

Brussels, 7 July 2006

## **New round of infringement proceedings in the field of electronic communications: What are the issues at stake?**

### **How often has the Commission already launched infringement proceedings against Member States under the 2002 regulatory framework for electronic communications?**

In total, since the entry into force of the regulatory framework for electronic communications in 2002, the Commission has opened proceedings under Article 226 of the EC Treaty against 24 EU Member States in nearly 80 cases due to failure to implement correctly the regulatory framework.

### **What are the issues at stake in the June 2006 round of infringement proceedings?**

#### **1. Directories/Directory enquiry services**

##### ***Principle***

Comprehensive directories and directory enquiry services comprising all listed telephone subscribers and their numbers (fixed and mobile) are clearly indispensable in everyday life. In view of this, these services form part of the universal service and their provision in all Member States is mandatory under European Community law.

##### ***Problem***

The Commission opened a number of infringement proceedings against Member States that failed to ensure the provision of a comprehensive directory and a comprehensive directory enquiry service (see [IP/05/875](#)).

##### ***Commission action***

Having analysed the replies to its reasoned opinions, the Commission has now decided to refer **Latvia** and **Poland** to the Court of Justice.

On the other hand, the Commission has closed cases in the **Czech Republic**, **Cyprus**, **Greece**, **Malta** and **Slovakia** following the publication of a comprehensive directory and/or a comprehensive directory enquiry service in the respective Member States.

Investigations are still pending against **France**, **Portugal** and **United Kingdom**.

## **2. Number portability**

### ***Principle***

Number portability is a key facilitator of consumer choice and effective competition. It ensures that subscribers can retain their telephone number when they change to a different operator. The 2002 EU regulatory framework requires implementation of number portability for fixed services as well as for mobile services.

### ***Problem***

The Commission opened proceedings against the Czech Republic, Latvia, Lithuania, Malta, Poland and Slovenia since number portability was not available in these Member States (see [IP/05/875](#)).

### ***Commission action***

Following the introduction of number portability in three Member States, the Commission has now closed proceedings against the **Czech Republic, Latvia and Lithuania**. There has been progress in **Slovenia**, where number portability appears to be available, and in **Malta** and **Poland** but in the latter two cases, availability in practice is still being examined.

## **3. Independence of the national regulatory authority (NRA)**

### ***Principle***

It is a basic principle of EC law in general and of the 2002 regulatory framework in particular that Member States must make sure that an authority performing regulatory tasks is separate from and independent of any operator it regulates. In particular, Member States that own electronic communications operators must clearly separate the regulatory tasks from the state's ownership activities.

### ***Problem***

Slovenia (see [IP/05/1269](#)) and Cyprus (see [MEMO/05/372](#)) had failed to put in place adequate safeguards to ensure that a body charged with a regulatory task is legally distinct from and functionally independent of all operators of electronic communication networks and services. Therefore the Commission had opened infringement proceedings against the two Member States.

### ***Commission action***

Following implementation measures clearly separating the ministry's ownership from the NRA's regulatory tasks in **Cyprus** and **Slovenia**, the two infringement proceedings can be closed. One proceeding against **Slovakia** is still pending.

## **4. Powers of the NRA/remedies**

### ***Principle***

The obligation to adopt decisions to define relevant markets, which may differ from those identified by the Commission if national circumstances so require, is one of the key prerogatives of national regulators in their duty to safeguard competition and protect consumers. National regulators must be given the powers and means necessary to regulate wholesale and retail markets in line with the aims and requirements of EU telecoms rules.

### ***Problem***

Since the powers of the NRA were not adequately transposed into national law, the Commission had launched infringement proceedings against various Member States (see [IP/05/430](#), [MEMO/05/478](#), [IP/05/1269](#) and [MEMO/05/372](#)).

### ***Commission action***

The Commission has now referred **Finland** to the Court of Justice for failing to ensure that the NRA has powers to impose regulation where appropriate on the termination of fixed to mobile calls. Moreover, a supplementary letter of formal notice is being sent to **Finland** because EU rules on remedies for ineffective competition have not been fully transposed into its national laws.

Following Poland's reply to the Commission's letter of formal notice, the Commission still deems that the explanation provided by the Polish authorities is not sufficient and that national legislation is still not in line with the Access Directive. It has therefore sent **Poland** a reasoned opinion, which is the second stage of the infringement procedure.

Following amendments to the law which grant the necessary powers to the NRA, the Commission has closed one infringement proceeding against **Estonia** and two (one under the Access and one under the Universal Service Directive) against **Slovakia**. In case of the **Netherlands**, following clarifications provided by the authorities, the Commission can now also close this case.

## ***5. E-Privacy Directive***

### ***Principle***

The Directive on Privacy and Electronic Communications (e-Privacy Directive) sets out EU-wide rules for the protection of privacy and personal data in mobile and fixed communications, including the Internet. EU Member States are required to ban unsolicited communication (also called spam). The ePrivacy Directive only allows an exception from the opt-in principle (where users indicate that they want to receive information), in cases when electronic contact details are obtained from customers in the context of a sale. In such a case, the same person may use these electronic contact details for direct marketing of similar products provided, however, that customers can "opt out" easily.

### ***Problem***

As the principles of the Directive were not correctly transposed into the national laws of six Member States (Austria, Malta, Latvia, Czech Republic, Germany and Slovakia), the Commission had launched infringement proceedings (see [IP/05/430](#) and [MEMO/05/478](#)).

### ***Commission action***

After the closure of the cases in Malta and Austria in earlier rounds, the Commission can now close the infringement proceedings against the **Czech Republic** and **Latvia** following amendments in the legislation in these two Member States.

The cases against **Germany** and **Slovakia** are still under review.

## 6. "Must-carry" obligations

### *Principle*

"Must-carry" rules mandate that network operators (such as cable companies or telecom operators) carry specified radio and TV broadcast channels and services where a significant number of end-users of such infrastructure use them as their principal means to receive radio and TV broadcasts.

Member States may, under the EU's Universal Service Directive, lay down reasonable "must-carry" obligations for the transmission of specified broadcast channels and services on the network operators under their jurisdiction, for legitimate public policy reasons. However, such obligations should only be imposed where they are:

- strictly necessary to meet clearly defined general interest objectives,
- proportionate and transparent, and
- subject to periodic review.

### *Problem*

Following a number of complaints and detailed examination, the Commission decided, as a first step, to initiate infringement proceedings against Belgium (two cases – Wallonia, and Brussels Region), the Netherlands and Finland, for failure to ensure that their must-carry regimes are in line with the requirements outlined above.

In all these cases, the Commission concluded that general interest objectives are not clearly defined or are even missing from the legislation of the Member States in question. The lack of clearly defined general interest objectives and an apparent lack of sufficiently precise, clear and foreseeable criteria for their eventual attainment make the rationale for "must carry" regimes opaque for stakeholders. Network operators are consequently uncertain about their obligations, and broadcasters are uncertain about their rights under these regimes.

Moreover, the legislation in these Member States does not provide for a limit on the number of "must-carry" channels which may be imposed. This adds a proportionality problem to that of inconsistency. Furthermore, in all the above cases, the requirement for periodic review of the must-carry regime is not met.

In view of emerging competition between different delivery platforms for broadcasting content, making "must-carry" rules proportional to the need that they are intended to meet would also ensure that end-users have more freedom of choice among channels, since network operators would base their choice on channels on end-user demands and not because of "must-carry" rules.

### *Commission action*

The Commission has sent **Belgium** (Wallonia and Brussels Region), **Finland** and the **Netherlands** letters of formal notice. These Member States have two months to reply. Moreover, as indicated in the 11<sup>th</sup> implementation report ([IP/06/188](#)), the Commission services are currently examining the situation with regard to the "must-carry" regime in all other Member States.

## **7. Rights of way**

### **Principle**

The Framework Directive, the Authorisation Directive and the Competition Directive stipulate transparent, timely and non-discriminatory procedures for granting rights to install facilities, on, over or under public property.

### **Problem**

No new entrant providing fixed communications networks in Cyprus has been able to effectively establish its own network with a view to providing e-communication services in competition with the incumbent, due to the failure of the relevant authorities to grant rights of way on, over or under public property, which was necessary for this purpose.

### **Commission Action**

The Commission has therefore sent **Cyprus** a letter of formal notice. The authorities in Cyprus now have two months to reply.

## **8. Transition to the new regulatory framework for electronic communications**

### **Principle**

In order to avoid any kind of legal vacuum, the Framework Directive on electronic communications provided that obligations imposed on operators under the previous regulatory framework should be maintained until the relevant markets have been reviewed under the new framework (see [IP/06/874](#)). Such legal certainty is crucial for private investment decisions and for the development of competition.

### **Problem**

Several Member States had failed to properly ensure this requirement. (see [IP/05/1585](#) and [MEMO/05/478](#)).

### **Commission action**

Following the notification by the Swedish NRA of its final decision on market 14 (wholesale trunk segments of leased lines - operators use such leased lines either to complete their own network infrastructure or to provide retail lease line services), that "legal vacuum" has been removed in **Sweden**, and the case can be closed.

### **What happened to earlier cases the Commission had opened for non-communication of national implementing legislation?**

At earlier stages, the Commission had launched proceedings against those Member States that had not adopted legislation necessary to transpose the new framework into national law in a timely manner.

In this current round, the case against the **United Kingdom** concerning notification of the electronic communications framework in Gibraltar is being closed since it notified the Commission of measures it took to transpose the relevant EU rules into national laws.

Following the adoption of measures transposing the ePrivacy Directive into national law in **Greece** on 20 June 2006, the 2002 EU regulatory framework for electronic communications is now formally transposed into the national laws of all Member States.

### **Where can I find further information on pending infringement proceedings concerning the electronic communications sector?**

A complete overview of the state of cases can be found on the implementation and enforcement website of the Information Society and Media DG:

[http://europa.eu.int/information\\_society/policy/ecomms/implementation\\_enforcement/index\\_en.htm](http://europa.eu.int/information_society/policy/ecomms/implementation_enforcement/index_en.htm)

### What is the EU regulatory framework for electronic communications?

The EU regulatory framework for electronic communications came into force in 2002 and consists of five Directives:

- **Framework Directive:** outlines the general principles, objectives and procedures
- **Authorisation Directive:** replaces individual licences by general authorisations to provide communications services
- **Access and Interconnection Directive:** sets out rules for a multi-carrier marketplace, ensuring access to networks & services, interoperability, and so on
- **Universal Service Directive:** guarantees basic rights for consumers and minimum levels of availability and affordability
- **e-Privacy or Data Protection Directive:** covers protection of privacy and personal data communicated over public networks

### What are the regulatory principles of the EU regulatory framework for electronic communications?

The liberalisation of telecommunications, completed in 1998, was generally considered a notable success. Opening up formerly monopolistic markets led to dramatically lowered prices and improved services for both consumers and business, boosting Europe's communications industry and creating economic growth.

Continuous technological innovation, however, overtook the telecoms regulatory regime. Digitisation now allows many kinds of content to be delivered over different networks. The Internet has become a global infrastructure for a range of electronic communications services. Information and communications technologies are converging, opening up considerable possibilities for new industries and services.

The EU regulatory framework for electronic communications tackles this technological convergence and extends and adapts the benefits of liberalisation to electronic communications in general.

Based on the experience of telecoms liberalisation, policy makers believe that extending competition and ensuring opportunity and reward for innovative companies is the key to promoting technological advance. So why regulate? Why not let market forces alone generate growth in the e-communications sector?

The difficulty is that Europe's telecommunications industry originated in state-run monopolies, leaving a legacy of imperfect competitive conditions.

Continued regulation is therefore essential for as long as these former monopolists have significant market power, to ensure a level playing field for new market entrants.

Another reason is that market forces alone may lead to the exclusion of some social groups from essential public services. The new regulatory system therefore recognises a universal service obligation to ensure basic services at affordable prices to all in cases where the market alone does not provide.

There are therefore a number of key principles underlying the Directives of the EU regulatory framework for electronic communications. These are summarized below.

- **Cutting red tape:** a general authorisation procedure for operators to enter new markets replaces individual licences. This drastically cuts red tape for enterprises, which no longer face frustrating delays as national regulators check compliance with licence conditions.
- **Light regulation:** the framework builds upon general concepts of competition law, as applied to normally functioning markets. Regulation is seen as essentially a *temporary phenomenon*, required to make the transition from the formerly monopolistic telecommunications industry to a fully functioning market system. To develop in the short term, new market entrants need regulatory support to gain access to the networks of incumbent operators and to provide the benefits to end users which the market would offer if it were effectively competitive. However, as the sector evolves, operators will increasingly build their own infrastructures and compete more effectively. As normal market conditions develop, regulation can be rolled back, and competition law, as applied to industry in general, will replace sector-specific intervention.
- **Technological neutrality:** regulation now refers to "electronic communications" - not "telecommunications". The same principles now apply regardless of which kind of existing or potentially new technology is involved. This "technological neutrality" is essential to provide the necessary flexibility to deal with emerging technologies and their convergence in fields such as media, internet and mobile communications.
- **Consistency across the European market:** operators need to be assured that their investments can be planned in a stable regulatory environment, consistent and predictable throughout the EU's Single Market. Such a regime allows companies to operate on a scale which only a European-wide market can provide. The regulatory framework establishes new processes permitting collaboration among the national regulatory authorities of the Member States and between national authorities and the Commission. This extensive collaboration plays a key role in achieving the necessary coherence within the regulatory process at European level. In key areas, each national regulatory authority submits its draft national measures to the Commission and to other national authorities for consideration, and discusses common approaches in the European Regulator's Group, established by the Commission in 2002. In this way, a consistent approach is developed throughout the single market while permitting maximum flexibility to deal with national markets and conditions.