

World Communications Regulation Report

International Information for International Businesses

Monthly News and Analysis on Communications Law, Regulation and Policy from Around the World

Volume 2, Number 12

December 2007

News

In a victory for the cable industry, the U.S. Federal Communications Commission has approved a compromise video competition report that will not provide the ammunition its chairman was looking for to impose new regulations on the cable industry. (Page 12)

T-Mobile may sell the popular iPhones in Germany exclusively, with a two-year contract and a SIM block, a Hamburg court has ruled, lifting a temporary restraining order on the company. (Page 6)

Canada's Industry Minister has announced the policy framework for the auction in May 2008 of Advanced Wireless Services (AWS) spectrum in the 1.7/2.1 gigahertz (GHz) bands. A stated objective of the framework is to encourage new entry and foster more competition in the Canadian mobile wireless market. (Page 3)

The European Commission has proposed sweeping regulatory reforms that include the establishment of a new regulatory agency for the entire European Union, as well as the right for national regulatory groups to force large dominant incumbent telecommunication companies to separate the management of infrastructure and services. (Page 4)

Regulations to implement Part 2 of the Unsolicited Electronic Message Ordinance are scheduled to be introduced in Hong Kong in late December. The UEMO prohibits senders of electronic messages from concealing their identification in telephone messages, distributing e-mails with misleading subjects, and sending commercial electronic messages to individuals registered on the do-not-call registry. (Page 7)

Japan and the United States have completed an agreement to facilitate trade in telecommunications equipment and harmonize certification requirements, allowing the agreement to enter into force on January 1. (Page 7)

The famous character of the "Spam" trademark for canned ham and other products cannot be extended to prevent the public from utilizing the term generically in reference to unsolicited e-mail, the U.S. Trademark Trial and Appeal Board has held. (Page 21)

Mexico's antitrust regulator has launched two investigations into the nation's telecom sector, an action long demanded by international companies complaining of a monopoly in the telephone and Internet markets. (Page 8)

Special Report

The new ICANN Chair, Peter Dengate Thrush of New Zealand, discusses with WCRR his goals and ambitions for ICANN and the Internet community. (Page 35)

Commentary

European Commission Releases Its 2007 Reform Proposals For The Electronic Communications Regulatory Framework, by Michael H. Ryan and Emma Wright, Arnold & Porter (UK) LLP, London. (Page 28)

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The Regulation of Submarine Communications Networks in South Africa, by Lisa Thornton and Carmen Cupido, Lisa Thornton Inc, and Kerron Edmunson, Johannesburg. (Page 32)



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Commentary

European Commission Releases Its 2007 Reform Proposals For The Electronic Communications Regulatory Framework

By Michael H. Ryan (Michael.Ryan@aporter.com) and Emma Wright (Emma.Wright@aporter.com), Arnold & Porter (UK) LLP, London

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 (i.e., regulation that is based on anticipated changes in the market), and to create a new "European Electronic Communications Market Authority". This note highlights the principal changes to the framework proposed by the Commission.

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 and
- 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. In addition, the Commission proposes to revoke Regulation 2887/2000 on unbundled access to the local loop. 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 to 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:

- 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;

- assist the Community, its Member States and the national regulatory authorities (the "NRAs") in the relations, discussions and exchanges with third parties;
- provide advice for market players and national regulatory authorities on regulatory issues;
- exchange, disseminate and collect information and undertake studies in areas relevant to its activities;
- 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;
- take individual decisions in relation to the issuance of rights-of-use for numbers from the European Telephone Numbering Space;
- assist the Commission in the selection of undertakings to be granted rights of use of radio frequencies and numbers; and
- 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 12 members – six to be appointed by the Commission and six by the Council), which will function as a board of directors for the Authority. Decisions of the Administrative Board will require a two-thirds 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 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 intervene only 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 seven. 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).

The Commission proposals will now be presented to the European Parliament for consideration. These proposals are likely to evolve before they become legislation and enter into effect around 2010.

(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. If you would like to obtain a copy, please send an e-mail request to A&P-TelecomPracticeAdvisory@aporter.com.)

Notes

- 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.

As Social Networking Soars, Privacy Issues Proliferate

By Christopher Wolf and Timothy P. Tobin; Christopher Wolf, a litigation partner in the Washington, D.C. office of Proskauer Rose LLP, chairs the firm's Privacy and Data Security Law Practice Group. Timothy Tobin is a senior associate in Proskauer's Washington office and practices in the Privacy and Data Security Law Practice Group.

Microsoft's recent purchase of a minority stake in Facebook, which values the company at a whopping \$15 billion, reflects the growing maturity and promise of social networking Websites. Facebook and MySpace led the way in the social networking craze, appealing mostly to college-aged young adults. Today, there are specialized social networking sites focusing on business connections as well as on travel, health and entertainment interests, among others.

And, increasingly, social networking sites appeal to school kids. Since social networking sites require personally identifiable information to facilitate the networking, serious issues of children's online privacy have arisen. The U.S. federal statute, the Children's Online Privacy Protection Act (COPPA), as well as federal child predator reporting requirements, the focus of state attorneys general, and the proposals for additional laws, all make operating a social networking site that attracts children a serious challenge.

COPPA and the FTC

At the U.S. federal level, the Federal Trade Commission (FTC) has had rules in effect to implement COPPA since 2000.¹ Those rules impose certain restrictions on Websites that collect personally identifiable information (PII) – defined broadly to include any individually identifiable information collected online² – from children under age 13. The sites covered by COPPA include those directed to children and general audience sites where the operator knowingly collects PII from children under age 13.

For general audience sites, actual knowledge of the collection of PII on children under age 13 is present when a site learns of a child's age or grade through the registration process, including when any broad age-identifying questions are asked. The COPPA requirements include posting an online privacy policy and obtaining verifiable parental consent before collecting children's PII.³

To be compliant with COPPA, general audience Websites that collect PII and that use an age-screening mechanism should ask users to provide age information in a way that does not invite falsification (neutral age-screening). A Website that provides a drop-down menu for users to enter the month, day, and year of birth might constitute a neutral screening mechanism. But a drop-down menu that allows users only to enter birth years making them 13 or older would not be considered neutral. Likewise, a check box stating that "I am over 12 years old" would not be considered a neutral age-screening mechanism. The FTC also recommends using temporary or permanent cookies to prevent children from back-buttoning and entering a new age to circumvent the screening mechanism.

Verifiable parental consent to collection and use of children's PII must occur before PII collection, and it is fairly stringent as to where children's personal information will be displayed. Acceptable methods include obtaining consent through a consent form that is faxed or sent through the mail, by requiring a parent to use a credit card in connection with a transaction, or by a parent's sending of an e-mail that is coupled with a pin or password obtained through a form or over the phone.

In 2006, the FTC entered into a settlement agreement for the first time with a social network site, Xanga.com. Xanga has a stated policy that children under 13 cannot join. However, Xanga created 1.7 million accounts over a five-year period for users submitting age information indicating that they were under age 13. The FTC accused Xanga of collecting, using, and disclosing personal information from children under age 13 without parental