Opinion of the European Economic and Social Committee on the
— Proposal for a Regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority


(2008/C 224/11)

On 10 December 2007, the European Commission decided to consult the European Economic and Social Committee, under Article 95 of the Treaty establishing the European Community, on the
Proposal for a Regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority.

The Section for Transport, Energy, Infrastructure and the Information Society, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 8 May 2008. The rapporteur was Mr Hernández Bataller.

At its 445th plenary session, held on 28 and 29 May 2008 (meeting of 29 May 2008), the European Economic and Social Committee adopted the following opinion by 80 votes and 1 abstention.

1. Conclusions and recommendations

1.1 The EESC shares the Commission’s goals of enabling users to derive maximum benefit from the electronic communications market, ensuring that there is no distortion or restriction of competition, encouraging efficient investment in infrastructure and fostering innovation, promoting efficient use and management of radio frequencies and numbering resources.

1.2 Given the high level of technological innovation and highly dynamic markets in the electronic communications sector, the EESC accepts the regulatory model for the electronic communications framework and the proposed modifications, which are based on the following aspects:

1.2.1 decentralised regulation in the Member States, giving national authorities the task of overseeing markets in accordance with a common set of principles and procedures. The independence, day-to-day management and discretion of NRAs are also strengthened, ensuring that they have their own budgets, sufficient human resources and stronger enforcement powers in order to improve the implementation of the regulatory framework;

1.2.2 strengthening of the internal market, assigning certain powers to the Commission for transnational markets that fall outside the responsibilities of a Member State;

1.2.3 improvement of legislative consistency, modernising specific provisions to bring them into line with technology and market developments, including the deletion of a number of obsolete or redundant provisions;
1.2.4 the definition of an efficient spectrum management strategy in order to achieve a Single European Information Space;

1.2.5 in exceptional cases, functional separation, adopted by NRAs subject to the Commission’s approval, to ensure the provision of fully equivalent access products to all downstream operators, including the vertically integrated operator’s own downstream divisions;

1.2.6 the achievement of reliable, effective communication over electronic communications networks. To this end, the Authority should contribute to the harmonisation of appropriate technical and organisational security measures by providing expert advice;

1.2.7 reinforcement of consumer rights with regard to certain aspects of contracts, transparency and publishing of information, availability of services, information and emergency services and number portability. However, the proposals do not attain a high level of consumer protection as set down in the Treaty on consumer protection, as they do not cover other aspects such as regulation of customer services, minimum quality levels, penalty clauses or potential joint procurement of services and terminals;

1.2.8 greater protection of privacy, although not all the proposals are sufficiently ambitious, for example in terms of spam protection which, the EESC believes, should be unequivocally based on the principle of express prior consent from the consumer to receive commercial communication.

1.3 The EESC welcomes the inclusion of terminal equipment within the scope of the regulatory framework, as this will improve electronic access for disabled end-users. It also welcomes the establishment of binding measures for disabled end-users in terms of universal service, improving the accessibility of publicly available telephone services, including emergency services, directory enquiry services and directories, equivalent to that enjoyed by other end-users, along with other specific measures.

1.4 The simplification and reduction of administrative costs is important, and increased flexibility in spectrum management tasks will facilitate administrative procedures and spectrum use for operators. The EESC believes that limited technical exceptions should exist, along with broader exceptions for the pursuit of general interest objectives (to be imposed by the Member States) in areas such as cultural and linguistic diversity, freedom of expression and plurality in the media, the promotion of social and territorial cohesion, and human safety, taking account of the technical, social, cultural and political needs of all the Member States, according to the provisions of national legislation in accordance with Community law.

1.5 The establishment of a European Electronic Communications Market Authority, as a body which is independent from the Commission and reinforces the powers of the NRAs, could be useful, as it would provide the means for effective partnership between the Commission and national regulators for issues in which EU consistency is required, such as market definitions, analysis and solutions, the harmonisation of radio spectrum use, and the definition of cross-border markets.

2. Introduction

2.1 In 2002 a reform of the telecommunications market was approved, which led to the establishment of a regulatory framework for electronic communications (including all satellite and terrestrial networks, both fixed and wireless), comprising the Framework, Access, Authorisation and Universal Service Directives and the Directive on the Processing of personal data and the protection of privacy in the sector.

2.2 This EU regulatory framework was designed to facilitate new operators’ access to existing infrastructure, encourage investment in alternative infrastructures, and offer consumers greater choice and lower prices.

2.3 The regulatory model for the current framework is based on the principle of decentralised regulation in the Member States, giving national authorities the task of overseeing markets in accordance with a common set of principles and procedures.

2.4 The framework sets down a minimum level of harmonisation, leaving it to the national regulation authorities (NRAs) or the Member States to define the implementing measures.

2.5 The aim of the regulatory framework is to progressively reduce ex ante sector-specific rules as competition in the market develops; this is done by means of a Commission recommendation identifying the product and service markets in which ex ante regulatory obligations could be justified.

2.5.1 The aim of any ex ante regulatory intervention is to benefit consumers and ensure that retail markets are competitive. The definition of relevant markets can change over time as the characteristics of products and services evolve and the possibilities for demand and supply substitution change, as pointed out in the Commission Recommendation of 17 December 2007 (1).

3. Commission proposals

3.1 The Commission is proposing a broad revision of the European legislation governing electronic communications (hereinafter ‘regulatory framework’), through the joint submission of:

— two proposals for a directive: one amending the Framework, Access and Authorisation Directives, and the other amending the Directives on Universal service and on the Protection of privacy;

— a proposal for a Regulation establishing the European Electronic Communications Market Authority (hereinafter the ‘Authority’).

3.2 In short, these proposals aim to regulate the ‘amended’ European regulatory framework for electronic communications, bringing it into line with the demands of national regulators, and operators and consumers of goods and services.

3.3 The objective is to establish a consistent ‘amended regulatory framework’ for the digital economy, which makes the most of the progress achieved from the development of the internal market. The proposals affect the following:

3.4 The proposal amending the Framework, Authorisation and Access Directives:

a) ensures, with regard to spectrum management, that Member States shall consult interested parties when considering exceptions to the principles of technology and service neutrality, including when pursuing general interest objectives;

b) increases the consistency of the regulatory framework by rationalising some procedural elements in the market review process, including the possibility for the Commission to take over a market analysis if an NRA is significantly late in performing its duties;

c) improves network integrity and security by reinforcing existing obligations, and extends the scope of integrity requirements from telephone networks to mobile and IP networks;

d) strengthens the legal guarantees of interested parties by defining various criteria relating to the independence of the NRAs, and recognises the right of appeal against NRA decisions and the possibility of suspending measures adopted by them in order to prevent serious and irreparable harm, in urgent cases;

e) caters for the needs of vulnerable groups, by including technical requirements for terminal equipment in order to improve e-accessibility for disabled persons, and updating NRAs’ objectives regarding older users and users with social needs;

f) enables the NRAs to impose functional separation with the prior agreement of the Commission;

g) establishes a common selection procedure;

h) lastly, strengthens the enforcement powers of the NRAs, which are to have the ability to impose specific conditions for general authorisations in order to ensure accessibility for disabled users, protect copyright and intellectual property, and guarantee communications by public authorities in the event of imminent threats.

3.5 The proposal amending the universal service scheme, the processing of personal data and protection of privacy and users’ rights in electronic communications and consumer protection cooperation builds on progress already achieved in the Commission’s legislative approach in the sector.

3.5.1 It is recognised that competition alone is not sufficient to satisfy the needs of all citizens and protect users’ rights; specific provisions are therefore included which safeguard universal service, users’ rights and the protection of personal data.

3.5.2 In particular, the proposal aims to improve the transparency of prices and the publication of information for end-users, by requiring operators to publish comparable, adequate and up-to-date information in an easily accessible form, and empowering NRAs to enforce operators’ compliance with these obligations.

3.5.3 Number portability provisions are included, so that consumers may change provider easily (the maximum time limit for the effective porting of numbers is set at one working day, and NRAs are given powers to prevent dissuasive practices by providers); improvements are made to requirements for information regarding the location of callers to the emergency services, such as the obligation to pass information to emergency authorities.

3.5.4 The ‘possibility’ for Member States to adopt specific measures in favour of disabled users is replaced by an explicit ‘obligation’ to do so, enabling NRAs to require operators to publish information of interest to disabled users.

3.5.5 Moreover, NRAs will have powers to prevent the degradation of service quality by setting minimum quality levels for network transmission services for end-users, and will be able to monitor retail tariffs if no undertakings are designated as a universal service provider.

3.5.6 Steps will also be taken to ensure that end-users are notified about breaches of security resulting in their personal data being lost or otherwise compromised, and are informed about precautions that they may take in order to minimise the resulting damage.
3.5.7 In line with this, use of ‘spyware’ and other malicious software is prohibited, regardless of the method used for its installation on a user’s equipment; the fight against unsolicited commercial communications in Europe is reinforced with the provision for Internet Service Providers to take legal action against spammers.

3.6 Lastly, it is worth pointing out the proposal to create an ‘Authority’, accountable to the European Parliament, which will include a board of regulators comprising the heads of the NRAs of all EU Member States and will replace the European Regulators Group (ERG) (2).

3.6.1 This Authority will advise the Commission on the adoption of certain decisions, act as a centre of expertise for electronic communication networks and services at EU level, and take over the functions of the European Network and Information Security Agency (ENISA).

4. General comments

4.1 The EESC welcomes the Commission’s proposals in that they aim to respond to the need for regulation and management of the pan-European electronic communications market.

4.1.1 The EESC endorses the Commission’s goal of further opening up the telecommunications markets to competition and boosting investment in high-speed networks (including all fixed, mobile and satellite technologies (3)), and its aim of furthering the Internet of the future (the Internet of things and the semantic web) and optimised spectrum management in the internal market, also in the context of audiovisual service digitisation. This is in the common interests of consumers and businesses which need access to high performance telecommunications networks and services.

4.1.2 The EESC notes that, under the current regulations, the regulatory framework in the telecommunications sector has made it possible to:

— make substantial progress towards more open, dynamic markets, as pointed out by the Commission in its 12th Report on the Implementation of the Telecommunications Regulatory Package;

— combat the severe inequalities between operators, which are the legacy of the advantages enjoyed by the old State monopolies.

4.2 The EESC also considers it positive that the regulatory scheme set down in the proposals is extended to the field of electronic communications and, therefore, to all the transmission and service provision networks that this comprises.

4.3 In addition to the improvement of the purely technical and management aspects mentioned above, the Committee also welcomes the wide range of provisions which specifically aim to strengthen the rights of the users of electronic communication services, and the procedural and administrative guarantees for operators to ensure that these provisions are properly implemented (right of affected parties to be heard, reasons for decisions, precautionary measures and right of appeal). The introduction of these guarantees complies with the ‘right to good administration’ stipulated in Article 41 of the Charter on Fundamental Rights.

4.4 The EESC especially welcomes the fact that the proposals take into account requests that it had made in previous opinions, regarding:

— the requirement that Member States adopt specific measures to help disabled users (4), in order to meet the objectives of the European Charter on Fundamental Rights and the United Nations Convention on the Rights of the Persons with Disabilities;

— general spectrum management principles (as the spectrum is of public interest and should be managed from an economic, social and environmental perspective) which, in addition to neutrality in terms of technology and service, should ensure cultural and linguistic diversity, freedom of expression and plurality in the media, and reflect the technical, social, cultural and political needs of all the Member States (5).

4.4.1 Preserving cultural and linguistic diversity also means ensuring that alphabetical letters which contain diacritical marks, as well as Cyrillic, Greek and any other characters, appear in legible form in emails. Sending mobile phone text messages containing such letters should not be more expensive.

4.5 The EESC also endorses the Commission’s proposals regarding, in particular:

a) the simplification of market analysis procedures which streamlines the administrative burden for NRAs and reduces administrative costs for operators;

b) the improvement of network security and integrity, guaranteeing reliable use of electronic communications;

c) reinforcement of the independence of NRAs by limiting the possible influence of other public bodies on the NRAs’ day-to-day management, and ensuring that they have their own independent budget and sufficient human resources.

5. Specific comments

5.1 As the purpose of the Commission proposals is, firstly, to adopt measures for the approximation of national legislation in the field of electronic communications and, secondly, to create a new supranational body, the EESC wishes to emphasise that the proposals are based exclusively on Article 95 TEC.

(3) See opinion OJ C 44, 16.2.2008, p. 60, rapporteur: Mr Retureau.
(4) See opinion OJ C 175, 27.7.2007, p. 91-95.
5.1.1 While this provision may well be an appropriate, sufficient basis for the objectives pursued (\(^1\)), according to the case law of the European Court of Justice, the Commission will have to ensure that the measures adopted actually have an impact on internal laws (enabling them to be amended) and exhaustively regulate at supranational level all those aspects which should benefit consumers and users of electronic communications, along with the aspects relating to the legal and procedural guarantees established in the proposals (\(^2\)).

5.1.2 In short, the adoption of the future supranational regulatory framework in this field should not become a simple cosmetic reworking of the current supranational regulatory framework in the electronic communications sector.

5.1.3 The above also applies to the creation of the Authority, whose existence is fully justified insofar as it is able to help to consistently, efficiently implement the wide range of provisions proposed and for which it is responsible by virtue of the specific powers assigned to it.

5.1.4 The creation of this Authority complies with the principle of subsidiarity, as the current cooperation system:

a) lacks structure and efficient mechanisms, and fragments the internal market;

b) does not guarantee equal conditions between operators established in different Member States; and

c) prevents the benefits that competition and cross-border services would bring the consumer.

5.1.5 It also complies with the proportionality principle, as it will make it possible to establish an effective partnership between the Commission and the National Regulators on issues where European consistency is needed.

5.2 The Authority should serve as the exclusive forum for cooperation between NRAs in the exercise of the full range of their responsibilities under the regulatory framework.

5.2.1 The EESC is awaiting the forthcoming assessment of the operation of the Authority, in order to ensure that it is based on transparency, accountability and independence, and that the powers of the NRAs have been strengthened by giving them a robust and transparent foundation in Community law.

5.3 With regard to the legislative approach of the regulatory framework proposed, it is important to recognise the benefits of applying specific criteria for the regulation of the sector, together with the principles and rules of free competition within the internal market (\(^3\)). This applies particularly to the sector in question, which requires ex ante administrative interventions involving sophisticated economic analyses of the relevant market, which are not necessary in other sectors of the internal market (\(^4\)).

5.3.1 The EESC endorses the regulatory framework's aim to progressively reduce ex ante sector-specific rules as competition in the market develops, as the Commission has been gradually doing, for instance in its recommendation of 17 December 2007. The EESC hopes that, given the dynamism of the electronic communications market, the characteristics of products and services and the possibilities for substitution will evolve in such a way as to make such intervention measures unnecessary.

5.3.2 The EESC believes that 'functional separation' is an exceptional measure that should be applied sparingly. It should only be imposed by the NRA, subject to the prior approval of the Commission, which should request an opinion from the new Authority.

5.3.3 This type of solution may be justified as a remedy 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 timeframe after recourse to one or more remedies previously considered to be appropriate.

5.4 However, the specific provisions proposed for this sector do not cover certain significant issues affecting the efficient, transparent implementation of free competition between operators and service providers in the pan-European market, or certain substantive aspects of user rights.

5.5 Firstly, there should be clarification of the scope of 'national security' for which, according to Article 3a(2) TEU, as amended by the Lisbon Treaty, Member States have 'sole responsibility' to safeguard.

5.5.1 Recognising non-regulated powers would allow for considerable discretion when establishing causes and measures which, for national security reasons, could result in exceptions to the application of the sectoral and competition law rules and principles embodied in the Commission proposals.

5.5.2 National regulations currently exist in the electronic communications sector which leave it to the Member States to identify the telecommunications networks, services, facilities and equipment which carry out activities essential to national defence and public security (\(^5\)). In this context, the EESC points out that the practice followed for the Galileo project could serve as a useful reference.

\(^{1}\) EC judgment of 25.5.2006, case C-453/03.

\(^{2}\) Ibid. Legal background, points 44 and 45.


\(^{5}\) For a more detailed analysis of these issues, see Carlos J. Moreiro González, Las cláusulas de Seguridad Nacional, Iustel, 2007, pp. 26-31 and 33-64.
5.6 In order to preserve social, economic and territorial cohesion when setting up the new network infrastructures, particularly the 'new generation networks', public authorities need to promote economic and social progress and a high level of employment, in line with Community law and democratic principles, in order to create a high-tech electronic communications market.

5.6.1 Intervention measures must, with public funding, especially from local authorities, serve to boost the future rollout of new-generation networks, ensuring that there is no impact on technological neutrality, and that, in line with the proportionality principle, unnecessary duplication of network resources is avoided.

5.7 With regard to the effect on user rights of the proposed regulatory framework, it will in some cases be necessary to specifically analyse the protection of access rights for services of general economic interest (11) (which, as well as being recognised as a fundamental right in Article 36 of the EU Charter of Fundamental Rights, will be regulated through Article 16 TEU and a protocol (No 9) appended to the Treaties), and the protection of free competition, which will not be listed as a specific objective of the EU in Article 3 of the Lisbon Treaty, but will be the subject of an ad hoc regulation following the Protocol on the internal market and competition appended to the Treaties.

5.7.1 Although the EESC welcomes the fact that the proposal on universal service establishes a consultation mechanism in Member States ensuring that due consideration is given in the decision-making process to consumer interests, it regrets that none of the provisions refers to the role of organised civil society when it comes to consultation and participation in the process of adoption by the competent supranational bodies, in order to select suitable measures which guarantee effective implementation in the EU.

5.7.2 With regard to the physical aspects of universal service, the EESC is waiting for the Commission's proposal on the subject, to be issued this year, before stating its position definitively. Provisionally, the EESC reiterates (12) the main principles that it considers applicable:

- a) access to high-quality services at fair, appropriate and affordable prices;
- b) rapid public broadband access to information and advanced telecommunications services in all regions;
- c) access for all consumers, irrespective of their income and geographical location, with the right to price equalisation;
- d) fair and non-discriminatory contribution by all telecommunications service providers to maintaining and advancing universal service;
- e) the existence of specific, predictable and adequate mechanisms guaranteeing that universal service is maintained and extended, in line with technology and social developments;
- f) any additional principles deemed necessary by the NRAs to protect the public interest;
- g) the creation of a telecommunications forum or observatory at Community level, in order to take into account the opinions of all economic and social players and other civil society organisations.

5.7.3 In terms of universal service, the Directive should cover the following aspects:

- a) the need for the regulation of customer services provided by operators, including the possibility of imposing quality levels on customer service, when service begins to deteriorate;
- b) the definition of penalty clauses, so as to provide greater legal certainty;
- c) contract amendments;
- d) minimum quality levels for certain aspects, empowering NRAs to impose minimum quality levels for all services if they so desire;
- e) detailed invoicing and improved pricing services, ensuring that invoices include a breakdown of any non-electronic-communication services;
- f) joint procurement of services and terminals, which should be subject to more transparent contractual arrangements.

5.7.4 The increase in consumer protection provided for in the universal service proposal does not fully guarantee consumers a high level of protection as required by Article 153 TEC, since the proposal does not, as a general principle, give subscribers the right to withdraw at any time, without penalty, from contracts with electronic communications network or service providers.

5.7.5 However, there are some aspects for which this protection is improved, such as:

--- pricing information, with transparent, updated or comparable rates and information on the type of services provided;

--- the reform of Regulation No 2006/2004 which makes international cooperation possible, in order to prevent undesirable practices such as 'phishing' (13), 'cyberstalking' and 'spoofing'.

(13) See opinions CESE 267/2008 (adopted on 14.2.2008), rapporteur: Mr Hencks.
(13) A type of fraud that involves falsely obtaining a person's bank details in order to access their account and divert the funds.
5.8 When it comes to the privacy of electronic communications, the EESC considers that the proposal is a step forward from existing legislation, and calls on the Commission to strengthen the confidentiality of communications made via public communications networks and publicly available electronic communications services, and of related traffic data, in accordance with the criteria stipulated in ECJ case law (14).

5.8.1 The EESC endorses strengthening the regulation of fundamental rights relating to electronic communications, such as the protection of privacy, protection of personal data, secrecy of communications and confidentiality, and certain commercial aspects relating to intellectual property.

5.8.2 When it comes to security (15), the relevant measures should be adopted to guarantee network security (16) and the use of sufficiently robust encrypted material, so as to strengthen the protection of privacy.

5.8.3 The EESC considers it positive that the protection afforded by this directive also applies to public communications networks supporting data collection and identification devices (including contactless devices such as Radio Frequency Identification Devices) (17).

5.9 With regard to unsolicited commercial communications (spam), the EESC reiterates (18) its belief that legislation should be unequivocally based on the principle of the consumer’s express prior consent: it is the consumer’s interests that should prevail in order to prevent unwanted commercial communications. Therefore, all necessary steps should be taken in order to guarantee that this principle is obeyed, establishing, where relevant, effective, proportionate, dissuasive penalties.


The President
of the European Economic and Social Committee
Dimitris DIMITRIADIS

(14) In particular, see the ECJ ruling of 29 January 2008 (case C-275/06).
(15) The EESC is drawing up opinion (INT/417) DT R/CESE 80/2008 on Combating fraud and counterfeiting of non-cash means of payment.
(17) See opinion on ‘Radio Frequency Identification (RFID)’, rapporteur: Mr Morgan, JO C 256 of 27.10.2007, p. 66.