

**COMMON REGULATORY FRAMEWORK FOR
ELECTRONIC COMMUNICATIONS NETWORKS AND SERVICES**

**Proposal for a Directive of the European Parliament and of the Council
(COM (2000) 393)**

UNICE COMMENTS

UNICE welcomes the proposed Framework Directive as part of the overall package of legislation forming the EU “1999 Communications Review”¹.

UNICE has been a strong supporter of liberalisation and the introduction of competition in the telecoms sector, which is a key enabler and input for Europe’s economy and society. As the Lisbon summit demonstrated, the communications industry is an essential component of the new “knowledge” economy and hence vital for Europe’s competitiveness.

The existing EU telecoms legislation has proved highly successful in introducing competition but was primarily designed for markets still overshadowed by monopoly and dominated by traditional fixed-voice telephony. Today’s markets are changing rapidly and are characterised by increased competition, technological change, convergence and globalisation. Trying to regulate them according to outdated rules will not work and will inhibit the markets from realising their full creative potential.

UNICE therefore supports the approach taken by the Commission in formulating its new framework, but also has concerns about some of the detailed proposals.

Basic principles

UNICE endorses the principle of “technology neutrality” underpinning the proposals, particularly given the convergence between different sectors, but warns that this must be balanced with a respect for competition and a commitment not to seek to extend “old” rules to “new” services. Internet and mobile are examples of sectors with tremendous potential for Europe, both of which have flourished in largely unregulated environments but which could be threatened if subject to the type of regulation associated with the fixed telecommunications market.

¹ See: “Towards a new framework for electronic communications infrastructure and associated services - The 1999 Communications Review”, UNICE preliminary comments, Brussels 15 February 2000, <http://www.unice.org> (documentation, telecommunications)

National Regulatory Authorities

UNICE supports the proposals to grant National Regulatory Authorities (NRAs) greater independence, as well as the requirement for functional separation from activities associated with ownership or control of operating companies. NRAs form the bedrock of the national regulatory system and can only function effectively if they are given adequate resource, and their independence is assured.

Competition Issues

The rationale for moving away from the current system is clear. In developing a new approach the Commission proposals have to be sufficiently flexible to ensure *ex-ante* regulation continues to apply in situations where markets are not fully competitive, while simultaneously allowing a prompt relaxation of such rules where competition is effective.

In this context UNICE believes that the new proposals for Significant Market Power (SMP) represent a pragmatic way of achieving this balance, opening the way to longer term de-regulation, without undermining the basis of sectoral rules where these are still needed.

The new SMP threshold (aligned with “dominance”) is also to be welcomed, as it allows for regulatory obligations to be linked more closely to actual market conditions, while at the same time anticipating the transition to greater reliance on competition rules.

UNICE questions however whether the additional / subsidiary parts of the proposed new-SMP test described in Recital 20 are appropriate. The competition law concept of dominance has been demonstrated by case law to already cater for ‘joint dominance’, leverage and vertical integration. By adding extra or subsidiary definitions on these points the Commission risks complicating the interpretation and application of the Directive without adding extra value.

Transparency and Consultation at EU-level

The greater flexibility introduced with the competition proposals has to be balanced by a guarantee of basic consistency at EU-level. UNICE does not wish to see extra bureaucracy introduced to the regulatory process, but it does wish to see a level-playing field, where a common approach is used to the removal of obstacles (including regulatory ones) to competition. Therefore UNICE supports the Commission’s proposals for a transparency and consultation procedure.

This should have two benefits. Firstly it will reduce the scope for widely diverging national implementation, and the consequent potential for competitive disadvantage for companies from different Member States. Secondly it will increase the chances that where NRAs choose to intervene in markets, this is done on a proportionate basis, with regulation kept to the minimum necessary.

Market Analysis

UNICE believes NRAs should be best placed to carry out national or regional market analysis. A consistent approach is necessary for the Internal Market however, and so UNICE supports the use of a Commission Notice to provide a starting point for such analysis. To ensure future flexibility, the content of the Notice should decline in scope over time, with fewer relevant markets defined by the Commission.

Review of market definitions should be frequent and flexible enough to respond quickly to new market developments. Review should also be undertaken on request of interested parties within industry. More attention also needs to be focused on the emergence pan-European services, where relevant markets may no longer be nationally-based. NRAs will inevitably pay most attention to their own national or regional markets, and a co-operation mechanism is necessary to ensure that pan-European markets can be addressed effectively.

Guidelines for SMP and Market Analysis

The market analysis proposals are critical to the implementation of the new SMP approach, and to the functioning of the transparency and consultation process. UNICE is very concerned therefore that no indication is given, either of the content of the proposed Guidelines, or the process by which they will be formulated. It is imperative that the process is made clear and allows for a full and considered consultation, with participation from Industry and other interested parties.

Committee Structure

UNICE notes the role which will be assigned to the new committee structures in the future regulatory regime. The HLCG and the Communications Committee will have an important say in the review of national decisions and the application of "soft law", recommendations and guidelines. UNICE is disappointed however at the lack of prominence given to industry in this process. Given the key importance of such measures for industry as a whole, it is essential that industry be given a more direct role through direct participation in the consultation process.

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UNICE will follow this dossier with close attention and may wish to comment further if developments so require.
