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Impact of the amended EU regulatory framework on spectrum and mobile issues

Overview

On 18 December 2009, the European Union (EU) published amendments to the electronic communications regulatory framework in three parts:

- Directive 2009/140/EC, called the ‘Better Regulation Directive’, amending the Framework, Access and Authorisation Directives;
- Directive 2009/136/EC, called the ‘Consumer Rights Directive’, amending the Universal Service and E-Privacy Directives and a consumer regulation; and
- Regulation 1211/2009 establishing a new regulatory advisory body, called the Body of European Regulators for Electronic Communications (BEREC).¹

These changes (collectively, the ‘2009 amendments’) create dozens of new rules

which, when implemented into national law, will change the regulatory system for spectrum management in important ways and affect the business of mobile network operators (MNOs) across Europe. As a big picture, we have divided the major issues of the 2009 amendments into six ‘issue groups’ that affect numerous parts of the electronic communications landscape, as shown in Table 1.

There are numerous topics in this list that affect MNOs, ranging from changes in the Commission’s market recommendation to new network security requirements, the new data breach rules and contract disclosure requirements, and many others. The concept of network neutrality alone will have implications for network management, content control and quality of service – all substantial topics. The focus of this article, however, is the intersection of mobile and spectrum rules, a topic with more than a few implications for the mobile communications sector.

Table 1 – Main Issues in the 2009 amendments

Main Issue	Subsidiary Issues	Directives Affected
Strengthened Regulatory Institutions	NRA independence BEREC Policy objectives and harmonisation Procedures and enforcement	Framework and Authorisation Directives and BEREC Regulation
Defining and Regulating Markets	Market definitions Changes to existing remedies The new functional separation remedy	Framework and Access Directives
Spectrum and Licensing Reform	Technology and service neutrality Spectrum trading Spectrum management particulars General licensing changes	Framework and Authorisation Directives
Network Security and Neutrality	Security Neutrality	Universal Service and Framework Directives
E-Privacy	Data breach Spam and Cookies	E-Privacy Directive
Consumer Issues	Service for the disabled Number portability Contracts and transparency Access to 112 and 116 numbers Internet freedom	Framework and Universal Service Directives

Introduction to spectrum regulation and licensing

Important amendments on spectrum management were made to the Framework and Authorisation Directives. For MNOs, an immediate question is how might these rules affect upcoming spectrum awards (eg, 800MHz ‘digital dividend’ spectrum). For all users of spectrum, the rules will strongly affect future regulatory handling of spectrum resources.

The theory behind spectrum management

From the beginning of the amendment process, the Commission wanted to move towards more coordinated and efficient management of spectrum. The resulting 2009 amendments include substantial changes to the way in which EU spectrum management will be conducted.

In particular, a major effort behind the spectrum reforms in the 2009 amendments is to foster ‘flexibility’ – expressed in terms of technology and service neutrality, more reliance on market forces through spectrum trading and greater harmonisation of spectrum use. These new principles will affect the way spectrum management and decisions are reached, and give the Commission more leeway for setting EU-wide policies, with the possibility of additional Parliament influence in the process.

General provisions on spectrum management

The 2002 Framework Directive already contained a relatively short Article 9 on management of radio frequencies. These provisions are now greatly expanded in the 2009 amendments. A new Article 8a on strategic planning and coordination is inserted before a much expanded Article 9, into which the concepts of technology and service neutrality are now included. A new Article 9a provides for a review of restrictions on existing rights of spectrum use and the spectrum trading provisions are moved into a more substantial new Article 9b.

In a decision published the same day as the framework amendments, the Commission amended Article 4 of its earlier decision that set up the Radio Spectrum Policy Group (RSPG), in order to provide further mechanisms for Parliamentary participation in spectrum management.²

The advisory body BEREC established as part of the 2009 amendments does not replace existing mechanisms for spectrum-related matters.³ Instead, Member States must continue to cooperate with each other, the RSPG and with the Commission for strategic planning and coordination of spectrum policy under Framework Directive Article 8a(1), taking numerous objectives into consideration. Article 8a(2) calls on them to promote coordination of policy approaches and, where appropriate, harmonised conditions. In addition, new Article 8a(3) permits the Commission to submit legislative proposals ‘for establishing multiannual radio spectrum policy programmes’. These programmes shall ‘set out the policy orientations and objectives for the strategic planning and harmonisation of the use of radio spectrum in accordance with [the framework]’. It remains to be seen what these RSPPs will do – part of the

Table 2 – Spectrum provisions in the Framework Directive

Article	Provisions
8a	Strategic planning and coordination of radio spectrum
9	Management of radio frequencies for electronic communications services
9a	Review of restrictions on existing rights
9b	Transfer or lease of individual rights to use radio frequencies

process was reflected in the Spectrum Summit recently held in Brussels on 22–23 March, a consultation is currently ongoing, and the Commission likely will release the first RSPP in the fall.

The Framework Directive already required Member States to ensure effective management and promote harmonisation through the Radio Spectrum Decision. The revised Article 9 extends these provisions and calls on NRAs to pursue benefits for consumers ‘such as economies of scale and interoperability of services’.

Technology and service neutrality

This sentence from Recital 34 to the Better Regulation Directive defines the basic goals of spectrum management in the amended Framework Directive: ‘Flexibility in spectrum management and access to spectrum should be increased through technology and service-neutral authorisations to allow spectrum users to choose the best technologies and services to apply in frequency bands declared available for electronic communications services in the relevant national frequency allocation plans in accordance with Community law.’

Both principles of technology and service neutrality are set out in revised Framework Directive Article 9(3) and (4) (as described in Recital 34). These two paragraphs require Member States to ensure that all technologies for electronic communications services, and the services themselves, may be used in radio frequency bands.

What does ‘neutrality’ mean?

The general concept of ‘technology neutrality’ was already included in the 2002 framework, as shown by excerpts from the Framework Directive in Table 3.

Table 3

Source	Context	Statement re: Technology Neutrality
Framework Directive 2002/21/EC – Recital 18	E-Communications – 2002 Framework	‘The requirement for Member States to ensure that national regulatory authorities take the utmost account of the desirability of making regulation technologically neutral, that is to say that it neither imposes nor discriminates in favour of the use of a particular type of technology, does not preclude the taking of proportionate steps to promote certain specific services where this is justified, for example digital television as a means for increasing spectrum efficiency.’
Framework Directive 2002/21/EC – Article 8(1)	E-Communications – 2002 Framework	‘Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, in particular those designed to ensure effective competition, national regulatory authorities take the utmost account of the desirability of making regulations technologically neutral.’

In its September 2005 communication on ‘a market-based approach to spectrum management,’ the Commission noted this principle, but recognised ‘that in certain cases the necessary interference management imposes constraints that in practice are more beneficial for one technology than for another’.⁴ The Commission adopted this concept more specifically in its February 2007 communication on Wireless Access Policy for Electronic Communications, or WAPECS.⁵ The 2009 amendments apply these principles, at least at the starting point, to all allocations and assignments of spectrum.

Exceptions to neutrality

Although technology and service neutrality are expressed as the guiding principle for spectrum management, a series of exceptions in the expanded Framework Directive 9(3) and (4) provide broad exceptions to these general requirements. These exceptions are so broad that the cynic would say they swallow the rule, as a policy maker can always find a reason that fits the exceptions.

For instance, one exception to technology neutrality is to avoid harmful interference, in Article 9(3) (a). This type of exception gives carte blanche to avoid neutrality requirements, because spectrum rules are always designed to avoid harmful interference. Another exception in Article 9(3) (c) to ensure technical quality of service (QoS) could be even more important, because QoS should be a higher standard than merely preventing ‘harmful interference’. Harmful interference

represents much more disruption to service than business requirements and subscriber/customer expectations will permit. These and other provisions in the new Article 9 give much running room to regulators to develop exceptions to the technical and service neutrality principles.

Spectrum management particulars

Spectrum Trading

The 2002 Framework Directive Article 9(3) provided that Member States ‘may make provisions for undertakings to transfer rights to use radio frequencies with other undertakings’. The 2009 amendments delete and replace this with an entirely new Article 9b on spectrum trading that requires Member States to permit spectrum trading in bands that the Commission identifies. These Commission decisions will in turn be made through the procedures of the Radio Spectrum Decision.⁶ Member States may allow spectrum trading in other bands or conversely may determine that spectrum trading does not apply where rights of use were initially obtained for free (a provision unlikely to apply to many mobile assignments).

Anti-hoarding

An apparently new concept to prevent hoarding or ‘warehousing’ of spectrum is introduced in Framework Directive Article 9(7). The new article provides that Member States may set rules ‘in order to prevent spectrum hoarding, in particular by

setting out strict deadlines for the effective exploitation of the rights of use...'. This provision is carefully limited by requiring the Member States to take into account 'relevant national circumstances,' but it carries possible harsh penalties by permitting the withdrawal of rights of use.

Amended Authorisation Directive Article 5(6) adds a corresponding provision that NRAs should ensure that frequencies are efficiently and effectively used, and ensure that competition is not distorted by any transfer or accumulation of rights of use.

Better Regulation Directive Recital 71 ties the concept of anti-hoarding rules to effective use of spectrum. These anti-hoarding provisions are more explicit than the 2002 Framework and could have special implications for MNOs in situations where they are awarded spectrum rights and do not use them within the time limits specified in the licence, especially for MNOs who obtain spectrum rights in multiple bands.

Upcoming spectrum awards

The spectrum management map in Table 4 shows the various proceedings that have an impact on spectrum allocations to mobile services. The WAPECs policy, discussed already above, was explicitly adopted to apply

before the spectrum provisions of the 2009 amendments came into play, and is based on flexible allocation policies similar to the 2009 technology and service neutrality requirements. The other instruments and their implementation dates will now operate under the 2009 framework.

When do these rules apply?

The amended framework requires a review of all existing rights of use to make sure they comply with the general framework objectives. These provisions are especially of concern to MNOs who rely on facilities licensed for long-term operation, because it requires all licenses to comply with technology and service neutrality rules within five years from 2011. This long five year phase-in is presumably intended to protect investment by current rights holders whose business plans might be disrupted by a sudden application of the neutrality concepts.

The revised Framework Directive Article 9 on management of radio frequencies (including technology and service neutrality) applies to all rights of use granted after 25 May 2011 – the date by which Member States must implement the revised framework. For those rights of use that are already in place, there is a five year period of review,

Table 4 – Spectrum management map

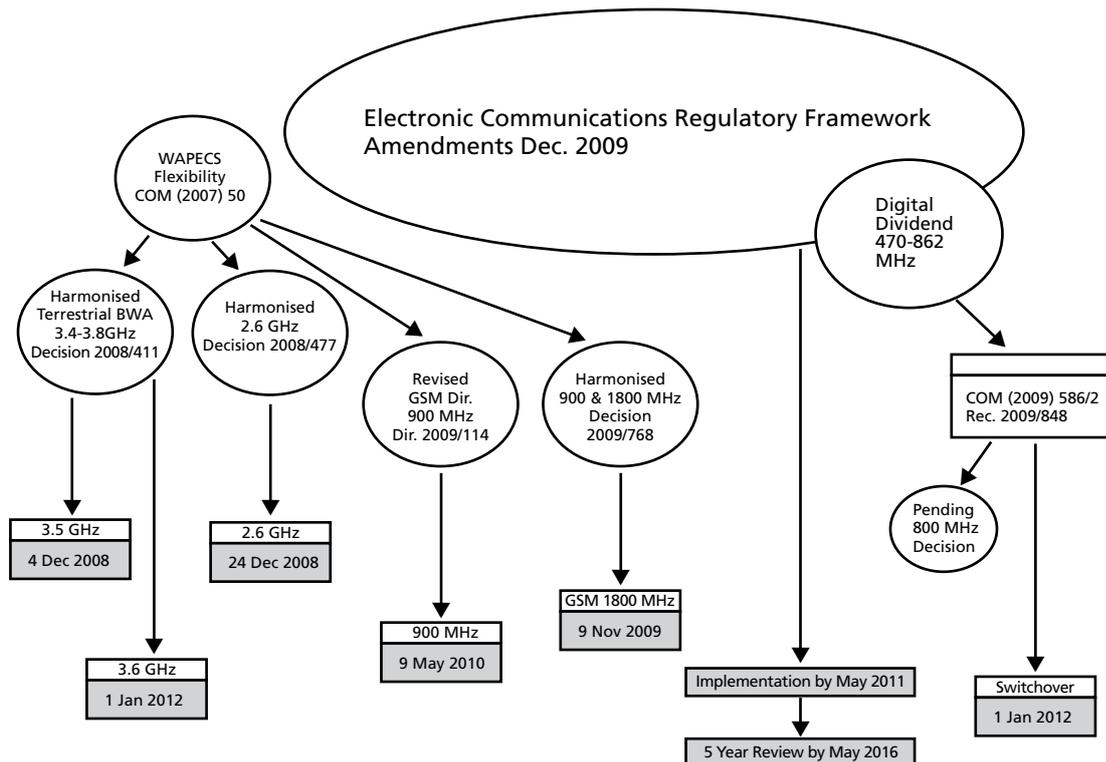


Table 5 – References: the 2009 Amendments

Better Regulation Directive	Directive 2009/140/EC of 25 November 2009 amending [the Framework, Access and Authorisation Directives], OJ L 337/37, 18 December 2009
Consumer Rights Directive	Directive 2009/136/EC of 25 November 2009 amending [the Universal Service and E-Privacy Directives, and Consumer Protection Regulation], OJ L 337/11, 18 December 2009
BEREC Regulation	Regulation (EC) No 1211/2009 of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, OJ L 337/1, 18 December 2009
Internet Freedom Declaration	Commission Declaration on Net Neutrality, OJ L 337/69, 18 December 2009, and also at OJ C 308/2, 18 December 2009

during which a rights holder can ask its NRA for a ruling whether the rights held are indeed neutral. After May 2016, Member States are required take ‘all appropriate measures to ensure that Article 9(3) and (4) on technology and service neutrality apply to all remaining general authorisations or individual rights of use and spectrum allocations...’. The possibility that long-term and critical rights of use will be reviewed under the new Article worries some operators, especially those that rely on long-term financing that could be affected by the uncertainty of the five year review. At a minimum, this provision in Article 9a could initiate licensing reviews of every authorisation granted across the EU to use radio spectrum.

There are other deadlines that apply to review the conditions listed for all authorisations, which add further complexity to the mix.

Summary

The amendments to the framework became effective the day after they were published. Member States have until 25 May 2011,

however, to adopt the laws and regulations necessary to implement the amendments. While the intersection of mobile and spectrum rules create a new possibly flexible system, they also will lead to many regulatory proceedings and changes to rules in the national implementation process. The 2011 implementation deadline gives legal advisors scarcely enough time to appreciate the many changes that will be required.

Notes

- 1 Full official citations to these EU legal instruments are set forth in Table 5.
- 2 Commission Decision 2009/633/EC of 16 December 2009, OJ L 336/50, 18 December 2009.
- 3 See BEREC Regulation Recital 10. The Commission will continue to rely on the RSPG for spectrum consultations and opinions. See, eg, Framework Directive Art. 8a(3) concerning RSPG advice on spectrum multiannual programmes.
- 4 ‘A market-based approach to spectrum management in the European Union,’ COM(2005) 400, 14 September 2005, p 9.
- 5 ‘Rapid Access To Spectrum For Wireless Electronic Communications Services Through More Flexibility (sic),’ COM(2007) 50, 2 February 2007.
- 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 (Radio Spectrum Decision), OJ L 108/1, 24 April 2002.