is not ensured in infrastructures, operators will be dependent on incumbent's infrastructure to operate. For this reason, alternative communications infrastructures are crucially important for the full exploitation of the liberalization.[329]

In this context, granting of infrastructure licences since 2006 onwards is a crucially important development for the telecommunications markets.

[328]Amending By-laws on Authorization in Telecommunications Services and Infrastructure (Official Gazete no. 26220 dated 06.07.2006)
[329] OECD. (2005). *"Annual Report on Competition Policy Developments in Turkey-2004."*

4.1.2 Current Market Situation

According to the records of Telecommunications Authority (TA), the total revenue of the telecommunications sector was 23 billion $ by 2007. Net sales of the mobile operators were 10 billion $ by 2007.[330]

In the 'Turkey 2007 Progres Report', European Commission states that the driving force behind the development of telecommunications services in Turkey is the growing mobile market.

Today there are three mobile operators in the sector, Turkcell, Vodafone[331] and Avea which is mainly owned by Turk Telekom. In December 2007, the numbers of GSM subscribers in Turkey was 61.975.807 million with a penetration rate of 89% compared to the 52.662.709 million subscribers with a penetration rate of 75% in December 2006.[332] 'This number rised to 62.874.885 million by March 2008.'[333]

The number of PSTN subscribers decreased from 18.831.616 in December 2006 to 18.201.006 in December 2007. The number of PSTN subscribers was 17.993.394 in March 2008. Penetration rate is around %26.[334]

According to the records of the Turkish Statistical Institute, 18.94 % of households had Internet access in 2007. According to the records of TA, numbers of broadband internet subscribers (ADSL) were 4,962 in March 2008.[335]

Numbers of operators authorized by TA by March 2008 are as follows:

---

[330] Press Conference dated 03.04.2008 by Tayfun Acarer, Chairman of Telecommunications Board, "*The 2008 Work Plan and On-Going Activities of the TA."*

[331] Telsim has been sold to Vodafone for 4.55 billion $ in May 2006.

[332] http://www.tk.gov.tr/Yayin/istatistikler/istatistikler.htm (Available on May 2008) According to the records of the Turkish Statistical Institute (TUIK) the population of Turkey is 70,586,256 by December 31, 2007. See. www.tuik.gov.tr

[333] http://www.tk.gov.tr/Yayin/istatistikler/istatistik/2008/gsm2008.htm (Available on May 2008)

[334] http://www.tk.gov.tr/Yayin/istatistikler/istatistik/2008/pstn2008.htm (Available on May 2008)

[335] Press Conference dated 03.04.2008 by Tayfun Acarer, Chairman of Telecommunications Board, "*The 2008 Work Plan and On-Going Activities of the TA."*

TABLE-3

Services	**Number of operators by March 2008**
Mobile Services	3
Fixed Line Services	1
Satellite Platform Services	2
Satellite Telecommunications Services	19
GMPCS Mobile Telephone Services	4
Satellite and Cable TV Services	1
Coastal Safety and Salvage Service	1
Data Transmission Over Terrestrial Lines Service	27
Internet Services	81
Common Usage Wireless Services	49
Long Distance Telephony Services	32
Infrastructure Services	15
Cable Platform Services	5
Directory Services	7
Total	247

Source: Press Conference dated 03.04.2008 by Chairman of TA[336]

[336] Ibid.

Due to the abolishment of the monopoly rights of the Turk Telekom and full liberalization of the telecommunications markets, the Turkish telecommunications sector has made a considerable progress towards competitition and increasing consumer benefits.

According to the records of TA, long distance charges decreased from 29 Ykr/min in 2004 to 9 Ykr/min in 2007. International call charges decreased from 77 Ykr/min in 2004 to 12 Ykr/min in 2007. Charges for calls from fixed line to mobile decreased from 72 Ykr/min in 2004 to 38 Ykr/min in 2007.[337]

In addition to these developments, it is believed that relatively new legislation on the 'Right of Way' and 'Number Portability' will significantly contribute to the competition in the sector after they implement effectively.

The By-laws on Right of Way was published in the Official Gazete no.26156 dated 02.05.2006.[338] Today, there are 15 Infrastructure Operation Service operators can benefit from Right of Way

The By-laws on Number Portability was published in the Official Gazette no.26421 dated 01.02.2007. The studies for the establishment of number portability central reference database are underway. Establishment of the central reference database is planned to be completed by the second half of 2008. According to the By-laws, operators are obliged to implement mobile number portability within six (6) months, geographic number portability and non-geographic number portability within twelve (12) months after the Authority's notification about central reference database's establishment.[339]

However, there are also some concerns that the development of competition in the telecommunications markets has been developed slower than expected. For instance, Cable TV infrastructure could not be a real competitor against the Turk Telekom's existing fixed line infrastructre due to the legislative delay and legal problems

[337] Ibid.
[338] Amending Communique on Right of Way was published in Official Gazete no.26552 dated 14.06.2007
[339] Temporary Article 1

concerning ownership.[340] As footnoted before, by 1998, cable television services had been provided through revenue-sharing agreements for 10 years between the Cable TV companies and Turk Telekom. Private companies made the investment for Cable TV infrastructure. "As part of the liberalization and privatization process, Turk Telekom was required to transfer its cable assets to the Turksat Inc. However, this is envisioned only as an interim solution and there is some ambiguity as to the ownership claims of the private operators. Thus, the uncertainties surrounding the ownership structure of a critical telecommunications pipeline are undoubtedly holding back further investment."[341] In addition to this, though the related legislation concerning 'unbundled access to the local loop'[342] was published in 2004, it could not have been implemented effectively for a few years. These, in turn, hinder the ISPs to come out as real competitors competing effectively with Turk Telekom. As a result of these, Turk Telekom, the dominant broadband internet provider, has had a huge market share in the broadband service market.

According to the records of TA, market share of broadband service providers by March 2008 are as follows[343]:

TTNet, Turk Telekom's subsidiary providing ADSL services, has 94.95% market share in the broadband market by March 2008. (This rate is 97.31% in March 2006 and 96.18% in March 2007)

Turksat Inc., providing Cable Internet, has 0.82% market share in the broadband market by March 2008. (This rate is 1.62% in March 2006 and 0.94% in March 2007)

Other Internet Service Providers, providing ADSL service, have 4.23% market share in the broadband market. (This rate is 1.07% in March 2006 and 2.87% in March 2007)

---

[340] Atiyas, İ. (2006). *"Competition and Regulation in the Turkish Telecommunications Industry."* p.34

[341] Burnham, J.B. (2007). *"Telecommunications Policy in Turkey: Dismantling Barriers to Growth."* p.9

[342] Unbundled access to the local loop: Access to the local loop (whether wireless or wired and usually owned by incumbent operators) for third parties. This enables new competitors to offer broadband services. See.Telecom Reform Glosarry

[343] Press Conference by Tayfun Acarer, Chairman of Telecommunications Board, "*The 2008 Work Plan and On-Going Activities of the TA."*

Main critism of the European Union on the Turkish telecommunications sector is the heavy taxes imposed especially on mobile communications which is believed to blocking the lower prices for consumers. [344]

Taxes and the usage fees imposed on the mobile communications are as follows: Value Added Tax (18%), Special Communication Tax (25%)[345], Treasury Share (15% - Based on annual revenue), Contribution Fee to TA's Expenses (0.35% - Based on annual revenue), Universal Service Fund (10% of the Treasury Share- Based on annual revenue), New Subscription Special Communication Tax (27.80 YTL - One-off), Wireless Usage Fee (10.78 YTL - One-off) , and Wireless License Fee (10.78 YTL-Annual).

Taxes and the usage fees imposed on the fixed-line communications are as follows: Value Added Tax (18%), Special Communication Tax (15%), Communication Tax (1%), Contribution Fee to TA's Expenses (0.35% - Based on annual revenue), and Universal Service Fund (1% - Based on annual revenue)

Competition Board Decision no. 04-57/797 dated 2.9.2004 concerning the requirements that has to be taken into account during the privatization of at least 51 % share of the Turk Telekom stated that the "special communication tax" that were charged to the private sector operators but not to Turk Telekom should be eliminated. However, Special Communication Tax is still in effect. Furthermore instead of eliminating the tax imposed operators, special communication tax has been expanded to cover fixed-line services in 2004. It seems that the tax will go on to be imposed at least for a few years as it is regarded as one of most important source of revenue by governments.

[344] European Commission. *"Turkey 2007 Progres Report"*. Chapter 10: Information Society and Media

[345] Special Communications Tax was introduced in 1999 in order to contribute to recover the damages of disastrous earthquake of 17 August 1999. The tax was supposed to be imposed for one year. However, it is still in effect. The legal basis of the Special Communications is Expenditure Tax Law no.6802 dated 13.7.1956, Article 39

Another concern related to the level of competition in the telecommunications market is that competition in fixed line telephony is very limited. According to the Turkey 2007 Progres Report, though TA granted a large number of relevant licences, including infrastructure licences, only a small number of new market entrants have yet become operational which means effective competition on the fixed telephony market is at an early stage.

Futhermore, local calls market is still close to competition and Telecommunications Authority's 2008 Work Plan doesn't envisage this issue.

It is argued that "the development of competition in the telecommunications industry is slower than expected, even in most potentially segments".[346] Although current level of competition in the sector is below expectation, we should anyway take into account that only a short period of time passed after the liberalization and privatization in the sector. A sound, transparent and a coherent regulatory reform addressing the above mentioned deficiencies can accelerate the competition in the sector in a short span of time.

4.2 Regulatory Framework for the Liberalized Telecommunications Networks and Services

In the legal texts, the main objective of the current regulatory framework is stated as to create a competitive telecommunications environment in order to promote new investments and increased consumer choices at lower prices and better quality.

4.2.1 Basic Regulatory Principles

According to the Article 4 of the Law no. 406 and the relevant secondary legislation, regulatory principles of the TA are:

[346] Atiyas, İ. (2006). *"Competition and Regulation in the Turkish Telecommunications Industry."* p.ii

- Promotion of competition
- Safeguarding rights and interests of consumers
- Interoperability of telecommunications systems
- Promotion of innovative technologies
- Efficient use of scarce resources
- Impartiality, non-discrimination, transparency

4.3 Legal Framework of the Sector-Specific and Competition Rules

The legal basis of the liberalised Turkish telecommunications sector is mainly composed of:

The Turkish Constitution[347]

Association Agreement (1963) (Article 16)

Additional Protocol (1977 OJ EC L361/1) (Articles 43, 57-59)

Customs Union Decision 1/95[348]

Telegraph and Telephone Law no. 406 dated 1924.[349] There had been significant amendments on this by Law no. 4502, Law no. 4673, Law no. 5071, Law no.5189, Law no. 5228, Law no. 5398, and Law no. 5457.
Radiocommunications Law no. 2813 dated 1983.[350] There had been significant amendment on this by Law no.4502, Law no. 5189, Law no. 5392, and Law no. 5398.

---

[347] Article 48 of the Constitution states that "The State shall take measures to ensure that private enterprises operate in accordance with national economic requirements and social objectives, and in conditions of security and stability."
Article 167 of the Constitution explicitly expresses the foundation for competition policy. Article 167 states that "The State shall take measures to ensure and promote the sound and orderly functioning of the money, credit, capital, goods and services markets, and shall prevent the formation, in practice or by agreement, of monopolies and cartels in the markets."
[348] According to the Customs Union Decision 1/95 Turkey has the obligation to enact a competition law in compliance with the competition rules of the EC, and to establish a well-functioning Competition Authority with financial and administrative autonomy.
[349] Official Gazette no.59 dated 21.2.1924
[350] Official Gazette no.18011 dated 7.4.1983

Amending Law no. 4502 dated 2000.[351]

Universal Service Law no.5369 dated 2005.[352]

Electronic Signature Law no.5070 dated 2004.[353]

Law no.3984 dated 13.04.1994 on the Establishment and Broadcasts of Radio and Television Enterprises.[354]

"Law no. 5651 dated 4.5.2007 on regulation of means combatting certain crimes committed via internet"[355]

Above mentioned Laws contain sector-specific rules which are enforced *ex-ante* by various regulatory or policy-making bodies, such as; Telecommunications Authority, Ministry of Transport and Radio and TV Supreme Council. In addititon to the above-mentioned Laws, these authorities have extensive powers to issue secondary legislation in the related areas. For instance; Telecommunications Authority has extensive power to issue secondary legislation in access and interconnection, authorization, tariffs, significant market powers, so on.

The Law no.4054 dated 07.12.1994 on the Protection of Competition.[356]
Turkish Competition Law aims to protect competition in markets for goods and services in order to contribute to social welfare by ensuring the most efficient allocation of resources. In this regard, Competition Law prohibit '*in all industries*'[357] agreements, decisions and concerted practices that prevent, restrict or distort competition in the markets for goods and services (Article 4), abuse of dominant

[351] Official Gazette no.23948 dated 29.1.2000
[352] Official Gazette no.25856 dated 25.6.2005
[353] Official Gazette no.25355 dated 23.1.2004
[354] Official Gazette no.21911 dated 20.04.1994
[355] Official Gazette no. 26530 dated 23.5.2007
[356] Official Gazette no.22140 dated 13.12.1994
[357] OECD Report (2005) states that "by its terms, the Competition Act appears to cover all forms of economic activity. The only express exemption from its ambit appears in banking legislation that applies to exempt bank mergers. In fact, however, a significant portion of Turkish commerce is beyond the TCA's jurisdictional reach, because standard rules of statutory construction and administrative law apply to override the Act."

position (Article 6), mergers and acquisition creating or strengthening a dominant position (Article 7). The law is applied to telecommunications sector with no exemptions.

Article 4 and 6 enforced through the *ex-post* enforcement of the Competition Law by the Competition Authority (CA). On the other hand, Article 7 are enforced *ex-ante* in order to prevent the merger of two or more enterprises or acquisition by an undertaking or by a person which would create or strengthen dominant market position, and impedes competition significantly in market for goods or services within the whole or a part of the country. CA issues 'Communiqué on the mergers and acquisitions that are calling for the permission of the Competition Board'.

Turkish Competition Law also empowers the CA to engage in 'competition advocacy' by providing its opinions on government policies and legislation and decisions that may impact on competition. (Articles 27 (g) and 30 (f) of the Turkish Competition Law no. 4054)

"Turkish Competition Law is applied equally to all enterprises, public or private, foreign or domestically owned, conducting commercial economic activities in Turkey. State owned and operated enterprises are subject to the competition law unless there are explicit provisions in accompanying legal and regulatory policies that permit practices that would otherwise be deemed illegal."[358]

4.3.1 Market Definition and Relevant Markets

Relevant legislation on the market definition and relevant markets within the context of the sector-specific regulation in telecommunications are:

- By-laws on Access and Interconnection published in the Official Gazete no. 26552 dated 14.06.2007[359]

[358] Khemani, S., R. (2006).*" Competitiveness, Investment Climate and Role of Competition Policy in Turkey."* pp.19-20

[359] This By-laws repealed the By-law on Access and Interconnection published in the Official Gazete no.25116 dated 23.5.2003

This By-laws, which aims to ensure sustainable competition in the telecommunications markets, covers the rights and obligations of operators with regard to 'access'[360] and 'interconnection'[361], and the rules and procedures applied for the fulfillment of those obligations.

- The By-laws on Rules and Procedures for the Determination of the Operators with Significant Market Power published in the Official Gazete no. 26396 dated 07.01.2007.

This By-laws lays down the rules and procedures for assessing, on the basis of market analysis, the significant market power that might subject to *ex-ante* sector-specific regulations and measures. This By-laws is applied to all operators functioning in the telecommunications sector.

These two By-laws were prepared by taking into account the EU 2002 Regulatory Framework.

According to the Article 4/b of the By-laws on the Determination of SMP "the *relevant geographic market* comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which area the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different."

The *relevant market* means a market comprising a certain telecommunications service and other telecommunications services substituting that service which is provided in certain parts of country or nationwide. [362]

The *relevant product/service market* comprises all those products or services that are sufficiently interchangeable or substitutable, by virtue of their prices, their intended

[360] Access means making available of telecommunications infrastructure and/or services to another undertaking, under defined conditions, for the purpose of providing telecommunications services. (See. By-law on Access and Interconnection, Article 4)
[361] Interconnection means the linking of the two networks in order to enable the telecommunications traffic between two separate telecommunications networks (See. By-law on Access and Interconnection, Article 4). Interconnection is a specific type of Access.
[362] By-laws on the Determination of SMP, Article 4/c

use and functional characteristics, but also in terms of the conditions of competition and/or the structure of supply and demand on the market in question.[363]

While defining relevant market, relevant product and/or service market and the relevant geographic market are considered.[364]

During the definition and identification of the relevant product and/or service markets, the below items are considered, if appropriate, while examining the demand demand-side and supply-side substitutability[365]:

- The possibility for consumers to use a product and/or a service for the same purposes in terms of functionality.
- The possibility for a product and/or services to be substituted for another in terms of tariffs/price.
- Quality and quantity of the switching costs, in a situation where end users face in order to substitute a product and/or service A for product and/or service B.
- Records of previous evidence of consumers' behaviour.
- Bundled products and/or services and those subsidiary services that has to be provided with bundled products and/or services due to the demand characteristics.
- Historical price fluctuations in potentially competing products and/or services, any records of price movements, and relevant tariff information.
- Predictions concerning users' or undertakings' prospective reactions to a permanent, minor but clear price increases.
- The possibility for potential undertakings to enter the relevant market at a reasonable period against the permanent, minor but clear price increases and the structural and legislative barriers to entry to the the market.
- In case of having certain component needed for providing products and/or services in the relevant market, the possibility for potential or existing undertakings to operate profitably in the relevant market.

[363] By-laws on the Determination of SMP, Article 4/ç
[364] By-laws on the Determination of SMP, Article 7/1
[365] By-laws on the Determination of SMP, Article 7/2

Relevant geographic market can be defined at the local, regional or national level. In defining the relevant geographic market, taking into account demand-side and supply-side substitutability, below-mentioned criteria are taken into account:[366]

- The area in which the undertaking is authorized to provide services.
- The area in which the undertaking is providing services, undertaking's network coverage and and the possibility for undertaking to provide services in the other areas.
- Similarity in the conditions to provide products or services with respect to geographic coverage.

For market definition, 18 relevant markets listed in the 'Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex-ante* regulation', and, also, Commission Guidelines on Market Analysis and assessment of SMP was taken as the reference point.

Additionally, economic principles and competition law-based methodologies used for defining markets by taking into account the demand-side substitutability, supply-side substitutability, and potential competition (forward-looking) assessments.[367]

Market definition and determination of the relevant markets are not only important and needed for the enforcement of the sector-specific rules but also mandatory for the enforcement of the competition rules.

As stated before; Turkish Competition Law prohibits abuse of dominant position in a market for goods or services within the whole or a part of the country (Article 6), and mergers and acquisitions creating or strengthening a dominant position in any market for goods or services within the whole or a part of the country (Article 7). In this regard, relevant market definition is critically important is assessing the market

[366] By-laws on the Determination of SMP, Article 7/3

[367] EU-Turkey Screening Process, Chapter 10, Information Society and Media, Detailed Screening 13-14 July 2006. Presentation on Relevant Markets and Market Analysis at www.abgs.gov.tr (Available on May 2008)

dominance. Turkish Competition Law does not make an explicit definition of the relevant market as the relevant market differs from case to case. However, it is understood that the term *'market for goods or services within the whole or a part of the country'* refers to the relevant market.

The criteria that are taken into account by Competition Authority during the determination of the relevant geographic market and relevant market are included in the Communiqué No: 1997/1 on the Mergers and Acquisitions.

According to the Article 4 of the Communiqué "The *geographic market* which comprises a substantial part of the country are areas in which undertakings operate in the supply and demand of their goods and services, in which the conditions of competition are sufficiently homogenous, and which can easily be distinguished from neighbouring areas, as the conditions of competition are appreciably different from these areas. In assessing the geographic market, particularly, factors such as the characteristics of the relevant goods and services, existence of entry barriers in respect of consumer preferences, and that of an appreciable difference as regards undertakings' market shares or prices of goods and services between the relevant area and neighbouring areas are taken into account."

According to the Article 4 of the Communiqué "In determining the *relevant product market*, the market comprising the goods or services which are the subject of a merger or an acquisition, and the goods or services which are deemed identical in the eye of consumers in terms of their prices, intended use and characteristics is taken into account; other factors that may affect the market determined shall also be assessed."

As to be understood, the definition of *relevant geographic market* and *relevant product market* in the By-Laws on SMP is very similar to the one in Communiqué on the Mergers and Acquisitions. The reason is that, economic principles and competition law-based methodologies used while defining markets that may warrant the imposition of the sector-specific regulation.

4.3.2 Market Analysis and the Assessment of Significant Market Power

Relevant legislation on the market analysis and the assessment of significant market power (SMP) within the context of the sector-specific regulation is the By-laws on Rules and Procedures for the Determination of the Operators with Significant Market Power published in the Official Gazete no. 26396 dated 07.01.2007.

In Turkey, market analysis in order to determine SMP in the relevant market can be conducted by TA on its own initiative or upon justifiable request from operator(s). Market analysis reviewed by TA at the latest within 3 years.[368]

Market analysis process comprised of three steps. These are[369]:

a) Definition of the relevant market,
b) Analysis of the level of competition in the relevant market,
c) Designation of the SMPs in the relevant markets,

According to the legislation, Telecommunications Authority considers the below principles while conducting the market analysis:[370]

a) Technological neutrality
b) Transparency
c) Non discrimination
d) Ensuring effective competitive environment.

While conducting market analysis, TA may demand all necessary information from the operator(s); may use customer public survey and may also use studies carrying out by third parties as well as international benchmarking. TA may prepare questionnaires concerning market analysis and publish these documents on its own web site. "*While*

[368] By-laws on the Determination of SMP, Article 6/1
[369] By-laws on the Determination of SMP, Article 6/2
[370] By-laws on the Determination of SMP, Article 5

conducting market analysis, TA takes the opinion of the Competition Authority and may publish these opinions in its web-site."[371]

The concept of SMP is used in various pieces of Turkish legislation such as; By-laws on Tariff, Access and Interconnection, Determination of SMP etc.[372] According to the Article 4/a of the By-laws on the Determination of SMP 'an undertaking shall be deemed to have significant market power within the relevant telecommunications market, 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 consumers'.

If there is an undertaking in the relevant market which holds alone or together with other undertakings a single or collective dominant position it means that effective competition does not exist on that market.[373]

In the assessment of the SMP in the relevant market, market shares of the undertakings are taken into account primarily. Revenues, number of subscribers, number of users, transmission capacity, and number of transmission lines are possible criteria for measuring the market shares of undertakings operating in the relevant markets.[374]

In addition to the market share, the following criteria can also be used to assess SMP in the relevant market.[375]

- control of infrastructure not easily duplicated,
- technological advantages or superiority,
- absence of or low countervailing buying power,
- easy or privileged access to capital markets/financial resources,

[371] By-laws on the Determination of SMP, Article 6/3c
[372] Previously, both the terms *dominance* and *SMP* were used in the Turkish framework. However, since 2007, only the term SMP has been used in the legislation.
[373] By-laws on the Determination of SMP, Article 8/1
[374] By-laws on the Determination of SMP, Article 8/2
[375] By-laws on the Determination of SMP, Article 8/3

- product and/or services diversification
- economies of scale,
- economies of scope,
- vertical integration,
- a highly developed distribution and sales network,
- absence of potential competition,
- barriers to expansion.

In the assessment of whether an undertaking in the relevant market holds alone or together with other undertakings SMP, the following criteria can also be used:[376]

- Maturity of the market,
- Stagnant or moderate growth on the demand side,
- Low elasticity of demand,
- Homogenous products and/or services,
- Similar cost structures,
- Similar market shares,
- Lack of technical innovation, mature technology
- Absence of excess capacity,
- High barriers to entry,
- Lack of countervailing buying power,
- Lack of potential competition,
- Informal or formal links between undertakings concerned,
- Retaliatory mechanisms,
- Lack or reduced scope for price competition.

For the determination of SMP in a relevant market, public consultation documents with questionnaires are published for each market. Those responses to consultation documents evaluated and final decision documents covering SMP designations, responses and TA's evaluations of responses published on the TA's web-site.

[376] By-laws on the Determination of SMP, Article 8/4

After the assessment of SMP as a result of market analysis, SMP designations are published in the Official Gazette.[377]

Where an undertaking has significant market power on a specific market, it may also be deemed to have significant market power on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking.[378]

Market definition in line with EU 2002 Regulatory Framework was finalized in 2005. Up until now, 16 markets among 18 markets listed in the Commission Recommendation[379] were defined in 9 consultation documents.[380] Then SMPs were determined according to the analysis of defined markets. SMP decisions were published in Official Gazette.[381] Market analyse is planned to be renewed in 2008 firstly for mobile markets. Then, market analyse is planned to be conducted for fixed and broadband markets.

TABLE-4

	Relevant Markets at Retail Level	**SMP**
1	Access to the public telephone network at a fixed location for residential customers	Turk Telekom
2	Access to the public telephone network at a fixed location for non-residential customers	Turk Telekom
3	Publicly available local and/or national telephone services provided at a fixed location for residential customers	Turk Telekom

[377] By-laws on the Determination of SMP,.Article 13
[378] By-laws on the Determination of SMP, Article 9
[379]Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex-ante* regulation. (2003/311/EC)
[380]Telecommunications Board Decision no.2006/DK-10/142 dated 21.2.2006 concerning SMP of Turk Telekom that was published in Official Gazette dated 17.03.2006
[381] Telecommunications Board Decision no.2005/880 dated 15.12.2005 concerning SMP of Turkcell, Telsim, and Avea that was published in Official Gazette dated 28.12.2005.

4	Publicly available local and/or national telephone services provided at a fixed location for non-residential customers	Turk Telekom
5	Publicly available international telephone services provided at a fixed location for residential customers	Turk Telekom
6	Publicly available international telephone services provided at a fixed location for non-residential customers	Turk Telekom
7	The minimum set of leased lines (comprising the specified types of leased lines up to and including 2Mb/sec).	Turk Telekom
	Relevant Markets at Wholesale Level	**SMP**
8	Call origination on the public telephone network provided at a fixed location	Turk Telekom
9	Call termination on public telephone networks provided at a fixed location	Turk Telekom
10	Transit services in the fixed public telephone network	Turk Telekom
11	Wholesale unbundled access (including shared access) to local loops and sub loops for the purpose of providing broadband and voice services.	Turk Telekom
12	Wholesale broadband access including bit-stream access	Turk Telekom
13	Wholesale terminating segments of leased lines	Turk Telekom
14	Wholesale trunk segments of leased lines	Turk Telekom
15	Access and call origination on public mobile telephone networks	Turkcell

16	Voice call termination on individual mobile networks	Turkcell Vodafone, Avea
17	The wholesale national market for international roaming on public mobile networks	X
18	Broadcasting transmission services, to deliver broadcast content to end users	X

Source: Assessment of SMP by TA[382]

The concept of "dominance" and "abuse of the dominant position" in Turkish Competition Law" is aligned with the EU law. Dominant Position is defined as "The power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers."[383] There is no particular market share test for identifying dominance.

Turkish Competition Law prohibits not the 'dominant position' but the 'abuse of dominant position'. Article 6 states that "The abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, is illegal and prohibited."

- Abusive practices listed in the Article 6 of the Turkish Competition Law is based on the list in Article 82 of the EU Treaty.

4.3.3 Imposition, Maintenance, Amendment or Withdrawal of Sector-Specific Regulatory Obligations

Relevant legislation on the imposition and withdrawal of the sector-specific regulatory obligations on the SMP is:

[382]Screening Process 13-14 July 2006. Chapter 10 Information Society and Media. Presentation on Relevant Markets and Market Analysis at www.abgs.gov.tr (Available on May 2008)
[383] Competition Law no.4054, Article 3

- By-laws on Access and Interconnection.
- By-laws on Rules and Procedures for the Determination of the Operators with SMP. (Article 10-11-12)

As stated in the previous parts, the operators having SMP are determined by market analysis conducted by TA. Those undertakings having SMP in the relevant markets are imposed *ex-ante remedies* defined in the By-laws on Access and Interconnection. These remedies are:

- Access Obligation

TA may impose obligations on operators with SMP to meet reasonable requests for access to specific network elements and associated facilities, in situations where the TA considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market or would not be in the end-user's interest.[384]

Those operators imposed on access obligation are concurrently obliged with the obligations of non-discrimination, transparency and cost orientated tariffs.[385]

Operators are free to determine themselves the terms and conditions of providing access, including interconnection, without prejudice the terms and conditions set out in their authorizations. In case of dispute on the terms and conditions, TA may settle the disputes if appropriate.[386]

- Interconnection

Operator with SMP in the relevant market is the interconnection provider. However, TA may impose obligations on operators with SMP, to meet reasonable requests for interconnection, in situations where the TA considers that denial of interconnection or

[384] By-laws on Access and Interconnection. Article 7
[385] By-laws on Access and Interconnection. Article 16
[386] By-laws on Access and Interconnection. Article 18

unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market or would not be in the end-user's interest.[387]
If an interconnection agreement cannot be reached within three months from the initial request, the requesting party can request the intervention of the Authority. If the parties still fail to reach an agreement with the Authority's arbitration within six weeks (extendable to four weeks), then the Authority sets the terms, conditions and tariffs of the interconnection in question.[388]

Availability of access and interconnection is crucial for the development of competition in the communications markets. As incumbents may impede the entrance of competitors to markets by refusing to provide access and interconnection, many regulatory frameworks impose access and interconnection obligation on incumbent operators.

- Non-discrimination

TA may impose obligations of non-discrimination, in relation to interconnection and/or access, on operators with SMP in order to ensure that SMP provides services to other undertakings providing equivalent services under the same conditions as it provides for its own services.[389]

- Transparency

TA may impose obligations for transparency in relation to interconnection and/or access, on operators with SMP. As regards transparency, TA may impose obligations requiring operators to make public specified information, such as; accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices.

If TA imposes obligations of non-discrimination on an operator, it may require that operator to publish a reference access and/or interconnection offer within three

[387] By-laws on Access and Interconnection. Article 8
[388] By-laws on Access and Interconnection, Article 18/1, 18/4, 18/5
[389] By-laws on Access and Interconnection, Article 9

months. Reference access and/or interconnection offers should be sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested, giving a description of the relevant offerings broken down into components according to market needs, and the associated terms and conditions including prices. SMP operators prepare the Reference Access and Interconnection Offer and submit these to the TA. These offers are approved by TA. TA may impose changes to reference offers to give effect to obligations. Upon the approval of the Authority, operators are obliged to made reference offers publicy available and easily accesible such as; via internet.[390]

Public consultation on the Turk Telekom's 2008 Reference Interconnection and Access Offer and 2008 Reference Interconnection Offer of Turkcell, Vodafone and Avea was completed by February 2008. New tariffs were approved by the TA's decision no. 2008/DK-07/136 dated 20.02.2008.

New Reference Tariffs are in effect since April 1, 2008 onwards. These new tariffs are as follows:

Euro-cent/min.	Turk Telekom's Call Origination and Termination Rates		GSM Operators' Call Termination Rates		
	In Zone	Out Zone	Turkcell	Vodafone	Avea
01.03.2007	1.06	1.69	7.65	8.15	9.39
01.04.2008	0.96	1.52	5.12	5.34	6.30

€=1.78 YTL

- Tariffs Control

Under the Law no.4502, in principal, the pricing policy is that operators are free to determine their tariffs that they charge the customers. However, TA is authorized to

[390] By-laws on Access and Interconnection, Article 10

regulate and supervise the SMP's (Turk Telekom, Turkcell, Vodafone, Avea) tariffs in order to prevent excessive pricing, predatory pricing, discrimination. In other words, an operator is subject to price regulation when it has SMP in the relevant market. In this context, TA use basically two tariffs approval methods; Cost of Efficient Service Provision Method and Price Cap Method. These methods can be applied either separately or together.

Cost of Efficient Service Provision Method means SMP are obliged to set cost-based access and interconnection tariffs. Cost-oriented price for access and interconnection consists of long-run incremental cost of efficient service provision.

The law states that TA should ensure tariffs are set by cost-orientation and try to avoid cross subsidisation between different services. If TA concludes that the tariffs are not set by cost-orientation, it sets the tariffs according to cost-orientation. Until determining the tariffs by cost orientation, TA sets up an upper limit for the tariffs by taking into account, if appropriate, the other countries' implementations.[391]

Rules and procedures concerning the approval and auditing of the tariffs of SMPs are laid down by the By-laws on Tariffs published in the Official Gazette no.24507 dated 28.08.2001.[392]

- Separation of accounts, cost of accounting, auditing

Separation of accounts means the requirement of having separate accounts for the business units defined in terms of revenues, costs and capital employed.

TA may impose obligations of accounting separation and cost accounting on operators with SMP in the relevant market.[393] TA may audit the operator's accounts.

[391] By-laws on Access and Interconnection, Article 11
[392] See. also Communiqué on rules and procedures regarding unbundled access to the local loop published in the Official Gazette no.26552 dated 14.06.2007
[393] By-laws on Access and Interconnection, Article 12

- Facility-sharing

Where an undertaking has the right to install facilities on, over or under public or private property, or may take advantage of a procedure for the expropriation or use of property, TA, taking into account the need to protect the environment, public health, public security or to meet town and country planning objectives, may impose on this operator the obligation to share of such facilities or facilities or property with other operators at reasonable prices,[394]

- Carrier Selection

TA may impose on operators with SMP, in the relevant market, the obligation to ensure that users may select their carriers freely.[395]

- Co-location

TA may impose on operators with SMP the obligation to provide physical co-location on its premises for the equipment of other operators at cost-oriented prices. In case of the exemption from the obligation of physical co-location, the operator is obliged to co-location by using a different method on equal economic, technical and operational conditions with physical co-location at cost-oriented prices.[396]

In addition to these, the Telecommunications Authority regulates the service quality.[397] Law no.4502 states that conditions regarding the service quality, such as; coverage, call blockage ratio and call failure ratio must be included in the operators' licenses. TA is also authorized to determine the general rules and procedures concerning the agreements signed among operators in order to guarantee non-discrimination and to prevent anti-competitive behaviours.[398]

---

[394] By-laws on Access and Interconnection, Article 14
[395] By-laws on Access and Interconnection, Article 15
[396] By-laws on Access and Interconnection, Article 13
[397] Law no.4502, Article 2(e) and Communiqué on the Determination and Measurement of the Criteria Regarding Quality of Service Obligations of GSM Mobile Operators published in Official Gazete no.26024 dated 15.12.2005
[398] Law no.2813, Article 7/h

If TA analyses the non-existence of competition in the market analysed in which an operator has SMP, it decides to impose *ex-ante remedies* mentioned above. However, while the access obligation, interconnection, non-discrimination, transparency, tariffs control, separation of accounts, cost of accounting, auditing, facility-sharing, carrier selection, co-location may be *imposed on those undertakings having SMP*, facility-sharing and co-location *may also be imposed on undertakings without SMP.*

In case of an operator does not fullfill the above mentioned obligations, TA may impose administrative fine on these operators.[399]

It is important to note that differentiated remedies may be imposed on the SMPs operating at the same or different markets. Differentiation means either the selection of different obligations and/or the selections of different implementation procedures.[400] For instance; obligations imposed on the incumbent fixed line operator, Turk Telekom, are not entirely same as those imposed on the mobile operators.

In this regard, remedies imposed on Turk Telekom are:

- Price Cap Method for voice services
- Cost-based tariffs for leased lines
- Retail-minus and benchmarking for wholesale broadband
- Reference Offers
- Accounting Separation and Cost Accounting
- Interconnection
- Carrier selection and pre-selection
- Simple resale, bit-stream access, local loop unbundling

Remedies imposed on GSM operators with SMP are:

- Price ceilings for all operators (Determination of cap to end user tariffs of GSM operators)

[399] By-laws on Access and Interconnection, Article 21
[400] By-laws on the Determination of SMP, Article 11

- Price floor for Turkcell (Regulating the Retail Tariffs of Turkcell in order to ensure retail prices are not lower than call termination rate)
- Reference Interconnection Offers
- Accounting Separation and Cost Accounting
- Interconnection

As a result of market analysis, existing remedies may be amended. If NRA finds out that no undertaking has SMP in the market analysed and effective competition exits, it does not impose *ex-ante* obligations, or withdraw existing regulation.[401]

Differs from sector-specific rules that consider the existence of a SMP as a justification for the imposition of sector-speecific remedies, Turkish Competition Law prohibits not the 'dominant position' but the 'abuse of dominant position'.[402] Article 6 states that "The abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, is illegal and prohibited."

Abusive practices listed in the Article 6 of the Turkish Competition Law are based on the list in Article 82 of the EU Treaty. Abusive practices listed in the Law are:

- Preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market,
- Making direct or indirect discrimination by offering different terms to purchasers with equal status for the same and equal rights, obligations and acts,
- Purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price,

[401] By-laws on the Determination of SMP, Article 12
[402] Aslan, Y. (2006). *"Rekabet Hukuku Dersleri."* pp.121-122

- Actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market,
- Restricting production, marketing or technical development to the prejudice of consumers.

If Competition Authority concludes that an undertaking abuse its dominant position, the Authority imposes antitrust remedies on this undertaking for the Termination of Infringement.[403]

4.4 Institutional Framework of the Sector-Specific and Competition Rules

In Turkey, main *sector-specific* regulators are:

- Energy Market Regulatory Authority (EMRA) which was established in 2001 as a regulatory and supervisory authority in charge of electricity, natural gas, petroleum and LPG markets in Turkey.
- Telecommunications Authority (TA) which was established in 2000 as a regulatory and supervisory authority in charge of telecommunications sector in Turkey.
- Banking Regulation and Supervision Agency (BRSA) which was established in 2000 as a regulatory and supervisory authority in charge of the banking sector in Turkey.
- Radio and Television Supreme Council (RTUK) which was established in 1994 as a regulatory and supervisory authority in charge of radio and television broadcasting services across Turkey.
- Capital Markets Board of Turkey (CMB) which was established in 1982 as a regulatory and supervisory authority in charge of the securities markets in Turkey.

[403] Competition Law no.4054, Chapter 2: Powers of the Board, Article 9 Termination of Infringement. For further information concerning the competition law remedies imposed in case of the infringement of competition See. Aslan, Y. (2006). *"Rekabet Hukuku Dersleri."* pp.209-243

- Tobacco and Alcohol Market Regulatory Authority (TAPDK) which was established in 2002 as a regulatory and supervisory authority in charge of tobacco and alcohol markets in Turkey.
- Turkish Sugar Authority, which was established in 2001, has the status of a regulatory and supervisory authority in the sugar sector.

In addition to these sector-specific regulators, the Competition Authority entrusted with the power to implement economy-wide antitrust rules was established in 1997.

In Turkey, main actors in the electronic communications sector are:

Council of Ministers which determines the overall policy; approves minimum fees for authorisations, and appoints theTelecommunications Board Member.

Ministry of Transport/General Directorate of Communications which is the policy-maker in the telecommunications sector and responsible for ensuring the implementation of the universal service obligations.

Communications High Board which makes suggestions to MoT regarding radiocommunications and approves radio and TV frequency channel plan.

Telecommunications Authority (TA) which regulates and monitors telecommunications sector; authorizes the operators, settles down the disputes, takes measures for consumer protection; carries out market analysis, imposes remedies and sanctions and is responsible for the frequency management and preparation of National Allocation Table.

Competition Authority (CA) which was established in order to ensure a sound competitive environment in the markets for goods and services.

Radio and TV Supreme Council (RTUK), an autonomous public legal personality, which is responsible for regulating and monitoring broadcasting sector and assigns radio & TV frequency bands and channels.[404]

Among these institutions, TA and CA -sector-specific and competition regulatory authorities- will be focussed on in the next parts.

4.4.1 Telecommunications Authority (TA)

Telecommunications Authority was established in August 2000, as the first independent sector-specific regulatory body, under the Law no.4502 amending Art.5 of Law No.2813.

TA, as an independent regulatory authority, has public legal personality and administrative and financial autonomy in order to carry out its rights and duties. The Ministry to which the Authority is related is the Ministry of Transport.[405] The decision making body of the TA is the Telecommunications Board consisting of a chairman and six members. Chairman and members of the Board are appointed by the Council of Ministers for a period of 5 years where re-appointment is possible.[406]

The total number of staff is 544 according to 2006 data.[407]

TA has various sources of revenues.[408] In 2006, TA' s revenues composed of spectrum usage charges (67%), license charges (19%), contribution to TA's expenses by the operators(7%), other revenues such as; fines and interest income (7%).[409]

Before the establishment of TA, telecommunications sector regulation, except radio and TV broadcasting content, were carried out by the Ministry of Transport.

---

[404] RTUK was established on 20 April 1994 in accordance with the Law No.3984 Article 5 & 6
[405] Law no.4502, Article 14
[406] Members of the Board were five including the chairman, at first. This was increased to seven by the Law no.5189 dated 16.06.2004 (Article 7). See. Law no.4502, Article 14 and Article 17
[407] Telekomünikasyon Kurumu. *"2006 yılı Faaliyet Raporu."* p.3
[408] Law No 2813, Article 5
[409] Telekomünikasyon Kurumu. *"2006 yılı Faaliyet Raporu."* p.15

Regulatory functions of the Ministry of Transport in telecommunications sector were transferred to the TA in 2000. The Ministry of Transport has maintained its responsibility for making telecommunications policy.

As defined in Article 7 of the Law no.2813 major tasks, *inter alia,* of TA are:

- to regulate the telecommunications networks and services,
- to conduct market analysis and identify SMPs,
- imposition of the *ex-ante* obligations on SMPs,
- enactment of the secondary legislation,
- authorisation of the operators providing telecommunication networks and services and monitoring of those operators,
- dispute resolution as regards access and interconnection,
- to take necessary measures to protect consumer interests,
- determination of the service standards for authorized operators and monitoring of the compliance with those standards,
- spectrum management considering the principles of objectivity, proportionality transparency, non-discriminatory access, technological neutrality,
- spectrum planning and preparation of the National Allocation Table,
- monitoring and inspection of spectrum use,
- imposition of fines and sanctions on undertakings found to be in breach of the relevant legislation, license provisions and Board decisions,
- to investigate any relevant matters including *anti-competitive* behaviour, either upon its own initiative or upon complaints,
- to give its opinions on telecommunications-related cases, including those on mergers and acquisitions, taken before the Competition Authority.

Briefly, TA's main duty is to take the necessary measures to ensure that telecommunications networks and services are being operated in completely competitive environment. In accordance with these tasks, the TA has the following main functional departments:

- Tariffs Department
- Licence and Agreements Department
- International Relations and EU Co-ordination Department
- Sectoral Competition and Consumer Rights Department
- Spectrum Management Department
- Spectrum Monitoring and Control Department
- Technical Regulations and Standards Department
- Sectoral Research and Strategies Department
- Information Technologies and Coordination Department

Decisions issued by TA are subject to judicial review. Appealing to the administrative court does not impede implementation of the decision.

4.4.2 Competition Authority (CA)

The liberalization of the markets has been accompanied by increased involvement of competition authorities in the liberalized markets. In Turkey, Competition Authority (CA) was established by Article 20 of the Turkish Competition Law no.4054 dated 1994. CA consists of Competition Board, Presidency, and Service Units. Competition Board was appointed on 5 March 1997 and Competition Authority began to operate on 5 November 1997 after three years later than the adoption of the Competition Law on 7 December 1994.

The Competition Authority having a public legal personality, and an administrative and financial autonomy is established in order to ensure the formation and development of markets for goods and services in a free and sound competitive environment.[410]

The Competition Authority is independent in fulfilling its duties. No organ, authority and person may give commands and orders to influence the final decision of the Authority.[411]

[410] Law no.4054 on the Protection of Competition, Article 20
[411] Law no.4054 on the Protection of Competition, Article 20

The Competition Board is composed of a total of 7 members, one being the Chairman and the other being the Deputy Chairman. Chairman, Deputy Chairman and members of the Board are elected for six years. The member whose term has expired is eligible for re-election. One third of the members of the Board is renewed every two years. The Council of Ministers elects and appoints the members from among the two candidates apiece, to be nominated from inside or outside the following institutions for each vacant membership: two members from the Competition Board, one member from the Ministry of Industry and Trade, one member from the Ministry of State with which the Undersecretariat of State Planning Organization is affiliated, and one member apiece from the Supreme Court of Appeal, Council of State, and Turkish Union of Chambers and Commodity Exchanges.[412] Although Board Members are nominated by the Council of Ministers they are not subject to commands and orders to influence from any of the governmental bodies and business.

The Ministry to which the Authority is related is the Ministry of Industry and Trade. The total number of staff is 314 according to 2006 data.[413]

The technical departments in the Authority are organized along sector-specific basis. As a result of the allocation of work and responsibility in the CA Department No. 2 deals with telecommunications sector.

CA is responsible for enforcement of the Turkish Competition Law and advocating the competition. In this respect, CA takes actions against anti-competitive practices in all sectors of the economy including telecommunications. Also, merger of two or more enterprises and acquisition of another enterprise exceeding 25.000.000 YTL and/or 25% market share need approval of the Competition Authority.[414] As mentined before, CA also is empowered by Law to engage in "competition advocacy' by providing its opinions on government policies and regulations that likely to impact on competition.

CA initiates investigations either upon the complaints received from relavant parties (competing businesses and consumers injured by the anticompetitive conduct) and/or

[412] Law no.4054 on the Protection of Competition, Article 22
[413] http://www.rekabet.gov.tr/word/istatistik.pps#259,2,Slayt 2 (Available on May 2008)
[414] Competition Law no.4054, Article 7 & Communiqué no.1997/1 on the Merger and Acquisition that are subject to the approval of the Competition Board, Article 4.

ex officio on its own initiative. "During the past eight years the vast majority of the cases have been 'demand driven' -only 11% of the cases were initiated by the Board."[415]

Decisions issued by CA are subject to judicial review. "Appeal may be made to the Council of State within due period against the final decisions, measure decisions, fines and periodic fines of the Board, as of communicating the decision to the parties. Appealing against decisions of the Board does not cease the implementation of decisions, and the follow-up and collection of fines."[416] "Appeals of Board decisions are quite common, which delay the final resolution of cases. Between 1999 and 2004, about 45% of the Board decisions were appealed to the Council of State."[417]

Competition Authority has a reputation of being one of the best managed and effective government bodies- a view shared by the OECD and the Report prepared by Khemani, S., R. as part of a larger Project within the framework of the FIAS/Competition Authority/TEPAV Project on 'Competition Policy and the Impact of Investment Environment in Turkey: Sectoral/Institutional and Legal Framework.[418]

The Competition Authority has concluded more than 2000 cases among which more than 100 cases related with information and communications related-issues.[419]The CA has actively involved in competition related issues in telecommunications sector. Up until now, CA has taken a number of significant decisions comprising structural policies, liberalization policies and conduct regulation.

> "Structural policies include break-up decisions, those decisions concerning the privatization of Turk Telekom, merger controls, and scope-of business decisions. Liberalization policy simply is about the removal of barriers to entry, such as; the 'National Roaming Decision of

[415] Khemani, S., R. (2006). *"Competitiveness, Investment Climate and Role of Competition Policy in Turkey."* p.3
[416] Law no. 4054, Article 55
[417] Khemani, S., R. (2006). *"Competitiveness, Investment Climate and Role of Competition Policy in Turkey."* p.21
[418] "Turkey - Peer Review of Competition Law and Policy" prepared by OECD in 2005 states that Turkish Competition Authority has continued to make excellent progress since 2002, and has developed a reputation as one of Turkey's most effective and best administered agencies. Also See. Khemani, S., R. (2006). "*Competitiveness, Investment Climate and Role of Competition Policy in Turkey."* p.4
[419] www.rekabet.gov.tr

> the Competition Board no.03-40/432 186 dated 2003. Conduct regulation are those that take the form of explicit monopoly controls and\or competition policy measures, constrains the pricing and other behaviour of dominant firms, such as; Competition Board Decision no. 02-60/755-305 dated 2.10.2002 concerning the assessment of TTAS' abuse of dominant position in the markets for internet services and internet infrastructure."[420]

Additionally, CA has increasingly engaged in 'competition advocacy'.[421] "Competition advocacy by the CA has two dimensions. The first reflects the agency's role as a consultant to the government and to sectoral regulators concerning legislation and regulations that implicate competition policy. The second is as a proponent at large for increased public recognition and acceptance of competition principles."[422]

"Available statistics indicate that since the year 2000, the CA has issued an increasing numbers of opinions on various government policy and regulatory matters: from 16 in the initial year to a peak of 42 in 2003, and 25 in 2004."[423] For example; CA issued its opinion on the privatization of at least 51 % share of the Turk Telekom; the tender for the sale of Telsim, Concession Agreement between Turk Telekom and GSM operators; Draft Electronic Communications Law, Draft By-laws on Access and Interconnection, Draft By-laws of Tariffs.[424]

"Prime Minister's office had issued a Communiqué no.1998/2001 in 1998 encouraging various government departments and agencies to consult the CA in advance on proposals and regulations that impacted on competition policy. But not all government agencies necessarily comply with this request or welcome the CA's opinions. This introduces inconsistencies in the way regulatory policies are formulated in respect to competition related matters. Competition Board is not always requested to provide its opinions and/or that it does not become aware of new policy and

---

[420] Karabudak, H., B. (2006). *"Competition Policy and Regulated Markets: Experience of Turkey."*

[421] Articles 27 (g) and 30 (f) of the Turkish Competition Law no.4054 empower the CA to provide its opinion, on its own initiative or upon the request of the Ministry, concerning the necessary amendments to be made in the competition law, and on legislation and decisions concerning competition policy.

[422] OECD. (2005). *"Turkey - Peer Review of Competition Law and Policy."*

[423] Khemani, S., R. (2006). *"Competitiveness, Investment Climate and Role of Competition Policy in Turkey."* pp.29-30

[424] ERSİN, M. A. (Rekabet Kurulu Üyesi). *"Türkiye'de Rekabetin Kurumsallaşması ve Kurumsallaşma Sürecinde Rekabet Kurumu'nun Rolü"*.

regulatory proposals in a timely fashion."[425] "It is not only the Government actions which may, directly or indirectly, hinder competition, but legislative acts of the Parliament enacted earlier or later than the Competition Law may have an adverse effect on the competitiveness of the markets. The legislative acts and government decisions should be consistent with the competition policy.Competition Board should be more pro-active in engaging in competition advocacy function instead of primarily providing input into policy changes when requested."[426] It is proposed that CA, on the basis of competition advocacy, should especially focus on the universal service policies in telecommunications implemented by Ministry of Transport as those policies have a critical sector-wide impact.[427]

4.4.3 Cooperation and Consultation between TA and CA

Effective cooperation and consultation between the TA and CA, and between these two sets of regulatory bodies and other related state institution and private sector (NGOs, operators etc.) is critically important for the well-functioning of the telecommunications markets.

Statutory basis of the cooperation and consultation between TA and CA and between these two sets of regulatory bodies and other related institutions set out by;

- Amending Law no. 4502 Article 1, Article 3, Article 4, Article 5 Article 6, Article 16. Amended
- Law no. 406 amended Article 3, Article 4, Article 6, and Article 10
- Law no. 2813 amended Article 7
- Law no. 4054 Article 27 and Article 30

Statutory basis of the cooperation and consultation between TA and CA is provided by Amending Law no. 4502 Article 4, Article 6, Article 16; Law no. 406 amended Article 4, and Article 10; Law no. 2813 amended Article 7

---

[425] Khemani, S., R. (2006). *"Competitiveness, Investment Climate and Role of Competition Policy in Turkey."*p.31

[426] OECD. (2005). *"Turkey - Peer Review of Competition Law and Policy."*pp.54-60

[427] For further information on universal service policies in telecommunications sector in Turkey See. Aydemir, D. (2008). *"Telekomünikasyon Sektöründe Evrensel Hizmet: Avrupa Birliği ve Türkiye'de Evrensel Hizmet Kapsamının Genişletilmesi Üzerine Bir İnceleme."*

As stated in the previous parts, TA is charged with to take necessary measures in order to ensure that those undertakings providing telecommunications services and operating telecommunications infrastructure perform their activities within a competitive telecommunications environment in Turkey.[428] Law no.4502 states that TA should take necessary measures for the establishment and maintainance of the competition in the telecommunications markets.[429] On its own initiative or upon a complaint, TA is authorized to investigate the practices related with the provision of the telecommunications services and operation of the telecommunications infrastructure. TA is also authorized to investigate the *anti-competitive behaviour* in the provision of the telecommunications services and operation of the telecommunications infrastructure and in the telecommunications sector in general. TA may request the provision of the all the relevant information and documents to fulfill its duties.

CA is charged with to take necessary measures in order to ensure the formation and development of markets for goods and services in a free and sound competitive environment. To this end, CA aims to prevent agreements, decisions and practices preventing, distorting or restricting competition in markets for goods and services, and the abuse of dominance in the markets.

As to be understood, both TA and CA aim to ensure functioning competitive markets. In this regard, "effective cooperation of TA and CA is crucially important in order to ensure that their decisions are co-ordinated to avoid the possibility of inconsistency and overburdening on relevant parties; to prevent problems associated with possible overlaps of actions by the two organisations. It also helps reduce problems associated with exchanging certain confidential information held by one to the other office."[430]

Law no.4502 Article 16 amending Article 7 of the Law no.2813 states that CA, in carrying out inquiry and investigations about the telecommunications sector, *must* initially consider the opinions of the TA. Additionally, CA, before taking any decision, including decisions about mergers and acquisitions, concerning

[428] Law no.4502, Article 16/ı
[429] Law no.4502, Article 4/ı
[430] OECD Reviews of Regulatory Reform. (2002).*"Regulatory Reform in Turkey: Regulatory Reform in the Telecommunications Industry."* p.20

telecommunications sector, *has to* take into account the TA' opinion and regulatory practices. Similarly, Article 6 amending Article 10 of the Law no.406 states that, TA *may* apply for CA's opinion in order to ensure that the standard reference access and interconnection offers or the agreements on interconnection and roaming do not impede the competition.

In addition to these, TA and CA cooperation in market analysis is covered by By-laws on the Determination of SMP. Article 6/c states that TA, in conducting market analysis, takes the opinion of the Competition Authority and *may* publish these opinions in its web-site."[431]

Functioning cooperation between TA and CA is critically important for the competitiveness in the telecommunications markets. However, the existing above-mentioned legislation does not clarify the division of labor between the TA and CA. Law No. 4502 provides the TA with the authority to investigate anticompetitive practices in the telecommunications industry (Article 16/m). It also states that the CA *has to* take the TA's opinion into consideration before taking any decisions on the telecommunications industry. However, "in a significant omission, it does not require the TA to seek the opinion of the CA."[432]

In order to clarify the coordination and exchange of information mechanism, to prevent forum-shopping, and to reduce uncertainties concerning their duties on the provision of competitive markets a Protocol was signed between TA and CA on September 16, 2002. The Protocol sets the procedures and mechanism on the cooperation of the TA and CA on the telecommunications related investigations, applications, mergers and acquisitions, negative clearance and exemption, assesment of the dominant positions, and specifications and concession agreements in order to prevent the uncertanities concerning their rights and duties. This administrative arrangement requires TA and CA to exchange information concerning the issues having significant effect on the protection of the competition in the

[431] By-laws on the Determination of SMP, Article 6/3c
[432] Atiyas, İ. (2006). *"Competition and Regulation in the Turkish Telecommunications Industry."* p.7

telecommunications markets within certain time limits. It also requires TA and CA to take eachother's opinions in a 'written' format.

The Protocol establishes a Coordination Committee and a Working Group composed of TA's and CA's high level officials and experts in order to facilitate coordination and exchange of information concerning the cases that they are investigating.

Although this Protocol has been in effect since 2002, it is not implemented effectively in practice. It is argued that "the coordination Protocol signed between CA and TA is not fruitfull because it includes provisions only regarding exchange of relevant information, but not detailed guidelines for implementing overlapping measures."[433] Inspite of these legislative and administrative arrangements in order to ensure effective coordination and cooperation between TA and CA, it is argued that "the level of collaboration between *sectoral regulator* and *competition authority* has been less than satisfactory."[434] Both in 2005 Regular Report for Turkey[435] and in OECD studies (under Competition Law and Policy Reports on Turkey) it is stated that "the sector regulatory authorities, such as; the TA do not ensure efficient cooperation and use of consultation mechanisms with the CA in order to prevent any competition distortions in the market yet. The CA should continue to seek opportunities for cooperation with the TA because the issues of overlapping jurisdiction impose uncertainty on private sector firms and impair competitive market operations." It is also argued that; "the lack of efficient cooperation between TA and CA is mainly arise from ambiguity in regulatory policy and split jurisdiction between the TA and CA. The CA interprets its jurisdiction to extend over anticompetitive practices in the telecommunications sector, whereas the TA holds the view that it does not."[436]

"Due to the ambiguity in the relevant law and protocol regarding the division of authority between the TA and CA, these two agencies have not been able to develop a

---

[433] Ünver, M. B. (2004). *"Essential Facilities Doctrine under EC Competition Law and Particular Implications of the Doctrine for Telecommunications Sectors in EU and Turkey."* pp.163-164

[434] Khemani, S., R. (2006). "*Competitiveness, Investment Climate and Role of Competition Policy in Turkey."* p.46

[435] European Commission. *"Turkey 2005 Progress Report"*. Chapter 8 Competition Policy.

[436] Khemani, S., R. (2006). "*Competitiveness, Investment Climate and Role of Competition Policy in Turkey."* p.46

productive relationship. The evolving tendency is that the CA will not investigate allegations of competition law violations when actions in question are in areas regulated by the TA. Although holding an exclusive competence to enforce antitrust rules, CA's decisions on telecommunications cases imply that CA refrains from investigating activities that are regulated by the TA."[437]

The main deficiency in the legislation is that it is not clear which authority will have the last word in case of a disagreement between the proceedings of two authorities. However, any user or undertaking has the right of appeal to a relevant court in case of any disputes with CA and TA.

4.5 Case Studies

The existing legislation neither requires the publication of the decisions of the Telecommunications Board nor the publication of their justifications and technical reports prepared by the relevant department. As a result, it is difficult to access easily to the Telecommunications Board decisions on telecommunications regulatory cases. Only a few of them are available on the TA's web-site. "This increases regulatory uncertainty as the intentions of the regulator remain unclear. From the investors' perspective it increases regulatory discretion and reduces trust in the appeal mechanism."[438]

In contrast to the sector-specific telecommunications legislation that does not require TA to publish Board's decisions and their justifications, Competition Law requires CA to publish Board decisions. Moreover, Competition Law obliges CA to publish Board's decision involving the following information[439]:

---

[437] Atiyas, İ. (2006). *"Competition and Regulation in the Turkish Telecommunications Industry."* p.37-38. & See. Turkish Competition Board Decisions no.**07-29/274-101** dated 29.3.2007, Decisions no.**05-87/1199-348** dated 22.12.2005, Decision no.**05-55/833-226** dated 8.9.2005, Decision no.**04-66/956-232** dated 19.10.2004, Decision no. **05-55/833-226** dated 8.9.2005, Decision no.**04-52/717-181** dated 12.8.2004, Decision no.**04-01/26-8** dated 8.1.2004.

[438] Atiyas, İ. (2006). *"Competition and Regulation in the Turkish Telecommunications Industry."* p.iv

[439] Law no. 4054, Article 52

- members of the investigation committee,
- members of the Board concluding to case,
- related parties,
- summary of the claims of the parties,
- summary of the issues discussed,
- opinion of the rapporteur,
- justification of the decision,
- conclusion,
- justification of the dissential vote, if exists,

Competition Board decisions are transparent and easily accessible on the CA's web-site.

During the past ten year, Competition Authority has handled, *ex-ante* and *ex-post*, more than 2000 cases and levied fines in a number of cases concerning agreements, concerted practices and decisions limiting competition, the abuse of dominant market position, exemptions and negative clearances, and mergers and acquisitions. In addition to these, Competition Authority has engaged in competition advocacy by providing its opinions on government policies and regulations that are likely to impact on competition. Among these 2000 cases, more than 100 cases are related with information and communications technology related-issues. Among these 100 cases, a few striking ones exemplifying the abuse of dominant position and competition advocacy practices of the CA will be analysed below.

1- Competition Board Decision no. 02-60/755-305 dated 2.10.2002 and Competition Board Decision no. 06-02/47-8 dated 5.1.2006 concerning the assessment and reassessment of TTAS' abuse of dominant position in the markets for internet services and internet infrastructure

CA launched an investigation, in 2001, on its own initiative as a response to news and claims on the press and upon the request of the TISSAD (Internet Service Providers Association), and a number of internet service providers (ISPs) concerning the alleged abuse of dominance by TTAS in the markets for internet service provision and internet infrastructure.

It is claimed that TTAS that has been providing infrastructure for ISPs:[440]

> -sets montly access charges below the cost, which, in turn, distorts the competition in the market.
> - doubled the tariffs for leased lines used by ISPs with no apparent increase in costs though it did not increase the tariffs of services provided by TTNet. That is, TTAS, either directly or indirectly prevents and/or makes harder the entrance of new internet providers into market.
> - refuses to rent to ISPs Primary Rate Interface (PRI) lines and forces them instead to rent Virtual Points of Presence (VPOPs) installed under its subsidiary TTNet. ISDN-PRI lines (as well as No. 7 and E1 technologies) are used to connect ISP narrow band internet traffic from TTAS switches to ISP points of presence (POPs). It was argued that the TTAS practice of refusing to lease PRI lines to ISPs forced ISPs to act as simple resale organizations and prevented them from competing against TTNet in terms of quality of service.
> - applies predatory pricing in the market for residential internet services.
> - limits the capacity it leased to ISPs up to 65 Kbps while providing five times higher capacity to TTNet.
> - forces ISPs to disclose confidential commercial information relating to customers, such as; subscribers' names, addresses and telephone numbers.
> - increased royalties to be applied to satellite earth station operators by 240-6300%. International fiber optic leased lines are extremely expensive in Turkey. Hence many ISPs use satellite connections for international transfers of data and most of the traffic conveyed by satellite earth station operators is internet traffic. It was argued that the increases in royalties were going to increase ISP costs directly and substantially and distort the sector.

On the basis of these claims refering to the infringement of the Article 6 of the Competition Law no. 4054, Competition Board decided to launch an investigation.[441] During the course of the investigation, the Competition Board decided to take preliminary injunction by Decision no. **01-28/273-M** dated 21.6.2001. According to preliminary injunction TTAS required[442]:

> i) to realign the tariffs of infrastructure services TTAS provided to ISPs so as to prevent any cross subsidies to internet services provided by its subsidiary TTNet.
> ii) to end its practice of forcing ISPs to rent VPOPs and provide to the extent technically possible and in a manner that was non-discriminatory

[440] Atiyas, İ. (2006). *"Competition and Regulation in the Turkish Telecommunications Industry."* p.59
[441] See. Competition Board Decision no.**01-13/123-M** dated 28.3.2001
[442] Atiyas, İ. (2006). *"Competition and Regulation in the Turkish Telecommunications Industry."* p.59

the requested technologies that could be used for the provision of internet services (such as; ISDN-PRI, ISDN-BRI, No.7 E1).
iii) to open up to the ISPs, in case of requested by ISPs, and in a non-discriminatory manner, the internet access over xDSL and Cable TV technologies.
iv) to end requesting the ISPs' customer information (such as; names, addresses, phone numbers etc.) except those that are necessary for technical reasons.

It is stated that in case of non-compliance with those requirement TTAS would be fined pursuant to the Article 16 and 17 of the Law no.4054. In response to the Competition Board Decisison no. 01-28/273-M, TTAS:

- increased tariffs of TTNet dial-up services by 20%, and stated that it would incease TTNet's tariffs every three months.
- indicated that the necessary studies in order to expand the internet access technologies were going on.
- stated that it was technically impossible to provide to ISPs access through xDSL and cable TV technologies at present. After the establishment of the necessary infrastructure, ISPs were provided internet access over xDSL and cable TV.
- stated that it was going to make necessary amendments in its ISP Agreement so that customer's private information would no longer be requested.

In addition to the above mentioned investigation, Competition Authority launched another investigation by the Competition Board Decision no.**01-30/300-M** dated 4.7.2001 owing to the increase in SCPC-VSAT tariffs by 300-6300 percent. Pursuant to the Article 7 of the Law no. 2813, Competition Authority applied to the opinion of Telecommunications Authority before taking preliminary injunction within this investigation. After taking the affirmative answer of the Telecommunications Authority, Competition Authority took its second preliminary injunction against TTAS. In its second preliminary injunction the Board asked TTAS to reverse the increase in tariffs applied to satellite ground station providers.[443] TTAS complied with this request. However, TTAS appealed to the Council of State against the preliminary injunction in order for its stay of execution and annulment. Council of State dismissed

[443] Competition Board Decision no. **01-37/363-M** dated 31.7.2001.

the request for stay of execution.[444] In 2004, the Council of State dismissed the request for annulment.[445]

Relating to the first preliminary injunction decided by Competition Board Decision no.**01-28/273-M** the Board decided in its Decision no.**01-53/528-M** that TTAS did not fully align with the requirements stated in the first preliminary injunction. As a result, the Board decided by its Decision no.01-53/528-M to fine TTAS pursuant to the Article 17/a of the Competition Law.

TTAS appealed to the Council of State for the stay of execution and annulment of the Decision no.**01-28/273-M.** The request for the stay of execution was dismissed by Council of State.[446] Then, TTAS appealed for appellate jurisdiction. Plenary Session of the Administrative Law Division reversed the decision of the Council of State 10th Division on the ground that "to vote for the final decision by the Board member involved in investigation prejudices the principal of impartiality."

TTAS appealed to the Council of State also for the annulment of the Decision no.**01-53/528-M** concerning the fine. Council of State dismissed the request.[447] Then, TTAS appealed for appellate jurisdiction. The appellate process is still going on.

During the course of investigation, TTAS, in its defense, argued that the TA has the priority for the regulation of the telecommunications market. It is also argued that the juristiction of the CA in telecommunications sector was restricted by the establishment of the TA.

In response to those arguments, CA argued that statutory basis of the cooperation between TA and CA lay down by Law no. 4502 Article 4, Article 6, Article 16; Law no. 406 amended Article 4, and amended Article 10; and Law no. 2813 amended Article 7. Those Articles does not prejudice the enforcement of the competition rules in the telecommunications markets. CA is authorized to enforce antitrust remedies in the telecommunications markets within the limits of its jurisdiction.

[444] Council of State 10th Division Decision: Esas Yılı: 2001 Esas No: 2001/2561
[445] Council of State 10th Division Decision: Karar Yılı: 2004 Karar No: 5848
[446] Council of State 10th Division Decision E:2001/2113 K:2004/5849, 29.6.2004
[447] Council of State 10th Division Decision E:2005/66 K:2005/2731

As a result of above mentioned investigations, in its Decision no. **02-60/755-305** dated 2.10.2002, the Board concluded that TTAS has the *dominant position* in the market for infrastructure needed for the provision of broadband internet services to corporate users; in the market for infrastructure needed for the provision of narrowband internet services to residential users; in the market for infrastructure needed to provide broadband internet access services to residential user; and in the market for satellite-based international data transfer.

The Board concluded that the following practices were the abuse of dominant position in respective markets:[448]

> 1) The market for infrastructure needed for the provision of broadband internet services to corporate users
>
> The tariffs of leased lines provided by TTAS to independent ISPs were significantly higher than the tariffs that TTNet applied to corporate users of internet services, making it impossible for independent ISPs to survive in this market. This practice amounted to an abuse of dominant position.
>
> 2) The market for infrastructure needed for the provision of narrowband internet services to residential users
>
> On the allegations that TTAS was engaged in predatory pricing in the dial-up market, the Board found that residential narrowband dial-up tariffs were largely below the cost of infrastructure elements that ISPs had to lease from TTAS and concluded that they reflected an abuse of dominant position.
>
> 3) The market for satellite-based international data transfer
>
> During the period of investigation satellite earth station operators did not have licenses and were operating through revenue agreements with TTAS. Even though they did not use any TTAS facilities, their revenue agreements required them to pay royalty fees to TTAS. In May 2001 TTAS increased royalty fees by 230-6400 percent depending on bandwidth. The royalty fees were going to be terminated as soon as station operators obtained their licenses at which time operators would become competitors to TTAS in the long distance data conveyance market (which occurred in March 2002).
>
> The Board concluded that the increase in royalty fees was part of a strategy by TTAS to wipe out potential competitors in the long distance

[448] Atiyas, İ. (2006). *"Competition and Regulation in the Turkish Telecommunications Industry."* p.60-61

conveyance market. It also noted that by maintaining very high tariffs on its international fiber optic lines on the one hand and by increasing royalty fees on data transfers through satellites on the other, TTAS was increasing the cost of international internet access of ISPs.

In the market for infrastructure needed to provide broadband internet access services to residential users, the actions of TTAS were not considered an infringement by the Board.

Competition Board imposed fine of 1.136.376.790.621 Turkish Liras on TTAS pursuant to the Article 16/2 of the Competition Law no. 4054.

However, above-mentioned Competition Board Decision no. 02-60/755-305 dated 2.10.2002 was annulled by the Council of State in 2005.[449] Legal ground of the Court Decision is, again, that "The Board decision prejudices the principal of impartiality as the Board member involved in the investigation voted for the final decision." There has been increasing numbers of Court Decision based on the same reason.

After the Court Decision, Competition Board reassessed the alleged abuse of dominant position of TTAS in the markets for internet services and internet infrastructure. The Board new Decision no.**06-02/47-8** dated 5.1.2006 came up with the same conclusions stated in the previous Decision no. 02-60/755-305. The Board imposed fine of 1.136.376.790.621 Turkish Liras on TTAS pursuant to the Article 16/2 of the Competition Law no.4054.

2-Competition Board's Decision no.03-40/432-186 dated 09.06.2003 on Essential Facility and National Roaming

This case related with the joint dominance of Turkcell and Telsim over the infrastructure necessary as an essential facility to provide national 'roaming'[450]

[449] Council of State 13th Division. E. 2005/1700 K. 2005/3392; E. 2005/1703 K.2005/3396 dated 1.7.2005

[450] Roaming defined as "inter-systems conveyance which provides operation of services of an operator through the equipment of clients of another operator or which provides interconnection to another system, provided that certain technical compatibility exists." (See.Law no.406, Article 1) "Roaming is a typical access agreement signed between network operators or service providers to allow access by one service provider's customers to the network or services of another service provider located outside the service area of the first

capability for GSM mobile phone services. "This decision constitutes the core of the case-law regarding Essential Facility Doctrine under Turkish Competition Law."[451]

The two GSM 900 mobile operators, Turkcell and Telsim, started to operate under revenue-sharing agreements with Turk Telekom in 1994. Revenue sharing agreements of the two mobile operators were transformed to 25-year licences (concession agreements) issued by the Ministry of Transport in1998. Aria was granted GSM 1800 licence via a tender in 2000 and actually started business in 2001.[452] "Aria needed access to the existing networks of Turkcell and Telsim via making a roaming agreement, since their parallel networks covered almost all the country and Aria's coverage was so limited at that time."[453] Aria argued that it had a right to obtain roaming services from the incumbents during a certain transition period as Article 6 of Law 4502 requires 'mobile telecommunication, data operators or operators of other services and infrastructure to satisfy reasonable, economically proportionate and technically feasible roaming requests of other operators'. "Turkey is among the few countries where policy makers developed an explicit policy of mandatory national roaming. Availability of roaming services, especially during the initial years of market entrance, is seen as an important factor that accelerating the development of effective competition."[454]

Aria negotiated with the incumbent operators but they could not conclude an agreement because the two incumbent operators did not accept the conditions offered by Aria for roaming agreement. That means, they refused to open their networks to

---

service provider." See. Ünver, M. B. (2004). *"Essential Facilities Doctrine under EC Competition Law and Particular Implications of the Doctrine for Telecommunications Sectors in EU and Turkey."* p.145. According to the Ulusoy (2000, p.70) roaming, in brief, means utilization of a certain operator's infrastructure and equipment by another operator.

[451] Ünver, M. B. (2004). *"Essential Facilities Doctrine under EC Competition Law and Particular Implications of the Doctrine for Telecommunications Sectors in EU and Turkey."* pp.145-147

[452] Aycell actually started business in 2001, too. The licenses of the new entrants required that their coverage areas cover 50 percent of the population in 2 years and 90 percent in 5 years through their own investments without any support from national roaming. See. Ulusoy, A. (2000). *"Telekomünikasyon alanındaki Son Yasal Düzenlemeler ve Uygulamaların Değerlendirilmesi."* p.75

[453] Ünver, M. B. (2004). "*Essential Facilities Doctrine under EC Competition Law and Particular Implications of the Doctrine for Telecommunications Sectors in EU and Turkey."* pp.145-147

[454] Atiyas, İ. (2006). *"Competition and Regulation in the Turkish Telecommunications Industry."* p.27

Aria and its access to their infrastructure and equipment. In other words, they forced Aria to construct its own GSM infrastructure.[455]

In the process, TA performed a role as both a mediator and an arbitrator between the parties.

TA determined the terms and conditions of the roaming agreement to be signed and required Turkcell and Telsim to sign the agreement and to allow Aria to make roaming through their own networks in accordance with Article 10/5 of the Law No. 406. Aria accepted the terms and conditions determined by the TA. However, Turkcell and Telsim brought the TA's order before both the national courts for preliminary injunction and international arbitration courts. They obtained the preliminary injunction.[456]

Meanwhile, Aria applied to the Competition Authority in December 2001 claiming that Turkcell and Telsim had abused their dominant position by refusing to provide roaming services.

"While the main legal issue in the developments described above was whether the TA had the authority to impose roaming obligations, here the issue was whether refusal to provide roaming was a violation of Competition Law. The Competition Board decided that the standing injunctions did not prevent investigating the roaming issue under the competition law and decided to launch an investigation."[457]

The Competition Board, firstly, investigated whether Turkcell and Telsim have 'joint dominance' over the GSM infrastructure market. "Joint dominance is defined as ability of operators to behave as a single operator by coordinating their actions. In particular, pre-conditions for the existence of joint dominance are: that there is no

[455] Ünver, M. B. (2004). *"Essential Facilities Doctrine under EC Competition Law and Particular Implications of the Doctrine for Telecommunications Sectors in EU and Turkey."* p.145

[456] Atiyas, İ. (2006). *"Competition and Regulation in the Turkish Telecommunications Industry."* p.27. For further information on 'roaming' from a legal point of view See. Ulusoy, A. (2000). *"Telekomünikasyon alanındaki Son Yasal Düzenlemeler ve Uygulamaların Değerlendirilmesi."* pp.70-79

[457] Atiyas, İ. (2006). *"Competition and Regulation in the Turkish Telecommunications Industry."* p.28

effective competition among the operators identified as jointly dominant and that they have a similar position vis-à-vis their suppliers, competitors and customers, as the position of a single dominant operator."[458]

The Competition Board concluded that the two incumbent GSM operators exercise joint dominance over the infrastructure necessary as an essential facility to provide national roaming capability by competing GSM operators.

Secondly, the Board investigated whether refusal to provide roaming services call for an abuse of dominant position by denying access to an essential facility. "A facility is said to be essential if without access to it competitors cannot provide their services to customers. According to European practice, for a facility to be deemed essential, it must be true that competing firms must lack a "realistic ability to duplicate the facility"[459]

The Competition Board concluded that wide geographic coverage is essential for new entrant to compete with the incumbents. However, new entrant was lack of ability to duplicate the necessary infrastructure due to technical, economic and legal difficulties. Hence refusal to provide roaming services was an act of abuse of dominant position. Two incumbent operators abused their joint dominance by refusing to sign a roaming agreement with Aria.

In 2003, the incumbent operators were fined by an amount of USD 21 million. The High Administrative Court has suspended the Board's decision pending appeal.[460]

It is argued that "this argument is interesting in the sense that normally the essential facility argument is used for cases where the competing firm lacks a realistic ability to duplicate a facility that it needs to provide its services. However, Aria was obliged by its own concession agreement to build its own infrastructure anyhow. More

[458] Ibid. p.49
[459] Bergman, Mats (2001) *"The Role of the Essential Facilities Doctrine," Antitrust Bulletin*, 46, 403-434. in Atiyas, İ. (2006).*"Competition and Regulation in the Turkish Telecommunications Industry."* p.49
[460] Karabudak, H., B. (2006). *"Competition Policy and Regulated Markets: Experience of Turkey."*

specifically, the building of a new network was presumably not realistically impossible, as otherwise Aria would not have purchased the license to begin with. Hence what the Board argument had to be is that the roll out of new infrastructure was costly and would take time."[461]

"Another interesting aspect of the decision has to do with the relation between the TA and the CA. While the investigation committee proposed specific actions to be undertaken by the parties, the Competition Board decided that which actions should be undertaken and which should be avoided should be determined by the TA."[462]

"In March 2003 Aria filed a lawsuit with the International Chamber of Commerce's against the TA asking for about 3 billion USD in damages because promised roaming rights had not been made available. The lawsuit was withdrawn when Aria and Aycell merged to form a new company. The new company, Avea, was established in 2004."[463]

On the other hand, it is argued that "the Competition Board's decision on roaming arrangements will have little effect on the development of competition in the mobile telephone services market because with the merger of Aria and Aycell, roaming has become a non-issue and it will remain a nonissue until further new entry, which is not likely to take place in the near future."[464]

3-Competition Board decision no.07-59/676-235 dated 11.7.2007 concerning the TTNet' 'Summer Storm Campaign'

CA launched an investigation, in 2006, upon the request of the three internet service providers (ISPs) concerning the alleged abuse of dominance by TTAS in the markets for broadband internet access services through its subsidiary TTNet applying predatory pricing in its campaign called 'Summer Storm'.

---

[461] Atiyas, İ. (2006). *"Competition and Regulation in the Turkish Telecommunications Industry."* pp.49-50 The licenses of the new entrants required that their coverage areas cover 50 percent of the population in 2 years and 90 percent in 5 years through their own investments without any support from national roaming.
[462] Ibid. p.51
[463] Ibid. p.28
[464] Ibid. p.29

TTAS provides the necessary infrastructure for ISPs. ISPs provide broadband internet services to end users through the TTAS' infrastructure. TTAS also provides internet services to the corporate and residential users through its subsidiary TTNet established in 26.4.2006. In other words, while TTAS operates infrastructure, and provides *wholesale* internet access services, its subsidiary TTNet provides *retail* internet access services. That means that internet service provider TTNet is the competitior of the other ISPs in the sector.

The three ISPs claimed that:

- Certain practices of the TTNet in the broadband internet access market restrain other ISPs' competitive practices in the market. For instance, TTNet is applying predatory pricing through its campaing called "Summer Storm".
- According to "Summer Storm"campaing, TTNet would provide wired or wireless modem together with broadband internet access. In this sense, those users who signed contact for subscription between the dates 4.6.2007-31.8.2007 lasting for 24 months with TTNet would be charged 14.99 YTL/month for broadband internet service and wired modem; or 19,99 YTL/month for broadband internet service and wireless modem (for 1024 Kbps/4 GB package). On the other hand, TTAS is charging ISPs, competing with TTNet, 23,78 YTL/month (VTA and Special Communication Tax included) for 1024 Kbps/4 GB package. This means that, TTNet sets montly access charges to end-users below the charges applied by TTAS to ISPs for their using the internet infrastructure. This, in turn, means that TTAS sets montly infrastructure use charge to TTNet below the charge applied to ISPs.
- TTAS abuses its dominant position in internet infrastructure by offering different terms and conditions to purchasers with equal status, equal rights, and obligations.
- Clauses of the Summer Storm Campaing is a sign of concerted practices distorting the competition in the broadband internet services market in the sense that practices of TTAS and TTNet restrain ISPs from competing in the broadband internet access market.
- TTAS and TTNet cross-subsidize profitable services with retail internet services.

- If the Summer Storm Campaing is not terminated, many ISPs will have to remove from the market.
- TA does not have any authority to regulate the TTNet's tariffs. Therefore, CA should handle the case.
- TTNet has 99% of the market share in the ADSL services. That is, TA should identify TTNet as SMP in the related markets.[465]

In the Turkish legislation, as in the case of EU law, sector-specific remedies imposed on those operators having significant market power (SMP). TTAS was determined as SMP in wholesale broadband access including bit-stream access by Telecommunications Board Decision in 2006.[466]

Under the Law no.4502, in principal, the pricing policy is that operators are free to determine their tariffs that they charge the customers. However, TA is authorized to regulate and supervise the SMP's tariffs in order to prevent excessive pricing, predatory pricing, discrimination. In other words, an operator is subject to price regulation when it has SMP in the relevant market. Based on its significant market power, TTAS tariffs for the whole broadband is subject to approval of the TA. In the above-mentioned Telecommunications Board's Decision there is not any evaluation concerning the TTNet's retail services. Anyhow, in the course of decision the legal personality of the TTNet has not been established yet. However, after the establishment of the legal personality of the TTNet, TA does not conclude any decision concerning the significant market power of TTNet in retail markets. Accordingly, as the TTNet's is not determined as SMP, sector-specific remedies, such as; tariff control and tariff approval are not imposed on TTNet.

According to the Law no.4502 Article 16 amending Article 7 of the Law no.2813 "CA, in carrying out inquiry and investigations about the telecommunications sector, *must* initially consider the opinions of the TA. Additionally, CA, before taking any decision concerning telecommunications sector, *has to* take into account the TA' opinion and regulatory practices.

[465] One of the ISP stated that it applied to TA for the determination of the TTNet as SMP. See. Competition Board decision no.07-59/676-235 dated 11.7.2007. p.3
[466] Telecommuncations Board Decision no.2006/DK-10/142 dated 21.2.2006

On the basis of this requirement, CA applied to TA for its opinion on the TTNet's Summer Storm Campaign. TA's opinion could not have been delivered before the final decision of the Competition Board. However, in order to fulfil the above-mentioned requirement, CA decided to take into account the TA's previous comments on similar cases. TA, in its previous comments, stated that "According to the existing legislation, TTNet is not required to apply to TA for tariff approval."[467] That means that, while TTAS' whole internet access services are subject to the sector-specific regulation, TTNet's retail services are not subject to any sector-specific regulation.

The Competition Board concluded that:

- As complaints expressed against the TTNet's Summer Storm Campaing overlaps with those included in the investigation launched by Competition Board Decision no.07-38/411-M dated 7.5.2007, the new complaints will be handled within this investigation.

The Board also decided to take preliminary injunction in order to prevent any serious and irretrievable loss until the final decision. According to the preliminary injunction:

- TTAS and TTNet are required to end or reorganize in a proper form *all* of those campaigns, including the 'Summer Storm', setting charges below the cost, or inducing price squeezing.

One of the Board member countervoted on the basis that TA's opinion for the Summer Storm Campaign should be waited before concluding the decision. To take into account TA's previous comments concerning the similar cases does not mean the fulfillment of the statutory requirement laid down by Law no.4502/Article 16.

In its final decision no.**07-63/792-288** dated 2.8.2007, the Board concluded that concerns the preliminary injunction decision concerning TTNet's charges in Summer Storm Campaign; there was no need for instituting any proceedings because it was announced that the said campaign was stopped upon the conclusion of the preliminary

[467] See. Competition Board decision no.07-59/676-235 dated 11.7.2007. p.7-8

injunction. Other claims will be handled as part of investigation launched by the Competition Board Decision no.07-38/411-M dated 7.5.2007.

In addition to above-mentioned complaints, TTNet raised new complaints through its "Top Speed Summer Storm Campaign" and "Modem Campaing".

An Internet Association, TID, claimed that TTAS's abuse its dominant position through the TTNet "Top Speed Summer Storm Campaign" and "Modem Campaing".

In Top Speed Summer Storm Campaign TTNet committed to provide 12 % discounted price for 12 months in case the customers committed a subscription for 24 months.

In Modem Campaing, TTNet commited to provide wired or wireless modem free of charge in case the customers committed a subscription for 24 months. Additionally, if customers preferred wired modem they would be entitled to free of charge internet access for two months.

In its Decision no.07-79/990-385 dated 18.10.2007, the Board concluded that as complaints expressed against the TTNet's Top Speed Summer Storm Campaign and Modem Campaing overlap with those included in the investigation launched by Competition Board Decision no.07-38/411-M dated 7.5.2007, the new complaints will be handled within this investigation.

4- Competition Board Decision no.04-57/797 dated 2.9.2004 concerning the privatization of at least 51 % share of the Turk Telekom

CA had delivered its opinion before the privatization of Turk Telekom pursuant to the Communique no.1998/4. [468] The Board Decision concerning the requirements that has to be taken into account during the privatization of at least 51 % share of the Turk Telekom is a prominent example of competition advocacy practices of CA. As regards the privatization of at least 51 % share of the Turk Telekom, Competition

[468] Communiqué Regarding the Methods and Principles to be Pursued During the Course of Pre-Notifications and Applications for Authorization Made to the Competition Authority in order to Acquisitions via Privatization to Judicially be Valid Communiqué no:1998/4.

Board Decision concluded that in order to ensure a more competitive telecommunications market structure after privatization, followings should be considered prior to privatization:

1. Cable TV infrastructure should be separated from Turk Telekom and Cable TV should be structured as a new legal personality together with all rights related to the ownership and operation of the infrastructure.[469]
2. Internet Service Provider branch of the Turk Telekom, TTNet, should be established as a separate legal entity from the other business units of Turk Telekom.
3. The dominant GSM operator neither to be allowed to acquire Turk Telekom alone nor hold a controlling interest in any consortium that submitted a bid. It is only possible for this operator to participate in a tender within any consortia in case this operator does not have a direct or indirect controlling right over the Turk Telekom. It is only possible for those persons or groups controlling directly or indirectly this operator to participate in the Turk Telekom tender alone, together and/or separately within a consortia, in case after the tender, they transfer, to a person outside their economic whole, all means granting a controlling right in this operator and/or any undertakings having a direct or indirect controlling right over this undertaking.
4. The inequality owing to the Special Communication Tax that was charged to the private sector operators but not to Turk Telekom should be removed prior to privatization.

Competition Board Decision, to a large extent, was respected during the privatization. In accordance with the opinion of the Competition Authority, Cable TV network was separated from Turk Telekom prior to privatization, in 2004, as it was accepted as an

[469] Cable TV services started as a pilot project of Turk Telekom in 1989, in Ankara. Then, in 1991, the operations in nine major cities were tendered to private companies. By 1998, Cable TV services had been expanded to 20 cities and such operations had been transformed into revenue-sharing agreements for 10 years between the Cable TV companies and Turk Telekom. See. OECD Reviews of Regulatory Reform. (2002). *"Regulatory Reform in Turkey: Regulatory Reform in the Telecommunications Industry."* p.13

alternative competitive infrastructure to Turk Telekom's infrastructure.[470] Today, Cable TV infrastructure is operated by the Turksat Inc.

Turk Telekom's internet subsidiary, TTNet, was legally separated from Turk Telekom in 2006. Today, TTNet provides retail internet access services while TTAS operates infrastructure, and provides wholesale internet access services.

In compliance with the Competition Board Decision, dominant GSM operator neither participated in Turk Telekom's tender alone nor hold a controlling interest in any consortium. The 55% shares of Turk Telekom sold to the Oger Telecoms Joint Venture, a consortium led by Saudi Oger and Telecom Italia.

However, in contrast to the Board's Decision, Special Communication Tax is still in effect. Furthermore instead of eliminating the tax imposed on operators, special communication tax was expanded to cover fixed-line services in 2004. It seems that the tax will go on to be imposed at least for a few years as it is regarded as one of most important source of revenue by governments.

"The mentioned Competition Board Decision concerning the privatization of Turk Telekom is considered as one of the Best Practice by OECD."[471]

5- Competition Board Decision dated 19.10.2004, sent to the Saving Deposit Insurance Fund, concerning the tender for sale of Telsim Mobile Telecommunications Services Inc.

Competition Board Decision concerning the tender for sale of Telsim Mobile Telecommunications Services Inc. is another prominent example of competition advocacy practices of CA.

Competition Board Decision dated 19.10.2004 concerning the participants that can be participated in the tender for sale of Telsim concluded that;

[470] Law no. 5335 dated 21.05.2005.
[471] Güçlü, S. (2006). *"RK, TT Özelleştirme Görüşü Dünya Literatüründe."*

In order to prevent the formation of the dominant position, or the strengthening of the existing dominant position; the only possibility for Turkcell or those persons or groups controlling directly or indirectly this operator to participate in the tender for the sale of Telsim alone, together and/or separately within a consortia, is that after the tender, they should transfer, to a person outside their economic whole, all means granting a controlling right in this operator and/or any undertakings having a direct or indirect controlling right over this undertaking.

In compliance with the Competition Board Decision, dominant GSM operator did not participate in tender for sale of Telsim. In May 2006, mobile operator Telsim was acquired by Vodafone from the Saving Deposit Insurance Fund for a consideration of USD 4.55 billion.

4.6 Alignment with EU Acquis

Although global trends towards the liberalization and privatization in the telecommunications markets has had a huge impact on Turkey's liberalization and privatization policies, the special contribution of the Turkey-EU relations over the liberalization and privatization of the Turkish telecommunications markets should not be underestimated.

"Starting from the Customs Union Agreement, the EU obliges Turkey to adopt an exclusive competition law in compliance with the EU law. In this context, EU required Turkey to eliminate state monopolies and reduce the state's share of the economy. At present, implementation of competition policy in Turkey is one element of a much larger national initiative to advance beyond the Customs Union Agreement."[472] Turkey has entered a new stage towards EU membership on October 3rd 2005. Turkey began accession negotiations with the EU under 35 Chapters.[473] Accession means the adoption, implementation and enforcement of the

[472] OECD. (2005). "Turkey - Peer Review of Competition Law and Policy."
[473] 1. Free movement of goods 2. Freedom of movement for workers 3. Right of establishment and freedom to provide services 4. Free movement of capital 5. Public procurement 6. Company law 7. Intellectual property law 8. Competition policy 9. Financial services 10. Information society and media 11. Agriculture and rural development 12. Food safety, veterinary and phytosanitary policy

EU *acquis communautaire* under these 35 Chapters including competition and telecommunications policies.

Negotiation process concerning the telecommunications sector has been carrying out under the "*Chapter 10:* Information Society and Media". As in other Chapters, Turkey should align its telecommunication legislation with EU acquis. Furthermore, Turkey should ensure the effective enforcement of the regulatory framework through the independent regulatory authority.

The overall regulatory environment in Turkey has already been mainly shaped by EU acquis. Turkey has been continuing its alignment to EU acquis with the enactment of new secondary legislation, such as; By-laws on the Determination of the Operators with SMP dated 2007, By-laws on Access and Interconnection dated 2007; By-Laws on Right of Way dated 2006; By-laws on Number Portability dated 2007.

Similar to the EU telecommunications regulatory framework, Turkish legislation lays down a range of obligations to be imposed on undertakings with significant market power in the relevant market.

In this regards, the relevant markets have been determining, since November 2005, in accordance with the Commission Guidelines on Market Analysis and the Assessment of Significant Market Power dated 2002. Likewise, since December 2005, SMPs have been designated in accordance with the EU 2002 Regulatory Framework.

18 Relevant Markets listed in the 'Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex-ante* regulation' were taken as the reference point for market definition. In accordance with the EU rules, economic principles and competition law-

---

13. Fisheries 14. Transport policy 15. Energy 16. Taxation 17. Economic and monetary policy 18. Statistics 19. Social policy and employment 20. Enterprise and industrial policy 21. Trans-European Networks 22. Regional policy and coordination of structural instruments 23. Judiciary and fundamental rights 24. Justice, freedom and security 25. Science and research 26. Education and culture 27. Environment 28. Consumer and health protection 29. Customs union 30. External relations 31. Foreign, security and defence policy 32. Financial control 33. Financial and budgetary provisions 34. Institutions 35. Other issues See. Turkey-EU Negotiatıng Framework, (Luxembourg, 3 October 2005)

based methodologies used for defining markets by taking into account demand-side substitutability, supply-side substitutability and forward-looking competition assessment.

Similar to the EU rules and regulations, if TA finds out that no undertaking has SMP in the market analysed and effective competition exits, it does not impose any sector-specific remedies, or withdraw the existing remedies.

"The access and interconnection regime is also closer to the European practice. It stipulates voluntary commercial agreements for access and interconnection, with the TA intervening for dispute resolution in case the parties fail to reach an agreement. It also allows the TA to impose various obligations of access, transparency and cost orientation on operators designated as having significant market power."[474]

In spite of these legislative developments and practices, European Commission argues that Turkey is only partially aligned with the EU 2002 Regulatory Framework. Turkish telecommunications legislation has a mixed character of 1998 and 2002 regulatory packages of the EU. According to the 2007 Progres Report, one of the key outstanding issues remains to be tackled is the adoption of the 'Draft New Electronic Communications Law'[475] which has been pending since October 2005. New Electronic Communications Law is expected to ensure a basis for the alignment with the EU 2002 Regulatory Framework.

Main concern of the EU is about the authorization regime. According to the 2007 Progres Report, one of the key outstanding issue that must be overcome is the licensing regime which is a barrier in front of market entry.

As stated before, there are four types of authorization permitting to enter the telecommunications markets for services and networks in Turkey, namely, authorization agreement, concession agreement, telecommunications license, general authorization. An undertaking in order to perform telecommunication services and/or

[474] Atiyas, İ. 2006. "*Competition and Regulation in the Turkish Telecommunications Industry."* p.ii

[475] See. http://www.tbmm.gov.tr/sirasayi/donem22/yil01/ss1057m.htm (Available on May 2008)

operate telecommunications infrastructure in Turkey should be authorized by one of those. [476] Turkish authorization regime is criticized in the sense that "it is highly complicated cumbersome regime where authorization cover narrowly defined activities. As distinctions between these activities are not always clear, this increases regulatory uncertainty and makes entry costly and more difficult."[477]

It is also argued that "licensing regime, in Turkey, is outdated. TA issues licenses for almost every specific service type with extensive obligations. This approach deters investment, blocks innovative services from entering the market and delays the improvement of competition in the telecommunications markets."[478]

The proposed alternatives, stated in the EU Authorization Directive, are general authorization and right of use to be granted for radio frequencies or numbers. In Article 3, it is stated that "the provision of electronic communications networks or the provision of electronic communications services may, without prejudice to the specific obligations referred in the Directive, only be subject to a *general authorization*." "General authorization means a legal framework ensuring rights for the provision of electronic communications networks or services and laying down sector-specific obligations that may apply to all or to specific types of electronic communications networks and services."[479] "The undertaking concerned may be required to submit a notification but may not be required to obtain an explicit decision or any other administrative act by the national regulatory authority before exercising the rights stemming from the authorization."[480]

EU authorization regime also allows for the limited number the right of use for such radio frequencies or numbers. Procedures for limiting the number of rights of use to be granted for radio frequencies are settled under the Article 7 of the Authorization Directive. Member States are required not to duplicate the conditions of the general authorization where they grant the right of use for radio frequencies or numbers.

---

[476] See. Law no.406, Article 1
[477] Atiyas, İ. 2006. *"Competition and Regulation in the Turkish Telecommunications Industry."* p.ii
[478] See. Telkoder. (2006). Report submitted to the European Commission.
[479] Authorization Directive 2002/20/EC, Article 2
[480] Authorization Directive 2002/20/EC, Article 3

Draft New Electronic Communications Law, which has been pending for 2 years, envisages a new authorization regime based on the right of use and notification in align with EU Regulatory Framework.

> "The authorization process lays down the rights and obligations between authorized and authorizing parties. During the early phase of liberalization and privatization, the original licenses were hefty documents containing very specific details regarding the technology to be used and behavior of a particular licensee. These documents representing the high point of *ex-ante* regulation were used as the primary regulatory instrument. Gradually, owing to the maturing of the competition in the markets regulators gave up issuing particular, detailed and specific authorisations. Detailed licences have been superseded by issuing light touch general authorizations. In some instances no authorization or formal approval are required. Here market entry is unlimited and any regulation that takes place is *ex-post* in the context of competition policy. General authorizations are well suited to activities characterized by rapid technological change and dynamism because in a converged environment to provide specific services with specific technologies become irrelevant. Authorizations will increasingly become service neutral or multi-service and technologically neutral."[481]

The EU has moved towards a simple authorization regime, namely general authorization with minimal regulatory intervention. EU requires the individual licences only for the use of scarce resources, such as; radio frequencies and numbering. In Turkey, authorization regime still represents the high point of *ex-ante* regulation. However, taking into account the short period of time passed after the liberalization and privatization in the Turkish telecommunications sector compared to EU, it is comprehensible why the detailed licenses have been issuing.

EU current regulatory framework uses the terms 'electronic communications services' and 'electronic communications networks' rather than the previously used terms 'telecommunications services' and 'telecommunications networks'. These new definitions response to convergence phenomenon by bringing together under one single definition all electronic communications networks and services which are concerned with the conveyance of signals by wire, radio, optical or other electromagnetic means. Differs from EU regulatory framework the terms

[481] http://www.ictregulationtoolkit.org/en/Section.3112.html (Available on March 2008)

'telecommunications services' and 'telecommunications networks' have been used and are still being used in Turkish telecommunications legislation. However, in the Draft New Electronic Commuications Law the terms 'electronic communications services' and 'electronic communications networks' are prefered to be used.

As explained in the third chapter in detailed, EU attributes considerable importance to the NRAs and NCAs in enhancing competition in national telecommunications markets. In this regards, cooperation between NRAs and NCAs is crucially essential. As mentioned before, however, in Turkey the level of collaboration between TA and CA is insufficient due to the ambiguity in the relevant law and protocol regarding the division of responsibilities. The Draft Electronic Communications Law handled this issue. However, "Draft Article 7 concerning the securing the competition in the markets is not satisfying as it does not clarify the division of responsibilities. The Draft Law empowers the TA for all *ex-ante* and *ex-post* regulations and limits the powers of CA. However, TA has not developed well-defined rules and procedures for *ex-post* regulation. *Ex-post* regulation may become a serious problem after the enactment of the Electronic Communications Law."[482]

Draft Electronic Communications Law was abrogated as it could not be enacted before the Parliamentary elections. However, in case it is given a second reading in the new Parliament, those controversial issues should be reconsidered.

Overall, it can be said that the determination of the relevant markets, market analysis and assessment of SMP, tariffs control, access and interconnection regime in Turkey are aligned with those of the EU. However, licensing regime is more regulated in Turkey compared to the EU.

[482] See.Telkoder. (2006). Report submitted to the European Commission. See. Parlak, M. (2004). *"Avrupa Birliği Yolunda Telekomünikasyon Sektörü."* IV. Telekomünikasyon Arenası Konuşma Metni.

4.7 Future Perspectives for the New Regulatory Framework

It is argued that Turkish legislation has a mixed character of 1998 and 2002 regulatory packages of the EU.[483] After the lauch of EU-Turkey negotiation process, Turkey has accelerated its alignment with the EU acquis. However, Draft New Electronic Communications Law which is expected to ensure a basis for alignment with 2002 regulatory framework was abrogated after a long-lasting pending in the Parliament. Draft Law envisaged less cumbersome authorization regime. However, it could not develop well-defined rules and procedures to strengthen the cooperation between TA and CA.

Anyhow, Draft Electronic Communications Law has not been in the agenda of policy-makers for more than 2 years. Although Turkey's '2007-2013 Program for Alignment with EU Acquis'[484] states that Draft Electronic Communications Law will be enacted in 2008, it does not seem realistic. It seems that, in the mean time, TA will go on to try to be in compliance with EU acquis by issuing updated secondary legislation.

Liberalization and accompanying privatization in Turkish telecommunications sector *may* lead more effective management of the TTAS, and contribute output growth, network expansion, better allocation of resources, increased efficiency, increased labor productivity, increase choice, and decreased costs, etc. However, one should has to keep in mind that those positive outcomes can be realized *if and only if* liberalization and accompanying privatization process are supported by a robust regulatory framework and market structure that is conducive to competitive environment.

A robust regulatory framework should be dynamic in nature in order to respond technological and market developments because there is a close relationship between regulation and competition. Appropriate regulation safeguards competition in the markets while creating certainty needed for the innovation, investment and growth in the sector. As technology and market dynamics evolve so does the regulatory framework. Outdated provisions should be removed. In this sense, Draft Law should be taken into agenda at the possible earliest time.

[483] 2006 Turkey Progress Report
[484] Available at: www.abgs.gov.tr

4.8 Conclusion

This chapter has briefly examined the liberalization of the telecommunications markets in Turkey. This chapter suggests that the most striking development to increase the competition in the Turkish telecommunications sector, in recent years, was the elimination of the monopoly rights of Turk Telekom over fixed-line voice services by 1 January 2004.

This chapter mainly examined the role and impact of the sector-specific and antitrust rules in the liberalized and privatized Turkish telecommunications markets.

Compared to the EU rules and practices, *ex-ante* sector-specific regulations are more widely used in Turkey. However, given the short period of time passed after the liberalization and privatization in the Turkish telecommunications sector compared to EU, it is comprehensible why sector-specific regulations are extensively used. It is anticipated that as the competition in the markets matures, *ex-ante* remedies will be replaced by *ex-post* antitrust remedies.

The experience so far confirms that the coordination and cooperation between TA and CA should be further improved in order to ensure that *ex-ante* and *ex-post* regulations better complement each other. Their roles and responsibilities in the sector should be further clarified for the sake of competition in the markets that is conducive to new entry, investment, growth and consumer's benefits.

As regards the regulatory alignment with the EU acquis, the regulatory framework is in progress towards the alignment with the acquis. Overall, it can be said that the determination of the relevant markets, market analysis and assessment of SMP, tariffs control, access and interconnection regime in Turkey are aligned with those of the EU. However, licensing is heavily regulated in Turkey compared to simple licensing regime in the EU. The more the telecommunications markets move towards effective competition the less cumbersome licensing regime should be established. Electronic communications is a rapidly evolving sector with lots of technological and market developments. For this reason, Turkey should revise its electronic communications framework at certain intervals in order to keep it updated.

CHAPTER 5

CONCLUSION

Liberalization and privatization do not automatically leads to competitive telecommunications markets as incumbents usually remain dominant for some time after the opening of the market to competition, and tend to abuse their dominant position through anticompetitive practices, such as; refuse to supply essential facility and interconnection. Those practices of the incumbents may create entry barriers for potential entrants. Additionally, liberalization and privatization lead new concerns to be addressed to create a competitive environment, such as; licensing procedures. It is evident that the new game could not be played by the old rules.

Accordingly, crucial point in the liberalization and the privatization of the telecommunications sector is the design of post-liberalization and post-privatization regulatory framework. An effective regulatory regime addressing newly emerging issues and controlling incumbents' abusive power is essential and crucial in achieving a competitive environment in the sector. The lack of well-defined regulatory framework will result in private monopoly instead state-owned monopoly and a chaotic market for new entrants.

As to be understood, the reason for regulating the liberalized electronic communications markets is that they are still warrant structural competition problems. The aim of regulation on these markets is thus to ensure strong and sustainable competition through the controlling of market power and removal of market barriers for new entrants. It is believed that effective competition encourages private investment, attract new entrants, facilitate the introduction of new technologies and services, and maximize consumer benefits. However, expected benefits of the liberalization and privatization can be acquired *if and only if* these processes are supported by a robust regulatory framework that is conducive to competitive environment.

In most of the developed and developing countries, regulatory objectives in the liberalized telecommunications markets can be achieved through two distinct sets of rules and institutions: economy-wide antitrust rules and institutions and sector-specific rules and institutions. Under the previous monopolistic model, the rules imposed on state-owned monopolistic operator were sector-specific, and aimed at to prevent the abuse of monopoly power. Competition rules were disregarded during the monopolistic period. However, as the telecommunications markets had been gradually liberalized, the role of competition policy in the sector was considered. Prior to the liberalisation and privatization, regulatory functions were carried out by the related governmental body. There was not an independent authority regulating the sector as it was not deemed necessary. Operational, policy-making and regulatory functions were all concentrated in a single entity. After the liberalization and privatization these three functions were separated. Operational functions have been started carrying out by private operators. Policy-making maintained in the hands of related ministries. Regulatory functions were transferred to newly established administratively and financially autonomous regulatory bodies. In the liberalized telecommunications markets all the regulatory objectives are to be achieved through two distinct sets of rules and institutions: sector-specific rules and institutions and economy-wide competition rules and institutions.

Despite certain exception, such as; *ex-ante* merger and acquisition controls and *ex-ante* competition advocacy, competition law tends to be *ex-post* as competition authorities generally intervene after an anticompetitive practice was occurred. On the other hand, sector-specific telecommunications regulation tends to be *ex-ante* as regulators intervene prior to certain actions in order to prevent anticompetitive practice.

It is clear that both sector-specific and competition rules and institutions aim at securing effective competition in a relevant market. These two sets of rules are not mutually exclusive. They are complementary measures to ensure the development of competition and prevention of abuse of market power. In this sense, to ensure the right balance among them is critically important. However, there is not an one-fits all model. The regulatory framework reflects different balances between antitrust and sector-specific approaches in different countries owing to the differences in legal and

administrative systems, and bureaucratic culture and traditions of the country. "However, 'Cooperation' is the key word for the interaction of the sector-specific regulators and economy-wide competition authority."[485]

Competition advocacy practices of the competition authorities, comprising all activities of competition authorities promoting competition, which do not fall in the enforcement category are crucially important for an effective competition policy. In this sense, it is proposed that competition authorities should increase their competition advocacy practices.

The intensity of *ex-ante* regulation is generally high in the early phase of liberalization when the competition in the markets is at low level. As competition develops, the need for *ex-ante* regulation will diminish. In a fully competitive environment, there is a more limited need for *ex-ante* sector-specific regulation in the sense that *ex-post* antitrust rules will safeguard the competition in the markets.

> "However, sector regulatory authorities still will have a critical role to play, particularly given the dynamic role of the sector and the unsettled issues that new technologies may introduce into the regulatory environment. For example, in today's environment, regulators are grappling with how to address issues, such as; spam and consumer concerns regarding privacy, which were not issues of concern to regulators ten years ago. Moreover, sector-specific regulators need to maintain a prominent role to ensure the provision of universal service obligation and proper management and allocation of scarce resources (e.g. spectrum)."[486]

The liberalization of telecommunications observed in the United Kingdom in the early 1980s, became one of the main concerns of the European Commission in the late

[485] Öz-Aşçıoğlu, G. (2006). *"Regional experiences and lessons learnt in fostering competition in regulated sectors, focusing on the link between competition agencies and regulated bodies"*.
[486] http://www.ictregulationtoolkit.org//en/Section.1687.html

1980s. Starting with handsets in 1988 and progressively adding services until 1998, the EU liberalised all telecoms services by 1 January 1998.

Liberalization of the Turkish telecommunications sector is a recent event influenced by the developments in other countries, especially those in the European Union. Turkey's ongoing accession process to the EU has also accelerated the liberalization and privatization process in the previously monopolistic telecommunications markets. Full liberalization in Turkish telecommunications markets was completed six years later than the European Union.

TABLE 5- Comparison of the telecommunications market liberalization in the EU and Turkey.

<table>
<tr><td></td><td>1980-1998</td><td>1998</td><td>1999</td><td>2000</td><td>2001</td><td>2002</td><td>2003</td><td>2004</td><td>2005</td><td>2006</td><td>2007</td><td>2008</td></tr>
<tr><td>EU</td><td>Partial liberalization in certain segments</td><td colspan="6">Full liberalization

1998 Regulatory Framework</td><td colspan="4">Fully liberalized markets

2002 Regulatory Framework (RF)</td><td>Fully liberalized markets

Review of the 2002 RF</td></tr>
<tr><td>TR</td><td colspan="3">Partial liberalization in Certain segment

Main Laws: Law no.406
Law no.2813</td><td colspan="4">Partial liberalization in Certain segment

Establishment of TA

Main Laws:
Law no.406
Law no.2813
Law no.4502</td><td colspan="5">Full liberalization

End of Turk Telekom's monopoly power on fixed-line telephony services and infrastructure.

Law no.406, Law no.2813. Law no.4502 &Secondary Legislation issued by TA

Mixture of 1998 and 2002 EU Regulatory Framework.</td></tr>
</table>

EU regulatory approach is increasingly competition-oriented. The general trend is towards less detailed *ex-ante* regulation, for operators without market dominance, and

more *ex-post* checks.The aim is to reduce *ex-ante* sector-specific rules progressively as competition in the market develops. The main idea is that *ex-ante* sector-specific regulatory obligations should be imposed only on operators with SMP and in case of lack of competition in the relevant market. In other words, *ex-ante* regulation should always address structural competition problems. As electronic communications markets tend towards effective competition, existing regulations should be removed. Regulators should not intervene in markets in case of the existence of effective competition.

Turkish competition law and sector-specific telecomunications law are aligned with EU acquis at a large extent. Similar to the EU telecommunications regulatory framework, Turkish legislation lays down a range of obligations to be imposed on undertakings with significant market power in the relevant market. However, compared to the EU rules and practices, *ex-ante* sector-specific regulations are more widely used in Turkey. Given the short period of time passed after the liberalization and privatization in the Turkish telecommunications sector compared to EU, it is anticipated that as the competition in the markets matures, *ex-ante* remedies will be replaced by *ex-post* antitrust remedies as in the case of EU.

Appropriate regulation safeguards competition in the markets while creating certainty needed for the innovation, investment and growth in the sector. For this reason, as technology and market dynamics evolve so does the regulatory framework. Outdated provisions should be removed.

EU has been revising its regulatory framework at certain intervals in order to keep it updated. The last revision completed in November 2007 sends a strong *deregulatory* signal. Overall aim of the 2007 EU Reform Proposals is less but more effective and consistent regulation.

Turkey needs all-encompansing, robust, coherent regulatory framework to foster the competitiveness of the sector. However, Draft Electronic Communications Law has not been in the agenda of policy-makers for more than 2 years. Although Turkey's

'2007-2013 Program for Alignment with EU Acquis'[487] states that Draft Electronic Communications Law will be enacted in 2008, it does not seem realistic. Draft Law should be taken into agenda at the possible earliest time. However, the controversial Articles, especially those concerning the TA and CA relations, should be reconsidered before the enactment of the Draft Law.

Main concern of the EU is the lack of effective coordination and cooperation between Telecommunications Authority and Competition Authority. EU attributes considerable importance to the NRAs and NCAs in enhancing competition in national telecommunications markets. In this regards, cooperation between NRAs and NCAs are crucially essential. However, in Turkey, the level of collaboration between TA and CA is insufficient due to the ambiguity in the relevant law and protocol regarding the division of authority. The coordination and cooperation between TA and CA should be further improved in order to ensure that *ex-ante* and *ex-post* regulations better complement eachother. Their roles and responsibilities in the sector should be further clarified and their collaboration should be guaranteed through statutory measures.

Gamze Aşcıoğlu-Öz states in competition law terms that "No authority has the *monopoly* of good ideas, for more competitiveness in the markets competition authorities and the sectoral regulatory authorities should be acting in a *concerted practice.* Cooperation and consultation with Competition Authorities is an *essential facility* for the sectoral regulatory authorities…"[488]

To conclude, relying on the analysis of the Turkish regulatory framework in the light of EU law, this thesis aimed to shed some light on the design and implementation of sector-specific and competition rules and their respective roles in the post-liberalization and post-privatization period in order to ensure the better regulation of the telecommunications markets.

[487] Available at: www.abgs.gov.tr

[488] Öz-Aşçıoğlu, G. (2006). *"Regional experiences and lessons learnt in fostering competition in regulated sectors, focusing on the link between competition agencies and regulated bodies".*

BIBLIOGRAHY

Aslan, Y. (2006). *"Rekabet Hukuku Dersleri"*. Ekin Kitapevi: Bursa

Atasayar, K. (2007). *"Rekabet Savunuculuğu ve Rekabet Derneği"*. Rekabet Derneği: Rekabet Forumu-Hukuk-Ekonomi-Politika. Sayı: 36 Tarih: 20 Temmuz 2007. Available at: www.rekabetdernegi.org

Atiyas, İ. (2006). *"Competition and Regulation in the Turkish Telecommunications Industry"*. Report prepared within the framework of the FIAS/Competition Authority;/TOBB Project on "Competition Policy and the Improvement of Investment Environment in Turkey: Setoral/Institutional and Legal Framework". TEPAV/EPRİ, Matsa Printhouse: Ankara

Aybar, B., & Güney, S., & Süel, H."*Privatization and Regulation in Turkish Telecommunications, A Preliminary Assessment"*. Available at: Social Science Research Network www.ssrn.com (on May 2008)

Aydemir, D. (2008). *"Telekomünikasyon Sektöründe Evrensel Hizmet: Avrupa Birliği ve Türkiye'de Evrensel Hizmet Kapsamının Genişletilmesi Üzerine Bir İnceleme."* Ulaştırma Bakanlığı AB Uzmanlık Tezi.

Burnham, J. B. (2007).*"Telecommunications Policy in Turkey: Dismantling Barriers to Growth."* Telecommunications Policy, doi:10.1016/j.telpol.2007.01.007. Available online at www.sciencedirect.com

Cantürk, İ. (2005). *"Rekabet Ortamı ve Rekabet Kültürü Nasıl Sağlanır"*. Rekabet Derneği: Rekabet Haber Bülteni. Sayı: 10 Tarih: 20 Nisan 2005 Available at: www.rekabetdernegi.org

Cave, M. and Stumpfc, U. And Valletti, T. (2006). "*A Review of certain markets included in the Commission's Recommendation on Relevant Markets subject to ex-ante Regulation"*. An Independent Expert Report.

Competition Board Decision no.02-60/755-305 dated 2.10.2002 and Competition Board Decision no.06-02/47-8 dated 5.1.2006 concerning the assessment and reassessment of TTAS' abuse of dominant position in the markets for internet services and internet infrastructure

Competition Board's Decision no.03-40/432-186 dated 09.06.2003 on Essential Facility and National Roaming

Competition Board decision no. 07-59/676-235 dated 11.7.2007 concerning the TTNet 'Summer Storm Campaign'

Competition Board Decision no.04-57/797 dated 2.9.2004 concerning the privatization of at least 51 % share of the Turk Telekom

Competition Board Decision dated 19.10.2004, sent to the Saving Deposit Insurance Fund, concerning the tender for sale of Telsim Mobile Telecommunications Services Inc.

Cooperation Protocol between CA and TA dated 16.09.2002

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *"Report on the Outcome of the Review of the EU Regulatory Framework for Electronic Communications Networks and Services in accordance with Directive 2002/21/EC and Summary of the 2007 Reform Proposals"*. Brussels, 13.11.2007. COM(2007) 696 final

Commission of the European Communities. *Proposal for a* "*Regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority"*. Brussels, 13.11.2007 COM(2007) 699 final 2007/0249 (COD) {SEC(2007) 1472}. {SEC(2007) 1473}

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on *Market Reviews under the EU Regulatory Framework* (2nd report) Consolidating the Internal Market for Electronic Communications. COM(2007) 401 final of 11.7.2007

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Single Market for Citizens,* COM(2007) 60 final of 21.2.2007

Communications Committee, Working Document. *"Broadband access in the EU: situation at 1 July 2007"*. COCOM07-50 FINAL

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on *Market Reviews under the EU Regulatory Framework*, *Consolidating the Internal Market for Electronic Communications.* COM(2006) 28 final of 06.2.2006

Commission Staff Working Document Annex to the "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the *"European Electronic Communications Regulation and Markets 2006 (12th report)"* [COM(2007) 155], SEC (2007) 403

Commission Staff Working Document Public Consultation on a *Draft 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 of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services. Brussels, 28 June 2006 SEC(2006) 837

Commission Staff Working Document Communication from the Commission to the Council, the European Parliament, the Council, the European Economic and Social Committee and the Committee of the *Regions on the Review of the EU Regulatory Framework for Electronic Communications Networks and Services* {COM(2006) 334 final} *Impact Assessment*. Brussels, 28 June 2006 SEC(2006) 817

Commission Staff Working Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the *Review of the EU Regulatory Framework for Electronic Communications Networks and Services,* COM(2006) 334 final, SEC(2006) 816, 28 June 2006

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the *Review of the EU Regulatory Framework for Electronic Communications Networks and Services,* COM(2006) 334 final of 29.6.2006

Competition Policy Developments in Turkey. Annual Report on 2004. Avaibale at: http://www.rekabet.gov.tr/word/annual2004.doc (Available on May 2008)

Çakal, R. (1996). "*Doğal Tekellerde Özelleştirme ve Regülasyon"*. Ankara: DPT Uzmanlık Tezleri, Yayın No: DPT 2455. pp. 98-138 Available at: http://ekutup.dpt.gov.tr/(Available on May 2008)

Draft Electronic Communications Law Available at: http://www.tbmm.gov.tr/sirasayi/donem22/yil01/ss1057m.htm (Available on May 2008)

Efem, G. (2001). *"Rekabet Etiği"*. Rekabet Kurumu: Perşembe Konferansları. Mayıs 2001.

Erol, M. (2003). "*Doğal Tekellerin Düzenlenmesi ve Telekomünikasyon Sektöründe Düzenleyici Kurum"*. Ankara: DPT Uzmanlık Tezleri, Yayın No: DPT : 2680. pp. 52-152 Available at: http://ekutup.dpt.gov.tr/ (Available on May 2008)

Ersin, M. A. (Rekabet Kurulu Üyesi). *"Türkiye'de Rekabetin Kurumsallaşması ve Kurumsallaşma Sürecinde Rekabet Kurumu'nun Rolü"*. Presented on the 11. Anniversary Syposium. Available at: www.rekabet.gov.tr (Available on May 2008)

European Commission, DG Information Society and Media. Factsheet 64. *"Why Europe's Telecoms Reform concerns you…."*. 1 December 2007. Available at: http://ec.europa.eu/information_society/newsroom/cf/itemdetail.cfm?item_id=3781 (Available on May 2008)

European Commission, DG Information Society and Media. Factsheets. "*2007 EU Telecoms Reform #10. A more effective regulatory system"*. November 2007. Available at: http://ec.europa.eu/information_society/doc/factsheets/tr10-newarticle7.pdf (Available on May 2008)

European Commission, DG Information Society and Media. Factsheets. "*2007 EU Telecoms Reform #9 From 18 to 7 regulated markets"*. November 2007. Available at: http://ec.europa.eu/information_society/doc/factsheets/tr9-listofmarkets.pdf (Available on May 2008)

European Commission, DG Information Society and Media. "*Call for Input on the Forthcoming Review of the EU Regulatory Framework for Electronic Communications and Services including Review of the Recommendation on Relevant Markets"* Brussels, 25 November 2005

European Commission Communication. "*Towards a new framework for Electronic Communications infrastructure and associated services: The 1999 Communications Review"* COM (1999) 539 (unofficial version)

European Commission. *"Green Paper on the Convergence of the Telecommunıcatıons, Media and Information Technology Sectors, and the Implications for Regulation"* Brussels, 3 December 1997. COM(97)623

European Commission. *"Turkey 2007 Progress Report"*. {COM(2007) 663} Brussels, 6.11.2007. SEC(2007) 1436

European Commission. *"Turkey 2006 Progress Report"*. {COM (2006) 649 final} Brussels, 08.11.2006. SEC (2006) 1390

European Commission. *"Turkey 2005 Progress Report"*. {COM (2005) 561 final} Brussels, 9 November 2005 SEC (2005) 1426

EU-Turkey Screening Process, Chapter 10, Information Society and Media, Explanatory Screening 12-13 June 2006, Detailed Screening 13-14 July 2006. Presentations. Available at: www.abgs.gov.tr (Available on May 2008)

European Regulators Group advice in the context of the Review of the Regulatory Framework for Electronic Communications Networks and Services (pursuant to Articles 3 and 7 of Commission Decision 2002/627/EC, as amended by Commission Decision 2004/641/EC), in response to the letter by Commissioner Viviane Reding of 30 November 2006

Geradin, D. (2006). *"The liberalization of network industries in the European Union: Where do we come from and where do we go?"*. Economic Council of Finland, Prime Minister's Office. (Available at: www.vnk.fi/hankkeet/talousneuvosto/tyo-kokoukset/globalisaatioselvitys-9-2006/artikkelit/Geradin_06-09-20.pdf)

Geradin, D., Munoz, R. and Petit, N. (2005). *"Regulation through Agencies in the EU: A new Paradigm of European Governance."* Cheltenham, UK: Edwar Elgar Publishing Limited. Available at: Social Science Research Network: http://www.ssrn.com/

Geradin, D., Kerf, M. and Neto, I. (2005) *"Antitrust vs. Sector Specific Regulation in Telecom: The Impact on Competitiveness"*. Available at: Social Science Research Network: http://www.ssrn.com/

Geradin, D., Kerf, M. and Neto, I. (2005) *"Antitrust vs. Sector Specific Regulation in Telecom: What Works Best?"* Available at: Social Science Research Network: http://www.ssrn.com/

Geradin, D. and Kerf, M. (2003). *"Controlling Market Power in Telecommunications: Antitrust vs Sector-specific Regulation."* Oxford: Oxford University.

Geradin, D. and Sidak, J. G. (2003). *"European and American Approaches to Antitrust Remedies and the Institutional Design of Regulation in Telecommunications."* Available at: Social Science Research Network: http://www.ssrn.com/

Güçlü, S. (2006). *"RK, TT Özelleştirme Görüşü Dünya Literatüründe."* Avalable at: http://turk.internet.com/haber/yazigoster.php3?yaziid=14721 (Available on May 2008)

Gürzumar, O. B. (2006). *"Zorunlu Unsur Doktrinine Dayalı Sözleşme Yapma Yükümlülüğü."* Ankara: Seçkin Yayınevi.

Humphreys, P. and Simpson, S. (2005). *"Globalisation, Convergence and European Telecommunications Regulation."* Cheltenham, UK: Edwar Elgar Publishing Limited.

International Competition Network. Competition Policy Implementation Working Group Subgroup 3 Competition Advocacy in Regulated Sector (2005). "*Competition Advocacy Review Case Studies on Regulated Sectors."* Available at: http://www.internationalcompetitionnetwork.org

International Competition Network. (2002). *"Advocacy and Competition Policy."* Report prepared by the Advocacy Working Group ICN's Conference. Naples, Itlay, 2002. Available at: http://www.internationalcompetitionnetwork.org

Joint Statement of Viviane Reding (EU Telecom and Media Commissioner), and Roberto Viola (Chairman of the European Regulators Group-ERG) after their meeting on 27 February 2007 on the forthcoming reform of the EU's Regulatory Framework for Electronic Communications

Karabudak, H., B. (2006). *"Competition Policy and Regulated Markets: Experience of Turkey."* Seminar on Competition Provisions in Regional Trade Agreements: How to measure development gains organized by UNCTAD and Yeditepe University, Turkey with the support of IDRC, Canada 31 July – 01 August 2006

Kenneth, D. and Peter, H. (1990) "*The Political Economy of Communications: International and Europan Dimensions."* Routledge: London, New York. p.g. 1-33, 77-107, 229-243

Khemani, S., R. (2006). World Bank.*" Competitiveness, Investment Climate and Role of Competition Policy in Turkey."* Report prepared within the framework of the FIAS/Competition Authority;/TOBB Project on "Competition Policy and the Improvement of Investment Environment in Turkey: Setoral/Institutional and Legal Framework". TEPAV/EPRİ, Matsa Printhouse:Ankara

MEMO/07/458. *"The EU Telecoms Reform proposes a Single Market for 500 million consumers – Frequently Asked Questions."* Brussels, 13 November 2007

MEMO/06/257. *"The Review 2006 of the EU's regulatory framework for electronic communications: Frequently Asked Questions."* Brussels, 29 June 2006.

Nihoul, P. and Rodford, P. (2004). *"EU Electronic Communications Law: Competition and Regulation in the European Telecommunications Market."* Oxford: Oxford University Press

Odudu, O. (2006). *"The Boundaries of EC Competition Law: The Scope of Article 81."* Oxford: Oxford University Press

OECD. (2005). *"Turkey - Peer Review of Competition Law and Policy."* OECD Country Studies. Available at: www.oecd.org

OECD. (2005). *"Annual Report on Competition Policy Developments in Turkey 2004*." DAF/COMP(2005)18/20. Available at: www.oecd.org

OECD Reviews of Regulatory Reform. (2002).*"Regulatory Reform in Turkey: Regulatory Reform in the Telecommunications Industry."* Available at: www.oecd.org

Öz-Aşçıoğlu, G. (2007) *"Türkiye'de Rekabet Hukuku ve Politikası: Eğitim ve Öğretimi Üzerine Görüşler."* Rekabet Derneği: *Rekabet Forumu Hukuk-Ekonomi-Politika* Sayı:32/ Tarih: 20 Mart 2007

Öz-Aşçıoğlu, G. (2006). *"The Role of Competition Authorities and Sectoral Regulations: Regional Experiences."* Submitted to UNCTAD's Seventh Session of the Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 30 October to 2 November 2006. Available at: http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p17_en.pdf

Öz-Aşçıoğlu, G. (2006). *"Regional experiences and lessons learnt in fostering competition in regulated sectors, focusing on the link between competition agencies and regulated bodies."* Seminar on Competition Law and Policy in Latin America : addressing development priorities UNCTAD/ IDRC/ Getulıo Vargas Foundatıon Law School Sao Paulo Brazil, 30 November - 1 December 2006

Öz-Aşçıoğlu, G. *"Rekabet Politikası ve Türkiye'de Yatırım Ortamının İyileştirilmesi: Kurumsal ve Hukuki Çerçeve"*. Available at: http://www.tepav.org.tr/tur/admin/dosyabul/upload/TOBBPRESENTATION3.pps#256,1, Rekabet Politikası ve Türkiye'de Yatırım Ortamının İyileştirilmesi KURUMSAL VE HUKUKİ ÇERÇEVE Yrd.Doç.Dr. Gamze ÖZ (Available on May 2008)

Öz-Aşçıoğlu, G. (2005). *"Legal and Institutional Aspects of Competition Policy in Turkey and Its Impact on Invetsment."* Report prepared as part of a larger Project within the framework of the FIAS/Competition Authority/TEPAV Project on 'Competition Policy and the Impact of Investment Environment in Turkey: Sectoral/Institutional and Legal Framework. TEPAV/EPRİ, Matsa Printhouse:Ankara

Parlak, M. (2004). *"Avrupa Birliği Yolunda Telekomünikasyon Sektörü"*. IV. Telekomünikasyon Arenası Konuşma Metni. Available at: www.rekabet.gov.tr

Presentation by Feliksas Dobrovolskis, Deputy Director, Telecommunications Department RRT, Lithuanian Communications Regulatory Authority. "*Telecommunications market liberalization"*. Round table Telecommunications market: competition, investments and regulatory issues. Minsk, 25 May, 2004

Press Conference dated 03.04.2008 by Dr. Tayfun Acarer, Chairman of Telecommunications Board, ""The 2008 Work Plan and On-Going Activities of the TA. See: http://www.tk.gov.tr/Etkinlikler/Ulusal_Etkinlikler/basintoplantilari/2008/sunumlar/03_04_2008_basin_toplantisi_sunum.pps#429,1,Telekomünikasyon Kurumu 2008 İş Planı ve Sürdürülmekte Olan Faaliyetler (Available on April 2008)

Press Release. *"Commission proposes a single European Telecoms Market for 500 million consumers."* IP/07/1677 Brussels, 13 November 2007

Press Release. *"Commission acts to reduce telecoms regulation by 50% to focus on broadband competition."* IP/07/1678 Brussels, 13 November 2007

Press Releases. *"Electronic communications: the Article 7 procedure and the role of the Commission - Frequently Asked Questions."* MEMO/07/107 Brussels, 16 March 2007

Press Releases. "*The European Electronic Communications Regulation and Markets 11th Report – Frequently Asked Questions."* MEMO/06/84 Brussels, 20 February 2006

Press Release. *"Telecoms: Commission tables plans to boost competition among telecoms operators and build a single market for services that use radio spectrum."* IP/06/874 Brussels, 29 June 2006

Press Releases. *"Commission issues market power assessment Guidelines for electronic communications."* IP/02/1016 Brussels, 9 July 2002

Telecommunications Board Decision no.2006/DK-10/142 dated 21.2.2006 concerning Turk Telekom's significant market power.

Telecommunications Board Decision no.2005/880 dated 15.12.2005 concerning SMP of Turkcell, Telsim, and Avea (Official Gazette dated 15.12.2005)

Tekdemir, Y. (2003) *"AT Rekabet Hukukunda AnlaşmaYapmayı Reddetme Sorunu ve Zorunlu Unsur Doktrini: Anlaşma Yapma Yükümlülüğü ya da Sözleşme Serbestisinin Sınırları."* Rekabet Kurumu Uzmanlık Tezi

Telecom Reform Glossary. Available at: http://ec.europa.eu/information_society/newsroom/cf/itemdetail.cfm?item_id=3701 (Available on May 2008)

Telekomünikasyon Kurumu, 2006 yılı Faaliyet Raporu, http://www.tk.gov.tr/Yayin/Raporlar/pdf/fr2006tr.pdf

Telkoder. (2006). *"Report submitted to the European Commission."* http://www.telkoder.org.tr/1-report/mc_commission2006.doc (Accessed in 03.01.2008)

Treaty Establishing the European Community. Consolidated versions of the Treaty on European Union and of the Treaty Establishing the European Community. (OJ C 321E of 29 December 2006)

Turkey's 2007-2013 Program for Alignment with EU Acquis Available at: www.abgs.gov.tr (Available on May 2008)

Türkan, E. (2005). *"Rekabet Savunuculuğu ve Rekabet Enstitüsü İhtiyacı."* Rekabet Derneği: Rekabet Haber Bülteni. Sayı: 10 Tarih: 20 Nisan 2005 Available at: www.rekabetdernegi.org

Ulusoy, A. (2000 *)."Telekomünikasyon Alanındaki Son Yasal Düzenlemeler ve Uygulamaların Değerlendirilmesi."* Rekabet Kurumu. Perşembe Konferansları. Kasım-Aralık 2000. Avilable at: www.rekabet.gov.tr

Ulaştırma Bakanlığı. (2005). *"1995-2005 Ulaştırma ve Haberleşme."*

Ünver, M. B. (2004). *"Essential Facilities Doctrine under EC Competition Law and Particular Implications of the Doctrine for Telecommunications Sectors in EU and Turkey."* Master Thesis: Middle East Technical University.

Viviane Reding (Commissioner for Information Society and Media) Speech, *"Why Europe needs even more efficient telecommunications markets in order to be competitive"*. Second Business Roundtable with the European Commission, Brussels, 29 January 2008.

Viviane Reding (Commissioner for Information Society and Media) Speech, *"The EU Telecoms Reform 2007: Better, more consistent rules for effective competition and sustainable investment"* 8th Annual ECTA Regulatory Conference. Brussels, 28 November 2007. SPEECH/07/765

Viviane Reding (Commissioner for Information Society and Media) Speech,*"Europe's evolving single market for telecoms: the future challenges of cooperation between the European Commission and National Regulatory Authorities"*. Budapest, 26 November 2007. SPEECH/07/755

Viviane Reding (Commissioner for Information Society and Media) Speech,*"Better Regulation for a Single Market in Telecoms*". Plenary meeting of the European Regulators Group Athens, 11 October 2007

Viviane Reding (Commissioner for Information Society and Media) Speech, "*Europe's Telecommunications Market ahead of the Reform of the EU's Regulatory Framework"*. 13. Internationale Handelsblatt Jahrestagung "Telekommarkt Europa, Düsseldorf, 12 June 2007

Viviane Reding (Commissioner for Information Society and Media) Speech, Press Conference,"*12th Implementation Report – the EU Telecom Sector Before the Reform",* 29 March 2007

Viviane Reding (Commissioner for Information Society and Media) Speech, "*The Network Industries in the 21st Century: Regulating for Growth and Competition in the Internal Market"*. European Government Business Relations Council, Brussels, 5 March 2007

Viviane Reding (Commissioner for Information Society and Media) Speech, "From Service Competition to Infrastructure Competition: the Policy Options Now on the Table", ECTA Conference, Brussels, 16 November 2006

Viviane Reding (Commissioner for Information Society and Media) Speech, "The Review 2006 of EU Telecom rules: Strengthening Competition and Completing the Internal Market", Annual Meeting of BITKOM, Brussels, 27 June 2006, SPEECH/06/422

Walden, I. and Angel J. (2005). *"Telecommunications Law and Regulation."* Oxford: Oxford University Press.

Internet Sources:

http://ec.europa.eu/information_society/index_en.htm
http://ec.europa.eu/comm/competition/index_en.html
http://ec.europa.eu/enlargement/turkey/key_documents_en.htm
http://www.internationalcompetitionnetwork.org
http://www.ictregulationtoolkit.org/en/index.html
http://www.itu.int/net/home/index.aspx
http://www.itu.int/ITU-D/ICTEYE/Default.aspx
http://www.unctad.org
www.tk.gov.tr
www.rekabet.gov.tr
www.rekabetdernegi.org
www.oib.gov.tr
www.turktelekom.com.tr
www.abgs.gov.tr
www.ubak.gov.tr
www.basbakanlik.gov.tr
www.tbmm.gov.tr
www.dpt.gov.tr