European Union

THE NEW EUROPEAN UNION REGULATORY FRAMEWORK
FOR ELECTRONIC COMMUNICATIONS: CONVERGENCE AND
REGULATION

This note presents an introduction to a new regulatory framework for electronic communications networks and services which will come into force in 2003 in the EU.

The text of the legislation is available on the web site
http://europa.eu.int/information_society/topics/telecoms/regulatory/new_rf/index_en.htm

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Overview

A new regulatory framework has just been adopted by the EU, in particular in order to respond to convergence trends (i.e. the trend for similar services to be delivered over different types of network) by covering all electronic communications networks and services within its scope. It builds on the conclusions of a process of public consultation and review.

The central feature of the new system is that a coherent regulatory framework will apply to all transmission infrastructures, irrespective of the types of services carried over them (a ‘horizontal’ approach). The new framework will therefore cover all electronic communications networks (including those used to carry broadcasting content such as cable television networks, terrestrial broadcasting networks, and satellite broadcasting networks), associated facilities and electronic communications services.

It should be noted that content services (e.g. broadcast content, e-commerce services) are outside the scope of the framework. Thus the regulation of content broadcast over electronic communications networks (e.g. radio and television programmes or TV bouquets) remains outside the scope of the framework.

The 15 Member States of the EU will have the new legislation in force by the summer of 2003. The new framework will also be adopted by all those countries joining the EU over the coming years.
The new legal framework

The 2003 regulatory framework is contained in seven texts:


In addition, there is a further Directive consolidating the existing « liberalisation » directives applicable to telecommunications.

Finally, there is also an EU Decision on a regulatory framework for radio spectrum policy in the European Community, which establishes a policy and legal framework in the Community in order to achieve the harmonisation of the use of the radio spectrum (« Radio Spectrum Decision »).

Four out of the five directives and the Radio Spectrum Decision were formally adopted in February 2002. Member States have 15 months to adopt and publish the laws, regulations and administrative provisions necessary to comply with the directives, but the new rules contained in these national laws will be applied on the same day in all Member States, 15 months after the date of the entry into force of the directives, ie sometime in June 2003.


Details

Role of national regulatory authorities

The primary responsibility for implementing the new framework will rely, as in the current framework, on the national regulatory authorities (NRAs) in the 15 EU Member States. NRAs are best placed to assess the specific conditions in their national markets, and the measures to address them.

The new framework establishes a more flexible set of rules at Community level, and gives NRAs a large degree of flexibility to choose the tools most appropriate to deal with regulatory concerns as they arise.

But as a counterweight to this increased flexibility, the new framework seeks to improve co-operation between NRAs, and between the European Commission and the NRAs, in a transparent manner, to ensure the consistent application throughout the EU of the provisions of the legislation.

Requirements for consultation and for co-operation between NRAs and other national authorities (in particular national competition authorities) are also more detailed compared to the current framework, as are the provisions on appeal.

The new procedure for deciding whether regulatory obligations are imposed

The approach underlying the 2003 regulatory framework is to regulate where there is not effective competition. In that case, certain specific obligations will fall on those operators which have

- significant market power (SMP);
- and are operating on particular markets where competition is not effective.

Thus the first step for regulators is to identify those markets where competition is not effective, and secondly to designate which operator(s) have significant market power on those markets.
Markets are defined according to competition law principles.

Under the current regulatory framework, regulated markets are pre-defined in the legislation on the basis of what type of service is being provided (e.g., fixed telephony). Moreover, the SMP designation is based on a 25% market share threshold, though NRAs have some flexibility to deviate from this.

Now that similar services can be provided over a variety of different technological platforms, the current framework has become too inflexible. For example, the current framework does not cover broadcasting networks.

Under the new framework, the market to be regulated will be identified in a Commission Recommendation on relevant markets. The Recommendation will identify those product and service markets within the sector which have characteristics which justify the imposition of regulatory obligations. It is not desirable that all electronic communications markets where possible competitive problems might arise should be subject to ex-ante regulation. The consequent risk of over-regulation would be detrimental to investment and innovation and thereby contrary to the long-term interests of European citizens.

NRAs will then carry out an analysis of these relevant markets in their country, and will decide whether these markets are effectively competitive or not – and impose, or amend, or withdraw regulatory obligations accordingly.

These markets will be defined using competition law methodologies, examining economic, legal, regulatory and technical barriers to competition. The threshold for imposing ex-ante obligations – new SMP - is now aligned to the competition law concept of dominance (i.e., the power of an undertaking, either alone or jointly with others, to behave to an appreciable extent independently of competitors, consumers and ultimately consumers).

The Commission will also produce Guidelines to assist NRAs with market analysis and the assessment of SMP, which must be in accordance with the principles of competition law.

The legislation sets out the procedure to be used by an NRA when deciding whether to impose, maintain, amend or withdraw obligations on specific undertakings on the basis of its market analysis of whether a relevant market is effectively competitive. A market that is effectively competitive is one where there are no undertakings with significant market power.

Where competition is not effective in specific markets, NRAs will impose specific obligations on companies that are classified as having significant market power on those markets. These obligations would normally apply to wholesale markets, but could cover retail markets. Wholesale remedies cover transparency; non-discrimination; accounting separation; access to and use of specific network facilities; price control; and cost accounting obligations. Possible regulatory controls on retail services include price controls or unreasonable bundling of services, requirement to offer leased lines, and carrier selection and pre-selection.

If competition is effective, existing obligations must be removed. Thus there is an assumption that, over time, obligations will be removed, as competition increases.