

The Scope of Sector-specific Regulation in the European Regulatory Framework for Electronic Communications

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A. Introduction

The European Community's (EC) regulatory framework for electronic communications contains many detailed and complicated regulations with regard to the content of sector-specific regulation in the field of telecommunications. Remarkably, though, it is rather reticent concerning the question which markets shall be subject to sector-specific regulation. In the ongoing process of transposition, this has caused much confusion and misunderstanding. This article therefore, strives to clarify the mechanism for determining which markets are, at least potentially, subject to sector-specific regulation provided by the Framework Directive¹ (sub B.). At the national level, a draft of the German Telecommunications Act has been presented by legal experts of the Federal Ministry of Economics and Labour on April 30th, 2003 (Draft German Telecommunications Act), and the subsequent Federal Government's draft act was published on October 15th, 2003 (Revised Draft German Telecommunications Act).² These drafts may serve as an example of bringing sec-

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¹ 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), 2002 O.J. (L108/33), hereinafter referred to as "Framework Directive."

²Both drafts are available for download from the WWW at <<http://www.tkrecht.de/index.php4?direktmodus=novelle-genese>>.

tor-specific regulation in line with general insights of competition policy within the discretionary scope left by the regulatory framework of the EC (sub C.).

B. The Determination of Markets Justifying Sector-Specific Regulation

With regard to the question of whether sector-specific regulation has to take place at the Member State level, EC telecommunications law establishes two different procedures: the market definition procedure (Article 15 of the Framework Directive) and the market analysis procedure (Article 16 of the Framework Directive). Although these two procedures are closely connected – both in a timely and material way – they are strictly separate at the normative level.

First, the “relevant markets” are defined in the course of the market definition procedure.³ Only the relevant markets are then subject to a market analysis according to the procedure laid down in Article 16 (1) of the Framework Directive. If the market analysis shows that such a relevant market is not effectively competitive, measures of sector-specific regulation must be taken with regard to this market.⁴ However, even in the case of these markets, sector-specific obligations (as referred to by Article 16 [2]) are only imposed on undertakings with significant market power (SMP).⁵ As a consequence it can be concluded that, according to EC telecommunications law, there are four procedural steps that must be made at the national level before measures of sector-specific regulation are taken:

- market definition
- market analysis
- examination whether a market is effectively competitive
- determination whether there are SMP undertakings

However, it is still not clear which step determines the scope of sector-specific regulation – and whether such a clear distinction is possible at all. Thus, the last three procedural steps deserve attention for a first analysis.

I. *The Market Analysis Procedure (Article 16 of the Framework Directive)*

A closer look at Article 16 (1) of the Framework Directive reveals that the provision does not permit national regulatory authorities (NRAs) to decide whether measures of sector-specific regulation are to be taken. Article 16 (1) simply states that NRAs

³Framework Directive, *supra* note 1, at Article 15 (3).

⁴*Id.* at Article 16 (2)-(4).

⁵*Id.*, at Article 16 (4).

have to carry out an analysis of the relevant markets, that is, the markets defined by the procedure laid down in Article 15 (3). According to Article 16 (2), the “market analysis referred to in paragraph 1” serves as the basis for determining “whether a relevant market is effectively competitive”. Thus, with regard to sector-specific regulation (in the sense of Article 16 (2)) this question must be answered for each relevant market – and therefore for all markets that are defined within the market definition procedure according to Article 15 (3).

The market analysis as laid down in Article 16 (1) – the market analysis procedure in the narrower sense – therefore, has a merely supportive function. In the context of the four procedural steps identified above, it does not constitute a procedural level at which the number of markets that may be subject to sector-specific regulation can be reduced or increased. The market analysis only provides the necessary data for examining whether the market is effectively competitive. Therefore, both procedural steps can be combined as the market analysis procedure in the broader sense.⁶ The market analysis procedure in the narrower sense does not directly influence the scope of sector-specific regulation. Thus, the procedural steps that lead to the imposition of sector-specific obligations may be reduced to three:

- market definition
- market analysis procedure in the broader sense: examination of whether the market is effectively competitive
- determination of whether there are SMP undertakings

Although the market analysis procedure in the narrower sense lacks an autonomous function in this respect, the Framework Directive thus still seems to offer several levels where a decision on the scope of sector-specific regulation can be taken. However, Recital 27 of the directive helps to tighten further the description of the process. According to the first sentence, a market is not effectively competitive where there are one or more SMP undertakings in that market. Recitals of regulations, directives, or decisions are of the utmost importance for interpreting expressions used within the respective legal instrument.⁷ Therefore, the so-called

⁶C. HUPPERTZ, DIE SMP-KONZEPTION 210 (2003), calls the examination whether the market is effectively competitive – that is, Article 16 (2) of the Framework Directive – the “actual market analysis”.

⁷Casa Fleischhandels-GmbH v. Bundesanstalt für landwirtschaftliche Marktordnung, 1989 E.C.R. 2789 (2808), para. 31; J.-D. Braun/R. Capito, “The Framework Directive”, in, EC COMPETITION AND TELECOMMUNICATIONS LAW 309 (C. Koenig et al. eds., 2002) ; J. Gaster, *Zur anstehenden Umsetzung der EG-Datenbankrichtlinie (II)*, 1997 COMPUTER UND RECHT 717, 719); C. Koenig & A. Neumann, *Gemeinsame Infrastrukturnutzung beim Aufbau eines UMTS-Netzwerks und das Gebot ‘Wettbewerblicher Unabhängigkeit’*, 2001 KOMMUNIKATION & RECHT 281 (288); B. Wegener in KOMMENTAR ZU EU-VERTRAG UND EG-VERTRAG 220 EC, para. 14 (2nd ed., C. Calliess & M. Ruffert eds., 2002), Article. See also E. Röder-Messell, *Alkohol-Freiheit – wesentlicher Aspekt der Warenverkehrsfreiheit auch im Europäischen Wirtschaftsraum*, INFESTISCHRIFT FÜR CHRISTIAN CELSEN 28 (A. Koch & A. Neumann eds., 2001).

equivalence hypothesis⁸ applies at least with regard to Article 16 of the Framework Directive.⁹ On one hand, the question of whether a market is not effectively competitive is identical to the question whether there are one or more SMP undertakings; on the other, a market is effectively competitive when there are no SMP undertakings.¹⁰ At least in theory,¹¹ determining whether there are or are not SMP undertakings in a market must be distinguished from identifying them. However, SMP undertakings only have to be identified in order to determine on *whom* sector-specific obligations are to be imposed. The identity of SMP undertakings is of no relevance to the question *whether* measures of sector-specific regulation have to be taken at all because, insofar, there is no discretion at the national level: NRAs *have* to impose at least one sector-specific obligation on undertakings with SMP in a relevant market that has been subject to a market analysis.¹²

⁸See C. KOENIG ET AL., FUNKTIONSFÄHIGER WETTBEWERB AUF DEN TELEKOMMUNIKATIONSMÄRKTEN 120 (2002); I. Vogelsang et al., 'Workable Competition' in *Telecommunications Markets – The Example of Germany*, 2003 C.T.L.R. 68 (71).

⁹See also R. Capito & M. Elspaß, *Die Auswahl des Betreibers und der neue Rechtsrahmen der Europäischen Gemeinschaft für die Märkte der elektronischen Kommunikation*, [2003] KOMMUNIKATION & RECHT 110 (114); C. Huppertz, *supra* note 6, at 219; C. Koenig, *supra* note 8, at 162; I. Vogelsang, *supra* note 8, at 73; R. SCHÜTZ ET AL., ELEKTRONISCHE KOMMUNIKATION 45 (2003); R. Klotz, *Die neuen EU-Richtlinien über elektronische Kommunikation: Annäherung der sektorspezifischen Regulierung an das allgemeine Kartellrecht*, 2003 1 SUPPLEMENT TO KOMMUNIKATION & RECHT 3 (7 note 48), incorrectly assumes that a different view was held by C. Koenig *et al.*

¹⁰R. Capito & M. Elspaß, *supra* note 9, at 114; S. FARR & V. OAKLEY, EU COMMUNICATIONS LAW 69 (2002); C. Huppertz, *supra* note 6, at 212. This does not necessarily comply with other uses of the term "effective competition" in the Community's body of law. Such uses are analysed, *inter alia*, by J.-D. Braun & R. Capito, *supra* note 7, at 323.

¹¹See also A. Bartosch, *Europäisches Telekommunikationsrecht in den Jahren 2000 und 2001*, 2002 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 389 (393), in practice, the market analysis would directly and only aim to identify SMP undertakings.

¹²Framework Directive, *supra* note 1, at Article 16 (4). See also Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, 2002 O.J. (C 165/6) ("Guidelines"), at para. 114. Cf. M. Cave & L. Prosperetti, *European Telecommunications Infrastructures*, 17 (3) OXFORD REV. OF ECON. POLICY 416,428 2001; R. Klotz, *supra* note 9, at 7; C. KOENIG ET AL., DIE NOVELLIERUNG DES TELEKOMMUNIKATIONSGESETZES 13 (2003); C. Koenig et al., *supra* note 8, at note 583; J. Scherer, *Die Umgestaltung des europäischen und deutschen Telekommunikationsrechts durch das EU-Richtlinienpaket – Teil I*, [2002] KOMMUNIKATION & RECHT 273 (286). A different view is held by C. Huppertz, *supra* note 6, at 239; U. Immenga & C. Kirchner, *Zur Neugestaltung des deutschen Telekommunikationsrechts*, 2002 TELEKOMMUNIKATIONS- & MEDIENRECHT 340 (355).

Therefore, in the remaining procedural steps, the decision of whether measures of sector-specific regulation must be taken depends only on the existence of SMP undertakings. Thus, the number of procedural steps used to identify those markets that are subject to sector-specific regulation may be reduced from the four steps initially identified to two:

- market definition
- market analysis procedure in the broader sense: examination of whether the market is effectively competitive, that is, whether there are no SMP undertakings in that market

If the market analysis procedure (in the broader sense) determined the scope of sector-specific regulation, markets would remain subject to such regulation until they become effectively competitive. Because of the equivalence hypothesis, this would have the consequence that under effective competition no undertaking has significant market power. Apart from certain methodological adjustments regarding the way market power is assessed, the concept of significant market power described in Article 14 is in line with the concept of dominance under Article 82 of the Treaty.¹³ If the market analysis procedure (in the broader sense) was the stage at which the scope of sector-specific regulation was determined, deregulation would only take place where no dominant undertaking could be found in the market.¹⁴

However, proactively¹⁵ removing positions of dominance is in sharp contrast with the principles of competition law. General competition law explicitly accepts existing dominant positions and only prohibits their abuse.¹⁶ Assuming that the competitive goal of EC telecommunications law is the creation of effective competition

¹³Recital 25 of the Framework Directive. See also Guidelines, *supra* note 12, at para. 70; A. Bartosch, *supra* note 11, at 391; J.-D. Braun & R. Capito, *supra* note 7, at 313; S. Farr & V. Oakley, *supra* note 10, at 70; C. Huppertz, *supra* note 6, at 195; U. Immenga, *Europäisierung des Telekommunikationsrechts: Eine neue Dimension*, 2002 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 673 (673); U. Immenga & C. Kirchner, *supra* note 12, at 343; R. Klotz, *Wettbewerb in der Telekommunikation: Brauchen wir die ex-ante-Regulierung noch?*, 2003 ZEITSCHRIFT FÜR WETTBEWERBSRECHT 283 (292); P. Oberndörfer, *Die Zugangsverpflichtungen von nicht marktbeherrschenden Mobilfunknetzbetreibern nach dem Referentenentwurf zur Novelle des TKG*, 2003 ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT 654 (655).

¹⁴C. Koenig et al., *supra* note 8, at 161.

¹⁵Merger control, in principle, aims to prevent the creation of a position of dominance, see J.-D. Braun & R. Capito, *supra* note 7, at 332, with further references. See also C. Koenig et al., *supra* note 8, at note 607.

¹⁶See also J. Basedow, *Dienstleistungsmonopole und Netzzugang in der europäischen Wirtschaftsverfassung*, 1997 16 JAHRBUCH FÜR NEUE POLITISCHE ÖKONOMIE 121 (126); C. Koenig & S. Loetz, *Bedeutung der Essential facilities-Doktrin für den Zugang zu Netzinfrastrukturen im europäischen Telekommunikationsrecht*, 2000 EUROPÄISCHES WIRTSCHAFTS- & STEUERRECHT 377 (381); C. Koenig et al., *supra* note 8, at 161, with further references *ibid*, at note 604.

(in the sense of Article 16 of the Framework Directive), it would therefore be at odds with the principles of general competition law.¹⁷ This outcome appears particularly dubious since the Community legislator wanted to further align EC telecommunications law with the concepts of general competition law.¹⁸ From an economic standpoint it makes sense to accept market dominance if the anti-competitive effects of the dominant position are compensated¹⁹ by heightened productive efficiency, dynamic adjustment, and innovation.²⁰ This trade-off is of practical relevance especially in dynamic markets with high economies of scale.²¹ Many telecommunications markets are typically dynamic markets with high economies of scale.²² Thus, from an economic point of view, deviation from the principles of general competition law can hardly be justified just for these markets.

Furthermore, the teleologic insufficiency of such a regulatory approach becomes evident when its supposed goal is achieved: As soon as the position of dominance is removed, the market would be effectively competitive, thus leading to the withdrawal of sector-specific obligations. Because the market would then be subject to general competition law only, the dominant position can readily be restored. If this happens, competition in the respective market would not be effective anymore, and that market would again be subject to sector-specific regulation. Assuming the

¹⁷C. Koenig et al., *supra* note 8, at 16. See also J.-D. Braun & R. Capito, *supra* note 7), at 332. Therefore, some statements in the Market Recommendation seem to be rather questionable, see, for example, its fifteenth recital which implicates that “restoring effective competition” is a goal of sector-specific regulation; the same holds true with regard to the reference to a tendency “towards effective competition” in the ninth recital of the recommendation. See also European Commission, *Explanatory Memorandum* (2003), at p. 15 (“A key aim of the ... regulatory framework is to enhance user and consumer benefits ... by promoting and ensuring effective competition.” emphasis added). The Explanatory Memorandum can be downloaded at http://europa.eu.int/information_society/topics/telecoms/regulatory/maindocs/documents/explan_memoen.pdf.

¹⁸See R. Klotz, *supra* note 9, at 3; *idem*, *supra* note 13, at 291; P. Oberndörfer, *supra* note 13, at 654.

¹⁹The more serious the market dominance is, the more difficult will this compensation be, see C. Koenig et al., *supra* note 8, at 204; I. Vogelsang et al., *supra* note 8, at 69-70.

²⁰C. Koenig et al., *supra* note 8, at 56 and 61; I. Vogelsang et al., *supra* note 8, at 69; I. Vogelsang, *Ökonomische Aspekte des Referentenentwurfs zum TKG*, 2003 MULTIMEDIA UND RECHT 509 (509). See also U. Immenga & C. Kirchner, *supra* note 12, at 355. A different view seems to be held by R. Schütz et al., *supra* note 9, at 45.

²¹See, e.g., I. Vogelsang et al., *supra* note 8, at note 16, with regard to economies of scale.

²²C. Koenig et al., *supra* note 8, at 90; I. Vogelsang et al., *supra* note 8, at 70.

Framework Directive ultimately aims to create effective competition (in the sense of its Article 16) there would be never-ending yo-yo regulation.²³

Therefore, the lack of effective competition, that is, the existence of at least one undertaking in a dominant position, may only be a trigger criterion for measures of sector-specific regulation,²⁴ just as it has been in German telecommunications law until now.²⁵ To put it another way: The lack of effective competition is a necessary criterion for imposing sector-specific obligations, but it is not sufficient to determine the markets that are subject to such a regulation. Therefore, why such a criterion is of relevance in a specific market, that is, why this market may be subject to sector-specific regulation, has to be determined on a different level: the (only remaining) market definition procedure.²⁶

II. *The Market Definition Procedure (Article 15 of the Framework Directive)*

Consequentially, the market definition procedure outlined in Article 15 of the Framework Directive gets into the focus of the analysis. This procedure also consists of different procedural steps. However, in this case it leads to integration of the Community level into the decision making process at the Member State level. For the purpose of this article, the guidelines for market analysis and the assessment of significant market power,²⁷ and any (future) decisions identifying transnational markets²⁸ may subsequently be left aside. This leads to the following process: a) the adoption of a recommendation on relevant product and service markets (Market Recommendation) by the Commission according to Article 15 (1) Subpara-

²³See also C. Kirchner, *Europäische Regulierung der Telekommunikationsmärkte – Gemeinschaftsrechtliche Regulierung von elektronischen Kommunikationsnetzen und -diensten*, in U. Immenga et al., *TELEKOMMUNIKATION IM WETTBEWERB* 129 (2001); R. Klotz, *supra* note 13, at 286, who rightly points out that sector-specific regulation should aim to achieve a durable self-sustaining competition.

²⁴R. Klotz, *Der Referentenentwurf zum TKG im Lichte der europarechtlichen Vorgaben*, 2003 *MULTIMEDIA UND RECHT* 495 (497).

²⁵C. Koenig & J. Kühling, *Reformansätze des deutschen Telekommunikationsrechts in rechtsvergleichender Perspektive*, 2001 *MULTIMEDIA UND RECHT* 80 (85); C. Koenig et al., *supra* note 8, at 128, with further references *ibid*, at note 450.

²⁶In similar vein C. Huppertz, *supra* note 6, at 191 and 196.

²⁷Framework Directive, *supra* note 1, at Article 15 (2).

²⁸*Id.* at Article 15 (4).

graph 1 Sentence 1 of the Framework Directive²⁹ and b) the definition of the relevant markets by the NRAs while taking the utmost account of the Market Recommendation according to Article 15 (3) Sentence 1.

Therefore, Article 15 (3) Sentence 1 provides the link between the two procedural levels. The Market Recommendation only has an indirect effect, in that NRAs have to take the utmost account of it when defining the relevant markets. Beyond that, the market analysis as laid down in Article 16 (1) is only chronologically, not logically linked to the Market Recommendation (“as soon as possible after the adoption of the recommendation or any updating thereof”). Therefore, in contrast to many dissenting claims,³⁰ the Framework Directive does not provide for automatism with regard to the Market Recommendation on one hand and the market analysis on the other: According to Community law, a market analysis in the sense of Article 16 (1) is consequently not mandatory for the markets that have been defined in the Market Recommendation. This outcome is also in line with the use of the phrase “relevant markets” that is also used in Article 16 (1) Sentence 1 in the wording of Article 15 (1) Subparagraph 1:

Whereas the recommendation shall be “on relevant product and service markets” (Sentence 1), the adjective “relevant” is missing in the rest of the provision. Therefore, although the recommendation deals with the relevant markets – mediated by Article 15 (3) Sentence 1–, it does not define these *relevant* markets itself, but only (from a more abstract point of view) “those product and service markets ... , the characteristics of which may be such as to justify the imposition of regulatory obligations set out in the Specific Directives”.

However, even if these findings could be ignored and a direct (logical) link between the Market Recommendation and the scope of the market analysis outlined in Article 16 (1) could be assumed, Community law still would not require a market analysis for each market defined in the Market Recommendation. This is because even under the given assumptions, the legal status of recommendations would have to be kept in mind. In contrast to the decision identifying transnational markets³¹, the Market Recommendation has, like all recommendations, as such no bind-

²⁹Commission 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, 2003 O.J. (L 114/45), hereinafter referred to as “Market Recommendation”.

³⁰See, e.g., S. Farr & V. Oakley, *supra* note 10, at 13.

³¹Framework Directive, *supra* note 1, at Article 15 (4).

ing force.³² Member States' authorities and courts only have to take recommendations into consideration because of Article 10 of the EC Treaty.³³ This applies in particular where recommendations cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions,³⁴ whereas the latter should also apply in the case of the Market Recommendation. Member States' duty to take recommendations into *consideration* lags even behind the duty to take the *utmost account* of it for the purpose of the market definition at the national level according to Article 15 (3) Sentence 1. Although this provision is obviously oriented towards the European Court of Justice's judgement in Grimaldi,^{35 36} it explicitly goes beyond it in this regard.

By analogy, when a statement is made it is taken into account when the person that must do so pays attention to it and includes it into his or her decision making process and, if necessary, justifies his or her dissenting decision to the person who made the statement.³⁷ If the law requires that the *utmost* account must be taken, particular importance needs to be attached to the relevant statement.³⁸ Nevertheless, it is not impossible to deviate from the statement.³⁹ The person who has to take (the utmost)

³²See Article 249 (5) of the EC Treaty. Cf. C. Huppertz, *supra* note 6, at 193; G. Husch et al., *Die Umsetzung des EU-Rechtsrahmens für elektronische Kommunikation: Ein erster Überblick*, 2003 MULTIMEDIA UND RECHT 139 (141); R. Klotz, *supra* note 13, at 290. See also H. A. Cosma & R. Whish, *Soft Law in the Field of EU Competition Policy*, 2003 EBLR 25 (37 and 48), for a discussion of recommendations as form of "soft law".

³³J.-D. Braun & R. Capito, *supra* note 7, at 346; C. KOENIG & A. HARATSCH, *EUROPARECHT* 102 (4th ed., 2003). The binding force that constitutes the Member States' duty to take recommendations into consideration therefore stems from Article 10 of the EC Treaty and not from the recommendation; the contents of the recommendation are in no way binding.

³⁴Salvatore Grimaldi v. Fonds des Maladies Professionnelles, 1989 E.C.R. 4407 (4421), para. 18. See also H. A. Cosma & R. Whish, *supra* note 32, at 48. Note quite accurate insofar A. Bartosch, *supra* note 11, at 392, according to whom the ECJ had ruled that national authorities were not only to take recommendations into account but also to "follow them".

³⁵See *supra* note 34.

³⁶J.-D. Braun & R. Capito, *supra* note 7, at 346.

³⁷C. Koenig/S. Loetz/A. Neumann, *supra* note 12, at 26.

³⁸See C. Koenig et al., *supra* note 12), at note 68, with regard to a similar provision in the German constitution. A more far-reaching view seems to be held by K.-H. Ladeur, *Europäisches Telekommunikationsrecht im Jahre 2001*, [2002] KOMMUNIKATION & RECHT 110 (113).

³⁹J. Scherer, *supra* note 12, at 281 (with regard to Article 7 [5] of the Framework Directive).

account of the statement retains the competence for the ultimate decision.⁴⁰ For the interpretation of Article 15 (3) Sentence 1, this means that by defining the relevant markets, NRAs have to include the Market Recommendation into their decision-making processes and attach particular importance to it. Nonetheless, this also means that Community law allows NRAs to deviate from the recommendation when there are sufficiently important reasons⁴¹ for such deviation.⁴² This includes the possibility to abstain from carrying out an analysis according to Article 16 of all of the markets that are identified in the Market Recommendation.⁴³

However, the situation becomes even more complex by looking at other harmonisation mechanisms provided by the Framework Directive. According to a popular view, the consolidation procedure as outlined in Article 7 has to be applied only when *additional* markets are defined.⁴⁴ On the basis of this view, there would be a loophole within the regulatory framework. Whether this interpretation is accurate at all; whether an analogy to Article 7 could be considered; whether such cases could be adequately handled with regard to a possible withdrawal of sector-specific obligations; whether this could open up sensible discretionary scope for NRAs; or whether it is a loophole that simply cannot be closed and whose legality can only be questioned by the Commission by means of an infringement procedure before the European Court of Justice, just like the refusal of a NRA to impose sector-specific obligations on an undertaking with SMP in a relevant market, are questions that cannot be answered within this article. In any case, the fact remains that the Market Recommendation is not legally binding for the NRAs, even not under Article 15 (3) Sentence 1.

⁴⁰C. Huppertz, *supra* note 6, at 290 (with regard to Article 7 [5] of the Framework Directive).

⁴¹See R. Klotz, *supra* note 9, at 6 (an economically and legally sound substantiation is required).

⁴²*Id.* at 5 (NRAs may deviate from the Market Recommendation both by defining additional markets and by abstaining from defining certain markets). However, see also B. Holznagel, *EU-Rahmenrichtlinien und Diskussion um das TKG in Deutschland – Das Anforderungsspektrum an die Novellierung im Überblick, in NOVELLIERUNG DES TELEKOMMUNIKATIONSGESETZES 9* (A. Picot ed., 2003); R. Klotz, *supra* note 24, at 496, who concludes that the Market Recommendation is “factually binding” because NRAs have to take the utmost account of it.

⁴³P. Knauth, *Der Referentenentwurf des Bundesministeriums für Wirtschaft und Arbeit zur TKG-Novelle*, in A. Picot, *supra* note 42, at 29 (36). A different view seems to be held in the Guidelines, at para. 4 (“the markets to be regulated”) (emphasis added).

⁴⁴See, e.g., S. Farr & V. Oakley, *supra* note 10, at 80.

III. *Criteria for the Definition of Relevant Markets*

However, it still has to be determined which criteria NRAs have to consider when defining markets on the basis of Article 15 (3) Sentence 1, that is, why there is the need for sector-specific regulation in a certain market. Three interpretations are possible: First, the definition of the relevant markets is simply an ordinary market definition in the sense of general competition law.

NRAs are completely free in defining the relevant markets; second, the definition of the relevant markets is guided by substantive criteria, or, third, the first alternative seems to be supported by the wording that the definition of the relevant markets should be carried out "in accordance with the principles of competition law."⁴⁵

However, if the first alternative were the accurate interpretation, all existing telecommunications markets would be relevant markets in the sense of the articles of the Framework Directive and would thus be subject to a market analysis according to Article 16 (1). As a consequence, it would again depend on the existence of SMP alone to determine the scope of sector-specific regulation. It has already been shown⁴⁶ that such an interpretation would not only seem teleologically questionable, but that it would also not be in compliance with the systematics of the Framework Directive and thus must be rejected. The serious practical consequences of such an interpretation for the resources of the NRAs, if they really were to carry out an analysis for every existing telecommunications market, shall only be highlighted as an additional point.

The second alternative would leave it to possibly arbitrary decisions of the NRAs to determine the scope of sector-specific regulation. Under German constitutional law, the lawfulness of such far-reaching discretionary power would at least be questionable.⁴⁷ But also from the perspective of Community law, it would seem rather un-systematic if the regulatory framework set up detailed criteria for the determination of SMP,⁴⁸ but failed to give criteria for the determination of the scope of sector-specific regulation, that is, of the markets with regard to which such a determina-

⁴⁵Framework Directive, *supra* note 1, at Article 15 (3) Sentence 1.

⁴⁶See above, B. I.

⁴⁷See C. Koenig et al., *supra* note 12, at 60, for an in-depth discussion of the principle of clarity and definiteness and related constitutional law requirements.

⁴⁸Article 14 read in conjunction with Annex II of the Framework Directive.

tion of SMP has to take place.⁴⁹ This is also reflected by Article 15 (1) Subparagraph 1 Sentence 2. This provision expresses the need for certain substantive criteria when it distinguishes between some product and service markets in the telecommunications sector “the characteristics of which may be such as to justify the imposition of regulatory obligations set out in the Specific Directives” on one hand, and the rest of the telecommunications markets on the other.

The Framework Directive contains only rudimentary indications on such criteria.⁵⁰ Only two clues can be found that, upon closer analysis, are two sides of the same coin: First, there is the passage from Article 15 (1) Subsection 1 Sentence 2, that was quoted above according to which the characteristics of some markets may be such as to justify sector-specific regulation. And second, the first sentence of Recital 27⁵¹ of the directive says that sector-specific regulatory obligations should only be imposed “where national and Community competition law remedies are not sufficient to address the problem” (and where there is not effective competition, which is relevant for Article 16).⁵² In a nutshell, the Framework Directive itself determines

⁴⁹See C. Huppertz, *supra* note 6, at 196, who explicitly identifies the need for substantive criteria as well. See also R. Krüger, *Marktabgrenzung im Telekommunikationssektor und die Definition von beträchtlicher Marktmacht (SMP)*, 2003 1 SUPPLEMENT TO KOMMUNIKATION & RECHT 9 (17).

⁵⁰C. Franzius, *Strukturmodelle des europäischen Telekommunikationsrechts*, [2002] EUROPARECHT 660 (684); C. Huppertz, *supra* note 6, at 200 and 203. This is the reason why immediately after the Framework Directive entered into force and before the Market Recommendation was drafted many legal writers, including the authors, assumed that the existence or lack of effective competition was to be the determinant for future sector-specific regulation, see, for example e.g., J.-D. Braun & R. Capito, *supra* note 7, at 320 (“To regulate or not to regulate, that is the question.”); U. Immenga & C. Kirchner, *supra* note 12, at 343; C. Koenig et al., *supra* note 8, at 157.

⁵¹C. Huppertz, *supra* note 6, at 203; R. Krüger, *supra* note 49, at note 61, also refer to Recital 27 with regard to the identification of substantive criteria for the purpose of defining markets that may be subject to sector-specific regulation. A similar view seems to be held by G. Husch et al., *supra* note 32, at 141.

⁵²This sentence cannot be assigned clearly to either Article 15 or Article 16 of the Framework Directive. Whereas the mention of “effective competition” obviously refers to Article 16, it is not clear to which provision the statement concerning the application of general competition law refers to. On the one hand, Article 16 of the Framework Directive deals in its third and fourth paragraph with the imposition of *ex ante* obligations. Therefore, the beginning of the sentence (“it is essential that *ex ante* obligations should only be imposed”) points to this provision, see, e.g., (implicitly) C. Kirchner, *STELLUNGNAHME ZUM TKG-REFERENTENTWURF (REFE) 4* (2003); U. Immenga & C. Kirchner, *supra* note 12, at 355. On the other hand, there are also strong arguments for an assignment to Article 15. First, the beginning of the sentence does not stand in the way of such an interpretation because *ex ante* obligations are also not imposed where there is no definition of a relevant market according to Article 15. Second, Recital 26 of the Framework Directive refers to Article 14 of the directive. If Recital 27 would really refer only to Article 16, there would be no recital with regard to Article 15 – a rather questionable outcome in the light of the great importance of this provision. Furthermore, the second sentence of Recital 27 clearly refers to (the second paragraph of) Article 15 of the Framework Directive and not to Article 16 alone. Third, if the statement concerning the application of general competition law would refer to Article 16, there would

the scope of sector-specific regulation only according to the necessity for sector-specific regulation. Therefore, the Framework Directive suffers from a severe teleologic shortcoming.

However, this shortcoming is compensated by the Market Recommendation, which provides three criteria for the definition of relevant markets that may be subject to sector-specific regulation:⁵³

There are high and non-transitory entry barriers whether of structural, legal or regulatory nature.

These entry barriers are not expected to be overcome within a foreseeable period of time or compensated by either market characteristics or structural factors behind the barriers of entry. The application of competition law alone would not adequately address the market failure(s) concerned (i. e. that is the existence of entry barriers⁵⁴).

The Commission has recourse to these three criteria when identifying the markets listed in the recommendation.⁵⁵ Furthermore, they should also be satisfied when a NRA identifies markets that differ from those of the Market Recommendation.⁵⁶

This supplementary function of the Market Recommendation with regard to the substantive criteria for the determination of relevant markets is not evident from

be no way to take this statement into account because Article 16 does not allow to make the imposition of obligations dependent on the question whether general competition law remedies are or are not sufficient, *see* C. Koenig et al., *supra* note 12, at 14; C. Koenig et al., *supra* note 8, at 159. It therefore has to be concluded that the reference to general competition law either refers to Article 15 – like assumed within the article – or has no effect at all. C. Huppertz, *supra* note 6, at 237, also assigns the statement concerning the application of general competition law to the market definition procedure; however, she justifies her interpretation by means of the Market Recommendation alone, which seems rather questionable with regard to the hierarchy order amongst the directive and the recommendation, because it implies that the Commission could decide which outcome is in compliance with the Framework Directive.

⁵³Recital 9 of the Market Recommendation.

⁵⁴It is not quite clear whether this third criteria aims only at a removal of the entry barriers. However, with regard to the internal systematics of Recital 9 of the Market Recommendation, it seems safe to assume that, at least, all criteria deal with the problems for competition which arise because of the existence of entry barriers, *see also* R. Klotz, *supra* note 13, at 314. In similar vein C. Huppertz, *supra* note 6, at 205.

⁵⁵Recitals 9 and 16 of the Market Recommendation.

⁵⁶Recital 19 of the Market Recommendation; European Commission, *supra* note 17, at 12; R. Klotz, *supra* note 24, at 497. A different view seems to be held by C. Huppertz, *supra* note 6, at 206; R. Schütz et al., *supra* note 9, at 49 (with regard to market definitions at the national level, NRAs should have recourse to the Guidelines, not to the criteria set out in the Market Recommendation).

Article 15 (1) Subparagraph 1. This provision further specifies the content of the Market Definition only with regard to the definition of certain markets, but not to the abstract criteria for such a definition. However, even if the Market Recommendation went beyond Article 15 (1) Subparagraph 1 in this regard, the specification of substantive criteria for identifying the relevant markets that may be subject to sector-specific regulation would be in compliance with Community law since Article 211 second indent of the EC Treaty explicitly gives the Commission a general power to formulate recommendations on matters dealt with in the Treaty where the Commission believes that it is necessary to do so.⁵⁷ The specification of these substantive criteria is even capable of resolving doubts of whether the Framework Directive itself is in compliance with Community law, because without the specification of such criteria, the directive could have been applied in a way that regulation would aim to create effective competition, that is, to remove dominant positions. If this had happened (or would happen), the Framework Directive would be in a potential conflict⁵⁸ with the basic principles of the system of undistorted competition that is requested by primary Community law,⁵⁹ because, as evidenced by Article 82 of the EC Treaty, such a system includes the participation of dominant undertakings in the competition,⁶⁰ if this is the result of the free market process.⁶¹

Although it is only of limited relevance for the actual subject of this article, the interrelation of the three criteria set out in the Market Recommendation on one hand and the markets identified in the Market Recommendation on the other shall be analysed for the sake of completeness. According to a common interpretation, the three criteria have already been used by the Commission with regard to the markets identified in the Market Recommendation and thus may not be checked again at the Member State level.⁶² This view is closely related to the assumption that NRAs have to carry out a market analysis for each of the markets identified in the Market Recommendation, because the possibility of reviewing these markets with

⁵⁷See also H. A. Cosma & R. Whish, *supra* note 32, at 37. According to some authors, this constitutes an explicit exception to the principle of attribution of powers, see M. Ruffert, in C. Callies & M. Ruffert, *supra* note 7, Article 211 EC, para. 8.

⁵⁸At the level of the Market Recommendation there really might be such a conflict with primary Community law, see *supra* note 17.

⁵⁹Article 3 (1) (g) of the EC Treaty.

⁶⁰See also *supra* note 16.

⁶¹However, see also the rather cautious comment by C. Koenig et al., *supra* note 8, at 162.

⁶²R. Klotz, *supra* note 13, at 295; *idem*, *supra* note 24, at 497.

regard to the three criteria at the Member State level offers the opportunity to deviate from the markets identified in the Market Recommendation. However, as has already been shown,⁶³ the assumption that a market analysis has to be carried out for each market identified in the Market Recommendation contradicts the systematics of the Framework Directive and the legal effect of the recommendations. For the same reasons, the view that the three criteria may not be used at the Member State level for a review of the markets identified in the recommendation has to be rejected.⁶⁴ However, the obligation to take the utmost account of the Market Recommendation⁶⁵ becomes important for two reasons. First, in defining the relevant markets the utmost account must be taken of the three criteria set out in the Market Recommendation. And second, in having recourse to these criteria, the utmost account has to be taken of the fact that the Commission found these criteria satisfied for the markets identified in the recommendation.

Additionally, it must be pointed out that the three criteria require a complicated economic analysis. This reveals a common misapprehension as to the terminology of the regulatory framework. Since Article 16 (1) deals with the “market analysis,” it implicitly seems to allow for an analysis of a defined market only in the course of the procedure outlined in Article 16 but not at the level of the market definition procedure according to this directive.⁶⁶ However, this would be incorrect since economic criteria, namely the three criteria specified in the Market Recommendation, have to be applied already for the purpose of defining the relevant markets. Therefore, even the definition of the relevant markets, that is, the market definition procedure, requires an analysis of the respective markets. This analysis⁶⁷ must not be confused with the market analysis in terms of the market analysis procedure outlined in Article 16.

⁶³See above, B. II.

⁶⁴The same view is held by P. Knauth, *supra* note 43, at 36.

⁶⁵Framework Directive, *supra* note 1, at Article 15 (3) Sentence 1.

⁶⁶See, for example, from the perspective of an economist M. Hellwig, “Beitrag zum Panel über Marktanalyse und Marktbeherrschung nach dem novellierten TKG”, in A. Picot, *supra* note 42 at 83 (84).

⁶⁷See also R. Klotz, *supra* note 9, at 7, who calls the market definition the first part of the market analysis and the examination whether the market is effectively competitive the second part of the market analysis. In similar vein, P. Knauth, *supra* note 43, at 36, discusses aspects of the market definition procedure within the paragraph dealing with the “Marktanalyse” (market analysis). With regard to terminology, it might be an option to speak of the combination of the analysis of markets with the aim to determine whether they satisfy the criteria for sector-specific regulation and the market analysis procedure in the sense of Article 16 of the Framework Directive as “market review”.

C. The National Implementation of the Market Definition Procedure – the Example of Germany

Next the consequences of these insights regarding the transposition of Article 15 (3) into the national law of the Member States will be analysed. After discussing the discretion left to Member States by the directive in subsection I, this article will argue that the solution of the German Federal Ministry of Economics and Labour can be seen as an example for an innovative approach that aims to combine general insights of competition policy with the requirements of Community law in subsection II.

I. Discretion Left to Member States with Regard to Implementing the Market Definition Procedure

Although directives may leave Member States no discretion in legal practice, a directive is only binding as to the result to be achieved, but leaves to the national authorities the choice of form and methods according to Article 249 (3) of the EC Treaty. Against this background, the national transposition of the market definition procedure required by Article 15 (3) Sentence 1 may take place in different ways. First, this provision might be literally adopted into national law. Such a direct transposition lies without any doubt within the discretion left to the Member States by the Framework Directive. Furthermore, it is very likely that this method of transposition would also be the easiest way from a political point of view. However, by choosing a literal transposition of Article 15 (3) Sentence 1, Member States would lose the possibility to take advantage of the remaining discretion for a regulatory micro-control. Moreover, a literal transposition would directly implement the market definition procedure into national law in the same complicated and vaguely defined way as it is laid down by Community law and which therefore is *prima facie* difficult to understand for the market participants.⁶⁸

The problem of vagueness and complication can be avoided by explicitly implementing the three criteria set out by the Market Recommendation into national law.⁶⁹ This alternative was chosen, for example, in Section M1 (2) of the Working

⁶⁸Even the authors of the German version of the Market Recommendation obviously were rather confused by the complex framework – its 21st recital speaks of the recommendation as “diese Richtlinie” (that is, “this Directive”). Furthermore, its 15th and 20th recitals refer to “echten/r Wettbewerb” although probably “wirksamen/r Wettbewerb” (“effective competition”) is meant. A similar problem arises, for example, with regard to the Spanish version of the Framework Directive. Although Recital 27 Sentence 1 of the directive mentions “competencia efectiva”, this term is not contained within Article 16 which only has recourse to the question whether the market is “realmente competitivo”.

⁶⁹See also the general proposal of U. Immenga & C. Kirchner, *supra* note 12, at 347.

Draft for a new German Telecommunications Act that was sent to interested parties on February 20th, 2003. However, this approach also faces two disadvantages. First, the national legislator would refrain from using the existing room for a regulatory micro-control, similarly to the first alternative for transposition. Second, this approach would implement those criteria into an Act of Parliament that are only contained in a recommendation that is explicitly subject to regular review⁷⁰. Although such review will probably, as a rule, only lead to changes of the product and service markets identified in the annex of the Market Recommendation, it may nonetheless be possible that the three criteria, to which the Commission has recourse in identifying those markets are amended too.⁷¹ In this case, national law would have to be changed accordingly. Thus, although both alternatives for a transposition of Article 15 (3) Sentence 1 comply with Community law, they also face practical and political disadvantages.

Therefore, it must be determined how a Member State can avoid these disadvantages in compliance with the requirements of Community law. From a law-maker's point of view, this goal can be achieved by linking the definition of the relevant markets to a criterion defined independently at the national level, and by explicitly stipulating that the utmost account has to be given to the Market Recommendation for the interpretation and application of this criterion. This approach has been taken both by the Draft German Telecommunications Act and by the new Austrian Telecommunication Act of August 19th, 2003⁷². According to Section 8 (2) Sentence 1 of the Draft German Telecommunications Act, those markets are⁷³ subject to sector-

⁷⁰Framework Directive, *supra* note 1, at Article 15 (1) Subparagraph 2. The Commission will review the need for any update of the Market Recommendation no later than June 30th, 2004, *see* Recital 21 of the Market Recommendation.

⁷¹This is explicitly confirmed by the European Commission, *supra* note 17, at 12.

⁷²2003 Bundesgesetzblatt für die Republik Österreich I-983.

⁷³However, in order to actually impose sector-specific measures, the respective market must also lack effective competition as laid down in Article 16 of the Framework Directive. This has led to the proposal that Section 8 (2) Sentence 1 of the Draft German Telecommunications Act should be amended in such a way that the market definition does not concern the markets that are subject to sector-specific regulation but rather the markets that *may be* subject to sector-specific regulation (that is, when there is also no effective competition on these markets), *see* Institut für Informations-, Telekommunikations- und Medienrecht (ITM) - Arbeitsgruppe 'Telekommunikation', *Stellungnahme der Arbeitsgruppe 'Telekommunikation' des ITM zum Referentenentwurf TKG-E 2003* (2003), at pp. 4 *et seq.* This proposal has been accepted within the Revised Draft German Telecommunications Act which was amended accordingly. Although there are no fundamental problems connected to such an amendment, it was probably superfluous, since Section 8 (2) Sentence 1 of the Draft German Telecommunications Act does not refer to "market regulation" - that is, sector-specific regulation in the narrower sense - as it is, for example, the case in Section 7 (1) but to regulation according to the second part of the act. Thus it could well be argued that carrying out a market analysis as provided for in Section 9 of the Draft German Telecommuni-

specific regulation, where “there is no workable competition.”⁷⁴⁷⁵ According to Sentence 2 of the provision,⁷⁶ “these markets are defined by the national regulatory authority ... taking the utmost account” of the Market Recommendation “in their respective version currently in force.” And Section 36 (1) Sentence 1 of the Austrian Telecommunications Act stipulates that “the national regulatory authority (has to determine) the relevant national markets that are subject to sector-specific regulation⁷⁷ ... taking account of the requirements of sector-specific regulation.” According to Section 36 (2) of the Austrian Telecommunications Act, the NRA has to take “into account the provisions of the European Communities” in doing so. In both cases, an independently defined criterion is used to further determine the markets that are (or may be) subject to sector-specific regulation (lack of workable competition respectively the requirements of sector-specific regulation). However, at the same time this criterion – and therefore the market definition – is dynamically linked to the Market Recommendation.

Such an approach may conflict with Community law when the nationally defined criterion does not allow to take the Market Recommendation into utmost account. However, just like the recommendation,⁷⁸ the three criteria are not strictly binding, but only have to be taken into the utmost account. Therefore, in adequate cases, a NRA may, without infringing Community law, abstain from defining a specific market despite the three criteria set out in the Market Recommendation being satisfied as well as it can define a relevant market although one or more of those criteria are not satisfied.

cations Act (which also belongs to the second part of the act), is, though not a measure of “market regulation”, a measure of “regulation” (according to the second part of the act) as well. In any case, the differences between these alternatives are of a terminological nature only.

⁷⁴“Workable competition” hereinafter does not refer to the concept of workable competition as defined by J. M. Clark, *Toward a Concept of Workable Competition*, 30 AM. ECON. REV. 241(1940), but to the concept of “funktionsfähiger Wettbewerb” which is based on Clark’s concept of workable competition and goes back to E. KANTZENBACH, *DIE FUNKTIONSFÄHIGKEIT DES WETTBEWERBS* (2nd ed., 1967). See also C. Koenig et al., *supra* note 8, and I. Vogelsang et al., *supra* note 8, for an in-depth discussion of this concept of competition with regard to telecommunications markets.

⁷⁵All translations are those of the authors and in no way official translations of the respective documents.

⁷⁶This sentence has been split into two sentences within Section 10 (2) of the Revised Draft German Telecommunications Act.

⁷⁷The Austrian legislator obviously also distinguishes between sector-specific regulation in the broader sense (including the market analysis) and sector-specific regulation in the narrower sense (limited to the actual imposition of sector-specific obligations) which is called “market regulation” within the Draft German Telecommunications Act.

⁷⁸See above, B. II.

Community law therefore does not forbid Member States to use an independently defined criterion for determining the scope of sector-specific regulation. However, the sharper national law describes such a criterion – and not only by referring to the Market Recommendation – the greater the danger of infringing Community law. Nonetheless, it must be noted that it is exactly this possibility to, at least roughly, outline the criterion for sector-specific regulation that makes such a transposition attractive both from a policy point of view and from a constitutional law perspective with regard to possible requirements of clarity and definiteness.⁷⁹ Therefore, choosing this transposition path requires the legislator to strike a balance between an independent regulatory micro-control and the utmost account that has to be taken of the Market Recommendation.

II. The Lack of Workable Competition as the Determinant for the Scope of Sector-Specific Regulation

The new Austrian Telecommunications Law has recourse to “the requirements of sector-specific regulation” as the national criterion to determine the scope of sector-specific regulation. It is unclear what is meant by such “requirements of sector-specific regulation”. This criterion seems to be rather vague and is thus not likely to conflict with the Market Recommendation. Consequentially, the approach chosen by the Austrian legislator appears to be in compliance with Article 15 (3) Sentence 1, although neither this provision nor the three criteria set out in the Market Recommendation were directly adopted into Austrian law.

The same holds true with regard to the Draft German Telecommunications Act, at least when looking only at the wording of its Section 8 (2). This provision stipulates that the relevant markets are those where there is no workable competition (Sentence 1). These markets, however, are defined by the NRA taking the utmost account of the Market Recommendation (Sentence 2). When both statements combined, Section 8 (2) of the Draft German Telecommunications Act only says that the NRA defines the relevant markets, taking the utmost account of the Market Recommendation. This corresponds exactly to the wording of Article 15 (3) Sentence 1. As a consequence, it must be assumed that Section 8 (2) of the Draft German Telecommunications Act ensures that, in case of a conflict between the nationally defined criterion and the criteria of the Market Recommendation, the latter is, at least in principle, given priority already at the normative level.

⁷⁹Ironically, R. Klotz, *supra* note 24, at 498, criticises the use of such a criterion within the Draft German Telecommunications Act for a lack of clarity.

This outcome may only be falsified if there were a systematic inconsistency. Such an inconsistency might result from the fact that the term “workable competition,” which is already known from the current German Telecommunications Act, has a substantial meaning on its own, and has even found its way into the statutory definition of Section 3 Number 9 of the Draft German Telecommunications Act. According to this definition, workable competition is “competition fulfilling certain functions⁸⁰ – control of market power,⁸¹ productive,⁸² and dynamic efficiency⁸³ – and that is at the same time structurally safeguarded in such a way as to persist following the revocation of competition-oriented regulation.^{84/85} It is questionable whether the use of the term “workable competition” in the national implementation of the market definition procedure, which has been subject to much criticism by commentators of the draft act,⁸⁶ might conflict with Article 15 (3) Sentence 1, be-

⁸⁰See E. Kantzenbach, *supra* note 74, at 16; C. Koenig et al., *supra* note 8, at 26, and I. Vogelsang et al., *supra* note 8, at note 4., for an explanation of these functions.

⁸¹This function is in fact a set of functions that are typically assigned to workable competition: the allocation of supply, income distribution, control of market power (in the narrower sense), and freedom. An aggregation of individual functions may take place for the purpose of finding a definition because goal conflicts only arise between the three aggregated functions, *see* C. Koenig et al., *supra* note 8, at 54; I. Vogelsang et al., *supra* note 8, at 69.

⁸²The creation of an “efficient allocation of resources” as one of the main functions of competition is also stressed by the European Commission, Guidelines on Vertical Restraints, 2000 O.J. (C 291/1), para. 7.

⁸³This set of function includes the functions of flexibility of adaptation and technological progress, *see* C. Koenig/ et al., *supra* note 8, at 54; I. Vogelsang et al., *supra* note 8, at 69. In the past, the European Commission has also identified functions of competition that correspond to what the Draft German Telecommunications Act calls “productive and dynamic efficiency”, *see* H. A. Cosma & R. Whish, *supra* note 32, at 41 for further references.

⁸⁴The importance of this aspect is also stressed by R. Klotz, *supra* note 13, at 314, with regard to EC telecommunications law.

⁸⁵*See*, with regard to the current German Telecommunications Act, C. Koenig et al., *supra* note 8, at 134; I. Vogelsang et al., *supra* note 8, at 71. *See also* Bundesverwaltungsgericht, Judgement of 25 April 2001, 2001 KOMMUNIKATION & RECHT 530 (537); Monopolkommission, *Wettbewerbsentwicklung bei Telekommunikation und Post 2001: Unsicherheit und Stillstand* (Special Report according to Section 81 [3] of the German Telecommunications Act), [2001] 14 BUNDESTAGSDRUCKSACHE 211 (216), para. 9.

⁸⁶*See, e.g.*, R. Doll et al., *Der Referentenentwurf für ein neues TKG – Einstieg in den Ausstieg aus der Regulierung?*, 2003 MULTIMEDIA UND RECHT 522 (523); S.-E. Heun, *Der Referentenentwurf zur TKG-Novelle*, 2003 COMPUTER UND RECHT 485 (488); R. Klotz, *supra* note 24, at 498 (who obviously – incorrectly – assigns the use of the term “workable competition” within Section 8 [2] of the Draft German Telecommunication Act to the level of the market analysis procedure). *See also* the comments of the Deutsche Gesellschaft für Recht und Informatik (DGRI) e. V., 2003 COMPUTER UND RECHT Supplement to Issue 7, at p. 1; C. Kirchner, at 3; the Verband der Anbieter von Telekommunikations- und Mehrwertdiensten (VATM) e. V., at 8; the Vereinigte Dienstleistungsgewerkschaft (ver.di) – Fachbereich 9, at 9. The comments of C. Kirchner,

cause this definition assigns a certain substantial meaning to the term. At the moment, this would only be the case if it were not possible to take the utmost account of the Market Recommendation in defining the relevant markets. Therefore, it must be possible particularly to determine the lack of workable competition only in such markets that satisfy the three criteria set out in the Market Recommendation. If the substantial meaning of the term “workable competition,” which is expressed in the statutory definition of Section 3 Number 9 of the Draft German Telecommunications Act, were an obstacle to such an application of law, the solution chosen by the Federal Ministry of Economics and Labour might be a breach of Community law.

The answer to this question is especially complicated because of a fundamental difference in perspective. Whereas Section 3 Number 9 of the Draft German Telecommunications Act positively defines workable competition, Section 8 (2) Sentence 1 of the draft refers to markets where there is *no* such competition, that is, where there is *non*-workable competition. In negating the definition set out in Section 3 Number 9 of the Draft German Telecommunications Act, non-workable competition may be defined as competition that either does *not* fulfill certain functions or is structurally *not* safeguarded in such a way as to persist (with regard to fulfilling these functions) following the revocation of competition-oriented regulation. To determine the practical relevance of the differences between defining markets where there is such non-workable competition (“non-workable markets”), and defining markets that satisfy the three criteria set out in the Market Recommendation (“criteria markets”), it is necessary to analyse both whether there are situations where criteria markets cannot be non-workable markets and whether there are situations where non-workable markets cannot be criteria markets.⁸⁷

In criteria markets, there are entry barriers that are not expected to be compensated by dynamical aspects and that could also not be adequately addressed by the mere application of competition law. If SMP is found in such a market, this market power is structurally safeguarded against (even potential) competition. Thus, in this market, competition would be non-workable. A situation where criteria markets are not, at the same time, non-workable markets, in principle can only occur when there is no SMP undertaking in the criteria market. In this case, there might as well be workable competition in that market, at least in principle (and by solely

the VATM, and ver.di may be accessed in the WWW available at <http://www.tkrecht.de/index.php4?direktmodus=novelle-genese>.

⁸⁷C. Huppertz, *supra* note 6, at 214, rightly points out that (also) from the perspective of EC telecommunications law there is, at least in general, no (need for) sector-specific regulation in a workable market that is not a criteria market – regardless of whether there are or are not one or more SMP undertakings on that market.

applying the statutory definition). However, barriers to entry, which are the main characteristics of criteria markets, restrict all competitive functions.⁸⁸ This in itself makes plausible that criteria markets are generally non-workable as well. But even if there were still situations where there is workable competition in such criteria markets (that is, in criteria markets where there is no SMP), one has to be aware of the fact that due to the lack of SMP regulatory measures may not be imposed in these markets.⁸⁹ Hence, the finding of workable (respectively the negation of non-workable) competition in a criteria market would merely have the consequence that no market analysis (in the sense of Article 16 [1]) would be carried out, but would not affect the imposition of regulatory measures.

With regard to the second possible conflict, it is irrelevant whether concrete implementations of a concept of workable competition are conceivable under which non-workable markets are not criteria markets. Because the concept of workable competition in itself is only vaguely outlined,⁹⁰ there are surely many of such implementations that can be imagined. However, for this article, the only question is whether a market can be non-workable on the basis of the definition in Section 3 Number 9 of the Draft German Telecommunications Act, which describes workable competition in a rather open way,⁹¹ while this finding cannot be linked to the finding of a criteria market. In answering this question, it must be distinguished between two explanations for non-workability, although there are logical links between them. First, a market may be non-workable if competition does not fulfil certain desired functions. Second, a market may also be non-workable if competition fulfils these functions, but is not at the same time structurally safeguarded in such a way as to persist following the revocation of competition-oriented regulation.

With regard to the first explanation for non-workability, there is considerable scope for interpretation in the evaluation concerning both the definition of the actual competitive functions that must be fulfilled, and particularly the evaluation of existing conflicts and trade-offs⁹² between conflicting functions.⁹³ For evaluation within

⁸⁸C. Koenig et al., *supra* note 8, at 45.

⁸⁹Framework Directive, *supra* note 1, at Article 16 (3) Sentence 1.

⁹⁰M. Hellwig, *supra* note 66, at 85; C. Koenig et al., *supra* note 8, at 115; J. Neitzel, *Regulierung in der Sackgasse?*, 2002 COMPUTER UND RECHT 256 (257).

⁹¹R. Doll et al., *supra* note 86, at 523; S.-E. Heun, *supra* note 86, at 488; C. Koenig et al., *supra* note 8, at 117.

⁹²Goal conflicts and trade-offs are central to the determination of workably competitive markets, *see* C. Koenig et al., *supra* note 8, at 28 and 52; I. Vogelsang et al., *supra* note 8, at 69.

⁹³I. Vogelsang et al., *supra* note 8, at 71 (*see also* 69).

this broad scope, the Market Recommendation can be used to a great extent. In particular, the question of whether competition does not fulfill the necessary control of market power may be answered by reverting to the existence of entry barriers in the sense of the first two criteria.⁹⁴ In order to determine whether the competitive function of dynamic efficiency is fulfilled, the second criterion of the Market Recommendation can be used. Nevertheless, not all aspects of non-workability can always be measured completely by means of the criteria set out in the Market Recommendation. This concerns especially the competitive function of productive efficiency. It also concerns the problem that, as the above remarks have shown, non-workability can often be found only by using part of the criteria set out in the Market Recommendation, whereas the finding of a criteria market requires that the three criteria are applied cumulatively.⁹⁵ However, the second reason for non-workability basically is the lack of structural safeguarding. Thus, whether competition is not workable for this reason can be determined to a large extent by means of the three criteria set out in the Market Recommendation. Competition then would not be structurally safeguarded when there are entry barriers that are not expected to be compensated by dynamical aspects and that also could not be adequately addressed by the mere application of competition law.

Therefore, a potential for conflict arises mainly where competition is not workable because it does not adequately fulfil the required functions, but where the three criteria set out in the Market Recommendation are not satisfied. In all other situations both approaches are essentially compatible in practice.⁹⁶ However, if competition turns out to be not workable in the sense of the statutory definition of Section 3 Number 9 of the Draft German Telecommunications Act, there are good economic reasons to deviate from the Market Recommendation and to subject these non-workable markets to sector-specific regulation. This is reconcilable with Community law because of the non-binding nature of the Market Recommendation, and could serve as an example for a reasonable regulatory micro-control at the Member State level.⁹⁷

⁹⁴See also R. Krüger, *supra* note 49, at 18, according to whom the indicators with regard to the second criterion are similar to those used for the finding of positions of dominance.

⁹⁵Recital 16 of the Market Recommendation.

⁹⁶Minor differences are not *per se* incompatible with Community law. According to Article 15 (3) Sentence 1 of the Framework Directive, there is explicitly no full harmonisation with regard to market definitions. This might be different with regard to other aspects of the regulatory procedure, e. g. concerning SMP as the trigger criterion for measures of sector-specific regulation, see R. Capito & M. Elspaß, *supra* note 9, at 115; R. Klotz, *supra* note 13, at 293; *idem*, *supra* note 24, at 497.

⁹⁷In similar vein, C. Kirchner, *supra* note 23, at 152, recommends that it should be the legislator, and not the NRB, who ultimately decides which markets should (or, from the perspective of Kirchner, should

However, within Section 3 Number 10 of the Revised Draft German Telecommunications Act,⁹⁸ the statutory definition of the term “workable competition” was amended in a highly questionable way by dropping the control of market power from the array of functions workable competition has to fulfil.⁹⁹ This will make it impossible to find non-workable competition, even in the case of a dominant position that resembles a monopoly, as long as there is productive and dynamic efficiency.¹⁰⁰

Furthermore, the amended definition does no longer require that the competition must be *structurally* safeguarded. This is surprising since the three criteria set out in the Market Recommendation explicitly refer to entry barriers that are traditionally part of the market structure.¹⁰¹ Finally, a newly attached second sentence of the statutory definition gives an example for *non*-workable competition. According to Section 3 Number 10 Sentence 2 of the Revised Draft German Telecommunications Act, competition is non-workable if the application of competition law alone would not adequately address the market failure or the anticompetitive behaviour.¹⁰² This clearly contradicts the Market Recommendation since its criteria should be applied cumulatively,¹⁰³ whereas Section 3 Number 10 Sentence 2 of the revised draft will

not) be subject to sector-specific regulation. Although this would go far beyond the regulatory micro-control achieved by means of the term “workable competition”, using such a criterion would at least leave a rudimentary decision on the scope of sector-specific regulation with the legislator.

⁹⁸See *supra* note 73.

⁹⁹The importance of the functions relating to the control of market power for workable competition is also stressed by R. Schütz et al., *supra* note 9, at 45. (However, Schütz et al. at the same time seem to restrict the relevant competitive functions to the control of market power.)

¹⁰⁰Moreover, it has to be kept in mind that by referring to the control of market power the statutory definition combined four individual functions, *see supra* note 81.

¹⁰¹See C. Koenig et al., *supra* note 8, at 30; I. Vogelsang et al., *supra* note 8, at 69. Recital 10 of the Market Recommendation distinguishes between structural barriers on the one hand and legal or regulatory barriers on the other.

¹⁰²Additionally, the revised definition contains some examples for situations in which this is the case: where frequent intervention is indispensable, where timely intervention is necessary to create legal certainty, where there is a need for monitoring technical parameters or where there is a need for a detailed assessment of costs. These examples are similar, but not identical to examples given in the explanatory memorandum to the Market Recommendation for circumstances in which sector-specific regulation would be considered to constitute an appropriate complement to general competition law, *see* European Commission, *supra* note 17, at 11.

¹⁰³Recital 16 of the Market Recommendation.

allow a relevant market to be defined only by applying the third criterion set out in the Market Recommendation. In a nutshell, the amendments which can be found in the Revised Draft German Telecommunications Act turn a reasonable economic concept into a questionable regulatory innovation while dramatically increasing the potential for conflict with Article 15 (3) Sentence 1 of the Framework Directive in combination with the Market Recommendation. Therefore, the German legislator would be well advised not to accept the proposed amendments to the statutory definition of the term “workable competition.”

The possibility of abstaining from the statutory definition of the term “workable competition” in the German Telecommunications Act shall only be highlighted as an additional point. In this case, an independent substantial meaning of this term could only be derived from its economic background or from its legal genesis. However, according to general principles of German law, the interpretation of the term would primarily depend on the respective provisions in which the term is used.¹⁰⁴ Thus, in the light of the systematics of Section 8 (2) of the Draft German Telecommunications Act, the term “workable competition” would merely serve as a link to the criteria set out in the Market Recommendation. This would ensure full compliance with Community law. Also the opportunity for regulatory micro-control at the national level would not be taken. Since this opportunity is the very reason for a criterion that is independently defined at the national level, it seems questionable if it makes sense to abstain from statutorily defining this criterion.

Consequently, much can be said for keeping the implementation of the market definition procedure described in the Draft German Telecommunications Act. It would establish a concept of competition that is, in the best sense of the term, workable in regulatory practice, where the EC telecommunications law lacks economic persuasiveness.¹⁰⁵ This becomes particularly evident in the first recital of the German version of the Framework Directive that announces the transition to perfect competition (“vollständiger Wettbewerb”),¹⁰⁶ although economists universally consider such a competition unrealistic even in markets where there are no economies of scale.¹⁰⁷ In contrast to the concept of workable competition, the term “effec-

¹⁰⁴See Bundesverfassungsgericht, Judgement of 16 January 1957, 6 BVerfGE 32 (38).

¹⁰⁵See also C. Koenig et al., *supra* note 8, at 174.

¹⁰⁶In contrast, the English version uses the term “full competition”, which is not attached to a particular concept of competition.

¹⁰⁷See E. Kantzenbach, *supra* note 74, at 136; C. Koenig et al., *supra* note 8, at 23; R. WHISH, COMPETITION LAW 5 (4th ed., 2001). This questionable terminological choice was already made under the former European framework, see Richtlinie 96/19/EG der Kommission vom 13. März 1996 zur Änderung der Richt-

tive competition" does not fulfil an independent function within the market analysis procedure.¹⁰⁸ The German legislator could – and should – do without this term in favour of a mere reference to the existence of SMP.¹⁰⁹

D. Conclusion

The procedures of market definition and market analysis are at the heart of the current EC telecommunications law. Articles 15 and 16 of the Framework Directive confront the Member States with a legislative challenge in that they establish a complicated procedural system that integrates the Community level into administrative procedures at the Member State level. A legal analysis of these provisions shows that the scope of sector-specific regulation is determined by means of the market definition procedure, whereas the only aim of the market analysis procedure in this context is finding whether there are undertakings with significant power on the respective market, which is the final trigger for actually imposing regulatory measures. Furthermore, national regulatory authorities must neither carry out a market analysis in the sense of Article 16 (1) for each of the markets identified by the Commission in the Market Recommendation, nor are they confined to using the three criteria set out in the Market Recommendation for the purpose of defining them. Against this legal background, the market definition procedure as outlined in Section 8 (2) of the Draft German Telecommunications Act respectively in Section 10 (2) of the Revised Draft German Telecommunications Act is an example of national transposition of Article 15 (3) Sentence 1, which is not only reconcilable with Community law, but also allows regulatory micro-control at the Member State level that is both economically reasonable and recommendable.¹¹⁰

linie 90/388/EWG hinsichtlich der Einführung des *vollständigen Wettbewerbs* auf den Telekommunikationsmärkten, 1996 O.J. (L 74/13) (emphasis added).

¹⁰⁸In particular, "effective competition" is not the same as "workable competition" in the sense of the statutory definition according to Section 3 Number 9 of the Draft German Telecommunications Act, see P. Knauth, *Regulierungsschwerpunkte und offene Fragen bei der Umsetzung der Telekommunikationsrichtlinien*, 2003 1 SUPPLEMENT TO KOMMUNIKATION & RECHT 24 (25); C. Koenig et al., *supra* note 8, at 163. A different view seems to be held by S.-E.-Heun, *supra* note 86, at 488.

¹⁰⁹C. Huppertz, *supra* note 6, at 364, also criticizes the use of "effective competition" and SMP as (only) supposedly different criteria within the market analysis procedures as a potential source for misunderstandings.

¹¹⁰See I. Vogelsang, *supra* note 20, at 509. See also the general recommendation in favour of the concept of workable competition by C. Koenig et al., *supra* note 8, at 173; I. Vogelsang et al., *supra* note 8, at 74.

Where a national regulatory authority intends to define a relevant market that differs from those defined in the Market Recommendation, the Commission can require the national regulatory authority to withdraw the respective draft measure.¹¹¹ Therefore, the non-binding nature of the Market Recommendation is supplemented by the possibility that the Commission may oppose market definitions that are not in line with it.¹¹² However, it is unclear – and rather questionable – whether this possibility also exists if the national regulatory authority abstains from defining a market that has been identified in the Market Recommendation.¹¹³ Furthermore, even where Article 7 (4) of the Framework Directive applies, the Commission is obliged to give detailed and objective reasons why the national market definition may create a barrier to the single market or not be compatible with Community law. Thus, the factual power to impede market definitions that do not comply with the Market Recommendation is not unlimited, but is only available under certain circumstances.¹¹⁴

Moreover, the fact that the Community level has influence on this decision by means of recommendations shows that the EC telecommunications law allows Member States to have a discretionary scope when defining a relevant market.¹¹⁵ This fundamental decision must also be respected in the procedural side of regulation outlined in Article 7 of the Framework Directive.¹¹⁶ Therefore, the Commission cannot use its powers that stem from Article 7 (4) to impede national market defini-

¹¹¹Framework Directive, *supra* note 1, at Article 7 (4).

¹¹²R. Doll et al., *supra* note 86, at 523; C. Huppertz, *supra* note 6, at 194; U. Immenga & C. Kirchner, *supra* note 12, at 353; R. Klotz, *supra* note 13, at 295.

¹¹³See above, B. II.

¹¹⁴See also R. Klotz, *supra* note 9, at 7; *idem*, *supra* note 13, at 295; P. Knauth, *supra* note 108, at 25. Therefore, it seems not quite accurate to call the Market Recommendation “factually binding”; see, however, C. Huppertz, *supra* note 6, at 194 and 206; U. Immenga, *supra* note 13, at 673; R. Klotz, *supra* note 9, at 7.

¹¹⁵This is the very reason why it is not really helpful in this context to look at the (important) aim of harmonisation that is also pursued by the EC framework for telecommunications. See also *supra* note 96.

¹¹⁶See also R. Schütz et al., *supra* note 9, at 52. In the original proposal (by the Commission), the Commission should issue a decision on relevant product and service markets, Article (1) Subparagraph 1 Sentence 1 of the Proposal for a Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, 2000 O.J. (C 365 E/198). According to Article 249 (4) of the EC Treaty, decisions are binding upon those to whom they are addressed. The question whether the Commission should be granted the power to define the markets that are subject to sector-specific regulation by means of a binding regulatory instrument was one of the major contentious issues during the legislative process, see J.-D. Braun & R. Capito, *supra* note 7, at 345; C. Koenig et al., *Die Interdependenz von Märkten in der Telekommunikation (Teil II)*, 2001 COMPUTER UND RECHT 825 (826).

tions that are legally issued in accordance with Article 15 (3) Sentence 1 merely because they do not fully comply with the Market Recommendation.¹¹⁷

Whether the innovative mechanism at the heart of current EC telecommunications law may serve as a role model for future integration mechanisms in other fields of EC policy depends on two questions; whether the Commission acts in conformance with these legal insights,¹¹⁸ and whether the Member States really are determined to establish the internal market or if they will create barriers to it by means of a market definition.

¹¹⁷See also H. A. Cosma & R. Whish, *supra* note 32, at 52, who point out that “quasi-legal instruments cannot modify the provisions of ... the secondary law”, and at p. 53, stressing “that the time for regulation by hard law is not over. It is a fundamental (principle) in all national systems that the authorities need to be given competence by way of law before they can be able (to) regulate individual behaviour. The same equally applies in the Community legal order.”

¹¹⁸A similar conclusion is drawn by G. Husch et al., *supra* note 32, at 141; W. Möschel, *Hat das Telekommunikationsgesetz seine Bewährungsprobe bestanden?*, 2002 KOMMUNIKATION & RECHT 161 (164).