

28 February 2008

## **BUSINESSEUROPE POSITION PAPER ON THE TELECOMS FRAMEWORK REVIEW**

### **Introduction**

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

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

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

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

### **ELECTRONIC COMMUNICATIONS – KEYSTONE OF THE INTERNAL MARKET**

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

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

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

- **Completion of the Internal Market**, because the integration of European markets has lost momentum.
- **Enforcement** of existing rules and a stronger focus on Member States' responsibilities
- **Efficiency**, through limiting harmonisation to essential requirements and maintaining an ambitious better regulation agenda.

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

### **Market context – European competitiveness**

Telecommunications, as part of the ICT sector, makes a major contribution to overall productivity and economic growth. The telecoms services market in Europe represents more than 40% of the total ICT market, with a value of €300 billion in 2006<sup>1</sup>. It is therefore a key factor of competitiveness of European business and the wider economy. The regulatory framework has a significant influence on the nature of the services available to business, affecting such matters as choice of supply, quality and price, and it has a direct impact on key investment decisions by operators and manufacturers.

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

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

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

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

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<sup>1</sup> European Information Technology Observatory (EITO) 2007 Report.

## **EU FRAMEWORK REVIEW – SPECIFIC PRIORITIES**

BUSINESSEUROPE notes that many of the Commission proposals are inter-linked, and the outcomes on issues such as functional separation, investment in new infrastructure, regulatory consistency and effectiveness cannot be considered in isolation from each other.

### **Relevant markets**

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

National Regulatory Authorities (NRAs) should act swiftly to review markets which are no longer included in the recommendation and remove regulation accordingly.

In the context of broadband and next generation networks the Commission and ERG should also look further into the possibilities of defining sub-national markets. We welcome the Commission's intention to issue guidelines on this.

### **Spectrum management**

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

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

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

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

## **Investment in and access to new-generation networks**

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

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

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

## **Functional / structural separation**

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

By explicitly proposing functional separation as an ex-ante remedy, the Commission is at one level simply clarifying that this would form part of the Framework (something that is at present only implicit). At another level however, the Commission is sending a clear signal that the scope of ex-ante regulation is expanding significantly.

BUSINESSEUROPE believes firmly in open markets and fair competition, with ex-ante access regulation kept to the minimum necessary, balancing the needs of investment in infrastructure and choice of supply. We also note that circumstances in the telecoms market are different from the energy sector, where separation between generation and transmission has been proposed.

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

Given that market players need the highest level of legal certainty in order to plan investments in the development of Next Generation Access networks (NGAs), the European Regulators Group (ERG) may need to look further into these aspects, and

NRAs could help provide greater certainty by clarifying their intentions early on, including the possibility of eventual “sunsets” contingent on benchmarks reflecting competitive conditions.

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

## **THE INTERNAL MARKET FOR ELECTRONIC COMMUNICATIONS**

BUSINESSEUROPE has identified completion of the overall Internal Market as a key strategic goal for Europe. Currently, inadequate enforcement and widely diverging application of the rules can prevent the full benefits of the Internal Market from being achieved in electronic communications. Market reviews are often delayed; the resulting regulatory remedies are applied inconsistently across Member States; and the application of national appeals procedures in some cases in some Member States has the effect of inhibiting decisions by NRAs.

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

### **Improved efficiency – streamlining the “market review” process**

BUSINESSEUROPE believes one of the concepts underpinning the Internal Market should be improved efficiency, through, for instance, the limitation of harmonisation to the essential requirement of resolving discrepancies among different national regulations, and an ambitious and broad programme on better regulation.

The current system of market reviews, based on national and EU-level consultation has played a positive role in promoting competition around Europe. At the same time, BUSINESSEUROPE supports moves to simplify and streamline the market review process and thus reduce bureaucracy within the sector. Removal of unnecessary bureaucratic steps should help lower the regulatory burden and give a positive impulse to regulators and regulated alike. However, the quality of market analysis should not suffer from any streamlined procedure. This is in line with principles of better regulation.

### **Effective enforcement – greater political independence for regulators**

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

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

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

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

- The function of the “Administrative Board” is unclear – it could be an unacceptable threat to the independence of NRAs if the Commission and Member States were able to influence the authority’s decisions;
- In addition, the extension of the scope to include such disparate issues as security, numbering, spectrum and e-accessibility seems unnecessary and unworkable.

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

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

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

## **OTHER ISSUES**

### **Consumers' and users' rights**

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

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

### **Security**

BUSINESSEUROPE supports measures aimed at increasing business users' confidence in the integrity and security of networks. At the same time, it is not clear that there are in fact market failures of the kind which would justify action beyond self-regulation or codes of conduct. Security is a key competitive element of differentiation in the market and BUSINESSEUROPE shares the aim of enhancing security as a means for increasing customers' confidence in electronic communications. The current regulatory measures and contributions of the companies provide for a high standard of security. Any proposed measures must be implemented in a manner which is proportionate and subject to proper impact and cost-benefit analysis.

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

### **Privacy**

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

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