

SPRING 2008

European Commission Publishes Details of its Proposed Reforms of the Electronic Communications Regulatory Framework

On 13th November 2007, the European Commission published its long-awaited proposals for further reform of the electronic communications sector. The proposals involve amending all five of the 2002 Directives by way of two new Directives, introducing a new Regulation and adopting a new Recommendation on Relevant Product and Service Markets.

The Recommendation was adopted and came into force on 13th November 2007. The two draft Directives and the draft Regulation were published on the same date but must yet proceed through the EU legislative machinery. They are not expected to be finalised before the end of 2009, with national implementation to follow in 2010.

Market Analysis and Imposition of Regulatory Obligations

One of the principal concerns of the Commission arising from the first round of regulatory reviews is the inconsistency in market analysis and regulatory measures adopted by national regulators (NRAs) across the EU. The Commission's proposals aim to resolve these differences and create a more harmonised regulatory environment. This is to be achieved in a number of ways.

Reduction in Recommended Markets

According to the Commission, certain markets have become more competitive since 2002 and it is no longer necessary to recommend them for analysis by national regulators, (although a case may still be made for analysing them where certain criteria are met). The markets now recommended for analysis are the following:

- Access to the fixed telephone market;
- Call origination on the fixed telephone network;
- Call termination on individual fixed telephone networks;
- Wholesale access to the local loop for broadband and voice services;
- Wholesale broadband access;
- Voice call termination on individual mobile networks; and
- Wholesale terminating segments of leased lines.

Save with one exception, all of these markets are wholesale markets.

'Article 7' Procedure

In order to deal with what the Commission considers is the inconsistent application of regulatory remedies to markets by NRAs across the EU, it is proposed that under a new 'Article 7' procedure the Commission will have the power to veto remedies proposed by NRAs, and to require an NRA to impose a specific remedy within a given time limit where re-notified measures from the NRA would still create a barrier to the single market or be incompatible with Community law.

Functional Separation

An additional regulatory remedy of 'functional separation' (i.e. splitting the wholesale and retail businesses of operators, while retaining common ownership) is to be made available to NRAs in circumstances where other measures have failed.

Direct Intervention by the Commission

It is also proposed that, in certain circumstances, the Commission would be able to take matters fully into its own hands.

- (a) When a NRA has not completed its market analysis within a two year period, the Commission may adopt a decision designating relevant undertakings with significant market power and imposing obligations directly on them.
- (b) The Commission may also issue decisions on the existence of significant market power and the remedies to be applied in respect of transnational markets.

Electronic Communications Market Authority

The Commission has proposed the establishment of a new authority, the European Electronic Communications Market Authority (ECMA) to assist NRAs and the Commission in co-ordinating and harmonising regulatory measures. The ECMA is to play a role in the new Article 7 procedure by seeking to ensure greater consistency in market definition and analysis and the application of remedies throughout the EU. The ECMA would be required by the Commission to issue opinions on all matters regarding electronic communications, including draft NRA proposals concerning market definition and the designation of SMP. Before the Commission would require the withdrawal of a remedy proposed by an NRA or its own specific remedy to be imposed on an undertaking, 'utmost account' would be taken of the ECMA opinion. The ECMA's views would also be sought on a range of other issues including number portability, the implementation of the European Emergency Number '112', the use of radio frequencies and the harmonisation of rights of use, and network and information security.

Spectrum Management

The scarcity of spectrum, a key economic resource, and the increasing requirements for access to bandwidth is a major concern of the Commission, which has prioritised the restructuring of the rules relating to spectrum allocation. Conscious of the 'digital dividend' which the switchover from analogue to digital TV is expected to create by 2012, the Commission has taken steps to promote technological and service neutrality, improve access to spectrum for operators and consumers, create a market for secondary trading and allow more unlicensed use of spectrum. The Commission wishes to ease access to frequencies and smooth the transition towards a future market in spectrum trading in which undertakings will be permitted to lease or transfer rights to use specified frequency bands to other undertakings.

Consumer Rights

The proposed changes to the Universal Services Directive include the following:

- (a) In advance of concluding contracts with subscribers (and regularly thereafter), providers of electronic communications services and networks will be required to inform subscribers of certain limitations on the services made available to them.
- (b) Porting of numbers between networks and their subsequent activation is to be executed no later than one working day from the date of the subscriber's initial request.

Conclusion

One senses in the proposals a shift in power, away from NRAs and towards the Commission. While it is true that national regulators' independence is to be reasserted under the new proposals and their powers will be increased in certain respects, the Commission appears to be seeking to exert more direct influence at a national level. The removal of markets from the Recommendation, the new power of the Commission to dictate which regulatory measures are appropriate in national markets, the direct regulatory role the Commission will assume in certain circumstances and the establishment of the ECMA seem to point inescapably to this. The proposals are, in a number of respects, more radical than expected and are likely to encounter some opposition as the legislative process moves forward.

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