

CLIENT ADVISORY

EUROPEAN COMMISSION RELEASES ITS 2007 REFORM PROPOSALS FOR THE ELECTRONIC COMMUNICATIONS REGULATORY FRAMEWORK

In June 2006, the European Commission ("Commission") commenced a review of the 2002 regulatory framework for electronic communications. The results of that process have now been released. The Commission is proposing to amend—sometimes in significant ways—the key Directives that comprise the framework, to substantially shorten the list of markets deemed susceptible to ex ante regulation, and to create a new "European Electronic Communications Market Authority." This note highlights the principal changes to the framework proposed by the Commission.

Arnold & Porter has prepared a package which contains the texts of the main proposed measures, including a redlined version of the measures that the Commission proposes to amend. See below for details on how to obtain a free copy by e-mail.

OUTLINE OF THE 2007 REFORM PROPOSALS

There are three substantive pieces of legislation proposed by the new package:

- A Regulation establishing a European Electronic Communications Market Authority (the "Authority");¹
- A Directive amending the Universal Service Directive and the Directive on Privacy in the electronic communications sector;²

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Brussels

+32 (0)2 517 6600

London

+44 (0)20 7786 6100

Washington, DC

+1 202.942.5000

New York

+1 212.715.1000

Los Angeles

+1 213.243.4000

San Francisco

+1 415.356.3000

Northern Virginia

+1 703.720.7000

Denver

+1 303.863.1000

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1. Regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority.
2. Directive of the European Parliament and of the Council amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector.
3. Directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and 2002/20/EC on the authorisation of electronic communications networks and services.

- A Directive amending the Framework Directive, the Access Directive, and the Authorisation Directive.³

The Commission has also released the “Second edition” of its Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation. This is in final form. The other measures will require approval of the Council and the Parliament before they enter into effect.

In addition, the Commission proposes to revoke Regulation 2887/2000 on unbundled access to the local loop. (This is not a substantive change. The inclusion in the 2002 Access Directive of an unbundling requirement has rendered the Regulation unnecessary.)

THE PROPOSED EUROPEAN ELECTRONIC COMMUNICATIONS MARKET AUTHORITY

The proposed Authority falls short of becoming the new European regulatory agency that was at one time mooted, but it may represent a stepping stone towards the creation of such an agency.

The Authority will supersede the European Regulators’ Group, and it will also take over responsibility for network information and security issues from the European Network Information and Security Agency.

The functions assigned to the proposed Authority will include the following:

- (a) issue opinions at the request of the Commission or on its own initiative and assist the Commission by providing it with additional technical support in all matters regarding electronic communications;
- (b) assist the Community, its Member States, and the national regulatory authorities (the “NRAs”) in the relations, discussions, and exchanges with third parties;
- (c) provide advice for market players and national regulatory authorities on regulatory issues;
- (d) exchange, disseminate and collect information, and undertake studies in areas relevant to its activities;
- (e) provide advice and assistance to the European Parliament, the Commission, or any competent

body appointed by a Member State with regard to any network and information security issue falling within the Authority’s remit;

- (f) take individual decisions in relation to the issuance of rights-of-use for numbers from the European Telephone Numbering Space;
- (g) assist the Commission in the selection of undertakings to be granted rights of use of radio frequencies and numbers;
- (h) collect and redistribute usage fees for rights-of-use of radio frequencies and numbers;

The Commission’s rationale for the creation of the new Authority is captured in the preamble to the draft Regulation, which recites that there is need for “[a] more substantial institutional basis” than the ERG provides “[to bring] together the expertise and experience of the national regulatory authorities” and the need for that body to have “a clearly defined set of competencies.” The preamble also speaks of a need “to enhance the mechanisms for ensuring consistent regulatory practice in order to complete the internal market in electronic communications and services.” That the new Authority is intended to complement the work of NRAs, not replace them, is also confirmed in the preamble, which says that:

The Authority should, through the pooling of expertise, reinforce the capacities of the national regulatory authorities without replacing their existing functions or duplicating work already being undertaken, for the further benefit of assisting the Commission in the execution of its responsibilities.

The Authority will include four bodies:

- an Administrative Board (composed of twelve members –six to be appointed by the Commission and six by the Council), that will function as a board of directors for the Authority. Decisions of the Administrative Board will require a 2/3rd majority.
- a Director, who shall act as MD of the Authority.
- a Board of Regulators (chaired by the Director and composed of the head of each NRA and one non-voting representative of the Commission). One of the tasks of

the Board of Regulators shall be to provide an opinion to the Director before the adoption of the opinions, recommendations, and decisions referred to above.

- a Board of Appeal (composed of six members and six alternates selected from among current or former senior staff of the national regulatory authorities, competition authorities, or other national or Community institutions with relevant experience). The Board of Appeal shall be responsible for deciding on appeals against decisions or measures taken by the Authority in relation to the issuance of rights of use for numbers from the European Telephone Numbering Space.

PROPOSED AMENDMENTS TO THE FRAMEWORK DIRECTIVE

The main changes relate to three areas:

Spectrum management

The amendments will allow spectrum tradeability to be imposed by Member States in commonly defined bands.

Technology neutrality is introduced as a binding principle together with a new principle of service neutrality. Member States will need to consult interested parties when considering a possible derogation from the principles of technology and/or service neutrality.

Role of the Commission

The Commission says that “the consistency of regulation of the internal market in electronic communications... will be achieved by a stronger role for the Commission in remedies imposed by NRAs, which will be combined with the close involvement of the new Electronic Communications Market Authority in the ‘Article 7’ procedure to ensure that the joint expertise of NRAs can be effectively harnessed and efficiently taken into account in the final Commission decision.”

The present system of automatic notification under the ‘Article 7’ procedure will be abolished, allowing the Commission to only intervene in serious cases.

The Commission assisted by the Authority may take over a market analysis if an NRA is significantly late in performing its duties and the Commission, assisted by the Authority, may impose specific obligations for draft measures that

have been re-notified.

Security and integrity

Integrity obligations are extended to mobile and IP networks.

PROPOSED AMENDMENTS TO THE ACCESS DIRECTIVE

NRAs will be empowered to impose functional separation as a remedy on an undertaking with SMP. The prior agreement of the Commission will be required before an NRA may impose functional separation. The NRA will be required to submit to the Commission detailed evidence proving that other obligations imposed on the undertaking have failed and an analysis of the impact such functional separation will have on the undertaking, other stakeholders, infrastructure competition, and any potential negative effects on consumers.

PROPOSED AMENDMENTS TO THE AUTHORISATION DIRECTIVE

The amendments focus on aligning procedures with the plans for spectrum policy reform and creating a procedure for firms needing rights of use to provide cross-European services.

PROPOSED AMENDMENTS TO THE UNIVERSAL SERVICE DIRECTIVE

The proposed amendments focus on three issues:

Improving the transparency and publication of information to end users

An obligation is imposed on operators to publish comparable, adequate, and up-to-date information in an easily accessible form.

The right to number portability is extended beyond publicly available telephone services to be linked to national numbering plans with the maximum time limit for the effective porting of numbers set at one working day.

Ensuring basic connectivity and quality of service/net neutrality

Operators will need to inform end users in advance and regularly during the term of any contract of any limitations

imposed by the provider on their ability to access or distribute lawful content.

NRAs will be able to set minimum quality levels for network transmission, and the Commission will be able to set a minimum level of harmonisation.

Facilitating use of and access to e-communications for disabled users

NRAs will need to report annually to the Commission and the Authority on the measures taken and progress towards eAccessibility issues for disabled users.

PROPOSED AMENDMENTS TO THE PRIVACY AND ELECTRONIC COMMUNICATIONS DIRECTIVE

Operators will be made subject to a mandatory notification of security breaches where users' personal data is lost or compromised.

The proposals also introduce provisions to strengthen network and information security together with enforcement provisions to combat spam.

NEW COMMISSION RECOMMENDATION ON RELEVANT PRODUCT AND SERVICE MARKETS

The number of markets deemed susceptible to ex ante regulation is reduced from 18 markets to 7. At the retail level, markets 1 and 2 have now been combined so that 'Access to the public telephone network at a fixed location for residential and non-residential customers' is a single market.

The relevant wholesale markets are:

Market 2 - Call origination on the public telephone network provided at a fixed location (*previously market 8*);

Market 3 - Call termination on individual public telephone networks provided at a fixed location (*previously market 9*);

Market 4 - Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location (*previously market 11*);

Market 5 - Wholesale broadband access (*previously market 12*);

Market 6 - Wholesale terminating segments of leased lines, irrespective of the technology used to provide leased or dedicated capacity (*previously market 13*);

Market 7 - Voice call termination on individual mobile networks (*previously market 16*).

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For additional information, please contact:

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Michael H. Ryan
+44 (0)20 7786 6155
Michael.Ryan@aporter.com

Emma Wright
+44 (0)20 7786 6156
Emma.Wright@aporter.com