Communications Regulation: Between Infrastructure and Content

The following article:

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

by Sebastian Schweda is an extract from the publication IRIS *plus* 2009-10
"Communications Regulation: Between Infrastructure and Content".
The entire publication as a printed version can be purchased
from the European Audiovisual Observatory.
For further information and order possibilities, please open hyperlinks:
IRIS *plus* series
IRIS *plus* 2009-10

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
IRIS Coordinator
Head of the Department for Legal Information
European Audiovisual Observatory

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

Sebastian Schweda, Institute of European Media Law (EMR) Saarbrücken/Brussels

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.

---

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]

---

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.