

The Enterprise User and Regulation

Background

The 2002 Telecoms Package set the scene for the regulation of 21st Century communications. It was transposed into national laws by the end of 2003 and in the UK the instrument was the [Communications Act 2003](#). The Act set up the converged regulator, Ofcom (see extract at [Annex 1](#))

The Act specifies the general duties of Ofcom as:

(1) It shall be the principal duty of OFCOM, in carrying out their functions—

(a) to further the interests of citizens in relation to communications matters; and

(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

This statutory focus – on the interests of the “citizen-consumer” – was imposed during the parliamentary scrutiny process before the draft Bill became law and subsequently constrains everything that Ofcom does, including the way it behaves. The Ofcom Consumer Panel, for example, restricts its activity to the needs of the SME and the citizen-consumer – it does not consider any representation from enterprises.

A [report](#) last year by the Economic and Social Research Council (ESRC) suggests that:

“the Government has adopted an approach to regulation and public services that emphasizes the role of the well-informed ‘citizen-consumer’, who yearns for greater freedom of choice and who exercises that choice at every opportunity. The ... bodies set up to regulate financial services and electronic communications (the Financial Services Agency and the Office of Communications), and the market reforms in the NHS all seek to balance consumer freedom and citizen rights”. (see [Annex 2](#)).

Unhappily, such a tight, politically-driven focus largely, if not completely, ignores the interests and needs of the wealth-creating, as distinct from the wealth-consuming, sector. In turn that poses a subtle but real threat to the realisation of the full economic benefits of 21st century communications by UK enterprises and hence to the economy as a whole.

To illustrate the point, Ofcom’s Strategic Review of Telecommunications resulted in the functional separation of BT in return for a set of “undertakings” by BT designed to foster retail competition based on equivalence of input. The benefits of those undertakings to communications providers (CPs) whose business model centres on serving the citizen-consumer have been widely recognised, not least by Ofcom. However, for CPs targeting business customers, the benefits of the undertakings have been less clear.

CMA has, on several occasions, protested to Ofcom the needs of the business customer. And on several occasions, at Chairman, CEO and other senior levels, CMA has been publicly and privately assured that Ofcom regards the term “consumer” as being inclusive of all types of user. Yet most Ofcom documents continue either to give the lion’s share of consideration to the residential user, or to

ignore the existence of the enterprise user completely. The result is that regulatory activity has increasingly assumed a populist aura; evidence-based regulatory decisions are biased heavily towards the residential market and the regulatory framework has thus become increasingly distorted. CMA has provided some [examples](#) of Ofcom's internal convolutions at the end of Annex 1.

Fundamental Differences

The main differences between the residential and enterprise markets are, in general, characterised as:

Traffic Profiles: Enterprise traffic is high volume and centres on a supply or value chain. Tariffs are refined accordingly. Residential traffic is individual, low volume, intermittent and peaks at predictable times of day/week/year. Enterprise traffic is also heavily affected by the different symmetry and asymmetry of traffic flows and by machine-driven traffic. It can be characterised by very high volumes of very small messages, by the need for large file transfers for off-site back up and by the need for peer to peer communications between third parties in a value chain network. The enterprise network is much more dependent on low contention ratios than are residential users.

Quality: Enterprise traffic on fixed links is intolerant of inconsistent performance parameters. Connectivity outages or breaks in synchronisation can cost large sums of money. Residential traffic is largely tolerant of breaks in service.

Choice: Enterprises tend to be locked in to one or more suppliers for far longer periods than the typical residential contract. Outsourcing adds further complexity.

Reach: UK-based internationals need seamless QoS, underpinned by seamless connectivity, across international borders, and if possible procured via a single supplier. This requirement has no equivalent in the residential or SME markets.

Management: Only the very largest enterprises – those with international reach – tend to employ in-house specialist regulatory staff. Medium-size companies will employ staff who manage outsourcing contractors, either technically or financially, while the smaller companies rely exclusively on their CP within negotiated contract terms. The management structure reflects the needs of the enterprise for information about usage and billing and the speed and frequency of the cost feedback loops, fuelled by the requirement to proactively optimise cost profiles. There is no comparable imperative in the residential market.

Key Concerns in the UK

The creation of Openreach has been very successful in promoting competition in the residential market, but has neglected competition in the business market.

Openreach's customers are the CPs, not the enterprise, yet the performance of Openreach affects the enterprise directly. Although that performance is improving it is inevitably a slow process, even to the point where some have proposed that full structural, rather than functional, separation of BT would have been preferable. Of primary concern at the present time is:

- Poor service performance, both in terms of provisioning and fault repair, characterised by a performance collapse in the months following the

- establishment of Openreach, leading to the imposition in March 2008, after a two-year delay, of SLA/SLG regulations by Ofcom.
- A serious lack of innovation, throughout the sector, in business-orientated products and services. In particular, BT has weak incentives to introduce new products – the lack of an SDSL product that might compete in the legacy leased line market is but one example.
 - Despite the existence of the equivalence of input agreement there are still too many patently unfair commercial and contractual terms that impact negatively, downstream, on the enterprise user in terms of cost and choice. For example, payment terms and frequency of payment, the unwarranted limitation of liability and disputes over billing.
 - It is apparent that SMP input products are not always cost-orientated. For example, PPCs are not subject to EoI criteria and there are reports from some CPs that price discrimination in favour of BT Retail is still practised. Retail margin squeeze still occurs when wholesale products are overcharged.
 - The advent of 21CN, although claimed to be subject to the same undertakings that were applied to the PSTN, is being unfairly leveraged. It is understood that the 2003 Framework allows ex-ante regulation only where SMP has been found. Nevertheless, it seems clear that BT will achieve first-mover advantage before Ofcom is prepared to act. The risk is that restrictions on interoperability at the NGN intelligence layer could allow BT to leverage its SMP.

An added concern, one that seems certain to grow as a result of the Commission's recent reduction in the number of sector-specific markets, is the general ineffectiveness of competition law (CL). It is Commission (and UK government) policy that CL should gradually replace sector regulation wherever possible. Unfortunately investigations and complaints take years to complete and an exceptionally strong case is required, comparable to the burden of proof required in criminal as distinct from civil cases.

Europe

On 19 March 2008 the European Commission's Telecoms Commissioner, on launching the Commission's 13th Progress Report on the Single Telecoms Market, said:

*"The European regulatory model is designed to increase competition in the telecoms market and this certainly is starting to pay off". "However, the job is not yet done. Competition is limited for access to the fixed network which is still provided to 86.5% of customers over the incumbent's infrastructure. In addition, though telecoms technologies know no borders, only 30% of major operators' EU business is outside their home market. **This shows that we still lack an attractive single market for businesses and services of European dimensions, so we must intensify our efforts to reduce the regulatory borders in Europe. Only by opening up the single market for business will Europe become competitive and will consumers benefit from a wide choice of rich and affordable services.**"*

The [Commission's chosen approach](#) to this goal centres on the creation of a new, central regulatory authority, the European Electronic Communications Market Authority (EECMA). However, the Commission's approach has been openly opposed by [MEPs](#), by the [Council of Ministers](#), by the trade association representing the incumbents ([ETNO](#)) and, as might be expected, by the European Regulators

Group ([ERG](#)), which, under the proposals, would effectively disappear as an independent body. Closer to home, the approach has not found unequivocal favour with BusinessEurope, the trade body representing business groups across Europe ([Annex 3](#)), nor with a [House of Lords Select Committee](#). National regulators, especially [Ofcom](#) and [ARCEP](#), see merit in some of the proposals but express concern over others that appear to detract from their freedom of action and authority.

Expressed concerns centre on the concept of EECMA, the extension of the power of veto over NRA decisions, and the authority to impose functional separation as a remedy. To a slightly lesser extent the Commission's policies on spectrum management have also been challenged. Arguments range from an unwelcome extension of bureaucracy, through support for an "ERG Plus", to a risk to future investment. Counter arguments have been heard, but have tended to be obscured by the better-funded and coordinated attacks from vested interests.

However, the Commission's proposals are fully endorsed by [INTUG \(Annex 4\)](#), by [EVUA](#) and by [ECTA](#). They are also [supported by BT](#), which has not only been functionally separated but which is also a competing player in other Member States.

The strength of the assault on the Commission's proposals is illustrated by the [Fifth Report](#) (8 Feb 08) from the European Union Committee of the UK House of Lords, "The Single Market: Wallflower or Dancing Partner?" The report has a section (Chapter 6 – Telecommunications) that deserves further exposure. Highlights include:

- "This chapter considers the state of the EU telecommunications sector. Less evidence was received in respect of this sector than the others, which is understandable given the progress already made towards a Single Market in telecommunications."
- "British Telecom in their evidence also suggested that the development of pan-European services for business has been constrained by the failure of national incumbents to provide suitable "local access" products (p 202). They argued that this is due to the debate on EU telecoms regulation focussing on "the needs of residential telecoms users rather than major business customers"
- "The one point on which witnesses disagreed with the Commission concerns centralised EU regulation mechanisms. Viviane Reding, the Commissioner for the Information Society, has proposed the establishment of the 'European Electronic Communications Market Authority'[\[25\]](#), to address issues with a pan-European dimension rather than the current system of co-operation between NRAs. Nearly all respondents expressed concern or hostility towards this proposal, considering that the European Regulators Group (ERG), comprising representatives of the 27 Member State NRAs, is capable of operating in an appropriate manner (BT p 203, CBI p 218, Ofcom pp 21-22, T-Mobile p 237). Despite the current inconsistency between Member States, witnesses like Ofcom (p 21) **and the CBI argued that NRAs "are closest to the market and ultimately should be best placed to make regulatory decisions", whereas a "Euro-regulator" would simply add an unnecessary "additional layer of policy or decision-making on top of the existing institutional arrangements" (CBI p 218)**. Commission officials told us that the proposal was aimed at "improving the better functioning of national regulators and improving their cooperation among themselves" (Q 406). But it

was not clear why a new level of authority, with the power to make recommendations to the Commission to veto remedies proposed by an NRA, was necessary to achieve this aim.”

It is noted that in the highlighted extract in the Committee report above that the CBI believed that ‘a “Euro-regulator” would simply add an unnecessary “additional layer of policy or decision-making on top of the existing institutional arrangements’.

However, in the event the CBI response to the Commission, submitted in March 2008, reflected a modified position and merely said (with some qualifications): “We also see some potential benefit in establishing a unified advisory body to the Commission for NRAs, rather than an EU communications regulator.” In that respect the CBI position does not equate to that of BusinessEurope ([Annex 3](#)). The BusinessEurope [opposition](#) suggests a disconnect between the leaders of industry and those they employ to further their purposes within a single market. “[Better Regulation](#)” does not, in the communications sector, mean “No Regulation”.

Conclusions

It is concluded that:

Nationally:

- As a direct but unintended consequence of government policy the needs of business customers of communications providers have been subordinated to those of the citizen-consumer.
- Any revision or replacement of the Communications Act 2003 must recognise the economic importance, to enterprises of all sizes, of communications in the UK public and private sectors, and amend the principal duties of the Regulator specifically to include such interests, on a par with those of the citizen-consumer.

At European level:

- The influence exerted by entrenched incumbents and government-influenced national regulators has acted to delay the achievement of a single market in telecommunications. Despite assertions to the contrary, progress in the areas of connectivity and services (as distinct from manufacturing) has been minimal.
- The proposals set out by the Commission in the Revised Framework of 2007, taken together as a coherent package, represent a realistic, practical and forceful solution to the problems of the status quo. Attempts to unpick the package risk a fatal weakening of its overall effectiveness. The proposals are therefore supported, in their entirety, by business consumers.

Annex 1 Extract from the UK Communications Act 2003 “The General Duties of Ofcom” (and a comment from CMA)

Annex 2 Extract from Economic and Social Research Council Report “The Rise (or not) of the Citizen-Consumer”

Annex 3 BusinessEurope position paper on the telecoms framework review.

Extract from the UK Communications Act 2003

http://www.opsi.gov.uk/acts/acts2003/ukpga_20030021_en_2#pt1-pb2-l1g3

General duties of OFCOM

(1) It shall be the principal duty of OFCOM, in carrying out their functions—

- (a) to further the interests of citizens in relation to communications matters;
- and
- (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

(2) The things which, by virtue of subsection (1), OFCOM are required to secure in the carrying out of their functions include, in particular, each of the following—

- (a) the optimal use for wireless telegraphy of the electro-magnetic spectrum;
- (b) the availability throughout the United Kingdom of a wide range of electronic communications services;
- (c) the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests;
- (d) the maintenance of a sufficient plurality of providers of different television and radio services;
- (e) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services;
- (f) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both—
 - (i) unfair treatment in programmes included in such services; and
 - (ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.

(3) In performing their duties under subsection (1), OFCOM must have regard, in all cases, to—

- (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
- (b) any other principles appearing to OFCOM to represent the best regulatory practice.

(4) OFCOM must also have regard, in performing those duties, to such of the following as appear to them to be relevant in the circumstances—

- (a) the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the United Kingdom;
- (b) the desirability of promoting competition in relevant markets;
- (c) the desirability of promoting and facilitating the development and use of effective forms of self-regulation;

- (d) the desirability of encouraging investment and innovation in relevant markets;
- (e) the desirability of encouraging the availability and use of high speed data transfer services throughout the United Kingdom;
- (f) the different needs and interests, so far as the use of the electro-magnetic spectrum for wireless telegraphy is concerned, of all persons who may wish to make use of it;
- (g) the need to secure that the application in the case of television and radio services of standards falling within subsection (2)(e) and (f) is in the manner that best guarantees an appropriate level of freedom of expression;
- (h) the vulnerability of children and of others whose circumstances appear to OFCOM to put them in need of special protection;
- (i) the needs of persons with disabilities, of the elderly and of those on low incomes;
- (j) the desirability of preventing crime and disorder;
- (k) the opinions of consumers in relevant markets and of members of the public generally;
- (l) the different interests of persons in the different parts of the United Kingdom, of the different ethnic communities within the United Kingdom and of persons living in rural and in urban areas;
- (m) the extent to which, in the circumstances of the case, the furthering or securing of the matters mentioned in subsections (1) and (2) is reasonably practicable.

(5) In performing their duty under this section of furthering the interests of consumers, OFCOM must have regard, in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money.

(6) etc

CMA Comment:

The wording of the Act clearly dictates Ofcom’s processes and priorities, although it seems also to lead to some internal stresses, even at senior level. Ofcom is at best ambivalent in its approach to business users and tailors its pronouncements on the issue according to its audience. For example, Ofcom’s Consumer Panel in its 2008 report on “Capturing the Consumer Interest” stated:

“.....the Panel’s main objective.....is to assess how Ofcom has taken consumer interests into account. Amongst others, the panel asks three key questions:

- Has Ofcom methodically considered the interests of consumers?
-
- How has Ofcom weighed up consumer interests with other factors in reaching its decisions?”

At the launch of the report (to which CMA was not invited), Ofcom, [said](#):

“Ofcom’s principal duty is to further the interests of consumers and citizens. So why do we need a toolkit to help us? Well, because it helps us to look at consumer interests in a systematic way, and to record how we do it. “The interests of consumers are not always the same as those of business. And as the Consumer Panel often reminds us, some elements within industry

are well-resourced and powerful, unlike most consumers – or even most consumer groups.”

However, in January 2007 Ofcom’s Chief Executive wrote to CMA:

“We have taken careful note of your central point that our Draft Plan does not differentiate between the interests of individuals and the interests of business customers, or recognise that these interests may diverge. I would observe that on every occasion that we are asked (*our Chairman*) and I always make very clear that when we refer to consumers we are referring to both residential and business consumers.”

The distortions revealed by these exchanges are self-evident.

Extract from Economic and Social Research Council Report

The Rise (or not) of the Citizen-Consumer

Report prepared by Professor Peter Taylor-Gooby,
Network Director, University of Kent. March 2007
p.f.taylor-gooby@kent.ac.uk <http://www.kent.ac.uk/scarr/>

http://www.esrcsocietytoday.ac.uk/ESRCInfoCentre/about/CI/CP/the_edge/issue24/consumer1.aspx?ComponentId=18727&SourcePageId=18793

The Government has adopted an approach to regulation and public services that emphasizes the role of the well-informed 'citizen-consumer', who yearns for greater freedom of choice and who exercises that choice at every opportunity. While that may indeed be an ideal model to aspire to, new research suggests that many people are not yet up to the task of being active citizen-consumers. Peter Taylor-Gooby reports.

The new bodies set up to regulate financial services and electronic communications (the Financial Services Agency and the Office of Communications), and the market reforms in the NHS all seek to balance consumer freedom and citizen rights. New research by myself, Professors Sonia Livingstone and Peter Lunt in the ESRC Risk Network examines how the public responds.

The reforms all involve a shift from topdown interventionist regulation and provision to emphasise individual choice, backed up by appropriate support and information. Professor Livingstone points out: "Ofcom's world of citizens and consumers is ... a world of media-savvy individuals who are ready to take responsibility for their own choices and actions. It is they, not the regulator, who specify the needs and wants that broadcasting will then supply, and while they may, on occasion, require the regulator's help in avoiding consumer detriment or social exclusion and ensuring media literacy, they do not require it to define their values or build their communities." She traces the changes of emphasis between the 2000 Communications White Paper which defines Ofcom's purpose in terms of the interests of 'consumers', 'the public' and 'citizens', through the 2002 draft Bill, which simply used the term 'customer' throughout, replaced initially by consumer in the Bill, and finally substituted by the twin terms 'consumer' and 'citizen' in the 2003 Communications Act. These are promptly hyphenated in the mission statement: "Ofcom exists to further the interests of citizen-consumers through a regulatory regime which, where appropriate, encourages competition."

The Economic and Social Research Council (ESRC) funds research and training in social and economic issues. ESRC is an independent organisation, established by Royal Charter, but receive most of its funding through the [Department for Innovation, Universities and Skills](#).



28 February 2008

BUSINESSEUROPE POSITION PAPER ON THE TELECOMS FRAMEWORK REVIEW

Introduction

BUSINESSEUROPE welcomes the opportunity to contribute to the current debate on the proposal to update the EU framework for electronic communications. The Commission proposals include several positive elements but also raise a number of issues where BUSINESSEUROPE has concerns.

BUSINESSEUROPE believes that the Framework Review should focus on the contribution that the telecommunications and ICT sectors make to Europe's **competitiveness**, both within the Internal Market and globally. In practical terms, this means encouraging and facilitating:

- **investment** in deployment of new ICT infrastructures;
- **competition** and choice among innovative new services.

This will work most effectively in an Internal Market based on efficient and consistent application of rules, with regulation kept to the minimum necessary for competition in accordance with the principles of subsidiarity and proportionality.

ELECTRONIC COMMUNICATIONS – KEYSTONE OF THE INTERNAL MARKET

BUSINESSEUROPE sees the Internal Market as a cornerstone of Europe's prosperity and one of its greatest achievements. At the same time action is still needed as the Internal Market remains incomplete and the implementation of fair and sustainable competition has not yet been completed.

Within the Internal Market, telecoms liberalisation has been a major success. However, inadequate enforcement and widely diverging application of the rules are preventing the full benefits from being achieved.

The Key principles identified by BUSINESSEUROPE for the renewed Internal Market Strategy and the revision of electronic communications legislation include:

- **Completion of the Internal Market**, because the integration of European markets has lost momentum.
- **Enforcement** of existing rules and a stronger focus on Member States' responsibilities

- **Efficiency**, through limiting harmonisation to essential requirements and maintaining an ambitious better regulation agenda.

The integration of the Internal Market for electronic communications should aim to encourage investment in efficient European network industries. It should promote liberalisation of network industries as a key for European competitiveness and innovation, make it easier for new entrants and innovators to access to networks and for investors to contribute to the development of the European telecommunications market.

Market context – European competitiveness

Telecommunications, as part of the ICT sector, makes a major contribution to overall productivity and economic growth. The telecoms services market in Europe represents more than 40% of the total ICT market, with a value of €300 billion in 2006¹. It is therefore a key factor of competitiveness of European business and the wider economy. The regulatory framework has a significant influence on the nature of the services available to business, affecting such matters as choice of supply, quality and price, and it has a direct impact on key investment decisions by operators and manufacturers.

The electronic communications sector is undergoing unprecedented challenges globally, which innovative firms are required to meet. Europe needs to maintain a competitive edge in relation to other economic regions such as Asia or the USA, precisely in the area of electronic communication services, which support productivity and innovation in other sectors. The EU telecoms framework will have to address these challenges and should be used to enable the ICT sector to deliver on the promise of the Lisbon agenda.

Europe's businesses require access to modern communications networks and services which offer the bandwidth, quality, resilience and innovative qualities to underpin competitiveness. Network operators need adequate returns to invest in high-speed networks and services, in a market place where demand is uncertain. Business users and consumers more generally are looking for new and innovative services which operate seamlessly across technical devices and platforms. A competitive market will drive investment, innovation and consumer benefit.

The needs of all will be best met in an environment of increasing choice and open competition. This should be characterised by a transition away from the need for detailed consumer regulation such as retail price controls as competition becomes more effective. The more regulation can be concentrated on the genuine bottlenecks, the quicker can be the move to a more open commercial model, in line with the original aim of the Telecoms Framework to relax regulation as the transition to competition evolves. A global level playing field is also necessary so that Europe is able to compete on equal terms with its international trading partners.

Looking beyond the legal Framework, BUSINESSEUROPE supports the Commission's activity to encourage European-based R&D and to promote take-up of ICT in both the public and private spheres.

1 European Information Technology Observatory (EITO) 2007 Report.

EU FRAMEWORK REVIEW – SPECIFIC PRIORITIES

BUSINESSEUROPE notes that many of the Commission proposals are inter-linked,

and the outcomes on issues such as functional separation, investment in new infrastructure, regulatory consistency and effectiveness cannot be considered in isolation from each other.

Relevant markets

While BUSINESSEUROPE does not take a view on the specifics of market definition, we welcome the Commission's removal of most retail, and some wholesale, markets from the scope of ex-ante regulation. BUSINESSEUROPE sees the need to keep those important wholesale markets which govern the terms of competitive access in important areas within the framework. This must still allow deregulation of all markets when justified by competition.

National Regulatory Authorities (NRAs) should act swiftly to review markets which are no longer included in the recommendation and remove regulation accordingly. In the context of broadband and next generation networks the Commission and ERG should also look further into the possibilities of defining sub-national markets. We welcome the Commission's intention to issue guidelines on this.

Spectrum management

BUSINESSEUROPE supports the main principles of the Commission proposals regarding the "digital dividend" for an increasingly liberalised and flexible market-based approach to spectrum. It will enable the roll-out of wireless broadband solutions for rural areas and will have a significant positive impact on competitiveness, growth and employment.

However, sufficient safeguards should exist to prevent harmful interference or distortion of competition across all frequency bands. The principles of technology and service neutrality should also apply, recognising that in some frequency bands different technologies cannot coexist. Europe's businesses will benefit from the availability and choice of innovative wireless communication and broadcast services, with sufficient competition between technologies and distribution channels.

The EU needs to ensure a policy framework which supports Europe's technology lead and learns from Europe's success in the mobile sector and in satellite distribution of digital TV. In this respect BUSINESSEUROPE, while supporting measures strengthening coordination for spectrum bands available across multiple Member States, is sceptical about a too radical shift of power at EU level and notably the proposed European Telecommunications authority.

The new policy framework should enable NRAs to have the scope to deal with local conditions and legacy issues appropriately, enabling new services, and recognising the substantial investments already made by existing operators. No additional institutional layer should be implemented. New structures only make sense if they bring about concrete positive effects for those concerned.

Investment in and access to new-generation networks

A major concern for Europe's economy is the timely roll-out of new generation, high-speed broadband access networks. Investments of billions of euros are needed to provide the necessary world-class communications infrastructure which Europe's companies need in order to successfully compete in tomorrow's knowledge based societies.

Regulators need to encourage investment and innovation, optimising legal certainty for investors and infrastructure competition where feasible. This approach must involve recognition of the considerable commercial risk involved in deploying new networks, and must also ensure that markets remain competitive, as competition, choice and certainty of supply are vital to the competitiveness of businesses using the new networks.

BUSINESSEUROPE believes investment should be led by the market, with public funding only used where there is long-term market failure, and on a basis which does not distort competition.

Functional / structural separation

The proposals envisage the introduction of “functional separation” as a new ex-ante remedy applicable by NRAs and overseen by the Commission.

By explicitly proposing functional separation as an ex-ante remedy, the Commission is at one level simply clarifying that this would form part of the Framework (something that is at present only implicit). At another level however, the Commission is sending a clear signal that the scope of ex-ante regulation is expanding significantly. BUSINESSEUROPE believes firmly in open markets and fair competition, with ex-ante access regulation kept to the minimum necessary, balancing the needs of investment in infrastructure and choice of supply. We also note that circumstances in the telecoms market are different from the energy sector, where separation between generation and transmission has been proposed.

Rather than considering such a new ex-ante remedy as a “one size fits all” approach, we believe that NRAs should have the primary role in assessing their national markets and considering appropriate regulatory responses. The first option should always be for the NRA to ensure more effective, timely and consistent implementation of existing remedies. Only where there is clear evidence that the usual remedies have been applied and failed, and that no other approach will guarantee competition, should an NRA be able to consider applying stronger forms of non-discrimination, as a remedy “of last resort”. The Commission’s role should be limited to the same right of “prior approval” that exists under the current Framework for “exceptional” remedies.

Given that market players need the highest level of legal certainty in order to plan investments in the development of Next Generation Access networks (NGAs), the European Regulators Group (ERG) may need to look further into these aspects, and BUSINESSEUROPE position paper on the Telecoms Framework Review 5 NRAs could help provide greater certainty by clarifying their intentions early on, including the possibility of eventual “sunsets” contingent on benchmarks reflecting competitive conditions.

As changes to the Framework will not be implemented before 2010 we also propose that the ERG and Commission should carry out more detailed impact assessments before then, so that all parties are better placed to assess the costs and benefits.

THE INTERNAL MARKET FOR ELECTRONIC COMMUNICATIONS

BUSINESSEUROPE has identified completion of the overall Internal Market as a key strategic goal for Europe. Currently, inadequate enforcement and widely diverging application of the rules can prevent the full benefits of the Internal Market from being

achieved in electronic communications. Market reviews are often delayed; the resulting regulatory remedies are applied inconsistently across Member States; and the application of national appeals procedures in some cases in some Member States has the effect of inhibiting decisions by NRAs.

BUSINESSEUROPE believes some changes are necessary to achieve its vision of an Internal Market providing a consistent regulatory framework for growth and fair competition, based on more effective enforcement and improved efficiency.

Improved efficiency – streamlining the “market review” process

BUSINESSEUROPE believes one of the concepts underpinning the Internal Market should be improved efficiency, through, for instance, the limitation of harmonisation to the essential requirement of resolving discrepancies among different national regulations, and an ambitious and broad programme on better regulation. The current system of market reviews, based on national and EU-level consultation has played a positive role in promoting competition around Europe. At the same time,

BUSINESSEUROPE supports moves to simplify and streamline the market review process and thus reduce bureaucracy within the sector. Removal of unnecessary bureaucratic steps should help lower the regulatory burden and give a positive impulse to regulators and regulated alike. However, the quality of market analysis should not suffer from any streamlined procedure. This is in line with principles of better regulation.

Effective enforcement – greater political independence for regulators

BUSINESSEUROPE believes that regulation in the EU will only become fully effective and consistent when regulators are freed from political control, and are able to apply regulations and remedies based on robust and balanced economic and commercial consultations with all market players. Though this has been largely achieved in a number of Member States it is still incomplete in others. It is also somewhat undeveloped as a concept at an EU level. While we support the Commission’s proposals for increased political independence of national regulators we also believe, as indicated below, that this needs to be spelled out more clearly in relation to the ERG and the Commission, or (if adopted) the proposal for an EECMA.

Effective enforcement – Single Market consolidation – role of the European Electronic Communications Market Authority (EECMA)

The current system has not delivered a true internal market, with businesses facing different regulatory approaches in different countries. BUSINESSEUROPE approves the Commission proposal for more action in this area, based on the principles of better regulation, subsidiarity and proportionality. NRAs are closest to the market and ultimately should be best placed to make regulatory decisions, but BUSINESSEUROPE recognises that NRAs are not always able to deliver the necessary level of consistency and certainty.

The Commission has proposed the “EECMA” as a way of addressing this issue. BUSINESSEUROPE does not support this proposal. We do not consider the case is made for such an additional institution, and we believe:

- The function of the “Administrative Board” is unclear – it could be an unacceptable threat to the independence of NRAs if the Commission and Member States were able to influence the authority’s decisions;

- In addition, the extension of the scope to include such disparate issues as security, numbering, spectrum and e-accessibility seems unnecessary and unworkable.

The existing ERG is an appropriate forum for considering the inconsistencies of current regulatory approaches. At the same time, the ERG is likely to have limited scope to require changes of behaviour by its own members, so some reform is needed. The Commission should clearly spell out in what circumstances and under what conditions it would consult with the ERG and consider its advice, while the ERG should spell out its internal procedures.

BUSINESSEUROPE would not wish to see increased bureaucracy and does not see a justification for an unlimited extension of the Commission veto to cover all aspects of the regulatory remedies which are currently subject to notification. The most detailed market analysis can be done more thoroughly at national level. However, a selective extension, based on the Commission's right to prior notification and approval could be an effective solution in the context of a simplified/reduced notification procedure. Such an extension of Commission power would have to be part of the overall checks and balances in which the ERG should also have a more prominent role than at present, and with the possibility of greater use of the existing Communications Committee.

To complete action on more effective enforcement, action is needed on appeal procedures. The right of appeal is a fundamental right which companies should retain. Whereas some Member States offer sufficient measures for preliminary injunctions, in other Member States, in some circumstances the use of appeals can delay application of regulatory decisions, and can create uncertainty for market players. In those cases, action on appeal procedures could contribute to more effective enforcement. We therefore support the Commission proposals on this issue.

OTHER ISSUES

Consumers' and users' rights

BUSINESSEUROPE agrees with the Commission's decision so far not to extend the scope of universal service and we will comment in more detail as part of the planned consultation in 2008. BUSINESSEUROPE believes that the current concept of universal service is increasingly overtaken by changes in the market, and that ever-increasing competition and choice make the focus on PSTN and payphones less relevant. Governments should fund public policy commitments from public spending and not distort the market.

As far as access to broadband is concerned, BUSINESSEUROPE notes the increasing demand from SMEs for higher bandwidth.

Security

BUSINESSEUROPE supports measures aimed at increasing business users' confidence in the integrity and security of networks. At the same time, it is not clear that there are in fact market failures of the kind which would justify action beyond self-regulation or codes of conduct. Security is a key competitive element of differentiation in the market and BUSINESSEUROPE shares the aim of enhancing security as a means for increasing customers' confidence in electronic communications. The current regulatory measures and contributions of the

companies provide for a high standard of security. Any proposed measures must be implemented in a manner which is proportionate and subject to proper impact and cost-benefit analysis.

The Commission should clarify further the proposed requirement for providers to notify NRAs when an interruption in the supply of a service occurs. The emphasis should be placed on measures that encourage the raising of industry standards in data management rather than the introduction of requirements leading to additional financial and logistical demands on firms, particularly SMEs.

Privacy

With regard to privacy clauses BUSINESSEUROPE is concerned about the Commission's introduction of obligations for electronic communications providers specifically to notify users and NRAs if there is any loss/alteration or disclosure of personal data. The text is unclear and will lead to the need for costly systems to be established, potentially creating discriminatory conditions for smaller market entrants. Furthermore, the EU already has the Data Protection Directive and therefore we urge the Commission to stick to the fundamental principles enshrined therein rather than adding sector-specific obligations onto electronic communications providers in a way that might distort competition. BUSINESSEUROPE does not believe that these changes are needed in the Framework Review.

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INTUG Position Statement on the European Commission's proposals following review of the European Telecommunications Framework.

Introduction

The International Telecommunications Users Group (INTUG) was established in 1974 to ensure that the voice of business telecommunications users was heard, wherever regulation was discussed. It is an independent association, consisting mainly of national and multinational user groups around the world, each representing many business users. Despite major differences between the requirements of residential domestic users and international businesses, the latter are an often overlooked, but vital group of user stakeholders.

Background

INTUG has consulted its user groups within the EU to establish their own members' views on the European Commission proposals. This position statement summarises the collective position. It is vital that the European Parliament takes into account the views of all user stakeholders, including multinational businesses and small to medium enterprises (SMEs), to ensure that the regulatory framework enables seamless services, and encourages effective competition within all Member States, and across the EU.

INTUG is acutely conscious of the powerful vested interests, which actively seek to protect national positions, and/or the domination of certain markets. Some of these arguments focus on the risk to employment and investment by the incumbents, but these overlook the job creation opportunities, not just in the rest of the ICT economy, but in all industries using telecommunications.

The predominant arguments favour greater competition, and argue strongly for the rights of all operators to obtain equal access to bottleneck resources. Despite counter claims that the introduction of functional separation in the UK has had a negative impact, the overwhelming evidence suggests a significant economic benefit has been generated through a step change improvement in the availability of broadband services to businesses of all sizes.

The incumbents sense an opportunity now to turn the clock back on recent regulatory progress, by foreclosing competition, via investment in their own next generation networks and access, linked to the re-establishment of previous privileged regulatory status. This will suppress innovation and reduce, or even eliminate, service choice for business customers.

INTUG has no such bias, is concerned only with the need to create a single market, and is therefore neutral in a competitive as well as a political sense. The European Commission's proposals, based on economic modelling using empirical evidence, have been shown to benefit overall EU economic welfare.

Executive Summary

INTUG welcomes the European Commission's proposals for revision of the European Regulatory Framework for Telecommunications.

Whilst applauding the EU's progress in the last decade towards an open and competitive telecommunications market, the business users which INTUG represent are still unable to obtain the seamless services within all Member States, or across the EU, that they need to support efficient ICT investment.

It is generally accepted that there is no single market in telecommunications in the EU, nor is there any prospect of one under current arrangements. There is a fragmented market of 27 independent and inconsistent jigsaw pieces, upon which industries and businesses have to build their ICT environments.

Effective interworking of IT applications throughout the extended supply chain of business partnerships in different company sites therefore all too often requires some form of dedicated "private" network, since neither the public Internet nor ISP offerings provide adequate access, quality and reliability.

Regulation has failed to ensure non-discriminatory availability of wholesale inputs from incumbent operators, which must be used when such networks cover multiple Member States. As a result, supply of pan-European business services is unnecessarily slow and expensive and, in some cases, simply impossible. Competition in the supply of such services is non-existent. The problem applies equally to fixed and mobile services, and is made worse by the increasing needs of business to use fixed/mobile converged services.

This highly unsatisfactory situation is seriously handicapping the attempts of EU businesses to boost their productivity by re-engineering business processes and restructuring operations fully throughout Europe. Many potential benefits associated with the EU Single Market are therefore denied them, and consequently European competitiveness is being damaged.

It may be thought by some that the advent of next generation networks and access services provides an ideal opportunity for solving these problems. Regrettably, there is a serious risk of the reverse happening. It is feared that, unless the right regulatory framework is established, with adequate power structures for enforcement, the progress made in establishing competition in some markets will be foreclosed by monopolies in bottleneck infrastructure.

This is why INTUG welcomes the proposed regulatory reforms and urges their full adoption by the European Parliament. They are needed to create a market in which there is competitive provision of pan-EU communication services in fixed and mobile. This must be based on providing more effective remedies, ensuring their application through streamlining of appeals procedures, and creating consistency of regulation and greater harmonisation of services.

INTUG believes the proposals are interdependent, with each element of the recommendations necessary for the desired outcome. INTUG believes that strengthening of the proposals in some areas, for example by reducing the conditions required to justify functional separation, could be of benefit.

It would also be wholly inappropriate to limit the application of functional separation to legacy networks, since it is via the next generation access infrastructure that there is the greatest threat to effective competition.

The open and competitive availability of high speed, high quality resilient broadband access services throughout the EU - not just in city business districts and major metropolitan areas - will contribute significantly to the achievement of the Lisbon i2010 goals. It will enable businesses to operate more energy-efficiently, and facilitate a more inclusive world in which all European citizens can participate fully in the global information society.

INTUG therefore urges the European Parliament to approve the European Commission's proposals for future EU telecommunications regulation.

Detailed Comments on Specific Proposals

1 Powers for NRAs to impose “functional separation” (thereby ensuring that the dominant operator provides equivalent access input products to itself and its competitors) and to require facility sharing

INTUG supports these proposals. Functional Separation will be a very useful remedy, as an option available to NRAs where other measures are insufficient to create competition. It has proved effective in the UK in accelerating LLU for broadband and is being adopted by other Member States already in advance of the proposal. It is accepted that this is not necessarily the best option in all cases. But where it is applied, it is essential that the remedy of Functional Separation should be applicable on a technology neutral basis. It is particularly appropriate for new fibre networks.

INTUG also believes that sharing of civil engineering facilities such as ducts, poles and building access facilities, can reduce the investments necessary for deploying fibre, and thus can enhance competition in a market, which is vital for provision of business quality symmetric broadband services.

2 Measures to ensure all NRAs have full political independence from vested interests, and are given effective enforcement powers

INTUG supports these proposals. Studies of NRAs' track records in implementation performance, such as the ECTA scorecard, show that only half of NRAs enjoy full independence. The current structure and role of the European Regulators Group has proved to be inadequate in securing implementation of many decisions despite collective agreement.

3 Measures to prevent dominant operators from using the appeals procedure or regulatory holidays to delay implementation of regulations

INTUG supports this proposal. Some operators apply systematic use of the appeals procedure to retain the status quo for a lengthy period, which is usually followed by inadequate sanctions or recompense even if the appeal fails. Appeals should only lead to suspension of NRA decisions in very exceptional circumstances.

Regulatory holidays are a completely inappropriate measure and almost certainly foreclose any prospect of effective competition by creating a monopoly bottleneck resource and by excluding innovation and choice.

INTUG also believes that specific so called sunset clauses cannot be introduced given the extreme uncertainty and immaturity of competition.

4. Establishment of a Body of European Regulators of Telecoms (BERT) building on the European Regulators Group (ERG), extending Commission veto powers to cover NRA remedies, and requiring the Commission to take utmost account of its recommendations

INTUG strongly supports this proposal. The current ERG, whilst making some progress, has no effective authority to ensure its members implement its decisions. This has produced wildly inconsistent regulatory positions, for example for Voice over IP and Mobile Termination Rates, and has allowed poor implementation. Continuing unjustifiably inflated levels of MTR have an impact elsewhere, and the supranormal returns achieved by operators from them do significant economic damage. The ERG has been unable to resolve such issues, or to deliver implementation consistency and harmonisation.

An extended Commission veto, backed up by a restructured ERG, is the only way forward, and will actually bring forward, rather than delay, the time when sector specific regulation can be removed. INTUG recommends that BERT be completely politically independent, with mechanisms to guarantee this.

INTUG accepts that the inclusion of radio spectrum and security within the scope of BERT, whilst a laudable objective when included within the original Market Agency proposal, presents undue complexities of implementation.

5. Allocation of radio spectrum on a technology and service neutral basis with measures to facilitate trading/prevent hoarding of spectrum

The current market is fragmented, with most countries believing this damages economies of scale for equipment manufacturers and blocks the provision of pan-EU services. These would be facilitated by the fostering of a Europe-wide mobile virtual network operator (MVNO) market, and a more coherent approach to an enterprise-friendly application of the digital dividend.

INTUG notes radio spectrum is not within the remit of all NRAs, and that other bodies created to address the issue have not produced the desired results.

INTUG recommends that further study of these key issues be undertaken to identify a solution that balances the concepts of service and technology neutrality with the demands of a single market in telecommunications, the role of NRAs, and the desire for greater harmonisation between Member States.

INTUG also urges action on spectrum allocation for digital services to enable more economically effective use of scarce resources in pursuit, and increased possibilities for pan-European wireless services.

6. Co-ordination of telecom security at a European level through the appointment of an EU Data Security Officer

INTUG believes that telecommunications security at network, data and application level must be subject to pan-EU processes to ensure the safety and security of EU citizens. It recommends that ENISA be given the full authority to ensure necessary controls are implemented throughout the EU. Security is only as strong as its weakest link, and is dependent on a mixture of architectures and technologies used

by different operators.

INTUG supports the role of an EU Data Security Officer, but recommends further study of the most practical way of addressing this key problem to ensure a feasible proposal is adopted. This must also preserve the ability of Member State governments to execute their national responsibilities for survivability of their own primary systems and networks.

7. General Authorisation

INTUG believes the current EU General Authorisation regime's scope is too wide, leading to overregulation and regulatory inefficiency. The 1998 EU rules for individual public telecom licences were clearer in defining who was required to obtain them. This clarity was lost in the revision leading to the current regime and lowered the threshold for General Authorisation requirement. This forced some businesses, who are not network and/or service providers, and should otherwise be exempt, to obtain authorisation in EU Member States. This has added burden and cost and created unnecessary delay.

INTUG recommends this flaw is corrected in the new Regulatory Framework, by limiting the scope in Article 3 of the Authorisation Directive to cover only public communications network providers and/or services. The Review process offers an important opportunity to do this.

*This document can be downloaded from the INTUG web site at www.intug.org
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