REFORM OF EUROPEAN ELECTRONIC COMMUNICATIONS LAW

A SPECIAL BRIEFING ON THE RADICAL CHANGES OF 2009

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Introduction

In November 2009 the European Institutions reached agreement on far-reaching and, in parts, controversial reform of EU telecoms regulation. The Commission proclaimed that reform would lead to stronger consumer rights, an open internet, a single European telecoms market and high-speed internet connections for all citizens. The reforms will be introduced by way of the Better Regulation Directive and the Citizens' Rights Directive[2].

At first sight the changes looks involved and legalistic; it might appear at first glance that the changes do not merit significant attention. Peer behind the drafting, however, and it is clear that in fact they will be of fundamental importance to electronic communications providers. Furthermore they represent a subtle yet significant shift in the balance of power from national regulators to the Commission. It will be essential for all communications providers to familiarise themselves with the changes introduced by these two new Directives – they will have a big impact.

In this Special Briefing we explain the history behind these new rules; we summarise some of the changes the new rules will bring about; we then examine selected key provisions in more depth.

History

By 1999 liberalisation in the EU had led to a complicated collection of more than twenty directives and associated legal materials most of which was aimed at the traditional telecoms industry at a time when convergence was starting to become a reality. The Commission was also concerned that the pan European market could not really function due to the wide range of national licensing regimes which had developed. Following a two year review a new package of directives was enacted, and became known as the Common Regulatory Framework (CRF). At that stage the Commission did look in some detail at whether there was a need to establish a European Regulator, a theme to which they returned in the most recent review, but they concluded in 1999 that there was no such need. The CRF introduced in 2002 represented a considerable simplification of the previous regime with 5 Directives replacing the previous twenty. The CRF is generally accepted to consist of:

1. The Access Directive (Directive 2002/19/EC)
2. The Authorisation Directive (Directive 2002/20/EC)
3. The Framework Directive (Directive 2002/21/EC)
4. The Universal Service Directive (Directive 2002/22/EC)
5. The Telecoms Data Protection Directive (Directive 2002/58/EC)

By November 2007 it was once again felt that the legal framework had simply been overtaken by developments in technology and in the market and that further reform was required. As is often the case with EU legislation, there was a period of intense wrangling between the member states and European legislators which resulted in a compromise package appearing in November 2008. In May 2009 it appeared that agreement had been reached but controversy erupted over the ability of ISPs to cut off service or restrict download speeds where users are engaged in activities which infringe intellectual property (the most common example being illegal file sharing of copyrighted material).

The European Parliament adopted a position that required ISPs to seek judicial authority prior to taking any such steps in order to protect the fundamental rights of internet customers. This was starkly at odds with certain member states which took the view that the Parliament was treading on the toes of national law makers, particularly where measures permitting ISPs to cease service or throttle back speeds had already been implemented.

As a result of this, the entire reform package was put at risk, and the whole package had to go through a conciliation process which allowed The Parliament and the European Council six weeks to reach a compromise.

This process led to the compromise announced on the 5th November whereby the Parliament hacked down from its previous position and accepted what is now known as the "internet freedom provision".

The Commission's press release states that the reform

[2] 2009/140/EC and 2009/139/EC

"substantially strengthens competition and consumer rights on Europe's telecoms markets, facilitates high-speed internet broadband connections to all Europeans and establishes a European Body of Telecoms Regulators to complete the single market for telecoms networks and services."

The new directives, which amend the directives in the existing Common Regulatory Framework ("CRF") are now in force (as of 19 December 2009)[3]. Member states will then have 18 months to incorporate the new provisions into national legislation.

Viviane Reding, the EU Telecoms Commissioner who had been an active party to the final talks, described the internet freedom provision as *"unprecedented across the globe and a strong signal that the EU takes fundamental rights very seriously, in particular when it comes to the Information Society."*

Summary of Key Changes

The following are some of the most significant changes introduced by the reform package, as now agreed:

1) Improved Consumer information and rights under contracts

   a) Better consumer information: Under the new telecoms rules, consumers will receive better information ensuring they understand what services they subscribe to and, in particular, what they can or cannot do with those communications services. Consumer contracts must specify, among other things, information on the minimum service quality levels, as well as on compensation and refunds if these levels are not met, subscriber's options to be listed in telephone directories and clear information on the qualifying criteria for promotional offers.

   b) A right to port fixed or mobile numbers in 1 working day. The current EU averages are 8.5 days for a mobile number and 7.5 days for a fixed number to be ported and in some states the process can take two to three weeks. In addition the maximum initial duration of a contract signed by a consumer with an operator cannot exceed 24 months. Operators will also be obliged to offer consumers 12 month contracts.

2) The new internet freedom provision will protect citizens' rights relating to internet access. The new telecoms rules now explicitly state that any measures taken by Member States regarding access to or use of services and applications through telecoms networks must respect the fundamental rights and freedoms of citizens in the European Convention for the Protection of Human Rights. Of particular note in light of recent announcements by the UK Government, any measures must respect the presumption of innocence and the right to privacy. Specifically in relation to internet access, Europe has stipulated that EU citizens are entitled to be dealt with by means of a fair and impartial procedure, including the right to be heard, and that they have a right to an effective and timely judicial review. It remains to be seen how the UK's proposals will comply with these requirements.

3) Net Neutrality: The new telecoms rules will ensure that while ISPs will be allowed to use traffic management tools to allow premium high-quality services (such as IPTV) to develop and to ensure secure communications, they will not be allowed to use these techniques to degrade the quality of other services to unacceptably low levels or to strengthen dominant market positions. National regulators will have powers to set minimum quality levels for network transmission services so as to promote "net neutrality" and "net freedoms" for European citizens. These provisions will work in tandem with the new consumer information requirements which will require that in advance of signing a contract consumers must be informed about the nature of the service, including any traffic management techniques and their impact on service quality, as well as any other limitations.

4) Consumer protection against personal data breaches. The volume of personal data held by telecoms companies carries with it enormous responsibility and the new rules seek to reflect this by introducing mandatory notifications for personal data breaches – the first law of its kind

[3] The BEREC Regulation, however, entered into force on the 20th day after publication in the OJ – 7 January 2010

in Europe. This means that communications providers will be obliged to inform not only the authorities but also their customers about security breaches affecting their personal data. It is hoped that this will encourage providers to improve their measures to protect customers' personal data. For providers, this is a highly significant change.

5) For those parts of Europe where regulators are still subject to influence by their national government, the new telecoms rules seek to reinforce national telecoms regulators' independence by eliminating political interference in their day-to-day duties and by adding protection against arbitrary dismissal for the heads of national regulators.

6) The creation of a new European Telecoms Authority ("BEREC"). This new body which replaces the more informal ERG (European Regulators' Group) is intended to deliver more consistency of regulation throughout European telecoms markets. BEREC will consist of the heads of the 27 national telecoms regulators. Decisions will be taken by a simple majority when giving opinions on the Commission's analysis of remedies notified by national regulators, and by a two thirds majority in other cases. BEREC will have an advisory role for national telecoms regulators when decisions have cross-border implications. BEREC met for the first time on 28 January 2010.

7) The Commission will gain enhanced powers to oversee remedies proposed by national regulators in telecoms markets. (e.g. on the conditions of access to the network of a dominant operator; or on fixed or mobile termination rates). The stated aim of this change is to increase consistency and thereby avoid distortions of competition in the single telecoms market. The Commission will be able to issue a recommendation that requires the national regulator to amend or withdraw its planned remedy. If regulators persist with inconsistent regulation the Commission will be able to adopt further harmonisation measures in the form of recommendations or (binding) decisions. Although this may appear quite radical, the power does fall short of what the Commission had demanded which was a right to veto and replace national decisions with the Commission's own decisions.

8) The remedy of functional separation, first introduced in the UK via Competition law will now formally become a remedy available to all national telecoms regulators "as a last-resort remedy". This new remedy will add a degree of legal certainty throughout Europe where some member states are currently progressing different forms of separation (Poland, Italy).

9) Encouraging next generation access network investment: This is an area which has been the subject of a great deal of lobbying. Incumbents have argued for less intrusive regulation in order to allow them to earn a return on investments, while newer market entrants have argued for continued regulation to ensure incumbents cannot exploit dominant positions to edge them out of the market. The rules seek to strike a balance between these two positions. They do this by allowing access to NGA networks and allowing for various cooperative arrangements between investors and access-seeking operators. The Commission plans to issue a recommendation for the regulation of access to NGA networks in the first half of 2010 taking into account the results of public consultations in 2008 and 2009 (IP/08/1370 and IP/09/909).

DETAILED ANALYSIS OF SELECTED TOPICS

The Internet Freedom

Summary

This section considers the so-called "Internet Freedom" and assesses what it means in practice to member states' attempts to restrict alleged illegal file sharing. The Internet Freedom seeks to clarify whether internet access falls to be considered under the law about fundamental rights and freedoms and if so, what protections are accorded to it.

In our view the Internet Freedom establishes that continued access to the internet is effectively to be treated as a fundamental right under European law; it may only be withdrawn in specific circumstances. However, despite a general tendency from national governments to encourage universal internet access[4], the Internet Freedom does not of itself create a right for end users to have internet access in the first place across the EU.

[4] It has been widely reported that the Finnish government has created a legal right for Finnish people to have access at 1Mb/s

It is likely that some of the more radical proposals of member states to restrict alleged illegal files-sharing will conflict with the Internet Freedom.

In particular, for member states to impose a requirement to cut off end-users without a prior hearing would clearly not be permissible. On this point the European Commission has been quite clear:

> *"'Three-strikes-laws', which could cut off Internet access without a prior fair and impartial procedure or without effective and timely judicial review, will certainly not become part of European law."*[5]

The internet freedom – history and effect

The "Internet Freedom" is contained at Article 1(3)a of the new Framework Directive. It is worth setting out in full here:

> *"Measures taken by Member States regarding end-users' access to or use of services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law.*
>
> *Any of these measures regarding end-users' access to or use of services and applications through electronic communications networks liable to restrict those fundamental rights or freedoms may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and their implementation shall be subject to adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law, including effective judicial protection and due process. Accordingly, these measures may only be taken with due respect for the principle of presumption of innocence and the right to privacy. A prior fair and impartial procedure shall be guaranteed, including the right to be heard of the person or persons concerned, subject to the need for appropriate conditions and procedural arrangements in duly substantiated cases of urgency in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to an effective and timely judicial review shall be guaranteed."*

It will be apparent to even the most casual reader that this is not particularly easy to construe; in fact, it is more difficult to construe than most legislation from Europe. The principal reason for this is probably that the internet freedom was a political compromise reached under the conciliation process.

The process of compromise over the internet freedom delayed the implementation of the whole package. As far back as 24 September 2008, the European Parliament voted through so-called "Amendment 138". This was touted at the time as a measure to support net neutrality; in fact, even the September 2008 version of the freedom was comparatively weak:

> *that no restriction may be imposed on the fundamental rights and freedoms of end-users, without a prior ruling by the judicial authorities, notably in accordance with Article 11 of the Charter of Fundamental Rights of the European Union on freedom of expression and information, save when public security is threatened where the ruling may be subsequent.*

The European Commission noted at the time[6] that this issue was a political hot potato, particularly in France. Not surprisingly, it took until November 2009 (and included another vote in the European Parliament) to finalise the Internet Freedom in the form shown above.

This creates some ambiguities in the drafting of the Internet Freedom and it is capable of being construed in a number of ways. Is our view the most likely interpretations are as follows:

a. Continued internet access is now a fundamental right and/or part of another fundamental right (freedom of expression[7]); or

[5] European Commission memo/09/513, 20 November 2009

[6] Commission MEMO/08/681, 7 November 2008

[7] **Freedom of expression** – a right which is protected by the ECHR and as a general principle of Community law: European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome IV, 1950, Article 10.1: Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and

b. Although not necessarily a fundamental right of itself, continued internet access is capable of attracting the protections accorded to such rights.

In practice, the distinction may be academic rather than practical (for the reason discussed in the next paragraph). For this reason we favour speaking of the Freedom as "effectively a fundamental right".

In addition, we would argue that the Internet Freedom will be a standalone legal concept with its own existence under the Framework Directive. Some specific features of the Freedom are set out explicitly. These include:

a. Restrictions on access to services may only be imposed if they are appropriate, proportionate and necessary

b. The right to privacy[8]

c. Right to a fair hearing[9]

There is a third possibility to those discussed in paragraph 8: that the wording of the Internet Freedom is effectively circular. Under this interpretation the Freedom is simply to be interpreted as saying no more than this: "*if fundamental rights and freedoms are affected by limiting access to the internet, then those fundamental rights are to be protected.*" In other words, in this interpretation, the question of whether internet access is a fundamental right is left open. The sharp-eyed reader will note that the September 2008 text of Amendment 138 could be interpreted similarly. On the fact of the drafting this is one reasonable interpretation. However we do not agree with is because it would simply be re-stating something which was already true.[10] There would be no real point in creating the internet freedom if this were the correct interpretation. It would merely be a piece of window dressing. It would also be contrary to the accompanying note which announces

> *"a new internet freedom provision... that will substantially strengthen the rights of internet users."*

How does the Internet Freedom relate to the position in member states?

impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. Article 10.2: The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. "Freedom of expression [is] a fundamental right which the Court must ensure is respected in Community law" Case C-100/88 *Oyowe and Traore v Commission*

[8] **Right to privacy** – as set out in the ECHR: Article 8.1 Everyone has the right to respect for his private and family life, his home and his correspondence; Article 8.2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[9] **Right to a fair hearing** – certain rights of due process are set out in relation to both civil and criminal charges in the ECHR:

1. Article 6.1:In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Article 6.2: Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Article 6.3: Everyone charged with a criminal offence has the following minimum rights:
   a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   b. to have adequate time and facilities for the preparation of his defence;
   c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[10] Member States are bound in any event to implement Community measures in a way which does not infringe fundamental human rights, as established in *Wachau v Bundesamt fur Ernahrung und Forstwirtschaft* Case 5/88 [1989]. This includes the implementation of Directives, *Booker Aquaculture Ltd and Hydro Seafood GSP Ltd v The Scottish Minister* C-20 and C-64/00 [2003].

At the time of writing, legislation is proceeding through the UK parliamentary process to deal with the problem of alleged illegal file-sharing. However one possible outcome of the UK proposals is an option considered in other member states – and dealt with explicitly in the Commission's explanation – is a three-strikes regime in which users who are alleged to have infringed copyright are given three warnings before having internet access cut off.

This kind of proposal could be challenged on a number of grounds:

a. Proportionality[11]: proposals for restrictions on or suspensions of services might be challenged as an unjustified, disproportionate restriction on freedom of expression. Freedom of expression is protected both by the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "ECHR") and as a fundamental right in accordance with Community law. Both the right to impart information and to receive it are protected and may only be restricted to achieve certain aims, for example the prevention of crime, and then only as far as is necessary and proportionate to the aim.[12] Already a blanket ban on telephone contact between a prisoner and the media has been found to be unjustified as it was not necessary in a democratic society.[13] The Internet Freedom specifically envisages similar protections.

b. Lack of fair prior hearing: some proposals do not include a prior hearing but merely an appeal right. The Internet Freedom specifically requires a prior hearing.

c. Right to privacy: this could be infringed for a number of reasons. For example, a proposed list of "serious repeat offenders" could breach this right. In addition, even the proposal that ISPs map the IP addresses of alleged infringers to the identities of individual could constitute a breach.

Is a distinction between criminal and civil liability relevant?

Much has already been made of a possible distinction between criminal and civil liability. Such a distinction does exist in human rights law as part of the right to a fair hearing. However we take the view that the distinction is not necessarily relevant to this case because:

a. Many of the protections afforded to the Internet Freedom exist completely independently of the question of whether this is a criminal matter; and

b. Aspect of the right to a fair hearing are in any case described in detail in the Freedom itself; and

c. The distinction between civil and criminal matters is one which it is not open to the national governments to make simply by ascribing a name to the process. The question of whether a sanction is criminal or civil will depend on the fact of each case[14].

Ultimately it is possible that some nice point of interpretation related to the distinction between criminal and civil matters will have a significant bearing on this matter. However, for the reasons identified above, our view is that the best course currently is to describe this distinction as irrelevant and a distraction.

Practical considerations

The likelihood of the member states' proposals breaching the Internet Freedom would be increased by several practical considerations which would exacerbate the likelihood of a breach:

a. If the procedure allows the complainant (rights holder) to take enforcement action without independent scrutiny.

[11] Proportionality – the concept of proportionality can be neatly distilled to the following: "a measure which interferes with a Community or human right must not only be authorised by law but must correspond to a pressing social need and go no further than strictly necessary in a pluralistic society to achieve its permitted purpose; or, more shortly, must be appropriate and necessary to its legitimate aim." *B v Secretary of State for the Home Department* [2000] UKHRR 498.

[13] *R (Hirst) v Secretary of State for the Home Department* [2002] EWHC 602

[14] See for example: *Secretary of State for the Home Department v MB* [2007] UKHL 46 Ruled that control orders were civil not criminal for the purposes of Article 6 ECHR. In *R(Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14 ruled that a prison disciplinary offence was a criminal charge

b. If there were be a defence to any allegation of breach of copyright which the rights holder has not known about or has chosen to ignore.

c. If a breach of rights has occurred, in a case where the procedure has identified the wrong perpetrator and therefore would effectively punish the innocent. For example, a particular IP address may have been used by a wi-fi jacker or a visitor or there may simply have been a mistake.

d. Even if none of the above objections holds good, the remedy targets all members of a household indiscriminately. Even those who were not aware of any infringing activity would be "punished".

Conclusions

The Internet Freedom is a dramatic legislative development which fundamentally alters the legal landscape in attempts by national governments to get tough on those alleged to have infringed copyright online. It may not go so far as the original advocates of amendment 138 intended; nor does it go so far as to recognise a right to broadband access. Once a customer has that access, however, it makes it very difficult indeed for it to be removed.

Net Neutrality

The concept of net neutrality has led to increasing debate in recent years, primarily in the USA but concerns have also been raised in Europe. It is generally agreed that the key to the success of the internet has been its openness and the transparency of the protocols and standards which power it.

When the internet was first created its designers did not know what would emerge and what the network would be used for so they employed an architecture that treated all applications equally. The architecture was based on a set of open standards and was open to any computer and any content configured using those protocols. This openness has been fundamental to the success of the internet. This is particularly true in e commerce. It does not distinguish between a small enterprise or even an entrepreneur and a blue chip company employing thousands. Indeed many of the web's biggest names such as Google and Yahoo have grown from such humble beginnings thanks to the openness of the internet.

The success of the network in turn increased the value of the network leading to increased investment by network operators, who improved the Internet's reach and its performance thereby further fuelling the success.

In recent years however, the spread of broadband and the increased demand for audio and video based content have highlighted the conflicting interests of content providers who wish to sell their content to end users, and network providers who find themselves struggling to invest the necessary sums to upgrade the networks over which the content is being provided. Network management tools employed by network providers have led to concern that users will increasingly have to pay more for services of sufficient quality to access the content which they wish to see.

The issue has sparked much more debate in the USA where end users typically have less choice of internet service provider but even in Europe there have been tensions. For example the launch of the BBC's iplayer service caused tension between the BBC (which saw no reason why it should pay for providing its content via the web) and ISPs who found themselves facing dramatically increased bills for connectivity in order to keep up with the demand fuelled by the new service.

In September 2009 the US Federal Communications Commission announced a major plan to protect a free and open Internet following an election pledge by President Barack Obama's to protect Net neutrality. The new principles outlined by the FCC concentrate on prohibiting discrimination of content or applications and ensuring that network management practices are transparent.[15]

In order to avoid seeming to be left behind, European lawmakers have now had to acknowledge, and try to address, the concerns of those who fear that the openness and neutrality of the internet are under threat.

In October 2009 Viviane Reding, the Commissioner Information Society and Media claimed that the deregulatory policies pursued by the FCC in the US meant the problems were far worse than in Europe

[15] http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-93A1.pdf

with its policy of pursuing ex ante regulation in order to promote competition[16].

Commissioner Reding summed up the Commission's position on net neutrality thus;

> *"Prioritising some traffic means restricting the rest, and it will be essential to remain vigilant as regards the impact this has on competition. The European commission attaches high importance to preserving the open and neutral character of the net in Europe, in the interest of fair competition and tangible consumer benefits."*

Comparing the European situation with the USA she said,

> *"In general, consumers and service providers in Europe seem to be in a relatively good position overall with regard to net neutrality, compared to the situation in the US where the debate is just really starting now. This is because European consumers generally have, thanks to pro-competitive EU regulation, a greater choice of competing broadband service providers available to them than US consumers under the strongly deregulated US telecoms market."*

Whether or not European consumers are better off or not, the new rules announced in November 2009 seek to address the issue. According to the Commission the rules provide "New guarantees for an open and more 'neutral' net". They seek to balance the concerns of consumers that they will face restrictions on the services they can access, with the desire of network operators to manage their networks.

The Commission highlights the fact that the powerful management tools available to network providers allow them to differentiate between the various different types of data transmissions on the internet, such as voice or 'peer-to-peer' communication. While using traffic management to facilitate premium grade services (such as IPTV) or to provide greater security of service would be legitimate, using those same techniques to degrade the quality of other services or to strengthen dominant market positions would not be acceptable.

But the Commission stops short of specifying exactly where they believe the boundary of what is or is not acceptable would be. Instead they have now given national regulators the powers to set minimum quality levels for network transmission services so as to promote "net neutrality" and "net freedoms" for European citizens.

But of course the issue of net neutrality is not merely a technical one and is closely bound up with consumer protection so the guarantee of openness has to be read alongside the consumer protection measures. Foremost among these are the new requirements on service transparency prior to the point of sale. In terms of these consumers must be informed prior to contract signature about the nature of the service which they are buying and in particular what traffic management techniques or other limits will apply and the impact they might have on service quality. Given the rather vague and imprecise art of predicting what broadband speed a customer can expect, it remains to be seen how service providers will cope with these new requirements, in particular the need to inform consumers about the available connection speed.

Although not strictly part of the new rules, the Commission also recognised that technology and the market have evolved and continue to evolve rapidly. They therefore made a a political commitment to keep the neutrality of the internet under close scrutiny and to use all its powers to report regularly on the state of play in net neutrality to the European Parliament and the Council of Ministers.

BEREC

Summary

This section considers the creation of BEREC, the body which replaces the European Regulators Group but which falls short of the European Super Regulator which some had called for.

This note does not deal with the pros and cons of a super regulator as opposed to BEREC. It describes in outline what had been proposed and then in some depth details the powers, duties and initial plans of BEREC.

BEREC, the Body of European Regulators for Electronic Communications, is a watered down version of the super-regulator originally proposed. The early plans called for a Commission-funded,

16 http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/446&format=HTML&aged=0&language=EN&guiLanguage=en

central regulator, which would be independent from the NRAs. Instead, BEREC is funded by NRAs with a subsidy from the Commission and is essentially an extension of the European Regulator's Group (which it replaces), albeit with its own office and administrative staff and slightly more standing and powers.

The recitals of the BEREC Regulation hint at the debate over a super-regulator which preceded the agreement of the EU reform package. The recitals alternate between justification of the need for a stronger central regulatory function and the need to do so in conformity with the principles of subsidiarity and proportionality, perhaps reflecting the conflicting opinions during the process of negotiating the regulations. For example, they state that there is an essential need for the EU regulatory framework to be consistently applied to ensure the successful development of the internal market and yet explain how the EU rules provide a framework for action by NRAs while granting them flexibility in certain areas to apply the rules in the light of national conditions. They state that the ERG has made a positive contribution towards consistent regulatory practice by facilitating cooperation between NRAs and between NRAs and the Commission but highlight that continued and intensified cooperation and coordination will be necessary for the development of the internal market. Therefore, they explain, BEREC should continue this work but be strengthened and recognised in the EU framework, although BEREC itself should not be a Community agency and should not have a legal personality. BEREC should provide expertise and establish confidence by virtue of its independence, the quality of its advice and information, the transparency of its procedures and methods of operation and its diligence in performing tasks and it should, through the pooling of expertise, assist NRAs. However, it should provide this assistance without replacing the existing functions or duplicating work already being undertaken.

So what body does Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office ('the BEREC Regulation) establish?

BEREC is essentially a Board of Regulators, which, like the ERG, is composed of one member per Member State. This member is the head or nominated high-level representative of the NRA with primary responsibility for overseeing electronic communications networks and services in each Member State. This Board is responsible for fulfilling the tasks and functions set out in the BEREC Regulation and must act independently. The Board of Regulators will have at least four plenary sessions a year and can also hold extraordinary meetings at the initiative of the Chair, at the request of the Commission or at the request of at least one third of the Board's members.

The Board of Regulators will adopt and make public its rules of procedure that will set out detailed voting arrangements and the practicalities of organising meetings. However, the BEREC Regulation specifically states that the Board will act by a two-thirds majority of its all members unless otherwise provided for in the BEREC Regulation, the Framework Directive or the Specific Directives (as defined in the BEREC Regulation). Board decisions will be made public and will indicate the reservations of an NRA at its request.

BEREC will also have an Office and legal personality and legal, administrative and financial autonomy and which must enjoy the most extensive legal capacity under the national law of each Member State. It will have a Management Committee and an Administrative Manager but the number of staff is limited to the number required to carry out its duties. The Management Committee is also made up of one member per Member State (the head or nominated high level representative of the NRA with responsibility for overseeing the day-to-day operation of the markets for electronic communications networks and services) and one member representing the Commission. The Administrative Manager is appointed by the Management Committee for a three-year term with the possibility of extending this for another three years if justified. The Administrative Manager is responsible for heading the Office, for assisting with the preparation of the annual budget for the Office and for the preparation and administration of the annual work programme (see below).

The Office will provide professional and administrative support services to the Board of Regulators, collect information from NRAs and transmit information and regulatory best practices to them. The Office also supports the Chair of the Board and sets up and supports the Expert Working Groups that may be formed by the Board.

How is it funded? The revenues and resources of the Office consist of a subsidy from the Community and contributions from Member States or their NRAs made "on a voluntary basis". One of the Board's functions is to approve the voluntary financial contribution from Member States or NRAs before they are made. This approval must be unanimous if all Member States or NRAs are contributing and by simple majority if a number of Member States or NRAs have unanimously decided to make a contribution. These contributions must be used to finance specific items of operational expenditure as defined in the agreement to be concluded between the Office and the Member States or their NRAs pursuant to a Commission Regulation. Each Member State must ensure that NRAs have the adequate financial resources required to participate in the work of the Office.

And what will it do? Like the ERG, BEREC will aim to ensure consistent application of the EU regulatory framework and better functioning of the internal market. It will draw on the experience of the NRAs and work in cooperation with them and the Commission independently, impartially and transparently. It will provide assistance to NRAs on regulatory issues on request and will also advise the Commission, Council and Parliament. It may, where appropriate, consult the relevant national competition authorities before issuing its opinion to the Commission. It has some specific tasks set out in the BEREC Regulation and may, upon a reasoned request from the Commission, decide unanimously to take on other tasks necessary for the accomplishment of its role. Importantly, the BEREC Regulation states that NRAs and the Commission must take the utmost account of any opinion, recommendation, guidelines, advice or regulatory best practice adopted by BEREC. They must also provide BEREC with the information it requests to enable it to carry out its tasks.

Specifically, its tasks are:

(a) to deliver opinions on draft measures of NRAs concerning market definition, the designation of undertakings with significant market power and the imposition of remedies, in accordance with Articles 7 and 7a of Directive 2002/21/EC (Framework Directive); and to cooperate and work together with the NRAs in accordance with Articles 7 and 7a of Directive 2002/21/EC (Framework Directive);

(b) to deliver opinions on draft recommendations and/or guidelines on the form, content and level of details to be given in notifications, in accordance with Article 7b of Directive 2002/21/EC (Framework Directive);

(c) to be consulted on draft recommendations on relevant product and service markets, in accordance with Article 15 of Directive 2002/21/EC (Framework Directive);

(d) to deliver opinions on draft decisions on the identification of transnational markets, in accordance with Article 15 of Directive 2002/21/EC (Framework Directive);

(e) on request, to provide assistance to NRAs, in the context of the analysis of the relevant market in accordance with Article 16 of Directive 2002/21/EC (Framework Directive);

(f) to deliver opinions on draft decisions and recommendations on harmonisation, in accordance with Article 19 of Directive 2002/21/EC (Framework Directive);

(g) to be consulted and to deliver opinions on cross-border disputes in accordance with Article 21 of Directive 2002/21/EC (Framework Directive);

(h) to deliver opinions on draft decisions authorising or preventing an NRA from taking exceptional measures, in accordance with Article 8 of Directive 2002/19/EC (Access Directive);

(i) to be consulted on draft measures relating to effective access to the emergency call number 112, in accordance with Article 26 of Directive 2002/22/EC (Universal Service Directive);

(j) to be consulted on draft measures relating to the effective implementation of the 116 numbering range, in particular the missing children hotline number 116000, in accordance with Article 27a of Directive 2002/22/EC (Universal Service Directive);

(k) to assist the Commission with the updating of Annex II to Directive 2002/19/EC (Access Directive), in accordance with Article 9 of that Directive;

(l) on request, to provide assistance to NRAs on issues relating to fraud or the misuse of numbering resources within the Community, in particular for cross-border services;

(m) to deliver opinions aiming to ensure the development of common rules and requirements for providers of cross-border business services;

(n) to monitor and report on the electronic communications sector, and publish an annual report on developments in that sector.

BEREC is also obliged to adopt an annual work programme. It must consult on this and transmit it to the European Parliament, the Council and the Commission as soon as it is adopted. The ERG has recently consulted on a draft work programme for 2010, although it recognised that this would probably form the basis of the first work programme of BEREC.

Projects for 2010 include

- monitoring and co-ordinating the collection of data under the Roaming Regulation. It will analyse the data, assess compliance, review market developments and consumer needs and report on the need for regulation and any alternatives to price regulation.
- updating the annex to the draft Commission Recommendation on Next Generation Access (NGA), which contains actual and planned NGA roll-out in 22 countries.
- considering regulatory issues surrounding open access, including the implication of the state aid rules and the future charging mechanisms/long term termination issues and NGN wholesale products.
- reviewing conformity with the Common Positions on wholesale broadband access, wholesale unbundled access and wholesale leased lines and considering practical implementation issues in connection with geographic differentiation.
- completing its exercise on symmetry of termination rates and assessing the harmonisation of regulatory accounting to see if further alignment can be achieved.
- investigating business-specific issues in wholesale access and the experience of multi-site business end-users.
- analysing convergent services and the ability of the regulatory framework to deal with them.
- reviewing numbering and the issues around access to numbers across the Community.
- examining issues associated with universal service and, in particular, access to communications by disabled users.
- issuing guidance on the new functional separation requirements in the Access Directive.

As suggested above, BEREC is not dissimilar to the ERG but with more powers and status. It is not a centralised regulator with powers to take decisions affecting operators in individual Member States. It is not a one-stop shop for operators with pan-European businesses. It is still a body made up of representatives from each NRA. However, it does represent a change from the ERG in that it does have an office and a budget and NRAs will have to take note of its decisions. Operators with pan-European businesses may be disappointed that they continue to have to operate under a variety of national regulatory regimes, but given that different member states are at a variety of stages in the process of evolving competition, the decision was perhaps inevitable. In any event it does not mean that the issue cannot be revisited in the future when markets in member states are more aligned than they are at present.

BEREC held its first meeting on 28 January 2010, to liberal encomia from its sponsoring Commissioners. The Telecom Commissioner, Vivian Reding, said this:

> *"The new body will help national telecoms regulators and the European Commission to provide consistent rules and competitive conditions across the EU. This will boost European telecoms services, which are evolving rapidly in areas like mobile internet and can become a major driver of economic recovery in Europe."*

Neelie Kroes, the Competition Commissioner, was if anything even more glowing:

> *"I look forward to seeing real progress in developing further the European single market in telecoms and, in particular, to the positive impact that it will have for Europe's 500 million citizens."*

In practice, it remains to be seen whether BEREC will make any real difference to existing arrangements.

Functional Separation

Pioneered in the UK, functional separation is proving an increasingly fashionable means of tackling competition problems in the telecoms sector. The European Commission and member states have embraced the concept. As part of the telecoms reform package, National Regulatory Authorities ("NRAs") are to be given the power to impose functional separation as an SMP remedy.

Various types of separation of vertically integrated operators have been tested around the world, with varying degrees of success. The UK itself implemented a notional separation between BT's Systems Business and its Supplemental Services Businesses long before functional separation. This proved an insufficient measure however as the distinction between the two became increasingly difficult to maintain. A lengthy experiment with structural separation preoccupied the U.S. throughout the 1980s and 1990s, which saw the separation of AT&T into long distance and local operations ("ILECs"). The measure has now effectively been reversed by the mergers permitted in the last decade of: MCI and Verizon; Qwest Communications and US WEST; and AT&T and BellSouth. These have structurally rejoined the ILECs and long distance operators.

One form of separation that is widely practised and is still quite rightly considered to be a desirable regulatory measure is accounting separation. Though framed as a measure of last resort, the backing of the EU Directives may aid regulators in Europe to make functional separation a similarly successful and accepted approach. Already in New Zealand The Telecommunications Act 2001 ordered functional separation of the incumbent Telecom New Zealand and the Australian government has put before parliament proposals for the separation of Telstra.

The telecoms package[17] amends the Access Directive[18] to introduce an additional SMP remedy available to NRAs.[19] Appropriate existing remedies must be tried first, i.e. transparency, non-discrimination, accounting separation, access to network facilities, and price control / cost orientation. The recitals suggest that as few as one may be appropriate.[20] Where these "have failed to achieve effective competition and… there are persisting competition problems and/or market failures identified in relation to the wholesale provision of certain access product markets", then as an "exceptional measure" the NRA may impose an obligation of functional separation.

The recitals are keen to impress that functional separation is intended purely as a measure of last resort, justified where "there has been persistent failure to achieve effective non-discrimination in several of the markets concerned, and where there is little or no prospect of infrastructure competition within a reasonable time-frame after recourse to one or more remedies previously considered to be appropriate."[21]

All proposals for functional separation are to be considered first by the Commission and "in order to avoid distortions of competition in the internal market… should be approved in advance by the Commission"[22]. NRAs are required to submit full justification for the measure, an analysis of its impact, and a draft measure detailing the design of the proposed separation. The recitals stress the importance of the NRA considering the full implications of imposing this remedy:

> *"[It] is very important to ensure that its imposition preserves the incentives of the concerned undertaking to invest in its network and that it does not entail any potential negative effects on consumer welfare. Its imposition requires a coordinated analysis of different relevant markets related to the access network, in accordance with the market analysis procedure set out in [the Framework Directive*[23]].

[17] Specifically Directive 2009/140/EC of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks an services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services

[18] 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 (Access Directive)

[19] New Article 13a Directive 2002/19/EC

[20] Recital 61, Directive 2009/140/EC

[21] Recital 61, Directive 2009/140/EC

[22] Recital 61, Directive 2009/140/EC

[23] Article 16, Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory

Explicitly, the information to be submitted to the Commission is as follows:

(a) evidence justifying the conclusions of the national regulatory authority […];

(b) a reasoned assessment that there is no or little prospect of effective and sustainable infrastructure-based competition within a reasonable time-frame;

(c) an analysis of the expected impact on the regulatory authority, on the undertaking, in particular on the workforce of the separated undertaking and on the electronic communications sector as a whole, and on incentives to invest in a sector as a whole, particularly with regard to the need to ensure social and territorial cohesion, and on other stakeholders including, in particular, the expected impact on competition and any potential entailing effects on consumers;

(d) an analysis of the reasons justifying that this obligation would be the most efficient means to enforce remedies aimed at addressing the competition problems/markets failures identified.

Further stressed in the recitals is the attention that the NRA must pay in designing the remedy to "the products to be managed by the separate business entities, taking into account the extent of network roll-out and the degree of technological progress, which may affect the substitutability of fixed and wireless services." Thus, the draft measure sent to the Commission is to include the following specific design details:

(a) the precise nature and level of separation, specifying in particular the legal status of the separate business entity;

(b) an identification of the assets of the separate business entity, and the products or services to be supplied by that entity;

(c) the governance arrangements to ensure the independence of the staff employed by the separate business entity, and the corresponding incentive structure;

(d) rules for ensuring compliance with the obligations;

(e) rules for ensuring transparency of operational procedures, in particular towards other stakeholders;

(f) a monitoring programme to ensure compliance, including the publication of an annual report.

The NRA must take the "utmost account" of the Commission's opinion in relation to the proposals when making a final decision on the remedy.[24]

In addition to addressing compulsory functional separation, the Directive introduces measures addressing voluntary separation by SMP operators.[25] Before either structural or functional separation by an SMP operator, it must inform the NRA to enable a full market analysis of all relevant markets to be carried out. Based on the outcome of that analysis, the NRA may impose remedies upon any new company or operationally separate business that is found to have SMP.

The EU has justified the new functional separation remedy substantially by reference to the UK[26], where the recent boom in broadband subscriptions has been attributed to the creation of Openreach and the take-off of local loop unbundling[27]. It is notable that functional separation in the UK was a voluntary undertaking by BT to avoid a reference to the competition authorities. For observers, the interesting part will be whether compulsory functional separation proves as successful. The regime in the UK where an informal approach to the terms of functional separation has resulted in a substantial number of variations to and waivers of BT's original commitments. As an SMP obligation, functional separation may have a different character. It is likely to be less flexible (requiring more substantial consultation before amendment or waiver) and easier to enforce by the regulator (for example, by the imposition of fines rather than court action) as well as by affected third parties. Perhaps in time even BT will be subject to an SMP condition of functional separation.

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[24] In accordance with Articles 6 & 7 Directive 2002/21/EC
[25] New Article 13b, Directive 2002/19/EC
[26] See 'EU Telecoms Reform: 12 reforms to pave way for stronger consumer rights, an open internet, a single European telecoms market and high-speed internet connections for all citizens' MEMO/09/568
[27] The Office of the Telecommunications Adjudicator reported 6.36 million lines unbundled at end December 2009.

Improved Consumer Protection and rights under contracts:

This section considers the proposals for improved consumer protection and rights under contracts and how (if at all) these will enhance the existing UK regulations.

Under the new telecoms rules, consumers will receive better information ensuring they understand what services they subscribe to and, in particular, what they can or cannot do with those communications services. Consumer contracts must specify, among other things, information on the minimum service quality levels, as well as on compensation and refunds if these levels are not met, subscriber's options to be listed in telephone directories and clear information on the qualifying criteria for promotional offers. In addition the maximum initial duration of a contract signed by a consumer with an operator cannot exceed 24 months. Operators will also be obliged to offer consumers 12 month contracts. We must await the detailed drafting of this proposed rule to understand its full effect.

The Communications Act came into force on the 23rd July 2003. It implemented the new EU Communications. Licenses were no longer required for those providing communications services in the UK – everyone is 'generally authorised' to provide communications services. However, this general authorisation is subject to the General Conditions of Entitlement:[28] These conditions apply to all persons providing electronic communications networks and services. In particular the following list identifies those areas covered by the EU's new rules on consumer protection

- GC 9 – Requirement to offer contracts with minimum terms
- GC 10 – Transparency and publication of information
- GC 12 – Itemised Bills
- GC 13 – Non Payment of Bills
- GC 14 Codes of Practice on Dispute Resolution
- GC 19 Provision of Directory Information

General Condition 10 governs transparency and publication of information. GC10.1 requires providers to provide clear and up to date information on its applicable prices and tariffs and on its standard terms and conditions. In particular GC10 (2) requires a minimum set of information to be provided. Ofcom has indicated that it considers one of the main purposes of General Condition 10 is to assist consumers making decisions about choosing a communications provider.

In 2008 Ofcom undertook a major review of what it called 'Additional Charges' and published a statement in December 2008[29]. This review looked primarily at so called additional charges such as extra charges for paying by cash or cheque instead of by direct debit, receiving an itemised or paper bill, paying late or early termination of contract. The issue under investigation was the compliance by communications providers with the Unfair Terms in Consumer Contracts Regulations 1999. On 19 December 2008, after public consultation, Ofcom published its final Statement in its Review of Additional Charges in contracts for communications services (including non direct debit and early termination charges). That Statement includes sector-specific guidance. Communications Providers were given until 1 April 2009 to implement the changes required by this Statement. Ofcom is presently undertaking an own Initiative review of compliance with the changes. Under the review programme, Ofcom are assessing communications providers' standard term contracts and we will take enforcement action where they consider it is necessary and appropriate to do so.

Number portability

Number portability is a facility that enables subscribers, who so request, to be able to retain their telephone number(s) when they change communications provider. The original requirement stemmed from a previous EU initiative. The aim of the latest reform is to make it easier and quicker for consumers to keep their telephone number when switching providers, and sets a maximum of 24 hours for operators to 'move' their number to the new provider. Today, the porting of numbers between providers, takes on average about 8 days

[28] CONSOLIDATED VERSION OF GENERAL CONDITIONSAS AT 16 September 2009 (including annotations) www.ofcom.org.uk/telecoms/ioi/g_a_regime/gce/cvogc160909.pdf

[29] Statement: Ofcom review of additional charges published 19|12|08

for fixed telephone numbers and about 5 days for mobile telephone numbers; the best countries for this are Malta (1 day), Germany, Austria, and Finland (3 days), while porting a fixed telephony number can still take up to 30 days in Estonia, and up to 20 days in Slovakia for mobile numbers. In future, the Commission will also be able to extend this consumer right to the possibility of porting subscriber's personal directories and to the portability of numbers between fixed and mobile networks.

A significant amount of work will be required to implement this proposal in the UK. Whilst porting numbers in the UK is well established for mobile operators and also for the larger fixed line operators it is not necessarily readily available between all operators. In such cases it can take quire some time to establish the mechanisms and associated commercial agreements governing the service.

The obligations for number portability are set out in General Condition18[30] of the General Conditions of Entitlement. In particular under GC18.1 all providers of Publicly Available Telephony Services (PATS)[31] are required to provide number portability as soon as reasonably practicable on reasonable terms to any of their subscribers who so requests. However, General Condition18 does not presently require communications providers to enter into porting arrangements with all other communications providers. It can therefore be a lengthy process particularly in the porting of fixed numbers. All providers are required under General Condition 18.2 to put a facility in place to enable the transfer of a number to another provider upon request and to do so, amongst other things on reasonable terms.

In 2007 Ofcom determined that porting of mobile numbers should be completed with 2 hours of the customer's request. Vodafone challenged Ofcom's two-hour proposal, arguing that the cost of that change would be close to £37 million per network and not in the region of £5 million as suggested by Ofcom It was supported by mobile operators BT, O2, Orange and T-Mobile. The Competition Appeal Tribunal[32] found in favour of Vodafone. Presently mobile number portability in the UK takes on average two days.

Communications providers who provide portability do so by following the Number Portability Processes, an industry agreed process.[33] The process takes no account of the commercial aspects of number portability. If fixed line portability is required to be achieved in 24 hours it will be necessary for Ofcom and communications providers to address the timely provision of commercial terms for porting arrangements. The introduction of a mandated 24-hour process is also likely to have a significant impact on the cost of the provision of service. When number portability was first introduced, it required a great deal of industry time and effort, aided by the regulator, Oftel, to establish agreed industry processes and documents. A similar level of effort and industry co-operation will be required to update and amend those same processes if the UK is to achieve compliance with the new requirements.

CONCLUSIONS

It will be clear from the discussion and analysis above that, agreement having finally been reached, the European Institutions have settled on a package that will have truly wide-ranging impacts right across the sector. The changes in the field of consumer protection alone have significant implications for the UK telecommunications industry. The next challenge will be implementation of the measures by member states. In countries with less well established systems for services like number portability, the issues surrounding implementation are potentially even greater. Experience would suggest a protracted bedding-down period with potential or open conflict between member states and the Commission. For the UK the key question will be whether a teleological method finally triumphs over the traditional, more literal, approach which as previously been applied to electronic communications regulation in our common law system.

[31] PATS Publicly Available Telephone Service: means a service available to the public for originating and receiving national and international calls and access to emergency organisations through a number or numbers in a national or international telephone numbering plan, and in addition may include one or more of the following services: the provision of operator assisted services, Directory Enquiry facilities, Directories, provision of Public Pay Telephones, provision of service under special terms, provision of special facilities for End Users with disabilities or with special social needs and/or the provision of non-geographic services.

[32] Vodafone v Ofcom [2008] CAT 22. The Tribunal held that the cost benefit analysis conducted by Ofcom in support of its decision could not withstand the "profound and rigorous scrutiny" of the Tribunal on "an appeal on the merits" pursuant to s.195 of the Communications Act 2008.

[33] Geographic NP Section C is at version 15 and Non Geographic NP is at version 12.