



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 6 June 2008

10334/08

**Interinstitutional File:
2007/0247 (COD)**

**TELECOM 92
MI 199
COMPET 222
CONSOM 66
AUDIO 46
CODEC 723**

REPORT

from : COREPER
to : COUNCIL
No. Cion prop. : 15379/07 TELECOM 150 MI 297 COMPET 391 CONSOM 132 CODEC 1294 +
COR 1
No. prev. doc. 9837/08 TELECOM 77 MI 159 COMPET 190 CONSOM 54 AUDIO 42 CODEC
645

Subject : Proposal for a Directive of the European Parliament and of the Council amending
Directives 2002/21/EC on a common regulatory framework for electronic
communications networks and services, 2002/19/EC on access to, and
interconnection of electronic communications networks and services, and
2002/20/EC on the authorisation of electronic communications networks and
services

- Progress Report

I. Introduction

1. The Commission adopted its proposals for the review of the EU regulatory framework for electronic communications on 13 November 2007 and they were presented to and debated in Council on 29 November 2007. Since then, the telecoms reform package, comprising two proposals for amending Directives (the so-called Better Regulation Directive amending the current Framework, Authorisation and Access Directives and the so-called Citizen's Rights Directive amending the Universal Service and Privacy Directives) and a proposal for a Regulation (establishing a European Electronic Communications Market Authority), has been examined in detail in several meetings of the Working Party on Telecommunications and Information Society. This work has resulted in three progress reports, one on each of the proposals, i.e. the present one on the Better Regulation Directive and the other two on the Citizen's Rights Directive (9838/08) and on the Regulation on the Authority (9095/08).
2. Taking into account that the two proposals for amending Directives on Better Regulation and on Citizen's Rights address a wide range of substantially different regulatory issues and in view of having efficient discussions in the Council's Working Party, the Presidency decided to examine these proposals on the basis of clusters of specific regulatory issues.
3. As a consequence, the Better Regulation Directive was examined around clusters of themes, i.e. radio spectrum, numbering, Article 7 procedure and remedies, and implementation issues. The proposal on the Citizen's Rights Directive was examined around clusters on consumer protection and users' rights and on security, privacy and data protection. On the basis of an examination of these clusters, the Working Party has started redrafting texts on the basis of Presidency compromise proposals.

4. Following this examination on the basis of clusters, the Presidency put together consolidated texts of the concerned Directives, i.e. the Framework, Authorisation and Access Directives on the one hand (i.e. the Better Regulation proposal), and the Universal Service and the Privacy Directives on the other hand (i.e. the Citizen's Rights proposal). These consolidated versions of the concerned Directives reflect the work undertaken under the Slovenian Presidency and incorporate various Presidency compromise proposals as discussed in the Working Party. After several discussions on these consolidated legislative texts put together by the Presidency, a broad consensus emerged that the texts are going in the right direction and will form a good basis for further examination during the next Presidency. In the case of the Citizen's Rights proposal, good progress was made towards a consensus, so that the Presidency decided to annex the consolidated texts on the Universal Service and the Privacy Directives to its progress report to reflect the state of play but without pre-empting the final position of the Member States.

5. The Presidency is proposing to the Council to have an exchange of views on the whole package with the purpose of taking stock of the examination of the Commission's proposals so far and to identify and discuss issues where future work in the Working Party under the French Presidency could benefit from the political guidance of the Ministers. In order to steer such discussions, the Presidency has also produced in a separate document *Guidelines for the exchange of views at the Council* (9894/08).

II. Commission Proposals

1. With its proposal for a Better Regulation Directive, the Commission aims to adjust the regulatory framework for electronic communications by improving its effectiveness, reducing the administrative resources needed for implementing economic regulation (the market analysis procedure) and making access to radio frequencies simpler and more efficient.

2. The Commission's proposals with regard to reforming spectrum management are inspired by technological development and convergence and underline the importance of spectrum as a scarce resource. However, its management within the EU has not kept pace with this evolution, according to the Commission's proposals. A more flexible approach is thus said to be needed to exploit the economic potential and realise the societal and environmental benefits of improved spectrum usage. Furthermore, the proposals make provision for ensuring a smooth transition to the introduction of spectrum trading.
3. The Commission's proposals also aim at improving the consistency of regulation of the internal market in electronic communications. This will be achieved, according to the Commission, by a stronger role for the Commission in remedies imposed by NRAs, which will be combined with the close involvement of the proposed new Electronic Communications Market Authority in the 'Article 7' procedure to ensure that the joint expertise of NRAs can be effectively harnessed and efficiently taken into account in the final Commission decision.
4. Strengthening security and integrity, for the benefit of users of electronic communications is another important objective in the Commission's proposals, as this is essential in order to reinforce the trust and confidence of business and citizens using electronic communications.
5. Finally, the proposals aim to create an efficient procedure for firms needing rights of use to provide cross-European services and to make provision for the introduction of functional separation as a remedy that can be imposed by NRAs (National Regulatory Authorities), subject to approval by the Commission, which has to seek the advice of the new proposed Authority to this end.

III. Principle reactions of the delegations

1. Delegations could support a number of objectives put forward in the proposals, such as the need to ensure consistent application in the Member States of the regulatory framework for electronic communications and the need to ensure a flexible and efficient use of radio spectrum. However, questions remain about the need for the proposed measures to achieve those objectives, about the proposed procedures to achieve harmonisation and about the level of detail of such harmonisation. Delegations are concerned that the proposals could disturb the current balance of proportionality and subsidiarity and that a number of proposals would considerably add to the administrative burden.
2. As a basis for the discussions in the Working Party, the Presidency has prepared several compromise texts, which have amended the original proposals to a more or lesser extent without, however, changing at this stage of the negotiations the main objectives put forward in the Commission's proposals. As compared to the original proposals, the Presidency compromise texts for the Framework and Authorisation Directives made a number of changes to the proposed provisions related to radio spectrum, such as regarding the proposed general authorisation approach, technology and service neutrality and the possible (review of) restrictions to these principles. Delegations generally do not support the proposals to allow the Commission to adopt radio frequency harmonisation measures and measures aimed at a common selection procedure for issuing rights to use frequencies to selected undertakings. Many delegations also expressed the wish that any initiatives at EU level in the area of radio spectrum should take into account relevant international agreements as well as national plans regarding radio spectrum usage. The Presidency has proposed amendments to the texts to reflect these views and concerns.

3. The proposed provisions on consolidating the internal market for electronic communications and the notification procedure in the Framework Directive have also been proposed to be amended. Delegations generally support the objective for more consistency in the application of the regulatory framework but they seem to favour an approach to achieve this, based on existing or enhanced cooperation between the NRAs (National Regulatory Authorities) and the Commission rather than shifting this responsibility to the EU level.

4. Other proposed provisions in the proposals in the Framework and Authorisation Directives were also discussed in detail, such as security and integrity, identification and definition of markets, market analysis, rights of way, enforcement and penalties, appeals and disputes and numbering issues. Also on these issues, changes to the original proposal were made and were discussed in the Working Party and on which a general consensus appeared to be emerging. However, further examination of these points will remain to be required.

5. The proposal put forward in the Access Directive on the issue of functional separation triggered reactions from Member States on the underlying strategic theme of the development of, and required investments in, next generation networks and this matter will need further examination as it is being considered a policy issue of major significance.

6. As also noted in the progress report on Universal Service and Privacy (9838/08), the issues of comitology and references to the Authority have also been reduced to a minimum in the proposal for a Better Regulation Directive. Where the possibility for the Commission to take action remains, it is usually proposed to be in the form of recommendations rather than decisions. On security and integrity of networks and services in the Framework Directive, Member States are considering whether ENISA rather than the Authority should play a role in this context.
7. Although most delegations agree that the amendments made in the Presidency compromise texts go in the right direction, further examination of the proposals will be required under the next Presidency. The main issues that will need to be revisited will be discussed in section 3 below.

IV. Main issues to be discussed further

i. Radio spectrum

1. *The Commission proposal identifies a number of areas where change is needed so as to make better use of the scarce radio spectrum resource. According to the Commission, more flexibility in the use of radio spectrum should be achieved by having the principles of **technology and service neutrality** as a basis for decision-making in the spectrum field. This means that in certain identified bands and under certain conditions any type of technology and any type of service can be provided subject to limited and justified restrictions, such as the need to avoid harmful interference or the fulfilment of general interest objectives. Such restrictions should be reviewed regularly so as to create a level playing field between old and new right holders.*

2. Although not entirely convinced about the feasibility and immediate benefits of the proposed approach, delegations do not disagree with it in principle. They do have concerns, however, about the implications at the implementation level and therefore seek safeguards, which would allow Member States to intervene in spectrum management where appropriate, e.g. to ensure technical quality of service, to safeguard efficient use of spectrum or to fulfil a general interest objective through the provision of broadcasting. Delegations are also critical regarding the application of technological and service neutrality to existing spectrum usage rights. This would require a review of restrictions to existing rights of use, which delegations fear could have significant administrative implications. Some delegations would favour a review method that is more in line with the subsidiarity principle.
3. *The Commission proposal would establish a **general authorisation approach** as the default method and would introduce an obligation to justify exceptional cases where individual usage rights are to be issued, for instance to prevent harmful interference or to fulfil objectives of general interest. The proposal also foresees a mechanism whereby the Commission and the Member States decide that certain frequency bands would be made subject to **tradability**.*
4. Also regarding this proposal, delegations could agree with the objective of general authorisations as the preferred method but fear practical problems at the level of implementation. Many delegations are against the proposal in its present wording regarding the review of existing rights to use radio frequencies in view of possibly changing such individual rights into general authorisations. They are open to consider the possible potential benefits of spectrum trading as it could lead to a more dynamic spectrum market but Member States tend to agree that such trading should take place in accordance with national procedures.

5. *The Commission proposes a number of **mechanisms for coordination** , e.g. relating to the issuing of general authorisations or individual spectrum rights, to the identification of tradable frequency bands and to restrictions to the principles of technology and service neutrality. In general, the Commission proposes to harmonise these and other, at times very detailed matters, using comitology procedures, sometimes with the assistance of the proposed Authority.*

6. Detailed discussions have taken place regarding which matters would require harmonisation in order to give effect to the main principles put forward in the Commission proposals, i.e. technology and service neutrality, general authorisations rather than individual usage rights, spectrum trading. Delegations generally do not agree with the level of detail that is proposed to be harmonised and divergences of views exist as to which matters require harmonisation and for what reasons. Delegations are generally critical regarding the proposed mechanisms for such harmonisation. Some delegations believe that the Commission goes too far with its intention to achieve harmonisation using comitology procedures and the proposal to use an "urgency" comitology procedure is generally rejected. The references to the Authority have been put on hold.

ii. Article 7 procedure and remedies

- 1. The Commission proposes to streamline and rationalise the **Article 7 procedure** by introducing new elements such as national consultation in advance of the Community consultation and clearer requirements on re-notification after a veto and a timetable for completion of market reviews. The proposal would enhance the Commission's role in the procedure, e.g. in the case of transnational markets, where the Commission (assisted by the Authority) would designate the undertaking with significant market power and impose remedies. Furthermore, the Commission pleads to be given the power, in the same way it has for SMP determination and market definition, to require NRAs to withdraw draft measures on the remedies proposed (**veto on remedies**). The Commission would also be enabled to lay down implementing provisions to define a number of procedural elements of the Article 7 procedure, e.g. in view of opening the way to a possible relaxation of notification requirements.*
2. Delegations discussed the various elements in the Commission proposal on the Article 7 procedure at various occasions. A number of delegations agree that the practices of NRAs should be further harmonised but few argue in favour of strengthening the Commission's role to achieve this. Other delegations consider that the proposals would imply a weakening of the NRAs' independence and strongly disagree with the proposed veto for the Commission on remedies. With regard to the notification of proposed remedies, the need for the adoption by the Commission of binding implementing provisions rather than non-binding recommendations is questioned by the majority of delegations. There was no support for the proposal that the Commission would impose decisions on remedies to undertakings having significant market power at transnational markets.

3. *The Commission proposes that NRAs should be able to impose **functional separation** in exceptional cases in markets where there are severe problems or where the other current remedies are insufficient. As infrastructure competition and consumer welfare may be affected by the imposition of functional separation, the Commission's agreement would be required.*
4. In the discussion, many delegations could see possible benefits of functional separation and could agree to the principle, but some of these Member States also point to the high burden of proof when imposing functional separation. Moreover, certain delegations disagree with the fact that the Commission should give prior approval.

On the other hand, some delegations argue that Member States themselves can impose functional separation anyhow, while some are ready to accept it as a remedy of last resort. Finally, few delegations are of the opinion that functional separation should not figure in the provisions of this proposal.

iii. **Implementation issues**

1. *The proposals of the Commission also aim at improving **the effective implementation** of the framework and contain provisions to this end on NRAs, enforcement and internal market issues. Concerning NRAs and in order to ensure a more effective application of the regulatory framework, it is proposed that NRAs should be protected against external, political intervention or pressure, that minimum standards are set out for the dismissal of the NRA's head and that the NRAs would have their own independent budgets and sufficient human resources. NRAs should also be able to obtain all the necessary information to carry out their tasks, including about network developments (e.g. NGN architecture) that may have an impact on services provided at wholesale level to competitors.*

2. *The proposals also touch upon existing powers of the Commission concerning harmonisation or coordination at Community level in some areas, arguing that this would allow for technical regulatory issues, and issues raised by changing technology, to be addressed in a timely and coordinated way.*
3. Member States are not yet in agreement on the modalities needed to ensure the independence of NRAs and there also remain some divergences of views regarding the procedure related to the dismissal of the head of the NRA. Several Member States have expressed their concerns as to the relation of these provision to their national legislation and structure in which their competent authorities are established.
4. With regard to harmonisation procedures, most delegations could agree to recommendations rather than decisions being issued by the Commission in case of the inconsistent application of the regulatory tasks by NRAs. Member States do not agree, however, with the proposed comitology procedure and also prefer deletion of the identification of a harmonised or coordinated approach for dealing with the proposed detailed list of issues.
5. *Proposed provisions on **appeals** would set out a minimum criterion for suspension (urgent need to prevent serious and irreparable harm to the appellant has to be shown) of an NRA measure and a mechanism would be introduced for reporting on appeals to allow the situation across the EU to be monitored.*
6. On appeals, a particular subject for discussion is the nature and amount of information to be made available to the Commission, where some delegations support the Presidency text, others preferring the Commission's proposal. This issue, as all other issues mentioned above, will require further examination.