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SUMMARY OF THE IMPACT ASSESSMENT

Accompanying document to the

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE COUNCIL

amending European Parliament and Council Directives 2002/19/EC, 2002/20/EC and 202/21/EC

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE COUNCIL

amending European Parliament and Council Directives 2002/22/EC and 2002/58/EC

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND THE COUNCIL

establishing the European Electronic Communications Markets Authority

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Impact Assessment Summary

1. INTRODUCTION

This document summarises the impact assessment (IA) report¹ on the review of the EU's regulatory framework for electronic communications networks and services (eCommunications). The current report deepens and refines the analysis of the first initial Impact Assessment of June 2006.

This review proposes amendments that take account of the experience gained to date and expected market and technological developments, with a view to enhancing the ability of the framework to deliver on its objectives and to support the i2010 policy objectives.

The IA report is structured into three broad main themes where more specific problems and objectives can be identified:

THEME I - Better regulation

1) Competition, investment and innovation: determining the best way to promote competition, investment and innovation in eCommunications, and thus to ensure that user needs are met and consumer interests are protected.

2) Spectrum management: ensuring that radio spectrum as a scarce resource in high demand is used for the maximum benefit of society, and that change in technology and demand structure can speedily be reflected in how the resource is used.

THEME II - Completing the single market in eCommunications

3) Regulatory consistency and effectiveness - institutional and procedural issues: devising a regulatory model delivering a single market in eCommunications through consistent and effective regulation while respecting the principles of subsidiarity and proportionality.

THEME III - Connecting with citizens

4) Users' rights and consumer protection: providing sufficient safeguards for users' rights, consumer protection and public interest in a technologically convergent environment in line with the i2010 objectives of an information society for all.

5) Privacy and security: contributing to an enhanced level of security and network integrity of eCommunications networks in Europe, which would provide tangible benefits for all citizens and society as a whole, in line with the i2010 objectives.

¹ SEC(2007) 1472.

2. SUMMARY OF THE PROBLEMS AND POLICY OPTIONS CONSIDERED

2.1. Competition, investment and innovation

The EU is performing at least as well as its major trading partners on competition and innovation in e-communications. Effective implementation of EU rules has opened up markets leading to reduced prices for voice and broadband services for business and consumers. Some EU countries are now world leaders in mobile and broadband penetration

The key issue for the coming years is whether the framework gives appropriate incentives for investments in new high speed networks that will support innovation in content-rich internet services. The policy debate in this area has focused on whether open access reduces incentives to invest in new infrastructure.

Under this heading, three main policy options were examined:

Option 1: Adopt an ‘open access’ model for new network infrastructure (i.e. separating infrastructure provision from service provision);

Option 2: No regulation: remove or restrict sector-specific regulation ('regulatory holidays'); and

Option 3: Maintain the current model of the framework.

Equal access of service providers to bottleneck infrastructures is already an objective of the existing regulatory framework (Option 3), which contains provisions to avoid discrimination to keep the market open and competitive. However, assuring such equivalence of access remains difficult where network operators are vertically integrated service providers, especially as regards non-price discrimination.

In cases where such discrimination is persistent and cannot be resolved by behavioural remedies the separation of the integrated operator into separate entities will remove incentives to discriminate between service providers (Option 1). The degree of separation that is appropriate depends on the nature of the network industry concerned (e.g. telecoms, energy or railroad). Full structural separation (ownership unbundling) is a decisive step which severs the incentives to discriminate through the divestiture of the non-replicable network assets. However, where, as is the case in e-communications, there is considerable innovation in technology and services, a less interventionist approach is to require the bottleneck assets to be placed in a functionally separated subsidiary with distinct management incentives, thus retaining the flexibility of common overall ownership of the infrastructure and service divisions, whilst raising transparency and increasing incentives to be non-discriminatory.

Option 2 – 'regulatory holidays' – puts at risk effective competition on the vast majority of European e-communications markets. Empirical evidence shows that investment and innovation are strongest where there is effective competition between infrastructures. However, there is still no infrastructure-based competition on around 80% of the EU's local loops. This means that ex-ante regulation continues to play a crucial role in maintaining competition and protecting consumers by setting conditions for access to the incumbent's infrastructure.

Conclusion

The empirical evidence indicates that although discrimination remains a serious issue on some markets, in others existing remedies have created an adequate equality of access. Thus, the analysis supports the continuation of the current approach (**Option 3**) of ex-ante remedies in order to maintain access. However, the Commission considers it necessary to provide NRA's with the power to impose **functional separation** as an exceptional remedy aimed at tackling persistent discrimination, not addressed through the existing set of behavioural remedies.

2.2. Spectrum management

Spectrum based services represent € 250 billion in the EU economy and are growing. Yet, the amount of radio spectrum is limited and current allocation systems are rigid and discourage innovation. The Commission's current policy is to promote greater flexibility and efficiency in spectrum use whilst safeguarding wireless users from interference. The options in this section consider changes to integrate this policy into the regulatory framework.

As a result of the public consultation on the Commission Review documents of June 2006, one option— an independent body to coordinate and streamline spectrum decisions - was set aside, and the options for spectrum management were reduced to two:

Option 1: Adapt the framework by introducing the principle of technology and service neutrality and co-ordinated spectrum trading; and

Option 2: No change to the regulatory framework.

Service and technology neutrality (the main principles of Option 1) would remove most regulatory constraints, strengthen competition and reduce the regulatory burden on users. When combined with spectrum trading and the enforcement of competition rules, this would ensure open market access for new technologies and new service providers.

While Option 2 in principle allows different management models to co-exist, in reality it is likely to preserve the technology and service-based administrative model that prevails today and which constrains the number of licences and slows the introduction of new technology.

Option 1 incorporates strengthened co-ordination mechanisms whereas Option 2 is based on voluntary co-ordination.

Conclusion

The Commission considers that **Option 1** is the most appropriate basis for a reformed spectrum management in Europe.

2.3. Regulatory consistency and effectiveness: institutional and procedural issues

Europe's biggest competitive advantage in the global economy is its open market of almost 500 million consumers. Gaining the benefits of this internal market depends upon enterprises being able to gain economies of scale through stable and consistent application of regulation.

The EU e-communications framework has established a system of 27 national markets that are coordinated through a common set of rules. However, despite good progress in some areas there are persistent problems of inconsistent implementation of these rules.

Three main options were analysed in order to tackle these problems:

Option 1: Single European Regulatory Authority with discretionary decision-making powers in market reviews and in charge of managing EU aspects of spectrum;

Option 2: European Regulatory Authority without discretionary decision-making powers assisting in the implementation of reinforced Community procedures; and

Option 3: Better co-ordination between the Member States.

Centralised regulation proposed in Option 1 would benefit operators doing business across the EU, thereby encouraging faster deployment of services with a pan-European potential and trans-national competition. However, there are significant subsidiarity and legal constraints that militate against this option.

Option 2 guarantees regulatory consistency while preserving the decentralised system of regulation. It combines stronger Community powers with an advisory role for a new European Authority, which provides an efficient approach to selection, authorisation and harmonisation of services with pan-European potential using frequencies and/or numbers.

Network and information security has been shown by evaluation and public consultation to require greater efficiency. Thus, under Option 2, the functions of the European Network and Information Security Agency (ENISA) would be merged into the European Regulatory Authority. This upgrading of ENISA to become an integral part of the European Regulatory Authority would provide operational efficiencies from combining the two bodies.

Option 3 requires all NRAs to commit to common guidelines and to apply consistent remedies. There is little evidence that such voluntary co-ordination would work in practice.

Conclusion

The Commission considers **Option 2** to be the most appropriate in the current institutional and legal framework.

2.4. Users' rights and consumer protection

Competition has brought major benefits to consumers by delivering prices that are dropping in absolute terms. However, competition and innovation also increase complexity. Thus further steps are needed to raise transparency, to safeguard connectivity and quality of communications services and to make sure that basic services such as emergency calls and 'e-inclusion' objectives are not left aside as new markets emerge.

Three policy options were analysed:

Option 1: Encourage more industry self-regulation;

Option 2: Update and strengthen the current provisions; and

Option 3: No change to the regulatory framework.

The effectiveness of Option 1 depends highly on the consensus of all stakeholders involved. At the present time it would not be feasible to expect that voluntary self-regulation would result in a significant improvement in consumer protection and user rights.

Option 2 takes into account technological advances and market developments and ensures that consumer issues would be guaranteed by law and not simply enshrined in industry agreements. The public consultation revealed a need to refine the initial Commission proposals, but with such adjustments, Option 2 would seem to have broad political support.

Option 3 could not address the identified problems relating to consumer protection and users' rights in eCommunications and would therefore not be in line with the i2010 objectives.

Conclusion

The Commission considers that **Option 2** is the most appropriate, while not ruling out the possibility of self-regulatory developments within the legal framework that Option 2 would create where these would effectively achieve the results sought.

2.5. Privacy and security

Under this topic, three policy options were identified:

Option 1: No change to the regulatory framework;

Option 2: Update and strengthen the current provisions; and

Option 3: Introduce a new, detailed instrument dealing with security and integrity.

Option 1 would mean that requirements concerning network integrity would remain applicable to fixed telephony networks only, which would substantially reduce their relevance in the future, with networks evolving towards an all-IP environment.

Option 2 would address issues like integrity and enforcement in a harmonised manner, ensuring that the framework was adapted to meet emerging needs without running the risk of being too prescriptive.

The results of the public consultation indicated that Option 3 did not enjoy general support by the stakeholders. In particular, there was a concern that new detailed legislation could significantly increase the cost of doing business and thus adversely affect competition.

Conclusion

The Commission considers that **Option 2** is the most appropriate offering a balance between harmonisation, predictability and flexibility, which will allow any future security threats to be addressed in a timely way.

3. MAIN IMPACTS OF THE PREFERRED OPTIONS

This chapter summarises the main impacts of the preferred options identified above.

THEME I - Better regulation

1) Maintaining the current model of market-based *ex ante* regulation offers the best way to promote competition, investment and innovation in eCommunications: NRAs have the means to foster competition, while taking into account the need for risky investments to generate an adequate return on capital. Functional separation as a new remedy of last resort could improve competition where competition problems and bottlenecks persist and where other remedies are not effective at achieving non-discrimination.

The revision of the 2003 Recommendation on Relevant Markets (which is revised in parallel to this review) shows that the current framework has already made substantial deregulation possible, as 11 (mainly retail markets) of the current 18 markets susceptible to *ex ante* regulation are proposed to be phased out. Regulation in the sector can thus focus on wholesale markets, where the key bottlenecks for effective competition still remain.

2) Reforming spectrum management by introducing more flexibility in the market will strengthen competition and reduce the regulatory burden of spectrum users. This will encourage investment and enable operators to introduce new technologies in the spectrum bands where they hold usage rights, thus making it practical to deploy new technologies and increasing their uptake by consumers through more choice and lower prices.

THEME II - Completing the single market in eCommunications

3) While the system of independent national regulators provides a rich knowledge base for regulatory action, the addition of European Authority with an advisory role combined with the Commission oversight of remedies would make a large contribution to improving the efficiency and speed of decision making in the EU. It would be a proportionate solution to the current problems of inconsistency of regulatory approach that leads to and uneven conditions for service providers across the EU. Consistency will not only encourage operators to develop their trans-border activities, but will reduce the cost of doing business in Europe in general by promoting pan-European services.

THEME III - Connecting with citizens

4) Updating and strengthening the users' rights – including users with disabilities - and consumer protection provisions takes into account technological and market developments thereby offering all users enhanced choice and legal certainty. Consumers will benefit by being better informed about prices and services. Increased use and easier access to communications services will lead to higher social participation for users with disabilities and/or special needs as well as the elderly. Enhancing caller location information would improve the quality of emergency services.

5) Updating and strengthening the current privacy and security provisions will provide consumers with higher quality and security of networks and services as well as more information and transparency, so that quality and security of service will become part of the selection criteria for the consumer. More information, transparency and trust will encourage the uptake of ICT.

Summary

The combination of all the preferred options contributes to simplification of the regulatory obligations imposed on businesses, and at the same time strengthens citizens' rights and

produces benefits for consumers. The key simplification elements are reducing the number of relevant markets in the Commission Recommendation, simplified market review procedures and the reform of spectrum management, leading to a net reduction of administrative costs. Electronic communications infrastructure provides the foundations for the economy as a whole, and improvements in this sector will feed through to benefit the rest of the EU economy.