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New Regulatory Framework for Electronic Communications

-- The European Commission's Legislative Proposals --

Last week the European Commission published proposals for eight measures that would modify, simplify, and make more flexible the regulatory framework applying to electronic communications infrastructure and services. The proposals are part of a revised approach of the European Union towards communications, consisting of three main elements as outlined in the Commission's 1999 Communications Review: (i) new sector specific legislation to replace the more than twenty existing legal acts; (ii) more frequent use of recommendations, guidelines, codes of conduct and other non-binding measures accompanying the new legal framework; and (iii) greater reliance on the general competition rules instead of sector specific regulation.

Convergence

The new regulatory framework recognizes the developing convergence among the telecommunications, broadcasting, and IT sectors, which is increasingly leading to a situation where it is possible to use any kind of terminal (PCs, mobile phones, TVs, handheld devices) on any kind of network (wireless, satellite, cable, fixed-line) for any kind of service (voice telephony, data, broadcasting). The proposed legislation consequently would subject electronic communications services, electronic communications networks, and associated facilities to a single harmonized regulatory framework. The package would apply to any paid transmission of signals on any network -- including wireline, wireless, satellite, broadcast, and cable TV networks. The proposed legislation does not apply to content.

Overview of the proposed measures

The proposed measures would consist of eight legislative acts: five harmonization directives concerning (i) the General Framework; (ii) Authorisation (licensing rules); (iii) Access & Interconnection; (iv) Universal Service and Users' Rights; and (v) Data Protection; (vi) a regulation on Unbundled Access to the Local Loop; (vii) a directive on Liberalisation (consolidating the existing liberalisation measures); and (viii) a decision on Radio Spectrum Policy.

The package requires approval of the European Parliament and the European Council, with the exception of the Liberalisation Directive, which will be adopted by the Commission.

All directives will then require implementation by the EU-Member States, which the Commission hopes will take place by the end of next year. The Unbundled Local Loop Regulation will apply without further implementation as soon as it is adopted, planned for the end of this year.

Key issues raised by the package

Unbundled local loop access made mandatory

The *Unbundled Local Loop Regulation* would impose the following key obligations on fixed public telephone network operators that have been designated by the National Regulatory Authorities (NRAs) as having significant market power (“notified operators”):

- Notified operators would have to make available to third parties, by 31 December 2000, unbundled access to the local loop (*i.e.*, the “last mile” of the network into the customer’s premises, defined as the physical copper line circuit connecting the customer’s premises to the operator’s local switch, concentrator or equivalent facility) under transparent, fair and non-discriminatory conditions;
- Notified operators would also be required to provide new entrants physical access to their facilities to allow them to collocate and connect their network equipment and facilities; and
- Notified operators would be obliged to publish, by 31 December 2000, a reference offer for unbundled access to local loops, including prices.

Unbundled access to the local loop would include both full unbundled access (*i.e.*, the new entrant takes over the circuit) and shared access (*e.g.*, the incumbent provides telephone services, and the new entrant provides data services over the same circuit). This would broaden the types of unbundled access available even in the minority of Member States that already have an unbundling requirement (*e.g.*, Germany, which mandates full but not shared unbundled access). The prices for access would have to be based on cost. NRAs would have authority to impose changes to the reference offer, including prices, and would also be granted authority to resolve disputes between undertakings concerning the issues covered in the Regulation in a prompt, fair, and transparent manner. In practice, NRAs will play a major role on and have the final say in unbundling issues.

Access and interconnection rules changed

The *Access & Interconnection Directive* would significantly change the rules governing access to and interconnection of electronic communications networks. The scope of sector specific *ex-ante* regulation would be reduced, while at the same time the impact of general competition law would be increased.

Three scenarios for ex-ante obligations. The Directive would allow the imposition of obligations on operators and undertakings in three sets of circumstances:

- In order to avoid distortions of competition, NRAs could impose one or several of the following *ex-ante* obligations on operators with significant market power (SMP): transparency; non-discrimination; accounting separation; access to, and use of, specific network facilities; and price control and cost accounting;
- In exceptional circumstances, NRAs, with the prior agreement of the Commission, could impose further obligations on operators with SMP, provided they are justified in the light of the objectives of the *Access & Interconnection Directive* and the *Framework Directive* and are proportionate to the aim pursued;
- In order to comply with international commitments, NRAs could impose interconnection obligations even on operators without SMP.

Revised concept of Significant Market Power. The second and third of these three situations are expected to occur only in exceptional circumstances. In the first case, an NRA would have authority to impose specific *ex-ante* access and interconnection obligations after having notified the Commission that an operator has SMP on one or several relevant markets (as defined by the Commission in a decision to the Member States that still needs to be adopted). The concept of SMP would be considerably modified: the 25% threshold would be completely abolished. Under the proposed directive, companies could be found to have SMP where they are considered to have a dominant position under competition law principles and where either there are problems of incumbency and/or problems of vertical integration, such that the *ex-post* remedies of competition law would not be adequate to address those market problems. The SMP concept would embrace single company dominance, joint dominance, and leveraging a dominant position onto an associated market.

Regular review of ex-ante obligations. The obligations currently in place under the existing rules would continue for an initial period. All current and future obligations would be reviewed on a regular basis.

Data protection issues

The *Data Protection Directive* would extend existing rules preventing unsolicited telephone calls for direct marketing purposes to all forms of communications. This would mean that unsolicited e-mails for direct marketing purposes would be prohibited, except with respect to subscribers who have agreed to receive such e-mails. This endorsement of an opt-in model as opposed to an opt-out approach (allowing unsolicited e-mails unless the user requests not to receive them) is expected to be very controversial.

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The proposed legislation and further information on the package can be found at the following Internet site: <http://www.ispo.cec.be/infosoc/telecompolicy/review99/Welcome.html>

Annex

The legislative acts proposed by the Commission

- *Framework Directive* -- Directive of the European Parliament and the Council on a common regulatory framework for electronic communications networks and services: consolidates the existing general framework including some horizontal harmonization rules in one document.
- *Authorisation Directive* -- Directive of the European Parliament and the Council on the authorisation of electronic communications networks and services: contains provisions on harmonisation of licensing rules and limits conditions that may be imposed on licensees.
- *Access & Interconnection Directive* -- Directive of the European Parliament and the Council on access to, and interconnection of, electronic communications networks and associated facilities: modifies rules for access and interconnection and, in particular, the concept of significant market power.
- *Users' Rights Directive* -- Directive of the European Parliament and the Council on universal service and users' rights relating to electronic communications networks and services: provides standards for users' rights and maintains universal service obligations.
- *Data Protection Directive* -- Directive of the European Parliament and the Council on the processing of personal data and the protection of privacy in the electronic communications sector: modifies data protection rules, especially on unsolicited communications.
- *Unbundled Local Loop Regulation* -- Regulation of the European Parliament and the Council on unbundled access to the local loop: requires incumbent fixed line operators to allow unbundled local loop access to entrants.
- *Liberalisation Directive* -- Commission Directive on competition in the markets for electronic communications services: consolidates existing rules on telecoms liberalisation in one single text.
- *Spectrum Decision* -- Decision of the European Parliament and the Council on a regulatory framework for radio spectrum policy in the European Community.

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