

European Commission proposes reform of EC telecoms rules

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The European Commission has published its legislative proposals for reform of the EC telecoms rules. The Commission hopes that the proposed changes will improve competition, complete the single market in electronic communications and improve consumer protection. The changes include a reduction in the number of telecoms markets susceptible to ex ante regulation from 18 to seven; increased powers for national regulators; the introduction of a new independent regulatory body, the European Electronic Communications Market Authority; improved security measures and consumer rights; and a remedy of "functional separation". The changes are material and, in some respects, more radical than was contemplated in the consultation that preceded them, and it is likely they will lead to heated debate during the course of the legislative process.

BACKGROUND

Regulatory framework

Prior to the late 1980s, the telecoms market was characterised by the existence of state monopolies and it was focused on fixed-line services. From the late 1980s, a process of market liberalisation began, and in 2002 the existing EC regulatory framework for telecoms was agreed in the form of a series of directives:

- Directive 2002/21/EC on a common regulatory framework for electronic communications networks (ECNs) and electronic communications services (ECSs), known as the Framework

Directive, because this creates the framework within which the other directives sit (*OJ 2002 L108/33*).

- Directive 2002/20/EC on the authorisation of electronic communications networks and services, known as the Authorisation Directive. It harmonised and simplified the authorisation regime for ECNs and ECSs by ending the licensing system and instead setting out a minimum set of obligations for operators under general authorisation (*OJ 2002 L108/21*).
- Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, known as the Access Directive. It harmonised the way in which member states regulated access to, and interconnection of, ECNs and associated facilities (*OJ 2002 L108/7*).
- Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, known as the Universal Services Directive. It established rights for end-users and aimed to ensure the availability throughout the EU of good quality publicly available services through effective competition and choice, and to deal with circumstances in which the needs of end-users were not satisfactorily met by the market (*OJ 2002 L108/51*).

In the UK, these four directives were implemented by the Communications Act 2003.

A fifth directive was implemented in the UK by means of the Privacy and Electronic Communications (EC Directive) Regulations 2003:

- Directive 2002/58/EC, concerning the processing of personal data and the protection of privacy in the electronic communications sector, known as the Privacy Directive (*OJ 2002 L201/37*).

The five directives together are known as the 2003 regime.

The new regulatory regime brought about by these directives was intended (among other things) to remove the previous distinction between different types of telecoms networks and services. The regime is applicable to all forms of communications technology, whether used for broadcasting or telecoms, and reflects the reality of the technological convergence between these two sectors. The focus of the legislation is on markets rather than technologies and was aimed at promoting competition to benefit consumers and users. The regime introduced competition-law-based principles for defining markets and for identifying those operators who have significant market power (SMP).

Article 7 of the Framework Directive provides for a system of review and notification by national regulatory authorities of measures they propose to take in markets subject to ex ante regulation. Markets which are susceptible for ex ante regulation (and which must be reviewed by national regulators) were identified in a Commission Recommendation (*OJ*

2003 L 114/45). Ex ante regulation may only be imposed following review of markets by national regulators and where it is found that the market is not effectively competitive, and must be removed once the market has become fully effective.

Need for reform

The European Commission has conducted annual reviews of the operation of the state of the electronic communications markets in the EU and the extent of implementation of the EC regulatory framework (see, most recently, *Legal update, Commission publishes 2006 report on electronic communications regulation and markets* (www.practicallaw.com/3-242-7971)).

The Commission considers that the liberalisation of the telecoms services markets has largely been successful in opening national markets to competition, stimulating investment in new services and infrastructure, and giving consumers the benefits of greater choice and lower prices.

However, the Commission considers that the full potential of the telecoms sector has not yet been achieved. It cites the fact that there are few transnational or EU-wide communications services, despite the fact that the radio spectrum used widely by this industry is a borderless resource. It sees one of the barriers to cross-border services as being the regulatory inconsistencies between member states - this can result in, for example, huge variation between mobile call termination rates.

There are still a number of former state monopolies in positions of structural dominance due to their inherited (generally state-funded) networks. As at July 2006, only 10% of subscribers in the EU used an alternative provider for direct access to fixed-voice telephony services. The figures are exacerbated by the fact that since 2002, 12 new member states have joined the EU, most still with dominant incumbent operators.

During the summer of 2007, the Commission introduced a regulation on

international mobile roaming in the EU. This placed limits on the wholesale and retail tariffs which telecoms providers could charge for calls made and received outside the user's home country. The Commission considers that its need to intervene in this is evidence of the failings of a fragmented market (see *Legal update, International mobile roaming regulation adopted* (www.practicallaw.com/9-369-7964)).

In 2006, the Commission consulted on proposals to update the framework (see *Legal update, Commission consults on options for updating the EU telecoms rules* (www.practicallaw.com/2-203-1961)).

FACTS

The Commission has published a package of reform proposals with the overall aim of enabling citizens in the EU to benefit from better and cheaper communications services. More specifically, the Commission hopes to:

- Improve competition through better regulation, by reducing the number of regulated markets, improving regulation of the radio spectrum and introducing the remedy of functional separation.
- Complete the single market in electronic communications by removing regulatory inconsistency and distortions of competition; by strengthening the powers of national regulatory bodies (NRAs); introducing a new European agency, the European Communications Marketing Authority; and increased Commission powers.
- Improve consumer protection.

Legislation

The proposals are contained in the following draft legislation:

- A draft directive amending the Framework Directive, the Access Directive and the Authorisation Directive.
- A draft directive amending the Universal Services Directive, the Privacy

Directive and Regulation 2006/2004 on consumer protection co-operation.

- A draft regulation establishing the European Electronic Communications Market Authority (informally referred to as the European Telecom Market Authority) (Market Authority).
- A recommendation on relevant product and service markets within the electronic communication sector susceptible to ex ante regulation in accordance with the Framework Directive (Recommendation).

The legislative proposals are accompanied by an impact assessment and a Communication setting out the main policy lines and reporting on the public consultation.

The Recommendation was adopted by the Commission on 13 November 2007 and comes into force immediately.

The rest of the Commission's proposals must be approved by the European Council and the European Parliament following the so-called "co-decision procedure". The Commission plans that the proposals will become law before the end of 2009; ready for implementation by member states during 2010.

Main proposals

De-regulation of markets

The Commission has reduced the number of markets susceptible to *ex ante* regulation under the Regulation from 18 to seven. This is with immediate effect, although it is without prejudice to market reviews conducted already. The markets it concludes to be not yet effectively competitive, and therefore still subject to *ex ante* regulation, are:

- Access to the public telephone network at a fixed location of residential and non-residential customers (this comprises two previous retail markets).

- Call origination on the public telephone network provided at a fixed location.
- Call termination on individual public telephone networks provided at a fixed location.
- Wholesale (physical) network infrastructure (including shared or fully unbundled access) at a fixed location.
- Wholesale broadband access.
- Wholesale terminating segments of leased lines, irrespective of the technology used to provide leased or dedicated capacity.
- Voice call termination on individual mobile networks.

These markets can only be regulated where the NRA has identified an operator with SMP.

The Commission has concluded that the following markets are effectively competitive and member states no longer have to conduct and notify to the Commission Article 7 market reviews for these markets:

- National/local residential telephone services from a landline.
- International residential telephone services from a landline.
- National/local business telephone services from a landline.
- International business telephone services from a landline.
- The minimum set of leased lines.
- Transit services in the fixed telephone network.
- Wholesale trunk segments of leased lines.
- Access and call origination on mobile networks.
- International roaming on mobile networks.

- Broadcasting transmission.

However, activities in these markets continue to be subject to regulation by competition law.

NRAs may still impose *ex ante* regulation on these markets (following notification of the proposed measures in accordance with Article 7) where, on the basis of a thorough review of national market conditions, they consider that the national market is not yet effectively competitive.

An Explanatory Memorandum, which accompanies the new Recommendation, explains the approach that the Commission has taken to identify the markets to include in the new Recommendation.

Spectrum management

The importance of access to the radio spectrum has increased significantly, due to the rapid development of wireless technology, which requires flexible access to spectrum, and the increasing demand for bandwidth. The Commission considers that improvement in spectrum allocation is a priority in order to foster innovation and competitiveness in the EU. This is of particular importance given that large quantities of valuable spectrum will be released following the switchover from analogue to digital television services in most member states (the digital dividend), because digital services use less spectrum than analogue services.

In addition, the Commission considers that access to broadband communications is important for the competitiveness and cohesion of the EU. Wireless access is an important way of addressing the "broadband gap" and "digital divide" which exists between different groups of society, in particular between rural and urban areas.

At present, spectrum management systems vary significantly between member states. The Commission notes that this fragmented approach increases costs for spectrum-users and deters innovation.

Following the proposals set out in its June 2006 consultation paper, the Commission has now made proposals to:

- Strengthen technological neutrality (free use of any technology in a spectrum band) and service neutrality (free use of spectrum for any telecoms service). This principle will be enshrined in the Framework Directive. The only exceptions will be in limited cases, where it is necessary to meet general interest principles, or where justified by health and safety risks.
- Improve access to spectrum by designating certain spectrum bands across the EU in which acquired spectrum rights can be traded (secondary trading).
- Allowing more unlicensed use of spectrum.
- Creating a more efficient and coordinated system for authorising wireless systems with a pan-European or cross-border dimension.

These measures will be introduced by amendments to Article 9 of the Framework Directive and Articles 5, 6 and 7 of the Authorisation Directive. The Authorisation Directive provides a transition process for the introduction of spectrum trading.

In addition, the Commission invites member states to develop a common spectrum plan at EU level. This will facilitate the introduction of new wireless services, by identifying common spectrum bands, which will be released by the digital dividend, that can be optimised by the creation of clusters of services in common spectrum zones. The Commission would prepare the required measures to reserve and co-ordinate such common bands at EU level.

Functional separation remedy

NRAs will be able to impose a remedy of functional separation on telecoms operators with SMP (*new Article 13a of the Access Directive*). This would force operators to separate the wholesale access part of their business so that it could supply access products and services to all undertakings on equal terms as supply to its own business.

This remedy can only be used where the NRA has first submitted a request to the Commission which demonstrates that the imposition of other remedies has failed to achieve effective competition and that there are important and persisting competition problems or market failures. Further, the NRA must conduct an assessment of the impact of the functional separation remedy on the NRA, the undertaking, on the undertaking's incentives to invest in its network and on other stakeholders including, in particular, the expected impact on infrastructure competition and any potential affects on consumers. The NRA must also provide the Commission with a draft of the proposed measure.

Under a new Article 13b of the Access Directive, NRAs are also obliged to conduct an assessment of the impact of any voluntary functional separation to be undertaken by operators with SMP. The NRA must determine whether such functional separation will necessitate the withdrawal, amendment or imposition of any other remedies.

Market Authority

The Commission does not believe that the existing structure of regulators is achieving consistent EU regulatory approaches fast enough or efficiently enough. It is particularly critical of the way the European Regulator's Group (ERG), which is made up of representatives from European NRAs (including some outside the EU), has failed to tackle cross-border issues such as voice-over-internet protocol, differences in mobile termination charges and high mobile roaming charges, because of differences among regulators. The Commission therefore proposes to set up the Market Authority, which would be made up of representatives of NRAs. It would be an independent body, accountable to the European Parliament, and would assist national regulators and the Commission in coordinating and where necessary harmonising telecoms regulation, and ensuring that regulation is applied more consistently and more swiftly across all member states. It would have the following main functions:

- Ensuring that the 27 national regulators work as an efficient team on the basis of common guiding principles.
 - Delivering opinions and assisting in preparing single market measures of the Commission for the telecoms sector.
 - Improving the accessibility of telecoms services and equipment for users with disabilities.
 - Monitoring the use of the single European emergency phone number, 112, and identifying remaining obstacles to its use.
 - Facilitating cross-border EU services in relation to rights of use for scarce resources such as spectrum and numbers, and enabling operators wishing to do so to use a single European area code for their services.
 - Addressing network and information security issues. It will take over the role of the European Network and Information Security Agency (ENISA).
- The Market Authority would be made up of:
- An Administrative Board responsible for appointing the Market Authority's Director, for adopting the Market Authority's annual work plan and budget, and approving the general report on the Market Authority's activities.
 - The Board of Regulators, made up of one member per member state (the head of the NRA) and the Director. The Commission would be able to participate in, but not vote, at Board meetings. The Board would be responsible for technical decision-making (in particular in Article 7 cases).
 - The Director, who would be the Market Authority's legal representative and responsible for the Market Authority's tasks.
 - A Chief Network Security Office, who would be responsible for co-ordinating the Market Authority's tasks in relation to network and information security.

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- A Board of Appeal.
- A Permanent Stakeholders' Group.

The Commission will have power to oversee remedies suggested by national regulators, to help ensure a more consistent, efficient and speedy application of the rules across the EU. It will validate draft remedies in close cooperation with the Market Authority.

Strengthening NRAs

The Commission is proposing a number of measures to strengthen the independence and enforcement powers of national regulators. In particular, the legislative proposals include:

- A requirement on member states to ensure that the head of the NRA can only be removed from office if he no longer fulfils the conditions required for the performance of his duties, as laid down in national law, or if he has been guilty of serious misconduct. The NRAs must also be given adequate financial and human resources to carry out the tasks assigned to them, and must have separate, published, annual budgets (*Article 3(3), Framework Directive*).
- Clarification that interim measures may only be granted to suspend an NRA decision on appeal if there is an urgent need to suspend the effect of the decision in order to prevent serious and irreparable damage to the party applying for those measures, and the balance of interests so requires (*Article 4(1), Framework Directive*).
- Member states must provide the Commission with details of appeals against NRA decisions (*Article 4(3), Framework Directive*).
- Member states must ensure that undertakings who provide ECSs give NRAs information concerning future

network or service developments that could have an impact on the wholesale services made available to competitors (*Article 5(1), Framework Directive*).

Member states must give NRAs the power to impose effective, proportionate and dissuasive penalties on undertakings that breach their obligations under the Directives (*Article 21a, Framework Directive*).

NRAs will also be able to use the remedy of functional separation to overcome network access bottleneck where standard remedies have failed.

Security and consumer rights

The Commission is proposing a number of measures to protect consumers, in particular to protect privacy and security. These will mainly be implemented by way of amendments to the Universal Services Directive and Privacy Directive. The proposed measures include:

- Improving the transparency of information provided by service providers to consumers, in particular on terms of supply and tariffs. Operators will be required to publish comparable, adequate and up-to-date information in an easily accessible form. NRAs will have powers to require the operators to improve their tariff transparency and to inform customers of possible restrictions on access.
- Making it possible to switch fixed or mobile provider during a single day.
- Improving implementation of the 112 emergency number, in particular by ensuring more efficient access to caller location information and facilitating access by customers with disabilities to 112 emergency services.
- Improving access to freephone numbers from abroad.
- Enabling NRAs to impose minimum service quality requirements based on standards drawn up at EC level.
- Strengthening existing provisions for disabled customers to access communications services.
- Operators will have to inform customers and NRAs if the personal data has been compromised following a breach of network security.
- Giving NRAs more responsibility in relation to the security and integrity of networks and services. Member states must give the NRAs the necessary powers to implement and enforce security obligations on operators.
- Strengthening the competent authority's enforcement and implementation powers in relation to issues such as e-mail "spam". The Commission also proposes that service providers could be given the power to take legal action against spammers.
- Clarifying the EU rules in relation to data collection and identification devices using electronic communications networks.

Commission powers

At present, the Commission can only comment on market definitions and on NRA assessments of market dominance: its opinions have no legally binding effect. Under a new Article 19 of the Framework Directive, where the Commission finds that divergences in the implementation by NRAs of their regulatory tasks may create a barrier to the internal market, it may (taking account of the opinion of the Market Authority) issue a recommendation or a decision on the harmonised application of the relevant regulatory provisions. NRAs must take account of any such Commission recommendation. The Commission's new power will, in particular, apply to:

- Consistent implementation of regulatory approaches, including regulatory treatment of new services.
- Numbering, portability of numbers, number and address translation systems, and access to 112 emergency services.

- Consumer issues, including accessibility to electronic communications services and equipment by disabled end-user.
- Regulatory accounting.

COMMENT

PLC IPIT & Communications and Mike Conradi, partner in Kemp Little, comment as follows:

These proposals make some material changes to the regulatory framework and are also, in some respects, considerably more radical than was contemplated when the initial consultation was published in 2006. They are likely to be negotiated hard during the legislative process.

Deregulation of markets

The reduction of regulated markets from 18 to seven will be welcomed by incumbent telecoms operators. The fact that most of the retail markets have been removed from the list and some wholesale markets have been too (for example, the mobile call origination market) is likely to mean a significant reduction in *ex ante* regulation in these areas (so, for example, existing rules in Norway and in Slovenia, requiring mobile operators to allow mobile virtual network operators (MVNOs) access to their networks, are now likely to be lifted).

However, the ERG has expressed concern about the analysis undertaken by the Commission in support of its removal of key wholesale markets from the list. The ERG does not support the removal of these markets, which it believes may undermine the ability of NRAs to regulate in the interests of consumers.

Spectrum liberalisation

Despite new technology which limits interference between radio bands, broadcasters may be concerned that freeing up radio spectrum for mobile phone operators could cause signal interference and increase their costs.

Functional separation remedy

In the UK this remedy has already been adopted in relation to BT, through the creation of its separate access business division called Outreach; and the success of this venture in promoting competition in the UK telecoms market was a major reason why the Commission is promoting this remedy for all member states. However, this might be down to special circumstances and it may not be as successful when used elsewhere. Functional separation is likely to work only if the incumbent operator embraces the concept as BT has – it cannot readily be imposed against the operator's will because a lot of good faith is required to make it work. Furthermore, in the UK, functional separation was not imposed – BT agreed to it as part of undertakings it gave in order to avoid a reference to the Competition Commission under the Enterprise Act 2002. This is a regulatory mechanism available only in the UK – it is not replicated in other member states.

It is likely that a number of member states and former incumbent operators will be opposed to this remedy and they have warned that it could reduce the incentives for operators to undertake risky investment in new access networks, although the Commission disputes this. However, smaller operators and new market entrants are expected to support this remedy as a means for them to gain a greater hold in markets currently dominated by one operator.

Market Authority and increased power for NRAs

National telecoms regulators will welcome the increase in their powers. However, neither NRAs nor governments appear to be happy about the new Market Authority, but the proposed Market Authority is not as significant a change as some of the press coverage would suggest. The proposal is very clear that the Authority is intended to complement the work of NRAs and not replace them, and if its activities lead to greater harmonisation there will be a real business benefit. A new "common selection

procedure", to be administered by the Authority, is a clear example, as it will provide a much more straightforward way for a single undertaking to be given pan-European rights to spectrum or telephone numbers (where appropriate).

The ERG opposes the move. In a letter to the Commissioner, the ERG explained that it supports the Commission's goal of improving the consistency and quality of regulation across member states, but argues this can be best delivered by strengthening the current model of a European network of independent regulators. It fears that the proposed Commission power to veto remedies, and new layers of unnecessary centralism, risk undermining at a European level the very independence which the Commission is concerned to protect at the national level. It urges the Commission to amend the Decision that set up the ERG in order formally to reflect the ERG's current and potential role in promoting the single market.

Consumer protection

The requirement on internet service providers and telecoms operators to notify their customers and the regulator of security breaches involving their personal data is a significant and material change to the current law, which has not received as much attention as it should have. This will impose potentially significant costs (at least in terms of reputational damage) to affected operators and it applies even where the breach occurs in respect of just one subscriber.

Source: European Commission press releases IP/07/1677 and IP/07/1678, MEMO/07/458, Commission Press Pack, EU Telecoms reform and Commission proposal documents (including 10 fact sheets).