

# REVIEW OF THE DIRECTIVE ON A COMMON REGULATORY FRAMEWORK FOR, ON ACCESS TO AND AUTHORISATION OF ELECTRONIC COMMUNICATIONS NETWORKS AND SERVICES

## KEY ISSUES

The aim of the review of the telecom package would be to bring significant improvements not only for the consumers as far as prices, access, and broadband speed are concerned, but also for undertakings, in terms of fair competition and investments.

### **1. Economics of electronic communications**

- a. Efficient investments
  - i. Investments
  - ii. Incentives for NGA (Next Generation Access) deployment
  
- b. Sustainable Competition
  - i. Balanced competition
  - ii. Geographic segmentation
  - iii. Risk sharing
  
- c. Remedies
  - i. Article 7 procedure: A dispute resolution system, rather than a veto mechanism
  - ii. Functional separation: a last resort tool

### **2. Spectrum management**

- a. Digital Switchover
- b. Evolution, not revolution

### **3. Content and IPR-related**

- a. Information, no enforcement
- b. Calls for fundamental rights

## EFFICIENT INVESTMENTS

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### Investments

Encouraging **investments** is one of the top priorities of the telecom package.

The report thus develops a framework aiming at providing the tools for a **regulatory certainty** which can have a positive impact on investments.

This approach will promote a steady **industrial activity** which is an additional guarantee for jobs.

Moreover **innovation** will also be supported. This can help our European companies to remain competitive thanks to necessary investments (and especially in fibre) to enhance our role on the international scene. Indeed, the telecommunications sector accounts for 3% of European GDP.

On top of that, as these new investments mean an extension of the roll-out, they can contribute to the bridging of the **broadband gap**. The idea there is to ensure everyone's access to the Information Society services which in turn would foster access to knowledge and education. Bridging the broadband gap is also a necessary condition for equal opportunities and reducing socioeconomic inequalities.

### Incentives for NGA (Next generation Access) deployment

As we all know, **NGN (Next Generation Networks)** are in most countries a very hot issue and some heavy investment decisions are currently or soon to be made: estimations show that the cost of the deployment of this technology across Europe may be as high as 300 billion euros.

This in turn calls for some signals. That's why despite the Commission's reluctance -there was nothing in the initial texts relating to NGN-, some elements to make the framework more future-proof and already send some positive messages in terms of regulatory certainty, adequate mechanisms and remedies were sent to the industry.

Indeed the key idea to foster NGN is once again **legal certainty and predictability**, through a more solid organisation of the national regulatory authorities (NRAs) leading to more consistency across Europe, and new risk-sharing mechanisms.

## SUSTAINABLE COMPETITION

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### Balanced competition

The question that arose when the model of competition had to be defined was either to go straight for **service competition**, and consider that, for this, only one single entirely shared network was needed (hence functional separation), or to try and keep the **infrastructure competition** approach as far as economically and technically feasible, in an attempt to push duplication of networks beyond the sole densely populated areas.

This means that with this approach too, a good **articulation with service competition** needs to be ensured, through proper access regulation.

This latter path is indeed much trickier but more rewarding in terms of investment. In both cases, there's a need for some clear rules in terms of both passive and active access solutions (local loop and sub-loop unbundling, duct access, bitstream...).

The bottom line of this: **is infrastructure competition wherever possible, services competition as much as necessary.**

### **Geographic segmentation**

In some area, where a solid market analysis showed that competition is effective, one can assume that there is no case for sector-specific **ex ante** regulation by national regulation authorities (NRA).

As a result these areas should be dealt with by competition authorities using **ex post** instruments. This new concept is called **geographic segmentation**. By using this process and keeping ex-ante regulation, national regulation authorities have another means to foster investment in the area where a mere logic of market cannot apply.

Geographic segmentation could also be used as it is currently in Austria, where it allows NRAs to micromanage the remedies they impose on operators.

### **Risk sharing**

By ensuring appropriate **risk-sharing** among the investor and firms wanting access to new facilities, the European Parliament calls for innovation and puts the stress on the importance of new and more efficient infrastructures.

While the ITRE report (Industry, Research and Energy Commission in the European Parliament) doesn't go further than calling for risk-sharing mechanisms, there are already several ways to approach this concept: either a **sharing of the investment** between several stakeholders or a "**risk premium**" clause. There are also options to adjust the way the cost of capital is calculated. **However this must not make more complex an already complicated issue.**

Other suggestions encompass the extension of the duration of contracts between access-seekers and access-givers, or an upfront payment from access-seeking operators in exchange for the possibility to use the existing infrastructures; however this latter solution has not won the support of alternative operators.

## REMEDIES

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### **Article 7 procedure: A dispute resolution system, rather than a veto mechanism**

It has been acknowledged by all the stakeholders that the Commission's proposal to extend its veto on remedies was not the right solution. The veto can be seen as a punishment; while the Commission's role should be to guide stakeholders and help them find solutions.

That is why an **alternative dispute resolution** system (branded "co-regulation") has been proposed and broadly supported by the European Parliament. It relies on a collaborative method based on checks and balances between the Commission, BERT (Body of European Regulators in Telecommunications, as suggested in Ms Del Castillo's report) and the NRAs: the Commission can raise some doubts about a remedy but this remedy would be withdrawn only if BERT's position is also negative.

This process would help us to allow regulatory **consistency** without threatening **subsidiarity** and more generally the global **balance of powers** and competences between regulatory authorities, political actors and technical experts.

### **Functional separation: a last resort tool**

For many observers of the telecommunications sector, **functional separation** stands as one of the very contentious points in the Better Regulation report. However eventually a large portion of the EP agrees on the balanced view that it should remain an option of last resort.

Indeed, as it has already been said the reviewed directive should aim at providing **consistency** and **predictability**, but with some degree of **flexibility**: given the diversity of market situations in Europe, there's no one-size-fits-all solution.

As a result, functional separation is still in the NRAs' toolbox but a **double-security mechanism** has been set up, in the way that following an NRA's notification of its intention to use it, both the Commission and BERT need to agree that functional separation is indeed justified for it to be applied. This is the only way to keep the threat but to make sure that it would be used sparingly and only when necessary.

The bottom line is that with this package, the Commission's goal was merely to "make the market work better"; however the EP brought industrial, economic and social aims in order to fully seize its benefits in terms of investments and development of services. But one should not rely only on competition to achieve these goals. In the end, the idea is to create the adequate conditions for a **sustainable and responsible development**, in other words an **ecosystem** for Information and Communications Technology (ICT).

### DIGITAL SWITCHOVER

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Amongst the key issues addressed in the telecom package, the future of **spectrum policy** is prominent. It is not an easy one as this debate merges with the allocation of frequencies in the **UHF band** released from the digital switchover (analogical to digital) around 2012 all around Europe.

The telecom package sets up an appropriate legislative framework, which will provide some guidelines on how to allocate these frequencies to the Member-States, which remain competent for the management of spectrum. This will contribute to **bridge the broadband gap** and coupled with higher investments in networks it will offer **better and more efficient services** to all the consumers in terms of **access, price and quality**.

Indeed, the way spectrum has been managed so far is not put into question, but the challenge is now to gradually find a new **balance** between all the goals that need to be achieved, while it remains difficult to determine precisely how important the **digital dividend** will be.

### EVOLUTION, NOT REVOLUTION

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Bearing in mind that spectrum is a **scarce and limited resource** which needs to be **allocated efficiently** in order to seize the most of the new opportunities it offers, we need to have a **sustainable management of spectrum**, not only from an economic point of view but also from a cultural and social one, to make sure we do not waste its benefits.

One of the commission's key original proposals was to favour spectrum trading according to the rules of **service and technology neutrality**. However, it created a number of concerns with regards to the diversity of services (typically, their providers do not 'weigh' the same in terms of buying power) and the risk of speculation on this scarce and increasingly valued resource. That's why the concepts of technological and service neutrality are clarified and framed, including through balanced, pragmatic exceptions.

More efforts are made as well to ensure a compatibility with ITU (International telecommunications Union) radio regulations.

In the end, some flexibility is to be added in the system, but what **we need is an evolution, not a revolution**. The adequate mechanism would then be to ensure a fair deal between different users of spectrum (broadcasters, telcos).

In parallel, some attempts are made at **streamlining the way spectrum policies are debated at the European level**, through an institutional simplification and a better distinction between political and technical issues.

## CONTENT AND IPR-RELATED

The issue of content and intellectual property rights protection (in particular copyright/authors' rights) appeared quite late in the debate; it wasn't initially foreseen that they would be touched by the review. However, while this package cannot handle properly the many questions at stake (the appropriate remuneration of artists for the distribution of their creations, in a digital form), which will find their place for example in the incoming "Creative Content Online" recommendation, it took so much importance that things need to be clarified here.

## INFORMATION, NO ENFORCEMENT

It has been widely acknowledged from the beginning that the telecom package was not the right place to deal with these issues. The "Better Regulation" suggests to *promote* lawful content through **general information** of the consumer about Intellectual Property Rights infringements and illegal downloads (accordingly with the Universal Service directive /Harbour report), but refrains from any sanction system or monitoring mechanisms. In so doing the opinion of the European Data Protection Supervisor was cautiously followed.

## CALL FOR FUNDAMENTAL RIGHTS

An amendment signed by 40 MEPs had been tabled at the initiative of Guy Bono and Daniel Cohn-Bendit, amongst others. This amendment as tabled initially, though already aiming for balance, was in fact not totally proofed or entirely clear.

A cross-Group agreement was found around the reiteration of the acknowledged principle that the judiciary is the guardian of public liberties and fundamental rights:

*(ea) In paragraph 4, point (ga) is added:*

*"(ga) applying the principle that no restriction may be imposed on the **fundamental rights and freedoms of end-users without a prior ruling of the judicial authorities, notably in accordance with Article 11 of the Charter of Fundamental Rights of the European Union on freedom of expression and information, save when public security is threatened, in which case the ruling may be subsequent.***

The oral amendment aims at clarifying that only **fundamental** rights are concerned by this application and to keep a certain balance: this amendment doesn't allow for a total freedom on the Internet, it only reasserts that freedom is to be assessed by a judicial authority.