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and renewed on 21 March 2007

Revision of the regulatory framework for electronic communications networks and services

Evaluation Sheet



Saarbrücken, 15 January 2008

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Foreword

1 General

The Committee of the Regions, by virtue of a tender to set up a network of outside experts (Ref. No. 2005/S141-139751), issued on 23 July 2005, expressed its interest in obtaining studies relating to current topics and in benefiting from existing databases and other kind of knowledge that are at the disposal of research centres or universities and that have been built up in the context of evaluating public policies, to the benefit of its various commissions. This specific action should provide the CoR with a rapid response capability and it should allow broader consultation of local and regional players.

The CoR, within the framework of the contract, disposes of a variety of different forms of commissioning experts' support, comprising:

- the drafting of *notes* and *sheets* that shall provide a critical analysis of the positive and negative aspects of a legislative proposal or key consultation document, or provide explicit answers to specific information questions. These notes may serve to support the requirement to assess the expected impact on administration and regional and local finances;
- the *assistance* in the contribution to the impact assessments which are systematically prepared by the European Commission in view of texts of major political importance (legislative and other proposals), put forward by the institutions or the Member States and concerning subjects of high relevance for local and regional authorities. This assistance may in particular relate to questions of subsidiarity and proportionality;
- the drafting of *reports* which may either be concentrated on outlook opinions and impact reports, or on an impact assessment. Such reports may be based on the results of a questionnaire (survey) drawn up and sent out by the contractor with the agreement of the CoR, and may be suited particularly when there is need for a comparative analysis of several Member States, in which case at least on half of Member States should be covered;
- the organisation of *workshops* which covers not only the actual pursuit of the conference but also its preparation, evaluation and follow-up.

Specific action by the contractor is only to be taken on the basis of a special agreement or order, issued in accordance with the terms of the framework contract on an ad-hoc basis by the CoR.

2 Evaluation sheet on the revision of the regulatory framework for electronic communications networks and services

The Committee of the Regions has issued an order for a service to be provided by the Institute of European Media Law relating to the Opinion of the CoR on the revision of the regulatory framework for electronic communications networks and services. The evaluation sheet shall include suggestions for the Committee of the Region's position on the recently published Commission proposals.

The following remarks have explicitly been made in view of an evaluation by the EMR:

The European Commission will adopt in mid November 2007 the future legislative proposals of the European Commission amending the regulatory framework for electronic communications networks and services, including a Regulation setting up a European Communications Authority, as well as the Recommendation on Relevant Markets.

Topics within these initiatives which are in particular relevant for the Committee of the Regions (CoR) include:

- a more market-based approach to radio spectrum management, maximising also the social potential of radio spectrum usage for broadband applications;
- functional versus structural separation and effective competition in electronic communications markets;
- realisation of cross-border and pan-European electronic services;
- strengthen consumers' rights and improving security.

The note is expected for each of the identified topics to

- a) outline possible implications for local and regional authorities, referring to their competences in some Member states in this field;
- b) outline key challenges for local and regional, small scale service providers;
- c) identify the tools for improving users' rights, in particular accessibility, privacy and security for consumers in this field;
- d) as the main focus: conclusions on how local and regional particularities can be more taken into account in this field, including, where possible, examples of best practice.

Additionally, the EMR was referred to a number of key documents by the European Commission outlining the reform proposals following the review of the EU regulatory framework for electronic communications, and to several Opinions adopted by the Committee of the Regions relating to aspects of electronic communications regulation.

Revision of the regulatory framework for electronic communications networks and services

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Evaluation Sheet on the “Revision of the regulatory framework for electronic communications networks and services – Suggestions for the Committee of the Regions' position”

Introduction

The first approach to a common telecommunications regulation at EC level dates back to the end of the 1980ies and the early 1990ies when a number of legal acts were adopted with a view to liberalising the telecommunications market. A core element of this package was the Open Network Provision (ONP) Directive¹ (90/387/EEC) establishing the rules for the interconnection of telecommunications networks and the interoperability of services.

In 2002, a new series of legal texts came into force revising the then effective rules and broadening their scope of application. The new EC regulatory framework aimed at further opening the markets as well as keeping pace with the latest developments in Internet and mobile phone services and in the convergence of the media. It was no longer to be limited to telecommunications networks and services, but was designed to include all electronic communications. Member States were obligated to transpose the new EC legislation into national law by 24 July 2003.

The 2002 reform package includes five Directives:

- the Framework Directive², establishing the general principles of electronic communications regulation throughout the European Union,
- the Authorisation Directive³, providing for the conditions under which both general authorisations and individual licenses for electronic communications are being issued,
- the Access Directive⁴, setting out the rights and obligations of operators and undertakings seeking access or interconnection to their networks,

¹ Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (ONP Directive), amended by Directive 97/51/EC of 6 October 1997 of the European Parliament and the Council amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adapting to a competitive environment in telecommunications.

² 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).

³ Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive).

- the Universal Service Directive⁵, governing the obligation imposed on one or more operators of electronic communications networks and/or services to provide a minimum set of services to all users, regardless of their geographical location within the national territory, at an affordable price,
- the Directive on Privacy and Electronic Communications⁶ stipulating the rules of personal data processing and safeguarding privacy in electronic communications⁷, addressing issues such as the retention of traffic data for police surveillance purposes, the use of cookies and the “opt-in” model for “spam” messages.

Furthermore, a better co-ordination of the different policy approaches at national level to efficient radio spectrum use has been integrated by means of the Radio Spectrum Decision⁸.

The application of this legislative framework is subject to constant monitoring by the European Commission. Reports on the implementation of the regulatory package and on the main developments on the market are published on an annual basis.⁹

According to review clauses in the said Directives, EC legislation in the field of electronic communications recently underwent new close scrutiny by the Commission, of which the results were published in a communication of June 2006.¹⁰ The findings of

⁴ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive).

⁵ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive).

⁶ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

⁷ In this regard, Directive 2002/58/EC has been amended by Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

⁸ Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community.

⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social committee and the Committee of the Regions - European electronic communications regulation and markets 2006 (12th Report) [SEC(2007)403], COM(2007) 155 final, http://ec.europa.eu/information_society/policy/ecomms/doc/library/annualreports/12threport/com_2007_155_en.pdf. Previous reports can be accessed through: http://ec.europa.eu/information_society/policy/ecomms/library/communications_reports/index_en.htm.

¹⁰ Communication from the Commission of 29 June 2006 on the review of the EU Regulatory Framework for electronic communications networks and services, COM(2006) 334 final. Already at this stage, the views of stakeholders, previously expressed upon a Commission ‘call for input’, had been taken into account.

the implementation reports have provided valuable input to this process. Simultaneously, the Commission launched a public consultation on its suggestions for a comprehensive reform of the regulatory framework, asking for comments to be submitted by 27 October 2006. In the period thereafter, the Commission prepared its legislative proposals, which were made public on 13 November 2007¹¹, taking the results of the consultation into consideration.

The envisaged modifications to the existing legislation aim at further improving the regulation of electronic communications networks and services, completing the single market for e-communications and enhancing consumer protection and user rights.

The present evaluation sheet aims to answer to the questions raised by the Committee of the Regions in its request of 15 November 2007. It consists of four parts representing the issues mentioned in the Order Form: a more market-based approach to radio spectrum management (see part I), functional versus structural separation and effective competition (see part II), cross-border and pan-European services (see part III), and consumer rights and security issues (see part IV). As far as possible, the focus has been laid on the implications the reform proposals would have at local and regional level, including the impact on authorities, undertakings and consumers. The evaluation sheet will analyse the potential improvements as well as shortcomings identified in the Commission proposals. In so doing, it shall help avoid that existing barriers for market players at a local and regional level persist or new hurdles be created.

I. Spectrum management

Following several studies carried out in this field¹², the Commission, in its recent legislative proposals on spectrum management, strongly favours further harmonisation and liberalisation of this area of legislation. This stems from the view that the rapid technological developments require new frequencies to be assigned to the new, innovative networks and services. A more efficient use of the spectrum available to electronic communications services is therefore deemed essential. This general claim is shared by most stakeholders who responded to the Commission during the consultation phase. However, comments differ significantly when it comes to the details.

¹¹ The legislative proposals of the Commission on the Review of the EU regulatory framework for electronic communications and services are available at: http://ec.europa.eu/information_society/policy/ecomm/library/proposals/index_en.htm.

¹² See the studies mentioned in Commission Staff Working Document – Impact Assessment, Accompanying Document to the Commission Proposals on the Review of the Electronic Communications Market, SEC(2007) 1472, p. 50., available at: http://ec.europa.eu/information_society/policy/ecomm/library/proposals/index_en.htm

The Commission considers the reform of the current rules on spectrum management to be “probably the most important area of this review, certainly in terms of the potential gains for Europe”.¹³ In the following paragraphs, it shall be analysed which impact the Commission’s proposals might have at regional level and to which extent they should be modified to take regional aspects more into account.

1. The Commission proposals

a) *Proposed main principles of a renewed regulatory framework*

The underlying principles of the proposed new approach to spectrum management on the one hand are those of **technology and service neutrality**. The strengthened principle of *technology neutrality*, (foreseen in Article 8 para. 1 subpara. 2 Draft Framework Directive (DFD) and) laid down in Article 9 para. 3 DFD, shall ensure that providers may use “all types of radio network or wireless access technology” in the spectrum assigned to electronic communications services. However, Member States may define exceptions to this provision, *inter alia*, to avoid harmful interference or to protect public health against electromagnetic fields, or to “comply with a restriction in accordance with paragraph 4”. Likewise, according to Article 9 para. 4 DFD, there shall be no general restriction as to the types of services that may be provided through the frequency bands open to electronic communications (*service neutrality*). Specific restrictions to the types of services may be imposed by Member States. Where they require a service to be provided in a specific band, they shall only be allowed to ensure the fulfilment of a general interest objective, including “the promotion of social, regional or territorial cohesion” and “the promotion of cultural and linguistic diversity and media pluralism”. An assignment of a certain band to one specific service excluding all other services from its use may only be made to protect safety of life services. In any case, restrictions imposed by Member States have to be proportionate and non-discriminatory.

Further exceptions to the principles of technology and service neutrality may be defined by the *Commission* pursuant to Article 9c (d). The Commission may also specify the scope and nature of any exceptions according to Article 9 para. 3 and para. 4 except for those aimed at promoting cultural and linguistic diversity and media pluralism.

Today, frequencies are in most cases assigned to specific services using the spectrum in compliance with certain technical specifications and restrictions which shall ensure that services use the frequency band that is most suitable to their needs (e.g. in terms of emission characteristics).

On the other hand, the aim of promoting a more efficient use of spectrum shall be further reinforced by allowing more unlicensed spectrum use based on **general authorisations** outlining all conditions of use. Member States may, however, make the

¹³ See Impact Assessment (footnote 12), p. 48.

use of a radio frequency subject to the granting of an individual right in cases where it is justified to avoid possible harmful interference or to fulfil other objectives of general interest, as provided for in Article 5 para. 1 of the Draft Authorisation Directive (DAD).

Finally, the Commission proposes to enhance competition by pursuing a more common approach to the **secondary trading** of spectrum resources which is, by, now, merely an option for Member States. In cases where the use of spectrum is still subject to individual rights, the owners of such licenses shall be enabled to sell or lease their rights to other undertakings in accordance with the rules set out in Article 9b of the DFD.

The Commission is granted specific rights to further implement the DFD provisions for spectrum trading, Article 9c. This includes measures to harmonise the identification of the frequency bands in which the trading of individual spectrum usage rights is to be introduced, the conditions under which those transfers shall be conducted as well as the specific measures to ensure fair competition when transferring such usage rights (Article 9c (a)-(c)).

b) Legislative power of the European Community

The far-reaching proposals outlined above require, in the first place, that the European Community has legislative power in the field of spectrum management. According to the **principle of conferred powers** (Article 5 EU Treaty, Article 5 para. 1 EC Treaty), this calls for a provision in the EC Treaty explicitly assigning the task to the Communities.

The spectrum which is to be regulated by the Commission's proposals, shall be used for a variety of different electronic communications networks, the most important of which will probably be wireless telecommunications networks and terrestrial broadcasting networks. While for telecommunications networks Article 154 EC Treaty on Trans-European Networks might be relevant, Article 151 EC Treaty regulates the Community's competence in cultural issues. However, both articles do not serve as a sufficient legal basis for imposing binding law: In reference to the areas described in Article 154 para. 1, Article 155 para. 1 limits the EC's power to supportive measures (guidelines, actions etc.). Also as regards culture, the EC's regulatory power is restricted to supportive measures according to the wording of Article 151 para. 2.

A (non-exclusive) competence to harmonise the respective legislation in the Member States might, however, result from Articles 49, 50 which require all obstacles to the freedom of services within the EC to be removed. **Article 95** to which the Commission refers as the legal basis of the Draft Amending Directive "on better regulation" (COM(2007) 697 rev1) concedes the Council the explicit power to "adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market". According to Article 95 para. 1, this provision is subsidiary to any

other competence mentioned in the EC Treaty.¹⁴ No other provision on competence appears to be relevant for the regulation of spectrum. A legal framework aiming at enforcing the fundamental freedoms of the Treaty would come, without doubt, under the scope of Article 95.

However, Article 151 para. 4 requires the European Community to take **cultural aspects** into account when acting under other provisions of the EC Treaty. The introduction of a set of new rules for spectrum management which would ultimately leave broadcasters without the spectrum they need to distribute their content without interference by other services would clearly violate this provision.

As far as its non-exclusive competence reaches, the EC legislator is furthermore limited by the principles of subsidiarity and proportionality, laid down in Article 5 para. 2 and para. 3. The **principle of subsidiarity** means that the Community “shall take action (...) only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States” and, as an additional requirement, “can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community”. Both conditions have to be met. To ensure this, the Protocol on the Application of the Principles of Subsidiarity and Proportionality provides for three guidelines: a) the issue to be regulated shows trans-national aspects which cannot be regulated at the level of the Member States, b) measures taken solely by Member States or the absence of EC measures would be in breach of the EC Treaty or otherwise impair the interests of Member States, c) EC measures would implicate considerable advantages compared to measures taken by Member States.

If the EC is to regulate in the manner referred to above, it should therefore abstain from including **purely national situations** without any cross-border impact. Services that are merely directed to users of a single Member State, should be excluded from any spectrum management rules at EC level. It is true that emissions may have a cross-border impact in cases where the sender is located near the border or emits high-power signals that extend into the territory of another Member State. Trans-national interference situations, however, have occurred since the beginning of spectrum use and have been tackled successfully in the past by international bodies like the CEPT/ECC or the ERG. There is no evidence that these arrangements could fail to function in the future.

Interference problems aside, there would be no benefit for services at national, regional or local level in their spectrum being regulated at European level. All action required to ensure an adequate administration of spectrum resources could be taken by Member States without a need for intervention by the European Community.

As far as pan-European services and services with a cross-border dimension are concerned, the establishment and functioning of the internal market requires, without

¹⁴ Exceptions are Articles 308, 176 EC Treaty to which Article 95 is *lex specialis*.

doubt, a common approach. Otherwise the provision of such services would severely be hampered by the need to comply with a number of different national laws. Providers would most likely be discouraged from offering their services at a cross-national level. It has to be noted that a cross-border dimension does not require that the service itself may be used in more than one Member State. Also in cases where a provider is located in one Member State and the user in another, this condition is fulfilled.

However, even for these situations, the existing bodies at European level may be able to set up **working procedures** for the provision of electronic communications services over waves in Europe, possibly even with a wider range (e.g. the CEPT has 48 members covering a bigger geographical territory than the EU). While some legal harmonisation in this field will certainly help create incentives for potential service providers and will therefore probably be better suited for pan-European services than a purely national approach, regulatory measures based on these rules may also be taken by a body consisting of the national regulators of the Member States.¹⁵

2. Impact of the modified approach, exemplified by the case of broadcasting services

The Commission documents provide for **substantial modifications** to the existing rules on spectrum management and on other important issues. Their impact can best be evaluated by examining one specific case featuring a number of peculiarities. In so doing, a comprehensive picture of the new regulatory approaches can be drawn, including also some of the aspects which might not stand out when only considering the standard case. A sector that, for its exceptional character as serving a general interest objective, particularly qualifies for this investigation, is the broadcasting sector. The possible effects of the draft legislation on the provision of broadcasting services shall be investigated in the following and hence **exemplified**, giving an impression on the general impact of the documents.

The proposed changes in spectrum management have received broad support from a number of Member States and most other stakeholders, but have been widely criticised by broadcasters and operators of terrestrial TV networks as endangering their exclusive rights of use. While the Commission's proposals aim at making the use of spectrum more efficient and tradeable, broadcasting advocates stress the cultural value of broadcasting and its share in promoting democracy, media pluralism and cultural diversity. They fervidly argue against commercialising spectrum without considering the special case of broadcasting. In their view, the broadcasting infrastructure has an auxiliary function for the provision of content. Its regulation should therefore continue to be dealt with on a sector-specific basis in order not to hamper, but rather facilitate the distribution of the content.

¹⁵ See part III for a detailed view on the proposal for a European Regulatory Authority.

The issue is of relevance for the regional level, as in some Member States regional authorities are competent for the regulation of **broadcasting services**.¹⁶ Furthermore, local and regional broadcasting stations are affected by the proposals. While in general, it is beyond doubt that a more flexible approach to spectrum management would lead to more competition and would therefore yield positive effects on the spreading of new technologies (see below, point 3, and part III) as well as on consumers' choice and service quality (see part IV), the specific situation of broadcasting needs a closer look to ensure that all aspects of a market-based model are considered adequately.

It is widely recognised among broadcasters and (regional) media regulatory authorities that in the future, broadcasting services may be disseminated not only through the traditional modes of transmission (terrestrial, cable, satellite), but also over mobile and fixed phone networks and other (wireless) services such as WiMAX, W-LAN, DSL, DMB, DVB-H or UMTS. However, stakeholders claim that recipients should not be limited in their choice of how they want to receive the broadcast signals. Indeed, it needs to be clarified that the different modes of transmission are complementary to each other and one may not be seen as a substitute of the other: currently, terrestrial distribution of (analogue as well as digital) broadcasting signals is widely used in many Member States. Which methods or technologies will prevail in the future, cannot be anticipated today. Unlike the distribution of broadcast content through cable or satellite, for instance, terrestrial transmission has a wider range of use as it also allows reception of broadcast signals on portable and mobile devices. It would therefore severely compromise the fulfilment of the broadcasters' mandate to contribute to cultural and lingual diversity and media pluralism if the Commission would create conditions under which broadcasters may be cut off from the spectrum resources they need in order to deliver their signals through terrestrial transmission.

In the Draft Communication on the use of the Digital Dividend, the Commission has clarified that the spectrum to be released in the course of the switchover from analogue to digital terrestrial television (generally referred to as the "**digital dividend**") shall be split up into three sections: one part will be available for "unidirectional high power networks" to fit "new broadcasting needs". As an example, the Draft Communication names "more TV services, possibly HDTV". This part will be exclusively under national regulation and may, as such, also be freed up *en bloc* for "fixed" broadcasting services, i.e. services that are not for mobile use¹⁷. However, it remains unclear how this "clustering" of the digital dividend shall be realised in practice under a regime that in

¹⁶ In Germany, for instance, the 16 Laender have the exclusive competence in cultural matters, including broadcasting. In Belgium, competence in media regulation is split up between the French, the German and the Flemish Community. In Spain, the Autonomous Communities are vested with the competence, as regards their region, to establish public service broadcasting stations and to regulate in the sector.

¹⁷ The two remaining parts include "unidirectional medium to low power networks" to be used typically for mobile multimedia services and bi-directional low power networks, predominantly used for fixed and mobile broadband access.

principle applies the rules of general authorisation, technology and service neutrality and spectrum trading.

It is true that the now proposed changes to the Framework Directive show a more sophisticated and balanced approach in this respect than the June 2006 documents. While, at the outset, no exceptions in favour of broadcasting services had been foreseen, the new proposals provide for an option to restrict **service neutrality** for the purpose of achieving a general interest objective, among others, to promote cultural and linguistic diversity and media pluralism (Article 9 para. 4 subpara. 2). In view of this target, a Member State might allow for an assignment of certain frequency bands to broadcasting services. However, the said option does not necessarily imply that these frequencies may be assigned on an *exclusive* basis, as can be concluded from subparagraph 3 which stipulates that only restrictions in favour of “safety of life services” may at the same time exclude the use of any other service on a certain band.¹⁸ While the **safety of life** is also named as a general interest objective in subparagraph 2, the power to pre-define which services may take on a safety of life function and therefore fall within the scope of subparagraph 3, lies with the Commission, as provided for in Article 9c (d). From the wording of the legal proposals made so far, however, it cannot be derived that the Commission assumes broadcasting to be a “safety of life service”. As in this regard no special reference to broadcasting services is made in the Commission documents, it seems to be the Commission’s intention to apply a narrow definition including only professional emergency services (e.g. fire brigades, police, medical services, disaster control) in the scope of subparagraph 3.

It should, however, be observed that also broadcasting services do make a valuable contribution to lifesaving. The character of these services as a means of mass media conveyance accessible to a huge part of the population makes it the ideal electronic communications service to announce to the public emergencies that might pose a threat to people’s lives: Traffic messages warning against dangers or obstacles on the road may prevent lethal traffic accidents, gas leaking alerts and similar information raise public awareness of specific hazardous incidents with a regional focus and reduce the risk of persons coming to death from an escalation of the situation. In cases of armed conflicts, terrorist attacks or natural disasters, broadcasting services can be an essential tool to keep up public order and, in so doing, care for the provision of goods indispensable for life and prevent civil unrest which endangers the life of many people.

At this point, it should be mentioned that other non-professional services such as amateur radio and even commercial mobile communications services can also play a vital role in emergency situations, particularly when other networks are overloaded due to the dimension of the emergency.

¹⁸ See also Recital 22 of the first Draft Amending Directive („on better regulation“, COM(2007)697 rev1) which points out that exceptions to the principles of technology and service neutrality should not result in exclusive use of spectrum, unless where necessary to protect safety of life.

A part of the spectrum should therefore be assigned to each of the relevant services on an exclusive basis. For clarification purposes, this should be regulated within the DFD itself. To this end, specific reference to all services that fall under the term “safety of life services” should be made in Article 9 para. 4 subpara. 3.

The problem of broadcasting services not being granted exclusive access to frequencies is that the risk of interference with other services using different technologies in the same band would increase in such a situation.¹⁹ This might, according to statements made by technical experts, result in a digital broadcasting signal (which tend to be more susceptible to interference than analogue signals) not at all being receivable in a certain area. Studies²⁰ ordered by the Commission, which are supported by statements made by broadcasters, have clearly demonstrated that digital broadcasting services cannot be mixed with other services within the same frequency band. This is why the Commission, in its Draft Communication on the use of the Digital Dividend, has proposed to cluster the spectrum arising from the digital dividend so as to guarantee that broadcasting services are not interfered with by other types of services using the same frequency band. It is yet unclear how the Commission intends to balance this approach with the proposal to Article 9 para. 4 subpara 3 DFD.

It might be argued that Article 9 para. 3 (a) already provides for an option to prevent technologies from being used in a certain band, if they may harmfully interfere with other technologies used on the same or another frequency. However, the said provision only alludes to “*restrictions*” that may be imposed “to avoid **harmful interference**”. By contrast, Article 9 para. 4 subpara. 3 explicitly allows for a “*restriction which prohibits the provision of any other service*” if a safety of life service is affected. Hence it may be concluded that a complete exclusion of services other than broadcasting services for reasons of technological incompatibility shall not be an option, even where heavy interference occurs. This finding is supported by Recital 21 of the first Draft Amending Directive which gives as an example for interference-induced restrictions the imposition of emission masks or power levels without considering a frequency change of the other service.

Finally, the same rule that can be applied to protect broadcasting from interference caused by other technologies may also be applied to the disfavour of broadcasting networks, because the mere fact that restrictions for services provided in order to fulfil a general interest objective may be justified in accordance with Article 9 para.4 subpara. 2, does not give these services an explicit priority within the spectrum band they use.

¹⁹ Even interference stemming from outside a frequency band exclusively assigned to broadcasting services, caused by harmonics (unwanted signals emitted by a sender on integer multiples of the main signal’s frequency), by “splattering” signals on frequencies directly adjacent to the band or by other spurious emissions can affect the transmission of broadcast signals.

²⁰ See Communication „Reaping the full benefits of the digital dividend in Europe“ (available at: http://ec.europa.eu/information_society/policy/ecomms/library/proposals/index_en.htm), p. 7, which refers to the „CEPT Report in response to the Commission Mandate on technical considerations regarding harmonisation options for the digital dividend (Part A and Part B)“.

Thus, in the case of an interference occurring between a broadcasting network and another provider, it is not clear from the outset which is the “interfering” technology, that shall be restricted, and which is the “interfered” technology, that deserves to be protected.²¹

If the EU is to preserve the role of broadcasting as it is presently established, content providers must continue to be able to rely on the exclusive right to use certain frequency bands in order to fulfil properly and to anybody the mandate they have in the general interest. To this end, the wording of Article 9 para. 3 (a) and para. 4 subparas. 2 and 3 should be adjusted accordingly.

Also in more general terms, it has been criticised that the **market-based approach** the Commission pursues in its proposals does not go well with the special situation of broadcasting and its objective in the general interest. Broadcasting service providers argue therefore for being exempt from the principles of *technology and service neutrality* and from the rule of *general authorisation*. Otherwise, they would run the risk of being ruled out by any other service interfering and, as a consequence, lose the physical framework for the transmission of their content. The Commission has met these concerns by introducing exception clauses which aim to exclude broadcasting services from the scope of application of these rules. Article 9 para. 4 subpara. 2 DFD refers to “the promotion of cultural and linguistic diversity and media pluralism” as a ground based on which restrictions might be laid down to the types of electronic communications services that may be provided. These restrictions shall be “proportionate and non-discriminatory”, as stated in Article 9 para. 4 subpara. 1 DFD. The definition of the scope and nature of the said exception remains with the Member States: Article 9c DFD explicitly excludes this restriction from any harmonisation at EC level. With regard to technology neutrality, Article 9 para. 3 (d) DFD refers to the exception laid down in Article 9 para. 4 subpara. 2 DFD. Article 5 para. 1 (b) DAD only mentions “**objectives of general interest**” as a valid exception from the rule of general authorisation without giving a definition of what is deemed to be covered by this term. The wording of Article 5 para. 2 subpara. 2 DAD, however, stipulates that rights of use shall be granted “[w]ithout prejudice to specific criteria defined in advance by Member States to grant rights of use of radio frequencies to providers of radio and television broadcast content services”.

Other general interest objectives recognised by Article 9 para. 4 subpara. 2 DFD (referred to by Article 9 para. 3 (d)) are the “safety of life, the **promotion of social, regional or territorial cohesion**, the avoidance of inefficient use of radio frequencies”. The Commission may, by way of implementing measures in accordance with Article 9c (d) DFD, “harmonise the scope and nature” of these exceptions as well as define further

²¹ The World Radio Conference 2007 (WRC-07) adopted a modified Table of Frequency Allocations which reportedly assigns parts of the UHF band (790 to 862 MHz) on a primary basis to both broadcasting services and mobile communications services. In the case of interference, none of both *services* would have general priority over the other. Instead, priority would be given to the *individual station* using the frequency for a longer time than the other.

exceptions not mentioned in Article 9 para. 4 DFD. In view of the rather vague definitions given in Article 9 para. 4 DFD and, even more, in Article 5 para. 1 DAD of what is to be considered as a general interest objective, it might, nevertheless, be desirable to strive for a less opaque wording that provides for clear criteria for the application of exceptions. The text of the Directives should not revert to ambiguous terms that may give rise to different interpretations. In the end, it might at least be clarified that the term “general interest objective” refers, as a minimum, to those exceptions accepted by the ECJ in its relevant case-law.

Similarly to the above-mentioned principles, the free **trade of individual rights** to use radio frequencies is a means that might not suit the European concept of broadcasting as an asset of predominantly cultural rather than economic value. Market-oriented approaches could lead to financially stronger telecommunications providers or other interested parties buying out spectrum resources which would again leave broadcasters without the infrastructure needed for the provision of their content services. To prevent this from happening, clear-cut frequency bands for broadcasting services which will remain free from spectrum trading should be defined in the text of the DFD rather than empowering the Commission to decide on this critical issue through the adoption of implementing measures according to Article 9b para. 1 subpara. 1 and Article 9c. Licences for these frequencies should be granted on the basis of cultural aspects (extent to which the applicant contributes to cultural diversity and media pluralism) rather than on financial power, and should not be subject to subsequent sale or lease.

Under the DFD, the decision on which frequency bands spectrum trading shall not be applied, would also clearly go beyond the power issued to Member States in Article 5 para. 6 of the DAD to take measures in order to stop **spectrum hoarding**, as the spirit and purpose of this norm is a different one: while Article 5 para. 6 aims to limit the *number of licences* one single entity may hold, a complete exemption of certain frequencies from spectrum trading, as proposed, would mean a market entry barrier for all undertakings not providing broadcasting services, i.e. a differentiation based on the *character/nature of the service*.

Neither would in these cases a limitation of the number of rights of use in accordance with Article 5 para. 5 and Article 7 DAD impede a creeping loss of frequencies available to broadcasting. As Recital 23 of the Authorisation Directive (2002/20/EC) points out, the application of Article 7 may lead to certain undertakings (e.g. “non-broadcasters”) being excluded from the selection procedure for a particular radio frequency on the basis of objective, transparent, non-discriminatory and proportionate selection criteria with due weight to the objectives in Articles 8, 9 DFD. This would, however, yield no effect with regard to subsequent spectrum trading because Article 7 para. 5 explicitly states that Article 7 is “without prejudice to the transfer of rights of use”.

3. Regional broadband access services

As has been demonstrated in the second paragraph of this chapter, the legislative proposals on spectrum management overall might leave broadcasting services and other services which at present benefit from clear rules regarding the use of frequencies worse off than before. The current **system of spectrum management** is based on a sophisticated and physically well-founded segmentation of spectrum into frequency bands allocated to specific services on a primary – sometimes, where necessary, even exclusive – or secondary basis. For a considerable number of services, an individual right of use is required ensuring that all providers using a frequency maintain a high quality standard and keep interference as low as possible. The system now proposed by the Commission is complex, and the consequences to spectrum usability are as yet not easy to survey. There is some risk, indeed, that an all too liberalised spectrum might suffer from increased interference problems, as general authorisations will most likely not be able to consider each individual case. Likewise, technology and service neutrality, secondary trading and the regular review of long-term rights of use might increase the unpredictability of how a certain frequency will be used in the future and what effects might arise therefrom for other users on the same or other frequencies.

However, the new market-oriented model could also mean a chance for new and innovative technologies trying to gain access to spectrum resources. A liberalised approach to spectrum management would increase chances of economic players as well as citizens to participate in these resources the way they prefer to. A sector in which the social and economic value added of a more flexible spectrum policy is particularly manifest is the provision of *regional and local broadband access services*. The Commission considers ubiquitous access to broadband communications to be of vital importance for the competitiveness and the cohesion of the European Union. It refers to the “digital divide”, i.e. the difference between the number of consumers disposing of broadband access in adequately served (mostly urban) regions and the corresponding number in under-served (frequently, but not necessarily always, rural) areas, as a main challenge to be tackled.

Indeed, on the one hand, the principles of technology and service neutrality and the increase in general authorisations to use spectrum would significantly reduce the administrative burden for regional broadband initiatives to enter the market. Providers would only have to ensure they meet the general conditions for the use of a certain frequency band. No specific documentary evidence would be needed; delays which usually have to be faced when awaiting a decision by the regulatory authority on the granting of an individual licence would simply not occur anymore.

On the other hand, regulatory options to boost **broadband services at regional level** would also decrease: regional services that may, under current law, be supported by setting out special conditions for the granting of an individual right to use certain spectrum may cease to benefit from these conditions, if they were to switch to the general authorisation scheme. In the same way, it is not entirely clear how the transfer of individual rights of use may affect future use of a frequency previously assigned to a

broadband access provider. Although the wording of Article 9b para. 1 DFD suggests that transferring an individual right of use would not lead to the right being converted into a general authorisation, the issue requires further clarification. Another question is which are the conditions referred to in Article 5 para. 2 subpara. 3 DAD, and how they are related to the conditions imposed on the original right holder when issuing the right.

Also the other instruments of market-oriented regulation might prove to be ambivalent: While technology and service neutrality as well as the secondary trading of individual licences in general may increase the chances and reduce the administrative efforts of regional or local services to gain access to the scarce spectrum resources, this is the case also for services with a broader coverage. Particularly with regard to the promotion of pan-European services, it has to be noted that any increase in spectrum use by these services may scale down the remaining spectrum available to regional services. Finally, it is not yet clear how far the power given to the Commission with regard to specifying, by adopting technical implementing measures, the rules of secondary trading and exceptions to the principles of technology and service neutrality (Article 9c DFD) reaches.

For these reasons, a minimum level of regulation might still be necessary in order to help fostering access of a wider population to these innovative technologies and services. Defining broadband access as a universal service might also be an option to be considered in this context.²²

4. General provisions

The envisaged introduction of a **review clause for individual licences** might have an adverse effect on the spread of innovative technologies and services. As set out in Article 5 para. 2 subpara. 5 of the DAD, any individual right to spectrum use that is granted for ten years or more and is not subject to spectrum trading shall be reviewed every five years in order to verify that the requirements for individual rights granting persist. If this is not the case at the time of the review, the individual right of use shall be turned into a general authorisation or be subjected to secondary trading. Particularly broadcasters, but also other service providers holding individual licences may be affected by this provision. It may have a negative impact on the readiness of these licence holders to invest in new technologies and services as they will be left in constant uncertainty about whether and when their right of use will definitely expire. On this basis, investment may not seem worthwhile at all. As a consequence, innovative technologies and services might not even be developed.

A **transitional provision** for all individual rights of use being in existence prior to the adoption of the DFD is contained in Article 9a DFD. According to Article 9a para. 3,

²² This view has already been taken in: Institute of European Media Law (EMR), Broadband and eGovernment in Europe, Evaluation Sheet of 17 November 2006 based on the Framework Contract CDR/ETU/25B/2005 with the Committee of the Regions, p. 39. See also part IV for details.

those rights of use would be subject to the rules on technology and service neutrality (Articles 9, 9c DFD) after a five-year period following the adoption of the DFD, if the right holders have not applied for an earlier reassessment of the restrictions to their rights. It should be further examined if the period for transition would be long enough for a service provider to adapt – also in economic terms – to the new legal situation, and how hardship cases, e.g. providers which have made considerable investment in good faith in the continuity of their legal position could be regulated.

5. Conclusion

Drawing on the specific situation of broadcasting services as an example, it has been demonstrated that a unified market-based approach to spectrum management may not in all cases be the best solution to achieve the goal of an efficient overall allocation of frequencies. Some service providers may not be in a position to keep their frequencies when forced to compete with other, better funded providers. A duplicate assignment of parts of the UHF band, for instance, to broadcasting services and mobile communication services, both on a primary basis, might expose broadcasters to a high risk of interference with the other services on the same band which cannot be resolved easily. For these reasons, the Commission proposals should be reassessed with a view to ensuring that services requiring specific treatment (as is the case with future wireless broadband access services, which would serve an important objective of overcoming the so-called digital divide and therefore would contribute to social and regional inclusion, or with broadcasting services, which help promoting cultural and lingual diversity and media pluralism) are adequately protected by the new regulatory framework.

Where such protection is not necessary because market players follow the general rules of competition, the intensified use of tools like general authorisation and spectrum trading and the application of the principles of technology and service neutrality may be of great advantage for the strengthening of competition on the market. However, also with services which generally can compete with other players, market forces may not always work. Particular attention in this respect should be turned on broadband internet access which acts as a pathfinder for the development of many other businesses and public services. Low demand in areas with low population density and high costs for infrastructure investments in remote areas may, under normal market conditions, discourage providers from offering their services. In these cases, specific rules should apply to ensure that ubiquitous broadband services becomes a reality. Imposing universal service obligations on this market might be the option that is best suited to achieve this goal. In any case, further clarification may be necessary as regards the interaction of the new rules among each other. The possible effects the combined application of these provisions (primarily, Articles 9 to 9c DFD, Article 5 DAD) might show, in particular on the long-term interference-free provision of wireless broadband access, should be further elaborated on.

Finally, when assessing the need for a European approach to spectrum management, primary EU/EC legislation on competence should not be disregarded. The issue of which networks and services may be regulated at EC level by such a far-reaching

proposal, and where the principles of subsidiarity and proportionality might require the Community legislator to abstain from centralised regulation, should be further investigated.

II. Functional vs. structural separation

Another issue the Commission addresses in its reform proposals is the question of how to deal with **vertically integrated companies** owning the essential infrastructure of a communications network through which, at the same time, they provide services. These companies hold a dominant position on the market because they control the physical backbone of the network and may therefore define the conditions of access at their discretion. Equal access of all competitors to this bottleneck asset is, however, an indispensable precondition for fair competition on the market. To some extent, this can be achieved by existing/modified ex-ante regulation imposing certain obligations, as laid down in the Access Directive, on the dominant player. In cases where other ex-ante remedies fail or prove not to be sufficient, the separation of the incumbent's infrastructure division from the remaining business is considered for various network industries. As regards the electronic communications sector, several options are currently being discussed.

1. Different separation schemes and precedence in Community law on telecommunications/electronic communications

A *structural separation*, meaning a full demerger of the company's network branch from its other business units, had been envisaged in the Commission's first Impact Assessment of 2006. For this purpose, the infrastructure division would have to be converted into a separate legal entity and placed under new ownership. In its latest Impact Assessment published on 13 November 2007, the Commission now favours a *functional separation* model where businesses are split up into operationally independent entities while ownership remains with the (parent) company. A simple *accounting separation*, in contrast, would imply merely to keep costs and revenues for each business activity on different accounts with no further segregation. This option has not been pursued further as it may well lead to greater transparency, but would not create any particular incentive for the network operating branch to grant access to the network on a non-discriminatory basis.

Accounting separation had been introduced on the cable sector by Commission Directive 95/51/EC,²³ the aim of which was to enhance transparency in cases where the

²³ Commission Directive 95/51/EC of 18 October 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalised telecommunications services.

operator of telecommunications infrastructure at the same time operated a cable TV network. The Directive provided for that financial accounting for both business divisions had to be conducted separately. This had become necessary since the same Directive also had lifted existing restrictions that had prohibited the use of cable TV networks for the provision of telecommunications services. Without external control, there would have been no incentive for the operator to invest in new infrastructure because any improvement of either of the two networks would have had a detrimental effect on the competitive standing of the other. However, in Commission Directive 1999/64/EC,²⁴ the Commission found that the separation of accounts had only lead to more transparency of financial flows, but had “not provided the necessary safeguards against all forms of anti-competitive behaviour”. The 1995 arrangement was therefore abolished in favour of a *functional separation* model requiring that both networks be operated by separate legal entities while joint ownership of these entities in principle was still allowed.

In 2002, all electronic communications services were integrated within a single legislative framework, which does not differentiate anymore between telecommunications and other electronic communications, such as broadcasting.

Article 13 Framework Directive (2002/21/EC) regulates the case that the provider of a public electronic communications network or a publicly available electronic communications service holds special or exclusive rights for the provisions of services in other sectors. This particularly includes content services offered through electronic communications networks and services. Member States can either request these undertakings to separate accounting for their activities concerning the provision of electronic communications networks and/or services, or prescribe a structural separation of this business from the other services.

Commission Directive 2002/77/EC²⁵ leaves the relevant provisions on cable TV networks basically unchanged, but adapts the wording to the new legal framework, saying that “no undertaking providing public electronic communications networks operates its cable television network using the same legal entity as it uses for its other public electronic communications network“, provided that the undertaking has a special position on the market and benefits from special rights resulting from a former (state) monopoly (see Article 8).

²⁴ Commission Directive 1999/64/EC of 23 June 1999 amending Directive 90/388/EEC in order to ensure that telecommunications networks and cable TV networks owned by a single operator are separate legal entities. The Directive is based on Art. 86 EC.

²⁵ Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services.

2. Application with regard to other network-based industries

Looking at other network-based industries, according to the latest Commission proposals on the reform of the **European energy sector** of September 2007, a *structural separation* model shall replace the rules currently in place on both the gas and electricity markets which have been found to be ineffective.²⁶ As yet, the regulatory regime already enforces a full operational (i.e. *functional*) and *legal separation* of the network provider from generation and supply divisions, but still permitting that both legal entities remain under the umbrella of a vertically integrated company. The Commission takes the view that in such situations the incumbent might still be tempted to privilege its own service providers and abstain from investing in new networks fearing increased competition. Indeed, the legal requirement of providing non-discriminatory access to the network puts the integrated company in conflict with the reverse economic interests of supply affiliates to maximise their return on sales. Infrastructure-owning companies might therefore frequently be inclined to hamper network access of third parties. Likewise, there is no incentive for the vertically integrated company to enhance its infrastructure the way it is needed for competitors to facilitate market entry, but rather to be geared to the needs of its subsidiaries on the supply level. This is why the Commission now proposes to reinforce control by switching over to full ownership unbundling.

However, it has to be noted that not all network-based industries show the same characteristics. A solution that fits the conditions on one market may be inappropriate on another. An example of *functional separation* is the German **railway sector**: following railway reform plans, national incumbent Deutsche Bahn (DB) AG was transformed into a holding company with legally and operationally independent business units, one of them merchandising the infrastructure on a non-discriminatory basis. However, the DB group keeps controlling all entities under its umbrella company. This solution, which is in place also in a number of other Member States²⁷, is in line with and even goes beyond EC regulation in this field which only requires a separate accounting of transport services on the one hand and railway infrastructure on the other (see Article 6 para. 1 Council Directive 91/440/EEC²⁸ as amended by Directive 2001/12/EC²⁹) and a body not providing transport services which shall ensure equitable

²⁶ See Explanatory Memorandum, COM(2007) DRAFT, pp. 4 et seq. The document is available at: http://ec.europa.eu/energy/electricity/package_2007/doc/2007_09_19_explanatory_memorandum_en.pdf. See also: Commission Staff Working Document Accompanying the Legislative Package on the Internal Market for Electricity and Gas – Impact Assessment, SEC(2007) 1179, available at: http://ec.europa.eu/energy/electricity/package_2007/doc/2007_09_19_impact_assessment_en.pdf.

²⁷ These include Austria, Belgium, Czech Republic, Italy, Lithuania and Poland. See IBM Global Business Services, Summary of the Study Rail Liberalisation Index Bahn 2007, p. 12, available at: http://www.db.de/site/shared/en/file__attachements/position__papers/study__rail__liberalisation__index__2007__summary.pdf.

²⁸ Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways.

²⁹ Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways. A further-reaching

and non-discriminatory access to the infrastructure (see Article 6 para. 3). Others, however, have advocated for a full institutional separation of infrastructure and transport³⁰, a model which is applied in ten other Member States.³¹

As can be seen from these examples, there is no “one-fits-it-all” solution suitable for any market situation. Rather have the conditions in each case to be assessed carefully before deciding on the best separation model. While structural separation shall now be enforced on the energy markets, functional separation has proved to be successful on two other infrastructure markets. It has to be added that competition on the electricity and – even more – on the gas infrastructure markets continues to be weak, particularly due to high degrees of vertical integration and market concentration.

3. Impact on markets of electronic communications

On many telecommunications markets, however, a **competitive environment** has already emerged. A structural separation might therefore not be necessary at this time. The Commission itself argues that any separation model in the e-communications sector should only act as a last resort if all other means fail. It would not make sense to move on immediately to the most severe separation option in these cases, if remedies below the line of separation measures do not prove to be effective.

Another argument that militates more in favour of **functional separation** is that this option may be unwound at any time through a simple in-house restructuring of the company involved. A structural separation, in contrast, cannot easily be reversed, should it later turn out to be wrong. Finally, the experience with functional separation in the UK, where the number of unbundled phone lines increased from 200,000 to 3.3 million within less than two years, gives an impression of what can be achieved by applying this tool. Against this background, the benefits that can be reached by implementing functional separation as a last resort remedy seem to outweigh the risk of a (potentially) lesser impact on competition, compared with the structural separation model.

operational or legal separation of infrastructure and transport is, however, an option explicitly allowed in accordance with Article 6 para. 2.

³⁰ See KCW, Uniconsult, HSH Nordbank, Steer Davies Gleave, “Privatisierung der integrierten DB AG – Auswirkungen und Alternativen”, Executive Summary of the Final Report, Study commissioned by the Federal Association of German Industry (BDI) and the German Chamber of Industry and Commerce (IHK); available at: http://www.bochum.ihk.de/linebreak4/mod/netmedia_document/data/bahnprivatisierung_kurz.pdf?PHPSESSID=f7b029c263c84d669a9d6187b8945163: This study looks at the issue from a primarily economic perspective. It strongly recommends to perform a vertical separation of the infrastructure from the transport sections to “neutralise” the discriminatory potential of the network.

³¹ These include Bulgaria, Denmark, Spain, Finland, Great Britain, the Netherlands, Norway, Portugal, Romania, Sweden and Slovakia. See IBM Global Business Services, Summary of the Study Rail Liberalisation Index Bahn 2007, p. 12, available at: http://www.db.de/site/shared/en/file__attachements/position__papers/study__rail__liberalisation__index__2007__summary.pdf.

From a strictly **regional perspective**, however, conclusions might be different: at first, it may seem unlikely that a regional service provider may gain significant market power (SMP), as one might tend to look exclusively at the situation at national level. It has to be noted, however, that National Regulatory Authorities (NRAs) may also identify sub-national geographic markets³² in business activities where substantial differences exist throughout a Member State. On these markets, a regional service provider may be found to have SMP and, in the end, be subject to separation rules, particularly, if it is the only supplier of a service in the area in question. It would then be in such provider's interest not to face the most rigid competition rules, which would make him prefer a mere functional over a structural separation model. In practice, however, most regional providers will, as a small or medium-sized enterprise (SME), benefit most from a strict vertical separation of the network from the other divisions of the dominant player as this would imply the best chances to gain full and non-discriminatory infrastructure access.

From an end-user's perspective, the impact of structural separation remains unclear, according to an OECD study on ownership unbundling of the local loop.³³ The study points out that there is inadequate evidence that prices would fall as competition unfolds.

4. Conclusion

As a comparative view on the different models and their application in different situations shows, there is no "standard" solution which will in all cases lead to the best results in opening up a market to competition. Since every market shows different characteristics and will react differently to competition regulation, a final recommendation is difficult to make. However, it should be kept in mind that, particularly in a situation of uncertainty about the outcome of a decision, reversibility is of great relevance. The option of a structural separation should therefore only be considered on markets which face severe competition problems caused by one big player that cannot be expected to be solved effectively by a mere operational and – if deemed absolutely necessary – legal separation of infrastructure and services. In any case, the latter option would most likely to be the less restrictive and better manageable measure. As can be seen from the examples mentioned, a structural separation has, in most cases, not been implemented in the first place, but only after another separation method had already proven to be failed.

³² Recommendation on relevant products and services markets, p. 12.

³³ OECD Working Party on Telecommunication and Information Services Policies, The benefits and costs of structural separation of the local loop, p. 25; available at: <http://www.oecd.org/dataoecd/39/63/18518340.pdf>.

III. Pan-European and cross-border services

The Commission has proposed to promote the development of services with pan-European potential or with a cross-border dimension. To this end, the Commission advocates further harmonisation of telecoms regulation, notably through establishing a Single European Regulatory Authority. In its opinion, better coordination in this field could lead to a more uniform use of spectrum and numbers throughout the European Union which would in turn facilitate the launch of a pan-European or cross-border service reliant on the use of these scarce resources.

The spread of this kind of services would have a twofold impact on regional level: While *cross-border* services in many cases will be realised through regional projects (e.g. as a transfrontier wireless broadband initiative within an INTERREG project), *pan-European* services by definition have a broader, (nearly) Union-wide scope (e.g. mobile satellite services or mobile communications on aircraft). In terms of EU spectrum policy, a uniform or partly overlapping assignment of the same frequencies to pan-European and cross-border services alike would pose a risk that the more *pan-European* initiatives get assigned frequencies for their services, the less space will remain for the development of regional services – cross-border or not – which rely on the use of spectrum. It should therefore be clarified which **frequency bands** shall be used for which services. In general, it is not yet clear, how the Commission intends to make use of the spectrum in case the new approach to spectrum management is implemented.

On the other hand, as the introduction of a new European Regulatory Authority³⁴ also aims at promoting *cross-border* services, one might come to the view that an increase in pan-European services would be compensated by an equal increase in the number of regional cross-border services. However, it has to be assumed that a company planning to launch a service with a pan-European dimension will – as the projected service is aimed to span the whole or huge parts of the EU and will therefore require a certain financial standing – probably dispose of significantly higher financial capacity than a regional cross-border initiative. In view of the Commission's secondary spectrum trading plans, this discrepancy would likely have a negative effect on the ability of **organisations operating at a regional level** to realise their respective cross-border projects. The risk of pan-European projects buying out frequency resources and leaving regional ventures by the wayside should therefore be considered closely (see also part I).

Furthermore, it remains doubtful if a centralised body at EU level will be capable of truly improving spectrum assignment and administration in this respect. Although it has

³⁴ See Proposal for a Regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority, COM(2007) 699 rev 2, available at: http://ec.europa.eu/information_society/policy/ecomm/library/proposals/index_en.htm.

to be acknowledged that a more unified approach might be beneficial in the case of pan-European services, this does not necessarily apply to cross-border services alike which will mostly involve only a small number of countries – possibly even non-EU Member States which would not fall under EU authority anyway. All the more in these latter cases, but also as regards pan-European services, it is not easy to understand why the same goal cannot be achieved in a similarly or more efficient way through organisations like the ERG, CEPT (in particular the Electronic Communications Committee, ECC) or (by way of Regional and World Radio Conferences) the ITU without compromising the principle of subsidiarity and interfering with Member States' clear competencies in this area. Particularly at CEPT level, the matter could be dealt with in a truly pan-European scope involving all 48 European member states. There is no evidence that decisions taken by the said organisations have not been sufficiently observed by Member States in the past.

A centralised body, in turn, may imply an increase in bureaucracy and administrative expenses, even if the need for additional staff shall be kept to a minimum by incorporating the European Network Information and Security Agency (ENISA). Furthermore, decisions taken at EC level regulating issues with merely national or sub-national impact might show to lack the necessary understanding for the peculiarities of those markets which continue to be present on a large scale. **National regulators**, by contrast, can count on a long-term expertise and a specialised knowledge that allows them to take the appropriate measures tailored to the needs of the relevant local, regional or national markets. While at the beginning of telecommunications regulation, a Community regulator might have provided some added value in creating consistent standards for all players, at the current stage of sector development, this has already been done to large extents. For this reason, it appears that there is no need anymore for a separate European Regulatory Authority. Remaining issues of coordination may be discussed within the ERG. In a letter of 13 November 2007,³⁵ the group has outlined to the Commission possibilities of how to strengthen co-operation between both organs.

IV. Consumer Protection and Security

According to the target areas for changes identified in the June 2006 Communication, the Commission also addresses consumer protection as well as privacy and security issues in the legal proposals. The changes suggested in these areas are included in the Draft Citizens' Rights Directive (COM(2007) 698 final) intended to amend the Universal Service Directive (USD) and the Electronic Communications Data Protection Directive (ECDPD).

³⁵ See http://www.erg.eu.int/doc/publications/viviane_reding_letter.pdf.

1. Consumer protection

The proposals include various improvements of user rights and other improvements in favour of consumers. The main topics covered are: price transparency and contract-related information for users of electronic communications services; number portability; standardisation of emergency services; access of disabled persons to electronic communications services (eAccessibility); network neutrality and quality of services provisions; and must-carry rules for broadcasting services.

No fundamental changes are proposed in the present documents as to the scope or concept of **universal services** in general, as this issue will be subject to a separate consultation announced to be initiated in 2008. This opportunity should be used to examine whether the challenges posed to the generally flourishing market of broadband access services during the past years, in particular as regards eInclusion, should eventually lead to the adding of these services to the list of universal services.³⁶ In so doing, the provision of (common quality) broadband access at an affordable price to all end-users irrespective of their geographical location might be better ensured. Broadband technology has a huge impact on the further development not only of the electronic communications services market, but also of the Single European Market as a whole: the competitiveness of the EU, the quality of services, the productivity, and, lastly, the employment rate in many other sectors may largely depend on the availability of rapid Internet connection. Likewise, in an environment where authorities and other institutions provide more and more services to citizens through electronic means (“eGovernment”, “eHealth”, “eLearning”, “eProcurement”), adequate access to broadband technologies becomes increasingly important in terms of democratic participation (“eInclusion”).³⁷ Finally, co-operation between local, regional, national and European authorities may also be strengthened by improving broadband access for public administration.

In order to facilitate the provision of broadband technology, particularly in disadvantaged areas, and to foster territorial cohesion, it may be considered earmarking resources from the European Structural Funds for the setting-up of broadband access

³⁶ Already in 2000, the Committee of the Regions stressed the importance of broadband services being included within the scope of existing universal services; see: Opinion of the Committee of the Regions of 13 April 2000 on the Fifth Report on the implementation of the Telecommunications Regulatory Package (COM(1999) 537 final), and on the 1999 Communications Review (COM(1999) 539 final), point 1.1.1.

³⁷ The key role the access to broadband services plays for a number of other sectors of economy and public administration has also been highlighted in previous opinions of the Committee of the Regions; see: Opinion of the Committee of the Regions of 13 February 2007 on Bridging the Broadband Gap and i2010 eGovernment Action Plan, OJ C 146, 30 June 2007, pp. 63-68, points 1.3 to 1.5; Opinion of the Committee of the Regions of 13 April 2000 (footnote 40), point 2.3.

services.³⁸ If broadband access services are not to be classified as universal services, the introduction of sector-specific regulation to the retail market might be the only alternative to overcome the “broadband gap”.

a) *Price transparency and contract-related information for users of electronic communications networks and services*

Article 21 of the Draft Universal Service Directive (DUSD) provides for several measures to create more **transparency for users** of public electronic communications networks and services, in particular as regards prices.³⁹ Operators would have an obligation under Article 21 para. 2 to publish “comparable, adequate and up-to-date information on applicable prices and tariffs” in an easily accessible form. Third parties shall be allowed to use these data according to Article 21 para. 3 for the purpose of publishing interactive guides or similar techniques that provide relevant price information to users for them to compare different offers independently. If such guides are not available on the market, national regulatory authorities (NRAs) are entitled to publish their own guides using the price information of operators. According to Article 21 para. 4, operators shall also be obliged to deliver to the individual customer information on the applicable tariff “at the time and point of purchase”.

Besides information on prices and tariffs, the operator shall also inform, in accordance with Article 21 para. 5, about any **restrictions in users’ ability to access or distribute lawful content** over the networks and/or services in question. As provided for by Article 21 para. 6, the Commission shall have the competence to adopt technical implementation measures in order to increase harmonisation in this area.

The proposed changes would significantly contribute to enhancing transparency on this market where competition – in some Member States – is already highly developed and some market players change their price models at irregular, sometimes very short intervals without adequately informing their potential users. Particularly as regards the use of information on prices and tariffs by third parties, the new provision would help protect consumers’ interests. Currently, some access providers explicitly prohibit independent platforms, such as German *teltarif.de*, to use their price tables in interactive

³⁸ See also: Opinion of the Committee of the Regions of 16 February 2006 on the Communication “i2010 – A European Information Society for Growth and Employment” (COM(2005) 229 final), point 1.14.

³⁹ The proposed changes to this article would tackle some of the issues the Committee of the Region raised in its Opinion of 14 December 2000 on the Proposal for a Directive of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services (COM(2000) 392 final), namely the claim for transparent information on applicable prices, tariffs, standard terms and conditions (point 7a) and for rules to ensure the consumer’s awareness of the cost of his/her phone calls (point 10)

dial-up software containing the price schemes of many different providers.⁴⁰ This business practice can be avoided by the wording of Article 21 para. 3 DUSD.

b) Number portability

Article 30 DUSD amplifies the scope of application of number portability. According to the new wording, the right of customers to retain their number when changing their service provider shall no longer be limited to publicly available telephone services, but shall apply to all numbers from the national numbering plan. In addition, the maximum period allowed for the porting of a number is set to one working day.

Unlike domain names, numbers are not protected by any trademark or neighbouring right. There is thus no legal reason why numbers or number spaces should be linked forever to a particular operator. Rather is it the user who can claim the (better) right to keep his/her number as it is directly connected to him/her. The right to retain a number is therefore an advantage for the consumer that increases the comfort and the attractiveness of a service provided with this feature. Article 30 para. 5 (a) DUSD provides for the possibility for the Commission to extend this right to the **portability of numbers** even between fixed and mobile networks. While it is commendable that this option has been introduced by the present proposals, it would have been preferable, from a customer's perspective, to have it inserted in Article 30 USD in a conclusive manner imposing an obligation to the Member States to implement it as a binding rule.⁴¹

A one working day limit would be most likely to lead to growing competition, as consumers who in the current legal situation are hesitant to change their operator because they fear to be cut off the service for a longer period would be safe from this happening under the new rule. Operators as well as customers would benefit from this situation, although the requirement would possibly mean the need for operators to make additional investments, e.g. by stepping up their staff or developing new software tools in order to effectuate a change within a shorter period.

c) Standardisation of emergency services

Article 26 DUSD reinforces the use of a single European **emergency call number "112"** free of charge to end-users. The provision also imposes an obligation on Member States to ensure that caller location information is automatically provided free of charge to the authority dealing with the emergency as soon as an emergency call to the emergency call number "112" is received.

Costs of the measures foreseen in Article 26 DUSD would presumably be modest and would by far be outweighed by the benefits of a single European emergency call

⁴⁰ See, for instance, the note on the "flat2surf" Internet-by-Call price table of German Internet Service Provider 1XNET GmbH of 15 January 2007, <http://www.flat2surf.de/seiten/internetbycall.html>.

⁴¹ The Committee of the Region has advocated for an early introduction of number portability between fixed and mobile networks; see Opinion of 13 April 2000 (footnote 40), point 3.6.1.

number. The latter would lie in a significant speed-up of emergency handling because the caller would be provided with a simple and easy-to-remember number that would grant him prompt access to the responsible authority without a need to have any means of payment at hand.

From local emergency authorities, a new emergency number would require some technical adaptation in order to ensure that calls to the new number are handled appropriately. It is not specified in the DUSD who will assume the costs of providing the technical equipment for the proper forwarding of incoming emergency calls, the costs of connecting the call as well as the costs for all measures to ensure equivalent access of disabled users to the standardised emergency service (see d) below).

d) Access of disabled persons to electronic communications services (eAccessibility)

The DUSD also includes a number of rules aiming to improve the **accessibility of electronic communications for disabled end-users**. In particular, the mere possibility of Member States to take specific measures for disabled end-users is turned into an obligation (see Article 7 DUSD). The obligation includes measures with a view to ensure access to and affordability of publicly available telephone services. Moreover, the choice of undertakings and service providers available to the majority of end-users shall be guaranteed. Operators may be requested to publish information on the quality of their services, including equivalent access for disabled end-users (Article 22 DUSD). According to Article 26 para. 4 DUSD, Member States would have an obligation to ensure accessibility to emergency services by disabled end-users.

It is obvious that disabled end-users would directly benefit from these measures. Particularly the access to emergency services is a requirement which should be implemented swiftly to ensure that the responsible authorities are notified as soon as possible of an emergency. It should be noted that the costs for undertakings to comply with Article 26 para. 4 DUSD may be significant, particularly with regard to the upgrading of public phone booths. They appear, however, to be justified in the interest of an efficient handling of emergencies.

e) Network neutrality and quality of service provisions

Article 20 para. 5 enhances the end-users' ability to make an informed choice of services by introducing an obligation of operators to inform subscribers in advance of the conclusion of a contract and regularly thereafter of any restrictions with regard to the access to or distribution of lawful content through the network or service provided.

According to Article 22 DUSD, NRAs shall be empowered to set **minimum quality of service requirements** on public communications network providers with a view to preventing degradation of service. The Commission may then adopt technical implementation measures to ensure a minimum level of harmonisation in this area. Generally, this provision would allow NRAs to set more stringent quality levels for universal service providers in Member States where infrastructure is already better developed than in others. In so doing, an NRA regulation may, for instance,

considerably enhance internet connection speed for the public in these Member States. This has been a claim the Committee of the Regions has already made in his Opinion on the 2002 Directive on Universal Service⁴².

However, with relation to the costs implied, the different impacts of such measures on different service providers have to be considered: While minimum quality requirements would affect all undertakings of a Member State in which the NRA has made use of its power, the costs consequently arising for necessary investments would above all affect small and medium enterprises (SMEs), regional initiatives, not-for-profit organisations and other providers funded on a small-scale basis.

Article 22 para. 3 only alludes to minimum requirements without clearly defining what is to be understood by “minimum” and to which specific technical requirements this extends. Instead, only the rather general objectives of preventing degradation of service and the slowing of traffic are mentioned. In order to give undertakings some planning reliability of what they may be asked for, a more precise definition should be laid down in Article 22. Also, an exception for **small undertakings** providing network access on a regional basis or to a small number of persons should be introduced to prevent that services which present an added value to consumers (as, for instance, local broadband initiatives in rural areas where no alternative access to those technologies is yet available) have to be shut down because operators are not in a position, from a financial point of view, to fulfil technical requirements imposed by an NRA ruling. The power to decide, in an individual case, which service providers need to be exempt from these obligations should lie with the bodies which have the required knowledge of the local situation and are therefore in a position to assess the circumstances of an individual case.

f) Review of must-carry rules

“Must-carry” rules impose an obligation on electronic communications network providers used for radio and television broadcasts to the public to transmit certain specified broadcast channels. An amendment of Article 31 shall replace the vague obligation to carry out a “periodical review” of “must-carry” rules by a three-year period.

Broadcasters not included in the “must-carry” list of a network could benefit from a clear and uniform regulation of the time period for reviews that would establish equal opportunities throughout the EU. Particularly broadcast stations with a regional focus for which public interest may considerably vary over the years should have an opportunity at regular intervals known in advance to lobby for the inclusion of their channels if it is justified in the general interest.

⁴² Opinion of the Committee of the Regions of 14 December 2000 on the Proposal for a Directive of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services, COM(2000) 392 final, point 6.

In a ruling of 13 December 2007, the **ECJ** held that Article 49 EC Treaty does not preclude a law on “must-carry” obligations where such legislation pursues an aim of general interest (e.g. the pluralist character of available TV channels) and is not disproportionate in relation to that objective, i.e. is applied in a way “subject to a transparent procedure based on objective non-discriminatory criteria known in advance”. Article 31 of the Universal Service Directive (2002/22/EC) did not apply because it was not in force at the time the law in question was adopted. With a view to the tightened review clauses in Article 31 DUSD, the case, however, raises the question of whether it is proportionate that a Directive imposes stricter rules than required by primary EC law on Member States wishing to introduce or maintain “must-carry” obligations on their territory. Further analysis should also be carried out with regard to some stakeholders’ call for an extension of “must-carry” rules to platform providers. While an obligation to grant access to an independent platform provider appears to be a reasonable claim, the integration of this term into the legal framework for electronic communications might pose a problem as the concept of a “platform” besides the established terms “service” and “network” is entirely new to the EC terminology in this field of legislation

g) Other issues

According to article 20 DUSD, it shall be required that additional information in relation to the **security of an electronic communications service**, the availability of emergency services through the electronic communications service and customer obligations as regards copyright and related rights be provided in contracts on electronic communications services. While the new rules would strengthen the confidence of consumers in electronic communications services, their fulfilment may pose some problems for service providers. The formulation of this information should be officially clarified in order to avoid legal uncertainty as has arisen recently in Germany with regard to the wording of a model information on the right of cancellation designed by the German Ministry of Justice. Following a series of judgements declaring some passages of the model used by private contractors to be contrary to German Civil Law, the Ministry of Justice has now modified the model in an attempt to bring it in line with legal requirements. The case shows that where even public authorities in Member States encounter difficulties to generate a legally correct information to the consumer, private service providers all the less may see themselves in a position to comply with the obligations to provide adequate consumer information. Particularly with regard to the **obligation to inform customers** about copyrights and related rights, it should be noted that this field of law is highly fragmented throughout the EU. Depending on where service providers and customers are located, the rules of different Member States may apply. It will thus be nearly impossible for an SME to formulate correct information sheets for all relevant cases. In order to minimise the risk of private companies failing to fulfil their information obligations due to lack of knowledge, the Commission should be charged together with national authorities with the designing of model information sheets.

Likewise, the provision in Article 33 para. 1 introducing a consultation mechanism to ensure that consumer interests are taken into account by NRAs in their decision-making process would contribute to a further improvement of consumer protection.

Article 27 aims to facilitate the development of the European Telephony Numbering Space (ETNS), in particular, by capping call rates to and from the ETNS to the maximum rate the respective service provider charges for calls to and from other Member States. This would set new incentives for the establishment of cross-border and pan-European services which rely on a single number in all Member States. In the same way, end-users shall be empowered to access all numbers provided in the Community which is currently not always the case.⁴³

The DUSD empowers the Commission to adopt **technical implementing measures** in a number of rather roughly described areas such as tariff transparency (Article 21 para. 6), prevention of service degradation (Article 22 para. 3), access to numbers and services (Article 28 para. 2) and eAccessibility (Article 33 para. 4). From the wording it cannot be derived to which extent the Commission may regulate these issues. As the text stands, the power given to the Commission seems to be rather comprehensive. In order to allow for a correct assessment of the scope of application of the Directive and of the powers transferred to the Commission, these powers should be outlined clearly and unambiguously within the Directive.

2. Privacy and Security

a) *Notification of security breaches*

Article 4 para. 3 of the Draft Electronic Communications Data Protection Directive (DECDPD) imposes an obligation on the provider of publicly available electronic communications to notify end-users of a **breach of security** leading to their personal data being lost or otherwise compromised, and to recommend measures the end-user may take in order to mitigate negative effects. This provision would increase consumers' confidence in data protection rules and ensure that undertakings act with due diligence when dealing with the personal data of their users in order to survive in the market.

b) *Combating unsolicited commercial communications*

Article 13 para. 6 DECDPD provides for a possibility to take legal action against "spammers", i.e. senders of **unsolicited commercial communication** in the form of eMail/SMS/MMS, voice mail systems or automated fax sending, for instance. Particularly service providers would be enabled through this measure to defend their

⁴³ For instance, in Germany some number spaces such as 0900 service numbers are not accessible from other Member States. In other cases such as the 032 trunk reserved particularly for the provision of non-location-based services (e.g. VoIP), numbers are not even accessible through all national service providers.

rights better against unsolicited commercial communications. A considerable share of traffic over electronic communications networks already consists of “spam”. Costs involved in the supply of network access and services such as e-mail or Instant Messaging might be significantly decreased if unsolicited communications can be stopped by bringing the responsible agents to court. Even other “spammers” may be deterred from continuing their behaviour when they are confronted with the legal consequences these actions may bring about. The ECDPD would be the first Directive to directly foresee a possibility for any person with a legitimate interest to take **legal action** against the initiator of unsolicited commercial communication. Neither the Distance Selling Directive (97/7/EC), nor the Data Protection Directive (97/66/EC), the E-Commerce Directive (2000/31/EC) nor the Directive on Unfair Commercial Practices (2005/29/EC) did implement similar mechanisms against “spam” within their respective scopes of application.

c) Enforcement of the ECDPD

By introducing a new Article 15a, the **enforcement of the data protection rules** contained in the ECDPD would be strengthened. The rule provides for an obligation of Member States to define effective, proportionate and dissuasive penalties applicable to infringements of the national laws implementing the ECDPD. Furthermore, the NRAs shall be granted the power to order the cessation of these infringements as well as all investigative powers necessary for the enforcement of this Directive.

d) Implementing measures

Regarding Articles 4 para. 4 and 15a para. 4 empowering the Commission to adopt technical implementing measures in the areas of security breach notification and enforcement of the ECDPD, the remarks on technical implementing measures according to the DUSD apply (see 1. g)).

3. Conclusion

The Draft Citizen’s Right Directive (COM(2007) 698 final) tackles a number of issues the **Committee of the Regions** has addressed in **earlier opinions**, such as price and terms of service transparency for customers, improvements in number portability and an option to introduce portability between fixed and mobile networks, and the setting of minimum quality of service standards. Consumers would benefit from these and other provisions, such as, in particular, duties of service providers to furnish certain information on contractual rights and obligations and on security issues, further regulation on the single European emergency number and enhanced eAccessibility rules to ensure access of disabled users to electronic communications. Where these new consumer rights imply problems for service providers (e.g. as regards the information to be given to customers on copyrights and related rights), some modifications to the wording of the Directive might be indicated. Some service providers, in turn, will also profit from new provisions such as the must-carry review clauses, which will allow for more flexibility on cable TV networks, and a possibility to take legal action against senders of unsolicited communications.