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# New European Rules for the Communications Sector

In working document SEC (98) 1284, the European Commission summarised the results of the public consultation on the Green Paper on the convergence of the telecommunications, media and information technology sectors, noting that "There appears to be substantial support for a more horizontal approach to regulation". The working document defined this approach as "same rules for networks / access issues, but with a vertical or sector specific approach for regulating aspects of the provision of services such as, for example, the content of audiovisual programming".

This working document will be five years old in July this year. Since it was written, horizontal regulation has been much debated and, in some cases, introduced. One example is the telecoms package adopted in December 2001. Despite its misleading title, the package completes the transition from regulation of telecommunications alone to regulation of the much broader field of communications. Although it is made clear that the new regulations do not apply to "content", they do have an impact on audiovisual media. This is analysed in the following *IRIS plus*.

However, the suggestion that a horizontal approach cannot be used to regulate content does not necessarily seem well-founded. In contrast to the aforementioned idea that audiovisual content should be regulated vertically, there are already trends towards the harmonisation of copyright law. Meanwhile, the cross-sectoral standardisation of existing advertising regulations is also being discussed. *IRIS plus* articles dealing with both of these subjects are being planned for later this year. In 2003, *IRIS plus* will therefore be focusing in particular on the theme of "horizontal regulation".

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# New European Rules for the Communications Sector

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*New rules for the communications sector have recently been agreed upon at the European level. In the coming months, the European Union Member States are to translate these rules into national legislation. The new regulatory framework is no longer aimed at regulating telecommunications, but takes "communications" as a general point of departure. This does not mean that it directly covers content. On the contrary: content regulation falls explicitly outside the scope of the new rules. But almost everything else is part of the revised regulation: infrastructure, conditional access and must-carry obligations for cable television are amongst the issues that are regulated and will affect the audiovisual sector directly or indirectly. This contribution will not only analyse the new framework but will also explore several of the provisions that are more directly relevant for the audiovisual sector.*

## Introduction

Quite soon after the historic decision was made in the United States to break the monopoly of AT&T by means of a compulsory split into various operations (1984), the thought also occurred in Europe that it would be desirable to intervene in the government dominated telecommunications sector to enhance privatisation and liberalisation in the market. In the 1980s and 1990s, this resulted in various Directives,[2] which still form the basis for the current telecommunications regulations in the Member States of the European Union.[3]

In 1999, the time was deemed ripe to reconsider the policy. The first signs of actual competition emerged and the telecommunications sector was doing well, if not extremely well. The European Commission instigated the so-called "Communications Review" to evaluate the situation and to generate new proposals for regulation.[4] The key element of this review consisted in proposals for the revision of the existing Directives concerning the telecommunications sector. The proposals included a further liberalisation of the market and were also promotive of a more technology-neutral approach. No longer was the focus on telecommunications infrastructure and services, but the "tele" was removed and all communications infrastructure and services would become the object of a new regulatory framework. This meant that – amongst other things - transmission infrastructure for broadcasting would fall under the new rules. As far as content is concerned, the Commission document clearly states: "[T]hese rules would of course be **without prejudice to regulatory obligations** (whether at EU or national level) **which apply to the content of broadcasting services or other information society services**".[5] The ensuing consultation process led to the drafting of a group of five new Directives (the Framework Directive, the Access Directive, the Authorisation Directive, the Universal Service Directive and the Directive on Privacy and Electronic Communications),[6] which were adopted in 2001 and were preceded in 2000 by a Regulation on the so-called Unbundled Access to the Local Loop.[7] All of these Directives have to be implemented before the end of July of this year (with the exception of the Directive on Privacy and Electronic Communications, for which the implementation has to be finalised by 31 October 2003).

## Why a New Framework?

The evaluation of the previous (to be replaced by the new framework) rules brought various flaws to light. In the former rules, for instance, fixed voice telephony took central position. This is hardly surprising, for the Internet was virtually non-existent in the 1980s (except in the academic world), and it was hard to make any predictions about the development of mobile telephony. That both phenomena would assume the proportions that they have today was beyond anybody's imagination at the time and therefore not so relevant from a regulatory perspective. Besides, there was the increasing phenomenon of convergence: partly due to the ongoing digitisation, services were no longer restricted to a particular infrastructure and vice versa. Consequently, the formulation of new rules should be more technology-neutral.

A second major point of criticism concerned the implementation of rules on a national level. This took a long time, as each Member State used its own interpretation of the European Directives, and some countries lacked independent and decisive regulatory authorities.

In addition, there was the impression that a less radical regime would suffice, since the telecommunications market had known competition all along. More restraint should be observed in placing market parties under special supervision, and supervisors should be more flexible in their choice of instruments to be used.

The considerations have partly or entirely found expression in the new Directives, which are briefly discussed in the outline below.

## Framework Directive

The new Framework Directive outlines the main principles of the new Regulatory Framework. In Recitals 5 and 6, it is clearly indicated that the convergence of the telecommunications, media and information technology sectors means that all transmission networks and services should be covered by a single regulatory framework.

***Scope of the new framework*** [8]

**Not included:**

**Application layer**
Mobile and fixed telephony services, Internet access, browsers, portals, user- and information services, broadcasting, paid-for content services, interactive applications, etc.

**Included in the new framework:**

**Teleservices**
Subscriber management services, CA, API, operational support systems

**Network and carrier services**
Routing, transcontrol, Internet backbone links, switching facilities

**Spectrum, physical infrastructure**
Wire and wireless telecommunications network, local loop, cable, satellite, terrestrial and broadband networks

No longer is it possible to maintain old paradigms based on a one-on-one relationship between infrastructure and services (telephone networks for telephone services, cable television networks for the distribution of television programmes). However, a separation of the regulation of transmission and the regulation of content is still deemed necessary. The new rules therefore do not "cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain Information Society services, and is therefore without prejudice to measures taken at Community or national level in respect of such services, in compliance with Community law, in order to promote cultural and linguistic diversity and to ensure the defence of media pluralism".[9] Furthermore, "[T]he separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection".[10] "Audiovisual policy and content regulation are undertaken in pursuit of general interest objectives, such as freedom of expression, media pluralism, impartiality, cultural and linguistic diversity, social inclusion, consumer protection and the protection of minors. The Commission communication "Principles and guidelines for the Community's audio-visual policy in the digital age", and the Council conclusions of 6 June 2000 welcoming this communication, set out the key actions to be taken by the Community to implement its audiovisual policy".[11] Although content has other "sensitivities", it is quite clear that the Commission would also like to come to a new European policy on the level of content-services. At the moment, only the content of television programmes is covered by the so-called "Television without Frontiers" Directive.[12]

The main objectives and principles are set out in Article 8 of the Directive. It emphasises the need to ensure effective competition, but national regulatory authorities should also take the utmost account of the desirability of making regulations technologically neutral. The Article sums up quite extensively what the objectives are for the promotion of competition (*i.e.*, ensuring maximum benefits for users in terms of choice, price and quality; avoiding market distortion and promoting the efficient use of scarce resources), the development of the internal market (*i.e.*, removing remaining obstacles to the provision of networks and services; eliminating discrimination) and the interests of European citizens (*i.e.*, ensuring access to universal services; consumer protection; privacy; transparent information).

The new Framework Directive also comprises the new supervisory framework. When compared with the previous situation, this Directive introduces prominent changes. The main questions to be asked here concern when the supervisory rules apply and whether measures can be imposed on the basis of these rules. The notion of significant market power remains the decisive factor in this context. Restrictions can only be imposed on market parties with significant market power. Under the existing market regime, there is significant market power when the market share is 25%. The new Directive links up with the term of significant market power in the context of competition law: "[A]n undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers".[13] The familiar percentage of 25% is thus replaced by a more material criterion. It is up to the national supervisors to decide if there are any companies with significant market power. With the "utmost" care, they are to observe the guidelines that the European Commission is to set in this context. Initially, the Commission wished to be vested with binding powers, but this wish received insufficient support from the Member States. Yet, the Commission remains involved in determining whether there are parties with significant marker power. When determining significant market power, the regulators are to take the recommendation of the European Commission on relevant markets into account. The Commission has already published guidelines on market analysis and the assessment of significant market power.[14]

Furthermore –as part of the process - the Commission indicates which markets, in its opinion, would qualify for the imposition of measures. The Directive stipulates that the first recommendation should at least contain the markets listed in an appendix to the Directive. These are markets for fixed and mobile voice networks and services that have already been identified. Explicit reference, however, is also made to markets of "call delivery in public mobile networks" (with respect to the high rates for calling from fixed to mobile), access to mobile networks, including carrier selection (with respect to the high rates for international calls via mobile networks and providing choice in call-handling to consumers) and international roaming via mobile networks (with respect to the high rates for mobile calls from abroad). The European Commission is working on a Recommendation that further elaborates on this issue of relevant product and service markets.[15] The underlying working paper contains more or less the same markets as already mentioned in the Annex to the Directive, but at the same time defines new markets that should be subject to regulatory scrutiny. In the context of this article, it should be mentioned that the Commission wants to include markets

related to broadcasting transmission.[16] On a Member State level, national regulatory authorities (NRAs) should make an analysis of broadcasting transmission services and distribution networks insofar as they provide the means to deliver content to end-users. This includes terrestrial, cable and satellite distribution. It will be interesting to see what the results are of the analysis in the various Member States because the outcome could substantially differ. For example, in some countries, cable networks might be considered as players with significant market power. In others, satellite might be seen as a service that has significant market power.

In principle, it is possible that on a national level, other markets may be selected as well, but this could raise objections in Brussels or be opposed by other Member States. This is more or less inherent in the procedure to be followed by national regulators when they intend to identify markets that lack competition. The Framework Directive provides for the condition that market parties must be consulted and that the European Commission and other Member States must have an opportunity to state their objections, so that there will be some form of homogeneity between the measures taken in the various Member States. The European Commission may demand that the proposed measure or identification is revoked and can thus veto the decision ("[T]he Commission may [...] take a decision requiring the national regulatory authority concerned to withdraw the draft measure"). This rather complex process was set up to achieve a sufficient level of harmonisation and to give the Commission a decisive role. As already mentioned, the European Commission originally wanted a stronger position, but could not generate enough support for its ideas.

With respect to the position of the regulators (the NRAs), the Framework Directive demands that the Member States have an independent regulator. This concerns the independence in relation to the market parties. Member States that own or exercise influence over providers of telecommunication networks or services are to make a distinction between regulating tasks and activities that are related to the property or the influence. This tends to become a rather complicated issue due to the economic situation of some of the incumbents with the State as a large or majority shareholder. The Directive contains no specific guidelines on how the independent regulatory powers have to be structured. Some Member States will maintain their present model (often with sector specific regulators for telecommunications and for broadcasting). Other Member States have decided to combine various regulators. A good example in this respect is the proposed creation of a new Office for Communications (OFCOM) in the United Kingdom, combining five regulatory instances (the Independent Television Commission (ITC), the Broadcasting Standards Commission (BSC), the Office of Telecommunications (Oftel), the Radio Authority (RA) and the Radio Communications Agency).[17]

It is interesting to see that the Framework Directive pays special attention to the interoperability of digital interactive television services (Article 18). It obliges Member States - in order to promote the free flow of information, media pluralism and cultural diversity – to encourage the use of open Application Program Interfaces (APIs) by providers of digital interactive television services for the distribution to the public in the Community on digital interactive television platforms, regardless of the transmission mode. APIs determine what kind of applications can be offered, based on the operating system of set-top boxes.[18] It also requires Member States to encourage providers of all enhanced digital television equipment for the reception of digital interactive television services on interactive digital television platforms to comply with an open API that meets certain minimum requirements. Furthermore, API-providers need to provide third parties with the information necessary to offer services. This has to be done on a fair, reasonable, non-discriminatory basis and against reasonable remuneration. If the providers do not comply with this, the Commission can take further action as foreseen in the Directive. This special provision – but also the access regime for conditional access in the Access Directive (see below) – indicates the importance attached to the matter.

## Regulation on Unbundled Access to the Local Loop and the Access Directive

The way in which access must be provided by parties with significant market power is laid down in the Access Directive and in the Regulation on Unbundled Access to the Local Loop (ULL). The Regulation is more than one year old and was ahead of the Directives. Its position in this context is special. Applying a Regulation is the most serious European regulatory instruments (and had not yet been used as a means to regulate communications or the media). Regulations carefully prescribe what the Member States are to do and do not allow for any margin of appreciation or local colour with regard to their implementation.

The Regulation concerns unbundled access to the local loop and thus ensures that third-party providers have direct access to end-users. Thus, it is an essential instrument in contracting out broadband Internet access. Access to the local loop and related facilities must be provided under transparent, fair and non-discriminatory conditions. The regulation is technology-dependent: the strict access regime applies exclusively to physical twisted metallic pair (*i.e.* the classical copper-wire telephone network) and excludes access to other technologies. Although the Regulation is not technology-neutral, it is at the same time content-neutral. Unbundled access to the local loop may be used to offer a wide variety of (broadband) services to the consumer. Experiments have shown that it is – technically - possible to offer services that can compete with on the air and cable television broadcasts. Whether it would be possible to build a viable business based on the offer of such services is still unclear.

Again, to a major extent, the Access Directive[19] has become technologically neutral and is no longer restricted to voice telephony. The Directive regulates access to communication networks so that third parties can provide their own services. For example, interconnection, being one of the better-known forms of access rights, is necessary to ensure the interoperability between networks. Interconnection means the linking of networks in order to allow users of one network to communicate with users on the same or another network, or to access services provided by other/independent service providers. The Directive does not make interconnection compulsory, but has a regime of negotiated access, where parties are to reach agreements in negotiations and disputes can be settled by the supervisor. But the Directive also applies to "associated facilities". Conditional Access is considered to be such a facility.

Although the Access Directive contains a general regime concerning access rights, it also has a provision that deals exclusively with Conditional Access, Article 6 of the Directive almost copies the rules from the present Directive on Conditional Access Services.[20] Member States have an obligation to ensure that service providers have access to conditional access systems for digital television and radio. It is not relevant – as it is in the case of the general access regime – whether the provider of the conditional access system has significant market power or not. Member States are, however, permitted to allow regulators to review the conditions being imposed on providers of conditional access systems based on a market analysis. It is interesting to see that the Commission pays particular attention to two aspects of conditional access, Electronic Programme Guides (EPGs) and APIs. Both are essential elements of a conditional access system. EPGs are the key to whatever choice the viewer or listener makes. As already mentioned, APIs determine what kind of applications can be offered based on the operating system of set-top boxes. Without these forms of access, it is very difficult to offer competitive services.

A new element is the flexibility concerning the measures to be imposed. All kinds of commitments, such as cost-orientated rates, making reference offers (a reference offer is like a menu in a restaurant. It shows everything that is on offer, even the things of which you might not have thought when entering the restaurant and for which you were not planning to ask) and the use of transparent and unbundled rates no longer automatically result from identification as a party with significant market power. A toolbox approach has been adopted instead, where national regulatory authorities can decide which instruments they consider most suitable. In this way parties with more significant market power may have to face greater commitments than parties with only a little significant market power.

## Authorisation Directive

The Authorisation Directive deals primarily with restrictions on the use of authorisations as regulatory instrument. The most important new element in the Authorisation Directive is the great store set by general authorisations (such as the current Dutch registration system; all rights attached to registrations or general authorisations are based on the law and are not defined by licence conditions, which may vary per case). General authorisation schemes have a clear advantage: the applicable rules are known in advance and are thereby more transparent and non-discriminatory than provisions of licences that can differ and can be subjective. The Member States are expected to resolve as many access issues as possible by applying the general authorisations rather than through individual licences. In fact, the Directive only allows for the use of the licence instrument in the case of numbers and frequencies.[21] One of the consequences is that Member States can no longer put all kinds of obstacles in the way when cables are laid. It is also worth mentioning that this Directive is the first instance where the auction is referred to as a permissible instrument for allocation. So, frequencies for broadcasting can be auctioned.

Does the fact that the Authorisation Directive obliges the use of a transparent and non-discriminatory procedure for the allocation of frequencies affect the present situation regarding the composition of national broadcasting systems (and in particular the position of the public broadcasters)? This is not directly the case. Article 5 of the Directive contains the following provision: "[W]ithout prejudice to specific criteria and procedures adopted by Member States to grant rights of use of radio frequencies to providers of radio or television broadcast content services with a view to pursuing general interest objectives in conformity with Community law, such rights of use shall be granted through open, transparent and non-discriminatory procedures". This still leaves Member States with a considerable discretionary power, but they shall have to further motivate their objectives in order to stay within the borders of this particular Article. Nevertheless, it is clear that this provision will affect the position of public broadcasters in the first place. In some countries, there is already a debate about how many frequencies should be allocated to public and to private broadcasters. Both in the Netherlands and in Germany ongoing discussions are taking place about what each share should be. Most private broadcasters claim that too many frequencies have been given to the public sector. This is of course a topic that has a freedom of expression element attached to it. Take, for example, the famous *Lentia* case, where the European Court of Human Rights decided that the monopoly of the incumbent Austrian public broadcaster could be maintained.[22]

## Universal Service Directive

Universal service aims to ensure the availability of good quality, publicly available services through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market. In order to do so, the Universal Service Directive defines a minimum of service that has to be offered within all the Member States. This minimum is a true minimum and limits the universal service primarily to ordinary voice telephony (also capable of transporting data, but without offering any substantial guarantees concerning Internet access - broadband access is not part of the requirements). The European Commission would prefer that the current definition of universal service was extended to encompass the guarantee of a certain Internet access quality as well, but this proposal was rejected. The Directive, however, does provide for an assignment for the European Commission to evaluate the magnitude of the universal service, but no consequences are attached. Also, Member States are free to extend the universal service.

The Universal Service Directive is a good example of a situation where the limits of technological neutrality are reached. The universal service is not only restricted to voice telephony. Most of the stipulations in the Directive to protect the consumer – including quality criteria with regard to the service, information and number portability – only apply to telephony or are primarily meant to be imposed on providers of voice telephony. The new Directives are therefore of little direct use to complaining Internet-users.

With respect to universal service, the Member States are only given limited room to manoeuvre when it comes to passing on the costs to the market parties. Certain countries have imposed such levies (or considered doing so) in order to protect the position of the current dominant parties. Under the

new Directive, the involvement of market parties in financing the universal service is subject to stricter conditions.

Article 31 of the Directive is a very interesting one. It contains the regulation of must-carry obligations. Member States may impose reasonable must carry obligations for the transmission of radio and television broadcast channels and services. However, these obligations "shall only be imposed where they are necessary to meet clearly defined general interest objectives and shall be proportionate and transparent. The obligations shall be subject to periodical review". This provision legitimises what is a standard practice in most Member States. Nevertheless, Member States do not have unlimited authority to create must-carry obligations, but they have to pass a standard proportionality and transparency test. The Directive puts this in writing for the first time. The second paragraph of Article 31 allows the Member States to determine an appropriate remuneration (which again has to be non-discriminatory, proportionate and transparent) for the must-carry obligation. Putting this in the Directive might give a new argument to market players that fall under a must-carry obligation but do not receive remuneration. Both the Preamble and the relevant Article make clear that a must-carry obligation can only be imposed to the extent that a significant number of end-users use such networks as their principal means to receive radio and television broadcasts. This means that an overall must-carry obligation is not allowed. Also, it is made clear that services providing content, such as the offer of sale of a package of programmes, fall outside the scope of the Directive (but Member States are free to regulate them on a national level).

## Directive on Privacy and Electronic Communications

In addition to well-known issues, such as number recognition and invoice specifications, this Directive focuses on the use of traffic and location data.[23] Traffic data are not really a new issue. However, location-based services - based on the use of location data - are likely to become an important issue in the near future. The new third generation of mobile telephony (3G) should be an excellent platform to offer services that make use of the fact that it is possible to determine the exact location of a handset. With this knowledge, new services can be offered varying from navigation to tourist information (including video for which 3G-networks will, to some extent, have sufficient capacity). It is clear that the use of location data may give rise to serious privacy concerns. Therefore, it is not allowed to use location data without any restrictions; they are to be made anonymous, or they require the user's or subscriber's prior consent. Before getting their consent, service providers have to inform the users or subscribers about the type of location data that will be used and for what kind of purpose. Users and subscribers are allowed to withdraw their consent at any time. Furthermore, it must be possible for users to interrupt the use of their location data.

The transmission of unsolicited faxes and e-mails (which at least includes SMS messages, but should also be applicable to newer forms of messaging such as multimedia messaging – MMS) were a major issue in the preparation of the Directive. These discussions contributed to the delay in the adoption process of the Directive. Originally there were big differences between the opinions of the European Commission and the European Parliament.[24] The Commission - claiming that there would otherwise be an excessive growth of these kind of messages (in particular of "spam" on the Internet)[25] - wanted to severely restrict the flow of unsolicited messages, whereas the Parliament was originally more sympathetic to the arguments of the marketers. Eventually, an "opt-in" system (subscribers are to apply explicitly for receiving unsolicited communication) was given preference over an "opt-out" system (subscribers can indicate they do not wish to receive any unsolicited communication). If companies already have electronic contact data for electronic mail from clients, they are allowed to approach these clients without their prior consent, although the client must have the opportunity to opt out.[26] Sending e-mails anonymously or without an address for direct marketing purposes is prohibited in all cases.

## Analysis

Will the new rules actually contribute to a further liberalisation of the communications sector? Expectations of the development of competition were high when the revision of the rules was in its first stage. Meanwhile, those expectations have been considerably moderated, whereas newcomers in the telecommunications market are experiencing difficulties.

In principle, the new rules - by being more technology-neutral - are more widely applicable than the old regime, which was mainly focused on voice telephony. All electronic communications networks and services are subject to the rules of the new framework. Whether the new rules really apply depends primarily on the question of whether or not there is significant market power. If there is no significant market power, it will in principle be impossible to intervene. As the notion of significant market power has been derived from competition law, the limit is set much higher than the previous norm of a 25% market share. Only if market shares of about 40% to 50% are at issue, is the regulatory authority allowed to act. In practice, such large market shares are occurring less and less often. Consequently, the chance of identifying parties with significant market power is greatly reduced, if such parties can be found at all. On the other hand, the new Directives provide the possibility to demarcate markets more carefully and to include markets (such as broadcasting transmission services and distribution networks) that were not within the scope of the old Directives.

The new framework has a direct and/or indirect impact on the audiovisual sector. This is already a logical consequence of the technology-neutral approach of the framework and of the fact that convergence has blurred originally-existing borders between telecommunications and broadcasting. Although content as such is outside the scope of the new rules, they do cover the (access to) distribution means and the provision of communications services. This is important because it could offer more transparency to players in the audiovisual world that want to offer services and for whom it is essential that they can have access to distribution networks and necessary facilities. It also means that "broadcasting" will lose some of its "special status", but at the same time, this process offers the opportunity to benefit from some of the regulatory achievements of what was previously defined as the telecommunications sector.

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2) Of which several are relevant for the audiovisual sector, for example: Commission Directive 95/51/EC of 18 October 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services, OJ L 256/49, 26 October 1995; Commission Directive 1999/64/EC amending Directive 90/388/EEC in order to ensure that telecommunications networks and cable TV networks owned by a single operator are separate legal entities, OJ L 175/39, 10 July 1999, and Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services, OJ L 117/15, 7 May 1997.

3) A good overview of the present situation and its historical context can be found in the "Status Report on European Union Electronic Communications Policy" (Update: December 1999) and the Commission Staff Working Document, "Europe's Liberalised Telecommunications Market - A Guide to the Rules of the Game"; both available at: http://europa.eu.int/information_society/topics/telecoms/regulatory/userinfo/index_en.htm

4) "Towards a new framework for Electronic Communications infrastructure and associated services: The 1999 Communications Review", Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, COM(1999)539, available at: http://europa.eu.int/ISPO/infosoc/telecompolicy/review99/review99en.pdf

5) Emphasis in original text. *Ibid.*, page vi.

6) Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108/33, 24 April 2002; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), OJ L 108/7, 24 April 2002; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) OJ L 108/21, 24 April 2002; Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108/51, 24 April 2002 and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201/37, 31 July 2002, all available at: http://europa.eu.int/information_society/topics/telecoms/regulatory/maindocs/index_en.htm#directives

7) Regulation (EC) No. 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop, OJ L 336/4, 30 December 2000, also available at: http://europa.eu.int/information_society/topics/telecoms/regulatory/maindocs/index_en.htm#directives

8) Source: N. Helberger, "Access to technological bottleneck facilities: the new European approach", *Communications & Strategies*, 2002-2, p. 33.

9) Recital 5.

10) *Ibid.*

11) Recital 6.

12) EC Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, adopted on 3 October 1989, OJ L 298/23, 17 October 1989 and amended by Directive 97/36/EC of the European Parliament and of the Council, adopted on 30 June 1997, OJ L 202/60, 30 July 1997, available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31997L0036&model=guichett

13) Article 14(2), the Framework Directive.

14) Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ C 165/6, 11 July 2002, available at: http://europa.eu.int/eur-lex/en/archive/2002/c_16520020711en.html

15) "Public consultation on a draft Commission Recommendation On Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services", European Commission Working Document, Brussels, 17 June 2002, available at: http://europa.eu.int/information_society/topics/telecoms/news/documents/206_17_rec_public_consultation.pdf
See further, N. Helberger, "European Commission: Draft Recommendation on Relevant Product and Service Markets in Electronic Communications", *IRIS Extra*, September 2002, available at: http://www.obs.coe.int/oea_publ/iris/archives.html

16) *Ibid.*, para. 4.4

17) See further: http://www.ofcom.gov.uk/

18) Additional information on API's: http://lib.hut.fi/Diss/2002/isbn9512261723/article5.pdf

19) See further, N. Helberger, "Council of the European Union: Access Directive Adopted", *IRIS* 2002-3: 4.

20) Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, OJ L 320/54, 28 November 1998, available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31998L0084&model=guichett

21) As far as frequencies are concerned, it should be mentioned that the Parliament and Council also adopted a Decision on a regulatory framework for spectrum policy in the European Community (Radio Spectrum Decision), OJ L 108/1, 24 April 2002. The decision tries to provide a framework for a more harmonised approach to frequency issues, such as planning and coordination.

22) *Informationsverein Lentia and Others v. Austria*, Judgment of the European Court of Human Rights of 24 November 1993, series A, no. 276, available at: http://www.echr.coe.int

23) Traffic data are any data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing thereof. Location data are any data processed in an electronic communications network, indicating the geographic position of terminal equipment of a user of a publicly available communications service. See further, O. van Daalen, "Council of the European Union: Amended Data Protection Draft Adopted", *IRIS* 2002-3: 5.

24) But it was also a sensitive issue between Europe and the United States.

25) According to a study undertaken for the European Commission, Internet subscribers worldwide are unwittingly paying an estimated 10 billion Euros a year in connection costs just to receive "junk" e-mails: S. Gauthronet & E. Drouard/Commission of the European Communities, "Unsolicited Commercial Communications and Data Protection", Internal Market DG – Contract no. ETD/99/B5-3000/E/96, January 2001, available at: http://europa.eu.int/comm/internal_market/en/dataprot/studies/spamstudyen.pdf

26) To be more precise, the exact text of the Directive (Article 13, para. 2) says "where a natural or legal person obtains from its customers their electronic contact details for electronic mail, in the context of the sale of a product or service, in accordance with Directive 95/46/EC, the same natural and or legal person may use these electronic contact details for direct marketing of its own similar products or services provided that customers clearly and distinctly are given the opportunity to object, free of charge and in an easy manner, to such use of electronic contact details when they are collected and on the occasion of each message in case the customer has not initially refused such use".

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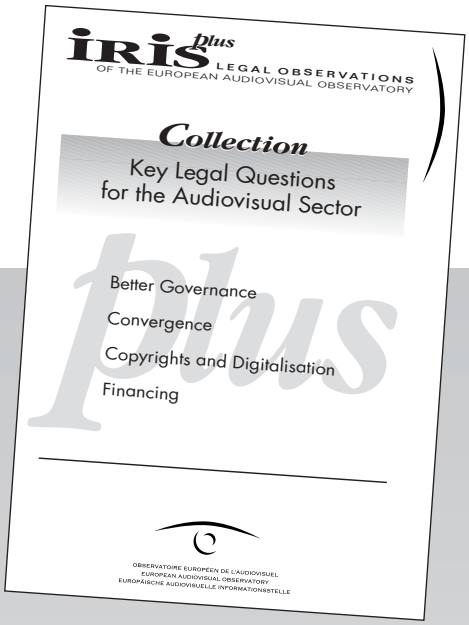


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