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Communications Regulation: Between Infrastructure and Content

Foreword

Audiovisual media services are subject to a wide variety of rules and regulations – some well known, others less so, some specific, others more general, some crucial and others less important. Exactly which rules spring immediately to mind depends on the chosen point of view, just as a mountaineer can appreciate different panoramas from different positions on a mountain peak. This issue of IRIS *plus* looks at aerials, satellite dishes and cable networks, as well as other parts of the infrastructure that is essential for the transmission of information. It considers the rules under which the communications infrastructure is used to "transport" audiovisual content to users. Where do the lawmakers intervene? Where is the market decisive? What role is played by the increasing digitisation of the media?

In short, this IRIS *plus* deals with communications regulation, which connects infrastructure and content.

First and foremost, therefore, it examines the review of the European telecommunications regulatory framework, a subject with which the European Council and Parliament are still grappling. The lead article is as multilayered as the theme itself. Market regulation, spectrum policy, new distribution methods, interoperability, network neutrality, investment protection, "must-carry" obligations, access to information, fundamental rights, universal services and data protection are just a few key phrases linked to the various aspects of communications regulation. Three of these aspects, i.e. market regulation, "must-carry" obligations and access to information, are then examined in greater depth in the "Related Reporting" section. Regarding the last of these aspects, the question of the balance between access to information and copyright law, the views of European lawmakers have differed to such a degree in recent months that the legislative procedure is still awaiting completion. On the other hand, ZOOM concentrates not on legislation, but on the national authorities responsible for regulating the communications market. It lists the institutions which are entrusted with this task in each Member State of the European Audiovisual Observatory and gives details of their homepages, constituent legal instruments and of the main national laws on communications regulation. The legal sources themselves can be found, mostly in English, via the links provided.

Come with us, then, to the top of the mountain of communications regulation and enjoy the clear insights provided by this edition of IRIS *plus*!

Strasbourg, November 2009

Susanne Nikoltchev
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The "Telecoms Review": New Impetus for Audiovisual Media?

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I. Introduction

What is probably the most important EC legislative project of recent years in the field of telecommunications law is nearing its conclusion: in autumn 2009, the Council will once again vote on the draft directives and regulations on the revision of the Community's regulatory framework for electronic communications networks and services. The European Parliament (EP) and Council are unlikely to agree on a final version until the conciliation committee stage. However, it is expected that the measures will be adopted later this year at third reading, following the conciliation procedure.

Although the legislative process is not yet complete, it is not too early to analyse the reforms package. The reforms were only rejected before the summer break because of a single, yet highly controversial issue (details below). In all other respects, however, the Council and EP reached agreement. The manner of the legislative process to date suggests that the newly elected Parliament and the Council, under its new Presidency, will not abandon lightly what has been achieved so far. The following article therefore provides an overview of the impact of the reform package on broadcasting and other audiovisual media,[1] based on the latest version of the relevant legal texts (end of September 2009).

1. Objectives and Progress of the Reforms

It is well known that the first attempts at developing a common regulatory framework in the telecommunications sector date back to the late 1980s and early 1990s. At that time, a series of laws were passed in order to open up the telecommunications markets, which were organised in the form of state monopolies, for competition and ultimately to liberalise them completely. In 2002, a series of legal instruments entered into force, revising the existing legislation and broadening its scope. The "new regulatory framework" consisted of five Directives, a Decision and a Regulation adopted by the EP and Council and a Directive, a Recommendation and a set of

1) For the purposes of this article, "audiovisual media" does not only mean the services defined in Art. 1 (a) of the Audiovisual Media Services Directive (Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, most recently amended by Directive 2007/65/EC, OJ L 332, 18 December 2007, pp. 27–45; hereinafter: AVMSD). It also includes purely audio services and electronic media services that do not meet the aforementioned legal definition because, for example, the distribution of audiovisual content is not their primary purpose or because no editorial control is exercised over them. Regarding the AVMSD, see also: IRIS *Special* "Ready, Set … Go? The Audiovisual Media Services Directive", European Audiovisual Observatory (ed.), Strasbourg 2009.

Guidelines issued by the Commission.[2] The regulations were no longer restricted to telecommunications networks and services, but in principle covered all forms of electronic communication.[3] In accordance with the review clauses contained in the EP and Council Directives, the Commission launched the review of the relevant legal instruments in 2005.[4] On the basis of the results of this groundwork, it submitted its proposals for the amendment of the Directives to the Parliament and Council on 13 November 2007.[5]

The Commission's reforms package includes various proposed amendments, which are contained in three draft texts: firstly, a proposed "Better Regulation Directive" covering the Framework Directive (FD), Authorisation Directive (AuthD) and Access Directive (AccD);[6] secondly, a proposed "Citizens' Rights Directive" concerning the Universal Service Directive (USD) and the Directive on Privacy and Electronic Communications (DPEC);[7] and, thirdly, a proposal for a Regulation establishing a European authority with responsibility for the sector.[8] At the same time as the proposed legislation, the Commission published a Communication on the outcome of the review of the telecommunications regulatory framework[9] and a Communication on the future use of the digital dividend.[10]

According to the Commission, the package of measures – in line with the objectives of the regulatory framework set out in Art. 8, paras. 2 to 4 FD – is mainly aimed at improving market regulation (and thereby creating stronger competition), completing the single market for electronic communications and promoting consumer protection and users' rights.[11]

On the basis of the Commission's proposals, the EP and Council, initially separately and then in consultation with each other and the Commission, considered the planned amendments of the EC regulatory framework for electronic communications. In the end, the EP adopted the re-amended reform proposals at second reading on 6 May 2009. However, as indicated above, the Council did

2) Directive 2002/21/EC (Framework Directive, last amended by Regulation No. 544/2009 – 2nd Roaming Regulation), Directive 2002/20/EC (Authorisation Directive), Directive 2002/19/EC (Access Directive), Directive 2002/22/EC (Universal Service Directive), Directive 2002/58/EC (Directive on Privacy and Electronic Communications, amended by Directive 2006/24/EC on data retention), Decision 2002/676/EC (Radio Spectrum Decision), Regulation 2887/2000/EC on unbundled access to the local loop, Commission Directive 2002/77/EC on competition in the markets for electronic communications services, Commission Recommendation on Relevant Markets of 11 February 2003 C (2003) 497, Commission Guidelines on market analysis and assesment of significant market power under the Community regulatory framework for electronic communications and services (11. July 2002), all (along with subsequently mentioned EC directives and Commission documents) available at: http://eur-lex.europa.eu?RECH_naturel.do
3) See N. van Eijk, "New European Rules for the Communications Sector", IRIS plus 2003-2.
4) See the consultation documents of 25 November 2005 (available at: http://ec.europa.eu/information_society/policy/ecomm/doc/library/public_consult/review/comments/511_25_call_for_input_comp.pdf) and 29 June 2006 (Commission Communication on the review of the EU regulatory framework for electronic communications networks and services, COM(2006) 334, available at: http://ec.europa.eu/information_society/policy/ecomm/library/communications_reports/index_en.htm).
5) The Commission's proposals and links to the documents connected with the ongoing legislative process are available at: http://ec.europa.eu/information_society/policy/ecomm/library/proposals/index_en.htm
6) Proposal for a Directive of the European Parliament and of the Council amending Directives 2002/21/EC, 2002/19/EC and 2002/20/EC, COM(2007) 697. The abbreviated title used here also applies to the subsequent stages of the legislative process.
7) Proposal for a Directive of the European Parliament and of the Council amending Directives 2002/22/EC and 2002/58/EC and Regulation (EC) No. 2006/2004, COM(2007) 698. The chosen abbreviated title also applies to subsequent legislative measures.
8) Proposal for a Regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority, COM(2007) 699.
9) Commission Communication – Report on the outcome of the Review of the EU regulatory framework for electronic communications networks and services in accordance with Directive 2002/21/EC and Summary of the 2007 Reform Proposals, COM(2007) 696, hereinafter: Review Report.
10) Commission Communication – Reaping the full benefits of the digital dividend in Europe: A common approach to the use of the spectrum released by the digital switchover, COM(2007) 700.
11) See Review Report, *op. cit.* (footnote 9), p. 4.

not agree on one crucial aspect. Against the background of national plans[12] for state authorities to block the Internet access of users who committed copyright infringements in the electronic communications sector, the Parliament insisted on the inclusion of a provision under which an end-user's basic rights and freedoms could only be restricted through a court decision. The Council had constantly opposed this idea throughout the negotiations. A compromise reached between the EP rapporteur and the Council's negotiators under the Czech Presidency was rejected by the Parliament's plenary session. As a result, the Council did not give the overall package the necessary approval and it was no longer possible to adopt it during the old legislative period. The Parliament is currently expecting a third reading to take place in mid-December.

2. Importance of the Reforms for Audiovisual Media

In the electronic media field, a clear distinction must be made between the three levels involved in content provision. The first level is the content service itself, which includes the provision of the actual media content; the second is the electronic communications service, which transmits programme signals from the broadcaster to the consumer (and sometimes in the opposite direction as well where interactive services are concerned); and the third level is the underlying infrastructure, i.e. the electronic communications network. The regulations contained in the package of directives dealt with in this article only concern the second and third of these levels. On the other hand, content (services) transmitted via electronic communications networks by communications services are, in principle, not covered by the telecommunications regulatory framework: Art. 1, para. 3 FD states that "content regulation and audio-visual policy" are not affected by these provisions. The Audiovisual Media Services Directive (AVMSD) now provides a Community law framework that extends beyond (linear) television and regulates important content-related aspects of audiovisual media services.

Nevertheless, content services are indirectly or even directly affected by the regulatory framework for electronic communications. For content provision is dependent on the existence of a potential group of users, to whom content is available. This presupposes that both providers and users of such content services can access at least one transmission network via which this content can be carried by a service provider. The purpose of audiovisual media services is to provide programmes via electronic communications networks as defined in Art. 2, lit. a FD.[13]

Virtually all the repercussions that the planned reform of the telecommunications regulatory framework might have for audiovisual media service provision can only therefore be investigated by asking a key question: how do audiovisual and other electronic media services reach their public? This question will be tackled firstly from the perspective of the audiovisual media service provider (see II. in particular) and, secondly, from the point of view of the (at least potential) user of these services (see III. in particular).

The availability of audiovisual content is affected by the planned reform in many different respects. On the one hand, media service providers need access to distribution networks. The EU's future spectrum policy, including the planned use of the digital dividend, will therefore be vitally

12) The so-called "French" model is based on the *Loi Création et Internet*, which was initially adopted in France but subsequently found by the *Conseil constitutionnel* (Constitutional Council) to be partly unconstitutional. Under this law, an independent authority, the *Haute Autorité pour la diffusion des œuvres et la protection des droits sur Internet* (Hadopi), was entitled, in the last of a three-step process, to ban users of electronic communications services who breached copyright rules from using their access service for between three months and a year, and to prohibit them from signing an agreement with an alternative service. The Constitutional Council decided that such a ban infringed the freedom of communication unless it was imposed by a court (see Amélie Blocman, "HADOPI's Power of Sanction Censured by the Constitutional Council", in: IRIS 2009-7:12). A revised law ("Hadopi II") now stipulates that a court must take such a decision, although exclusively on the basis of information provided by the Hadopi. It was adopted by the National Assembly and Senate on 15 and 22 September 2009 respectively (http://www.assemblee-nationale.fr/13/ta/ta0337.asp) and partially confirmed by the *Conseil Constitutionnel* on 22 October 2009 (http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/2009/decisions-par-date/2009/2009-590-dc/decision-n-2009-590-dc-du-22-octobre-2009.45986.html).

13) See Art. 1, lit. a AVMSD.

important for the distribution of audiovisual media services.[14] The revision of the "must-carry" rules in Art. 31 USD will also need to be taken into consideration. In addition, if the network neutrality principle is abandoned, access to infrastructure could be restricted (see III. 2, below) as operators could impose blanket bans on the provision of certain electronic communications services via their networks or reserve them exclusively for selected service providers. Access issues can also affect television companies as a result of interoperability rules, for the use of different norms and standards can obstruct the efficient transmission of TV signals to end-users and the use of additional services (e.g. conditional access systems, APIs or EPGs).[15] The access issue can be a particularly hot topic when vertically integrated companies not only control the communications network, but also use it for their own range of (audiovisual) services. The (functional) separation of these activities provided for in the revised telecoms package (as a last resort) could also help content providers find simpler, cheaper access to transmission services where competition remains distorted. The same applies to the planned regulations on investment protection for operators of new, high-speed networks.

On the other hand, access restrictions can also prevent customers from using content services. Possible exceptions from the network neutrality principle, as well as the non-existence, inadequacy or incorrect application of "must-carry" rules primarily affect the user. They limit the user's freedom of information by preventing them from receiving existing services. The same is true of the aforementioned plans to block network access for people who breach copyright rules: such a ban also prevents the user from accessing content offered lawfully via the network. New rules on the availability and minimum quality of certain (transmission) services and the possible treatment of broadband access services as universal services also emphasise the reception aspect of media use, which is discussed further in section III. Alongside this, the reform package's implications for data protection are briefly described, particularly because content services are becoming increasingly bidirectional or interactive.

Finally, where relevant, reference is made to further legal instruments, legislative plans and (Commission) documents that, although they are not part of the "telecoms review" in its narrowest sense, nonetheless help us to understand the relationship between broadcasting and electronic communications.

II. Access to Distribution Networks

1. Spectrum Policy

The Commission's original reform proposals included plans for the comprehensive harmonisation and liberalisation of radio spectrum management. It explained that technological advances made it necessary to allocate spectrum bands to new, innovative networks and services. More efficient use of the frequencies available for electronic communications therefore seemed necessary. It proposed three main principles, with corresponding instruments, in order to achieve this objective:

- the principles of technology and service neutrality in relation to spectrum use,

- the granting of general rather than individual authorisations,

- the compulsory introduction of trading in spectrum usage rights, at least in certain, predetermined bands.

14) For more detail on this topic see N. Weißenborn, "Broadcasters' Access to Broadcasting Frequencies", IRIS plus 2007-2

15) See K. Merkel/A. Roßnagel/A. Scheuer/S. Schweda, "*Sicherung der Interoperabilität als Ziel der Regulierung der Rundfunkübertragung, Studie im Auftrag des Bundesministeriums für Wirtschaft und Technologie*", May 2009, available at: http://www.bmwi.de/BMWi/Navigation/Technologie-und-Innovation/Telekommunikation-und-Post/telekommunikationspolitik,did=303108.html

The indiscriminate application of these proposals to broadcast distribution networks and services would ultimately have resulted in the member states having very little influence on the actual use of a frequency that had (originally) been reserved for broadcasting. As a result, the special position granted to broadcasters for cultural and pluralistic reasons, which had, until that point, included exemption from the obligation to pay for spectrum use, for example, was at risk of being lost. Numerous statements made on behalf of interested parties from the broadcasting sector during the consultation phase had therefore warned against the negative effects that the excessive liberalisation of spectrum use might have on broadcasting. The current proposals counter these concerns by providing for exceptions designed to promote cultural and linguistic diversity and media pluralism.

a) Strategic Planning and Coordination of Spectrum Policy

Through its proposals for the regulation of strategic planning and coordination of spectrum policy at European level, the EP hopes to promote far-reaching "coordination and, where appropriate, harmonisation at Community level". This should ensure "that spectrum users derive the full benefits of the internal market and that EU interests can be effectively defended globally… Where appropriate, legislative multiannual radio spectrum policy programmes should be established to set out the policy orientations and objectives for the strategic planning and harmonisation of the use of radio spectrum in the Community."[16] In addition, the Commission – taking utmost account of the opinion of the Radio Spectrum Policy Group (RSPG), may submit legislative proposals to the EP and Council (see Art. 8a, para. 3 FD-D).

Although the EP recognises that "spectrum management remains within the competence of the Member States",[17] the tendency to bring spectrum policy under EU control, which had been criticised by the Council during the legislative process, has continued. The member states are obliged to cooperate "with each other and with the Commission in the strategic planning, coordination and harmonisation of the use of radio spectrum", taking into consideration, *inter alia*, aspects of "public interest, freedom of expression…as well as the various interests of radio spectrum user communities" (Art. 8a, para. 1 FD-D). In this way, spectrum use should be optimised and harmful interference avoided.

Compared to the current legal situation, this does not necessarily mean that the broadcasters' own position will be weakened, since content service providers themselves will have an interest in a coordinated spectrum management process. The adequate protection of their related interests is now enshrined in the proposed Directive, which mentions aspects of the public interest and freedom of expression. Art. 9, para. 1 FD-D provides member states with a model for the "effective management of radio frequencies". However, they must take "due account of the fact that radio frequencies are a public good that has an important social, cultural and economic value". This passage was added by the EP at first reading in order to emphasise that broadcasting should be regarded not only as an economic good but also as a cultural one.

b) Technology and Service Neutrality

The current version of Art. 8, para. 1, sub-para. 2 FD sets out a general obligation for national regulatory authorities (NRAs) to make electronic communications regulations **technologically neutral.**[18] This means that electronic communications networks and services should, as far as possible, be regulated regardless of the technology on which they are based. However, this does not preclude the promotion of specific services "where this is justified"; Recital 18 FD expressly mentions digital television as an example.

16) See proposed "Better Regulation Directive", *op. cit.* (footnote 6), Recital 21. Unless otherwise indicated, quoted provisions of the proposed directives (each time with the suffix "–D" in the abbreviated title of the directive) and quoted recitals from the proposed "Better Regulation" and "Citizens' Rights" Directives refer to the version adopted by the European Parliament at second reading on 6 May 2009.
17) See proposed "Better Regulation Directive", *op. cit.* (footnote 6), Recital 21.
18) In the current version of the draft, the member states themselves are also obliged to take into account the need for a technologically neutral approach, see Art. 8a, para. 1, sub-para. 2 FD-D.

In addition, according to the reform proposal this obligation shall only apply "unless otherwise provided for in Article 9 regarding radio frequencies". Art. 9, para. 3 FD-D is therefore a *lex specialis* in relation to Art. 8, para. 1, sub-para. 2 FD-D and takes precedence – including the exceptions listed in Art. 9, para. 3, sub-para. 2 FD-D – where spectrum management is concerned. Art. 9, para. 3 FD-D requires the member states to ensure that "all types of technology used for electronic communications services may be used in the radio frequency bands" that are available for such services. Exceptions to this rule are mainly based on technical factors, such as the need to avoid interference or damage to health, to ensure technical quality of service or to safeguard efficient use of spectrum (see Art. 9, para. 3, sub-para. 2 FD-D). However, a restriction for the use of certain technologies may also be allowed if it is necessary to ensure "the fulfilment of a general interest objective in accordance with paragraph 4" (see Art. 9, para. 3, sub-para. 2, lit. f FD-D).

Art. 9, para. 4, sub-para. 1 FD-D contains another principle that only applies to rules on spectrum use. It requires member states to ensure that "all types of electronic communications services may be provided in the radio frequency bands" that are available for them. Member states may make provision for restrictions of this so-called **service neutrality** principle in order to ensure the fulfilment of a general interest objective. For example, Art. 9, para. 4, sub-para. 2 FD-D provides examples including the protection of human life (lit. a) and "the promotion of cultural and linguistic diversity and media pluralism, for example by the provision of radio and television broadcasting services" (lit. d). This explicit reference to radio and television services follows widespread criticism from broadcasters and terrestrial broadcasting network operators, who thought the previous wording left too much room for interpretation.

Even if, in order to meet general interest objectives, member states require certain services to be provided in certain frequency bands, this does not mean that these services should have exclusive use of the bands allocated to them. It is merely stipulated that they should be given priority over other services or technologies (Recital 28, last sentence; so-called "primary use"). Under the proposed reforms, exclusive spectrum allocation should remain the exception, in order to increase the efficiency of spectrum use. In principle, only "safety of life" services should be granted such exclusive use (Art. 9, para. 4, sub-para. 3 FD-D). After fierce protests by representatives of the broadcasting sector, the Council, in its common position, introduced a version that was only slightly amended by the Parliament at second reading, allowing member states to grant exclusive use "exceptionally" to fulfil other general interest objectives. Recital 29 expressly recognises, in this connection, that it lies within the competence of the member states "to define the scope and nature of any exception regarding the promotion of cultural and linguistic diversity and media pluralism". Therefore, the principle of service neutrality – unlike in the Commission's proposals of 13 November 2007 and 6 November 2008 – no longer prevents member states from allocating a frequency band for exclusive use by broadcasters.

c) General Authorisations

Many of the frequencies available for electronic communications are still permanently assigned to specific services, partly in order to ensure that services use the band most suitable for their purposes for technical reasons (such as wave characteristics, for example). However, under existing provisions, the use of radio frequencies should, where possible, be based on so-called general authorisations (Art. 5, para. 1 AuthD). A general authorisation is a generally established legal framework for the granting of rights of use (see Art. 2, para. 2, lit. a AuthD). This system should simplify spectrum use by removing the need to undergo a lengthy authorisation process in order to obtain an individual right of use (individual authorisation). For example, a company which has established that it fulfils the general conditions for using a frequency for its services or networks can begin to use that frequency without the need for further checks by a third party, such as an official authority. However, since the Commission thought that general authorisations were used too rarely, it proposed an amendment to the wording of the Authorisation Directive in order to emphasise the exceptional nature of individual rights of use (individual authorisations). In particular, it concluded by naming the reasons that could justify the granting of individual authorisations in the future, i.e. "to avoid harmful interference" and "to fulfil other objectives of general interest". After adding two further exceptions and slightly amending the wording, the EP has now approved this proposal at second reading.

The granting of frequency usage rights to providers of radio and television broadcast content services is dealt with in Art. 5, para. 2, sub-para. 2 AuthD-D. Under this provision, rights should be granted through open, objective, transparent, non-discriminatory and proportionate procedures without prejudice to specific national criteria and procedures.[19] Sentence 2 in particular stipulates that exceptions to the requirement of open procedures may apply in cases where the granting of individual frequency usage rights is necessary to achieve a general interest objective. In other words, individual authorisations may continue to be granted to broadcasters in the future as long as, in the context of audiovisual media, the primary reason for doing so is to promote cultural and linguistic diversity and media pluralism.

d) Frequency Trading

Where individual frequency usage rights are granted, Art. 9b FD-D sets out rules under which these rights may be transferred or leased to other undertakings in certain frequency bands, to be specified by the Commission. The member states can allow additional frequencies in other bands to be traded. This proposal is designed to strengthen competition in the electronic communications sector. Current provisions do not, in principle, prohibit trading in frequency usage rights. However, it has so far been the sole responsibility of the member states to decide whether and for which bands such trading should be permitted.

Under Art. 9b, para. 2a, sentence 2 FD-D, frequencies which are used for broadcasting are expressly excluded from the Commission's right to identify bands for which rights may be traded. If necessary, the member states can authorise the transfer or lease of usage rights in these bands. This wording, which was not included in the draft until the EP's second reading, is designed to counter fears expressed during the consultation process that, in the fight for frequencies, broadcasters might lose out to telecommunications companies, which were financially stronger, and be denied access to important transmission networks for ever.

e) Review of Granting of Individual Usage Rights

Art. 5, para. 2, sub-para. 5 AuthD-D contains a clause under which individual usage rights granted for 10 years or more must either be changed into a general authorisation or made transferable or leaseable in accordance with Art. 9b FD-D, if the competent national authority finds that the criteria for granting the rights are no longer applicable. In order for it not to come as a total surprise for the licence-holder concerned, any change should take place "subject to prior notice and after a reasonable period of time".

f) Scope of Exception Clauses

It should be noted that the wording of the aforementioned exceptions that can be granted to broadcasters does not clearly indicate whether they also apply to frequencies that have not traditionally been used for the distribution of broadcast services. These provisions are currently most relevant to analogue and digital (DVB-T in the television sector) terrestrial signal transmission. In principle, however, they may also apply to networks suitable for mobile television reception (such as via DVB-H or UMTS) and other frequencies via which television services (such as IPTV) can also be transmitted wirelessly (e.g. satellite DSL or WLAN-/WiMAX services). Even Internet TV services (webcasting), which can also be transmitted via broadband Internet services, could be included. It is therefore necessary to ask how a meaningful distinction can be made, so that a relevant part of the frequency bands available for electronic communications is not ultimately included in the exceptions made for broadcasters. It seems conceivable to take into account the rules contained in the ITU's Radio Regulations defining the extent to which certain frequency bands are allocated for use by broadcast services – rules that are binding on member states under international law.

19) See proposed "Better Regulation Directive", op. cit. (footnote 6), Recital 53, last sentence.

2. Broadband as the New Distribution Channel for Broadcasting

The increase in broadband (DSL) connections appears to have two opposing consequences for audiovisual media: on the one hand, the additional need for frequencies for wireless broadband access networks – particularly during the sharing out of the digital dividend – limits the spectrum available for the terrestrial distribution of television signals. On the other, it is becoming clear in convergent networks that IP-based services, typically offered via broadband networks, have enormous potential for the transmission of television and other forms of audiovisual content. An additional method of audiovisual media transmission could therefore become available in areas which previously had little or no access to wired networks due to their geographical location or small population.

From the audiovisual sector's point of view,[20] it is therefore difficult to say which parts of the spectrum freed up by the switchover from analogue to digital terrestrial television should be used for what purposes in the future. When it published its reform proposals for the telecommunications regulatory framework, the Commission also issued a Communication on the use of the digital dividend,[21] which suggests dividing the 470–790 MHz band into three clusters: one allocated primarily to "fixed broadcasting services" and the others to mobile multimedia services, and fixed and mobile broadband access services.

Regardless of how the digital dividend is used, increasing broadband provision as a whole (i.e. including wired broadband communication and broadband access in other frequency bands[22]) is an objective of the i2010 initiative, under which the Commission has taken various measures. In its Communication of 20 March 2006 on bridging the broadband gap,[23] it explained how the provision of broadband infrastructure in rural areas can be supported. As well as "more active" application of the telecommunications regulatory framework and its regulatory instruments, possible strategies particularly include national support measures and the use of EU funds from the Structural Funds and Rural Development Fund.[24] The Commission's European Economic Recovery Plan is setting aside additional funds totalling EUR 1 billion for this purpose. On 17 September 2009, the Commission also published guidelines on the application of EU aid rules to the financing of broadband expansion.[25]

3. Interoperability of Networks and Services

The reform proposals also include suggestions on improved support for the interoperability of electronic communications services.[26] Some of these ideas were introduced during the legislative process, such as the amendment in Art. 9, para. 2 FD-D. Under this provision, member states should promote the harmonisation of frequency usage not only, as before, in order "to ensure effective and efficient use thereof", but also now to benefit the consumer. "Interoperability of services" is mentioned as one such benefit.

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20) The use of the so-called "800MHz spectrum" (790–862 MHz), which is being freed up by broadcasters in many countries during the digitisation process, by mobile broadband services may trigger various problems: firstly, it is feared that interference will occur with television (broadcast) services distributed below this frequency band, even those carried via cable networks. The "production side" is also affected, in relation to both the use of so-called "ancillary services" (*Services Ancillary to Broadcasting* (SAB), *Services Ancillary to Programme Making* (SAP)) and technology at events (*Programme Making and Special Events* (PMSE)) such as concerts, theatre, etc.

21) See COM(2007) 700, op. cit. (footnote 10).

22) On 27 July 2009, the Council followed the EP in approving a directive under which the 900MHz band, which was previously reserved for GSM networks, is opened up for use by UMTS and other pan-European electronic communications services, such as mobile Internet. The directive should enter into force in October 2009; see Commission press release of 27 July 2009, available at:
http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1192&format=HTML&aged=0&language=DE&guiLanguage=en

23) Commission Communication: "Bridging the Broadband Gap", COM(2006) 129.

24) See also Commission Communication: "Better access for rural areas to modern ICT", COM(2009) 103.

25) Community Guidelines for the Application of State aid rules in relation to rapid deployment of broadband networks, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:235:0007:0025:EN:PDF

26) The European standardisation processes required for interoperability are discussed in a White Paper on the modernisation of ICT standardisation in the EU, published by the Commission on 3 July 2009 (COM(2009) 324).

In the same way, measures that NRAs can take under Art. 5 AccD regarding undertakings, regardless of whether they have significant market power, were extended from the possibility of imposing access or connectivity obligations (Art. 5, para. 1, sub-para. 2, lit. a and b AccD) to imposing obligations to make services interoperable (see Art. 5, para. 1, sub-para. 2, lit. ab AccD-D). These can be imposed on undertakings that control access to end-users "in justified cases and to the extent that is necessary". This additional provision ensures that NRAs have the necessary authority to fulfil the task set out in Art. 5, para. 1, sub-para. 1 AccD.

4. Investment Protection for Infrastructure Operators

After a lengthy dispute between the Commission and Germany[27] over the possibility of exempting new markets from regulation, the proposed reforms provide clarity on this subject for the future. As before, exemptions for individual (new/developing) markets from sector-specific regulation (so-called "regulatory holidays") will be prohibited. Also, when investing in innovative technologies, companies must, in principle, grant to their competitors access to corresponding networks and services. However, under Art. 8, para. 5, lit. d FD-D, "appropriate" account must be taken of the investment risk (see also Art. 12, para. 2, lit. c AccD-D). In concrete terms, this means that such risks must be taken into account when calculating the cost of granting access. However, how this should be achieved is not specified. The second half of the sentence in particular expressly provides for the possibility of permitting "various cooperative arrangements between investors and parties seeking access to diversify the risk of investment", although in doing so the NRA must ensure "that competition in the market and the principle of non-discrimination are preserved". These provisions give NRAs a certain degree of freedom to lay down relevant competition rules.

For providers of audiovisual media content, this means that infrastructure operators are not allowed to prevent competitors from using their high-speed networks and to distribute only their own services. Under these rules, the IPTV platform of a vertically integrated company may no longer be the only one whose services can be offered via the company's own high-speed network. Other providers' IPTV services must be granted equal access to the high-speed infrastructures; in return, however, competing providers may be obliged to carry part of the investment risk.

5. New Market Regulation Provisions

The regulatory framework for electronic communications contains a considerable amount of sector-specific competition law. The regulations are based on the assumption that competition in this sector is not yet fully established, since before the telecommunications markets were opened from 1998 onwards, there was a (usually state) telecommunications monopoly in the member states that has not yet been completely dismantled. The transition from monopoly to competition was meant to be achieved through a controlled market liberalisation process, which under the current rules takes the form of (often *ex ante*) sector-specific regulation. The market behaviour of companies with significant market power (mainly former monopolists) is therefore monitored in advance by the NRAs. In 2003, the Commission specified which markets are susceptible to *ex ante* regulation in a Recommendation issued in accordance with Art. 15 FD.[28] The measures that can be taken if a market is categorised as requiring (*ex ante*) regulation include all regulatory instruments available under the Directives of the telecommunications regulatory framework. For example, providers of transmission services with considerable market power in the wholesale market for "broadcasting transmission services, to deliver broadcast content to end users" (market no. 18 in the Recommendation) may be subject to transparency obligations, requiring them to publish certain

27) The opinion of Advocate General Poiares Maduro supports the Commission's view that Germany infringed Art. 7, para. 1 and Art. 8 FD, Art. 8, para. 4 AccD and Art. 17, para. 2 USD by adopting the disputed national legislation. The opinion of 23 April 2009 in case C-424/07, Commission v Germany, is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007C0424:EN:NOT

28) See Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC, C(2003) 497, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:114:0045:0049:EN:PDF

information, such as technical specifications, network characteristics, terms and conditions for supply and use, and prices (see Art. 9, para. 1 AccD). Price control, including the need for transmission service prices to be cost-oriented, can also be imposed.

On account of the rapid development of competition in the telecommunications markets, the Commission adapted its Recommendation on 17 December 2007.[29] The new version drastically reduces the number of markets that the Commission believes are susceptible to *ex ante* regulation from 18 to seven. The aforementioned "market no. 18" is among those no longer susceptible to *ex ante* regulation.

The Commission believes that, as a result of the digital switchover, significant changes are under way in the wholesale market for broadcast transmissions, changes which are reflected in a rise in the number of competing transmission platforms. As a result, the second criterion for a market susceptible to *ex ante* regulation[30] is no longer met. The Commission also points out that problems in obtaining access to transmission services in the wholesale market can be solved by means of the "must-carry" rules[31] (Art. 31 USD), as long as the transmission serves general interest objectives. In the Commission's view, this, together with the provisions of general competition law, is sufficient to ensure a functioning wholesale market. Additional *ex ante* regulation is therefore no longer necessary.

NRAs can adopt a completely different view where their national markets are concerned. However, if this is the case, they must submit their draft regulations to the Commission and the other NRAs in accordance with the so-called "Article 7 procedure".[32] In addition, if *ex ante* regulation is to continue, a new market review must be carried out; the NRA must give reasons for any decision to keep such regulation in place.[33]

Mention should also be made of another instrument created as part of the reform package, which could counteract problems of access to transmission services. According to Art. 13a AccD-D, in cases of "important and persisting competition problems and/or market failures identified in relation to the wholesale provision of certain access product markets", member states can require vertically integrated companies to place activities related to the provision of access products in an independently operating business entity (so-called "functional separation"). For such a measure, an extensive procedure must be completed, including submission to the Commission of a detailed proposal and a draft measure and, following the Commission's decision on the draft measure, a coordinated market analysis (see Art. 13a, para. 3 and 4 AccD-D). The obligation of functional separation can – and should[34] – therefore only be imposed in exceptional cases, as a last resort when a vertically integrated company persistently distorts competition.[35]

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29) Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC, C(2007) 5406, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:344:0065:0069:EN:PDF

30) Recital 5 of the Recommendation lists three criteria which must be fulfilled cumulatively if a market is to be considered susceptible to *ex ante* regulation. Firstly, non-transitory barriers to entry must exist. Secondly, the market must not tend towards effective competition within a relevant time horizon. Thirdly, competition law alone must not adequately address the market failure.

31) See IRIS *Special* "To Have or Not to Have – Must-carry Rules", European Audiovisual Observatory (ed.), Strasbourg 2005, and: A. Scheuer/S. Schweda, "Progress in the Must-offer Debate? Exclusivity in Media and Communication", IRIS *plus* 2008-10.

32) This opportunity has been taken in some member states. For example, measures taken in France and Spain have been approved by the Commission, while there are plans to regulate a large network operator in Sweden; see C. Mohrmann, "*EU: Kommission zum Rundfunkübertragungsmarkt*", Multimedia & Recht 8/2009, S. XVI, available at: http://rsw.beck.de/rsw/shop/default.asp?sessionid=CD17B4A71D194C97A74A6DD214790728&docid=285821

33) See Explanatory Note on the Recommendation, SEC(2007) 1483 final, p. 50; available at: http://ec.europa.eu/information_society/policy/ecomm/doc/library/proposals/sec2007_1483_final.pdf. However, the Commission hopes to simplify the notification procedure for such cases in future and, "in principle", remove the need for it to submit comments; see Recital 16 of the Commission Recommendation of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC, C(2008) 5925; available at: http://ec.europa.eu/information_society/policy/ecomm/doc/library/recomm_guidelines/article7/art7en.pdf

34) See also Recital 46 of the proposed "Better Regulation Directive", *op. cit.* (footnote 6).

35) Concerning the distinction between functional separation and other forms of separation of vertically integrated companies, see the short study by the EMR for the Committee of the Regions, *Review of the Electronic Communications Regulatory Framework*, January 2008, pp. 21 ff.; available at: http://www.emr-sb.de/news/EMR_AdR-TK-Review_16012008_final.pdf

III. Access to Reception

1. General Access to Information

Access to the information transmitted via electronic communications networks and services is protected by the European Convention on Human Rights (ECHR), the fundamental principles of which must also be upheld by the EU institutions (see Art. 6, para. 2 EU Treaty). According to Art. 10, para. 1, sentence 2 ECHR, the right to freedom of expression includes the freedom to receive and impart information and ideas without interference by public authority. In a similar way, Art. 11, para. 1, sentence 2 of the Charter of Fundamental Rights of the EU (EU Charter) stipulates that the right to freedom of expression includes the freedom "to receive and impart information and ideas without interference by public authority…".

2. Network Neutrality and Access Restrictions

The concept of "network neutrality" is not defined as a principle within the current EU regulatory framework.[36] Attempts to define it have been made as part of the telecoms reform package. In a similar way to the "net freedoms" defined through a similar approach by the US regulatory body, the FCC,[37] the proposals are based on a concept of network neutrality considered primarily from an end-user perspective. In order to protect the rights of end-users, certain obligations are imposed on providers. In relation to the fundamental rights mentioned under 1., above, the EP proposes in Art. 8, para. 4, lit. g FD-D that NRAs should promote "the ability of end-users to access and distribute information or run applications and services of their choice".

Art. 22, para. 3 USD-D should, for the first time, make it possible to lay down minimum quality of service requirements for public network operators. This provision is particularly designed to stop operators from deliberately reducing the quality of their electronic communications services in order to prevent or make unattractive the use of certain applications, for example by artificially slowing down data traffic for certain transmission protocols. Such obstructions are often blamed on insufficient bandwidths or the increased cost of carrying large quantities of data. However, strong competition-related interests often lurk behind restrictions that are allegedly imposed for (purely) technical reasons. This is sometimes the case, for example, where services or applications are provided by the network operator itself. Fixed network telephony services, for example, are facing increasing competition from *Voice-over-IP* services, which can ultimately be carried via DSL on the same electronic communications network. A similar situation exists in the mobile telephony sector. Audiovisual services may also be deliberately obstructed if, for example, a company tries to force services competing with a (closed) IPTV service, transmitted via its own DSL network, off the (open) Internet (e.g. Zattoo or Livestation, or video-on-demand services such as Joost or media libraries of television companies). The provision of Art. 22, para. 3 USD-D is meant to prevent this kind of (hidden) restriction of competition. In their contracts with users, network operators and service providers must, according to Art. 20, para. 1, lit. b, 3rd hyphen USD-D, specify the minimum service quality levels offered in a clear, comprehensive and easily accessible form.

Technical limitations can be used as a reason not only to slow down access to or use of services and applications to an unreasonable level, but also to completely block such access or use. Such restrictions will still not be prohibited in the future.[38] The Commission assumes that they do not generate any unfavourable effects on competition as long as the user can choose between a number of different infrastructures and services (it is presumed that there are relevant differences between

36) The concept of network neutrality is commonly understood to mean when a particular network transmits all the data that it receives to the recipient under the same conditions, regardless of its content. A definition developed by the FCC for the concept of "net freedoms" could also be helpful. This currently contains four rights granted to users. The FCC Chairman is planning to add two further rules, which also take account of the point of view of content and application providers.

37) For current developments in the USA, see the measures planned by the Chairman of the Federal Communications Commission (FCC): http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293568A1.pdf

38) Art. 1, para. 2a, sentence 1 USD-D expressly states that the USD itself neither mandates nor prohibits restrictions on access to or use of services or applications.

the services offered by different providers). Users must simply be informed of these restrictions, both when concluding the initial contract (see Art. 20, para. 1, lit. b, 2nd hyphen USD-D) and when subsequent changes are made (see Art. 21, para. 3, lit. b USD-D). With regard to access and interconnection obligations, companies with significant market power can also be forced to make such conditions public (see Art. 9, para. 1 AccD-D). Restrictions imposed on this basis under national law must comply with (other) EC law.

Some member states (such as France[39] and the United Kingdom[40]) have taken matters even further by attempting to restrict the use of electronic communications networks and services by individuals who have repeatedly committed offences, such as copyright infringements, via these networks and services.

In this connection, under Art. 21, para. 4, lit. a and Art. 20, para. 1, sentence 3 USD-D, member states can require network operators and service providers to inform their users about forms of unlawful activity. Infringements of intellectual property rights are particularly mentioned. For this purpose, telecommunications companies can, under Art. 33, para. 3 USD-D, cooperate with sectors interested in the "promotion of lawful content" in electronic communications networks and services.

In order that citizens' fundamental rights and freedoms are still protected when access or use restrictions are imposed, either generally or individually, to punish a user's unlawful activities, the EP, at second reading, introduced a proposed amendment in Art. 1, para. 2a, sentence 2 USD-D. This provision states that, where access or usage restrictions are imposed – either generally or individually to punish a user's unlawful activities – the fundamental rights and freedoms of citizens must be respected. Recital 22a of the proposed "Citizens' Rights Directive" explicitly states that network operators are not required to monitor information transmitted over their networks or to bring legal proceedings. Throughout the legislative process, considerable controversy has surrounded a proposal to add Art. 8, para. 4, lit. h FD-D, which was introduced at first reading but rejected by the Council and then reinstated at second reading. Under this proposal, the fundamental rights and freedoms of end-users may not be restricted without a prior ruling by a judicial authority. *Post factum* review may only be chosen in cases where public security is threatened. National plans to block Internet access for copyright offenders particularly led the EP to demand that such a step should always be preceded by court proceedings. It argued that the freedom of expression and information in particular (Art. 10 ECHR, Art. 11 EU Charter) could be affected by such a ban, since electronic communications networks and services were also used for purposes other than unlawful activities – a view that was confirmed by the French Constitutional Council.[41]

3. Easier Access through Interoperability of Services and Consumer Equipment

Until now, all digital television receivers have had to be able to decode signals scrambled using the European "common scrambling algorithm" (CSA).[42] Under a proposed amendment to Annex VI USD, this ability to unscramble digital television signals is only required of consumer equipment intended for the reception of "conventional" signals. Conventional signals are understood to mean those broadcast "via terrestrial, cable or satellite" and "primarily intended for fixed reception" (see Annex VI no. 1 USD-D). The new wording is particularly designed to exclude mobile television and

39) See footnote 12.
40) See the recent comments from British Business Minister, Lord Mandelson, concerning the announcement of a new bill; http://www.dailymail.co.uk/news/article-1206901/Mandelson-launches-crackdown-file-sharing—just-days-meeting-record-producer.html. See also report on "Digital Britain", IRIS 2009-8:14.
41) In its Decision no. 2009-580 of 10 June 2009, the *Conseil constitutionnel* ruled that the right to freedom of expression under Art. 11 of the Declaration of the Rights of Man and the Citizen includes the right to free access to public online communication services (Recital no. 12).
42) Regarding this and the technical principles behind the digitisation of audiovisual services, see A. Scheuer/M. Knopp, "Digital Television Glossary", supplement to: IRIS *Special* "Regulating Access to Digital Television", European Audiovisual Observatory (ed.), Strasbourg 2004.

IPTV transmission services from the scope of the provision. However, the wording is flawed on several counts. Firstly, the definition of a "conventional" digital TV signal is hardly convincing: a "terrestrial" signal can also be used to transmit mobile television services, while cable may also be used for new transmission methods (based on Internet protocol, for example). It also remains unclear under what criteria a signal "primarily" intended for fixed reception should be distinguished from one primarily intended for mobile reception. However, if the transmission standards used (DVB-T, DVB-C, DVB-S2, etc.) were specifically named, there would be sufficient clarity, at least for the systems in common use today, although this would only serve to make the real problem clearer, i.e. the fact that the exemption rule goes against the principle of technology neutrality without adequate justification.

Already the Commission's early drafts contained an addition to Art. 18, para. 1 FD, with a new lit. c requiring member states in future to ensure that "providers of digital TV services and equipment…cooperate in the provision of interoperable TV services for disabled end-users".[43] This amendment, which is still contained in the current proposals, is designed to help meet one of the objectives of the reforms, i.e. "an inclusive information society" (Recital 3, sentence 3, proposed "Better Regulation Directive").

4. "Must-carry" Obligations

According to Art. 31 USD, member states can impose reasonable "must-carry" obligations on operators of electronic communications networks used to transmit radio and television broadcast channels. Under the proposed reforms, these obligations will in future apply not only to the transmission of radio and television broadcast channels themselves, but also to complimentary services. Art. 31, para. 1, sentence 1 USD-D states that such services include "particularly accessibility services to enable appropriate access for disabled end-users". This is designed to contribute further to the creation of an inclusive information society (see Recital 3 of the proposed "Better Regulation Directive"). Recital 38 of the proposed "Citizens' Rights Directive" mentions videotext, subtitling, audio description and sign language as examples of such services. On the other hand, the proposed reforms do not produce any substantial changes in this area. Reference should be made to ECJ case-law on the form of "must-carry" obligations.[44]

5. Broadband Access: a Universal Service Obligation?

Broadband access to electronic communications networks is vitally important for the provision of content services that require a high data transmission rate. For audiovisual media services in particular, the quantity of data transmitted remains very high in spite of rapid advances in compression techniques; this is particularly true of future-oriented high-resolution picture formats such as HDTV. The success of these media services may therefore be heavily dependent on the extensive availability of high-speed access to suitable (particularly IP-/packet-based) transmission networks. In this context, it is therefore necessary to consider whether access to broadband technologies should be the subject of a universal service obligation.

Such an obligation would need to be defined in Art. 4 ff. of the USD. The reforms package does not include any relevant changes in this respect. However, this theme is the subject of a separate consultation process, launched by the Commission in autumn 2008 in its Communication under Art. 15 USD on the second periodic review of the scope of universal service. The Communication refers to a higher penetration level for broadband Internet access, but at the same time stresses the differences that still remain between and within the member states. In total, less than half of

43) See also the need to promote access to audiovisual media services for people with a visual or hearing disability in Art. 3c (and Recital 64) AVMSD.

44) See in particular ECJ, C-336/07, judgment of 22 December 2008, case C-336/07, *Kabel Deutschland v. Niedersächsische Landesmedienanstalt*; ECJ, judgment of 13 December 2007, C-250/06, *United Pan-European Communications Belgium and others v. Belgium*; available at: http://curia.europa.eu

EU households with Internet access used a broadband connection, meaning that the first of the criteria listed in Annex V section 2 USD for the inclusion of a service in the list of universal services was not fulfilled. However, coverage was approaching that level. In addition, the Commission thought that narrowband transmission rates would soon no longer be sufficient to permit "functional internet access", which was part of the universal service obligations laid down in Art. 4, para. 2 USD.[45]

The Commission therefore hopes that the consultation will, among other things, produce answers to the question whether, in future, a new interpretation of the concept of functional Internet access, adapted to these developments, would be advisable. The definition of a new universal service for broadband access would then no longer be necessary. The Commission does not rule out the possibility that the market could develop as dynamically as the mobile communications market, making additional regulatory measures unnecessary. If this does not materialise, the Commission asks for opinions on what advantages and disadvantages such a universal service obligation would have compared to other policy instruments[46] for implementing a "broadband for all" policy, and what it would look like in practice. The Commission hopes to publish a summary of the results in the form of a Communication later this year. If, on the basis of these results, an amendment of the USD proves necessary, it will be able to make the relevant proposals in 2010.

6. Data Protection in Bidirectional Television/Interactive Audiovisual Media Services

Specific data protection issues were more or less irrelevant to traditional unidirectional broadcasting. Although information distributed by the broadcaster was subject to general data protection rules, these were no different from those applicable to information distributed via another, non-electronic method. Consumers themselves (at least when receiving content) did not have to divulge any information about themselves in order to receive the content they wanted.

Now, however, in the context of increasingly bidirectional signal transmission (via IP-based networks, for example) and more interactive services, data protection issues are also beginning to affect the audiovisual sector. The DPEC also applies to the provision of audiovisual content via electronic communications networks.

Art. 5, para. 3 DPEC-D is particularly relevant to providers of interactive supplementary services used via an Internet PC or a set-top box designed for the use of such services. This provision prohibits the storing of information (such as cookies) and gaining of access to information already stored, in terminal equipment, without the consent of the user or subscriber. Storage and access should only be permitted for the sole purpose of carrying out the transmission of a communication or as strictly necessary for the provision of an explicitly requested service.

IV. Outlook

It appears likely that the "revised new regulatory framework" for electronic communications networks and services will shortly be adopted. What impetus this will give in general to the telecommunications sector certainly depends, to a degree, on how the member states transpose the amended provisions into national law – and particularly on how they implement them.

The conclusion of this "telecoms review" will affect the audiovisual sector in different ways. However, it is difficult to determine precisely how great the impact will be. Despite the continuing development of Community law in other areas (the Audiovisual Media Services Directive is a prime example), the wording of provisions that are directly aimed at electronic media suggests that they

45) Commission Communication on the second periodic review of the scope of universal service in electronic communications networks and services in accordance with Article 15 of Directive 2002/22/EC, COM(2008) 572, p. 9.
46) For example, the introduction of sector-specific regulatory measures in the end-user market for broadband access services.

apply mainly to broadcasting, which is normally understood to mean traditional radio and television services. Additional wording (audiovisual media services) discussed in connection with the "must-carry" provisions, for example, was not adopted, calling into question whether (non-linear) on-demand audiovisual media services might, for example, benefit in future from "must-carry" obligations. Here, as elsewhere, the principle of service neutrality therefore breaks down, raising the question of whether the new regulatory framework is truly "future-proof".

It is also not yet absolutely clear how the future development of (business models for) audiovisual media might be affected by the inclusion of provisions (primarily aimed at the protection and exercise of intellectual property rights) describing measures that can be taken against consumers who use (media) content or certain applications unlawfully. It is notable that stakeholder groups have managed, in this context, to have the concept of network blocks or "network management" included in legal instruments which, although also designed to promote media pluralism and the freedom of expression and information, do not, in principle, concern content regulation. In view of the continuing debate on creative content online, it might be said that the cart is being put before the horse.

Even if the legal instruments analysed in this article are adopted before the end of this year, it appears that the audiovisual sector would be well advised to continue monitoring EU developments in the electronic communications field. The discussions on the "digital dividend" and the so-called "digital divide", i.e. the exclusion of certain parts of the population from digitisation, are already showing that further developments – positive or negative, but certainly not neutral – affecting audiovisual media lie ahead.

Free Market Versus State Intervention

It was officially communicated in December 2007 that the European Commission was withdrawing its current recommendation of February 2003 concerning the *ex ante* regulation under certain circumstances of so-called Market No. 18 – broadcasting transmission services for the delivery of broadcast content to end users. Whether states have gone along with the Commission's change of direction and have since then refrained from taking any corrective measures in this area is the subject of the first four contributions.

Another way of furthering the dissemination of specific content via communications networks by means of state intervention is to impose a must-carry obligation, which is a possibility expressly provided for by Article 31 of the Universal Service Directive. The aim of the telecoms reform is to extend this right to supplementary services. In 2005, the European Audiovisual Observatory dealt with this subject in depth in the IRIS Special entitled "To Have or Not to Have – Must-carry Rules". Five reports cover the more recent developments in the case law of the European Court of Justice and the courts of various countries, including countries outside the EU.

At the end of the report, we summarise four other contributions on the key facts surrounding the French Hadopi Law and discuss why the adoption of the future EU regulatory framework for telecommunications has been delayed. It needs to be added that Hadopi II, that is to say a new version of the original law that takes account of the arguments of the French Constitutional Council, was passed by the French parliament on 22 September 2009. In contrast to Hadopi I, the new version only gives the courts the right to impose reasonable sanctions on copyright violators. Again, one possibility is to block Internet access temporarily. Just like Hadopi I, Hadopi II has also been challenged on constitutional grounds, so it cannot enter into force unless and until the Constitutional Council gives the green light. The most recent developments in the United Kingdom, Italy and Ireland indicate that the "graduated response" system also has its supporters in other states and will therefore occupy us for a long time to come.

I. The "Liberated" Market Nr.18

Bulgaria: Decision of the Constitutional Court on Digital Broadcasting

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On 4 June 2009 the Bulgarian Constitutional Court decided on a case regarding the constitutionality of some provisions of the Electronic Communications Act (ECA) and the Radio and Television Act. The application to the Constitutional Court was submitted by 51 members of the National Assembly. The application contains arguments for declaring Article 47a, Article 48, paras. 3, 4 and 5 of the ECA (published in the State Gazette, issue 17 of 2009); Paragraphs 5, 5a, 5b, 5c, 5d of the Final and Transitional Provisions of the ECA and Article 116i of the Radio and Television Act (published in the State Gazette, issue 14 of 2009) incompatible with the Bulgarian Constitution.

The application states that Article 47a of the ECA contradicts the Constitution because by virtue of this provision a restriction on radio and television operators and their related parties in obtaining permits for the use of a scarce resource (radio frequency spectrum for carrying out electronic communications through electronic communications networks for terrestrial digital broadcasting) is established.

According to the disputed Article 48, para. 3 of the ECA, an enterprise and its related parties, which has/have obtained a permit for the use of an individually assigned scarce resource, is/are restricted to becoming a radio and television operator or to creating radio or television programmes. In addition, the above-mentioned enterprises and their related parties cannot construct electronic communications networks for broadcasting radio and television programmes (Article 48, para. 5 of the ECA). According to the claim submitted to the Constitutional Court the said prohibition contradicts Article 19, paras. 1, 2 and 3 of the Constitution because it violates the principle of equal economic initiative and the principle that all Bulgarian and foreign legal entities performing economic activities in the country should enjoy equal rights. The prohibition contained in Article 48, para. 3 of the ECA is identical with the ban set out in Article 116i of the Radio and Television Act.

The Constitutional Court decided as follows:

- Article 48, para. 5 of the ECA has been proclaimed unconstitutional and therefore illegal, and

- Paragraph 5a, item 1 (which says:" Within the framework of a single procedure under Article 48 (1) herein, the Communications Regulation Commission shall designate a single undertaking whereto the said Commission shall grant an authorisation for the use of the individually assigned scarce resource - radio spectrum, for the provision of electronic communications over electronic communications networks for digital terrestrial broadcasting within a national range in conformity with the provisions for the First Stage of the Plan for the Introduction of Digital Terrestrial Television Broadcasting (DVB-T) in the Republic of Bulgaria, adopted by the Council of Ministers.") has been proclaimed partially illegal.

The rest of the disputed provisions have been declared compatible with the Constitution and therefore remain in force.

- *РЕШЕНИЕ № 3 София, 4 юни 2009 г. по конституционно дело № 3 от 2009 г., съдия докладчик Гeорги Петканов (Обн., ДВ, бр. 45 от 16.06.2009 г.)* (Decision No 3 of 4 June 2009 on Constitutional Case No 3/2009)
  http://merlin.obs.coe.int/redirect.php?id=11855

IRIS 2009-8:8

Cyprus: Regulations for the Provision of Networks for Digital TV Services

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In accordance with Article 10 of the Telecommunications Law 112(I)/2004, requiring the Telecommunications Commissioner to ensure maximum benefit to end-users, new regulations set the terms and conditions under which providers give access to their network and services for terrestrial digital TV. The Regulations are provided in a decree issued by the Commissioner for Telecommunications and Postal Services, enacted as Normative Administrative Act KDP.200/2009. This also harmonizes Cypriot law with European Community Directives 2002/19/EC, 2000/20/EC and 2000/21/EC and the relevant documents of the European Commission.

The Regulations define the rights and obligations of the providers of network and services of terrestrial digital TV, in respect of access to those networks. The scope of the Regulations is to set the principles and conditions under which providers will give broadcasters the access that enables them to disseminate their programmes through digital networks.

Access should be offered in accordance with the following principles: transparency, non-discrimination, separate book-keeping and controlled pricing. In order to ensure respect for these principles, negotiations with interested parties should be based on open tenders, where the terms and conditions are to be made fully available. Providers should conduct negotiations with broadcasters in good faith. A template annexed to the Regulations lists the various sections and the specific points on which information must be provided. The sections include the general terms, pricing, network technical description and technical specifications of connection services; procedures on handling applications and information exchange; information on co-installation services and procedures on sanctions/damages should also be provided in the documents.

- *Ο περί Ρυθμίσεως Ηλεκτρονικών Επκοινωνιών και Ταχυδρομικών Υπηρεσιών Νόμος του 2004, ΚΔΠ 200/2009, Επίσημη Εφημερίδα, 15/05/2009* (Law on Electronic Communications and Postal Services of 2004, Normative Administrative Act KDP.200/2009, Official Gazette, 15 May 2009)

IRIS 2009-7:5

Spain: Government Approves a New Decree-Law on Television

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On 23 February 2009, the Spanish Government approved a new Decree Law, whose provisions deal with the introduction of Digital Terrestrial TV (DTTV) and limits to media ownership.

In Spain, laws are generally approved by Parliament, but, in case of urgent need, can also be approved by the Government, by means of a "Decree Law". In this case, the Government has considered that, in the context of the economic crisis and the switch-off of analogue terrestrial TV, there was an urgent need to change the limits to media ownership in order to allow the national broadcasters to reach, within the new limits, the agreements needed to create companies adapted to the decrease in advertising revenue and able to fund the transition from analogue to digital terrestrial television.

Regarding the switch-off, it is important to bear in mind that in Spain terrestrial TV broadcasting is still considered a public service, which can be directly managed and provided by the State through public broadcasters, or which can be indirectly managed by those private companies that are granted a concession.

The private concessionaires are required to cover at least 96% of the population and the national public broadcaster RTVE is required to cover at least 98%. However, this means that once the switch-off takes place, a small part of the population, located in certain rural areas, will not have access to the public service of terrestrial TV.

The new Decree Law establishes that, in order to avoid that situation, the national terrestrial TV broadcasters shall reach, within three months, an agreement to ensure that their free-to-air DTTV programmes are simultaneously available from at least one satellite platform. Access to those programmes via satellite will be restricted to those areas not covered by DTTV once the switch-off is complete. The users in those areas shall not be required to pay any subscription fee or any decoder rental.

That scheme may also be used by regional or local terrestrial TV concessionaires, provided it can be ensured that their programmes are only effectively received by users within the areas specified by the concessions granted to those broadcasters.

All these provisions shall be further implemented by means of a Decree.

As regards media concentration, the Government has decided to remove the ownership limit that prevented any company from having more than 5% of capital shares in more than one national terrestrial TV concessionaire. According to the new limit, a company is only prevented from acquiring shares in more than one national terrestrial TV concessionaire if the average audience share of all the channels affected by the acquisition during the previous 12 months was greater than 27%. This limit will not apply if the 27% audience share threshold is reached once the acquisition is complete.

However, there are two additional limits with which broadcasters have to comply. A company cannot get a voting right or a relevant participation in the capital share of more than one terrestrial TV concessionaire, if the following apply:

a) It gets control of spectrum capacity equivalent to two national DTTV multiplexes or, for each region, more than one regional DTTV multiplex.

b) That means that there would be fewer than three concessionaires, which would be considered as detrimental to media pluralism.

The Decree-Law also establishes that national public broadcasters shall not control more than 25% of the spectrum capacity available for DTTV, and regional and local public broadcasters shall not control more than 50% of the spectrum capacity available for DTTV in the corresponding territories.

- *Real Decreto Ley 1/2009, de 23 de febrero, de medidas urgentes en materia de telecomunicaciones, Boletín Oficial del Estado, n. 47, de 24 de febrero de 2.009, pp. 19.015 y ss.* (Decree Law 1/2009, of 23 February 2009, on urgent measures for the telecommunications sector, Official Journal n. 47, 24 February 2009, p. 19015 ff.)
  http://merlin.obs.coe.int/redirect.php?id=11676

IRIS 2009-4:8

Spain: Competition Authority Imposes Fine for Monopoly in Audiovisual Signal Distribution

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On 19 May 2009, the Spanish *Comisión Nacional de la Competencia* (National Commission for Competition - CNC) imposed a fine on Abertis, the main operator for signal distribution in the Spanish audiovisual sector, of EUR 22.6 million for "well-established anticompetitive practices in the sector of DTT signal distribution, due to its notorious dominant position in the industry".

A comprehensive analysis of this situation ought to begin in 1988, when the end of the State monopoly in Spanish television led to the creation of three new commercial television operators and the privatisation of the infrastructures for signal distribution. The exploitation of those infrastructures was assigned to a new firm, called Retevision, which was focused more on telecommunications than on the audiovisual sector.

Retevision's ownership changed several times over the next decade. It finally joined the international telephone group Orange, while its audiovisual signal transport business was taken over by a new society, called Abertis, which was linked to one of the main financial brands in Spain, La Caixa.

Abertis has occupied an important position as the leading force for La Caixa activities in manufacturing and, more particularly, services. As such, Abertis manages a number of heterogeneous services, from toll highways in Italy to airports and telecommunication services in Latin America, as well audiovisual services in Spain, an area in which it enjoys a position of virtual monopoly. These services include traditional analogue services, DTT and satellite television (with Abertis being the key stakeholder of both Hispasat and EutelSat).

This monopoly, however, was challenged with the arrival of DTT. Until then, the national television operators had used Abertis services without discussion. However, the Spanish strategy of promoting DTT through regional and, mostly, local services, created a puzzle of "mini-markets", too small to attract Abertis, but promising enough to attract new entrants into the market.

One of these new entrants, Axion, the regional operator of broadband services in Andalusia, complained to the CNC that the contents of the agreements between Abertis and the main commercial networks prevented effective competition. There were two main elements taken into account by the CNC: the excessive time-length of the agreements imposed by Abertis (which offered an important discount to those television operators who would accept periods of between 5 and 10 years) and the very severe financial penalties that those agreements established for television operators who would end their contract before the scheduled date. The CNC has recognised that these two features "prevented the possible action of new competitors" and that this is especially serious in a recently liberalised market, where all steps have to be taken in order to ensure an appropriate level of competition.

Abertis has announced its intention to appeal this resolution before the European Court of Justice. Ironically, it has also brought a case before the Luxembourg Court against the European Commission, which supported the intervention of the Italian government against the merger of Abertis and Atlantia.

- *Resolución del Consejo de la Comisión Nacional de la Competencia (CNC), expediente sancionador nº 646/08 AXION/ABERTIS, 19 de mayo de 2009* (Decision of the National Commission for Competition, 19 May 2009)
  http://merlin.obs.coe.int/redirect.php?id=11779

IRIS 2009-7:10

II. Latest News on Must-carry

Court of Justice of the European Communities: Judgment on Must-carry Obligations and the Freedom to Provide Services

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In 2001, a group of cable operators (UPC, Coditel Brabant SPRL, Brutele and Wolu TV ASBL) brought proceedings before the Belgian *Conseil d'Etat* (Council of State) challenging the obligation imposed on them by Belgian legislation to broadcast, in the bilingual region of Brussels-Capital, television programmes transmitted by certain private broadcasters designated by the State authorities. The cable operators contested their must-carry obligations on the basis of Articles 49 EC and 86 EC (the latter being read in conjunction with Article 82 EC). They argued that the private broadcasters benefiting from the must-carry status enjoyed a special right which, in breach of Articles 82 EC and 86 EC, could distort competition between broadcasters and disadvantage broadcasters established in Member States other than Belgium, while one of those private broadcasters held a dominant position in French-speaking Belgium on the market for pay-TV. They also contended that, in breach of Article 49 EC, the freedom to provide services was being restricted. The national Court conceded that the negotiating position of foreign broadcasters seeking to have their programmes distributed by cable in the bilingual region of Brussels-Capital was indeed weaker than private broadcasters enjoying must-carry status.

In 2006, it referred a set of questions to the ECJ which sought to determine - as summed up by the ECJ - whether article 86 EC must be interpreted as meaning that it precludes legislation of a Member State "which provides that private broadcasters falling under the public powers of that State and which those powers have designated, have the right, by virtue of a must-carry obligation, to have their television programmes broadcast in their entirety by the cable operators which provide services in the relevant part of that State".

The European Court of Justice recalled that the mere creation of a dominant position through the grant of special or exclusive rights within the meaning of Article 86 (1) EC is not in itself incompatible with Article 82. A Member State will be in breach of the prohibitions laid down by those two provisions "only if the undertaking in question, merely by exercising the special or exclusive rights conferred upon it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses". However, the ECJ dismissed the national Court's questions pertaining to competition matters as inadmissible because it was not provided with sufficient information to establish whether the conditions relating to the existence of a dominant position or of abusive conduct were satisfied.

The national Court's second set of questions in essence sought an answer to the same question but this time concerning Article 49 EC. The ECJ recalled that the transmission of television signals, including the transmission of such signals by cable television, constitutes as such, a supply of services for the purposes of Article 49 EC. Though it concludes that the Belgian legislation granting certain private broadcasters must-carry status does indeed amount to a restriction on freedom to provide services within the meaning of Article 49 EC, it recalls that such a restriction may be justified only where it serves overriding reasons relating to the general interest, is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it. It finds that these three essential points are met by the Belgian legislation at hand and concludes: "Article 49 EC is to be interpreted as meaning that it does not preclude legislation [...] which requires, by virtue of a must-carry obligation, cable operators providing services on the relevant territory of that State to broadcast television programmes transmitted by private broadcasters falling under the public powers of that State and designated by the latter, where such legislation:

- pursues an aim in the general interest, such as the retention, pursuant to the cultural policy of that Member State, of the pluralist character of the television programmes available in that territory, and
- is not disproportionate in relation to that objective, which means that the manner in which it is applied must be subject to a transparent procedure based on objective non-discriminatory criteria known in advance." It is for the national Court to determine whether those conditions are satisfied.

• Judgment of the Court of justice of the European Communities, United Pan-Europe Communications Belgium and Others, 13 December 2007, C-250/06
http://merlin.obs.coe.int/redirect.php?id=11100

IRIS 2008-2:4

European Commission: Next Step against Belgium for Non-Compliance with "Must-carry" Rules

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On 6 May 2008, the European Commission sent a reasoned opinion to Belgium on the application of EC broadcasting legislation, in the context of "must-carry" rules imposed on broadcasters in the bilingual region of Brussels-Capital. Such rules, which involve obligations imposed on network operators, as for example cable companies or telecom operators, to transmit specific radio and television broadcast channels and services, are permitted under Article 31 of the EC's Universal Service Directive. According to the directive, "must-carry" rules can be introduced when a significant number of end-users of the networks in question use them as the principle means to receive radio and TV broadcasts. The rules must be:

- necessary to meet clearly defined general interest objectives;
- proportionate and transparent; and
- subject to periodical review.

The infringement proceedings against Belgium come on top of a preliminary ruling handed down by the European Court of Justice on must-carry legislation in the Brussels-Capital Region in December last year. The ECJ, on the basis of Article 49 EC Treaty (freedom of services), ruled that must-carry rules must pursue an aim in the general interest and be proportionate to that aim. The latter, in turn, implies that that the manner in which they are applied must be subject to a transparent procedure which is based on objective non-discrimnatory criteria known in advance.

Two letters of formal notice had previously been sent to Belgium by the Commission in July 2006 and June 2007. Nevertheless, when the Electronic Communications Act of the Brussels-Capital Region was amended in March 2007, the Commission's concerns were not addressed. The Commission considers that the current regime lacks clarity and transparency, that the number of channels that can be designated is excessive and that, as things now stand, network operators and broadcasters are uncertain as to their rights and obligations.

• Telecoms Rules: Belgium receives final warning on broadcasting "must-carry" rules, Brussels, 6 May 2008

IRIS 2008-6:Extra

Russian Federation: New Concept to Develop Broadcasting

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A decree of the Government of the Russian Federation of 29 November 2007 (# 1700-r) approved a Concept for the development of TV and radio broadcasting in Russian Federation in 2008-2015. This document has been worked out by the high-level Governmental Commission on development of TV and radio broadcasting chaired by Dmitry Medvedev in his capacity of 1st vice-chair of the Government.

The Concept states that analogue over-the-air broadcasting remains the only means of access to TV and radio programmes for 88.5 % of the population; 11 % have access to both over-the-air and cable transmissions, while just 0,9 % of the population have access to direct satellite TV and radio.

The aim of the Concept is to facilitate citizens in providing their "constitutional right to obtain socially important information". Licensing remains the main instrument of the state policy in broadcasting and will continue to be performed by the executive branch of the government. There will be no limit as to the number of licenses provided to a given broadcaster. The main lever to develop broadcasting is seen in a transfer from analogue to digital TV and radio by 2015.

The Government will develop a "socially-important package of channels" obligatory for free or nominal-fee transmission for the population via all platforms, or in other words a package of must-carry programmes. In TV it will consist of a national news channel, one or two national info-tainment channels, a national channel on cultural life, a national channel for children, a national sports channel, and a regional channel to cover events taking place in a particular province. In radio the package will consist of the state-run national channels "Radio Russia", "Yunost" (Youth), "Mayak" (infotainment), as well as a regional channel in each province. The Government will cover the costs of providing such a transmission. Delivery of all other channels will be regulated by market relations.

The Concept confirms an earlier decision of the Government (of 25 May 2004) that digital TV in Russia will be based on the European standard DVB (Digital Video Broadcasting), while the standard of compression will be MPEG-4 and higher. DRM will be the standard for digital radio.

It is planned that the infrastructure and networks necessary to develop digital TV and radio will be built at the expense of the communication companies, while the government takes the burden to work out the legislative basis for such development. This will consist of drafting amendments to three statutes (on licensing, on communications, and on the mass media), as well as issuing a set of governmental ordinances.

- *Концепция развития телерадиовещания в Российской Федерации на 2008 - 2015 годы* (Concept of development of TV and radio broadcasting in Russian Federation in 2008-2015) http://merlin.obs.coe.int/redirect.php?id=11089

IRIS 2008-2:17

Norway: Non-Commercial Public Access TV Licensed in the DTT Network

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On 14 March 2008, the Norwegian Media Authority granted a license to an association named Foreningen Frikanalen for transmission of a non-commercial public access TV channel (also called "open channel") in the digital terrestrial network in Norway. The channel has a must carry status and is expected to start broadcasting in September this year.

Foreningen Frikanalen is open to all non-commercial and non-governmental organisations, which base their activities on voluntary work. As of today, Foreningen Frikanalen has 50 direct members and 130 associated members. However, according to the license obligations, Foreningen Frikanalen must give airtime not only to members, but also to all non-commercial organisations, associations and individuals based on objective, transparent and non-discriminatory criteria. It may not favour its own members when allocating airtime and scheduling programmes. The channel should not have a religious, ethnic or other particular profile that may exclude single groups from joining. An independent board of complaints must be established to handle possible disputes. Foreningen Frikanalen is obliged to appoint an editor-in-chief, but may delegate editorial responsibility for single programmes to the different organisations in charge of producing the content. All participants are responsible for acting in conformity with the Broadcasting legislation. Advertisements are not allowed, but sponsorship of programmes will be accepted under certain conditions.

The license to establish and operate the digital terrestrial network in Norway was granted to Norges televisjon as (NTV) in June 2006. The process of digitalising the old analogue terrestrial network started in September 2007 and NTV is making the network operational on a region by region basis. It is expected that NTV will complete the digitalisation by November this year. During the course of 2008 and 2009 the old analogue network will be shut down. In two regions the digital switchover has already been finalised. According to its license obligations, NTV is required to offer capacity to a non-commercial open channel. Foreningen Frikanalen has been given access to a 24 hour channel, but until the digital switchover has been finalised, the licensee may share the allocated channel with local television and will only use the airtime between 12 pm – 5.30 pm. The license will expire in 2021, at the same time as the DTT license.

- *Vedtak om tildeling av konsesjon for ikke-kommersielt fjernsyn i det digitale bakkenettet* (Decision on licensing of non-commercial television in the digital terrestrial network)

IRIS 2008-6:15

Malta: Policy Document on General Interest Objectives

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The Malta Communications Authority (MCA), the Broadcasting Authority (BA) and the Ministry for Education, Culture, Youth and Sports and the Ministry for the Infrastructure, Transport and Communications have been discussing a policy document entitled "Making Digital Broadcasting Accessible to All: A Policy and Strategy for Digital Broadcasting Meeting General Interest Objectives". The MCA led the discussions on the drafting of the document, with input from the BA and both ministries. Eventually the document was referred to the Cabinet for approval and, on 6 February 2009, released to the public.

On 15 September 2007, the MCA and the BA jointly published a consultation document on how broadcasting may best meet General Interest Objectives (GIOs). The consultation period was spread over a period of five months (see). The consultation document was built around a number of fundamental principles that are seen as forming the conceptual framework within which a GIO set-up should be modelled, namely:

- The public's right to free-to-air viewing of GIO channels via unencrypted transmission;
- An adequate number of GIO broadcasters, balanced against minimal distortion of market mechanisms;
- Efficient use of spectrum;
- Sufficient frequency spectrum for GIO broadcasting, such as to cater for future needs, on the basis of known (existing and foreseen) technology capabilities;
- The concept of GIO broadcasting embracing both the public service broadcaster and a number of private broadcasters;
- The application for GIO status, by privately owned stations, on a voluntary basis;
- The award of GIO status only on the basis of stringent qualifying criteria;
- PBS Ltd. as the "de facto" public service broadcaster;
- The need for transition costs to be kept at manageable levels;
- Broadcasting to go beyond GIOs via the award of commercial licences.

In determining the nature and ownership of the network, the Government has opted for the setting up of a distinct GIO network. The Government has taken note of the fact that PBS Ltd. is the only broadcasting company with an obligatory requirement to operate under a GIO remit. This makes it the ideal company to organise and run the GIO multiplex. The public service broadcaster will therefore be appointed as the network operator for broadcasting that meets GIOs. As a result of this arrangement, there will be no need to enforce must-carry obligations on terrestrial commercial networks. Such a course of action would result in an unnecessary duplication of transmission capacity.

The following are the other key features of the policy direction that the Government has adopted with respect to broadcasting that meets GIOs:

- The GIO network will be required to carry up to six GIO TV stations;
- All transmissions on the GIO networks will be unencrypted and therefore viewable without the need for any subscription to a network operator and free of charge;
- The second frequency reserved for GIO use will be kept in reserve for the eventual transition of GIO stations to HDTV;
- The BA, with the technical assistance of the MCA, will provide the necessary monitoring of the operation of the GIO network;
- On the drawing up of detailed criteria by the BA, an eligibility test for broadcasters will be carried out, with right of first choice for existing analogue terrestrial;
- Vacant slot(s) on the GIO network will subsequently be filled via a call for expressions of interest.

The publication of this policy document marks the start of a series of initiatives that will lead to analogue switch-off, set for the end of December 2010. Such initiatives will include updating of the Broadcasting Act, the refinement of the high level GIO eligibility criteria, the setting-up of the GIO network infrastructure, the selection of GIO stations and public information initiatives. The implementation of these steps will pose quite a challenge to all concerned.

- "A Policy and Strategy for Digital Broadcasting that meets General Interest Objectives", Malta Communications Authority (MCA), the Broadcasting Authority (BA) and the Ministry for Infrastructure, Transport and Communication (February 2009)
http://merlin.obs.coe.int/redirect.php?id=11622

IRIS 2009-3:16

III. The French Hadopi Act and the Telecoms Package

France: Graduated Response according to the Bill on "Creation and the Internet"

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The French Government has presented a bill entitled "Creation and the Internet" as a solution to the threat to creation posed by unlawful downloading. Proposing the setting up of a system of "graduated response" which is intended to be dissuasive rather than repressive, the bill has given rise to considerable debate both in France and in Europe. Amendment 138 adopted by the European Parliament catalysed the fears expressed by the bill's detractors (see).

"Graduated response" refers to the method for warning and sanction that the new High Authority for the Broadcasting of Works and the Protection of Rights on the Internet (*Haute Autorité pour la Diffusion des Oeuvres et la Protection des Droits sur Internet* - Hadopi) would apply to holders of Internet subscriptions used for unlawful downloading (see). The holder, identified by a sworn Hadopi agent, would be sent in the first instance an ordinary letter, and possibly a second letter by registered post with request for acknowledgement of receipt, before being sanctioned by the Hadopi if he/she failed to mend his/her ways or those of the users for which he/she was responsible. The authority may then propose a transaction or suspend the Internet subscription, which would not release him/her from the obligation of paying the subscription.

Those opposed to the bill object that it would be counter to freedom and would not provide any solution to the loss of earnings suffered by content originators. Those in favour of the bill feel, on the contrary, that this system gives Internet users an opportunity to change their behaviour once they become aware that what they are doing is illegal, thereby preserving the freedom of all parties concerned. The Creation and Internet bill highlights the fundamental opposition between two concepts of the Internet. The European Parliament's adoption of Amendment 138 during the discussions on the Telecoms Package in the autumn has highlighted the contentions and given MEPs an opportunity to express their disagreement with the French solution. The Amendment provides for application of "the principle that no restriction may be imposed on the rights and freedoms of end-users, notably in accordance with Article 11 of the Charter of Fundamental Rights of the European Union on freedom of expression and information, without a prior ruling by the judicial authorities, save when public security is threatened". The text, presented as a flat refusal of the French bill, has so far only been adopted by the Parliament – it still has to go through the Council and the Commission and, if it is successful, may be transposed into national law within two years.

Nicolas Sarkozy, the French President, sent a letter to José Manuel Barroso requesting his "personal undertaking to have the Amendment set aside". By way of reply, the Commission merely recalled that the European procedure for adopting texts made no allowance for the discretionary withdrawal of an Amendment adopted by the European Parliament. Whatever happens, the date for the Senate examining the bill remains the 29 and 30 October 2008.

- *Projet de loi favorisant la diffusion et la protection de la création sur Internet* (Bill in favour of the circulation and protection of creation on the Internet)
  http://merlin.obs.coe.int/redirect.php?id=11480

IRIS 2008-10:10

Council of the European Union: New Legislative Proposals for Telecoms Reform

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The legislative package on EU Telecoms Reform continues to wind its way through the article 251 co-decision procedure necessary for its official adoption as European law. Following the European Parliament's vote earlier this autumn (see), the European Commission, on 5 and 6 November 2008, brought forth its revised legislative proposals. The new texts took into consideration the amendments adopted by Parliament and aimed at paving the way for agreement on identical terms between the European Parliament and the Council of Ministers. The Council itself deliberated the drafts on 27 November 2008, a process described by EU Telecoms Commissioner Viviane Reding as a "constructive crisis". She nevertheless applauded the resulting political agreement as "an improvement compared with the initial text", but warned that room for further progress still exists.

The main source of debate emanates from amendments 138 and 166, adopted by plenary vote in Parliament. These asserted that any restriction on end-users' access rights to content, services and applications must be proportionate and rest on a court ruling, in accordance with the Charter of Fundamental Rights of the European Union. The Commission had accepted amendment 138, expressly noting its respect for the nine-tenths majority with which it was passed, and remarking in its revised proposal that the amendment ensures "a fair balance […] between the various fundamental rights protected by the Community legal order, in particular, the right to respect for private life, the right to protection of property, the right to an effective remedy and the right to freedom of expression and information". Amendment 166, on the other hand, fared less fortunately, having been discarded in the new Commission proposals. Nevertheless, a similar fate eventually awaited amendment 138 as well, although at a later date; Concern had been consistently expressed that the Council would not accept Parliament's amendment, in view of its incompatibility with the French plans to introduce a legislative system of "graduated response" to copyright infringement (see). In the event, the controversial amendment was indeed dropped from the Council's proposals. This was despite initial objections voiced by Austria and Denmark.

It is worth mentioning that recital 14(b) to the Universal Service Directive, inserted by Parliament, remains in place. The recital indicates that, in the absence of relevant Community provisions (such as those that the aborted amendments would have introduced), the legislative treatment of unlawful content, applications and services is to be regulated on a local level by the Member States, in accordance with due process and the rule of law.

[…]

The UK, Sweden and the Netherlands abstained from the political agreement in the Council. The Council is now expected to adopt its common positions on all the Commission proposals by the end of 2008. These will then serve as a basis for negotiations with the European Parliament, so as to enable a second reading agreement between the two institutions by spring 2009. Commissioner Reding has invited the French Presidency to call a meeting of all three institutions in early December, to facilitate compromise.

- Relevant press pack, including all official documents of the new EU Telecom Package http://merlin.obs.coe.int/redirect.php?id=11533

IRIS 2009-1:5

European Parliament: Approves the New Telecoms Package in the Second Reading

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On 6 May 2009, the European Parliament voted on the informal political agreement reached with the Commission and the Council in the discussions following last autumn's first reading of the Telecoms Package. The package involves a revision of the EU's electronic communications regulatory framework, appertaining to five existing Directives and as encapsulated in three separate legislative proposals and corresponding Parliament reports (see). The EP approved the new package in its entirety, save for one modification: it reinstated amendment 138 of the Trautmann report, a controversial article which states that the fundamental rights and freedoms of end users may not be restricted without prior ruling by a competent judicial authority, unless public security is threatened. The amendment had been introduced by Parliament in the first reading, but was later rejected by Council (see).

The move is considered significant, as amendment 138 is widely held to constitute a political signal against the so-called "three strikes and you're out" approach being implemented in national legislation. It is particularly seen as incompatible with France's *Création et Internet* legislative bill, which was recently voted through by the French National Assembly.

On the other hand, the likewise heavily debated amendment 166 of the Harbour report remains outside the endorsed package, with the re-written text, as negotiated with Council, taking its place. Amendment 166 in its initial form required that any measures restricting users' access rights take heed of the principles of proportionality, effectiveness and dissuasiveness. The new text explicitly explains that it "neither mandates not prohibits" conditions imposed by providers limiting users' access to and/or use of services or applications. Instead, these are safeguarded by means of an obligation to inform customers of existing restrictions. A "universal service" obligation in relation to functional internet access is also imposed. In any case, MEP Malcolm Harbour has indicated his view that lines have been blurred in the discussions surrounding Telecoms reform: "This directive package has never been about copyright enforcement. The Parliament cannot impose on a country conditions about how it organises its judicial system. That is a basic element of subsidiarity".

[…]

The new texts must now be accepted by Council by a qualified majority if agreement on the package is to be found. Discussions on the question are likely to take place at the Telecoms Council on 12 June 2009. If rejected, the whole package of reforms will have to enter the conciliation process in Parliament's next legislative term, following the upcoming European elections.

- No Agreement on Reform of Telecom Legislation, EP press release, 6 May 2009
  http://merlin.obs.coe.int/redirect.php?id=11736

IRIS 2009-6:5

2009-10 p.36

France: Hadopi's Power of Sanction Censured by the Constitutional Council

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After months of controversy, the Act "promoting the circulation and protection of creation on the Internet" (the Hadopi Act), adopted on 13 May 2009 after long and laborious parliamentary debate, has finally been censured by the Constitutional Council, to which it had been referred by opposition MPs opposed to the text.

The Act was designed basically to set up a "graduated response" to the illegal downloading of works on the Internet, and introduced a "High Authority for the circulation of works and the protection of rights on the Internet" (Hadopi), a nine-member independent administrative authority with power to warn and, initially intended to, sanction, to which application is made by sworn agents attached to the societies for gathering and redistributing royalties and by the national cinematographic centre (*Centre National de la Cinématographie* - CNC).

The Act introduces an obligation of vigilance (new Article L. 336-3 of the Intellectual Property Code - CPI), the keystone of the new system, as a result of which all Internet subscribers must ensure that "such access is not used to exploit [a work, a recording or a programme] without the authorisation of the rightsholders where this is required". Under the Act, failure to comply with this obligation would incur the possibility of the Hadopi sending a "recommendation" by e-mail to the Internet subscriber via its IAP reminding him/her of the obligation of vigilance and the corresponding sanctions. In the event of a second infringement within six months of this e-mail being sent, the Hadopi could send a letter in similar vein to the subscriber by registered mail. Lastly, if the subscriber continued to disregard the obligation of vigilance within a year of this letter being sent, the Act provides for the possibility of the Hadopi "suspending access to the Internet for a period of between two months and one year, combined with the impossibility for the subscriber to subscribe" to a contract with another operator.

On 10 June the Constitutional Council found this power of sanction (stopping access) on the part of the Hadopi unconstitutional, on the grounds that freedom of communication and expression implied "nowadays, in the light of the generalised development of the Internet and its importance for participation in democratic life and the expression of ideas and opinions, freedom of access to these on-line communication services". Thus the Hadopi's powers as provided for in the legislation could lead to restricting an individual's exercise of the right to express him/herself and communicate freely. The Constitutional Council decided that access to the Internet could only be cut off by the courts. The Act also provided that its sanctions could only be imposed on the holder of the Internet subscription contract, unless that person provided proof of fraud on the part of a third party. The Constitutional Council found this provision contrary to the principle of the presumption of innocence.

Withdrawing all power of sanction from the Hadopi Act deals a serious blow to the Government's logic of "decriminalisation". The text, minus its sanction provisions, was promulgated on 13 June 2009. The Minister for Culture explained that the Act would need to be supplemented in order to "give the courts the power to impose appropriate sanctions and more specifically to decide on the temporary suspension of access to the Internet, the principle of which has been validated by the constitutional judge". A new text should therefore be tabled for the Parliament's extraordinary session in July. The Minister said that the Hadopi, now responsible exclusively for the "preventive and educational aspect" of combating on-line piracy (the sending of warning messages), would be set up "within the scheduled timescale", i.e., in September 2009.

- *Loi n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet* (Act No. 2009-669 of 12 June 2009 promoting the circulation and protection of creation on the Internet)
  http://merlin.obs.coe.int/redirect.php?id=11765

- *Conseil constitutionnel, décision n° 2009-580 DC du 10 juin 2009* (Constitutional Council, Decision No. 2009-580 DC of 10 June 2009)
  http://merlin.obs.coe.int/redirect.php?id=11766

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National Regulatory Authorities responsible for Telecommunications in Europe

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	Regulatory Authorities responsible for Telecommunications	Website	Other regulators/sub-entities particularly relevant for communications
AL-Albania	Autoriteti i Komunikimeve Elektronike dhe Postare (Authority of Electronic and Postal Communications also referred to as Telecommunications Regulatory Entity)	AKEP (TRE) www.akep.gov.al	
AT-Austria	Rundfunk und Telekom Regulierungs-GmbH (Broadcasting and Telecoms company)	RTR www.rtr.at	Telekom-Control Kommission TKK (independent, administrative link with RTR)
BE-Belgium	Institut Belge des Services Postaux et de Télécommunications (Belgium Institute of Postal and Telecommunications Services)	BIPT www.bipt.be	Competition Council http://mineco.fgov.be/organization_market/competition/home_fr.htm
BG-Bulgaria	КОМИСИЯ ЗА РЕГУЛИРАНЕ НА СЪОБЩЕНИЯТА (Communications Regulation Commission)	CRC www.crc.bg	
CH-Switzerland	Federal Office of Communications (OFCOM)	BAKOM www.bakom.ch	Eidgenössische Kommunikationskommission (ComCom), http://www.comcom.admin.ch/index.html?lang=de; Wettbewerbskommission (WEKO), http://www.weko.admin.ch

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Ligji Nr. 9918 dt. 19.05.2008 "Per komunikimet elektronike ne republiken e shqiperise" (Law no. 9918 dated 19 May 2008 on Electronic Communications in the Republic of Albania), http://merlin.obs.coe.int/redirect.php?id=11944
Bundesgesetz über die Einrichtung einer Kommunikationsbehörde Austria ("KommAustria") und eines Bundeskommunikationssenates (KommAustria-Gesetz – KOG) (Federal Act on the establishment of an Austrian Communications Authority ("KommAustria") and a Federal Communications Board (KommAustria Act - KOG)) 2001, http://merlin.obs.coe.int/redirect.php?id=11947 (as last amended on 17 June 2009 in 2009, BGBl. I Nr. 52/2009) (German version only), http://merlin.obs.coe.int/redirect.php?id=11948; *Telekommunikationsgesetz 2003* (Telecommunications Act 2003), http://merlin.obs.coe.int/redirect.php?id=11945; (as last amended on 15 July 2009, http://merlin.obs.coe.int/redirect.php?id=11946)
Loi du 17 janvier 2003 relative au statut du régulateur des secteurs des postes et des télécommunications belges (Act of 17 January 2003 on the status of the regulator of the Belgian postal and telecommunications sectors) - (version originale) http://merlin.obs.coe.int/redirect.php?id=11951; (official version coordinated by BIPT); http://merlin.obs.coe.int/redirect.php?id=11952; *Accord de coopération du 17 novembre 2006 entre l'Etat fédéral, la Communauté flamande, la Communauté française et la Communauté germanophone* (Cooperation agreement between the Federal State and the Communities of 17 November 2006), http://merlin.obs.coe.int/redirect.php?id=11953; *Loi du 31 mai 2009 portant modification de la loi du 17 janvier 2003 concernant les recours et le traitement des litiges à l'occasion de la loi du 17 janvier 2003 relative au statut du régulateur des secteurs des postes et télécommunications belges* (Act of 31 May 2009 amending the Act of 17 January 2003 concerning the remedies and procedures for disputes related to the Law of 17 January 2003 concerning the statute of the regulator of the Belgian postal and telecommunications sectors), http://merlin.obs.coe.int/redirect.php?id=11949; *Loi du 18 mai 2009 portant des dispositions diverses en matière de communications électroniques* (Act of 18 May 2009 containing various dispositions on electronic communications issues), http://merlin.obs.coe.int/redirect.php?id=11950
Law on electronic communications of 10 May 2007, http://merlin.obs.coe.int/redirect.php?id=11955; General requirements for provision of public electronic communications in force as of 4 March 2008 issued by the communications regulation commission promulgated sg, no. 24 of March, 2008, http://merlin.obs.coe.int/redirect.php?id=11956; Resolution No. 1124 of the CRC of 16 August 2007 for adoption of a list of networks and services for operation of public electronic communications within general frame of requirements issued by the communications regulation commission, promulgated in the sg, No. 78 of 28 September 2007, http://merlin.obs.coe.int/redirect.php?id=11957; Rules for the conditions and procedure for transferring of authorizations for use of individually assigned scarce resource in force since 18 March 2008 issued by the communications regulation commission promulgated in the sg, No. 29 of 18 March 2008, http://merlin.obs.coe.int/redirect.php?id=11958
Fernmeldegesetz vom 30. April 1997 (FMG) (Telecommunications Law), http://merlin.obs.coe.int/redirect.php?id=11959; *Bundesgesetz vom 24. März 2006 über Radio und Fernsehen* (RTVG) (Federal Law of 24 March 2006 on radio and television), http://merlin.obs.coe.int/redirect.php?id=11960 *Verordnung der Eidgenössischen Kommunikationskommission betreffend das Fernmeldegesetz (Art. 1)* (Regulation of the Swiss communications commission on the Telecommunications Law), http://merlin.obs.coe.int/redirect.php?id=11961; *Kartellgesetz vom 6. Oktober 1995 mit den Änderungen vom 20. Juni 2003* (Anti-trust Law of 6 October 1995 with the amendments of 20 June 2003), http://merlin.obs.coe.int/redirect.php?id=11962

	Regulatory Authorities responsible for Telecommunications	Website	Other regulators/sub-entities particularly relevant for communications
CY-Cyprus	Γραφείο Επιτρόπου Ρυθμίσεως Ηλεκτρονικών Επικοινωνιών και Ταχυδρομείων Office of the Commissioner of Electronic Communications and Postal Regulation	OCECPR www.ocecpr.org.cy	Τμήμα Ηλεκτρονικών Επικοινωνιών του Υπουργείου Συγκοινωνιών και Έργων Department of Electronic Communications of the Ministry of Communications and Works, http://www.mcw.gov.cy/mcw/dec/dec.nsf/DMLindex_en/DMLindex_en?opendocument
CZ-Czech Republic	Český telekomunikační úřad (Czech Telecommunication Office)	CTU www.ctu.cz	
DE-Germany	Bundesnetzagentur (Federal Network Agency)	BNetzA www.bundesnetzagentur.de	Beirat (http://www.bundesnetzagentur.de/enid/195e933dfd3b05246716d00f6fc3216f,0/Die_Bundesnetzagentur/Beirat_xw.html) Bundeskartellamt, http://www.bundeskartellamt.de/
DK-Denmark	IT - og Telestyrelsen (National IT and Telecom Agency)	NTA www.itst.dk	
EE-Estonia	Tehnilise Järelevalve Amet (Technical Surveillance Authority) Konkurentsiamet (Estonian Competition Authority)	TJA www.tja.ee ECA www.konkurentsiamet.ee	Electronic Communication Division of the TJA Communications Regulatory Division of the ECA, Competition Division of ECA

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The Regulation of Electronic Communications and Postal Services Law (L. 112(I)/2004) of 2004 (last amended by Laws L.134(I)/2007 and L.46(I)/2008 of 11 July 2008), http://merlin.obs.coe.int/redirect.php?id=11963; The Radiocommunications Law (L.146(I)/2002) of 2002 (last amended by Law L. 74(I)/2006))
Act No. 127/2005 Coll. on Electronic Communications and on Amendment to Certain Related Acts (Electronic Communications Act) as amended by the Act. No. 290/2005 Coll., Act. No. 361/2005 Coll., Act. No. 186/2006 Coll., Act No. 235/2006 Coll., Act. No. 310/2006 Coll., Act. No. 110/2007 Coll., Act. No. 261/2007 Coll., Act. No. 304/2007 Coll., Act No. 124/2008 Coll., Act No. 177/2008 Coll., Act. No 189/2008 Coll., Act No. 247/2008 Coll., Act No. 384/2008 Coll., and Act No. 227/2009 Coll. — part hundred sixty-five http://merlin.obs.coe.int/redirect.php?id=11964; Act No. 265/1991 Coll., on the Competences of the Bodies of the Czech Republic in the Pricing Area, as amended - Section 2 of the Act
Gesetz über die Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen vom 7. Juli 2005 (zuletzt geändert durch Gesetz vom 5. Februar 2009), (Law on the federal network agency for electricity, gaz, telecommunication, postal services and railway services, last amended by Law of 5 February 2009) http://merlin.obs.coe.int/redirect.php?id=11965; *Telekommunikationsgesetz (TKG) vom 22. Juni 2004 (zuletzt geändert mit Gesetz vom 14. August 2009)* (Telecommunications Law of 22 June 2004, last amended by Law of 14 August 2009), http://merlin.obs.coe.int/redirect.php?id=11966; *Gesetz über Funkanlagen und Telekommunikationsendeinrichtungen (FTEG) vom 31. Januar 2001 (zuletzt durch Gesetz vom 26. Februar 2008 geändert),* (Law on Radio and Telecommunications Equipment of 31 January 2001, last amended by Law of 26 February 2008) http://merlin.obs.coe.int/redirect.php?id=11967; *Gesetz gegen Wettbewerbsbeschränkungen*, (Law against restraints of competition), http://merlin.obs.coe.int/redirect.php?id=11968
Lov om Telestyrelsen no. 395 af 10. Juni 1997 (Act on the National IT and Telecom Agency No. 395 of 10 June 1997, as amended by Act No. 418 of 31 May 2000); *Lov om radiofrekvenser nr. 421 af 6. juni 2002* (Act on radio frequencies No. 421 of 6 June 2002 in the version Notice No. 680 of 23 June 2004), http://merlin.obs.coe.int/redirect.php?id=11969 (EN) (last amended by Act No. 545 of 8 June 2006); *Lov om radio- og teleterminaludstyr og elektromagnetiske forhold nr. 232 af 5. April 2000* (Act on radio equipment and telecommunications terminal equipment and electromagnetic matters No. 232 of 5 April 2000), http://merlin.obs.coe.int/redirect.php?id=11970 (EN), updated version in Notice No. 912 of 5 November 2002, http://merlin.obs.coe.int/redirect.php?id=11970 (last amended by Act No. 1225 of 6 December 2006); *Lov om konkurrence- og forbrugerforhold på telemarkedet, lovbekendtgørelse Nr. 780 af 28. juni 2007* (Act on competitive conditions and consumer interests in the telecommunications market No. 780 of 28 June 2007), http://merlin.obs.coe.int/redirect.php?id=12070 (EN); *Lov om standarder for transmission af tv-signaler m.v. nr. 471 af 12. juni 1996* (Act No. 471 of 12 June 1996 on standards for transmission of TV signals etc. (as amended by Act No. 399 on radio and TV activities standards for transmission of TV signals, http://merlin.obs.coe.int/redirect.php?id=11972) (EN) and subsequent amendments
Elektroonilise side seadus (Electronic Communications Act, entry into force 1 January 2005), http://merlin.obs.coe.int/redirect.php?id=11973 Statutes of Estonian Competition Authority, http://merlin.obs.coe.int/redirect.php?id=11974 (entry into force 1 January 2008) The Competition Act (entry into force 1 July 2006), http://merlin.obs.coe.int/redirect.php?id=11975

	Regulatory Authorities responsible for Telecommunications	Website	Other regulators/sub-entities particularly relevant for communications
ES-Spain	Comisión del Mercado de las Telecomunicaciones (Telecommunications Market Commission)	CMT www.cmt.es	
FI-Finland	Viestintävirasto Kommunikationsverket (Finnish Communications Regulatory Authority)	FICORA www.ficora.fi	
FR-France	Autorité de Régulation des Communications électroniques et des Postes (Telecommunications and Posts Regulator)	ARCEP www.arcep.fr	
GB-United Kingdom	Office of Communications	Ofcom www.ofcom.org.uk	Communications Commission of the Isle of Man http://www.gov.im/government/boards/cc.xml
GR-Greece	Εθνική Επιτροπή Τηλεπικοινωνιών και Ταχυδρομείων (National Telecommunications and Post Commission)	EETT www.eett.gr	Αρχή Διασφάλισης Απορρήτου Επικοινωνιών (Authority for Communication, Security and Privacy)
HR-Croatia	Hrvatska agencija za poštu i elektroničke komunikacije (Croatian Post and Electronic Communications Agency)	HAKOM www.hakom.hr	Consumer Protection Commission (within HAKOM)
HU-Hungary	Nemzeti Hírközlési Hatóság (National Communications Authority)	NHH www.nhh.hu	Gazdasági Versenyhivatal (Economic Competition Office – GVH), Nemzeti Fogyasztóvédelmi Hatóság (National Consumer Protection Authority – NFH),

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Ley 32/2003, de 3 de noviembre, General de Telecomunicaciones (Act 32/2003 on Telecommunications of 3 November 2003), http://merlin.obs.coe.int/redirect.php?id=11976
Viestintämarkkinalaki – Kommunikationsmarknadslag (Communications Market Act) (393/2003 includes amendments 628/2003, 152/2004, 518/2004, updated version), http://merlin.obs.coe.int/redirect.php?id=11978 (EN); *Laki radiotaajuuksista ja telelaitteista – Lag om radiofrekvenser och teleutrustningar* (Act on Radio Frequencies and Telecommunications Equipment, 1015/2001 with amendments up to 11/2007), http://merlin.obs.coe.int/redirect.php?id=11979 (EN); *Laki televisio- ja radiotoiminnasta – Lag on televisions- och radioverksamhet* (Act on Television and Radio Operations, 744/1998 with amendments up to 1251/2006), http://merlin.obs.coe.int/redirect.php?id=11977 (EN); *Laki tietoyhteiskunnan palvelujen tarjoamisesta – Lag om tillhandahållande av informationssamhällets tjänster* (The Act on the Provision of Information Society Services (458/2002), http://merlin.obs.coe.int/redirect.php?id=11980 (EN)
Code des postes et des communications électroniques no 63-815 (Code for postal and electronic communications services no. 63-815), http://merlin.obs.coe.int/redirect.php?id=11981; *Décision no 2009-0527 de l'Autorité de régulation des communications électroniques et des postes en date du 11 juin 2009 portant modification du règlement intérieur* (Decision no. 2009-0527 of the regulatory authority for electronic communications and postal services, dated 11 June 2009, amending the internal rules), http://merlin.obs.coe.int/redirect.php?id=11982; *Loi no 2004-669 du 9 juillet 2004 relative aux communications électroniques et aux communications audiovisuelles* (Act no. 2004-669 of 9 July 2004 on electronic communications and audiovisual communication services), http://merlin.obs.coe.int/redirect.php?id=11983; *Loi pour la confiance dans l'économie numérique (LCEN) adoptée le 13 mai 2004* (Act on confidence in the digital economy, adopted on 13 May 2004) *(Loi n° 2004-575),* http://merlin.obs.coe.int/redirect.php?id=11984; *Loi relative aux obligations de service public des télécommunications et à France Telecom adoptée le 31 décembre 2003* (Act on public service obligations in the area of telecommunications and of France Telecom, adopted 31 December 2003) (n° 2003-1365), http://merlin.obs.coe.int/redirect.php?id=11985
Office of Communications Act 2002, http://merlin.obs.coe.int/redirect.php?id=11986; Communications Act 2003, http://merlin.obs.coe.int/redirect.php?id=11988; The Wireless Telegraphy Act 2006, http://merlin.obs.coe.int/redirect.php?id=11989
Law No. 3115/2003 law on the Authority for Communication, Security and Privacy, http://merlin.obs.coe.int/redirect.php?id=11992; Law No. 3431/2006 on electronic communications and other provisions, http://merlin.obs.coe.int/redirect.php?id=11990
*Statut Hrvatske agencije za poštu i elektronicke komunikacije, (*Statute of the Croatian Post and Electronic Communications Agency, Official Gazette 116/08), http://merlin.obs.coe.int/redirect.php?id=11994 (EN); for secondary rules, see http://merlin.obs.coe.int/redirect.php?id=12071 (EN); *Zakon o elektroničkim komunikacijama*, ABl. Nr. 73/2008 (The Electronic Communications Act of 19 June 2008), http://merlin.obs.coe.int/redirect.php?id=11993 (EN); *Zakon o koncesijama* (Concessions Act, Official Gazette of the Republic of Croatia, no. 82/92), as last promulgated in OG no. 125/08, http://merlin.obs.coe.int/redirect.php?id=12060
Act 100 of 2003 on Electronic Communications, http://merlin.obs.coe.int/redirect.php?id=11996 (Act C); Act 174 of 2007 on the amendment of Act 100 of 2003 on Electronic Communications, http://merlin.obs.coe.int/redirect.php?id=11997; Act 74 of 2007 on the rules of broadcasting and digital switchover, http://merlin.obs.coe.int/redirect.php?id=11999;

	Regulatory Authorities responsible for Telecommunications	Website	Other regulators/sub-entities particularly relevant for communications
HU *continued*			Kormányzati Frekvenciagazdálkodási Hivatal (the Government Frequency Management Office – KFGH), Hírközlési és Informatikai Tudományos Egyesület (the Scientific Association for Info-communications – HTE)
IE-Ireland	Commission for Communications Regulation	COMREG www.comreg.ie	
IT-Italy	Autorità per le garanzie nelle comunicazioni (Communications Regulatory Authority)	AGCOM www.agcom.it	Direzione reti e servizi di comunicazione elettronica Electronic communication networks and services Direction (within AGCOM)
IS-Iceland	Póst- og fjarskiptastofnun (Post and Telecom Administration)	PTA www.pta.is	
LI-Liechtenstein	Amt für Kommunikation	AK www.ak.llv.li	Close cooperation with the Swiss Bundesamt für Kommunikation (BAKOM)
LT-Lithuania	Ryšių reguliavimo tarnyba (The Communications Regulatory Authority)	RRT www.rrt.lt	

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Act 154 of 2007 on the amendment of Act 74 of 2007 on the Rules of broadcasting and digital switchover and Act I of 1996 on Radio and television broadcasting, http://merlin.obs.coe.int/redirect.php?id=11998
Communications Regulation Act, 2002 (No. 20 of 2002), http://merlin.obs.coe.int/redirect.php?id=12000; S.I. No. 510 of 2002 Communications Regulation Act 2002 (Establishment Day) Order 2002, http://merlin.obs.coe.int/redirect.php?id=12001; Telecommunications (Miscellaneous Provisions) Act, 1996 (No. 34 of 1996), http://merlin.obs.coe.int/redirect.php?id=12002; Communications Regulation (Amendment) Act, 2007, http://merlin.obs.coe.int/redirect.php?id=12004; Competition Act 2002, http://merlin.obs.coe.int/redirect.php?id=12003
Legge n. 249 del 31/07/1997 Istituzione dell'Autorità per le Garanzie nelle Comunicazioni e norme sui sistemi delle telecomunicazioni e radiotelevisivo (Law No. 249 of 31 July 1997 on the establishment of the regulatory authority for communications), http://merlin.obs.coe.int/redirect.php?id=11889; *D.Lgs. 1 agosto 2003, n. 259, Codice delle comunicazioni elettroniche* (Regulation No. 259 of 1 August 2003: Electronic Communications Code), http://merlin.obs.coe.int/redirect.php?id=12005; *D.Lgs del 31 luglio 2005, n. 177, Testo unico della radiotelevisione* (Regulation No. 177 of 31 July 2005: Consolidated text for radio and television, http://merlin.obs.coe.int/redirect.php?id=12072
Lög um Póst- og fjarskiptastofnun 2003 nr. 69, 24 mars (Act on the Post and Telecom Administration, No. 69, 24 March 2003, http://merlin.obs.coe.int/redirect.php?id=12006; *Lög um breytingu á lögum um Póst- og fjarskiptastofnun 2006 nr. 172, 20 desember* (Act No. 172 of 20 December 2006 on an amendment on the Act on the Post and Telecom Administration (in force since 1 January 2007), http://merlin.obs.coe.int/redirect.php?id=12007; *Lög um fjarskipti 2003 nr. 81, 26. mars* (Electronic Communications Act No. 81, of 26 March 2003), http://merlin.obs.coe.int/redirect.php?id=12008; *Lög 2005 nr. 78 & lög 2007 nr. 39* (Act No. 78/2005 and Act No. 39/2007, Amendments on the Electronic Communications Act No. 81/2003)
Verordnung vom 3. April 2007 über die Aufgaben und Befugnisse der Regulierungsbehörde im Bereich der elektronischen Kommunikation (RKV), (Regulation of 3 April 2007 on the Tasks and Powers of the Regulatory Authority in the area of electronic communications), http://merlin.obs.coe.int/redirect.php?id=12009; *Gesetz vom 17. März 2006 über die elektronische Kommunikation* (Kommunikationsgesetz; KomG), (Law of 17 March 2006 on Electronic Communications) http://merlin.obs.coe.int/redirect.php?id=12010
Nutarimas Nr. 1029 Dėl Lietuvos Respublikos Ryšių reguliavimo tarnybos nuostatų patvirtinimo (Resolution No. 1029 on the approval of the Regulations of the Communications Regulatory Authority of 19 August 2004), came into force 25 August 2004, Official Gazzette *Valstybės žinios 2004* Nr.131-4734, http://merlin.obs.coe.int/redirect.php?id=12011; *Nutarimas Nr. 617 Dėl valstybės įmonės Valstybinės radijo dažnių tarnybos reorganizavimo į Vyriausybės įstaigą Ryšių reguliavimo tarnybą prie Lietuvos Respublikos Vyriausybės* (Resolution Concerning the Reorganisation of the State Radio Frequency Service into a Government Institution, the Communications Regulatory Authority under the Government of the Republic of Lithuania), Government of the Republic of Lithuania/Resolution no. 617 of 30 May 2000, came into force on 8 June 2000, Official Gazzette *Valstybės žinios 2000* Nr.46-1316, http://merlin.obs.coe.int/redirect.php?id=12012 (EN); *Elektroninių ryšių Įstatymas* (Law on Electronic Communications) Parliament of the Republic of Lithuania/Law/ IX-2135/2004 of 15 April 2004, came into force on 1 May 2004, Official Gazzette *Valstybės žinios* 2004 Nr.69-2382, http://merlin.obs.coe.int/redirect.php?id=12013 (EN); The Rules for Provision of Universal Electronic Communications Service (Government of the Republic of Lithuania/Resolution No. 162 of 15 February 2006, came into force 1 July 2006, Official Gazzette *Valstybės žinios* 2006 Nr.23-749), http://merlin.obs.coe.int/redirect.php?id=12014 (EN)

	Regulatory Authorities responsible for Telecommunications	Website	Other regulators/sub-entities particularly relevant for communications
LU-Luxembourg	Institut Luxembourgeois de Régulation (Regulatory Institute)	ILR www.ilr.public.lu	
LV-Latvia	Sabiedrisko pakalpojumu regulesanas komisija (Public Utilities Commission)	SPRK www.sprk.gov.lv	
MK-Former Yugoslav Republic of Macedonia	Агенција за електронски комуникации (Agency for Electronic Communications of the Republic of Macedonia)	AEC www.aek.mk	
MT-Malta	Malta Communications Authority	MCA www.mca.org.mt	
NL-Netherlands	Onafhankelijke Post en Telecommunicatie Autoriteit (Independant Authority for Post and Telecommunications)	OPTA www.opta.nl	Certain telecommunications matters, in particular the allocation of frequencies fall within the authority of the minister of Economic affairs, www.minez.nl (some of these responsibilities are executed by a special agency, the Agentschap Telecom, www.agentschap-telecom.nl)
NO-Norway	Post- og teletilsynet (Norwegian Post and Telecommunications Authority)	NPT www.npt.no	
PL-Poland	Urząd Komunikacji Elektronicznej (Office of Electronic Communications)	UKE www.en.uke.gov.pl	
PT-Portugal	Autoridade Nacional de Comunicações (National Authority for Communications)	ANACOM www.anacom.pt	

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La loi du 30 mai 2005 sur les réseaux et les services de communications électroniques (Act of 30 May 2005 on networks and electronic communication services), http://merlin.obs.coe.int/redirect.php?id=12015
Likums par sabiedrisko pakalpojumu regulatoriem (Law On Regulators of Public Utilities) as amended by 14 Juni 2007, http://merlin.obs.coe.int/redirect.php?id=12016 (EN); *Sabiedrisko pakalpojumu licencēšanas noteikumi* (Regulations no. 664 regarding the Licensing of Public Utilities) of 30 August 2005, http://merlin.obs.coe.int/redirect.php?id=12018; *Elektronisko sakaru likums* (Electronic Communications Law) as amended by 3 May 2007, http://merlin.obs.coe.int/redirect.php?id=12017 (EN)
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	Regulatory Authorities responsible for Telecommunications	Website	Other regulators/sub-entities particularly relevant for communications
PT *continued*			
RO-Romania	Autoritatea Naţională pentru Administrare şi Reglementare în Comunicaţii (National Authority for Management and Regulation in Communications of Romania)	ANCOM www.ancom.org.ro	Ministerului Comunicaţiilor şi Societăţii Informaţionale (Ministry for Communications and for the Information Society) http://www.mcsi.ro
RU-Russia	Министерство связи и массовых коммуникаций (Ministry of Communications and Mass Communications of the Russian Federation - executive body for state policy and regulation in communications sector)	Minkomswjas www.minsvyaz.ru	Федеральный агентство связи Federal Agency for Communications (operates public property in communications) (Rossvyaz) http://www.minsvyaz.ru/departments/rossvyaz/ Федеральная служба по надзору в сфере связи, информационных технологий и массовых коммуникаций Federal Service on Control over Communications, Information Technologies and Mass Communications (control and overseeing activities in communications, radio spectrum, mass media, and personal data) (Roskomnadzor) http://www.rsoc.ru
SI-Slovenia	Agencija za pošto in elektronske komunikacije Republike Slovenije (Post and Electronic Communications Agency of the Republic of Slovenia)	APEK www.apek.si	

Legal basis for the authority and most relevant laws regulating the communication of audiovisual content
The Law no. 5/2004 was supplemented by *Lei n.º 35/2008, de 28 de Julho* (Law no. 35/2008, of 28 July 2008), http://merlin.obs.coe.int/redirect.php?id=12037 (EN); *Lei n.º 32/2009, de 9 de Julho* (Law no. 32/2009, of 9 July 2009), http://merlin.obs.coe.int/redirect.php?id=12035 (EN)
Hotărârea nr. 12 din 16 ianuarie 2009 privind organizarea si funcţionarea Ministerului Comunicatiilor si Societatii Informationale (Decision No. 12 of 16 January 2009 on the organisation and the fuctioning of the Ministry for Communications and for the Information Society), http://merlin.obs.coe.int/redirect.php?id=12039; *Ordonanţă de urgenţa nr. 22 din 11/03/2009 privind înfiinţează Autoritatea Naţională pentru Administrare şi Reglementare în Comunicaţii* (Ordinance No. 22 of 11 March 2009 on the creation of the National Authority for Management and Regulation in Communications of Romania), http://merlin.obs.coe.int/redirect.php?id=12040; *Ordonanţă de urgenţa nr. 25 din 18 aprilie 2007 privind stabilirea unor măsuri pentru reorganizarea aparatului de lucru al Guvernului* (Ordinance no.25/2007 on the establishment of certain measures in order to reorganise the Government working apparatus), http://merlin.obs.coe.int/redirect.php?id=12041; Law no. 510/2004 on the reorganization of the Inspectorate General for Communications and Information Technology, http://merlin.obs.coe.int/redirect.php?id=12042 (EN); Emergency Ordinance no. 211/2008 on the amendment and completion of the Government Emergency Ordinance no. 106/2008 on the establishment of the National Authority for Communications, http://merlin.obs.coe.int/redirect.php?id=12043 (EN); *Ordonanţă de urgenţa no. 79/2002* on the general regulatory framework for communications, approved, with amendments and completions, by Law no.591/2002, with the subsequent amendments and completions (unofficially consolidated text, including the legal provisions in force as of March 2009), http://merlin.obs.coe.int/redirect.php?id=12044 (EN); Law no.133/2007 for the approval of the Government Emergency Ordinance no.70/2006 on the amendment and completion of certain normative acts in the fields of electronic communications and of postal services, http://merlin.obs.coe.int/redirect.php?id=12045; Emergency ordinance no.70/2006 on amending and completing certain normative acts in the fields of electronic communications and of postal services, http://merlin.obs.coe.int/redirect.php?id=12046; Law no. 239/2005 on the amendment and completion of several normative acts in the field of communications, http://merlin.obs.coe.int/redirect.php?id=12047 (EN)
Federal Statute of the Russian Federation On Communications, http://merlin.obs.coe.int/redirect.php?id=12048 (EN); Law of the Russian Federation On the Mass Media, http://merlin.obs.coe.int/redirect.php?id=12049 (EN); Federal Statute of Russian Federation On Information, Information Technologies and Information Protection, http://merlin.obs.coe.int/redirect.php?id=12050 (EN)
Statut Agencije za pošto in elektronske komunikacije Republike Slovenije, Stran 7048, http://merlin.obs.coe.int/redirect.php?id=12051; *Zakon o elektronskih komunikacijah – ZEKom, Ur. l. RS št. 13/07-UPB1 in 102/07-ZDRad* (The Electronic Communications Act, (Official Gazette of the RS, no. 13/07 – consolidated text and 102/07-ZDRad), entry into force 1 May 2004), http://merlin.obs.coe.int/redirect.php?id=12052 (EN)

	Regulatory Authorities responsible for Telecommunications	Website	Other regulators/sub-entities particularly relevant for communications
SK-Slovak Republic	Telekomunikačný úrad Slovenskej republiky (Telecommunications Office of the Slovak Republic)	TO SR www.teleoff.gov.sk	
SE-Sweden	Post- och Telestyrelsen (Post and Telecom Agency)	PTS www.pts.se	
TR-Turkey	Bilgi Teknolojileri ve İletişim Kurumu (Information and Communication Technologies Authority)	BTK www.tk.gov.tr	

Legal basis for the authority and most relevant laws regulating the communication of audiovisual content
610 Zákon z 3. decembra 2003 o elektronických komunikáciách (Act no. 610 of 3 December 2003 on Electronic Communications as amended by Act no. 716/2004 Coll., Act no. 69/2005 Coll. and Act no. 117/2006 Coll.), http://merlin.obs.coe.int/redirect.php?id=12053 (EN); *654 Zákon z 11. decembra 2007, ktorým sa mení a dopĺňa zákon* č. *610/2003 Z. z. o elektronických komunikáciách v znení neskorších predpisov a o zmene niektorých zákonov* (Act no. 654/2007 of 11 December 2007, amending the Act No 610/2003 Coll. on Electronic Communications and on Amendments to Certain Acts, as amended), http://merlin.obs.coe.int/redirect.php?id=12054 (EN)
Lag om elektronisk kommunikation (The Electronic Communications Act, came into force on 25 July 2003), http://merlin.obs.coe.int/redirect.php?id=12055 (EN)
Law no. 2813 "on the Establishment of the Information and Communication Technologies Authority" (7. April 1983) as last amended by Law no. 5809 dated 5 November 2008, http://merlin.obs.coe.int/redirect.php?id=12057 (EN); Law no. 5809 "Electronic Communications Law", dated 5 November 2008, put into force on 10 November 2008, http://merlin.obs.coe.int/redirect.php?id=12056 (EN); Law no. 406 "Telegram and Telephone Law" as last amended by Law no. 5809 dated 5 November 2008, http://merlin.obs.coe.int/redirect.php?id=12058 (EN); Law no. 5369 "Law on Provision of Universal Service and Amendments to Certain Laws (16 June 2005), http://merlin.obs.coe.int/redirect.php?id=12059 (EN)

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