

European Telecommunications Practice Group

Introduction to the New EU Regulatory Framework for Electronic Communications

When the European Commission, in July 2000, first introduced the package of legislative proposals which became the foundation for the new EU Regulatory Framework for Electronic Communications, the Commission stressed the need for a “comprehensive reform” of regulation which would “drive forward the liberalisation of telecommunications markets by adapting regulation to the requirements of the Information Society and the digital revolution.”¹ Only time will tell whether the measures that comprise the new framework will adequately respond to that need, but there can be no doubt that the changes introduced by the new regulatory framework are fundamental.

The purpose of this note is to provide an outline of the main themes of the new regulatory framework. Although the changes introduced by the new framework are fundamental, it is also true that the new framework carries forward many principles first articulated in earlier measures. In addition, several measures dating from the old framework will continue in force, either on a transitional basis or indefinitely, alongside the new measures. Therefore, in order to provide a comprehensive picture of the new regulatory environment, we begin this introduction, in section 1, with a brief history of the evolution of EU telecoms law since 1987, when the Community embarked on the path to competition. We then provide, in section 2, a brief description of the reform process initiated in 1999 that led to the adoption of the new framework. Finally, in section 3, we turn to the new measures themselves, highlighting the principal policy innovations.

1. Evolution of EU law since 1987

Until 1987, access to the markets of most EU Member States² was limited by policies which gave incumbent national operators special or exclusive rights over the provision of most telecommunications equipment, services and infrastructure. The process of opening these markets began that year with the publication by the European Commission of a Green Paper³ which proposed the gradual introduction of competition. The Council gave general support to the Commission's proposal in 1988 and adopted the following policy goals for the sector:-

- the progressive opening of the market for telecommunications services, especially value-added services;
- the promotion of European-wide services through standardisation, including the definition of common tariff principles;
- the development of a Community-wide market for terminal equipment;
- the development of conditions permitting competition on an “equal footing,” including for example separation of regulatory and operational functions where these were under the direction of a single administration.⁴

¹ Press Release IP/00/747, Brussels, 12 July 2000.

² The principal exception being the UK, which began to liberalise telecommunications markets in 1981.

³ COM (87) 290 final.

⁴ See Council Resolution of 30 June 1988 on the development of the common market for telecommunications services and equipment up to 1992, OJ C 257, 04.10.1988, p.1.

Two separate streams of legislative initiatives followed: Commission-initiated measures aimed at the *liberalisation* of telecommunications equipment and services and (later) infrastructure;⁵ and Council-initiated measures aimed at *harmonisation* of laws and regulation in Member States to ensure open access to telecommunications services and networks.⁶

(a) Liberalisation

The first market to be liberalised was the supply of telecommunications terminal equipment. The 1988 Terminal Equipment Directive⁷ obliged Member States to remove special or exclusive rights relating to the importation, marketing, connection, bringing into service and maintenance of telecommunication terminal equipment connected to the PSTN and receive-only satellite stations, thereby bringing to an end the monopolies enjoyed by incumbent operators over attachment of equipment to their networks. The Terminal Equipment Directive also obliged Member States to create an independent body responsible for drawing-up specifications for, and subsequently monitoring, a type-approval process for competitively-supplied equipment.⁸

The liberalisation of services began in 1990 with the adoption of the Services Directive.⁹ That Directive required Member States to liberalise the provision of value-added and data services and the provision of voice services by closed-user groups (but, in so doing, implicitly authorised the continuation of monopoly with respect to public voice telephony, telex, mobile, paging and satellite services - the so-called "reserved services"). Member States were required to ensure that operational and regulatory functions would be carried out by separate entities; and, specifically, that the power to grant operating licences, control type approval and mandatory interface specifications, allocate frequencies and monitor the conditions of use be vested in a body independent of the national operator. The Services Directive provided that where the supply of the services covered by the Directive was made subject to a licensing or declaration procedure aimed at compliance with "essential requirements", any conditions attached to the grant of licences must be objective, non-discriminatory and transparent, that reasons be given for any refusal to grant a licence, and that there be a procedure for appealing against any such refusal. "Essential requirements" was defined for this purpose to include security of network operations, maintenance of network integrity and, "in justified cases," interoperability of services and data protection.

The Services Directive also attempted to facilitate competition by requiring Member States to ensure that operators requesting leased lines could obtain them within a reasonable period without restrictions on their use, and that price increases would be justified.

⁵ Based on what was then Article 90(3) of the EC Treaty.

⁶ Based on what was then Article 100(a) of the EC Treaty. Measures adopted after 1 November 1993 were based on the co-decision procedure provided for in Article 189(b).

⁷ Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment, OJ L 131, 27.5.1988, p. 73. The Commission has since issued decisions establishing common technical regulations for terminal equipment interfaces for a variety of services, including 2 m/bit leased lines, DECT and ISDN.

⁸ Beginning in 1986, the EU adopted a series of measures on the mutual recognition of type approvals, culminating in Directive 98/13/EC of the European Parliament and of the Council of 12 February 1998 relating to telecommunications terminal equipment and satellite earth station equipment, including the mutual recognition of their conformity, OJ L 74, 12.03.1998, p. 1. Directive 98/13/EC was repealed by Directive 1999/5/EC of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity OJ L 91, 7.4.1999, p. 10 (reproduced in this book on page 205), which created a self-certification regime for terminal equipment.

⁹ Council Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, OJ L 192, 24.07.1990, p. 10.

The Services Directive was amended in 1994 to remove satellite services from the scope of “reserved services” and open that market to competition.¹⁰

The Services Directive did not initially address the ownership of infrastructure, which remained in most countries (subject to minor exceptions) the preserve of the incumbent national operator. The Cable TV Directive¹¹ began the process of infrastructure liberalisation by abolishing restrictions on the use of cable infrastructure for the carriage of already-liberalised services (i.e., services other than “reserved services”) from 1 January 1996.

In 1996, mobile and personal communications services were also removed from the list of reserved services, and restrictions on the right of operators of such services to provide their own infrastructure or use facilities provided by third parties were abolished.¹²

The final step towards market liberalisation was taken in 1996 with the adoption of the Full Competition Directive.¹³ That Directive required Member States to ensure that any remaining restrictions on services competition and the deployment of alternative infrastructure were removed by 1 January 1998. The Full Competition Directive also developed and refined the provisions of the Services Directive on licensing. In addition to the requirement of the Services Directive that licence conditions be objective non-discriminatory and transparent, the Full Competition Directive required that such licence conditions also be “proportionate.” The list of permitted subjects for licence conditions was also expanded by broadening the definition of “essential requirements”, to include the protection of the environment and town and country planning objectives, the effective use of the frequency spectrum and the avoidance of harmful interference between radio-based telecommunications systems and other space-based terrestrial technical systems. Member States were prohibited from imposing any limit on the number of licences to be issued except in cases where a limitation was justified by a lack of available spectrum. The Full Competition Directive also specified that remaining restrictions on the use of alternative infrastructure should be lifted by 1 July 1996.

(b) Harmonisation

The liberalisation process was complemented and reinforced by a series of measures adopted by the Council designed to provide for the gradual harmonisation on a Community-wide basis of the conditions for access to and use of public telecommunication networks and services. The Open Network Provision Framework Directive,¹⁴ adopted at the same time as the Commission’s Services Directive, aimed at preventing incumbents

¹⁰ Commission Directive 94/46/EC of 13 October 1994 amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications, OJ L 268, 19.10.1994, p. 15. This Directive also brought satellite earth station equipment within the scope of the Terminal Equipment Directive, *supra*.

¹¹ 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 liberalized telecommunications services, OJ L 256, 26.10.1995, p. 49. In 1999, the Commission adopted an amendment to the Cable TV Directive requiring state-owned and dominant telecom operators to structurally separate their telephone and cable TV operations: see 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, OJ L 175, 10.07.1999, p. 39.

¹² Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications, OJ L 20, 26.1.1996, p. 59.

¹³ Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets, OJ L 74, 22.3.1996, p. 13.

¹⁴ 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, OJ L 192, 24.7.1990, p. 1. (Later amended by Directive 97/51/EC of the European Parliament of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications, OJ L 295, 29.10.1997, p. 23.)

from using their monopoly control of infrastructure to frustrate the provision of liberalised services. The ONP Framework Directive provided that access to public telecommunications networks and already-liberalised public telecommunications services would be provided on the basis of non-discriminatory, objective and transparent conditions published in an appropriate manner. It stipulated that access could be denied only on the basis of “essential requirements” similar to those set out in the Services Directive. The principles defined in the ONP Framework Directive were later refined and applied to leased lines, voice telephony and interconnection, as discussed below.

The ONP Leased Lines Directive of 1992¹⁵ required every Member State to ensure that users within the Member State had access to a minimum set of analogue and digital leased lines with harmonised technical characteristics from at least one organisation in that State and stipulated that, until effective competition was achieved, prices for leased lines must be cost-orientated, non-discriminatory and transparent. The ONP Leased Lines Directive also required the implementation of cost accounting systems by incumbents in order to permit an assessment by regulatory authorities of the operators’ compliance with the ONP principle of cost orientation. The ONP Leased Lines Directive was amended in 1997¹⁶ so that requirements which had originally been applicable only to bodies with “special or exclusive rights” became applicable to any organisation with “significant market power” (“SMP”) in the supply of leased lines within a particular geographic area within a Member State. SMP was presumed to exist where an operator had 25% or more of the relevant market.

The ONP Voice Telephony Directive, which was adopted in 1995,¹⁷ laid out minimum requirements which Member States must meet through their telecommunications organisations, operating either separately or jointly, pertaining to access to the fixed public telephone network by the public. It provided that individuals should have access to operator assistance and emergency and directory enquiry services, and required national regulators to ensure that public pay telephones were provided to meet the reasonable needs of users. It also defined parameters for the provision of universal service. The ONP Voice Telephony Directive was superseded in 1998 by a new Directive on the subject.¹⁸ The new Directive added a requirement that all users should have access, at an “affordable” price (as defined by authorities within each Member State), to the fixed public telephone network, at a fixed location, for communication by voice, data or facsimile. It also stipulated that users must have access to a basic range of facilities including itemised billing and tone dialling. It was left to Member States to determine which organisations would carry out these obligations in any particular State.

The same Directive set out the principles for sharing of the net costs of universal service obligations by service operators. Member States were required to take account of the principles of transparency, non-discrimination and proportionality in setting any contributions to be made.

¹⁵ Council Directive 92/44/EEC of 5 June 1992 on the application of open network provision to leased lines, OJ L 165, 19.06.1992, p. 27 (the “ONP Leased Lines Directive”). (Later amended by Commission Decision 94/439/EC of 14 June 1994 on amendment of Annex II of Council Directive 92/44/EEC, OJ L 181, 14.7.1994, p. 40; Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications, OJ L 295, 29.10.1997, p. 23; and Commission Decision 98/80/EEC of 7 January 1998 on amendment of Council Directive, OJ L 14, 20.1.1998, p. 27.

¹⁶ Directive 97/51/EC, *supra*.

¹⁷ Directive 95/62/EC of the European Parliament and of the Council of 13 December 1995 on the application of open network provision to voice telephony, OJ L 321, 30.12.1995, p. 16.

¹⁸ Directive 98/10/EC of the European Parliament and of the Council of 26 February 1998 on the application of open network provision to voice telephony and on universal service in a competitive environment, OJ L 101, 1.4.1998, p. 24.

The Interconnection Directive of 1997¹⁹ was intended to secure interconnection of networks and interoperability of services. The Directive stipulated that organisations authorised to provide public telecommunications networks and/or publicly available telecommunications services identified in Annex II of the Directive had a right and, when requested by similar organisations, an obligation to negotiate interconnection with each other. Operators with SMP were subject to further obligations intended to ensure transparency, non-discrimination and cost-orientation of their rates. They were required to meet all reasonable requests for access to their networks, including access at points other than network termination points offered to the majority of users (i.e., so-called “special network access”).

In 1998, an amendment to the Interconnection Directive was adopted which required operators to introduce fixed-link number portability and, in the case of SMP operators, carrier pre-selection, by 1 January 2000.²⁰

A Licensing Directive was adopted in 1997.²¹ That Directive established a distinction between general authorisations and individual licences; the latter being licences which require an express decision by the licensing authority before the rights conferred by them could be exercised; the former being any form of authorisation (including registration) which did not require any such explicit decision. The Directive limited Member States’ freedom to require individual licensing to the provision of public voice telephony and facilities-based network services, and to cases involving allocation of scarce resources (such as spectrum, numbers and rights of way), universal service obligations or access obligations. Where individual licensing was permitted, the Directive required Member States to set reasonable time limits for granting licences which could not, in any event, exceed six weeks. It also provided that Member States could not limit the number of individual licences for any category of telecommunications services or the establishment and operation of infrastructure except where the use of scarce resources would be required.

The Licensing Directive further limited the types of conditions which Member States could attach to general authorisations and individual licenses. Apart from reiterating the requirements of the Services Directive and the Full Competition Directive that conditions must be objectively justified in relation to the service concerned, non-discriminatory, proportionate and transparent, the Licensing Directive stipulated that general authorisations and individual licenses could only contain types of conditions taken from an exhaustive list contained in an Annex to the Directive. That list included conditions intended to ensure compliance with “essential requirements” (as previously defined in the Full Competition Directive), conditions to ensure competitive markets and the efficient use of numbering capacity and radio spectrum and conditions relating to interconnection, the protection of users’ rights, the provision of universal service, directory information and emergency services and special arrangements for disabled persons.

During the same time frame as these harmonisation measures were being introduced, the Council was also addressing the matter of spectrum co-ordination. A 1990 Directive aimed at co-ordinating spectrum licensing among Member States to facilitate the introduction of

¹⁹ Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP), OJ L 199, 30.6.1997, p. 32.

²⁰ Directive 98/61/EC of the European Parliament and of the Council of 24 September 1998 amending Directive 97/33/EC with regard to operator number portability and carrier pre-selection., OJ L 268, 3.10.1998, p. 37.

²¹ Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services, OJ L 177, 7.5.1997, p. 15.

cellular service using the GSM standard on a pan-European level.²² The Council went on to adopt similar measures aimed at co-ordination of frequency allocations to facilitate the provision of digital radio paging service,²³ cordless service,²⁴ satellite-based PCS²⁵ and, more recently, UMTS.²⁶

2. The Reform Process since 1999

By 1999, most of the legislative measures needed to complete the transition to a competitive regime for telecommunications were in place. Despite signs that competition was beginning to take hold, few operators were active on a pan-European basis and incumbent operators continued to occupy dominant positions in their home markets, in particular in the last mile. In addition, the trend toward convergence between carriage and content functions called into question existing arrangements under which telecommunication and broadcasting were regulated under different regimes. Against this backdrop, on 10 November 1999, the Commission launched a review of the existing regulatory framework with the simultaneous release of four communications. These included the Fifth Report on the Implementation of the Telecommunications Regulatory Package,²⁷ a Green Paper on Spectrum Policy,²⁸ a Report on the Development of the Market for Digital Television in the European Union²⁹ and, most significantly for present purposes, a Communication entitled "Towards a New Framework for Electronic Communications Infrastructure and Associated Services" (the "1999 Communications Review").³⁰

The 1999 Communications Review introduced the key elements of the Commission's policy for a new regulatory framework designed to cover all communications infrastructure and associated services. The new framework had five aims: to promote more effective competition; to react to technological and market developments; to remove unnecessary regulation and simplify associated administrative procedures; to strengthen the internal market; and to protect consumers.

²² Council Directive 87/372/EEC of 25 June 1987 on the frequency bands to be reserved for the co-ordinated introduction of public pan-European cellular digital land-based mobile communications in the Community, OJ L 196, 17.7.1987, p. 85.

²³ Council Directive 90/544/EEC of 9 October 1990 on the frequency bands designated to be reserved for the co-ordinated introduction of pan-European land-based public radio paging in the Community, OJ L 310, 9.11.1990, p. 28.

²⁴ Council Directive 91/287/EEC of 3 June 1991 on the frequency bands to be reserved for the co-ordinated introduction of digital cordless telecommunications (DECT) into the Community, OJ L 144, 8.6.1991, p. 45.

²⁵ Council Decision No 710/97/EC of 24 March 1997 on a co-ordinated authorization approach in the field of satellite personal communications services in the European Union, OJ L 105, 23.04.1997, p. 4. (Later extended by Decision No 1215/2000/EC of the European Parliament and of the Council of 16 May 2000, OJ L 139, 10.1.2000, p.1.)

²⁶ Decision No 128/1999/EC of the European Parliament and of the Council of 14 December 1998 on the co-ordinated introduction of a third-generation mobile and wireless communications system (UMTS) in the Community, OJ L 17, 22.1.1999, p. 1.

²⁷ COM (1999) 537.

²⁸ Communication on the Consultation on the Radio Spectrum Green Paper, COM (1999) 538.

²⁹ COM (1999) 540.

³⁰ COM (1999) 539.

A wide-ranging public debate ensued, and on the basis of the results flowing from it,³¹ the Commission, on 12 July 2000, published a proposal for a package of measures which were to form the basis for the new EU Regulatory Framework for Electronic Communications. These were:

- a Framework Directive;³²
- an Authorisation Directive;³³
- an Access and Interconnection Directive (the “Access Directive”);³⁴
- a Universal Service and Users' Rights Directive (the “Universal Service Directive”);³⁵
- a Decision on Radio Spectrum Policy (the “Radio Spectrum Decision”);³⁶
- a Directive on Privacy and Electronic Communications;³⁷
- a Regulation on Local Loop Unbundling;³⁸

Of these, the EU Regulation on Local Loop Unbundling was put on a legislative fast track because of the pressing need for regulation in that field. The Regulation came into force on 2 January 2001.³⁹

After protracted debate, the first five of the above listed measures received the approval of the EU Parliament and of the Council on 12 December 2001 and 14 February 2002 respectively and were published in the Official Journal on 24 April 2002.⁴⁰ These measures must be transposed into national law by 24 July 2003.

The Directive on Privacy and Electronic Communications, which was originally intended by the Commission to replace, without much substantive change, Directive 97/66/EC⁴¹ concerning the processing of personal data and the protection of privacy in the telecommunications sector without much substantive change, became unstuck on its way through the EU legislative process over a number of issues such as unsolicited communications, cookies and data retention and was put on a separate track. It finally received approval of the EU Parliament on 30 May 2002, and was adopted on 12 July 2002.⁴² Member States must transpose the provisions of the Directive into national laws by 31 October 2003.

The package of proposals for legislative measures comprising the new regulatory framework for electronic communications also included an eighth measure, a Commission Directive on Competition in the Markets for Electronic Communications.⁴³ This measure consolidates and carries forward elements of the old regulatory framework described above, such as the abolition of special and exclusive rights in the communications sector, and the obligation to ensure that dominant providers of electronic communications services operate their public electronic communications networks and cable television

³¹ The results of the public consultation are summarised in the Commission Communication dated 26 April 2000, COM (2000) 239.

³² COM (2000) 393, later amended by COM (2001) 380.

³³ COM (2000) 386, later amended by COM (2001) 372.

³⁴ COM (2000) 384, later amended by COM (2001) 369.

³⁵ COM (2000) 392, later amended by COM (2001) 503.

³⁶ COM (2000) 407, later amended by COM (2001) 524.

³⁷ COM (2000) 385, later amended by COM (2002) 338.

³⁸ COM (2000) 394, later amended by COM (2000) 761.

³⁹ Regulation (EC) No 2887/2000 of 18 December 2000, OJ L 336, 30.12.2000, p. 4.

⁴⁰ Directive 2002/21/EC of 7 March 2002, OJ L 108, 24.04.2002, p. 33 (Framework Directive); Directive 2002/20/EC of 7 March 2002, OJ L 108, 24.04.2002, p. 21 (Authorisation Directive); Directive 2002/19/EC of 7 March 2002, OJ L 108, 24.04.2002, p. 7 (Access Directive); Directive 2002/22/EC of 7 March 2002, OJ L 108, 24.04.2002, p. 51 (Universal Service Directive); Decision No 676/2002/EC of 7 March 2002, OJ L 108, 24.04.2002, p. 1 (Radio Spectrum Decision);

⁴¹ OJ L 24, 30.1.1998, p.1.

⁴² Directive 2002/58/EC, OJ L 201, 31.7.2002, p. 37.

⁴³ OJ C 96, 27.3.2001, p. 2.

networks under separate legal entities. This measure did not require approval under the EU co-decision procedure, and was adopted by the Commission on 16 September 2002.⁴⁴

3. Highlights of the New Regulatory Framework

(a) Consolidation of Existing Measures

The new framework represents a complete overhaul of the existing EU regulatory regime. As the Commission noted in the 1999 Communications Review, that regime was primarily designed to manage the transition from monopoly to competition. The focus of the new measures is on creating a regime that reflects the current state of competition, establishes a level playing field for all operators, and takes into account developing markets and technological evolution. The new framework consolidates the existing legal measures, introduces new measures and for the first time includes an overarching Framework Directive. Figures 1 and 2 show the relationship between the existing measures to be repealed and the new measures.

⁴⁴ See Footnote 21

⁴⁴ Directive 2002/77/EC, OJ L 249, 17.9.2002, p. 21.

Measures to be Repealed

New Framework

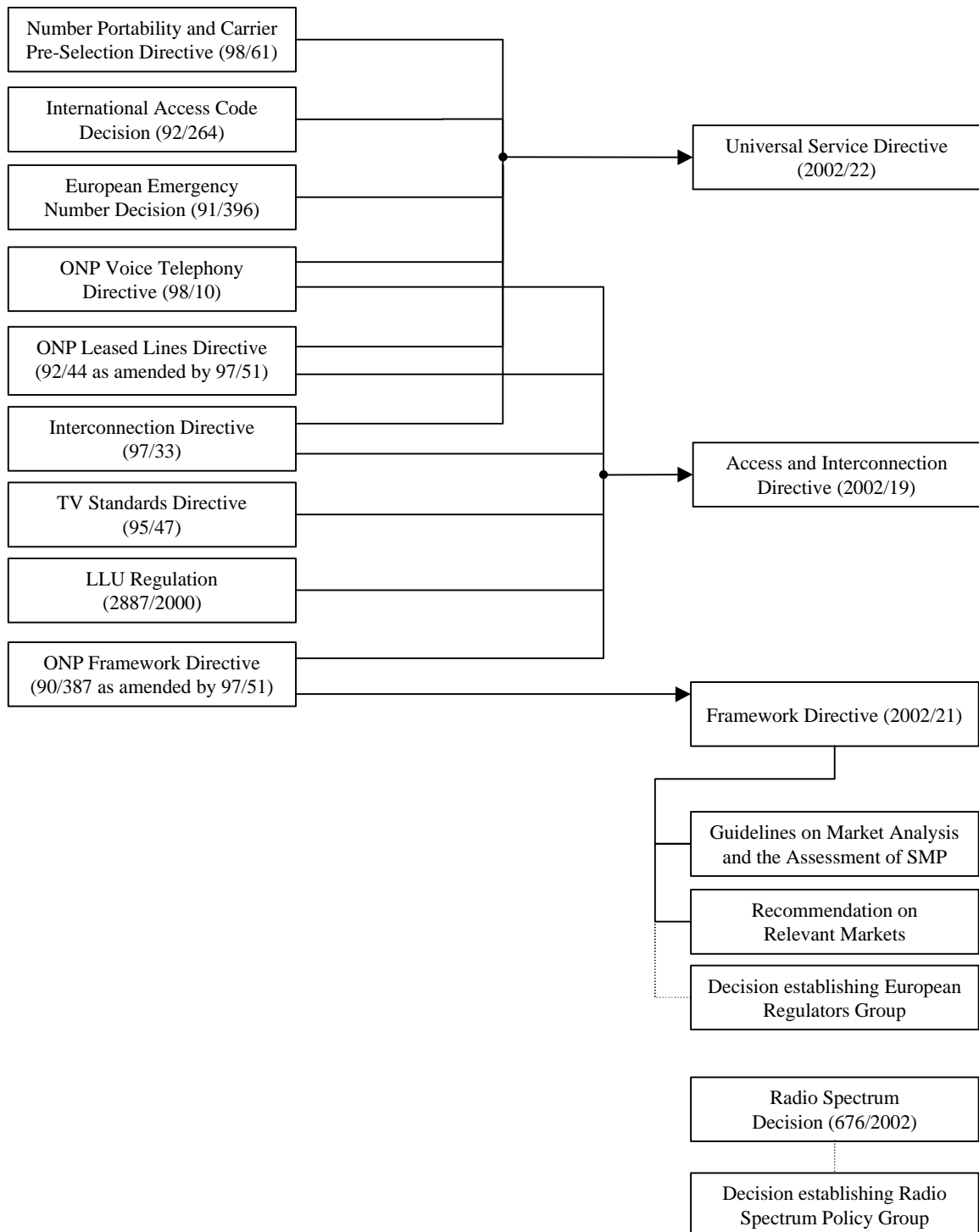


Figure 1

Measures to be Repealed

New Framework

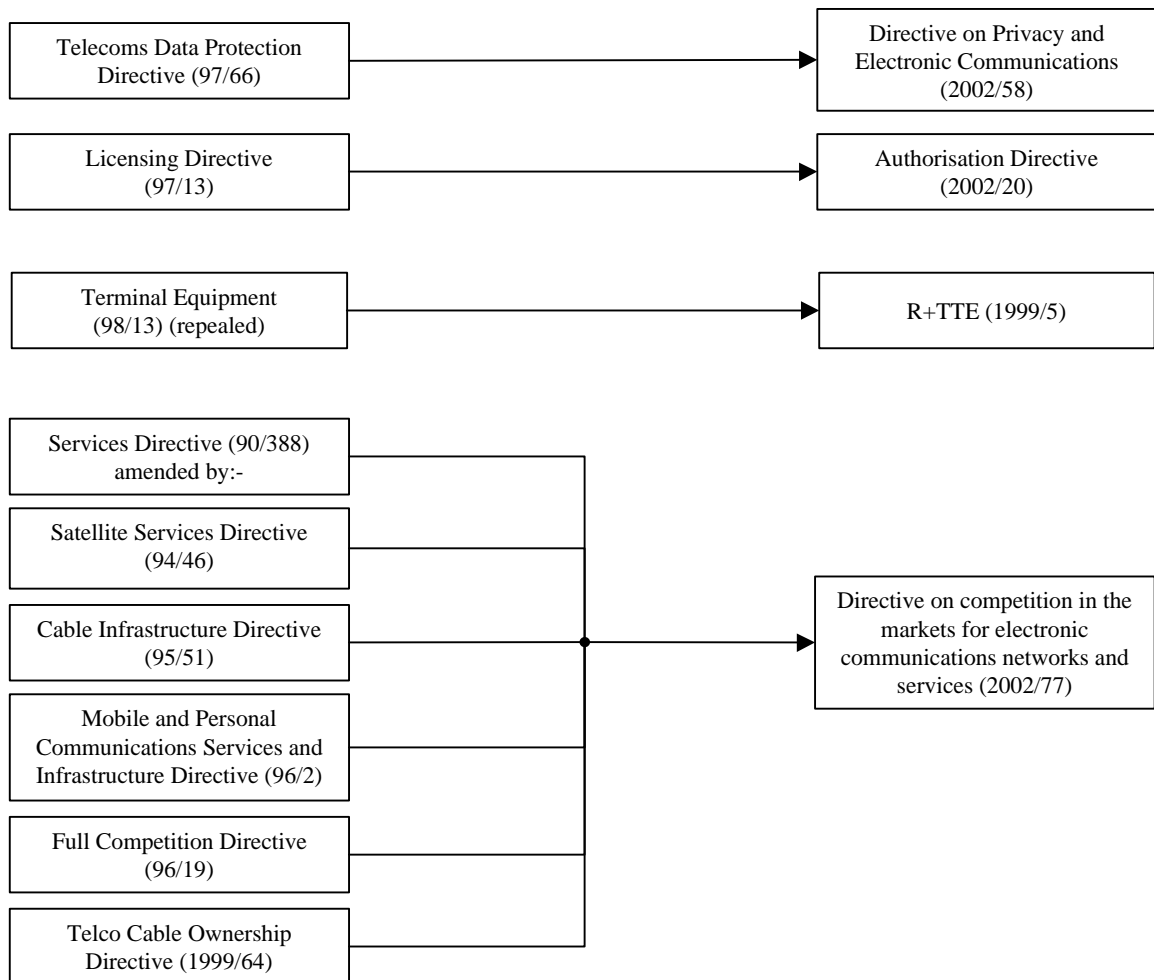


Figure 2

(b) Key changes

The new regulatory framework will bring significant changes to the environment in which both incumbents and competitors are operating. Among the most significant of these changes for operators are the following: -

Scope

Whereas broadcasting networks are expressly excluded from the scope of current laws, the new regulatory framework covers all electronic communication networks, including networks used for broadcast services.

Technological Neutrality

Increasing convergence of the telecommunications, broadcasting and information technology makes the traditional separation of regulatory functions between these sectors obsolescent and calls for a coherent and consistent regulatory regime. The new Framework Directive introduces the principle of technological neutrality, i.e. there shall be no discrimination between different means of transmission for regulatory purposes. It will apply to all telecommunications networks (fixed or wireless) as well as broadcast networks (terrestrial, satellite, and cable), so that equivalent rules will apply to all these networks.

An immediate application of this principle will be the resolution of the Voice over IP/Internet issue. In the past, the EU treated voice over Internet as a non-voice service, with the consequence that an individual voice telephony licence has not been required to provide this service. Under the new framework, the means of transmission will be irrelevant and all electronic communications services will be subject to a common authorisation regime.

Under the current regime, the status of Internet access and IP services is uncertain. In line with the principle of technological neutrality, the new framework expressly provides that Internet access and transmission services should be treated in the same way as any other transmission services.

Streamlining of the Licensing Regime

Under the provisions of the old Licensing Directive,⁴⁵ telecoms providers either operate under general authorisations or are issued individual licences by NRAs. The former allow anyone to operate within the conditions of the relevant general authorisation without recourse to a formal licensing procedure, but the latter require an individual decision by the NRA based on the merits of the operator's application. The new Authorisation Directive all but abolishes individual licensing and moves to a system of general authorisation. After the implementation deadline, Member States will only be allowed to grant individual rights where the allocation of radio spectrum or numbering ranges is at issue. All other electronic communications networks and services will thereafter be subject only to general authorisations. This change will eliminate the current discrimination in licensing terms between public voice and data providers, and facilities-based and resale providers, and create a common authorisation framework for all electronic communications network and service providers.

Transition to a Competition Law based Regime

The current regulatory regime is built upon laws and regulations that are "sector-specific." It is one of the aims of the new framework to bring telecom regulation more into line with

⁴⁵ See Footnote 21.

general competition law principles. The new framework is built on the premise that general competition rules will be the prime vehicle for regulating the electronic communications market once it becomes effectively competitive. Ex-ante regulation will only survive where it is required to deal with particular issues. Apart from creating greater harmony in regulatory practices across Member States and between regulated industries, the proponents of this change believe that it will facilitate the transition to a deregulated environment.

An example of the movement toward greater reliance on competition law principles is the change to the way in which operators with significant market power will be identified and regulated. The concept of SMP currently functions as the trigger for imposition of specific obligations on operators (e.g., obligations to supply unbundled, cost oriented, interconnection services, obligation not to unduly discriminate). Operators with more than 25% market share in a specific market are presumed to have SMP, but the relevant NRA enjoys some discretion to take other factors into account. The existing concept of SMP was developed with the incumbent ex-monopoly operator in mind and has been a major tool in facilitating market entry for new operators. Now that these market-entry objectives have been largely achieved, the concept of SMP is being redefined in line with the general competition law concept of market dominance. An operator will be judged dominant if, either individually or jointly with others, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and consumers. When an operator has SMP on a specific market, it may also be deemed to have SMP on a closely related market where the links between those markets are such as to allow the market power held in one market to be leveraged into the second market.

An operator will be presumed to be dominant if it enjoys a market share of over 40%, as compared to the current 25%. While market share is one factor taken into account when assessing the existence of a dominant position, other relevant factors which will be taken into account by the Commission and the European Courts are:

- overall size of the undertaking
- control of “essential facility” type infrastructures
- technological advantages
- absence of countervailing buying power
- economies of scale and scope
- vertical integration
- highly developed distribution and sales network
- absence of potential competition.

Access and Interconnection

The obligation to negotiate interconnection has been carried over from the Interconnection Directive. However, it has been extended to all operators of public communications networks, not only those satisfying the “Annex II” criteria. As a result, the concept of “Annex II status” will no longer be relevant.

The new framework contains an express prohibition on linkages between interconnection charges payable by a new entrant and the new entrant’s level of investment in infrastructure.

Unbundling of the Local Loop

The Regulation of 18 December 2000 on Unbundled Access to the Local Loop will be superseded by provisions of the Access Directive which are to similar effect. These

provisions stipulate that network operators that have been designated by their relevant NRA as having SMP must publish a reference offer on unbundled access to the local loop incorporating a minimum list of items (including shared access to the local loop) prescribed by Annex II of the Directive.

Number Portability on Mobile Networks

Number portability is the ability of a subscriber to retain an existing number when changing from one service provider to another. Under the current regime, number portability on fixed public telephone networks was made mandatory from 1 January 2000, but the obligation did not extend to mobile networks. The UK and other EU Member States have already adopted measures obliging mobile operators to offer number portability. The Universal Service Directive introduces an EU-wide obligation for mobile operators to make number portability available.

EU-Level Market Analysis Procedure

Along with the new concept of SMP, the new regulatory framework will provide for an EU-level market analysis procedure to provide guidance to NRAs on the often complex and difficult questions of defining markets and assessing the level of competition.

The Framework Directive requires the Commission to produce guidelines on this subject. Accordingly, the Commission has published Guidelines on Market Analysis and the Assessment of Significant Market Power.⁴⁶ Consistent with the shift to a more competition-law based approach, the notion of “relevant market” is defined in line with general competition law principles. Thus, the relevant product market comprises goods or services which are substitutable from the consumer or the producer perspective (demand/supply-side substitution). The relevant geographic market comprises the area where the conditions of competition are sufficiently homogeneous and which can be distinguished from other areas. Relevant geographic markets may be local, regional, national, or include two or more countries (e.g., pan-European, EEA or global markets).

The Commission will, on an annual basis, adopt a recommendation on relevant product and service markets listing those markets whose characteristics may be such as to justify regulatory intervention. At the time of writing, a draft recommendation was expected to be published shortly. The recommendation will be without prejudice to determinations that may be made in specific cases under competition law.

Forbearance

For the first time, NRAs will be placed under an obligation to refrain from regulating a market once it has been deemed to be “effectively competitive.” Determination of whether or not a market is “effectively competitive” is to be made by the NRA on the basis of a market analysis conducted in accordance with Commission guidelines, as described above.

Relationship between NRAs and the Commission

One of the aspects of the new regulatory framework which was most hotly debated during the legislative process leading up to the enactment of the new framework was the Commission’s proposal to give itself a power to review and rescind certain NRA decisions judged to be incompatible with the objectives of the new regulatory framework. The so-called veto power was considerably watered down in the final version of the new measures. NRAs are placed under a general obligation to cooperate with each other and the Commission in a transparent manner in order to ensure the consistent application of

⁴⁶ OJ C 165, 11.07.2002, p. 6.

the provisions of the new framework. This is an obligation to consult only. But in certain cases where the process of market definition is engaged (for example as a preliminary to a finding of SMP, or a decision to forbear), the Commission can intervene directly in the NRAs' decision making process. The Framework Directive provides that, where an NRA defines markets in a way that does not conform to Commission guidelines and recommendations on market definition (see above) and affects trade between Member States, and the Commission considers that giving effect to the proposal would create a barrier in relation to the single European market, or the Commission has serious doubts as to whether the proposal would be compatible with the requirements of any Community obligations, the Commission may require the NRA to withdraw the proposal.

Appeals

Member States are required for the first time to ensure that "effective mechanisms" exist at national level for appeals from NRA decisions to a court or other body with appropriate experience which is independent of the parties involved.

Radio Spectrum Co-ordination

From an early date, the Council and the Commission have recognised the desirability of a co-ordinated approach to spectrum allocation. In the past, Community initiatives in this area have taken the form of ad hoc initiatives, such as the 1987 decision to formally co-ordinate the allocation of spectrum for GSM in order to ensure the operability of the service on a pan-European basis.⁴⁷ The new framework for the first time introduces mechanisms designed to ensure co-ordination of policy and harmonised conditions relating to the availability and use of spectrum. A Radio Spectrum Committee will be created to assist the Commission, with a mandate to deal with technical implementation issues. Where issues fall within the scope of CEPT activities, mandates shall be issued to that body.

Secondary Trading in Radio Spectrum

Under the new regime, EU Member States will be allowed to introduce secondary trading of radio spectrum, subject to appropriate safeguards at EU level.

(c) Implementation and Transition

It is recognised that Member States may not have completed the implementation of all measures contemplated by the new regulatory framework by July 2003, when the old measures will be repealed. Member States are required to maintain in effect certain measures imposed under the repealed measures until such time as the NRA can determine whether to impose, maintain, amend or withdraw those obligations:-

- Articles 4 ('Rights and obligations for interconnection'), 6 ('Non-discrimination and transparency'), 7 ('Principles for interconnection charges and cost accounting systems'), 8 ('Accounting separation and financial reports'), 11 ('Collocation and facility sharing'), 12 ('Numbering') and 14 ('Publication of and access to information') of the Interconnection Directive 97/33/EC;
- Article 16 ('Special network access') of ONP Voice Telephony Directive 98/10/EC; and
- Articles 7 ('Provision of a minimum set of leased lines in accordance with harmonized technical characteristics') and 8 ('Control by the national regulatory authority') of the Leased Lines Directive 92/44/EEC.

⁴⁷ See footnote 22, above.

In addition, Member States are obliged to maintain, pending a similar review by the NRA, all measures relating to:-

- retail tariffs for the provision of access to and use of the public telephone network, imposed under Article 17 of the ONP Voice Telephony Directive 98/10/EC;
- carrier selection and pre-selection, imposed under the Interconnection Directive 97/33/EC;
- selected obligations relating to leased lines, imposed under the Leased Lines Directive 92/44/EEC.

(d) Secondary Measures

Certain of the new regulatory framework measures contemplate the adoption of secondary measures:-

- Guidelines on market definition and the assessment of significant market power (pursuant to Article 15 of the Framework Directive), to assist national regulators in applying the new regulatory framework. These were published by the Commission on 11 July 2002.⁴⁸
- Recommendation on Relevant Product and Service Markets within the electronic communications sector (pursuant to Article 15 of the Framework Directive), identifying those market segments where sector-specific regulatory obligations may be appropriate. At the time of writing, a draft had been issued by the Commission for public consultation.
- Decision establishing a European Regulators Group, composed of national regulators and the Commission (see recital (36) of the Framework Directive), with the aim of fostering co-operation to ensure consistency of regulatory decision-making across the EU. This decision was adopted on 29 July 2002.⁴⁹
- Decision establishing a Radio Spectrum Policy Group, composed of high level representatives from each Member State and from the Commission, with the aim to assist and advise on the need for the co-ordination of policy approaches and, where appropriate, harmonised conditions with regard to the availability and efficient use of the radio spectrum. This decision was adopted on 26 July 2002.⁵⁰

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⁴⁸ OJ C 165, 11.07.2002, p. 6.

⁴⁹ OJ L 200, 30.07.2002, p. 38.

⁵⁰ OJ L 198, 27.07.2002, p. 49.