

Gerry Oberst looks at Brussels proposals for changing the regulatory framework.

European communications rules in play

Brussels officials are reviewing Europe's electronic communications regulatory framework, which has only been in place for a few years. They intend to publish their proposed changes by early 2007, with the aim to make the application of European rules more consistent across the 25 member states and to encourage cross-border communications services.

The European Commission started discussion on these changes early in 2006 with a public workshop in Brussels to air views on the review. In late June it released its current thinking to launch a public consultation that runs to 27 October, after which actual proposals will be released.

As part of the review, the Commission also chose several expert groups to prepare studies to aid the process. Hogan & Hartson was selected to prepare a strategic report on the next steps that might be taken to refine and improve the regulatory structure. Our final report included more than 350 pages and 65 recommendations for the Commission to consider. The Commission published the report at the end of August and referred to it as 'food for thought', suggesting that while the report's recommendations do not bind the Commission, they nevertheless provide a useful contribution to the public debate ahead.

KEY THEMES FOR CHANGE

Just days before the Commission released its June communication, Commissioner Viviane Reding, responsible for information society and media, identified main issues that she said the review should tackle. These included more efficient use of radio spectrum, which has become 'economically strategic in the wireless society'. Further, she wants to improve regulation in general. In other parts of the various Commission papers, the goal of strengthening consumer protection and users' rights is noted.

While these are broad themes, in other places the Commission has appeared to characterise the types of changes it will propose to be 'evolutionary' rather than 'revolutionary', thus keeping the general approach of the current framework intact.

This evolution will apply to the current regulatory framework for electronic communications that the European Parliament and the Council adopted in 2002. The framework is composed of five Directives: the Framework Directive itself, together with

directive on Access, Authorisations, Universal Service and e-Privacy.

Another key element of the framework that the EU adopted in the same 2002 timeframe is a Radio Spectrum Decision that sets procedures for Commission decisions on radio frequencies used throughout the European Union.

Under the cover of the Commission's main themes, there may be numerous areas where the regulatory framework is modified or adjustments are made. A Commission staff paper that accompanied the main Commission communication in June listed almost forty specific proposals, some containing broad brush concepts that will in turn lead to many specific changes.

The end result is that the 'devil will be in the detail'. In other words, the Commission's proposals coming out in December must be scrutinized closely to see to what extent the changes truly are evolutionary, and where some changes might in fact lead to profound differences in the regulatory structure.

MORE EFFICIENT USE OF RADIO SPECTRUM

Commissioner Reding says the total value of services that depend on use of the radio spectrum in the EU already exceeds €200bn, which represents more than 2 per cent of the European GDP. Making more efficient use of this resource is a high political priority and has been discussed in numerous policy making papers over the last few years. Spectrum reform has an immediate impact on any business that depends on wireless technology to reach its customers or run its internal operations.

It may be in this area that the most sweeping changes in the framework arise. For instance, the Commission plans to tighten requirements for licensing spectrum rights, thus decreasing use of licensing in general for spectrum use.

More radically, the Commission has emphasised greater reliance on trading mechanisms for spectrum rights, which takes the choice of who uses spectrum away from regulators and places it into the

market. Commission proposals for change will include terms such as 'flexible' allocations, with emphasis on technology and service neutrality, which again means that regulators would not choose the technology or the services to be provided in spectrum allocations.

One controversial suggestion concerns who should administer these approaches. The Commission has considered a European spectrum regulator, but the alternative, and more likely, approach is to rely on existing the spectrum management committee structure, perhaps with increased authority to harmonise conditions for spectrum use. If the approach of the review is to be evolutionary, then we would put our money on the committee approach being followed for spectrum policymaking. If this is the approach chosen, however, we think there is need for more public participation in the process.

MORE EFFICIENT REGULATION

Under the current structure, the Commission checks the regulations that national authorities apply. The framework requires national regulators to review markets to define which companies hold 'significant market power'. Authorities can subject those companies to *ex ante* regulation, as opposed to relying on competition remedies to cure abusive behaviour on an *ex post* basis.

This system is widely perceived to be cumbersome – the Commission has reviewed over 450 notifications from national authorities thus far, and the overall process is not yet complete. It is most likely that the review will lead to proposals to relax the notification requirements and generally streamline the process. Changes to the process could possibly give more Commission input into the remedies that the national regulators apply. There likely will be proposals to harmonise the appeal procedures that vary widely among the member states and can lead to delays that effectively paralyse the implementation of national regulators' decisions.

Some of the largest communications

companies, generally the former incumbent national telecoms companies, argue that increasing competition in the markets makes it less necessary to apply the remedies set forth in the framework, even at the wholesale level where incumbents are constrained to provide access to competitors for network facilities. So far, the Commission has not appeared favourable to this view – again, we see a more evolutionary approach aimed at making the existing system more efficient rather than any substantial decrease in the regulatory remedies themselves.

What is likely instead is that the Commission will decrease substantially the number of retail markets that are subject to *ex ante* remedies. The Commission says it might cut about a third of the current 18 markets and leave those to competition authorities. This approach would leave most of the big wholesale markets subject to the existing set of remedies, including interconnection requirements and tariff rules.

Mrs Reding struck a provocative note in her speech when she suggested re-examining the remedy of 'structural separation' for dominant operators, requiring them to separate their infrastructure and service arms (similar to the approach BT and the UK regulators adopted). As we noted in our study, this approach may be possible even under the existing framework. But focusing on this option at such a high level is a good signal that reviewing the framework could increase regulatory intrusiveness just as easily as it relaxes burdens.

Another aspect of the framework that is targeted for efficiency goals involves the authorisation of services and networks. The current framework already streamlined the previous overload of national authorisations by listing conditions that regulators can apply to whatever authorisations and rights of use that they require. Nevertheless, the general view is that this process has not led to sufficiently harmonised conditions. Regulators in one country may apply far more intrusive conditions than their counterparts in another member state, even for essentially the same service.

It is also recognised that the existing framework does not provide sufficient regulatory tools at the European level to harmonise national conditions. Current Authorisation Directive art 8 on harmonised assignments of radio spectrum to services is unworkable and Framework art 19 on harmonisation procedures is weak – the latter only permits recommendations that national authorities do not have to obey and it has only been used five times to date.

In response, the Commission will very likely introduce procedures for member states to agree on common requirements and perhaps common selection procedures for networks or services. From one business perspective, this can make for easier pan-European service proposals. From another perspective, it could move decision making away from national regulators, towards a more remote Brussels location. Again, we see a need for any such approach to have more transparent public participation.

Mrs Reding floated the idea of a European Telecom Agency, saying it could work together with national regulators, 'similar to the European System of Central Banks'. We would expect to see this kind of agency strongly opposed by many national authorities. More likely, as even the Commission's own Impact Assessment on the review predicted, is that some combination of existing committee structures will be used to cobble out more harmonised regulatory conditions in the future structure.

Throughout the Commission's discussion, there is reference to harmonising conditions for obtaining market access. The Commission indicates it wants to co-ordinate usage conditions for pan-European services to overcome the extreme variations amongst conditions set by regulators for individual rights of use. Any electronic business that crosses national boundaries – which essentially means almost all IP based services – could benefit from the proposals likely to be introduced in the review.

CONSUMER PROTECTION AND USERS' RIGHTS

This topic covers numerous concepts, ranging from user privacy and security, to dispute resolution, number portability for mobile terminals, and so-called 'eAccessibility' issues concerning the ease with which communications devices can be used by disabled consumers. Under this category are both big picture concepts and highly specific proposals that could affect some market sectors significantly. Again, the devil will be in the details, but we already see some developing specifics that call for comment.

An item that is high on the agenda for the framework review is communications and data security. In this area the Commission already has offered some of its most specific proposals, including a requirement for providers of electronic communications to notify consumers when breaches of security occur. Our study noted that art 4 of the e-Privacy Directive

speaks only in terms of risk of network security breaches and not what happens if there actually is a breach. The European Network and Information Security Agency has recommended that providers give more information to consumers if a breach occurs, and this same approach has been adopted in other countries. Some providers say this approach could result in confusion or a burden on their operations, and we expect to see some targeted comments on the proposal in the October consultation.

The Commission wants to extend and strengthen existing provisions on network security and integrity. This likely includes new powers for national regulators to require information on security policies and to issue binding instructions to providers of electronic networks or services. There also is language in the review on 'future-proofing' network integrity requirements, and perhaps extending requirements beyond traditional public telephone networks to cover mobile and IP networks.

A further change relating to consumers and users suggests that regulators should be able to impose minimum quality of service requirements on all operators, not just those who hold significant market power as under the current framework.

Finally, the Commission staff proposes to create a new committee, representing member states, industry and disabled users, to identify appropriate actions that could address eAccessibility issues.

NEXT STEPS?

This article of course only scratches the surface of the issues that are suggested in the review so far. Anyone tackling this proceeding for the first time is facing a large stack of paper and many different contrasting viewpoints. We expect comments numbering in the thousands of pages to be filed in the October consultation.

While the Commission plans to release concrete proposals by the end of the year, new European rules will likely come into force no earlier than 2009 or 2010, with the inevitable lag time before all EU member states implement revised rules. The new package is supposed to set the ground rules up to 2015 and will affect the entire telecommunications investment context.

The Commission's main webpage for the review is at http://europa.eu.int/information_society/policy/ecommm/tomorrow/index_en.htm

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