

# The New European Commission Regulatory Framework for Electronic Communications

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## Introduction:

Much has been made of the draft United Kingdom (“UK”) communications bill (the “Draft Bill”) introduced earlier this year by the Government. Commentators have noted that the Draft Bill, if passed, will herald significant changes to the regulation of the UK communications and broadcasting industries.<sup>1</sup> While this is true, in the midst of all the commentary on the Draft Bill, scant attention has been paid to the new European Commission (“EC”) regulatory framework for electronic communications that may, in fact, have far greater impact on the telecommunications industry than the Draft Bill.

Four new directives<sup>2</sup> and accompanying decisions, directives and guidelines<sup>3</sup> (the “Accompanying Regime”) regarding electronics communications were adopted by the EC in the year 2002. The trailblazing nature of these directives -- the Framework, Authorisation, Access and Universal Services Directives (the “Directives”) and the Accompanying Regime -- are yet to be fully appreciated. This may be due to the fact that European Union (“EU”) member states (“Member States”) have until 25 July 2003 to implement the Directives and Accompanying Regime into national legislation.<sup>4</sup> This article shall briefly review the major aspects of the Directives and the Accompanying Regime in order to provide an overview as to the new telecommunications legal environment envisioned by the EC.

## Framework Directive:

The Framework Directive (Directive 2002/21/EC) establishes the EC goal of a harmonised framework for the regulation of electronic communications services and networks as well as associated facilities and services.<sup>5</sup> It also lays down tasks for national regulatory authorities (“NRAs”) and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the EU.<sup>6</sup> The Framework Directive, the Specific Directives<sup>7</sup>

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<sup>1</sup> Graeme Maguire and Jason Romer, *An Overview of the Draft United Kingdom Communications Bill*, C.T.L.R. 2002, 8(6), 137.

<sup>2</sup> Framework Directive – 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, 2002 O. J. L108/33. Access Directive – 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, 2002 O. J. L108/7. Universal Service Directive – 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, 2002 O. J. L108/51; and Authorisation Directive – Directive 2002/20, 2002 O. J. L108/20.

<sup>3</sup> Decision 676/2002 on a regulatory framework for radio spectrum policy, 2002 O. J. L108/1; Guidelines on market analysis and the calculation of significant market power, 2002 O. J. C165/6; Directive on competition in the markets for electronic communications services, 2002/77/EC, 2002 O.J. L249/21; Directive on the processing of personal data and the protection of privacy in the electronics communications sector, 2002 O. J. L201/37; Decision 2002/622 establishing a Radio Spectrum Policy Group, 2002 O.J. L198/49; and Decision 2002/627 establishing the European Regulators Group for Electronic Communications Networks and Services, 2002 O. J. L 200/38.

<sup>4</sup> Pursuant to section 2(2) of the European Communities Act 1972, S.I. 2001/3495, the Director General of Telecommunications has promulgated draft regulations in order to ensure that the UK will be ready to implement the new regulatory regime by 25 July 2003.

<sup>5</sup> Directive 2002/21/EC, Article 1.1.

<sup>6</sup> *Ibid.*

and the Accompanying Regime together make up the EC regulatory scheme addressing the phenomenon of convergence in the telecommunications, media and information technology sectors. Convergence is the coming together of the traditionally separate environments of telecommunications, media and information technology over common networks and platforms.<sup>8</sup> These days telecommunication companies want to become broadcasters, while broadcasters increasingly are moving into e-commerce and Internet service providers are offering television channels.<sup>9</sup>

One need only examine the definition of “electronic communications network” to see the effects of convergence upon telecommunications law:

“[E]lectronic communications network” means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by electromagnetic means, including satellite networks, fixed (circuit and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed.<sup>10</sup>

Even though certain content providers operate electronic communications networks, the Framework Directive and the Specific Directives 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.

The Framework Directive charges an NRA such as the Office of Communications (“OFCOM”), whose creation is authorised under the Draft Bill, with the responsibility for the implementation of the Directives. NRAs such as OFCOM are to operate independently with a view to ensuring the impartiality of their decisions.<sup>11</sup> Any party who is the subject of a decision by an NRA should have the right to appeal to a body that is independent of the parties involved.<sup>12</sup> NRAs are also to gather information from market players in order to carry out their regulatory function as well as exchange non-business confidential information with the EC.<sup>13</sup> NRAs are also supposed to consult all interested parties on proposed decisions and take account of their comments before adopting a final decision.<sup>14</sup> Generally, in consolidating the internal market of the EU, NRAs are to act in consultation with the EC and other Member States except in exigent circumstances.<sup>15</sup>

The specific tasks that NRAs are charged with under the Framework Directive are as follows:

- Promoting competition in the provision of electronic communications networks, services and associated facilities by ensuring that users, including disabled users, derive maximum freedom in terms of choice, price and quality;
- Ensuring that there is no distortion or restriction of competition in the electronic communications sector;

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<sup>7</sup> Defined in Article 2(1) as the Authorization, Access and Universal Services Directives plus the Telecommunications Data Protection and Privacy Directive (97/66/EC), 1998 O. J. L24/1.

<sup>8</sup> Dept. of Trade & Industry, *Communications Liberalisation in the UK* (online), <http://www.dti.gov.uk> [March 2001].

<sup>9</sup> Ibid.

<sup>10</sup> Framework Directive, op cit., Article 2(a).

<sup>11</sup> Framework Directive, op cit., Preamble, paragraph 11.

<sup>12</sup> Ibid, paragraph 12.

<sup>13</sup> Ibid, paragraph 14.

<sup>14</sup> Ibid, paragraph 15.

<sup>15</sup> Ibid, Article 7, paragraph 6.

- Encouraging efficient investment in infrastructure, and promoting innovation; and
- Encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources.<sup>16</sup>

In terms of the development of the EU internal market, NRAs are required to:

- Remove remaining obstacles to the provision of electronic communications networks, associated facilities and services and electronic communications services at the European level;
- Encourage the establishment and development of trans-European networks and the interoperability of pan-European services, and end-to-end connectivity;
- Ensure that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services; and
- Cooperate in a transparent manner to ensure the development of consistent regulatory practice and consistent application of the Directives.<sup>17</sup>

Finally, NRAs are required to promote the interests of European citizens by:

- Ensuring all citizens access to a universal service;
- Ensuring a high level of protection for consumers in their dealings with suppliers;
- Contributing to ensuring a high level of protection of personal data and privacy;
- Promoting the provision of clear information, in particular requiring transparency of tariffs and condition for using publicly available electronic communications services;
- Addressing the needs of specific social groups, in particular disabled users; and
- Ensuring that the integrity and security of public communications networks are maintained.<sup>18</sup>

The Framework Directive also details how Member States should:

- manage radio frequencies for electronic communications;
- control the assignment of all national numbering resources;
- assign rights of way for the installation of communication facilities in a transparent matter;
- encourage the sharing of locations and facilities where an electronic communications network has been given a right under national legislation to install facilities over or under public or private property; and
- require accounting separation and transparent financial reporting for electronic communications networks given special or exclusive rights for the provision of communication services by a Member State.<sup>19</sup>

The Framework Directive obliges NRAs to carry out a market analysis to establish the state of competition in relevant communications markets and identify any providers with significant market power (“SMP”) in these markets and, if so, identify which specific obligations are appropriate to impose on those providers.<sup>20</sup> SMP is defined as when an undertaking, either individually or jointly with others, 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.<sup>21</sup>

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<sup>16</sup> Ibid, Article 8, paragraph 2.

<sup>17</sup> Ibid, Article 8, paragraph 3.

<sup>18</sup> Ibid, Article 8, paragraph 4.

<sup>19</sup> Ibid, Framework Directive generally.

<sup>20</sup> Ibid, Article 15, Paragraph 1.

<sup>21</sup> Ibid, Article 14, Paragraph 2.

Once a particular market analysis is completed, the EC shall adopt a recommendation, define markets in accordance with the principles of competition law and regularly review the recommendation.<sup>22</sup> The EC has published guidelines on market analysis and the assessment of SMP under the EC regulatory framework for electronic communications networks and services.<sup>23</sup> The guidelines are part of the Accompanying Regime to be examined later herein. NRAs are required to take the utmost account of the recommendation and guidelines, defining relevant markets appropriate to national circumstances and geographic markets within their territory, all in accordance with competition law principles.<sup>24</sup> The NRA analysis of the relevant markets should be completed in conjunction with national competition authorities and should determine whether or no a relevant market is effectively competitive.<sup>25</sup>

Provision is made for the EC to standardise and harmonise the provision of electronic communications network, services and associated facilities.<sup>26</sup> There is also a strong emphasis on the desirability of providers of digital interactive television services for distribution to the public in the EU to use an open application program interface which conforms to standards or specification adopted by the European standards organisation.<sup>27</sup> NRAs are given the authority to resolve disputes between undertakings providing electronic communications networks or services in a Member State.<sup>28</sup> A mechanism is provided for resolution of cross-border disputes arising under the Directives.<sup>29</sup> The EC provides for a communications committee that will foster the exchange of information between Member States and the EC on the telecommunications situation and the development of regulatory activities regarding electronic communications, networks and services.<sup>30</sup>

The Framework Directive repeals a number of directives and decisions from 25 July 2003.<sup>31</sup> These directives include: Directive 90/387/EEC; Council Decision 91/396/EEC; Council Directive 92/44/EEC; Council Decision 92/264/EEC; Directive 95/47/EC; Directive 97/13/EC; Directive 97/33/EC; and Directive 98/10/EC. The Framework Directive entered into force as of 7 March 2002.<sup>32</sup>

#### Authorisation Directive:

The Authorisation Directive (2002/20/EC), 2002 OJ L 108, creates a legal framework designed to ensure the freedom to provide electronic communications networks and services, subject to the conditions laid down therein and any restrictions in conformity with Article 46(1) of the Treaty establishing the EU.<sup>33</sup> The Authorisation Directive stems from the realisation that convergence between different electronic communications networks and services and their technologies requires the establishment of an authorisation system covering all comparable services in a similar way regardless of the technologies used.<sup>34</sup> The Authorisation Directive applies only to the granting of rights to use radio frequencies where such use involves the provision of an electronic communications network or service for remuneration.<sup>35</sup> It is designed to achieve it aims by general authorisation of all electronic communications networks and services without requiring any explicit decision or

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<sup>22</sup> Ibid, Article 15, Paragraph 2.

<sup>23</sup> 2002/C 165/03.

<sup>24</sup> Framework Directive, op cit., Article 15, Paragraph 3.

<sup>25</sup> Ibid, Article 16, Paragraph 1.

<sup>26</sup> Ibid, Article 17, Paragraph 1.

<sup>27</sup> Ibid, Article 18, Paragraph 1.

<sup>28</sup> Ibid, Article 20, Paragraph 1.

<sup>29</sup> Ibid, Article 21.

<sup>30</sup> Ibid, Article 27.

<sup>31</sup> Ibid, Article 26, 28 (1).

<sup>32</sup> Ibid.

<sup>33</sup> Authorisation Directive, Preamble, paragraph 3.

<sup>34</sup> Ibid, Preamble, paragraph 2.

<sup>35</sup> Ibid, Preamble, paragraph 5

administrative act by an NRA and by limiting any procedural requirements to notification only.<sup>36</sup> The general authorisation entitles undertakings providing electronic communications networks and services to the public to negotiate interconnection under the Access Directive while undertakings providing electronic communications network and services other than to the public can negotiate interconnection on commercial terms.<sup>37</sup> Specific obligations which may be imposed on providers of electronic communications networks and services in accordance with EC law by virtue of their SMP should be imposed separately from the general rights and obligations under the general authorisation.<sup>38</sup>

In addition to recognising the applicability of the definitions set out in Article 2 of the Framework Directive, two specific definitions are offered in the Authorisation Directive. First, a “general authorisation” is defined as a legal framework established by a Member State ensuring rights for the provision of electronic communications networks or services and laying down sector specific obligations that apply to all or to specific types of electronic communications networks and services, in accordance with the Authorisation Directive.<sup>39</sup> Second, “harmful interference” is defined as interference which endangers the functioning of a radio navigation service or of other safety services or which otherwise seriously degrades, obstructs or repeatedly interrupts a radio communications service operating in accordance with EC or national regulations.<sup>40</sup>

The Authorisation Directive calls on Member States to ensure the freedom to provide electronic communications networks and services and not prevent an undertaking from providing electronic communications except where absolutely necessary.<sup>41</sup> In particular, the Authorisation Directive eliminates when feasible the requirement that Member States issue individual licences for the grant of individual rights of use for radio frequencies and numbers.<sup>42</sup> If necessary, licences may be issued by Member States for granting rights of use of radio frequencies to providers of radio or television broadcast content services through open, transparent and non-discriminatory procedures.<sup>43</sup> Competitive or comparative bidding is to be used for the grant of rights involving the use of numbers of exceptional economic value.<sup>44</sup> The Authorisation Directive provides specific conditions which attach to the authorisation and to the rights of use for radio frequencies and for numbers, and specific obligations.<sup>45</sup> It also provides a specific procedure for limiting the number of rights of use to be granted for radio frequencies.<sup>46</sup>

Once usage of radio frequencies has been harmonised, access conditions and procedures have been agreed and undertakings to which the radio frequencies shall be assigned have been selected in accordance with international agreements and EC rules, Member States shall grant the right of use for such radio frequencies.<sup>47</sup> In this process, Member States shall not impose any further conditions, additional criteria or procedures which would restrict the common assignment of radio frequencies.<sup>48</sup> An undertaking can request a declaration to be issued by an NRA (within one week of such request) to facilitate the exercise of rights to install facilities and rights of interconnection.<sup>49</sup> The Authorisation Directive provides certain

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<sup>36</sup> Ibid, Preamble, paragraph 8.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid, Preamble, paragraph 17.

<sup>39</sup> Ibid, Article 2, paragraph 2(a).

<sup>40</sup> Ibid, Article 2, paragraph 2(b).

<sup>41</sup> Ibid, Article 3, paragraph 1.

<sup>42</sup> Ibid, Article 5, paragraph 1.

<sup>43</sup> Ibid, Article 5, paragraph 2.

<sup>44</sup> Ibid, Article 5, paragraph 4.

<sup>45</sup> Ibid, Article 6, paragraph 1.

<sup>46</sup> Ibid, Article 7.

<sup>47</sup> Ibid, Article 8.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid, Article 9.

conditions which undertakings must comply with in order to enjoy the rights of use of radio frequencies or numbers as well as setting forth an enforcement regime.<sup>50</sup> Appeal from the enforcement regime can be had pursuant to the procedure set forth in Article 4 of the Framework Directive.<sup>51</sup>

The Authorisation Directive sets forth the requirements for information to be submitted to an NRA by undertakings in order to be awarded rights of use.<sup>52</sup> It also states the conditions upon which an NRA may impose administrative charges on an undertaking and publish relevant information on rights, conditions, charges, fees and decisions concerning general authorisations and rights of use.<sup>53</sup> Member States may impose fees for the rights of use for radio frequencies or numbers or rights to install facilities on, over or under public or private property reflecting the need to ensure the optimal use of these resources.<sup>54</sup> Member States, however, may only amend the general authorisations and rights of use or rights to install facilities in objectively justified cases and in a proportionate manner.<sup>55</sup> Requirements on publication of information, review procedures and the reconciliation of the new Authorisation Directive with already existing authorisations conclude the Authorisation Directive. The Authorisation Directive shall come into effect from 25 July 2003 and Member States have until 24 July 2003 to promulgate implementing regulations. The Authorisation Directive entered into force on publication on 24 April 2002.

#### Universal Service Directive:

The Universal Service Directive (2002/22/EC) concerns the provision of electronic communications networks and services to end-users.<sup>56</sup> Its aim is to ensure the availability throughout the European Union 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.<sup>57</sup> In particular, the Universal Service Directive establishes the rights of end-users and the corresponding obligations on undertakings providing publicly available electronic communications networks and services.<sup>58</sup> The Universal Service Directive defines the minimum set of services of specified quality to which all end-users have access, at an affordable price in light of specific national conditions without distorting competition.<sup>59</sup> The directive also sets out obligations with regard to the provision of certain mandatory services such as the retail provision of leased lines.<sup>60</sup>

Of primary concern in the Universal Service Directive is the availability of universal service. Member States are required to ensure that public telecom services be available to all end-users in their territory, independently of geographical location and at an affordable price.<sup>61</sup> At the same time as Member States are required to implement universal service, they must also minimise market distortions ensuring objectivity, transparency, non-discrimination and proportionality.<sup>62</sup> The Universal Service Directive requires Member States to ensure that all reasonable requests for connection at a fixed location to the public telephone network and for access to publicly available telephone services at a fixed location are met by at least one

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<sup>50</sup> Ibid, Article 10, paragraphs 1 through 6.

<sup>51</sup> Ibid, Article 10, paragraph 7

<sup>52</sup> Ibid, Article 11.

<sup>53</sup> Ibid, Article 12.

<sup>54</sup> Ibid, Article 13.

<sup>55</sup> Ibid, Article 14.

<sup>56</sup> Universal Service Directive, Article 1, paragraph 1.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid, Article 1, paragraph 2.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid, Article 3, paragraph 1.

<sup>62</sup> Ibid.

undertaking.<sup>63</sup> Member States also have to ensure that customers are provided with at least one comprehensive telephone directory enquiry service, access to public pay telephones, easy availability of access to the single European emergency call number and special measures for protection of disabled users.<sup>64</sup>

In terms of regulating the telecommunications industry, Member States will have to require undertakings to adhere to universal service obligations, to regulate the level of retail tariffs, expenditures and add-on charges consumers may have to pay and regulate the quality of service offered the general public by undertakings.<sup>65</sup> Member States also have responsibilities for regulating the costing and financing of universal service obligations.<sup>66</sup> The Universal Service Directive emphasizes the importance of transparency in implementing a mechanism for sharing the net cost of universal service obligations.<sup>67</sup> It also places significant regulatory controls on undertakings with SMP in specific markets: first, to review obligations relating to retail tariffs, carrier selection and leased lines; second, to ensure that Member States through their NRAs shall provide regulatory controls on retail services, on the minimum set of leased lines, carrier selection and carrier pre-selection.<sup>68</sup>

The Universal Service Directive incorporates the EC rules on consumer protection, in particular Directives 97/7/EC and 93/13/EC, and national rules in conformity with EC law.<sup>69</sup> The Universal Service Directive also sets forth requirements that must be incorporated by undertakings when entering into contracts with consumers, for instance, that subscribers shall have a right to withdraw from their contracts without penalty upon notice of proposed modifications in the contractual conditions.<sup>70</sup> Member States must ensure that transparent and up-to-date information on applicable prices and tariffs, and on standard terms and conditions, in respect of access to and use of public telephones be made available to end-users and consumers.<sup>71</sup> Similarly, information must be made available by NRAs on the quality of services provided by undertakings to the public as well as a defined set of parameters by which to judge the quality of services.<sup>72</sup>

The Universal Service Directive requires Member States to take all necessary steps to ensure the integrity of the public telephone network at fixed locations and, in the event of catastrophic network breakdown or in cases of force majeure, the availability of the public telephone network.<sup>73</sup> It also requires that subscribers to publicly available telephone services have access to directory enquiry services and be listed in applicable directories.<sup>74</sup> Member States have to ensure that, in addition to any other national emergency call numbers specified by the NRAs, all end users of publicly available telephone services, including users of public pay telephones, are all able to call the emergency services free of charge, by using the single European emergency call number “112”.<sup>75</sup> Member States shall ensure that all subscribers can, if they want, retain their telephone number independently of the undertaking providing the service at a specific location in the case of a geographic number or in the case of a non-geographic number at any location.<sup>76</sup> Finally, where necessary, Member States have the authority to impose reasonable “must carry” obligations, for the transmission of specified

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<sup>63</sup> Ibid, Article 4, paragraph 1.

<sup>64</sup> Ibid, Articles 5, 6 and 7.

<sup>65</sup> Ibid, Article 8

<sup>66</sup> Ibid, Articles 12 and 13.

<sup>67</sup> Ibid, Article 14.

<sup>68</sup> Ibid, Chapter IV.

<sup>69</sup> Ibid, Article 20, Paragraph 1.

<sup>70</sup> Ibid, Article 20, Paragraph 2.

<sup>71</sup> Ibid, Article 21, Paragraph 1.

<sup>72</sup> Ibid, Article 22.

<sup>73</sup> Ibid, Article 23.

<sup>74</sup> Ibid, Article 25.

<sup>75</sup> Ibid, Article 26.

<sup>76</sup> Ibid, Article 30.

radio and television broadcast channels and services, on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcasts to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts.<sup>77</sup>

The Universal Service Directive contains the typical general and final provisions found in other Specific Directives and the Framework Directive concerning consultation with interested parties, out of court dispute resolution, technical adjustment, notification, committee assistance and transposition.<sup>78</sup> Like the Framework Directive and the other Specific Directives, Member States are required to prepare and publish laws, regulations and administrative provisions necessary to comply with the Universal Service Directive by 24 July 2003 at the latest. The measures shall be applied from 25 July 2003.<sup>79</sup> The Universal Service Directive was entered into force upon its publication on 7 March 2002.<sup>80</sup>

#### Access Directive:

The fourth and final of the Directives, the Access Directive (2002/19/EC), is concerned with establishing rights and obligations for operators and for undertakings (not end-users) seeking interconnection and access to their networks or associated facilities.<sup>81</sup> The Access Directive sets out objectives for NRAs with regard to access and interconnection, and lays down procedures to ensure that obligations imposed by NRAs are reviewed and, where appropriate, withdrawn once the desired objectives have been achieved.<sup>82</sup> “Access” is defined as the making available of facilities and/or services, to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services.<sup>83</sup> “Interconnection” is defined as the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking; it is a specific type of access implemented between public network operators.<sup>84</sup>

In terms of the framework for access and interconnection, Member States have to ensure that there are no restrictions which prevent undertakings from negotiating between themselves agreements on technical and commercial arrangements for access and/or interconnection, in accordance with EC law.<sup>85</sup> Operators of public communications networks shall have a right and an obligation to negotiate interconnection with each other for the purpose of providing publicly available electronic communications services, in order to ensure provision and interoperability of services throughout the European Union.<sup>86</sup> NRAs are seen as the chief enforcer to encourage access and interconnection to ensure end-to-end connectivity, obligations on undertakings that control access to end-users, including in justified cases the obligation to interconnect their networks where this is not already the case.<sup>87</sup> Additionally, NRAs are necessary to ensure accessibility for end-users to digital radio and television broadcasting services on fair, reasonable and non-discriminatory terms.<sup>88</sup> A Member State must ensure that its NRAs are empowered to intervene at their own initiative where justified

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<sup>77</sup> Ibid, Article 31.

<sup>78</sup> Ibid, Chapter V.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Access Directive, Article 1, paragraph 2.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid, Article 2 (a).

<sup>84</sup> Ibid, Article 2(b).

<sup>85</sup> Ibid, Article 3, paragraph 1.

<sup>86</sup> Ibid, Article 4, paragraph 1.

<sup>87</sup> Ibid, Article 5, paragraph 1 (a).

<sup>88</sup> Ibid, Article 5, paragraph 1 (b).

or, in the absence of agreement between undertakings, at the request of either of the parties involved, in order to secure the policy objectives of the Directives.<sup>89</sup>

The Access Directive requires Member States to ensure that conditional access systems operated on the market in the European Community are to have the necessary technical capability for cost-effective transcontrol allowing the possibility for full control by network operators at local or regional level of the services using such conditional access systems.<sup>90</sup> Member States must also ensure that all operators of conditional access services, irrespective of the means of transmission, who provide access services to digital television and radio services and whose access services broadcasters depend on to reach any group of potential viewers or listeners are to: offer to all broadcasters, on a fair, reasonable and non-discriminatory basis compatible with EC competition law, technical services enabling the broadcasters' digitally-transmitted services to be received by viewers or listeners authorised by means of decoders administered by the service operators.<sup>91</sup> Member States are also to ensure that when granting licenses to manufacturers of consumer equipment or holders of industrial property rights to conditional access products and systems that this is done on fair, reasonable and non-discriminatory terms.<sup>92</sup> Member States must empower NRAs to impose obligations of transparency, non-discrimination, accounting separation, access to specific network facilities and price control and cost accounting obligations.<sup>93</sup> Finally, the Access Directive has the procedural provision found in the other directives such as those dealing with information, notification, review procedures, transposition, entry into force, addressees.<sup>94</sup> The Access Directive entered into force on its day of publication on 7 March 2002.<sup>95</sup> Member States have until 24 July 2003 to adopt and publish the laws, regulations and administrative provisions necessary to comply with the Access Directive by not later than 24 July 2003 with the measures being applicable from 25 July 2003.<sup>96</sup>

#### Guidelines on Market Analysis and Assessment of SMP:

In addition to the Directives, a look at the EC guidelines on market analysis and the assessment of SMP<sup>97</sup> under the regulatory framework for electronic communications networks and services provides some additional guidance on the importance of maintaining a level competitive playing field in the new telecommunications environment across the European Community. First, it must be noted that until the Universal Service Directive, 2002/22/EC, is formally adopted, Directive 97/66/EC concerning the processing of personal data and protection of privacy in the telecommunications sector remains the relevant directive.<sup>98</sup> The new regulatory framework provides for the markets to be regulated in accordance with European competition law.<sup>99</sup> This is a change from the 1998 regulatory framework in which markets were not defined in accordance with competition law principle but in an *ex ante* fashion.<sup>100</sup> For instance, under the 1998 regulatory framework, NRAs have the power to designate undertakings as having SMP when they possess 25% market share, with the possibility to deviate from this threshold taking into account the undertaking's ability to influence the market, its turnover relative to the size of the market, its control of the means

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<sup>89</sup> Ibid, Article 5, paragraph 4.

<sup>90</sup> Ibid, Annex I, Part I(a).

<sup>91</sup> Ibid, Annex I, Part I(b).

<sup>92</sup> Ibid, Annex I, Part I(c).

<sup>93</sup> Ibid, Chapter III generally.

<sup>94</sup> Ibid, Chapter IV, generally.

<sup>95</sup> Ibid, Article 18, paragraph 1.

<sup>96</sup> Ibid.

<sup>97</sup> Commission guidelines on market analysis and the assessment of significant market power under the EC regulatory framework for electronic communications networks and services, OJ C 165/6, 11/07/02.

<sup>98</sup> Ibid, Introduction, paragraph 3.

<sup>99</sup> Ibid, Introduction, paragraph 4.

<sup>100</sup> Ibid, Introduction, paragraph 3.

of access to end-users, its access to financial and its experience in providing products and services in the market.<sup>101</sup>

The markets to be regulated by the EC are identified in its recommendation on relevant product and service markets pursuant to Article 15(1) of the Framework Directive (the “Recommendation”).<sup>102</sup> In justifiable national circumstances<sup>103</sup>, other markets can be identified by NRAs for regulation. With transnational markets susceptible to *ex ante* regulation, the EC must decide pursuant to Article 15(4) of the Framework Directive.<sup>104</sup> NRAs can only intervene to impose obligations on undertakings only where the markets are considered to be not effectively competitive as a result of such undertakings being in a position equivalent to dominance within the meaning of Article 82 of the EC Treaty.<sup>105</sup> Dominance has been defined in European Court of Justice case law as a position of economic strength affording an undertaking the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.<sup>106</sup> Thus, under the new framework, the EC and NRAs will use competition law principles and methodologies to define the markets to be regulated *ex ante* and to assess whether undertakings have SMP on those markets.<sup>107</sup>

The guidelines address market definition, assessment of SMP, SMP designation and procedural issues related to all of these subjects.<sup>108</sup> In terms of the geographical dimension of the product and service markets, NRAs do not define the geographic scope of any transnational markets as this is left to the Framework Directive.<sup>109</sup> NRAs, in compliance with the guidelines, are to conduct an analysis of the market conditions as they are identified in the Recommendation and Framework Directive and by NRAs.<sup>110</sup> NRAs identify relevant national or subnational products and service markets which are not listed in the Recommendation when this is justified by national circumstances and following the procedures set out in the Framework Directive.<sup>111</sup> NRAs also designate, following market analysis, undertakings with SMP in the relevant market and to impose proportionate *ex ante* measures consistent with the terms of the regulatory framework.<sup>112</sup> The guidelines also assist Member States and NRAs in applying the Authorisation Directive and the Framework Directive and ensure that undertakings comply with the obligation to provide information necessary for NRAs to determine relevant markets and assess SMP thereon.<sup>113</sup> Furthermore, the guidelines offer NRAs direction on dealing with confidential information which is likely to be provided by undertakings, national competition authorities, the EC and NRAs in other Member States.<sup>114</sup>

#### Electronic Communications Directive:

Another area in which the EC has promulgated new regulations is competition in the markets for electronic communications networks and services. Commission Directive 2002/77/EC of 16 September 2002 [2002] O.J. L108/51 (the “Electronic Communications Directive”) is to be interpreted in conjunction with the Directives as well as Directive 2002/58/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’

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<sup>101</sup> Ibid, Introduction, paragraph 3.

<sup>102</sup> Ibid, Introduction, paragraph 4.

<sup>103</sup> Framework Directive, Articles 6 and 7.

<sup>104</sup> Commission Guidelines on Market Analysis, op cit, Introduction, paragraph 4.

<sup>105</sup> Ibid, Introduction, paragraph 5.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid, Introduction, paragraph 8.

<sup>109</sup> Ibid, Introduction, paragraph 9.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

rights relating to electronic communications network. This latter directive, the so-called directive on privacy and electronic communications, is beyond the scope of this current review.

Of primary importance is the fact that the Electronic Communications Directive makes reference to “electronic communications networks” rather than the previously used terms “telecommunications services” and “telecommunications networks”:<sup>115</sup> The Electronic Communications Directive recognises the fact that the “new definitions are indispensable in order to take account of the convergence phenomenon by bringing together under one single definition all electronic communications services and/or networks which are concerned with the conveyance of signals by wire, radio, optical or other electromagnetic means (*i.e.*, fixed, wireless, cable television, satellite networks).”<sup>116</sup> Curiously, the Electronic Communications Directive specifically points out that radio and television broadcasts or transmissions are electronic communications services and that the definition of electronic communications networks also covers fibre networks.<sup>117</sup>

The Electronic Communications Directive requires Member States to remove exclusive and special rights for the provision of all electronic communications networks, not just those for the provision of electronic communications services.<sup>118</sup> Moreover, special or exclusive rights which amount to restricting the use of electronic communications networks for the transmission and distribution of television are not permissible insofar as they have the effect of permitting a dominant undertaking to limit production, markets or technical development to the prejudice of consumers.<sup>119</sup> Member States that control vertically integrated network operators that operate networks, which have been established under special or exclusive rights, must ensure that when they enjoy a dominant position in the relevant market that they do not discriminate in favour of their own activities.<sup>120</sup>

The Electronic Communications Directive also stresses that Member States should no longer make the provision of electronic communications services and the establishment and provision of electronic communications network subject to a licensing regime but to a general authorisation regime.<sup>121</sup> Member States also should not grant exclusive or special rights of use of radio frequencies and that the rights of use of those frequencies should be assigned according to objective, non-discriminatory and transparent procedure.<sup>122</sup> National schemes to share the net cost of the provision of universal service obligations shall be based on objective, transparent and non-discriminatory criteria consistent with principles of proportionality and least market distortion.<sup>123</sup> If there are incompatibilities between the EC competition rules and the rights and obligation arising from international conventions setting up international satellite organisations, Member States should take all appropriate steps to eliminate such incompatibilities.<sup>124</sup> Member States must also ensure that dominant providers of electronic communications networks and publicly available telephone service operate their public electronic communication network and cable television network as separate legal entities.<sup>125</sup> Finally, Directive 90/388/EC, the predecessor to the Electronic Communications Directive is repealed.<sup>126</sup>

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<sup>115</sup> Electronic Communications Directive, whereas clause 7.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*, whereas clause 8.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*, whereas clause 10.

<sup>121</sup> *Ibid.*, whereas clause 9.

<sup>122</sup> *Ibid.*, whereas clause 11.

<sup>123</sup> *Ibid.*, whereas clause 12.

<sup>124</sup> *Ibid.*, whereas clause 13.

<sup>125</sup> *Ibid.*, whereas clause 15.

<sup>126</sup> *Ibid.*, Article 10.

### Radio Spectrum Decision:

Decision 676/2002/EC of the European Parliament and of the Council on a regulatory framework for radio spectrum policy in the EC (the “Radio Spectrum Decision”) is designed to ensure coordination of policy and harmonisation with regards to the availability and efficient use of radio spectrum in the internal EU market.<sup>127</sup> The Radio Spectrum Decision attempts to set forth EC policy for electronic communications, transport and research and development.<sup>128</sup> In addition to developing technical implementing measure, the Radio Spectrum Decision seeks to contribute to freedom of expression, including freedom to receive and disseminated information and ideas, irrespective of borders as well as plurality of the media.<sup>129</sup> The decision calls for a commission, the Radio Spectrum Committee, to be formed to adopt the necessary technical implementing measures with a view to ensuring harmonised conditions for the availability and efficient use of radio spectrum.<sup>130</sup> There is, consistent with the Directives, a requirement that Member States makes available to the public their national radio frequency allocation table and information on rights, conditions, procedures, charges and fees concerning the use of radio spectrum.<sup>131</sup> The EC is charged with monitoring developments regarding radio spectrum in third countries and in international organisations which may impact the Radio Spectrum Decision.<sup>132</sup> The Radio Spectrum Decision requires Member States not to disclose information covered by the obligation of business confidentiality, in particular information about undertakings, their business relations or their costs components.<sup>133</sup> Finally, the Radio Spectrum Decision entered into force on its publication 7 March 2002.<sup>134</sup>

### Directive on Processing of Personal Data and Protection of Privacy in the Electronic Communications Sector:

Another linchpin of the new regulatory environment is Directive 2002/58/EC of the European Parliament and of the Council of July 12, 2002 concerning processing of personal data and the protection of privacy in the electronic communications sector (the “DPEC”). The DPEC harmonises the provisions of the Member States required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy, with respect to the processing of personal data in the electronic communications sector and to ensure the free movement of such data and of electronic communication equipment and services in the EU.<sup>135</sup> The DPEC applies to the processing of personal data in connection with the provision of publicly available electronic communications services in public communications network in the EU.<sup>136</sup> The provider of a publicly available electronic communications service must take appropriate technical and organisational measures to safeguard security of its services, if necessary in conjunction with the provider of the public communications network with respect to network security.<sup>137</sup> The DPEC requires Member States to ensure the confidentiality of communications and related traffic data by means of a public communications network and publicly available electronic communications services, through national legislation.<sup>138</sup> For instance, traffic data relating to subscribers and users processed and stored by the provider of a public communications network or publicly

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<sup>127</sup> Radio Spectrum Decision, whereas clause 2.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid, whereas clause 3 and 4.

<sup>130</sup> Ibid, Article 4, paragraph 1.

<sup>131</sup> Ibid, Article 5.

<sup>132</sup> Ibid, Article 6.

<sup>133</sup> Ibid, Article 8.

<sup>134</sup> Ibid, Article 11.

<sup>135</sup> DPEC, Article 1, Paragraph 1.

<sup>136</sup> DPEC, Article 3, Paragraph 1.

<sup>137</sup> DPEC, Article 4, Paragraph 1.

<sup>138</sup> DPEC, Article 5, Paragraph 1.

available electronic communications service must be erased or made anonymous when it is no longer needed for purpose of the transmission of a communication.<sup>139</sup>

The DPEC sets forth regulations concerning a variety of requirements that Member States must require telecommunications networks and systems to follow in their respective states from presentation of calling line identification to processing of location data other than traffic data. Member States must ensure that there are transparent procedures governing the way in which a provider of a public communications network may override the elimination of the presentation of calling line identification for tracing malicious or nuisance calls or pursuant to emergency service requirements such as law enforcement, ambulance and fire brigades.<sup>140</sup> Member States must also ensure that any subscriber has the possibility, using a simple means and free of charge, of stopping automatic call forwarding by a third party to the subscriber's terminal.<sup>141</sup> Member States are also required to ensure that subscribers are informed, free of charge and before they are included in the directory about the purpose of the directory and be given the right to correct data in such directory pertaining to them or withholding such data entirely.<sup>142</sup> The DPEC also governs unsolicited communications such as faxes or e-mails sent for direct marketing purposes and proscribe their use absent prior consent of the proposed recipient.<sup>143</sup> It also requires that no technical features be imposed on terminal or other electronic communication equipment which could impede the placing of equipment on the market and the free circulation of such equipment in the EU.<sup>144</sup> Certain provisions contained in Directive 95/46/EC concerning judicial remedies, liability and sanctions have been deemed applicable to the DPEC and national provisions adopted pursuant thereto.<sup>145</sup> Finally, the DPEC provides for some transitional arrangements and transposition requirements including the obligation on Member States that they must bring into force provisions necessary to comply with the DPEC and a review mechanism.<sup>146</sup> The DPEC repeals Directive 97/66/EC and was entered into force on the date of its publication 12 July 2002.<sup>147</sup>

#### Regulators Group Decision:

The final component of the new EC regulatory framework for electronic communications network and services to be examined here is the Commission Decision of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services, 2002/627/EC (2002 OJ L 200) (the "Regulators Group Decision"). The Regulators Group Decision calls for the establishment of a European Regulators Group for Electronic Communications Networks and Services (the "Group") to provide an interface for advising and assisting the EC in the electronic communications field.<sup>148</sup> The Group, composed of the heads of each relevant NRA in each Member State shall assist the EC on any matter related to electronic communications networks and services, consulting extensively with market participants, consumers and end users in an open and transparent manner whilst respecting the confidentiality of information received from all sources.<sup>149</sup> The Regulators Group Decision takes force on 29 July 2002, the date of its publication.<sup>150</sup>

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<sup>139</sup> DPEC, Article 6, Paragraph 1.

<sup>140</sup> DPEC, Article 10.

<sup>141</sup> DPEC, Article 11.

<sup>142</sup> DPEC, Article 12.

<sup>143</sup> DPEC, Article 13.

<sup>144</sup> DPEC, Article 14.

<sup>145</sup> DPEC, Article 15.

<sup>146</sup> DPEC, Articles 17 and 18.

<sup>147</sup> DPEC, Articles 20 and 21.

<sup>148</sup> Regulators Group Decision, Article 3.

<sup>149</sup> *Ibid*, Articles 4, 5, 6 and 7.

<sup>150</sup> *Ibid*, Article 9.

### Conclusion:

In this article, the main directives, decisions and guidelines underlying the new EC regulatory framework for electronic communications have been examined. The starting point for any inquiry is the Framework Directive. The Framework Directive sets forth the EC goal of providing a harmonised environment for the regulation of electronic communications services and networks. Redefining telecommunications networks and services to take into account the effect that convergence is having on the way content is delivered to consumers, the Framework Directive establishes what is required of NRAs in promoting and managing competition in the electronic communication and broadcasting sectors. The Framework Directive posits a new analysis of the role of SMP held by undertakings in a particular market. Any analysis of SMP under the Framework Directive must be guided by consideration of the guidelines on market analysis and assessment of SMP.

The Framework Directive must also be read in conjunction with the three specific directives entered into force at the same, namely, the Authorisation Directive, the Universal Service Directive and the Access Directive. The Authorisation Directive applies only to the granting of rights to use radio frequencies where such use involves the provision of an electronic communications network or service for remuneration. It is designed to achieve it aims by general authorisation of undertakings to provide electronic communications networks and services to the public without the requirement of specific NRA decision-making or licensing. The Universal Service Directive addresses the social goal of the EC to provide all persons and regions of the EU without regard to their economic status or location reasonably equal access to and service from electronic communications networks. The Access Directive seeks to provide the same rights for undertakings as those provided to the general public in the Universal Service Directive, e.g., that former state-owned undertaking not use the ownership of rights of way to exclude new competitors.

After consideration of the Directives, our analysis moved to the Accompanying Regime consisting of the regulatory framework decision, the guidelines on market analysis and the calculation of SMP, the directive on competition in the markets for electronic communications services, the directive on the processing of personal data and the protection of privacy in the electronics communications sector, the decision establishing a radio spectrum policy group and the decision establishing a European regulators group for electronic communications networks and services. As the guidelines on market analysis were already discussed in the context of the Framework Directive, a second review herein is not required.

The Accompanying Regime seeks to eliminate the licensing barriers that service providers presently face in Members States when seeking to own and operate an electronic communications service provider or network. This will be accomplished largely through the Electronic Communications Directive. The Radio Spectrum Decision seeks to deal with issues involving harmonisation and efficient use of the radio broadcasting spectrum throughout the internal market by setting up a radio spectrum committee to examines issues of freedom of expression and technical delivery. The DPEC seeks to harmonise Member State provisions with respect to the processing of personal data in the electronics communications sector in order to ensure fundamental individual rights such as the right to privacy. Finally, the Regulators Group Decision calls for the establishment of a group consisting of the heads of the NRAs of each Member State in order to provide an interface to advise and assist in EC in its harmonisation effects in the electronic communications network and services field.

To conclude, the EC has put in place an ambitious regulatory scheme to address the new technological advances of the digital revolution in the telecommunications field. While the new rules and regulations are impressive in scope and direction, it is too early at this point in

time to tell what kind of impact they will have on the EU telecommunications sector. It will not be until some time after each Member States sorts out its own respective implementing structure and such implementing structures have been in place for some time before we will be able to gage the success of the EC's latest venture in the field of telecommunications regulation.