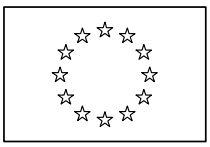

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 29.6.2006
SEC(2006) 816

COMMISSION STAFF WORKING DOCUMENT

Annex to the

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

on the Review of
the EU Regulatory Framework for electronic communications networks and services

{COM(2006) 334 final}

Proposed Changes

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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS
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Proposed Changes

1. INTRODUCTION

The Communication on the review of the EU regulatory framework for electronic communications identifies two areas for major changes:

- application of the Commission's policy approach on spectrum management, as set out by the Commission in its Communication of September 2005[1]
- reduction of the procedural burden associated with the reviews of markets susceptible to ex-ante regulation.

Other proposed changes seek to:

- consolidate the internal market,
- strengthen consumers and user interests,
- improve security and
- remove outdated provisions.

This Working Document explains the suggested changes in more detail. The associated Impact Assessment captures the broader range of options considered prior to drawing the conclusions presented in the Communication.

Changes to the regulatory framework require new EU legislation, and any new legislative provisions would be expected to come into force around 2009/2010 and remain in force until around 2015.

The revision of the Recommendation on Relevant Markets is a parallel consultation[2], but the revised Recommendation would come into effect in early 2007, and probably remain in effect for 2-3 years.

[1] COM(2005) 400.
[2] Commission Staff Working Document on the revision of the Recommendation on relevant markets.

In view of the special characteristics of international roaming services for mobile voice telephony in the Community, the Commission will propose a Regulation of the European Parliament and of the Council to address this specific issue. The revision of the Recommendation on relevant markets will take account of this (deletion of market No17 from the list of markets which may be subject to ex ante regulation).

2. INNOVATION, INVESTMENT AND COMPETITION

An important question addressed in reviewing the regulatory framework was whether it has contributed to investment and growth. This section provides further information to substantiate, in some detail, the conclusion in the Communication, that the principles and flexible tools in the regulatory framework, when applied in a full and effective manner, offer the most appropriate means of encouraging investment and innovation leading to growth.

Investment in Europe

Some studies show that the level of investment in the sector in Europe over recent years has been at least as high, if not higher, than in other regions.

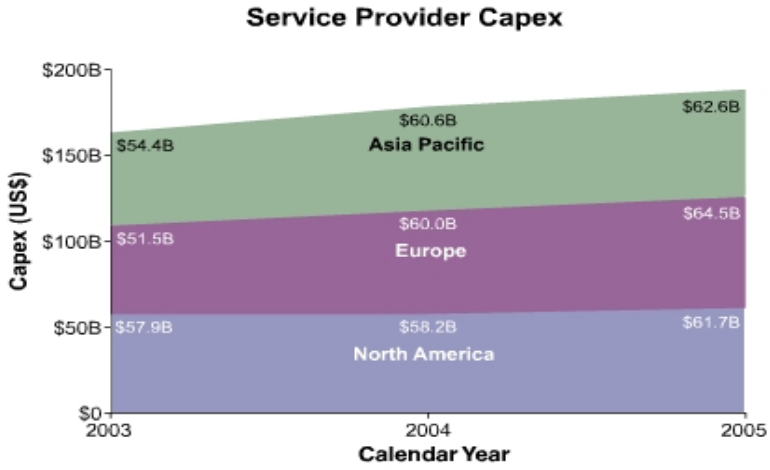


Figure 1. Service Provider capital expenditure in 2003-2005 in Europe, US and Asia
(Source: Infonetics, 2005)

The findings of a recent study undertaken for the Commission[3] indicate that investment in e-communications fell in 2001 and 2002 after the bursting of the Internet bubble, stabilised in 2003, and began to increase in 2004 (Fig 2).

[3] London Economics in association with PricewaterhouseCoopers, study for DG Information Society and Media of the European Commission on "An assessment of the Regulatory Framework for Electronic Communications - Growth and Investment in the EU e-coms sector' (to be published).

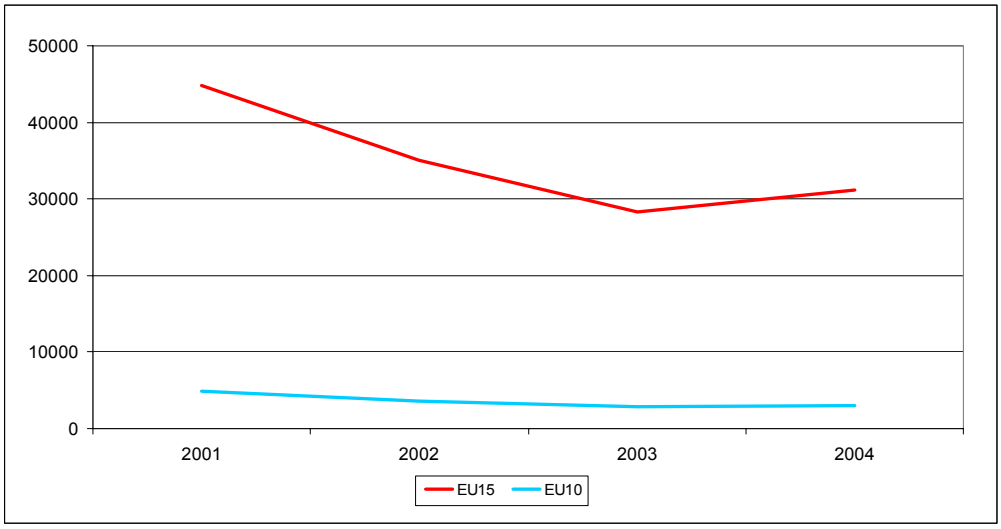


Figure 2. Total gross investment by EU15 and EU10 in the eCommunications sector, years 2001-2004 (EUR million, 2001 prices), company annual reports and LE calculations

Other findings of this study are:

- Investment in the mobile sub-sector is as big in absolute terms as in the fixed telephone sub-sector, and appears to have been the major element in the 2004 recovery.
- Investment in the CATV and broadcasting sub-sectors represent on average a combined 10% share of the total investment in e-communications.
- Incumbent firms invest more in absolute terms than new entrants, but new entrants invest more relative to their turnover.
- Firms operating in more than one sector invest more, but the fact that a firm operates in different countries does not appear to increase investment.

see Figure 3).

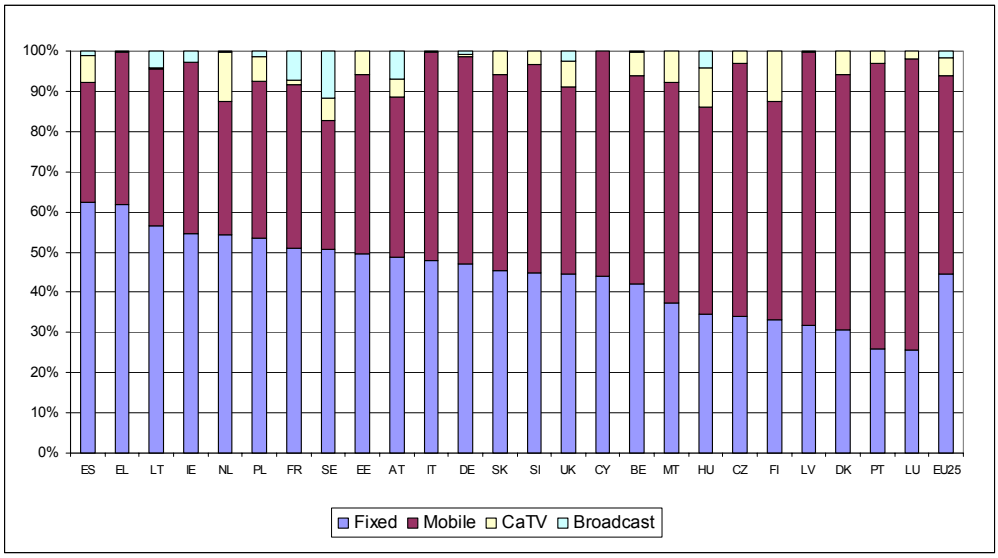


Figure 3: Composition of gross investment by sub-sector (2001-2004, 2001 prices)
Source: London Economics study (company annual reports and LE calculations).

Regulation and investment

The Commission study explores the relationship between regulatory reform (based on the OECD index, see Fig. 4) and investment. The data and analysis indicate that:

- those countries with a poor record of regulatory reform have less investment;
- those countries with higher GDP per capita have higher levels of investment. (A 1% increase in GDP per capita would lead to an increase of 0.7% in investment in e-communications);
- other things being equal, a unit decrease in the OECD index (reducing the regulatory impediments) should produce a 1.1% increase in investment;
- And, unsurprisingly, a higher cost of capital leads to lower investment, other things being equal.

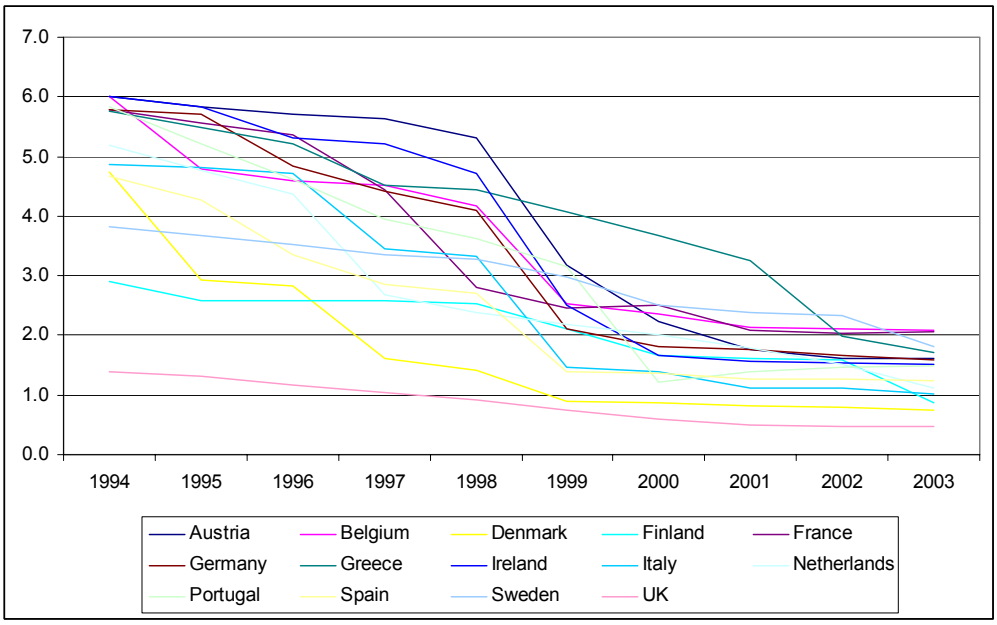
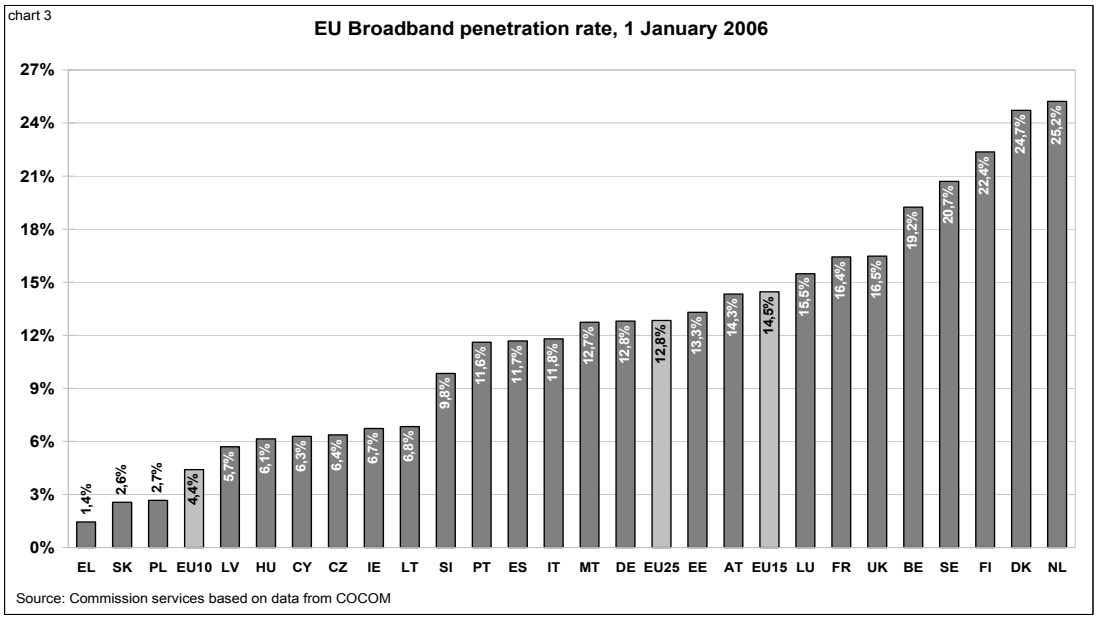


Figure 4: OECD Regulatory Reform Index for the Telecoms sector
Source: OECD

This tends to support the claims made by the European Competitive Telecommunications Association (ECTA) in their response to the Call for Input, that those countries that have implemented the EU regulatory framework in an effective and pro-competitive manner have attracted most investment.

With the growth in broadband in the EU over recent years, the correlation between broadband roll-out and competition in infrastructure has become very clear. Those countries where there is strong competition between telecommunications operators and cable operators are among those that have the highest broadband penetration.

Figure 5. Broadband Penetration rate, Lines per 100 population



Flexibility under the framework for dealing with new and emerging markets

The EU framework is based on regulation of markets, not regulation of technologies. The market based approach is a response to convergence, and allows inter-platform competition to be fully taken into account, avoiding the technology-specific regulation that is inherent in the regulation of assets.

Some argue that the EU framework is not sufficiently predictable when it comes to access regulation. The competition-based approach to access regulation means that the access rules applied by an NRA depend on the degree of competition on the relevant market, and this creates uncertainty for an operator trying to evaluate the regulatory risks several years in advance of any new product or service launch. This has led to a debate about the regulation of 'emerging markets'.

The Commission Staff Working Document on the Recommendation on relevant markets describes how emerging markets are handled under the regulatory framework. The Commission considers that 'emerging markets' are markets that are so new and volatile that it is not possible to determine whether or not the '3 criteria' test, identified in its Recommendation, is met. Only markets that satisfy the three criteria warrant consideration for ex-ante economic regulation, although consumer protection rules may nonetheless apply. The 3 criteria are 1) the presence of high and non-transitory barriers to entry; 2) no tendency towards effective competition (in the absence of regulation); and 3) the insufficiency of competition law to address the market failure.

It takes time to establish whether in a particular market there are high barriers to entry (criterion 1), and if so what are the competitive dynamics behind the barrier (criterion 2). Until such time as it is possible to apply the 3 criteria, an emerging market is effectively outside the scope of economic regulation (see associated Working Document on the Recommendation on relevant markets). In some cases it may be possible at a very early stage to determine that the 3 criteria are met, and in those cases a market could face regulation without much delay if Significant Market Power (SMP) were found to exist.

Once a market satisfies the 3 criteria and is found to be uncompetitive, the framework gives NRAs considerable flexibility when imposing remedies. It recognises the need to allow adequate cost recovery on existing assets, and to properly reward innovation and new, risky investments, by calling on NRAs to *"take into account …the initial investment by the facility owner, bearing in mind the risks involved in making the investment"*[4]. One way that NRAs can do this is to vary the cost of capital when setting an access price, so as to ensure the facility owner receives a reasonable rate of return.

Regulators must also balance the needs for long-term and short-term competition. There is sometimes a trade off between protection of consumers in the short term (lowering of the prices today) and protection of their interests in the medium to long term (greater choice and innovation, as well as lower prices, through more sustainable competition tomorrow).

[4] Article 12(2) of the Access Directive

The difficulty of achieving this balance should not be underestimated. Regulators do not know the true ex ante project risk, and investors will tend to exaggerate the risk in order to boost the regulated access price. Access seekers will in turn argue that such risks are overstated or non-existent[5]. This is an area where regulatory cooperation and the development of Community regulatory practice could prove useful.

Summary

The evidence available supports the conclusion that **competition drives investment,** and that investment occurs even where access regulation is imposed, but that slow implementation of regulatory reform and poor application of the framework hold back investment. The framework is flexible enough to handle new and volatile markets, and allows regulators to take account of the need for risky investments to generate an adequate return on capital when imposing pro-competitive access obligations.

3. NEW APPROACH TO SPECTRUM MANAGEMENT: FLEXIBILITY AND COORDINATION – PROBLEMS AND DESCRIPTION OF PROPOSED CHANGES

The demand for radio spectrum for electronic communications services and networks, such as mobile, wireless and satellite communications, TV and radio broadcasting, and other radio applications like short-range devices, defence, transport, radio location and the GPS/Galileo satellite system, has increased dramatically during the last decade, and this trend is expected to continue. National borders are increasingly irrelevant to wireless electronic services and many operators and equipment manufacturers operate globally.

This review focuses on the electronic communications regulatory framework and thereby contributes to the broader discussion on how to manage spectrum overall.

The proposals below build on the policy approach set out in Commission Communication 2005(411) on a forward-looking radio spectrum policy and Commission Communication 2005(400) on a market-based approach to spectrum management in the European Union,.

In the area of electronic communication services, conditions for access to, and use of, radio resources still vary according to the type of operator, for example, between mobile operators and broadcasters, while the electronic services provided by these operators increasingly overlap. These divergences create tensions between rights holders and in their demand for spectrum, and discrepancies in the implied value of the spectrum being used. Moreover, the gap between market demand and the supply under current spectrum distribution practices impairs efficient use of spectrum and the development of a genuine internal market. Inefficient spectrum use creates costs and reduces the take-up of innovative services, to the detriment of consumers and the wider economy.

[5] Gans & King; Access Holidays for Network Infrastructure investment; Agenda, volume 10(2) 2003, pp. 163-178.

The current regulatory framework for electronic communications establishes general principles for spectrum management which are difficult to implement in practice and do not ensure coherence at EU level, with the exception of the coordination of technical radio spectrum usage conditions pursuant to the Radio Spectrum Decision[6] and equipment regulation under the R&TTE Directive. The legal framework needs be modified to achieve further coherence and coordination at EU level and ensure suitable mechanisms for spectrum management.

No single approach is likely to facilitate access to radio resources for market players in all situations.

The baseline approach, as already laid down in the current framework, is to include the conditions for using spectrum in general authorisations for the provision of electronic communication services, with the objective to reduce hurdles to market entry as much as possible.

This approach is well reflected where spectrum access is operated on an 'unlicensed' basis[7]. However, a more common practice is to grant exclusive usage rights on the basis of individual licences, in order to guarantee an appropriate level of protection against harmful interference. As a general trend, technological progress is progressively reducing the risk of harmful interference and therefore making the use of individual rights less necessary in certain bands.

Taking into account the baseline approach and the need to ensure greater coherence where individual rights are applied, it is proposed to build on the general objectives and principles laid down in Articles 8 and 9 of the Framework Directive to ensure a co-ordinated approach for the achievement of the single market for equipment and services.

The measures proposed for achieving this objective are:

- to require that the granting of exclusive usage rights on the basis of individual licences be subject to clear justification that the risk of harmful interference cannot be managed in another way;

- to give spectrum users, either under general authorisations or individual usage rights, more freedom to choose the technologies used and services offered, applying technological and service neutrality as the default principles, and deviating only in justified cases;

- to facilitate access to spectrum resources for market players. The aim is to shift away from administrative decisions towards market based valuation of spectrum, including in particular trading of exclusive spectrum usage rights to optimise efficiency and flexibility of usage and reduce access costs. However, public administrative control over spectrum usage should be maintained where specific public interests objectives – such as safety of life - are at stake;

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6 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, OJ L 108 of 24.4.2002, p. 1.

7 Unlicensed bands are frequency resources shared by several users without them needing to acquire individual usage rights, as long as they comply with generic technical specifications which prevent harmful interference to licensed usage in the same band and to limit the risk of interference with other unlicensed usages. For using these frequencies on an unlicensed basis, there is neither exclusive usage nor a guarantee of interference-free operation.

- to ensure that, where the internal market for electronic communications services depends significantly on radio spectrum, the management of spectrum is coordinated at EU level.

3.1. Introducing the freedom to use any technology in a spectrum band (technology neutrality)

As indicated in the Communication on a forward-looking radio spectrum policy[8], the lack of flexibility in spectrum management constitutes a bottleneck for new radio technologies, yields inefficient spectrum use and artificially restricts innovation to the detriment of the internal market. It is therefore proposed to increase such flexibility, and to provide a stronger legal basis for the principle of technology neutrality, whereby spectrum users would be free to use any type of radio network or access technology in a given spectrum band to provide a service. The principle of technology neutrality is recognised by the current regulatory framework and is enshrined in the approach to Wireless Access Policy for Electronic Communications Services (WAPECS)[9] developed by the Radio Spectrum Policy Group.

The entire spectrum used for electronic communications would be made subject to technology neutrality. However, limits to technology neutrality could be imposed on the grounds of ensuring proper sharing of generally authorised spectrum, avoiding harmful interference, or limiting public exposure to electromagnetic fields. Any additional exceptions to technology neutrality would need to be strictly justified on the basis of a limited number of legitimate general interest objectives. All exceptions should be proportionate, limited to the extent necessary to meet the objective, and properly justified by the authority which claims such exception.

Appropriate technical specifications can be established and made legally binding under the existing Radio Spectrum Decision as far as spectrum management is concerned and under the R&TTE Directive as for equipment.

3.2. Introducing the freedom to use spectrum to offer any electronic communications service (service neutrality)

The principle of service neutrality would complement the principle of technological neutrality, by allowing owners of spectrum usage rights the freedom to provide any type of electronic communications service in that spectrum. With appropriate transitional measures, it should, as a general principle, apply to all bands used for electronic communications. The current regulatory framework already calls for the least burdensome restriction on the freedom to provide services, but this principle needs to be strengthened. It is therefore proposed to reinforce the obligation to apply the principle of service neutrality when issuing rights to use spectrum and to include the conditions and necessary transitory measures for its implementation.

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[8] COM(2005) 411.

[9] See Opinion of the Radio Spectrum Policy Group of 23 November 2005, RSPG05-102 final.

Exceptions to service neutrality would need to be proportionate, time-limited, non-exclusive, justified and necessary to achieve a limited number of legitimate general-interest objectives. Such objectives could be audiovisual policy, promotion of cultural and linguistic diversity and media pluralism, establishment of services with a pan-European coverage or safety of life. A mechanism will be needed to coordinate at Community level, where necessary, the definition of such general interest objectives and their application to a given band.

3.3. Facilitating access to radio resources: coordinated introduction of trading in rights of use

The Commission presented its general approach to spectrum trading in 2005[10], with the aim of optimising the efficiency of spectrum use and reducing the burden on access to spectrum where individual usage rights apply. It built upon the opinion of the Radio Spectrum Policy Group[11] which endorsed the principle of the coordinated introduction of spectrum trading in appropriate circumstances. In specific spectrum bands identified to this end and subject to individual rights, tradability would apply throughout the EU.

Spectrum tradability - combined with technology and service neutrality and applied to a sufficient amount of spectrum - would ensure a high level of fluidity of radio resources and reduce the direct and indirect costs of obtaining usage rights. Under the proposal, trading would gradually replace the administrative management method for individual rights. Spectrum authorities would retain the power to regain control of the bands from the users, against a fair compensation, where justified by specific general interest objectives. Such objectives could be the introduction of a pan-European service or the EU-wide application of general authorisations in a band where technical developments so allow.

Achieving this would require coordination at European level of management methods and of the essential conditions attached to tradable spectrum usage rights, with sufficient legal certainty and rapidity, according to the principles of subsidiarity and proportionality.

It is therefore proposed to establish a committee mechanism whereby potentially tradable bands are identified jointly by Member States and the Commission, so that tradability under common conditions can be applied throughout the EU. The mechanism will include appropriate measures to ensure a smooth transition from existing rights to tradable rights in specific bands, inasmuch as existing spectrum rights should not automatically become tradable to avoid competition distortions. Also, public authorities would retain the right to take action, where justified, so as to ensure that trading does not lead to a distortion of competition.

3.4. Establish transparent and participative procedures for allocation

Where allocation of spectrum to specific technologies or services remains necessary, such allocation reduces the freedom of users to choose the type of service or technology they could provide or use. Under Article 9 of the Framework Directive, allocation must be based on objective, transparent, non-discriminatory and proportionate criteria.

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[10] COM(2005) 400.

[11] RSPG Opinion on Secondary Trading of Rights to use Radio Spectrum, 19 November 2004, RSPG04-54 Rev. (final).

To ensure the effective implementation of such criteria as well as of the general principle of consultation in Article 6 of the Framework Directive, it is proposed to introduce rules so that allocation would be subject to appropriate public consultation, and to include guarantees similar to those applicable to the procedure used to limit the number of spectrum usage rights under Article 7 of the Authorisation Directive.

3.5. Decision mechanism for coordinated spectrum management

Implementation of the new approach described above would require decision mechanisms that yield binding results to be commonly applied by all Member States under their national powers to manage spectrum. Such mechanisms should be robust enough to produce results applicable in all Member States, allow for comparatively fast adoption of measures, and facilitate implementation at national level. Within the current institutional framework, it is proposed to use a committee procedure for such decision making, involving relevant committees such as the Radio Spectrum Committee and the Communications Committee to prepare Commission Decisions to be implemented by Member States, complementing the existing mechanisms of the R&TTE Directive.

Proposed areas where such decision mechanism would be applied are:

– identification of the bands where the use of spectrum throughout Europe should be made subject to general authorisations only (e.g. unlicensed bands) and coordination of the conditions applicable to the use of spectrum in those bands;

– identification of the bands where spectrum rights should be made tradable;

– definition of the minimum format of the rights to be made tradable;

– availability, accessibility and reliability of information necessary to establish a functioning spectrum trading environment;

– definition of any specific requirements aimed at protecting competition in relation to the tradability of rights;

– adoption of common criteria to solve legacy issues, i.e. for the transformation of existing rights into tradable rights, or for subjecting specific bands to general authorisations; this may also include spectrum refarming and compensation mechanisms;

– where necessary, the common definition of exceptions to technology or service neutrality;

– development of a common approach to service authorisation with pan-European or internal market dimension, see chap. 5.3.

4. STREAMLINING MARKET REVIEWS

4.1. Relaxing notification requirements for the Article 7 procedure

By 2010, NRAs in all 25 Member States will have conducted at least two and possibly three market reviews under the current notification procedure in Article 7 of the Framework Directive. The procedure requires regulators to make draft measures “accessible to the Commission and to the national regulatory authorities in other Member States, together with

the reasoning on which the measure is based"[12] in a form that would allow the measures to be assessed for their potential to create a barrier to the internal market or as to their compatibility with Community law.

In the first round of notifications, many problems were resolved prior to formal notification with the result that only 5% of the notifications raised problems with regard to internal market issues and compatibility with Community law[13]. Respondents to the Call for Input for the Review were nearly unanimous in their call for streamlining of this procedure, citing the administrative burden and the time consumed in conducting market analyses and notifying draft measures.

In the light of experience with the Article 7 procedure, the Commission believes that the process could be streamlined while preserving the Commission's role in ensuring consistency of regulation within the internal market. Based on this experience, a relaxation of the current notification requirements could be introduced. NRAs would still be obliged to conduct market reviews and undertake national and European consultations, but for certain market analyses and notifications the current level of detail would no longer be required; a simplified procedure would be introduced that could apply to the following categories of cases:

– notifications of markets which were found to be competitive in the previous review, unless substantial changes in competitive conditions have occurred since that review;

– notifications where only minor changes to previously notified measures are proposed (such as the details of a remedy).

For cases falling under the simplified procedure, a standard notification form could be established to limit the information required to a minimum so as to reduce significantly the administrative burden for NRAs, operators and the Commission. In such cases, in exceptional circumstances where the Commission detected serious problems with the measures under consultation, it could still require the measure to be notified in full. Also, in the case of Member States that had recently joined the EU, the Commission would routinely require a first complete round of market analyses to be notified in full.

This system proposed would represent a considerable decrease in the administrative work currently undertaken by NRAs for their market analyses, and this in turn would lead to a decrease in the information that NRAs request from market players.

4.2. Rationalising the market review procedures in a single instrument

At present, some of the procedural elements of the Article 7 procedure are contained in the Framework Directive and others are in a (non-binding) Commission Recommendation[14]. In the short term, it is proposed to issue a revised version of the procedural Recommendation to initiate the simplified notification procedures from 2007.

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12 Article 7(3) of the Framework Directive.

13 By the end of May 2006, 405 notifications had been received, which included 16 withdrawals by NRAs and 5 cases closed with veto decisions.

14 Commission Recommendation C(2003) 2647 of 23 July 2003.

In the longer term, it is proposed to modify the framework to gather all of these procedural elements together into a single Regulation[15] that would replace the current Recommendation and certain parts of the Framework Directive. In addition, the proposed Regulation could set a precise and legally binding timetable, using defined triggers, for initiating and for completing future market analyses and for the imposition or removal of remedies. Changes could be introduced to lay down a deadline for the start of market analyses, such as within twelve months of the adoption of a revised Commission Recommendation on relevant markets. Once started, all market reviews would have to be completed within a further fixed time period, such as 12 months. A prescribed timetable for completion of market reviews would also be relevant to future accession countries for their initial reviews.

4.3. Minimum standard for notifications

Experience so far has demonstrated that in many cases, the Commission has had to ask for further information from the NRA in order to make an effective assessment of a notification. Also, NRAs have occasionally chosen to split the notification process into two parts, the first dealing with market definition and/or SMP assessment, and the second dedicated to either proposed remedies or SMP assessment and proposed remedies. This approach is inefficient.

More efficiency in the market review procedure could be achieved if the requirements for notifications were set out by a binding legal instrument. The proposed Regulation referred to in Section 4.2 above would require NRAs to include, in their notifications, all three aspects of the Article 7 market review mechanism, i.e., the definition of the relevant market, the assessment of SMP and the imposition or withdrawal of the relevant remedies; the Regulation could also require NRAs to provide the necessary information and analysis for a proper evaluation according to a standard template.

4.4. Re-notifications after vetoes

Although the Commission has issued relatively few 'veto' decisions, it has been found in some cases that the NRA does not carry out and re-notify a revised market review. The proposed Regulation could therefore also include a requirement for regulators to re-notify their re-assessment and revision of the initial market reviews, within a specified time period (e.g., 6 months), where the Commission has issued a 'veto' on the first notification. The duration of the national consultation would be a matter for the NRAs.

4.5. Other streamlining that can be accomplished without any change in the legislation

In the absence of a revised version of the Recommendation, NRAs are able to decide when to re-analyse their markets. The framework is silent on the interval between such reviews. Accordingly, the Commission proposes that intermediate reviews need only be undertaken if a material change had taken place in market circumstances. It would be open to interested undertakings to provide evidence to the NRA of such material changes. This would have the advantage of being responsive to market changes while easing the burden on NRAs, as the burden of gathering evidence for another review would fall on the undertakings in question. The decision to undertake an intermediate market review rests with the NRA.

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[15] It is proposed to amend the Framework Directive to allow such a regulation to be adopted by the Commission.

5. CONSOLIDATING THE INTERNAL MARKET

5.1. Commission veto under the 'Article 7 procedure'

The 'Article 7' consultation mechanism aims to: (1) promote consistent regulation across the EU on the basis of competition law principles; (2) limit regulation to markets where there is a persistent market failure; and (3) provide a transparent regulatory process. Consistency has been improved in the way that markets are defined and SMP is assessed, but only to a lesser extent in relation to the choice of appropriate remedies. Nevertheless, remedies are a key element in determining market conditions - notably as regards access to networks – and in creating competitive conditions for new entrants.

Based on the nature of the problem identified, regulators must impose appropriate remedies that are proportionate and justified in the light of the policy objectives set out in the Framework Directive[16]. As regards the market reviews that have been notified to date, a significant proportion of the Commission's comments so far has concerned the appropriateness of the remedies proposed. The Commission has commented on remedies that solved only part of the competition problem identified,[17] appeared to be inadequate[18] or might have produced effective results too late.[19]

NRAs have not always applied similar sets of remedies to similar market failures. Even where the same remedies are applied, the implementation of those remedies has differed from one Member State to another. Such differences are manifest, for example, in pricing (e.g., methodologies for cost orientation), and are problematic for the functioning of the internal market, hindering the creation of pan-European players. Greater consistency in the application of remedies is needed.

In order to contribute to the development of the internal market, the Commission proposes to extend the veto powers under the market review procedure to include proposed remedies. Such an extension would contribute to a consistent approach to the way remedies are applied across Europe and improve the competitive environment within the internal market. The Commission would not have the power to replace an NRA remedy by one of its own, but would indicate the problems with the remedy proposed by the NRA in its justification for the veto decision. Based on experience to date, and prior to the entry into force of any new provisions, the Commission would provide an analysis of the lessons learnt from earlier market analyses, to provide guidance on formulating appropriate and proportionate remedies.

Taken together with the other suggestions in Section 4, the overall impact would make the market review procedure more transparent, would lighten the burden of conducting this procedure and would significantly contribute to the development of the internal market. The effectiveness of the *ex ante* regulatory mechanism in the regulatory framework would consequently be improved.

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16 Article 16(4) of the Framework Directive.

17 In a case where mobile termination rates were regulated only for calls originating on mobile networks or abroad, but not for calls originating on fixed networks.

18 In cases where price regulation was not based on the most appropriate cost model or where the choice of cost model and cost accounting rules were left to the undertakings concerned.

19 In a case where cost-oriented mobile termination rates based on an LRIC cost model were left to private negotiations between operators first, with the regulator intervening only in the context of dispute settlement.

5.2. Making the appeals mechanism more effective

Article 4 Framework Directive currently requires that an effective appeal mechanism at national level should be available for any party to appeal against an NRA decision. Pending the outcome of such an appeal, the regulator's decision should in principle be maintained. Some countries have relatively efficient national appeal processes. Others have systems that take years to reach a final outcome and systematically suspend regulatory decisions during the appeal process. When courts routinely suspend an NRA decision pending the outcome of appeals, it creates an incentive for undertakings systematically to use the appeal process as a delaying tactic. Delaying the application of regulatory measures can hinder the development of competition in the relevant market as well the consolidation of the internal market, to the detriment of other market players who would benefit from the disputed regulatory measures.

The proposed approach would be to tackle the problem of routine suspension of regulatory decisions by amending the provisions of Article 4 so as to lay down legal criteria, based on European case-law, that national courts must use in deciding whether to suspend NRA decisions on appeal, i.e. NRA decisions should be suspended only where irreparable harm to the appellant can be shown. The effect of this measure would be to harmonise the treatment of requests for suspension as well as to reduce significantly the number of frivolous appeals.

It is proposed to introduce a mechanism for Member States to report on the timing and the number of appeals and suspended opinions to allow the situation across the EU to be monitored.

References to the European Court of Justice remain a fundamental prerogative of national courts and, in some circumstances, are obligatory under Article 234 EC. Other information and cooperation mechanisms will also be used by the Commission to enhance the degree of consistency between national court decisions.

5.3. Common approach to the authorisation of services with pan-European or internal market dimension

The deployment of services with a pan-European footprint or where a presence in many or all Member States creates an economy of scale is both an opportunity to reinforce the internal market and an unavoidable trend as markets emerge at the pan-European level. The development of interoperable services and the marketing of communications equipment become more attractive if the permitted conditions of use are common throughout the EU. However, authorising the deployment of such services and the production and distribution of related equipment on a European scale are critically dependent on a coherent and efficient regulatory procedure, for access to scarce resources such as numbers or radio spectrum.

The present arrangements for authorising such services are complex, as service providers still need to comply with essentially national procedures. Although the current regulatory framework establishes general authorisations as the norm, the practice shows that most often individual rights of use are required at national level for using scarce resources. These rights are coupled with conditions that may differ among Member States. Furthermore, there are no binding mechanisms to coordinate the issuance of individual rights and the conditions attached thereto, for the provision of services with a pan-European scope or a cross-border dimension. This impacts negatively on industry, delays the achievement of an internal market and hinders the development of wider pan-European services.

The possibility to coordinate usage conditions for certain pan-European services would overcome such difficulties. Agreeing at EU level on the appropriate authorisation approach to be commonly applied would complement the current system of granting rights of use for scarce resources. Where a service has a pan-European scope or internal market relevance, one authorisation granted in one Member State should be valid throughout the EU and be a sufficient condition to provide the service in all Member States, once all the conditions and requirements for the provision of such a service have been agreed. This would considerably facilitate the access of such services to the market and reduce the administrative burden of obtaining authorisations.

To this effect, it is proposed to amend the current provisions of the regulatory framework so as to allow coordination of the following aspects of service authorisation at EU level:

- qualifying services as having a pan-European scope or an internal market dimension, which would be a pre-condition for using the EU procedure for the coordination of authorisations;

- defining authorisations and selection methods, to be commonly applied by all Member States;

- defining conditions attached to the rights of use for scarce resources (frequency bands and/or numbers) where appropriate (e.g., maximum duration of the rights of use, technological and operational conditions, etc)[20], to be commonly applied by all Member States.

The practical implementation of the authorisation procedure would continue to be managed at national level, such as the assignment of rights of use, monitoring of compliance by undertakings, and the like.

To ensure the effectiveness, legal certainty and speed of the coordination procedures, a decision mechanism is needed. It is proposed to use a committee approach to achieve a consensus among Member States which would then be applied through a subsequent Commission Decision.

5.4. Amendment to Article 5 of the Access Directive: access and interconnection

Article 5(1) of the Access Directive empowers regulators to impose remedies, under certain conditions, on undertakings without Significant Market Power (SMP) in order to ensure adequate access and interconnection, and the interoperability of services (i.e. end-to-end connectivity) in a way that promotes efficiency, sustainable competition, and gives the maximum benefit to end-users. This can be seen as an exception to the normal approach whereby operators are not subject to *ex ante* obligations unless there is a lack of effective competition in the relevant market and they are found to have SMP in such a market. In order to ensure the consistent application of this provision and avoid the imposition of inconsistent obligations without a market analysis, it is proposed to bring the procedure into line with that to be followed by regulators (in Article 8(3) of the Access Directive) when they intend, under exceptional circumstances, to impose remedies other than those defined in the Access Directive.

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[20] See section 3 for the case of frequencies.

It is proposed that NRAs should submit a request to the Commission for authorisation to impose an obligation on a non-SMP undertaking. The Commission could take a decision under an advisory committee procedure to authorise or prevent the adoption of the relevant measure. This would prevent the risk of over-regulation and a fragmentation of the Internal Market through the imposition of inconsistent non-SMP obligations.

5.5. Introducing a procedure for Member States to agree common requirements related to networks or services

There may be circumstances where, pursuant to specific general interest objectives or the framework directive objectives in general, it is in the interests of the EU for Member States to agree common requirements to facilitate some forms of interoperability in electronic communications networks or services. One example currently being addressed by the Communications Committee is the development of common requirements for the interface between network operators and public safety answering points for the handover of emergency calls. Other examples can be found in data retention or network security. Typically the development of such common requirements entails a tight co-operation between different networks and/or organisations.

In line with the principles of better regulation and the desirability of technological neutrality of regulatory action, it is better to leave the technical means and the choice or design of common specification and standards to undertakings. Conformity to the relevant standards normally ensures conformity to the common requirements.

Standardisation in the EU is a voluntary industry-led process, although there is provision in the regulatory framework to make certain standards mandatory if necessary[21]. Because it is a voluntary process, stakeholders active in the standardisation bodies may not reach consensus on developing standards for regulatory purposes. In the absence of such standards, Member States tend to impose their own requirements on suppliers.

The proposal is to establish a mechanism whereby a common set of requirements for certain features or certain forms of interoperability needed to support regulation in critical areas could be agreed at EU level. These common requirements would then be passed to European standards bodies for development of the appropriate technical standards.

5.6. Broadening the scope of technical implementing measures taken by the Commission on numbering aspects

At present, NRAs are responsible for the management of national numbering plans and the assignment of numbers. As a consequence, numbering schemes vary significantly across Europe. While this situation may be appropriate for nationally-based services, it stands in the way of a common approach to certain specific numbers and to the associated services within the EU. As a result, citizens are not able to access some services provided in different Member States using the same number, and tariffs for similar services can vary considerably. Furthermore, the current approach can hinder the emergence of new services that would benefit from more consistent numbering and charging arrangements.

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[21] Art 17 of the Framework Directive.

The current provisions under EU law allow the Commission to take technical implementing measures in the field of numbering where there is a need for harmonisation of numbering resources "*to support the development of pan-European services*"[22]. Experience shows that the present limitation on the type of technical implementing measures that can be taken hinders the development of a common EU approach to the use of certain numbers so as to facilitate cross-border business and the movement of citizens in the EU. There is scope for increased coordination at EU level - and cooperation among Member States – on numbering aspects and associated tariff schemes with a view to improving certain services across the EU.

Therefore, it is proposed to enable the Commission to take - where appropriate - harmonisation measures to ensure a coherent and common approach supporting the development of the internal market for certain services. While the assignment of numbering resources would remain the sole responsibility of the Member States, it is proposed to broaden the scope of technical implementing measures that the Commission can adopt, assisted by a committee procedure, in the area of numbering management.

5.7. Amendment to Article 28 of the Universal Service Directive on non-geographic numbers

The current provisions of the regulatory framework concerning access to non-geographic numbers need to be amended in order take into account technological progress as well as the increasing use of cross-border services using non-geographic numbers. The current provisions have a narrow scope as they apply to non-geographic, telephone-based services; moreover, effective access can be restricted for technical and economic reasons or when the called party has chosen for commercial reasons to limit access to calling parties located in a specific geographical area.

The proposal is therefore to introduce a more general provision to clarify that end-users have a right to access services using non-geographic numbers, including Information Society services, across borders. This would foster access to all cross-border services (for example to free phone numbers) and remove technological restrictions in the current framework which are no longer justified in the light of the expected upgrading to Next Generation Networks (NGNs). Exceptions would be permitted to combat fraud and abuse (e.g. in connection with premium-rate services).

5.8. Improving enforcement mechanisms under the framework

The implementation of the regulatory framework is not considered fully satisfactory in certain respects. Enforcement mechanisms and powers available both to the NRAs (under the Authorisation Directive), and to the Authorities concerned with the implementation of the e-Privacy Directive do not seem to be working effectively and require adjustment.

In response to the Call for Input, the European Regulators Group (ERG) and Member States described their experience to date with the enforcement mechanisms under the regulatory framework. Current measures empowering the NRAs, including the Data Protection Authorities, to impose fines on operators failing to comply with regulatory measures have proved insufficient to provide adequate incentives for compliance, to the detriment of both operators and consumers. Under the Authorisation Directive, operators are given the

[22] Article 10(4) of the Framework Directive.

opportunity to rectify any breaches before penalties are imposed; in practice, undertakings have no incentive to comply immediately with an NRA measure, as they would be able to gain from unfair commercial or anti-competitive practices for a period - including the duration of the NRAs investigation – and can redress the situation after the event, avoiding any penalty for non-compliance for their past conduct.

As regards breaches of the e-Privacy Directive, light sanctions and uneven enforcement have led in some cases to ineffective or insufficient protection of consumer rights in the field of privacy and personal data. In order to create incentives for regulated players to comply with the regulatory framework, new rules should be established for both the Authorisation Directive and the e-Privacy Directives such that:

- NRAs should be empowered to impose sanctions on undertakings found to have acted in breach of the authorisation conditions even when the undertakings rectify the breach afterwards. Moreover, enforcement provisions could be reinforced by granting NRAs the power to impose significant and dissuasive penalties (e.g. in proportion to turnover, retroactivity, etc.).

- As regards the implementation of the e-Privacy Directive, new rules could be established providing for specific remedies (e.g. an explicit right of action against spammers, possibly on behalf of consumers) or an indication of the level of penalties to be expected for breaches (as above).

5.9. Strengthening the obligation on Member States to review and justify 'must carry' rules

'Must carry' rules existed well before the entry into force of the regulatory framework, usually coming under the broadcasting laws of the Member States. They serve as one way of enabling broadcasters to meet their public service remit. However, technological progress has significantly changed the conditions under which 'must carry' rules operate. More transmission capacity is now available with even more capacity becoming available after completion of the transition to digital TV. In addition, network penetration has increased and new networks are being rolled-out (fibre, DLS, etc.), offering new services and new ways of delivering existing radio and TV content[23]. The fact that more distribution channels exist does not necessarily mean that 'must-carry' rules have lost their purpose. This would depend on the actual use of these distribution channels and whether or not they meet defined general interest objectives. However, attention must be paid to possible distortions of competition; 'must-carry' obligations must be proportionate and transparent. Moreover, 'must- carry' obligations of the future must be kept to the minimum necessary to achieve the general interest objectives at stake, and must reflect evolving market and technological developments.

Implementation of the 'must-carry' existing provisions has been uneven, and general interest objectives are sometimes not well defined by Member States. To encourage the relevant authorities to properly define their general interest objectives, it is proposed to introduce a deadline for reviewing all national 'must carry' rules (e.g., one year following the application of the new legislation). Failure to carry out a review could lead to an infringement procedure. This would ensure that 'must carry' rules are not simply carried forward without examination, that they are adapted in line with market and technological developments, and thus that they

[23] See COM(2005) 646, Proposal for amending Council Directive 89/552/EEC.

remain proportionate. To enhance the proportionality of 'must carry' rules, Member States would be required to include a justification of their rules in their national laws.

5.10. Adapting the regulatory framework to cover telecommunications terminal equipment, ensuring constancy with the R&TTE Directive

The regulatory framework for electronic communications does not cover 'telecommunications terminal equipment' as defined in the R&TTE Directive 1999/5/EC[24]. This separation between terminal and network dates back to the early days of the liberalisation of the telecommunications sector, when Commission Directive 88/301/EEC opened up to competition the market for telecommunications terminal equipment. By contrast, the regulatory framework does have provisions for consumer 'terminal' equipment used for broadcast reception, since this was never subject to monopoly supply in the same way as telecommunications equipment.

Addressing this anomaly will require changes in both the R&TTE Directive and the electronic communications framework. As a first step, it is proposed to review the definition of the Network Termination Point in the Universal Service directive and to enable a relaxation of the obligation in the current R&TTE directive for public network operators to publish their network-terminal interface specifications. At present this obligation applies to all types of network. Whilst the objective of maintaining competition in the terminal market should be retained, a general obligation would make it unattractive for manufacturers to co-operate with network operators to innovate. A relaxation of this obligation should therefore be envisaged to promote investment in innovative technologies and networks.

The change will also make is easier to address eAccessibility issues, as described Section 6.5.

6. STRENGTHENING CONSUMER PROTECTION AND USER RIGHTS

Universal service and consumer and user rights are covered by the Universal Service Directive which lays down the basic principles for universal service and addresses other specific user and consumer rights, with corresponding obligations on undertakings. The Directive defines universal service as the "minimum set of services, of specified quality to which all end-users have access, at an affordable price in the light of national conditions, without distorting competition". The Commission Communication COM(2005) 203 of May 2005 invited comments on the future evolution of the scope of universal service. The responses indicated acceptance of the need to change the scope of universal service in the long term, but a reluctance to make immediate changes. The present document describes how the current provisions of the Universal Service Directive could be adapted to improve consumers and users rights, prepare universal service for the longer term and provide disabled users with greater access both to universal service and to other electronic communications services.

[24] OJ L 91, 7.4.1999, p. 10

6.1. Changes related to consumer protection and user rights

Improving the transparency and publication of information for end-users

Two main problems have been identified in relation to the transparency and publication of consumer information. Firstly, callers are often unable to find out, or are not aware of, which tariff applies to their services. For example, when calling a premium rate number, consumers are not always adequately informed on the price involved or even on the type of service behind the number. Another example is that a mobile call to a number advertised as "freephone" may be not free. Secondly, making price comparisons can be difficult for consumers, particularly in cases of service bundling.

The suggested changes seek to (a) give NRAs powers to require from operators better tariff transparency (with the possibility to agree technical implementing measures at EU level) to ensure that consumers are fully informed of the price before they purchase the service, (b) ensure that third parties have the right to use without charge or hindrance publicly available tariffs published by undertakings providing e-communication services, for the purpose of selling or making available comparative price guides, and c) empower NRAs to make price guides available where the market has not provided them.

Improving caller location obligations related to emergency services

Current provisions on calls to the single European emergency number require network providers to make caller location information available to emergency services when this is technically feasible. Technical feasibility can no longer be considered as an obstacle for the provision of caller location with most technologies (PSTN, GSM), and are not expected to be an issue in 2010-2015 even for a technology like VoIP; therefore, it is proposed to strengthen the obligation for network operators to pass caller location information to emergency authorities, while recognising that some exceptions may be justified in order not to over-burden innovative services. Moreover, it is proposed to specify that caller location information should be provided to the emergency authorities in a "push" mode, and the cost of this transmission should be borne by the network operator.

6.2. Updating Universal Service

Responses to the 'Call for Input' on the Review, together with contributions received on the Commission consultation on the scope of Universal Service[25], suggest a need for a fundamental reflection on the role and concept of Universal Service in the 21st century. The issues extend beyond the confines of the review of the framework, touching upon the balance between sector-specific and horizontal rules for protecting consumers, in particular disabled users; the validity of requiring commercial firms to finance directly social obligations; and the feasibility of a one-size-fits-all approach in a Union of 25 Member States. For these reasons, alongside the technical changes identified in the Communication and described more fully in this Working Document, the Commission intends to publish a Green Paper on Universal Service in 2007, to launch a wide ranging debate.

[25] COM(2006) 163 of 7 April 2006.

Separation of access and provision of services

The current EU provision of universal service is based on the 'traditional model' of a vertically integrated telecommunications operator providing both network access and voice telephony services. As networks move increasingly to IP, voice will become just one application on the IP network. This will create an internet-like model, whereby anyone with an IP connection can choose between a range of competing voice service providers.

To prepare for this, it is proposed to amend the Universal Service Directive to introduce separate obligations on providers of access infrastructure and on providers of services. This change would not affect the scope or provision of universal service to consumers and end users, but would facilitate a future review of the obligations for the provision of telephone service and network access. Linked to this is the need to update several definitions, mainly in the Universal Service Directive, e.g. PATS[26], NTP[27].

Removing provisions on universal directories and directory inquiry services from the scope of universal service

With an increasingly competitive market for the provision of directory inquiry services, and the development of internet-based directories, it is proposed to remove the provision of directories and directory inquiry services from the scope of universal service and leave the market to meet demand for these services.

The wholesale obligations on network operators to make directory data available to third parties would remain in force. This will ensure that providers of directories and directory services obtain essential subscriber data while leaving the right of subscribers to "opt into" directory listings unaffected.

6.3. Other changes relating to consumers and users

Adapting 'telephone service specific' provisions to technology and market developments

There are a number of provisions in the Universal Service Directive that will be valid for some time to come but which at some stage over the life of any revised directive may need to be technically updated. These include articles relating to provision of additional (telephone) facilities and to carrier selection and carrier pre-selection. It is proposed to introduce a mechanism by which such measures can be withdrawn or modified under a committee procedure.

Adapting the concept of Number Portability

Portability of telephone numbers is currently required when users switch service providers. In future, switching operators could become much more complicated. For example, some service providers already store a subscriber's personal directory not on the user device itself, but centrally (via a "Personal Directory & Profile information" service). While this may offer added value for consumers, it may render the transfer of this directory information problematic when they switch providers. Provisions on number portability may need to be updated accordingly.

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[26] PATS: Publicly Available Telephone Service, Article 2(c) of the Universal Service Directive.

[27] NTP: Network Termination Point.

As a complement to the point above, other provisions of the framework (e.g. Article 2, Universal Service Directive; Article 10 Framework Directive) will need to be updated to include identifiers other than traditional telephone numbers. Internet naming and addressing will remain outside of the scope of the responsibilities of the NRAs under the existing framework (Recital 20, Framework Directive).

6.4. 'Net neutrality': Ensuring that regulators can impose minimum quality of service requirements

A key concern for the near future will be to ensure that the internet remains "open": open from the point of view of service providers wanting to deliver new, innovative services and open from the point of view of consumers wanting to access, create and distribute the services of their choice.

In the U.S., the concept of "*Net Neutrality*" and *"Net Freedoms"* are currently being debated as part of the reform of the U.S. Telecoms Act. "Net Neutrality" relates to the ability of a network provider to offer different levels of quality-of-service for content travelling over its network. (See section 9.2 below for further discussion of "Net Freedoms".)

In general, a competitive market means that if one supplier seeks to restrict user rights, another can enter the market with a more 'open' offer. In Europe the regulatory framework allows operators to offer different services to different customer groups, but does not allow those who are in a dominant position to *discriminate* between customers in similar circumstances. However, there is a risk that, in some situations, the quality of service could degrade to unacceptably low levels. It is therefore proposed to give NRAs the power to set minimum quality levels for network transmission services in an NGN environment based on technical standards identified at EU level.

The existing provisions for NRAs to impose obligations on operators with significant market power, and the powers for NRAs to address access and interconnection issues [28] could be used to prevent any blocking of information society services, or degradation in the quality of transmission of electronic communication services for third parties, and to impose appropriate interoperability requirements.

6.5. Facilitating the use of and access to e-communications by disabled consumers

The Commission highlighted the existence of significant barriers to achieving eAccessibility for all citizens in a 2005 Communication on this issue[29]. The Commission identified three ways of addressing the problems, one of which is the use of legal measures.

Strengthening the right of disabled users right to access emergency services via the number '112'

The sub-group INCOM (Inclusive communications) of the Communications Committee noted that disabled users, in particular deaf persons, are not always able to call 112. Since existing provisions on universal service include access by disabled users to emergency services, the nature and extent of this requirement needs to be clarified. To address this issue, it is proposed

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[28] Art 5(1) of the Access Directive.

[29] COM(2005) 425.

to amend Article 7 of the Universal Service Directive to ensure that disabled users, notably deaf people, are able to call the emergency services via '112'.

Introducing a Community mechanism to address eAccessibility issues

The proposed change seeks to address in general terms eAccessibility issues where there is a proven need for prescriptive action. The proposal is to create a mechanism to enhance eAccessibility in practice by establishing a group consisting of Member States, associations of the electronic communications industry and associations representing disabled users which would identify appropriate action to address problems with eAccessibility. The Commission would adopt specific measures following committee procedures.

The changes mentioned in section 5.10 above will make it easier to deal with accessibility issues for user groups with special needs. At present the legal partitioning between networks and terminals makes it difficult to address these issues in a proportionate and coherent manner.

7. SECURITY

Security is identified in i2010 as one the four challenges for the creation of a Single European Information Space. Competition driven policies have had a very positive impact in the electronic communications sector. Market and technological developments have resulted in more players entering the field of electronic communications. The trend towards IP-based transmission networks means that networks are in general more open than in the past. A wide take-up of converging services partly depends on trustworthy, secure and reliable ICT. However, the growth of spam, viruses, spyware and other forms of malware is reducing users' confidence in electronic communications. At the same time, society is becoming more dependent on essential modern electronic communications networks and services for everyday life, in business or at home. The market has so far failed to address security problems to the satisfaction of users. The current document addresses the need for the regulatory framework to provide an adequate legal framework to protect citizens and businesses, and to promote consumer trust and confidence in the information society, while contributing to the development of the internal market[30]. It is important that security measures do not reduce the interoperability of services or serve as a pretext for anti-competitive practices.

A key policy proposal in this area is to extend and strengthen existing provisions on security and network integrity, currently found in the e-Privacy Directive and the Universal Service Directive, and at the same time bring them together within a specific chapter of the Framework Directive, thereby highlighting the importance of the subject in a competitive environment. These modifications would also require corresponding minor changes in the Authorisation Directive (conditions attached to general authorisations).

[30] Addressing security requires looking beyond regulation. This is why the 2006 Communication on security will set out a general, multi-faceted strategy for improving network and service security in the EU.

This Communication does not deal with Radio Frequency Identification Devices (RFID), which are subject to a separate public consultation[31]. In the light of the RFID consultation, further changes could be proposed to the ePrivacy Directive.

7.1. Obligations to take security measures, and powers for NRAs to determine and monitor technical implementation

The e-Privacy Directive states that providers of a publicly available electronic communications service must take appropriate technical and organisational measures to safeguard the security of their services (Article 4). If necessary this must be done in conjunction with the provider of the public communications network with respect to network security. In principle, these measures must ensure a level of security appropriate to the risk presented, having regard to the state of the art and the cost of implementation.

While in some Member States specific requirements apply to the obligation to take appropriate technical and organisational measures, many others leave the assessment of the security level to service providers without offering guidance. As security threats multiply, the effective implementation of these measures is being called into question.

It is proposed to clarify what these 'appropriate technical and organisational measures' should be. New requirements would be imposed on providers of electronic communications networks and services to:

- implement and maintain security measures to address security incidents, and to prevent or minimise the impact of such incidents on customers and on other interconnected networks which would include a liability clause for not taking appropriate security measures;

- respect any guidance issued by regulators in conformity with Community law on the practical implementation of such measures; and

- insert in contracts with consumers a specific clause to inform them of specific actions that could be taken in reaction to security/integrity incidents and in prevention of known security threats and vulnerabilities (by modifying Article 20 of the Universal Service Directive).

There would be no need to include a very detailed list of requirements in the Directive, and in any case the requirements are likely to change as threats evolve. For these reasons regulators must have flexible powers to implement the legal provisions in an appropriate and proportionate way.

NRAs would therefore be given new powers to:

- require information, such as specific security policies including emergency plans of an operator; require audits to be conducted, and sanction companies not complying with these requests, e.g., by fining; and

- issue binding instructions to providers of electronic networks or services in order to implement any relevant Commission recommendations.

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[31] http://ec.europa.eu/information_society/policy/rfid/index_en.htm

In order to avoid distortions of the internal market that could result if individual regulators placed very different demands on market players in their countries, it is proposed that the Commission should be able to adopt technical implementing measures in the form of Decisions, under a committee procedure, in areas coved by the proposed new legal provisions. Such measures would not touch upon aspects of national security. The relevant changes would also include a provision recognising the advisory role of ENISA in security matters.

7.2. Notification of security breaches by network operators and Internet Service Providers (ISPs)

Article 4 of the e-Privacy Directive requires service providers to take appropriate technical and organisational measures to safeguard the security of their services. Today's rules only require the notification of security risks, but not the notification of actual security breaches.

A security breach may lead to the interruption of services, and/or the loss of personal data. Under the general Data Protection Directive, all undertakings that process personal data are obliged to take measures to protect such data against loss, alteration, and unauthorized disclosure or access. Network operators and ISPs, as the gatekeepers for users' access to the on-line world, carry a special responsibility in this regard.

A requirement to notify security breaches would create an incentive for providers to invest in security but without micro-managing their security policies. The proposed changes would require providers of electronic communications networks and services to:

- notify the NRA of any breach of security that led to the loss of personal data and/or to interruptions in the continuity of service supply. The regulator would have the possibility to inform the public if they considered that it was in the public interest; and

- notify their customers of any breach of security leading to the loss, modification or destruction of, or unauthorised access to, personal customer data.

7.3. Future-proof network integrity requirements

Article 23 of the Universal Service Directive imposes obligations to ensure the integrity of the public switched telephone network (PSTN), the availability of PSTN and publicly available telephone services at fixed locations in case of certain catastrophic events, as well as uninterrupted access to emergency services from fixed locations.

The emphasis on the telephone network in this context is becoming outdated, so it is proposed to adapt this provision to reflect the importance of mobile and IP networks in modern communications. The implementation of such integrity requirements would seek to guarantee the stability and resilience of the networks that underpin society today.

The changes would include:

- extending, in a proportionate manner, the scope of the integrity requirements beyond the traditional public telephone network, to cover mobile and IP networks used for public services; and

- separating the obligations concerning the use of telephone networks in emergency or disaster situations from the obligations concerning the integrity of the underlying networks.

The changes proposed seek to reinforce the trust and confidence of business users and individual users in electronic communications, for the benefit of the sector itself and the economy as a whole. Such changes would improve the protection of the interests of citizens in line with the key objectives of the regulatory framework and would set more detailed standards for security in electronic communications while creating incentives to comply. In this way, the changes would future-proof integrity requirements for networks and make the competent national authorities better able to monitor and guide private undertakings.

Enhancing the security of networks and services benefits all users, but entails costs for market players which ultimately may need to be recouped from their customers. The proposed modifications will mostly affect the providers of electronic communications networks and services, in particular those who at present have inadequate security measures in place. Extending integrity requirements beyond the telephone network to other networks would also entail costs for other network operators, for example for installing back-up facilities. Nevertheless, the critical contribution that the ICT sector makes to the economy justifies further legal measures. The overall benefit for the sector generated by a higher level of trust, as well as the *de facto* dependence on ICTs within -industry in general, should justify the individual costs for the companies concerned.

8. BETTER REGULATION: REMOVING OUTDATED PROVISIONS

8.1. Deletion of the minimum set of leased lines

The requirement for a minimum set of leased lines derives from the previous Leased Lines Directive which predated market reviews and the existence of SMP remedies in wholesale and retail leased line markets. This is a retail market where there is no need or justification for mandating specific retail services. The relevant wholesale markets would remain in the Recommendation on relevant markets, giving NRAs the flexibility to decide on the details of appropriate remedies, including any required retail offers, in the light of their market analyses. The Commission can take steps to vacate the minimum set of leased lines, but removal of the concept altogether requires legislative amendment of the Universal Service Directive.

8.2. Withdrawal of Article 27(2) of the Universal Service Directive on ETNS

Despite the provisions of the Universal Service Directive supporting the introduction of the European Telephony Numbering Space (ETNS), implementation of the scheme has failed to take place, primarily because no clear business case has emerged that would secure the participation of incumbent network operators. The ETNS concept which was designed to support the introduction of pan-European services is now over 10 years old and technology has advanced substantially since that time. Other methods of meeting consumers needs have also substantially reduced interest in the ETNS. This situation should be recognised and the Article in the Universal Service and Users Rights Directive should be formally withdrawn. This would require legislative amendment of the Universal Service Directive.

8.3. Repeal of Regulation 2887/2000 on unbundled access to the local loop

Recital 43 of the Framework Directive acknowledges indirectly that the Regulation on unbundled access to the local loop (ULL) was meant to be a bridge between two regulatory frameworks. It calls upon the Commission to monitor the transition from the old (1998) regulatory framework to the new (2002) regulatory framework and to bring forward proposals

to repeal Regulation 2887/2002 at an appropriate time. Under the current framework, NRAs are under a duty to analyse the ULL market and, in the absence of effective competition, to apply appropriate remedies. Once all NRAs have completed their market analysis of the ULL market, the Regulation becomes unnecessary and can be withdrawn.

8.4. Other deletions

Annex I of the Framework Directive

Annex I of the Framework Directive provided the basis for the initial version of the Recommendation on relevant markets, but will be obsolete once a revised version of the Recommendation is issued, and could be withdrawn.

Transitional measures

The transitional measures set out in Article 27 of the Framework Directive are no longer necessary and could be removed or revised in anticipation of future accessions.

Article 5(4) of the Access and Interconnection Directive

Article 5(4) of the Access Directive empowers NRAs to intervene in access and interconnection issues at their own initiative where justified, or, in the absence of agreement between undertakings, at the request of either the parties involved in order to secure the policy objectives of Article 8 of the Framework Directive. The scope of this provision overlaps with NRAs powers in several other articles, namely Article 5(1) of the Access Directive (interoperability), Article 20 of the Framework Directive (dispute resolution procedure), and Article 7(6) of the Framework Directive (adopting provisional measures in cases of urgency). In order to bring more clarity to the framework, it is proposed to withdraw Article 5(4) of the Access Directive.

9. AREAS WHERE CHANGES ARE NOT PROPOSED

This section addresses areas where the existing provisions of the regulatory framework appear to be sufficient to address issues that may arise. In particular, it deals with Premium Rate Services (PRS), "Net Freedoms", and interconnection issues.

9.1. Premium-rate services; protection from unfair, fraudulent or abusive practices

In recent years, a rise in abusive practices has been seen in relation to premium-rate services (PRS). For example, hidden web-diallers have created significant problems for PC users with dial-up modems. Issues related to consumer protection and PRS will be covered under two legal instruments relating to consumer protection that are currently in the process of transposition and implementation in all Member States: the Unfair Commercial Practices Directive[32] and the Regulation on consumer protection cooperation[33]. In view of this, apart from the change related to transparency and publication of information to end-users as set out in Section 6.1, no specific changes are proposed for the regulatory framework; however the Commission could decide to issue guidelines clarifying the applicable consumer protection

[32] Directive 2005/29/EC, OJ L 149, 11.6.2005, p. 22.
[33] Regulation 2006/2004/EC, OJ L 364, 9.12.2004, p. 1.

legislation in relation to problems in the electronic communications sector should this prove necessary.

9.2. "Net Freedoms"

The U.S. Federal Communications Commission (FCC) has identified four "Net Freedoms", namely, the right for users to access and distribute (lawful) content, to run applications and connect devices of their choice. These are equally applicable in Europe.

The Commission services consider that these net freedoms are best regarded as general guidelines for use by regulators and policy makers, and that it would not be appropriate to translate them into legislative obligations.

Open and competitive markets together with the current provisions in the EU regulatory framework, should in principle be sufficient to protect "*Net Freedoms*" and to offer a suitably open environment for both users and service providers. In particular, the existing provisions for NRAs to impose obligations on operators with significant market power, and the powers for NRAs to address access and interconnection issues [34] could be used to prevent any restriction of access to information society services, and to impose appropriate interoperability requirements[35].

9.3. Interconnection issues

The move to IP networks raises questions as to how interconnection will be handled in an all IP environment, and how to manage the transition from the current model of PSTN interconnection. The framework does not impose any particular method of charging for interconnection. This means that the industry could in principle move to a 'bill and keep' model. This could have repercussions for the markets that are susceptible to ex-ante regulation (in particular call termination) but such developments – if they occur - can be addressed through the regular updating of the Recommendation on relevant markets.

10. CONCLUSION

The proposal with the greatest potential economic impact is the application of the Commission's policy approach to spectrum management by incorporating new provisions into the regulatory framework for electronic communications.

The other main proposal is to reduce the burden of the regulatory procedures associated with the reviews of relevant markets. The suggested relaxation of the notification requirements under the Article 7 procedure, through the introduction of a simplified procedure for certain cases, would cut down the administrative burden for NRAs and for market players; these changes would also rationalise the use of scarce resources, in particular in NRAs; and allow the Commission to monitor national implementation more effectively. The value of the market review procedure could be enhanced to make it less time consuming and burdensome.

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[34] Art 5(1) of the Access Directive.

[35] To impose these '*Net Freedoms*' as an obligation on *all* network providers would be to prevent the market offering low budget, limited access services, which some users might value; whereas maximising user choice is one of the main aims of the framework.

Overall, the proposals would add significantly to the effectiveness, transparency and proportionality of the procedure.

Suggestions for strengthening the internal market take several forms. Creating the power for the Commission to vet and, where appropriate, veto proposed national remedies from an internal market perspective will strengthen the effectiveness of the core regulatory provisions of the framework. Allowing NRA decisions on remedies to be reviewed in a European, and not simply a national, context, will ensure that the internal market interests are fully reflected in the process, and will also inject greater transparency, predictability and legal certainty into the regulatory procedure. The changes in the rules on appeals that are suggested would reduce the undue length of many of the national appeal procedures and avoid the systematic suspension of regulatory decisions which currently frustrate effective implementation. Introducing a co-ordinated authorisation procedure for market entry of certain wireless pan-European services could stimulate a significant growth in wireless pan-European services which are currently held back by a fragmented regulatory environment.

In terms of consumer protection, the changes suggested would improve the reliability and transparency of information available to consumers and improve the ability of emergency services to use caller location information. While possibly creating new costs for companies, these changes would empower users to make informed choices and indirectly put pressure on prices. Reinforcing caller location obligations relating to emergency services would enable emergency services to respond more effectively, thus improving safety and the quality of emergency services, particularly for people travelling within the EU. Other changes reflect the move away from voice-based services and recognise that future electronic services will be diverse and be delivered via different end-user terminals.

Earlier consultations have shown widespread consensus that universal service should evolve with the times. While it would be premature to suggest fundamental changes at present, some aspects of the current system could be adjusted to anticipate changes in markets and technologies and increase flexibility. Such changes would allow for regulatory obligations to be reduced once the market is shown to be meeting users' needs and would render the framework more future proof.

Users with special needs such as the disabled are entitled to enjoy universal service no less than others. The changes to universal service that are suggested for those with special needs would reinforce the right of disabled users to access the emergency services via the number '112'; and create a mechanism to adopt eAccessibility measures at EU level. Changes along these lines would contribute to e-inclusion, and in particular to eAccessibility, which is one of the pillars of the i2010 strategy, partly filling the gap between the rights of the disabled and those of other users.

The critical contribution that the ICT sector makes to the economy justifies the suggested additional measures to enhance the security of the EU communications environment. The overall benefit for the sector generated by a higher level of trust outweighs the individual cost for the companies concerned. In view of the current risks, enhancing security of networks and services will benefit all users, but will also entail costs for market players which ultimately may need to be recouped from their customers.

It is also proposed to repeal legislative provisions that are now unnecessary as well as those that will be obsolete by the time any revision of the framework is implemented, thus

eliminating uncertainty regarding the status of certain provisions and making the framework more up to date.

SUMMARY OF PROPOSALS

1. New approach to spectrum

- Ensure that the use of spectrum is subject to general authorisations only, whenever possible
- Introduce freedom to use any technology in a spectrum band (technology neutrality)
- Introduce freedom to use spectrum to offer any electronic communications service (service neutrality)
- Open selected bands to trading of rights of use
- Establish transparent and participative procedures for allocation
- Improve coordination at EU level through a wider application of committee mechanisms

2. Streamlining market reviews

- Relax notification requirements for Article 7 procedures
- Rationalise the market review procedures in a single instrument including timetables
- Introduce minimum standard for notifications
- Require re-notifications after vetoes

3. Consolidating the internal market

- Commission veto under the 'Article 7 procedure'
- Make appeals mechanism more effective
- Common approach to authorisation of services with pan-European or internal market dimension
- Amend Article 5 of the Access Directive: non-Significant Market Power access and interconnection
- Introduce a procedure for Member States to agree common requirements related to networks or services
- Broaden the scope of technical implementing measures taken by the Commission on numbering aspects
- Amend Article 28 of the Universal Service Directive on non-geographic numbers

- Improve enforcement mechanisms of the framework
- Strengthen the obligation on Member States to review and justify 'must carry' rules
- Adapting the regulatory framework to cover telecommunications terminal equipment, ensuring constancy with the R&TTE Directive

4. Strengthening Consumer Protection and Users' Rights

- Improve the transparency and publication of information for end-users
- Strengthen the obligation for network operators to pass caller location information to emergency authorities
- Separate the provision of access to public communications networks from the provision of telephone services
- Remove provisions on universal directories and directory inquiry services from the scope of universal service
- Adapt 'telephone service specific' provisions to technology and market developments
- Update the provisions on number portability to ensure transfer of all relevant data
- Ensure that regulators can impose minimum quality of service requirements
- Strengthen the right of disabled users to access to emergency services via the number '112'
- Introduce a Community mechanism to address eAccessibility issues

5. Improving Security

- Oblige operators to take security measures, and grant powers to NRAs to determine and monitor technical implementation
- Require notification of security breaches by network operators and ISPs
- Future-proof network integrity requirements

6. Modernisation and updating

- Delete the minimum set of leased lines
- Withdraw Article 27(2) of the Universal Service Directive on ETNS
- Repeal Regulation 2887/2000 on unbundled access to the local loop
- Delete Annex I of the Framework Directive, Article 27 of the Framework Directive and Article 5(4) of the Access and Interconnection Directive