

# ARNOLD & PORTER (UK) LLP

## CLIENT ADVISORY

March 2009

## THE EU'S PROPOSED TELECOM REFORM PROPOSALS REACH A CRITICAL STAGE

The proposal for reform of the European Union's Regulatory Framework for Electronic Communications first unveiled by the European Commission in November 2007 may receive final approval this Spring. The purpose of the following client advisory is to provide an overview of some of the key proposed reforms and to highlight some issues that may present obstacles to final approval.<sup>1</sup>

### BACKGROUND

In June 2006, the European Commission commenced a review of the functioning of the regulatory framework for the sector (adopted in 2002). The results of that review were released on 13 November 2007 and included a formal proposal for substantial changes to the various measures that comprise the framework. That proposal has now made its way through several stages in the EU legislative process. The European Parliament and the Council of Ministers (Council), whose agreement is required before the proposal can become law, have both suggested changes to the Commission's text, some of which the Commission has accepted. The European Commission remains hopeful that the European Parliament and the Council of Ministers can reach agreement on the proposed measures before the intervention of European Parliament elections in June 2009. There is a lot of speculation as to whether this timetable is achievable.

### KEY ISSUES

From a rather long list of proposed changes to the current framework, the following are a few which are among the most significant and politically sensitive:

#### ■ Expanded Commission Veto Power

Under the law as now stands, the Commission may "veto" the decision of a national regulatory authority (NRA) on market definition if the NRA defines a market in a way which differs from those set out in the Commission's current "Recommendation" on that subject. It can also veto an NRA's finding that a particular operator has "significant market power" (SMP) in a market. The European Commission *cannot*, however, veto an NRA's choice of remedies to address the presence of SMP. The European Commission wants to extend its veto power to remedies. This proposal has excited a lot of discussion. The *removal* of a veto over remedies was a key part of the

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*This summary is intended to be a general summary of the law and does not constitute legal advice. You should consult with competent counsel to determine applicable legal requirements in a specific fact situation.*

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<sup>1</sup> Michael Ryan, the author of this client advisory, recently participated in an executive training programme for the Hungarian NRA that was sponsored by Central European University (Budapest) and Arnold & Porter LLP. A set of slides giving more details on the EU Telecom Reform Package presented at that event by the author is available on request.

compromise between the Commission, Parliament, and the Council that allowed the passage of the 2002 regulatory framework. The re-opening of this issue is likely to again become a point of contention.

#### ■ **Functional Separation**

In 2005, BT entered into an agreement with Ofcom that resulted in the functional separation of BT's wholesale access business from its other businesses. The European Commission would like to ensure that *all* NRAs have the authority to impose functional separation on incumbents in appropriate cases, subject to Commission oversight. There is quite a mixture of views on this issue. The European Parliament generally supports the Commission's proposal, but the Council of Ministers has been quite divided, with some member states opposing the introduction of functional separation as a remedy, some supporting it; and some supporting it only subject to revised procedures.

#### ■ **Spectrum Policy**

In its original proposal, the Commission proposed changes that would secure a more important role for itself in planning and coordination of spectrum policy. Parliament is of the view that member states should retain ultimate control over national spectrum but favours coordination and harmonisation for pan-European services and harmonised spectrum trading rules—the Commission's amended proposal reflects these concerns. The Council is generally opposed to the introduction of any new mechanisms in this area. On the other hand, there is broad agreement among the three institutions that spectrum trading should be facilitated.

#### ■ **Institutional Change**

In its original proposal, the Commission proposed the creation of a new "market authority" at EU level to facilitate the harmonisation of communications regulation among member states that would be accountable to the European Parliament. NRAs have generally opposed the proposal. The European Parliament has proposed as an alternative the creation of a "Body of European Regulators in Telecoms" that would have a role in overseeing the NRAs' selection of remedies for SMP (and therefore restrict the role

the Commission has proposed for itself). Many in the Council have serious reservations about the creation of a new body and have advocated instead the creation of a "Group of European Regulators in Telecoms" that would have no formal decision-making role (but whose views both the NRAs and the Commission would be required to take account of in relation to several policy issues).

### OTHER ISSUES

Among the other reforms proposed are the following:

- Introducing a requirement that operators are required to activate number porting requests within 24 hours.
- Empowering NRAs to intervene to prevent "degradation of service and slowing of traffic over networks" and authorising operators to carry out "reasonable network management."
- Broadening incumbents' obligation to share facilities with competitors.
- Strengthening safeguards on the independence of NRAs from government interference.

### NEXT STEPS

The next stage in the legislative process is second reading of the reform package in the European Parliament. This is expected to occur in Spring 2009. If the package is adopted in the Spring, it can be expected to enter into law in member states in 2010.

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*We hope that you have found this client advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:*

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