

# Single eComms Market? No Such Thing... (\*)

**Jacques PELKMANS**

College of Europe, Brugge, and CEPS, Brussels

**Andrea RENDA**

CEPS, Brussels, and Luiss Guido Carli, Rome

**Abstract:** Notwithstanding the undeniable success of telecoms liberalisation in terms of price reduction, new services and technologies as well as consumer satisfaction, EU telecoms policy is at least a half failure. This might seem hard to believe, but we show in this paper that there is no such thing as an EU telecoms (or eComms) single market. We provide ample empirical economic and regulatory evidence of profound and lingering fragmentation as well as a brief assessment of the flaws of the eComms package as amended in 2009, and recently entered into force. Overcoming the fragmentation cannot but yield a considerable welfare improvement for the Union, which is exactly what a single market should be expected to deliver. Doing away with the flaws in the EU system requires a better institutional design. We wonder whether the regulatory (and competition policy) approach is really suitable for the Union and whether the fundamental conflict between the EU constitutional doctrine and the building of the single market (just as much a constitutional duty!) should not be resolved in novel ways.

**Key words:** electronic communications, Internal Market, liberalisation, spectrum, regulatory authorities, price differentials.

**T**he liberalisation of telecoms (or eCommunications) in the EU is widely regarded as a great success. Tariffs and prices have decreased radically, new entrants have come in from all corners, new services have been stimulated and consumers have benefitted significantly from technological convergence. Of course, it is the combination of (more) competitive markets with a stream of new technology that has engendered these significant welfare gains.

Therefore, it might be difficult for many readers to believe that EU telecoms policy is at least a half-failure, if not worse. Recently, it took the EU

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three agonizing years before a relatively modest third package of telecoms policy and regulations could be adopted <sup>1</sup>. Most of the problems which have emerged so far (including price disparities, low broadband penetration, and most notably lack of investment in new infrastructure) can be traced back – at least partially – to an underlying cause: the EU still lacks an internal market for eComms. This means that, even if competition has developed in each and every member state, the fragmentation between national markets is usually profound, and at times extreme. The institutional framework and the allocation of tasks between the EU and national levels are simply not designed to accomplish what the EU must do under the treaty: establish a single market and ensure that it functions properly!

This paper focuses on the systemic neglect of the internal market in eComms. The 1<sup>st</sup> Section summarises the current evidence on the lack of integration between national markets in the eComms sector, both with the help of many indicators of price disparities as well as non-price evidence of fragmentation. The 2<sup>nd</sup> Section discusses EU telecoms policy in the light of the fragmentation, especially the 2002 and 2009 telecoms regulatory packages (including some institutional features) and the recent Digital Agenda. We find painful flaws and omissions, so much so that there seems to be every reason to have serious second thoughts about the overall EU approach adopted so far, geared towards opening national markets to competition. Thus, in the concluding section, we wonder whether the chosen approach is really suitable for the future of EU eComms.

## ■ Economic indicators show entrenched fragmentation

This section surveys available market indicators showing the profound fragmentation of the internal EU eComms market. Empirical economic evidence can be usefully divided into two categories of data: price disparities and non-price indicators of fragmentation. We illustrate them separately in the next two subsections.

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<sup>1</sup> For an account of this cumbersome process, see e.g. RENDA, 2009.

## Price disparities

Thirteen years after the 1998 telecoms package, supposedly establishing an internal telecoms market, and following almost two decades of EU liberalisation and attempted harmonisation, price disparities in the EU internal eComms services market are still very large and numerous. In a well-functioning internal market, price disparities might not fully disappear but they would be held in check over time by arbitrage and corporate strategies. It is an empirical matter how much scope for residual price disparities would remain – as national characteristics, also of demand, may play a role – but in a fully integrated and competitive market differences beyond (say) 50% between lowest and highest would surely attract attention of business players (as an opportunity to act), not to speak of disparities beyond 100% or more.<sup>2</sup> In this subsection, we briefly illustrate a number of price disparities,<sup>3</sup> none of which can be called relatively small (say, <50%) or only slightly worrying (say, < 100%). On the contrary, all of them are far beyond 100%, if not large multiples of 100%.

Figure 1 collects price disparities in no less than 11 eComms services, comprising most of the often used ones. Not a single one indicator amounts to less than 50% or even less than 100%. The 'lowest' one, fully unbundled local loop (ULL), has a highest/lowest ratio of 319%, and 211% when removing the two outliers.

The largest price discrepancies border on the absurd, certainly in an 'internal' market: international fixed calls to a distant EU country have a highest/lowest ratio of 2865% (still 1060% without the two outliers), fixed calls to Japan even reach an incredible 4610% (still 2504% without the two outliers) and leased lines make 1206% (still 655% without the two outliers). But what to think of international fixed calls overall (with 1077%, and still 458% without outliers), disparities in national fixed call charges of no less than 958% (510% without outliers) and shared access to ULLs (with 1016%, and still 565% without outliers)?

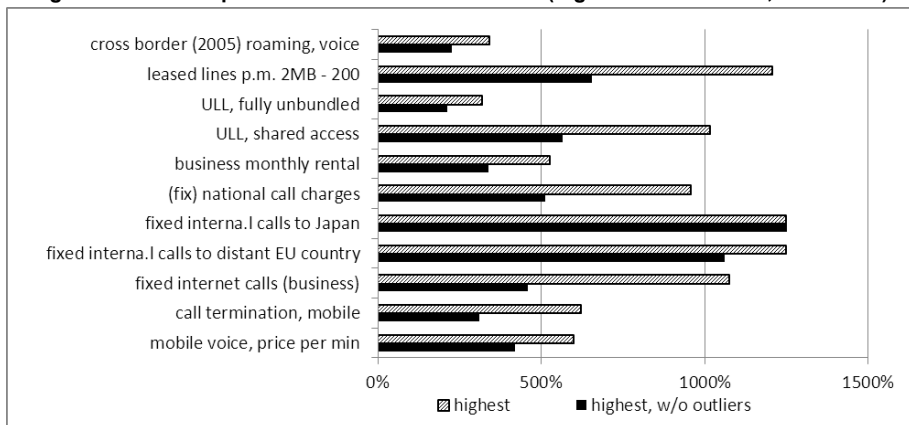
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<sup>2</sup> Note: a disparity of 50% implies a highest/lowest ratio of 150%; one of 100% requires a highest/lowest ratio of 200%.

<sup>3</sup> Many of them have been taken from European Commission, 15<sup>th</sup> progress report on the single European electronic communications market, Staff Working Document SEC(2010) 630/2 of 25 August 2010, Part 2. See PELKMANS & RENDA, 2011, for details, also on the other sources used.

And the mobile market seems little better with mobile voice price disparities 'enjoying' a highest/lowest ratio of 600% (still 420% without outliers) and call termination on mobile networks showing a ratio of 622% (still 310% without outliers). In case one has doubts whether a snapshot of 2008-09 is appropriate (although the point is of course that these enormous disparities still persist after 20 years of liberalisation), note that the coefficient of variation<sup>4</sup> over time is just as worrying. For example, this coefficient remains high (30% plus) and constant over four years up to 2008 for mobile interconnect tariffs, reaches some 45% (and constant) for interconnect rates in fixed voice and even increases over 7 years for local calls (from 30% – plus).<sup>5</sup> We have included cross-border intra-EU voice roaming charges, which used to be notoriously high everywhere as is widely known. With prices being high overall, one would expect price disparities to be muted. Figure 1 shows otherwise: using 2005 data (before the intrusive roaming price reduction regulation was proposed), the ratio is 341% (and 226% without outliers)<sup>6</sup>.

**Figure 1 - Price disparities in EU eComms markets (highest/lowest ratios; 2008-2009)**



Note: Ratios for 'fixed international calls' (2 x) extend beyond what the bars show (see text).

<sup>4</sup> The standard deviation for a given year in the 27 Member States, divided by the mean.

<sup>5</sup> European Commission, 15<sup>th</sup> progress report on the single European electronic communications market, *op. cit.*

<sup>6</sup> These data are from 2005, and of course cannot reflect the impact of the Roaming Regulations adopted since 2007. The Commission must provide a full review of the functioning of the roaming regulation by 30 June 2011. In the review, the Commission will also assess how best to reach its current objective, as outlined in the Digital Agenda for Europe, *i.e.* that the difference in tariffs between roaming and home-country mobile-phone calls should approach zero by 2015.

Altogether, the conclusion is that the price convergence one should expect in the internal eComms market is simply absent. Disparities are so large that pursuing a well-functioning single market in eComms is bound to yield great economic benefits.

### **Non-price indicators of fragmentation**

Besides price, other indicators can signal whether market integration has been effectively achieved by the regulatory framework for ecommunications. We illustrate below the persistent fragmentation with two indicators.<sup>7</sup> First, Figure 2 below shows two estimates of monthly expenditure on given OECD-based composite baskets of telecoms services<sup>8</sup>. As shown in Figure 2a, The average monthly spending of business users (in particular, usage costs) by September 2009 exhibited an approximate highest/lowest ratio of 245% (195% without outliers): such discrepancies in business costs can be a factor in locational (dis-)advantages and might be expected to come under pressure in a well-functioning internal market. In the more integrated U.S. internal market, the monthly business spending between California and New York State hardly differs. Figure 2b shows the high-usage residential basket of monthly expenditures with an approximate highest/lowest ratio of 378% (269% without outliers), again with usage costs generating most of the disparities. If the U.S. is anything to go by, the discrepancy between California residents and those in New York State is no more than approximately 30%. Overall, Figure 2 is consistent with citizens' complaints about great cost differentials in their telecoms costs across Europe. An oft-quoted aspect of fragmentation consists of the discrepancies in the availability and use of broadband infrastructure between member states. This is directly linked with a European, not national, perspective on how best to stimulate new interactive digital platforms. Reading fixed broadband penetration rates,<sup>9</sup> one discerns a clear 'broadband divide' in the Union, due (among other things) to disparities in income levels and the coverage of cable networks.

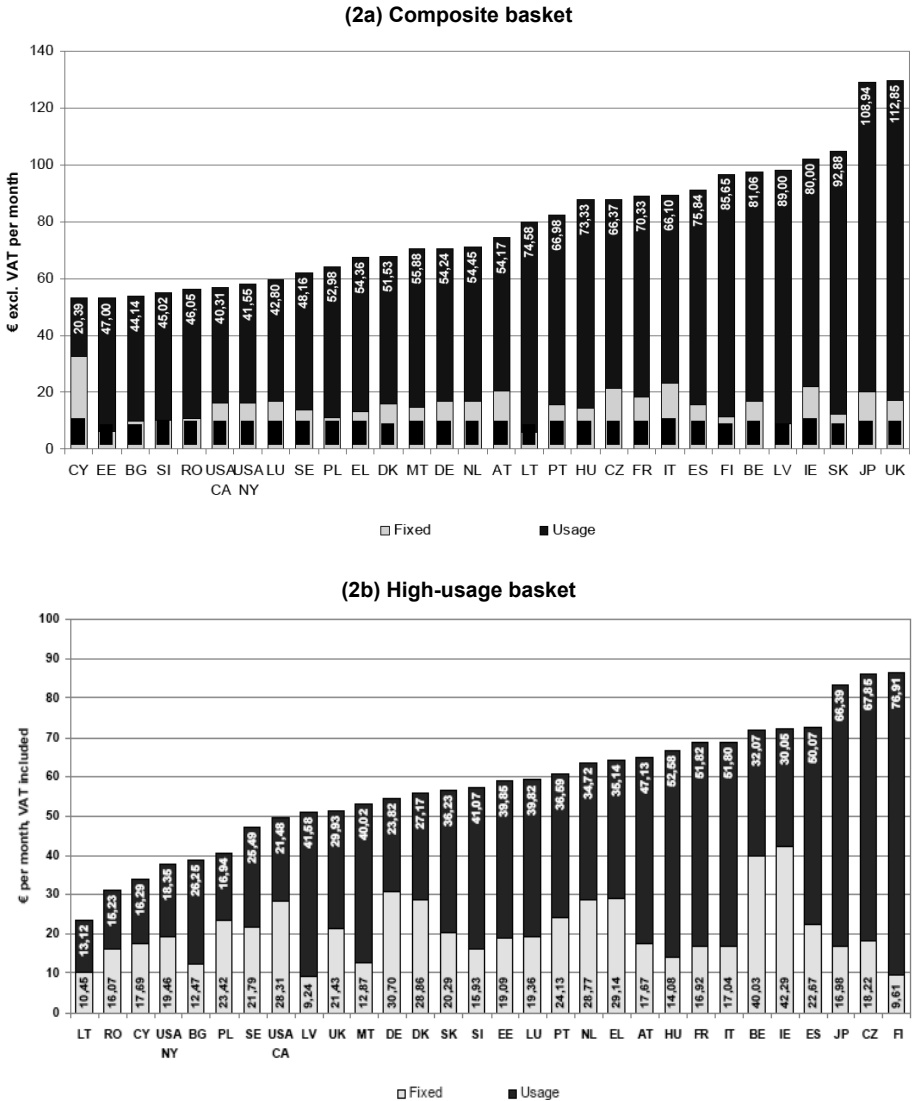
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<sup>7</sup> Some additional empirical evidence is provided in PELKMANS & RENDA, 2011.

<sup>8</sup> We define these indicators "non-price" since they do not refer directly to price levels, but rather to evidence of spending, penetration and usage; of course, it remains clear that these indicators are also affected by price discrepancies across the EU27.

<sup>9</sup> Source: European Commission, 2010, Digital Competitiveness Report 2010, SEC (2010) 627 of 17 May 2010.

Figure 2 - Average monthly expenditure, composite and high-usage baskets

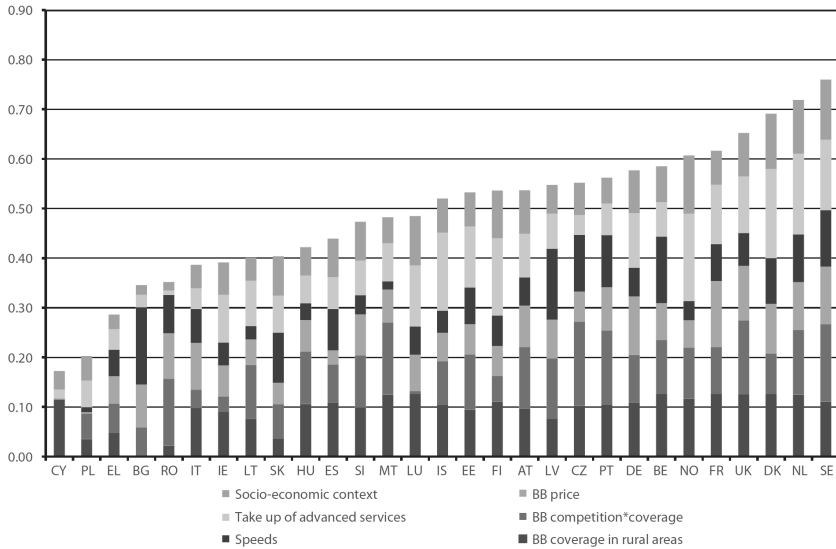


Source: PELKMANS & RENDA (2010)

As is well-known, the nature of competition in these transforming e-Comms markets is far more complex than the mere availability of broadband. Therefore, we reproduce Figure 3 depicting the Broadband Performance Index capturing six determining features such as rural

coverage, price, take-up of advanced services and speeds as well as mobile broadband and newer combinations (e.g. fibre + LAN in some new member states). The conclusion is that a richer assessment of dynamic competition accentuates the 'broadband gap' in the internal market.

**Figure 3 - Broadband performance index, July 2009**



Source: PELKMANS & RENDA (2010)

Although non-price indicators are typically less straightforward than the ones showing price disparities, the few examples provided here <sup>10</sup> raise at the very least a serious suspicion of profound fragmentation for legal, competition, behavioural and infrastructure reasons. Together with the powerful empirical evidence emerging from huge price disparities – and this after so many years of EU telecoms liberalisation – one is compelled to conclude that the internal eComms market has been seriously neglected, to the detriment of the European economy, and against the spirit if not the letter of the treaty <sup>11</sup>.

<sup>10</sup> Amongst the other illustrations provided in PELKMANS & RENDA (2011), one should be mentioned here: cross-border intra-EU internet purchases and B2B cross-border e-commerce remain dramatically behind domestic activities and this is not due to a myopic attitude in European business or consumers. Similarly, the absence of real pan-European networks – especially in the fixed-line sector – suggests the absence of an internal market.

<sup>11</sup> After all, the European Commission itself observed the absence of a single market in a number of recent documents, including the Digital Agenda Communication (where the Commission states that "Europe is far from having a single market for telecom services",

## ■ Single market fragmentation and EU telecoms policy

Although several aspects of telecommunications policy are likely to support economic growth – an overarching economic goal of the TFEU ever since the Rome Treaty – the treaty logic for EU action in this field is mainly focused on creating the paramount 'means' to promote this aim, namely, the internal market. Very little can be done at the EU level to boost economic growth through the development of a true information society, if it is not linked to the internal market objective. Indeed, the legal basis for much of EU eComms regulation is Art. 114 TFEU (formerly Art. 95 EC), the pivotal internal market article. There is a close link with Art. 106, TFEU (former Art. 86 EC) associated with EU competition policy mainly for network industries. Although Art. 106, TFEU is found in the competition chapter of the treaty, too often it is overlooked that the internal market and competition policy are acting hand-in-glove here, basically being inseparable.<sup>12</sup> Put simply, the idea of the treaty competition chapter is neither to promote competition in general, nor competition in 'national' markets, but competition in the internal market.<sup>13</sup> In order to do so, the internal market has to be established first. Since the market remains deeply fragmented, as shown, there are compelling grounds for acting to overcome this fragmentation as an intermediate goal. Only when this intermediate goal, a well-functioning internal eComms market, has been achieved, can it serve as the 'means' to

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COM(2010)245, Section 2.1); but also the Commission Press Release titled "Telecoms: Commission report on national telecoms regulation shows more competition but no Single Market" (IP/10/644, 1 June 2010); and the Communication from the Commission on market reviews under the EU Regulatory Framework (3<sup>rd</sup> rapport) - Further steps towards the consolidation of the internal market for electronic communications, COM(2010)271, 1 June 2010.

<sup>12</sup> Indeed, Art. 106, TFEU says "[...] neither enact nor maintain in force any measure contrary to rules contained in the Treaties, in particular [...]" non-discrimination and the competition rules. (emphasis added, the authors). The need to ensure consistency with competition rules emerged also back in the early days of telecoms regulation: for example, directive 90/387 on the establishment of the internal market for telecommunications services through the implementation of open network provisions ("ONP") (based on Art. 100a EEC, now 114 TFEU) and directive 90/388 (based on Art. 90 EEC, now 106 TFEU) have both been adopted on the same day, 28 June 1990. Also, several Commission Communications have mentioned the complementary/coherent character of Competition Rules and Sector Specific telecommunications (harmonisation) regulation (see e.g. Commission guidelines on the application of EEC competition rules in the telecommunications sector, OJ C233/2, 6 September 1991, pt.).

<sup>13</sup> This is clear from Art. 3(b), TFEU dealing with exclusive competences. The exclusive competence of the Union is defined as "competition rules necessary for the functioning of the internal market". Protocol 27 adds encouragement to this. Nowhere in the treaties, old or new, is there any provision instructing the EU to exercise its powers to promote, let alone, ensure, competition in national (e-communications) markets.



serve the higher aims of the treaty, especially (additional) economic growth. It follows that the overcoming of fragmentation cannot but deserve priority over any other EU action in this field. This is what the treaty mandates the Commission, Council and the European Parliament to achieve.

The problem is systemic and far from new. Some analysts already highlighted the absence of sufficient legal provisions that would help achieve the Internal Market for eComms in the late 1990s<sup>14</sup>. For example, PELKMANS & YOUNG (1998) argued that there were "lingering doubts about [...] a single telecoms market" (PELKMAN & YOUNG, 1998; PELKMANS, 1998). A few years later, during the co-decision procedure that led to the approval of the 2002 package, a CEPS report authored by Martin CAVE and Pierre LAROUCHE (2001) noted that the "integration of national markets into an internal market remains a dark spot in the track record of telecoms liberalization". The report also expressed concern that "the internal market will remain forgotten – or ignored – in the new regulatory framework". Even the member states' officials preparing the 2002 package in Council admitted that the internal market was never at the centre of attention during those days. So, it is no surprise that the (former) Commissioner for the Information Society Viviane Reding observed in 2007:

"Two decades after we started to open national markets formerly dominated by state-owned monopolies, to competition, we still do not have an internal market for telecoms."

And the new Commissioner in charge of the Digital Agenda, Neelie Kroes, was even tougher on the issue, as she recently stated at the 2010 Mobile World Congress:

"Europe is still a patchwork of national markets. We no longer have queues of lorries at frontiers but we are still very far from achieving a Digital Single Market."

Against this background, a genuine internal market would not only further boost productivity and growth in the near future for existing services and infrastructure, but also be likely to greatly motivate large-scale investment and other dynamic adaptations in order to benefit effectively from new technologies, broadband services and the potential of high-quality IP-based

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<sup>14</sup> This does not mean that such provisions have been completely lacking in the past years. For example, the entire sector-specific regulatory package for networks and services (except directives 90/388 and subsequently 2002/77) was composed of harmonisation directives. These measures, however, were not adequately backed by true liberalization measures and an institutional context conducive to the integration of national markets into a single market.

infrastructure, engendering a higher growth path for many years to come (see e.g. Micus Consulting, 2008). This is indeed the 'workhorse' function of the internal market in the treaty and the principal reason for its pivotal place in European integration. The Section below looks at some critical problems linked to the internal market that remained unresolved by the second telecoms package of 2002. The following Section discusses, in short, the Commission's proposals preceding the third package with respect to the internal market and their resolution (or not) in the third telecoms package of December 2009. The Section after touches upon the main internal market aspects in the Commission's Digital Agenda of May 2010.<sup>15</sup>

### **Why the 2002 eComms regime did not realise an internal market**

The 2002 eComms regime did not bring the EU internal market much closer. Without being exhaustive, we provide five reasons why this was so. First, not only was the 'national markets approach' maintained: the fragmentation was in fact 'hardened' by compelling the national regulatory authorities (NRAs) to work on an ambitious and loaded agenda of (national) market analysis – more than 700 to date, all in all – and subsequent remedies, with a possible Commission veto on those analyses<sup>16</sup>. Bypassing the three-criteria test on whether *ex ante* regulation was the proper action to take, national markets almost invariably became regulated without appropriate economic analysis necessarily supporting that move, leaving a huge gap in the 'better regulation' dimension of the package (RENDA, 2008; STREEL, 2008). The lingering dominance of incumbents is also likely to harden the fragmentation. Indeed when studying the remaining seven markets, left over after the revision of the 18 pre-defined 'relevant' markets in December 2007, it turns out that all member states feature a player with significant market power (SMP) in almost all of them. Given the upcoming transition to next-generation-access networks (NGANs), which is likely to require higher access prices (and fewer access points), there is a risk that

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<sup>15</sup> Note that length constraints prevent this paper from treating many of these relevant aspects in-depth. For a more elaborate discussion, readers are referred to PELKMANS & RENDA, 2011.

<sup>16</sup> As of 19 May 2011 COCOM reported 721 cases closed with (489) "comments" letters; 409 cases closed with (312) "no comments" letters; 6 veto decisions; 9 cases closed with (6) "withdrawal of serious doubts" letters; 2 notifications declared "incomplete"; 16 cases pending and 49 withdrawals by NRAs. See COCOM11-12 of 19 May 2010.

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service competition may suffer and entrants will decline in number, without facilities-based competition having taken off in non-cable countries.

Second, even if the digital internal market is fragmented due to an approach rooted in 'national' markets, one could argue that convergence between member states in their regulatory and antitrust approaches would at least trigger a level-playing field and greater convergence of market conditions, thus mimicking EU-wide allocative benefits for consumers, business users and operators themselves when acting across borders. However, the lack of a Commission's veto power on remedies under the Art. 7 procedure led to considerable inconsistencies precisely where they matter most, yielding differences in market definition, in the choice of cost parameters and access price models, in the implementation of remedies and in appeals procedures. Furthermore, the fact that some EU countries have introduced 'functional separation' whereas others have not might also be regarded as an additional element of fragmentation for potential new entrants wishing to operate in more than one member state.

Third, the internal market risked becoming further fragmented, too, due to a series of problems with infrastructure investment. Such investments are costly and subject to economies of scale and scope. Keeping it simple, it is about investment in high-quality DSL (digital subscriber line) or, going beyond it, to very-high-speed infrastructure like fibre or adjusted cable. Since the ladder-of-investment has proven to be of doubtful effectiveness, EU rates of infrastructure investment in telecoms have often remained below the OECD average (depending on the EU country) up to the crisis<sup>17</sup>. All this led to the emergence of a 'broadband gap' (Figure 3) which makes it even harder for economic operators to embark on European strategies, whilst the European consumer is faced with radically different opportunities and benefits depending on where (s)he resides. Importantly, divergences between national remedies may well be exacerbated with the transition to NGA networks, as national governments and regulators have come up with a wide array of approaches to remedies, ranging from the forced sharing of in-building wires to duct-sharing to access to dark fibre, or bitstream access in a limited number of member states.

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<sup>17</sup> On the limited effectiveness of the ladder of investment, see RENDA, 2010; BOURREAU *et al.*, 2010. For a more critical review, see HERRERA-GONZÁLEZ & CASTEJÓN-MARTÍN, 2011.

Fourth, NRAs tended to turn inward<sup>18</sup> whilst paying scant attention to soft cooperative processes at EU level. The exchange of good practices and guidance in the European Regulators Group or ERG (the network of NRAs) appeared far too soft. The alternative route of (more) centralisation never seemed to be considered as a realistic option. The straightforward notion that a single telecoms market requires a single and authoritative regulator (as indeed in every other telecoms market in every OECD country and in many other countries in the world) has been rejected in reports and studies commissioned by the European Commission between 1995 and 2006. The NRAs as a group never made up for this 'regulatory gap' at the EU level: they did not show much of an urge to improve the working of the hopelessly fragmented EU market, since their procedures and resolve were weak at best. The mere existence of NRAs and the hardening of domestic tasks and orientation have created huge vested interests in pre-empting a common EU regulator. They are helped by the constitutional taboo on establishing an independent EU regulator in (any) network industries, the so-called 'Meroni doctrine'<sup>19</sup>. If an EU Agency would be created, it might have modest powers but it cannot become an independent regulatory authority. The Commission or a comitology committee (with the member states in it) will always have to stand above it and assume ultimate responsibility for decisions. The *de facto* influence of some existing EU Agencies in other domains shows that the approval by the Commission or comitology can be turned into a formality but even that option seems far off in eComms markets. For the European Parliament, with its gradually increased powers over time and again in the Lisbon Treaty, a truly independent EU Agency is equally unattractive since it will tend to take away powers that have only recently been bestowed upon it. Thus, for legal and political reasons, the governance structure, which should help the proper functioning of the internal eComms market, was (and still is) about the worst one can envisage: neither an independent EU Agency for the EU market as a whole, nor an autonomous EU Agency with modest but real powers, nor an effective (even when merely coordinating) ERG nor a European Commission which can reach into national markets deep enough or begin to erode the 'national' market approach in the first place.

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<sup>18</sup> Note the Commission's remark when presenting the third package proposals: "[The NRAs]... perspective has largely remained confined to national borders, despite the efforts made to improve coordination via the European Regulators Group" (COM(2007)696 of 13 November 2007).

<sup>19</sup> Case 9/56 Meroni & Co, Industrie Metallurgiche SpA v. High Authority [1958] ECR 133. In its ruling, dating from 1958, the CJEU ruled out the possibility for the High Authority to delegate discretionary powers to bodies established under private law.

Fifth, the EU level had next to nothing to say on 'spectrum'. In the aftermath of the second package, this has grown into an ever more costly omission and this cost is likely to increase to much higher levels in the near future. Why? The principal reason is wireless broadband, which is expected to be subject to significant technological progress, such that 4G (4th generation) wireless technologies (like LTE, the latest standard in the mobile network technology tree) can become genuine alternatives to fixed broadband with fairly high speeds. This opportunity is of particular importance for non-cable countries since platform-based competition would thus become possible in broadband, more or less like in cable countries. To seize this opportunity, scarce spectrum has to be made available. Fortunately, there is a unique window of opportunity with the transition from analogue to digital broadcasting which requires far less spectrum. This 'digital dividend' – freeing broadcasting frequencies for wireless – has been fiercely opposed by European broadcasters, if only to pre-empt new competitors in national markets. It would be good for technological progress and the internal market (the two would interact) if the European Commission could mandate the spectrum transition and not the member states separately, as is the case today<sup>20</sup>.

### **Will the 2009 e-Comms package bring the single market forward?**

The European Commission made proposals for a third telecoms package in November 2007. All the proposals amounted to an adaptation of the second package, refining and improving the competition-policy inspired regulatory regime in national markets. Falling outside this framework, the Commission also proposed strict EU-wide price controls for cross-border roaming, a uniquely intrusive measure after telcos proved unable or unwilling to solve the problem of excessive pricing via self-regulation. There can be little doubt that, by 2007, the Commission had begun to realize that the internal eComms market was still nowhere and that it deserved greater

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<sup>20</sup> In the past few months, the Commission has undertaken significant actions to encourage the release of the digital dividend. These include, most notably, Commission Recommendation 2009/848/EC of 28 October 2009 facilitating the release of the digital dividend in the European Union, *O.J. L* 308/24, 24 November 2009 and Commission Decision 2010/267/EU of 6 May 2010 on harmonised technical conditions of use in the 790-862 MHz frequency band for terrestrial systems capable of providing electronic communications services in the European Union, *O.J. L* 117/95, 11 May 2010. In addition, the Radio Spectrum Policy Programme currently being debated in the European Parliament provides for some key steps and deadlines in the direction of coordinating digital dividend policies at national level (though this comes perhaps too late, when most countries have already deployed their national strategies).

priority. Two queries are therefore relevant: do these proposals bring the internal market forward and did the Commission get its way? Unfortunately, the answer to both queries is rather disappointing: the proposals would not have brought the single market forward very much and precisely where these would have been helpful, the Commission harvested few useful results in the EU legislative process.

The dilemma of promoting competition in services based on access (whether to old copperwire networks or to NGNs) *versus* infrastructure competition (which tends to be more sustainable, though up-front far more costly especially for fibre and even more so in areas with less density) loomed large in the third package debates. As in all network industries, the installed base may impose path-dependencies in policies from which it is hard (and costly) to escape. Thus, in EU countries with little or no cable, investment in new infrastructure may well have been throttled precisely by generous access regulation. This negative relation between infra investment and TPA (third party access) has been demonstrated repeatedly in the empirical economic literature (WAVERMAN *et al.*, 2007; WALLSTEN, 2007; WALLSTEN & HAUSLADEN, 2009; GRAJEK & ROELLER, 2009; PIETRUNTI, 2008). It is therefore understandable that some telcos pleaded to mimic the temporary exemption from TPA in the gas sector used to stimulate new pipelines investment. These 'regulatory holidays' in gas, however, do not fit the EU telecoms model of the second package and have indeed later been forbidden by the Court of Justice of the EU.<sup>21</sup> This can only mean that the 'investment ladder' approach has to be successful, but that is made increasingly difficult with the risky and high capital costs of investment in NGNs. Moreover, such NGNs have fewer access options in the first place. In this context, a debate on 'functional separation' (a kind of management unbundling, without ownership unbundling) emerged as an extreme remedy in case of proven, lingering problems of access to incumbents' networks. New or not (RENDA, 2009; 2008, pp. 13-14), from the perspective of the internal market and eComms players eager to develop EU-wide strategies, having functional separation imposed in one EU country and not in another can easily render such European approaches very problematic. It is anything but obvious that the single market is improved by such selective and country-by-country measures. Interestingly, the Commission developed 'guidance' (a soft regulatory approach) in addition to the eComms framework by means of a Recommendation on NGAs, finally adopted on 20 September 2010. The stated purpose of the NGA

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<sup>21</sup> C-424/07, *Commission v. Germany*; judgment of 3 December 2009.

Recommendation is the development of the internal market by enhancing legal certainty and promoting investment, competition and innovation with respect to NGAs.<sup>22</sup> It boils down to a risk premium (between 10% and 15%) in the cost-price calculations underlying access pricing to NGA infrastructure, something that many operators considered insufficient to encourage any massive investment in NGA infrastructure. Indeed, the regulatory overlap between the copper networks and remedies for NGAs may well have exacerbated the legal uncertainty surrounding the issue.<sup>23</sup>

The EU governance debate should of course be about the single market. It is the single market imperative that might justify centralising decision-making and conflict resolution.<sup>24</sup> If the promotion of competition mainly in national eComms markets is the overriding aim, all one would need are hard indicators to analyse local competition and concomitant powers for NRAs (and /or local competition authorities) to realize it. The Commission proposed veto power for the Commission on (national) remedies, besides a new EU-level Agency called EECMA (later, BEREC) for the NRAs jointly and deeper analysis. The Commission's objective was merely to obtain greater assurance of consistency in measures and remedies at the national level by greater 'Europeanisation' of NRAs and more centralisation (merely) of analytical and support functions in EECMA. The Council basically resisted any weakening of NRAs by significant 'Europeanisation' and the European Parliament rejected EECMA first of all because it was seen as oversized, yet merely advisory, while presumably diluting the European Parliament's influence<sup>25</sup>. As concluded in RENDA (2009, p. 15):

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<sup>22</sup> See the Commission Recommendation 2010/572/EU of 20 September 2010 on regulated access to Next Generation Access Networks (NGA), *O.J. L* 251/35, 25 September 2010, pt. 1. This also echoes one of the key regulatory principles for NRA of the e-communications package, as added in 2009 in Article 8(5)(d) of the Framework Directive: promoting efficient investment and innovation in new and enhanced infrastructures, including by ensuring that any access obligation takes appropriate account of the risk incurred by the investing undertakings and by permitting various cooperative arrangements between investors and parties seeking access to diversify the risk of investment, whilst ensuring that competition in the market and the principle of non discrimination are preserved".

<sup>23</sup> CAVE & SHORTALL, 2010, state that legal certainty "is the one area where the Commission has not only failed but in fact may aggravate the problem".

<sup>24</sup> See PELKMANS, 1998; PELKMANS & YOUNG, 1998, Ch. 10, and PELKMANS, 2005, for a fully developed functional subsidiarity test for the EU.

<sup>25</sup> At the same time, the revised telecoms package did not lead to a Commission's veto power on remedies proposed by NRAs. However, the new Art. 7a of the Framework Directive gives the Commission the right to issue a recommendation requiring an NRA to amend or withdraw a draft measure, taking utmost account of BEREC's opinion. Whether this will lead to an enhanced possibility for the Commission to affect NRAs' decisions on remedies, remains to be seen.

"BEREC is essentially the same as the ERG. It has no legal personality, it is not an EU Agency, it does not include the competences that are reserved to ENISA and it does not have any significant competence on spectrum issues" <sup>26</sup>.

The single eComms market seems to have been forgotten in the heat of the pointless power struggle. One can only venture some hope that BEREC will eventually yield greater 'Europeanisation' of the mindsets of NRAs. On obtaining EU-level decision-making power on spectrum – e.g. designated bands to be harmonised for pan-European services – when relevant for the better functioning of the internal eComms market, the member states have been defensive at best. Moreover, the EP was irritated by the lack of any proposed EP (as against proposed Commission) influence in the spectrum area. One might suspect that a degree of capture (by e.g. broadcasters) of national governments explains the resistance in Council, if not in the EP. Nonetheless, the failure to develop European digital services will not be easily overcome and the digital dividend is not exploited in some EU countries. True, the Commission has successfully pursued a strategy of more flexible methods of spectrum management (see Cave & Minervini, 2009, for detail) but how helpful this can be for the internal market remains to be seen. Lately, Art. 8a of the Framework Directive, foreseeing multiannual Radio Spectrum Policy Programmes, the first version of which as proposed by the Commission is currently under Parliament scrutiny, seems to have determined a shift of gear towards more coordinated spectrum policy in Europe: even if the RSPP does not propose a shift in the balance of power between the Commission and the Member States and accordingly spectrum management remains a largely national competence, the RSPP could be considered as an interesting step towards harmonisation especially regarding the digital dividend 800 MHz band <sup>27</sup>.

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<sup>26</sup> For a slightly different vision, which suggests that BEREC is a "reinforced ERG", see HANCHER & LAROUCHE, 2011, pp. 777-778. The main differences between BEREC and ERG from this standpoint are that, while BEREC has no legal personality, its related Office does have it; in addition, unlike ERG, BEREC is now enshrined in the text of the directives, and accordingly NRAs have explicit cooperation obligations with it.

<sup>27</sup> See the European Commission Proposal for a Decision of the European Parliament and of the Council establishing the first radio spectrum policy programme, COM(2010) 471, 20 September 2010. The European Parliament adopted an amended version of this proposal in first reading on May 11, 2011 - see European Parliament legislative resolution of 11 May 2011 on the proposal for a decision of the European Parliament and of the Council establishing the first radio spectrum policy programme - COM(2010)0471 – C7-0270/2010 – 2010/0252(COD), P7\_TA-PROV(2011)0220.



In one area the EU level has acted firmly: cross-border roaming, be it outside the 2002 eComms framework. Roaming charges had been shown to remain extremely far above underlying costs whilst joint dominance was hard to prove. Precisely in a domain of EU activity (namely, cross-border) where voluntary agreement between NRAs cannot be the proper institutional approach as they are nationally oriented, a 'need-to-act-in-common' (as the subsidiarity test has it) is indispensable. The EU adopted a uniquely draconian Regulation on mobile voice, followed in 2009 by data services (including films, music, etc.). EU-wide price controls in network industries, indeed, in almost all sectors other than selected agricultural goods, are unheard of. Pursuing a properly functioning internal market cannot normally be based on such regulatory intrusion but on the efficiency-improving outcomes of dynamic competition processes. Alas, EU consumers and users could not rely on the latter for cost-oriented prices of roaming <sup>28</sup>.

### **Will the Digital Agenda realize the Digital Single Market?**

The May 2010 Commission proposals on the EU Digital Agenda <sup>29</sup> are incomparably more ambitious than i2010 or its predecessor. Table 1 constitutes a selection of those proposed measures that help establish or improve the Single Digital Market. A Single Digital Market would widen the approach of eComms, still heavily supply-side oriented, to digital demand questions that need to be resolved for a single market to work properly. Stronger, the dynamics of using new, innovative services as well as the incentives to generate more of such new services in the EU are throttled by numerous barriers, incompatibilities and uncertainties.

The supply side of (new) infrastructure and competitive supply of (e.g. bundled) services interacts of course with these demand aspects, and increasingly so with convergence and digital progress. All 19 Agenda items listed in Table 1 would have to be proposed within 2½ years, a tall order. The critical measures include: i) pan-European licensing for on-line rights management; ii) strengthening EU data protection rights of consumers; iii) updating the e-commerce directive, and with it the e-Signature directive as

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<sup>28</sup> The roaming regulation is currently being reviewed, also on the basis of an external study by specialized consultancy firm Wik. See: [http://ec.europa.eu/information\\_society/activities/roaming/regulation/consult2011/index\\_en.htm](http://ec.europa.eu/information_society/activities/roaming/regulation/consult2011/index_en.htm) for all related information.

<sup>29</sup> COM (2010) 245 of 19 May 2010. A Digital Agenda for Europe. The communication has been annulled and replaced in August 2010 by COM(2010) 245/2 of 26 August 2010.

well as ensure interoperability of secure e-Authentication systems, realizing mutual recognition of e-identification and authorisation across the EU and an EU-wide Online Dispute Resolution system; iv) a contract law instrument, complementing the Consumer Rights Directive; v) harmonising of numbering resources so as to finally enable the provision of business services across Europe; vi) a decision by EP & Council on a European Spectrum Policy Programme (see above); and not least; vii) the long-awaited (and now adopted) Recommendation to encourage investment in competitive NGA networks.

**Table 1 - Actions foreseen by the Digital Agenda**

<i>Commission legislative action/proposals</i>	<i>Planned Delivery</i>
<i>A vibrant digital single market</i>	
Propose a framework Directive on collective rights management, establishing pan-European licensing for (online) rights management	2010
Propose a Directive on orphan works to facilitate digitisation and dissemination of cultural works in Europe	2010
Review the EU data protection regulatory framework, to enhance individuals' confidence and strengthening their rights	2010
Make proposals updating the e-Commerce Directive for online markets	2010
Propose measures to make Single Euro Payment Area (SEPA) migration obligatory by a future fixed date	2010
Review the eSignature Directive to ensure cross-border recognition and interoperability of secure eAuthentication systems	2011
Propose a contract law instrument complementing the Consumer Rights Directive	2011
Propose measures for an increased harmonisation of numbering resources for provision of business services across Europe	2011
Report on the review of the Directive on the enforcement of intellectual property rights	2012
Report on the need for additional measures needed to promote cross-border and pan-European licences	2012
Review the Directive on Re-Use of Public Sector Info, notably its scope and principles on charging for access and use	2012
Propose an EU-wide Online Dispute Resolution system for eCommerce transactions	2012
<i>Trust and security</i>	
Propose legal measures to combat cyber attacks	2010
Propose rules on jurisdiction in cyberspace at European and international levels	2013
<i>Fast and ultra fast internet access</i>	
Propose a decision by the European Parliament and Council on a European Spectrum Policy Programme for more efficient management of radio spectrum	2010
Issue a Recommendation to encourage investment in competitive NGA networks	2010
<i>ICT-enabled benefits for EU society</i>	
Review the Public Access to Environmental Information Directive	2011
Issue a Recommendation on digitisation of European cinema	2011
Propose a Council and Parliament Decision requesting member states to ensure mutual recognition of e-identification and authentication across the EU based on online 'authentication services'	2012

Together with the remaining – welcome although less critical – proposals, the Digital Single Market would receive the major stimulus many business actors and consumers have been insisting on for years. Another step in this direction is the recently adopted Commission Communication on the "Single Market Act – Twelve levers to boost growth and strengthen confidence – Working together to create new growth (COM(2011) 206 of 13 April 2011), which emphasises e.g. the need to take actions to improve consumer confidence in online transactions. A recent study (Copenhagen Economics, 2010) finds that a realisation of the Digital Single Market could have an EU GNP boost of 4.1%, quite apart from the dynamic incentives leading to innovation and new services, if not additional investments (which are exceedingly hard to simulate). The Commission is to be commended for squarely giving unreserved priority to the route towards an EU Digital Single Market.

## ■ Conclusions

A full success of EU eComms liberalisation, combined with regulation and competition policy, would consist in creating a far more conducive environment for drastic price reductions, made possible by rapid technological change, and for consumer-responsiveness, innovation and a high rate of investment driving new services and, recently, new advanced infrastructure. So far, the benefits experienced by all and the dynamics of the sector have concealed significant structural flaws in the EU digital regulatory model. There is no such thing as an EU digital single market, whether on the supply or demand side. Not only is the building of that internal market the central mandate of the treaty to the EU level, it is ever more costly for the European economy to do without.

Although the general claim that an internal market is lacking has of course been made before, not least by the Commission, it is only when one employs systematically a 'single market lens' that one begins to realize what a curious and poor construct the EU eComms and digital framework still is today! Price disparities abound and are profound, at times absurd, as well as lingering; non-price indicators of fragmentation are adding more discomfort. Reconsidering the three regulatory packages of 1998, 2002 and 2009, again focusing solely on the internal market aspects, demonstrates that the EU has first neglected the single market dimension, and later failed to address it in a meaningful way. It is only the very recent EU Digital Agenda that

squarely tackles the lack of a single digital market, in particular on the demand side. It is high time that Council and the EP begin to appreciate the urgency and economic importance of restoring the core mandate of the treaty. When the EU legislature will finally realize what they have (not) done, we offer them two further thoughts to consider in earnest.

First, is there any serious economic, institutional or treaty rationale for maintaining an EU eComms framework that consists of stimulating competition in national, fragmented markets? Economically, the EU misses out on a major set of incentives for pan-European services, which currently (13 years after the full *de iure* liberalization of the sector by Telecoms-1998) are practically non-existent. An EU single market is equally critical for innovation in services and for building advanced infrastructure requiring a better perspective of user demand for such new services. Institutionally, NRAs have, almost by definition, a profound vested interest to maintain the current splintered set-up of the EU 'internal' market, if not showing a strong inclination to define relevant markets as if national borders (should) matter. The TFEU does not mandate EU legislative bodies or, for that matter, the Commission, to foster competition inside national markets, but literally and solely in the EU internal market.

Second, the current narrow formulation of the Meroni doctrine is simply inconsistent with the emergence and permanent proper functioning of the internal market in a network industry like eComms. In the treaty logic, with the overriding (intermediate) purpose of constructing a properly functioning internal market so as to serve the higher aims of the TFEU (such as economic growth), a network sector cannot be expected to integrate over the entire EU economy as ordinary goods and services markets do. It does require somewhat greater centralisation. By assuming an absolutist constitutional view on the disallowed delegation to independent EU Agencies, without noting the glaring inconsistency with building the internal (eComms) market – the principal 'means' to make the treaty work – one fails to consider proven, alternative ways of solving this dilemma (as, for example, some federations have done with framework laws and mechanisms of accountability to the legislator). When, nowadays, EU Agencies are set up, they suffer from enormous institutional complexity and narrow mandates, remaining at best somewhat autonomous in the presence of 27 national regulators! In eComms, even that poor status has not been accomplished. Every OECD country and many other countries have an independent regulator for eComms, yet, mysteriously, the EU expects a well-functioning internal market to come about without a common independent regulator (and the Commission can only partly fill the gap).

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