

The Electronic Communications Regulatory Framework & the Internal Market - The spectrum policy case study

Marina P. Markellou, Adj. Lecturer Ionian University, PhD, LL.M IP Attorney

Abstract

The following presentation outlines the relationship between the Electronic Communications and the Internal Market and it is divided into two main parts. The first one summarizes the importance of creating a single EU telecoms market. The second one identifies the most relevant issues that are at stake by underlying the spectrum policy case study.

Before analyzing the importance of creating a single telecoms market for Europe¹, a brief presentation of the European Communication' Regulatory Framework should be reported.

The existing regulatory framework for electronic communications networks and services comprises five directives, together referred to as “the Framework Directive and the Specific Directives”²:

-Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to electronic communications networks and associated facilities

-Directive 2002/20/EC on the authorization of electronic communications networks and services

- Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services

¹See M. Lemmel and A. Renda, “Achieving the Internal Market for E-Communications”, Report of a CEPS Task Force 2008, Brussels

²See http://europa.eu/legislation_summaries/internal_market/single_market_services/l24108i_en.htm

- Directive 2002/22/EC Universal Service Directive and

- Directive 2002/58/EC Directive on Privacy and electronic communications. This legal Framework regulates all electronic networks and communications services that are transmitted electronically, whether fixed or wireless, data or voice, Internet-based or circuit switched, broadcast or personal.

The European Commission is positive about the progress made since 2002 in opening up national telecoms markets to competition. The main goal of this regulation is to create and complete the internal market for electronic communications by strengthening the Community mechanism for regulating operators with significant market power in the key markets. The establishment of an internal market for electronic communications is a topic of high priority because of the increasing economic importance of the telecoms sector in Europe³.

But what is actually an internal market? The development of an internal market is one of the rationale of European intervention and the main objective of electronic communications regulation. Indeed, achieving the Internal Market in the communications sector is of strategic significance for the Europe not just because communications as such is one of the leading sectors of the European economy but also because the whole of economy benefits from a healthy and efficient communications sector. We remind that the ambitious objective of The Lisbon European Council for Europe was to become the most competitive and dynamic knowledge based economy in the world, capable of sustainable growth with more and better jobs and greater social cohesion. It is not sufficient to make the national markets more competitive they must also be more integrated.

³See M. Cave and P. Larouche, "European Communications at the Crossroads", Report on the CEPS working party on electronic communications, October 2001

The European regulatory framework for E-communications networks and services should therefore be reformed in order to achieve a single European market for telecoms. On 24 November 2009 the European Parliament at its plenary session in Strasbourg formally approved the European Telecoms Reform Package after two years of discussions⁴. Three are the main parts of the package: the E-coms framework directive, the citizen's rights directive and the establishment of a new Body of European Regulators for E-coms (BEREC). The reformed Package entered into force with its publication in the Official Journal of the EU on 18 December 2009. The 17 Member States have till July 2011 to transpose these new rules into their national telecommunication laws. BEREC was established in January 2010⁵. BEREC unites the national telecoms regulators of the EU Member States and seeks to strengthen the EU telecoms market and guarantee fair competition. BEREC replaces the European Regulators Group (ERG), the previous organization within which National Regulatory Authorities (NRA's) exchanged their expertise and thoughts on the functioning of the telecoms market in the EU. BEREC provides a forum for the regulators to coordinate pan-European policies and study new developments in the telecoms market. BEREC will provide opinions, reports and advice to the National Regulatory Authorities, the Commission and, on request, to the EU Parliament and the Council.

The Review of the European regulatory Framework for Electronic Communications aims to ensure that the framework continues to serve the needs of the next decade. In that regard, the review aims to diminish the regulatory fragmentation and inconsistencies between the activities of the national regulatory authorities in order to reinforce the competitiveness of the sector and the substantial consumer benefits from cross-border competition.

⁴See <http://www.europarl.europa.eu/wps-europarl-internet/frd/vod/player?date=20091124&language>

⁵See <http://berec.europa.eu/>

The Procedure for the consistent application of remedies is described in article 7a of the Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009. The National Regulatory Authorities shall contribute to the development of the internal market by working with each other, the BEREC and the Commission in a transparent manner. Under the procedure of article 7, the national telecommunications regulators must submit their market analyses and their regulatory measures to the Commission before adopting final decisions with a view to consolidating the internal telecoms market. The European Commission can raise serious doubts about the draft measure that a National Regulatory Authority intends to take - if BEREC agrees, the National Regulatory Authority amends or withdraws - if not, the National Regulatory Authority provides serious justification - in all cases the European Commission recommends.

The Telecom package reform clearly proves that the establishment of an internal market for E-Communications is a topic of high priority. A European Commission report released on 1 June 2010 shows that EU telecoms markets have become more competitive thanks to the Commissions guidance in the consultation and review process known as the article 7 procedure⁶.

Despite of the fact that all the previous measures were taken, one important question is raised: have we got a full market for Electronic Communications? A single European telecommunications market is still far from reality. An example that reflects this consideration is the Radio Spectrum Case study.

The radio spectrum is defined as all the waves operating at frequencies between 3 KHz and 300 GHz. It is divided into “bands”, i.e. ranges of frequencies. Different applications use different bands: terrestrial TV is between 400 and 800 MHz, mobile phones around 900,1800 and 2000 MHz, cordless phones below 1900

⁶<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/644>

MHz, Wifi “hots-spots” at 2.4 or 5 GHz and satellite communications often at even higher frequencies. The radio spectrum accommodates a growing number of applications (TV, mobiles, GPS, civil and military radars, earth observation and weather satellites, telemetry, radio astronomy, medical implants, hearing aids....)⁷.

On the issue of radio spectrum, the Commission advocates moving towards a common, a more flexible and market-based approach for allocation of the radio spectrum needed for innovative services and for devices to work EU-wide. To accomplish that, the Commission intends to give spectrum usage right holders substantially more freedom to choose radio network and access technologies used (technology neutrality) as well as services offered (service neutrality)⁸.

The strategy for flexible use of the Radio Spectrum can be briefly summarized as:

- Non exclusive use by a particular service, such as mobile or broadcasting.
- Non restrictive approach to the use of radio resources for electronic communications services.
- The scarcity of the resource requires judicious management: that means common definition of certain bands, easy and rapid transfer of spectrum, usage rights, and common European position for negotiations with third countries.

⁷See:

http://ec.europa.eu/information_society/policy/ecomm/radio_spectrum/_document_storage/videos/wh at_is_rs.swf

⁸See EBU’s technical Review: “The terms “technological neutrality” and “service neutrality” are frequently used by regulators and particularly by the European Commission. The policy of “technological neutrality” is simple to explain: regulators should let the market decide which technology should be used for a particular purpose. “Service neutrality” is a more recent concept than technological neutrality – and slightly more difficult to define. In essence, it implies that regulators should encourage more flexible use of spectrum by allowing ANY frequency band to be used for ANY type of service”. http://www.ebu.ch/en/technical/trev/trev_312-editorial.html

- No fragmentation that stops the innovation and the creation of a true single market.

By providing a structure for coordination and collaboration, the European Commission can enable Europe to take a single, strategic and coherent path towards spectrum reform.

De-regulated access to spectrum can encourage the development and use of innovative technologies and the Commission's strategy for promoting a flexible market also aims at creating new opportunities in existing allocations, e.g. spectrum formerly used for voice communications will become available for new broadband technologies which allow mobile Internet access.

Similarly, the Commission believes that a flexible approach should be taken when identifying parts of the radio spectrum for new uses. For example the transition from analogue to digital broadcasting will lead to a considerable spectrum 'dividend'⁹.

The Commission services organized a public consultation until 9 April 2010 on the possible content of a proposal for a multiannual radio spectrum policy programme for the period 2010-2015.¹⁰ The objective of this programme as stated in article 8(3) of the Framework Directive is to set out the policy orientations and objectives for the strategic planning and harmonization of the use of radio spectrum in accordance with the provisions of this Directive and the Specific Directives.

⁹See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Rapid access to spectrum for wireless electronic communications services through more flexibility, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0050:FIN:EN:HTML>

¹⁰See http://ec.europa.eu/information_society/policy/ecomm/radio_spectrum/rspp/index_en.htm

In line with this Directive, the up mentioned Programme will take the form of a legislative proposal by the Commission to be adopted by the Parliament and the Council. The Commission will also take into account the opinion of the Radio Spectrum Policy Group and on the results of the Spectrum Summit. The Radio Spectrum Policy Group was established under Commission Decision 2002/622/EC, amended in December 2009 and it gathers high-level governmental experts of the 27 EU member states¹¹.

The European Spectrum Summit has taken place in Brussels on 23 March 2010 and there was reaffirmed that spectrum should be accessible to innovative services and that the 800 MHz band will be soon a subject of a Commission decision. Neelie Kroes, the Vice-President of the European Commission and the Commissioner for the Digital Agenda mentioned the proposal of the adoption by the Commission of a technical harmonization on the 800MHz band which is one part of the digital dividend frequencies. This will set the technical conditions to apply in any Member State that decides to move away from using this sub band for broadcasting and will ensure a harmonized approach to the introduction of the Wireless broadband there. The Radio Spectrum Policy Group assured that coordinated availability of the 800MHz band for Electronic Communications Services other than broadcasting should be achieved in all EU Member States by 2015.

«I am not naïve – Mrs Kroes said - change may have an unsettling effect on some industries that are less prepared or less used to regular innovation. But, frankly, that is life. (...) When the world changes you have to change with it¹²».

¹¹See <http://rspg.groups.eu.int/>

¹²See Neelie Kroes, Why Europe needs effective co-ordination Spectrum Summit, European Parliament Brussels, 23 March 2010
<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/115&format=HTML&aged=0&language=EN&guiLanguage=en>