European electronic communications regulation and markets, 2004

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PURPOSE: to present a Communication on European Electronic Communications Regulation and Markets 2004.

CONTENT: The electronic communications sector play a vital role in nearly all economic activities and innovative communications services are a potent driver of labour productivity. The implementation of the new EU regulatory framework for electronic communications provides technologically neutral regulatory principles which, when fully operational in the Member States (MS), will assist the market to deliver choice and value for the consumer. The optimum timeframe for implementation is short and critical. The effective application of EC competition rules also plays a vital role. The Commission has promoted implementation of the EU framework vigorously through reporting, co-operation with MSs' authorities and, where necessary, infringement proceedings. The last report on regulation and markets (COM(2003) 715) concentrated on the Commission's main concerns resulting from the transposition process. This Communication focuses on market developments and the main persisting regulatory issues. It is based on more detailed analysis and market data set out in a Commission services' working document adopted in parallel, and covers all twenty-five MS for the first time. The regulatory situation described here is generally that at 1 October 2004.

MS were required to transpose the EU regulatory framework by 24 July 2003 (EU 15) as regards the core directives and by 30 October 2003 as regards the ePrivacy Directive; it applied in its entirety from 1 May 2004 for the 10 new MS.

20 MS have completed the adoption of primary legislation and notified the Commission thereof. This is a major achievement which in all cases has involved either a complete recasting of existing laws or the introduction of major new legislation. However, 5 MS, although they have in all cases carried out significant steps in the legislative process, still need to adopt primary legislation to transpose the framework: Belgium, Czech Republic, Estonia, Greece and Luxembourg. The Commission has launched infringement proceedings for non-notification, and proceedings are pending before the European Court of Justice against Belgium, Greece and Luxembourg.

Secondary legislation (substantive, in some cases) is still to be adopted in 8 MS in order to give full effect to primary legislation: Spain, France, Cyprus, Latvia, Lithuania, Poland, Slovenia and Slovakia.

The Commission is currently assessing the conformity with the EU *acquis* of the transpositions carried out in all MS, and will take appropriate action in accordance with the Treaty.

While the picture in the market is broadly positive, the Commission has identified a number of key areas where regulation in the MS needs to be improved. These are as follows:

- National regulatory authorities (NRA): The ability of national markets to function well is directly proportionate to the quality of the legal framework put in place in the MS concerning the NRAs. NRAs must be independent of all commercial or other vested interests. They must also be entrusted with all of the powers laid down in the framework, and be able to exercise them without outside interference. The Commission has serious concerns that the principles of independence and impartiality are still not fully observed in all 25 MS. Some of these arise from the fact that full separation between a State's shareholding and the taking of regulatory decisions is still not ensured in all instances. There is also

concern that in some countries NRAs may be impeded in the application of appropriate regulatory remedies in the light of their market analyses. This can arise, for example, where ministries, which have not been notified as NRAs responsible for market analysis, intervene by giving instructions or directions affecting the NRAs' regulatory decisions. In certain cases it is rather the national legislation that is at fault for limiting the discretion of the regulator to regulate the market. Lastly, the need for NRAs to undertake market reviews in addition to their work on market supervision, dispute settlement and enforcement has, in some cases, caused severe resource problems for a significant number of regulators.

- Charges for authorisation of services: Charges relating to the management of authorisation systems and the granting of rights of use should be transparent, proportionate and objectively justified and cover only the actual administrative costs incurred. Other charges may not be imposed. The Commission is examining the position in some MS where charges are relatively high and where compliance with these principles needs to be verified.

- Individual rights of use for radio frequencies: Where individual rights of use of radio frequencies are granted by MS, open, transparent and non-discriminatory procedures should be used. While this requirement has been extensively transposed, the Commission is examining whether the practical application of these criteria can be observed in practice in a number of MS, in the absence of a national frequency allocation table or because of licensing procedures.

- Rights of way, co-location and facility sharing: The Commission notes the persistent problems that have arisen across the Union in particular in the granting of rights to install masts and antennas for the provision of mobile services, and related fees. This has in some cases delayed the rollout of third generation (3G) infrastructure, sometimes in the face of strict rollout requirements in national licences.

- Provision of universal service: The provision of a minimum set of services to all end-users at an affordable price and specified quality is a key principle of the regulatory framework; MS are required to ensure that no undertaking or category of undertaking is precluded a priori from providing universal service. The Commission is examining closely concerns that in some MS the universal service provider may be designated without regard to this principle, or without the necessary transparency.

- Must-carry obligations: MS may impose must-carry obligations only where they are necessary to meet clearly-defined general interest objectives. The Commission is examining whether a clear link between the obligations and objectives has been established, so that the discretionary powers of the authorities to grant must-carry status do not give rise to arbitrary decisions.

- Unsolicited commercial communications: The Commission notes that, while the opt-in rules in the ePrivacy Directive have in general been transposed, there is a tendency to move also towards voluntary codes to protect users. This development is welcomed.

- Traffic data: The Commission will examine the tendency for the authorities in a number of MS to increase the statutory period during which a requirement for the retention of traffic data may be imposed for law enforcement purposes.

- Implementation of the transitional provisions in the EU15: MS from the EU15 are required under the transitional provisions to ensure that existing regulatory obligations on SMP undertakings remain in place until determinations are made by regulators in accordance with the new framework. The Commission is examining whether there are still instances where such obligations, relating for example to cost accounting and accounting separation, are not well implemented, leading to margin squeezes on new entrants. It is also concerned that the positive development of investment by new entrants and the migration of customers to better-grade products via a move from resale products to bitstream and local loop unbundling may in some cases be frustrated by process-related problems.

- Implementation of the 'starting conditions' in the new MS: The new MS were required to ensure that regulatory obligations were in place on SMP undertakings by the date of accession. Some of the outstanding problems in the EU 10 replicate those persisting under the old framework in the EU 15, such as cost accounting and tariff transparency. The existence of an appropriate reference interconnection offer is also questionable in some of the new MS, as well as the absence of full implementation of carrier selection, carrier pre-selection and number portability.