



UNICE

Union of Industrial and Employers' Confederations of Europe
Union des Confédérations de l'Industrie et des Employeurs d'Europe

**“Towards a new framework for
electronic communications infrastructure and associated services”**

- The 1999 Communications Review -

UNICE preliminary comments

Brussels, 15 February 2000

Executive Summary

- ◆ Major eEurope initiatives by the European Commission (including the “eEurope” Communication and the “1999 Communication Review”) draw attention to the accelerated transformation of Europe into an information society and an e-economy.
- ◆ This transformation indicates a fundamental sea change in Europe. This is not a sectoral development, but a horizontal one, which influences all businesses alike. The European e-economy architecture as a whole is of paramount importance for Europe’s economic growth, employment and competitiveness.
- ◆ Although the 99-review suggests just addressing telecommunications infrastructures and associated services, in practice the review has a major impact on the overall regulatory framework for all e-communications in the internal market.
- ◆ The scope of the new framework concerns two tiers of EU e-economy regulations:

Area

Network services, information society services (ISS), including internet and e-commerce transmissions

Associated services = communication services and access services

Communication infrastructure = communication networks and associated facilities

Rules/Regulation

E-commerce directive, other ISS regulations

New e-regulatory framework

New e-regulatory framework

- ◆ UNICE agrees with the overall objectives and principles of the 99-review. In particular, UNICE welcomes that the proposed regulatory review is based on:
 - Promotion and sustainment of an open and competitive European market,
 - Simplification and reduction of relevant legislation accompanied by non-binding measures,
 - Strengthening of alternative dispute resolutions and e-economy co-regulation,
 - Greater reliance on general competition rules,
 - Technology neutrality for network infrastructures and transmission services.
- ◆ In addition, the approach of the 99-review is positive in recognising that the content and structure of the present framework is not appropriate for the future, that the pace of technological change is best served by less regulation, and that competitive markets should be de-regulated.
- ◆ In view of European competitiveness and against the background of the global convergence process, UNICE would like to underline the importance of creating an overall regulatory framework for communication infrastructures and associated services in the EU and of supporting this development by parallel initiatives in international fora and organisations.

1. Regulatory Simplification and Flexibility

The 99-review Communication¹ which forms part of the overarching eEurope initiative² states that the new framework must be flexible, to allow it to adapt to new technology and new market conditions and to take account of different states of development in different Member States. UNICE welcomes the objective of the 99-review to simplify substantially the current framework by reducing the number of legal measures from twenty to six (see the attached overview).

The Commission is right to recognise that detailed Directives will no longer be the right instruments for regulation. They take too long and will be outdated on implementation.

The role of regulation is changing from specific rules to setting of a general framework within which the market can develop. However, depending on the regulatory guidelines thereon, UNICE believes the proposals made for greater reliance on non-binding measures (guidelines, recommendations, and other soft law means) require stronger involvement and direct involvement of e-economy stakeholders, for instance in committee procedures.

The sheer number of different approaches to delivering non-binding measures implies that the subject is liable for misinterpretation. Furthermore, the relative ease and speed with which recommendations and guidelines can be developed could facilitate production of more, rather than less, regulation, and such initiatives might be prone to reflect short-term political priorities at the expense of longer-term coherence. Nevertheless the use of non-binding measures can be significant and should be developed further in close co-operation with all stakeholders.

2. E-economy Self-regulation

UNICE supports the principle that e-communications regulation should be carried out as close to the market as possible. Binding regulation as well as non-binding rules should be carried out in direct co-operation with market players and other e-economy stakeholders involved. Concerning non-binding measures, UNICE urges further analysis and experience to clarify the implications thereof.

UNICE is of the opinion that non-binding measures as they might be applied to communication activities are potentially significant and far-reaching. Due to their flexibility non-binding measures have the potential to enable telecommunication industries in Europe to move from a regulated ex-monopoly to truly competitive industries governed by general competition law.

As one of the examples of e-economy self-regulation, UNICE has - on many occasions - advocated low-cost and effective alternative dispute resolutions (ADRs) such as arbitration and mediation in co-operation with consumers and other e-economy stakeholders. Such co-operative self-regulation or co-regulation also in the telecommunications field needs, as remarked by the Commission, ample chances to grow. UNICE therefore welcomes the initiative by the Commission to also address co-regulatory issues under the 99-review of European telecommunication regulations.

It is desirable that ADRs are developed in such a way that simple, timely and inexpensive complaint handling and dispute settlement procedures exist for users and consumers, other than via national courts. Different constructions will be appropriate in different circumstances.

¹ "Towards a new framework for Electronic Communications infrastructure and associated services"- The 1999 Communications Review - COM(1999)539, dated 10 November 1999 (in the following the "99-review")

² "eEurope – An Information Society for All", Communication on a Commission Initiative for the Special European Council of Lisbon, 23 and 24 March 2000 - COM(1999)687 final, dated 8 December 1999, as presented by the President of the European Commission, Mr R. Prodi, at the Helsinki Summit on 10 December

Consensus and co-operation through dialogue bodies should draw up such co-regulatory measures where all stakeholders are able to state their views. Governments should stimulate and strengthen these processes but should refrain from direct interference through the endorsement of model codes, arbitrary minimum redress requirements, trusted web-trader audit systems, etc.

It is of paramount importance to address these issues in one overall regulatory document. Except for specific sectoral aspects, co-regulation should not be spread across various sectoral directives or regulations. This could even pass unnoticed by those concerned.

In particular, the proposed 99-review “Telecommunication Framework Directive” should not be burdened with constitutional elements of e-governance self-regulation in Europe. E-governance has to be addressed in one single overall framework to which other rules, regulations, and directives have to refer. Otherwise the dispersion will only create confusion rather than the urgently needed clarity. The same goes for privacy issues. These should be kept out of the telecommunications field and be addressed in one reviewed and new framework directive which encompasses all privacy matters.

In addition, regulatory experiences elsewhere, for example experiences concerning industry co-regulation mechanisms under the 1997 Australian Telecommunications Act, have to be scrutinised and taken into account (such as the Australian “Telecommunications Industry Ombudsman”, “Telecommunications Access Forum”, and “Australian Communications Industry Forum”).

3. Institutional Issues

UNICE agrees with the proposals for a form of EU-level co-ordination to ensure consistent application of rules in Member States, and to prevent fragmentation of the Single Market. The proposed structure would grant National Regulatory Authorities (NRAs) much greater discretion in the application of regulation. This increased national discretion should be positive inasmuch as NRAs should have a better understanding of the working of their national markets.

On the other hand, this inevitably raises the spectre of uneven application between Member States, with certain NRAs choosing to continue regulating heavily in competitive markets, while others might relax rules before competition is fully effective. The balance between NRAs and the proposed EU-level Committee structure will be of critical importance. A structure needs to be put in place to ensure a higher degree of harmonisation, which guarantees the necessary independence, impartiality and effectiveness of national authorities, and encourages pro-competitive policy priorities.

National regulatory decisions should be fully transparent and better regulation will be ensured if a right of appeal to an independent body is allowed, on a swift and effective basis, against regulatory decisions.

If the Framework approach is to be followed successfully it will require a change to the current balance between EU and national regulators. If national authorities gain greater flexibility and discretion, they should also first have to justify at EU-level any decisions likely to depart significantly from EU practice. This does not mean that the EU should create a European Regulatory Authority, but it does imply, as the Commission proposes, greater regulatory oversight at EU-level. UNICE welcomes the proposal to use a new Committee structure including the Commission, Member States and NRAs. These committees should consult closely with industry and should have industry membership in national delegations.

UNICE trusts that ongoing discussions on regulatory details of specific directives will result in further simplification and flexibility. To this end, both the proposed Co-ordination Committee and High Level Communications Group (HLCG) should be made as transparent and practically viable as possible through direct business stakeholder involvement in the proceedings. However, before setting up new NRAs co-operation bodies in a formal way at European level, extensive harmonisation of national regulatory authorities and national implementation of European regulations have to take place.

4. Access and Interconnection

UNICE broadly supports the Commission's generic proposals regarding access and interconnection arrangements and would like to underline the approach in putting more emphasis on general competition law. Where effective competition is established, competition issues should be dealt with using competition law, as in other sectors of the economy. Sunset clauses might help to end regulatory involvement as soon as effective competition exists.

As underlined by the Convergence Green Paper³ the convergence process merits an approach based on the principle of technological neutrality and the horizontal approach to infrastructure regulation. However, it should be stressed that the application of technological neutrality does not justify the extension of traditional regulation to new, competitive, communications markets.

UNICE supports the principle of common criteria laid down at Community level. However, the detail of how such criteria would be developed and applied, as well as what constitutes such a harmonised approach needs careful consideration and open consultation with European industry.

UNICE agrees that the logical approach is to refer to the traditional competition law concepts of "dominant position" and "significant market power" and use them as triggers leading to adoption of measures proportionate to the level of competition. Consequently, the concept of dominant position on a particular market would appear to be the more appropriate trigger for heavier *ex ante* obligations, in particular cost-orientation and non-discrimination.

To avoid internal market fragmentation the new regulatory framework needs to ensure that findings of dominance by NRAs should be based on objectives concerned with economic efficiency in the internal market. As a general approach the Telecommunication Framework Directive should refer to Article 3(g) of the Treaty which states that the Community will implement "a system ensuring that competition in the internal market is not distorted".

The current proposal to allow unlimited rights of NRA intervention in regulating operators understood to have significant market power will mean *de facto* retention of the present situation - or even greater regulatory uncertainty. Therefore, the powers of NRA intervention should be clearly defined and strictly limited.

5. Licensing and Authorisations

UNICE is in broad agreement with the recommendations regarding licensing and authorisations. The area of licensing, with the large variations found between individual Member States, is frustrating for new entrants, lacks common implementation and transparency, and can distort competition. For global and trans-national operators the difficulties are profound.

³ Green Paper on the convergence of the telecommunications, media and information technology sectors, and the implications for Regulation – Towards an information society approach – COM(1997)623

A move to general authorisations would in principle be greatly welcomed. UNICE believes that, if well managed, it is the best way to create a competitive environment and bring the benefits of competition to the consumer. However there is some concern about the effect of moving to a new regime and whether, without a proper detailed migration path, the effects might be to deter or delay new entrants and new investment in Member States. Specific authorisations when administered with a light hand and to a common set of requirements may also work well in some circumstances where this is the only feasible way under national law to grant requisite permits to enable network construction or operation.

Restricting the range of possible conditions that can be attached to authorisations is fully supported. It is UNICE's perception that given the wide divergence of these requirements in Member States many are unnecessary to the licensing process and that their effect, if not intent, is anti-competitive.

The wide divergence in levels of fees for similar licences in different Member States is incomprehensible, given that for most types of licenses, such fees should already be cost-based. UNICE welcomes the introduction of EU level guidelines. The use of fees to support activities other than those involved in administration and issuing of licences seems at odds with the EU's aims. In particular, general use of licence fees to fund government activities other than these seems to be allowing an additional tax to be placed on end-users, who ultimately pay these fees.

6. Management of Radio Spectrum

UNICE generally supports the Commission proposals regarding the management of radio spectrum. The Commission is right to note that at the centre of the debate is the need to ensure that, ultimately, the Community derives maximum economic and social benefit from the resource, including a balance between the proper needs of both commercial and non-commercial users.

UNICE believes that spectrum pricing is a potentially useful tool in promoting efficient use of this scarce resource. UNICE recognises that many Member States are themselves already engaged in a variety of spectrum pricing methodologies, including in some cases auctions. However, UNICE also recognises that not all Member States support pricing and auctioning as a useful means of promoting the efficient usage of the radio spectrum. Nevertheless, UNICE strongly believes that this is an aspect which should be carefully monitored to ensure that there are no distortions which impact negatively on European economic growth and employment, and thus unnecessarily burden European companies economically.

UNICE would concur wholeheartedly with the principle that fees charged for spectrum use should have an objectively demonstrable effect on the efficiency of spectrum use. UNICE also agrees that the revenues thus raised should not simply be used to fund public budgets. Paving the way for reform of (often inefficient) government-used spectrum is the least burdensome of several sector-oriented possibilities.

UNICE wonders about the Commission's intention to amend the Licensing Directive⁴ to permit transfer of licences to third parties (secondary trading), and therefore urges further clarification.

UNICE welcomes the strengthening of the Conférence Européenne des administrations des Postes et des Télécommunications (CEPT) to ensure proper technical consideration of matters relevant to both allocation of spectrum and harmonisation across national boundaries in a variety of ways.

⁴ Licensing Directive (97/13/EC)

UNICE has noted that two allocation methods are possible for the Commission: auctioning or comparative testing (“beauty contest”). It appears that some countries are strongly opposed to the auction methods. UNICE therefore proposes that the Commission provides elements of comparison on the interest of both methods.

7. Universal Service

In the 1999 review the Commission addresses the question of the scope and nature of Universal Service, and states there is no justifiable reason at present to extend the scope to broadband services. UNICE agrees with this approach of the Commission and strongly believes that the scope of universal service obligations should remain unchanged. Universal service obligations should not be a means to meet public policy objectives.

The current scope of Universal Service includes the provision of voice telephony, fax and data transmission via modems, without which any individual would be seriously disadvantaged in modern society. A user who has a personal computer and a modem can connect to the Internet through their standard phone connection, and therefore the current scope of universal service effectively already ensures basic access to the internet. A more efficient market will take care of the rest.

The circumstances applying to access to higher bandwidth services are very different. There are huge costs associated with rollout and considerable uncertainty of revenue. Any such extension would have to be funded via cross-subsidy between services, i.e. ordinary narrow-band users subsidising higher bandwidth users. The result would be higher communications charges than without such a cross-subsidy.

Promoting particular technologies falls within the ambit of national economic policy and should be funded by government through general taxation. In practice many Member States are already developing their own practical approaches to promoting use of the internet, which do not require regulatory intervention. Where Member States wish to invest in provision of equipment such as PCs, this should be managed transparently from national taxation, and not from universal service obligations.

UNICE would like to stress again the need for regulatory simplification and flexibility concerning future revisions of Directives, including the Voice Telephony Directive.

As a last point UNICE would like to stress that affordability of universal service is a relative concept depending on varying social and economic trends in the Member States. Therefore it is not appropriate for the Commission to develop pricing principles at EU level to ensure affordability.

8. Telecommunication Services

UNICE supports the principle of technology neutrality being applied to different forms of communications. With regard to network and services regulation, UNICE proposes separate approaches to the regulation of network infrastructure compared to transmission services. Transmission services providing content should be regulated according to their nature and not according to their underlying infrastructural means. Accordingly, network infrastructure regulation should be clearly distinguished from transmission service regulation as such, delivering content via the communications network.

To maintain a clear distinction between network infrastructure and transmission services as well as for consistency with other Commission positions on services, UNICE urges early clarification of what constitutes a service for telecommunications purposes.

9. Telecommunication Data Protection

UNICE agrees with the Commission that the specific Telecommunication Data Protection Directive⁵ is clearly outdated due to rapid technological developments resulting inter alia in the convergence of different communications infrastructure and transmission services. The terminology of the current TDP Directive is mainly appropriate for traditional fixed telephone services and less for new services, which are now available.

Since the market is becoming technically sophisticated UNICE's preferred approach would be to phase out the TDP Directive in favour of the umbrella Data Protection Directive⁶. Rather than redrafting this special directive, a review of the general privacy framework in the EU, to be started now, should lead to incorporation of telecommunication and other special issues. The umbrella Data Protection Directive is much better suited for dealing with the converged digital environment.

10. Telecommunication Competition Issues

UNICE supports the view that, as far as the framework for aspects of market regulation is concerned, general competition law and its supervision by the competition authorities would suffice as soon as effective free competition has been established. The guideline in formulating the future regulatory telecommunication framework should be that it relates as much as possible to general competition law. Sector-specific rules may be needed temporarily at this stage of market development, but should be phased out as soon as the market permits.

From a competition policy viewpoint, UNICE agrees with the Commission that the following structure of the telecommunications framework should be envisaged:

- Several binding directives in the area of communications infrastructure and the transmission services provided over it,
- Several non-binding measures (recommendations, guidelines, etc.),
- General competition rules.

UNICE is of the opinion that competition law will ultimately be sufficient to regulate the conduct of market players. It cannot yet be forecast when that time will be. The regulatory framework should, however, interface as tightly as possible with general competition policy rules and regulations. A tight interface with general competition law would facilitate the transition to general competition rules. Complementary sector-specific competition rules (inter alia on access, interconnection, and interoperability) will only be needed to accelerate creation of competitive markets and will only apply to market players with a dominant position.

⁵ Telecommunication Data Protection Directive (97/66/EC), in the following: "TDP Directive"

⁶ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (entered into force in October 1998)

11. Numbering, Naming and Addressing

UNICE does not see a need to consider mandating the interoperability of intelligent networks (IN) databases, and to do so would be incompatible with the principle of technology neutrality. If on a particular occasion there were a recognised need for regulatory intervention then the regulator should only specify the requirements and leave it to the industry to find the most effective technology to meet those requirements.

UNICE considers that the task of facilitating innovative and competitive service provision is best served by the development of open standards to application programme interfaces (API). Such standardisation should be left as far as possible to the market players. Complementary standardisation measures may only be desirable in the interest of an accelerated development of competitive markets.

UNICE agrees with the Commission not to pursue specific regulatory measures at this stage with respect to internet naming and addressing, but to keep the situation under review. Where existing non-governmental institutions provide good number allocation, the Commission and Member State governments should withdraw and be content to monitor the situation.

This situation occurs, according to UNICE, in the allocation of names and addresses for internet transmission services. Commission and government involvement in the activities of the "Internet Corporation for Assigned Names and Numbers" (ICANN) continues to be necessary in order to follow and to respond to developments. As such, UNICE welcomes the recent initiative by the Commission to propose creation of a new top level domain ".eu" on the internet for companies who wish to operate throughout the Internal Market. UNICE agrees with the Commission that it is in the interest of European companies in registering with the ".eu" top level domain.

12. Conclusion

The creation of a dynamic and truly competitive European e-economy and information society is a task that will require considerable efforts of all stakeholders involved. Industry agreements can provide for a market-led and flexible approach to a number of issues at hand.

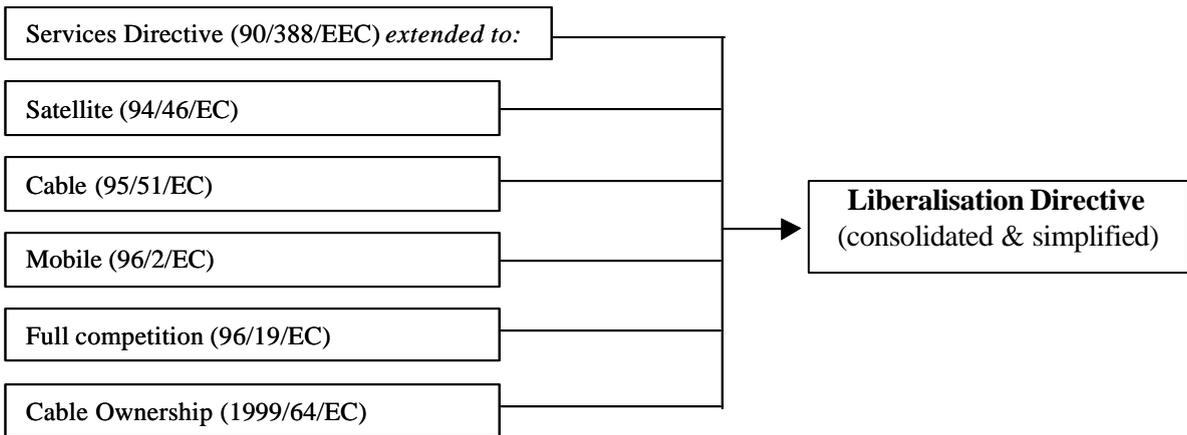
UNICE strongly favours this market-led co-regulatory approach and is ready to co-operate with other e-economy stakeholders as well as European and national regulatory institutions. UNICE expects to continue to do so and in particular to assist in the development of appropriate non-binding measures to accompany the new communications regulatory framework for e-economy in Europe.

UNICE will forward additional comments in due course once the announced e-communications draft directives have been published.

Attachment:

Overview of legislative simplification

Article 86 Directives



Article 95 Directives / Decisions

