

2.3. The ESC is pleased that the proposal addresses the issue of fundamental licensing motives. As the Commission points out, licensing has in some cases become very costly without basically benefiting end-users. A single European market can only be achieved if licensing is harmonised at a low level of intervention. That has proved effective in several Member States.

2.4. It is important that conditions for the authorisation of operations do not include non sector-specific obligations. The Committee is pleased to see that this is explicitly stated in Article 6 of the Directive and also welcomes recital 14's specification that it is not necessary to require systematic and regular proof of compliance with all conditions. This can be seen as a positive step towards reducing the burden the rules place on companies.

2.5. The ESC agrees with the Commission that licences should only be used in the case of scarce radio spectrum and telephone numbers, and that administrative charges should be set so as to cover only those administrative costs that are incurred under the proposed minimal regulation. There seems to be growing concern that IT users will be forced to contribute to spectrum licensing costs, which can significantly exceed administrative costs besides being totally unconnected with the outcome at auction.

2.6. The proposed Authorisations Directive should, in the Committee's view, be amended so as to explicitly prohibit the charging of one-time fees that are not used for purposes which can boost spectrum efficiency or are not part of an auction procedure or some other system in which the price is used as a means to achieve efficient radio spectrum allocation.

Brussels, 24 January 2001.

The President
of the Economic and Social Committee
Göke FRERICHS

Opinion of the Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services'

(2001/C 123/13)

On 16 October 2000 the Council decided to consult the Economic and Social Committee, under Article 95 of the Treaty establishing the European Community, on the above-mentioned proposal.

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 7 December 2000. The rapporteur was Mr Lagerholm.

At its 378th plenary session on 24 and 25 January 2001 (meeting of 24 January) the Economic and Social Committee adopted the following opinion with 77 votes in favour and one abstention.

1. Introduction

1.1. Since 1990 the Commission has progressively put in place a comprehensive regulatory framework for the liberalisation of the telecommunications market. This has been vital to the EU's global competitiveness. An advanced

communications industry is a precondition for Europe's transition to the information society. The Lisbon European Council of 23-24 March 2000 highlighted the potential for growth, competitiveness and job creation of the shift to a digital, knowledge-based economy. In particular, it emphasised the importance for Europe's businesses and citizens of access to an inexpensive, world-class communications infrastructure and a wide range of services.

1.2. The current regulatory framework for telecommunications has been successful in creating the conditions for effective competition in the telecommunications sector during the transition from monopoly to full competition. The new framework for communications infrastructure and associated services is designed to focus on promoting and sustaining an open and competitive European market for communications services. This will benefit the European citizen and consolidate the internal market.

2. The Commission proposal

2.1. The convergence of the telecommunications, media and information technology sectors⁽¹⁾ means that all transmission networks and services should be covered by a single regulatory framework. The proposed regulatory framework is to consist of the present framework directive and the following additional measures:

- Directive on the authorisation of electronic communications networks and services;
- Directive on access to, and interconnection of, electronic communications networks and associated facilities;
- Directive on universal service and users' rights relating to electronic communications networks and services;
- Directive on the processing of personal data and the protection of privacy in the electronic communications sector; and
- Regulation on unbundled access to the local loop.

2.1.1. In addition to the above package, a proposal for a decision on a regulatory framework for radio spectrum policy in the European Community has been submitted.

2.1.2. The proposals are based on public consultations on the Green Paper on convergence, the Green Paper on radio

spectrum policy⁽²⁾ and the 1999 Communications Review⁽³⁾ on the existing regulatory framework.

2.2. Chapter I of the proposed directive sets out the aim and scope of the new framework. This is to establish a harmonised framework for regulation of electronic communications networks and services, i.e. a framework covering all satellite and terrestrial networks including both fixed and wireless.

2.3. Chapter II sets out principles for the establishment of national regulatory authorities (NRAs) and establishes certain procedures to which they are subject. Member States are to guarantee NRAs' independence and publish their tasks. The directive also establishes a right of appeal, making it clear that any appeal must be to a body independent of government. NRAs are to be given the right to gather information from market players in order to carry out their tasks effectively. They must consult the interested parties on proposed decisions and exercise their powers impartially and transparently.

2.4. Chapter III requires NRAs to contribute in a way that is technology-neutral to an open and competitive market and the development of the internal market, and to support the interests of citizens. NRAs are to promote the harmonisation of use of radio spectrum at Community level and ensure its effective management. They are also to ensure that adequate numbers and numbering ranges are provided on the basis of transparent, objective and non-discriminatory criteria. Timely procedures should also be established for the granting of rights of way and for compulsory facility sharing, which may be appropriate in some circumstances.

2.5. The general provisions set out in Chapter IV apply to several directives within the new regulatory framework. Accordingly, an undertaking is deemed to have significant market power if, either individually or jointly with others, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.

⁽¹⁾ Green Paper on the convergence of the telecommunications, media and information technology sectors, and the implications for regulation — Towards an information society approach (COM(97) 623 final); ESC opinion in OJ C 214, 10.7.1998.

⁽²⁾ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions — Next steps in radio spectrum policy — results on the public consultation on the Green Paper (COM(1999) 538 final); ESC opinion on the Green Paper in OJ C 169, 16.6.1999.

⁽³⁾ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions — Towards a new framework for electronic communications infrastructure and associated services — The 1999 Communications Review (COM(1999) 539 final); ESC opinion in OJ C 204, of 18.7.2000. Communication from the Commission — The results of the public consultation on the 1999 Communications Review and Orientations for the new Regulatory Framework (COM(2000) 239 final); ESC opinion in OJ C 14, 16.1.2001.

2.6. Market analyses are to be carried out regularly on markets with an international dimension, as listed in the Commission Decision on Relevant Product and Service Markets that has still to be issued. Where an NRA determines that a market is not effectively competitive in a specific geographic area, it is to impose — or maintain — sector-specific obligations.

2.7. Other provisions deal with standardisation and the resolution of disputes between undertakings and disputes involving parties in different Member States. To secure single market harmonisation, the Commission is to be given scope to issue recommendations or lay down binding harmonisation measures using the comitology procedure. The Commission is to be assisted by the communications committee. The framework directive also establishes a high-level communications group, acting independently and with advisory status.

3. General comments

3.1. The evolution of the information technology (IT) and telecommunications sectors in Europe over the last decade has been most impressive. Customers in Europe do not yet always have the lowest tariffs, but in most Member States they can choose services that are appropriate to their needs to an extent that is barely matched elsewhere in the world. In most countries tariffs are decreasing fast.

Basically this is due to technology shifts, but these opportunities could not have been utilised for the benefit of end-users if EU telecommunications regulation had not opened the way to competition by getting rid of entrenched monopolies and other special rights.

Although it is clear that a full transition from monopoly provision to competitive supply is not complete in all Member States and on all relevant markets, it is nonetheless becoming increasingly obvious that the regulatory framework of the 1990s is not flexible enough for the current rapid market changes — changes that involve both the improvement of existing products and services and the creation of new ones; partly due to the convergence of technologies.

3.2. In its opinion on the Commission's Communication on the 1999 Communications Review⁽¹⁾, the Economic and

(1) Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions — Towards a new framework for electronic communications infrastructure and associated services — The 1999 Communications Review (COM(1999) 539 final); ESC opinion in OJ C 204, 18.7.2000. Communication from the Commission — The results of the public consultation on the 1999 Communications Review and Orientations for the new Regulatory Framework (COM(2000) 239 final); ESC opinion in OJ C 14, 16.1.2001.

Social Committee expressed general support for the proposed new regulatory framework for electronic communications.

3.2.1. The Committee

'particularly welcomed the commitment to base the proposed regulatory evolution on:

- the promotion and sustaining of an open and competitive European market;
- the consolidation of the internal market;
- greater reliance on competition law and simplification and reduction of sector-specific legislation accompanied by recommendations, guidelines and interbranch agreements. Besides the need to regulate access to scarce resources, sector-specific regulation should be employed only in areas where sufficient competition is lacking and only during a transitional period;
- technology neutrality, including no Internet-specific measures. Technologically neutral regulation should not, however, lead to stronger regulation of new services, but rather to the roll back of existing specific regulation of traditional services.'

3.2.2. The Committee underlined 'the importance of keeping these principles at the forefront, as the Commission further developed its detailed positions, and to ensure that the implementation of the proposals does not proceed at the pace of the slowest Member State but instead that sector-specific regulation is replaced by general competition legislation on the various markets (geographical and services), as competition arises. It was stressed that this could become more of a problem with the enlargement of the EU and that the enlargement can also be expected to make it necessary to provide appropriate support to some new entrants'.

3.2.3. The Committee also laid stress on 'the global character of the converging communication markets. The proposed European regulatory framework must not be seen in isolation. It is essential that the competitiveness of European players is maintained and allowed to thrive. There can be a risk that regional regulation could lead to the European regional market becoming isolated from the global market, especially if extensive regulation is allowed to curb the operation of market forces. The Committee therefore urged the Commission to take into account the impact of any measures on the global competitiveness of European industry'.

3.3. The ESC welcomes the fact that the Commission has maintained the general outline of the proposed regulatory framework after the extensive public consultation on the 1999 Communications Review.

3.3.1. The Committee considers the principle of increasingly flexible regulation with a limited number of public safeguards, which underpins the Directives as proposed at present, to be both appropriate and timely. It is also pleased to see that the new framework aims at predictability and greater consistency with horizontal EU legislation on competition and consumer protection.

3.4. The Committee wishes to stress the importance of a speedy realignment to horizontal principles. For institutional and practical reasons, it would not seem possible to shorten the timetable proposed by the Commission further. However, in relation to actual technology and market developments, it could prove to be too slow, and could blunt the competitive edge which the European electronic communications sector displays today.

3.5. The Committee supports both the Commission's aim to introduce a common regulatory framework for electronic communications networks and communications services in the EU, and the main thrust of the proposed regulatory framework. However, it is not able to endorse certain details of some of the proposals.

3.6. A number of points are worded in a way which can be considered contradictory and not fully in line with the general guidelines. The Committee deals with these points in its opinions on the respective proposals for directives.

4. The framework directive (FD)

4.1. The ESC welcomes the fact that the FD aims to address only cases where effective competition does not operate effectively on a relevant market. It is also pleased that a relevant market is to be defined in the same way as in EU competition rules. There is long experience of this practice and the outcome can be predicted with reasonable certainty.

4.2. Whether the outcome of the relevant market analysis motivates ex-ante, rather than the traditional ex-post, competition regulation is a matter of debate within Member States. Many take the view that ex-ante regulation should only be applied to companies deriving their dominant position on the market by virtue of their financing of investment within a

monopoly regime. That also seems to be in line with the Commission's arguments in the proposed directive, as expressed in recital (20). In the Committee's view, this should have been expressed more explicitly in the directive itself.

4.3. It could also be argued that the reverse procedure for regulatory intervention — i.e. temporarily or permanently suspending the application of legislation ("forbearance") when its objectives have been achieved — should be spelled out more clearly. To both end-users and to providers it is at least equally important that the regulation should cease to apply once its objectives have been achieved. Implementation must therefore provide scope for stability, so that the regulation is not immediately reverted to as soon as a — perhaps temporary — deviation from the declared objectives is noted.

4.4. It is proposed that existing obligations for undertakings with significant market power (SMP) should be transposed into a new regime. In the Committee's view it must then be clearly stated that existing legislation should only be applied until such time as the first analysis of relevant markets is carried out in accordance with the new directive. This should have been clearly stated in the proposed Framework Directive.

4.5. Predictability is a key issue. Reliance on competition rules tends to promote predictability, but experience so far shows that application of a common regulatory framework still can lead to very different interpretations in Member States, as demonstrated by SMP notification on the mobile communications markets. While telephony was mostly a domestic service, new IT services are rapidly going cross-border, requiring more harmonised interpretation than the present regime has provided.

4.6. The ESC therefore supports the principle of listing acceptable NRA interventions and the mandatory notification of proposed regulatory action in Member States according to Article 6. It could however be questioned whether full consultation of all Member States is compatible in practice with the necessary speed of IT regulation. The problem could be significantly exacerbated by EU enlargement, which will accentuate the discrepancies between the various Member States' communications environments. Further thought should therefore be given as to whether the normal procedure for harmonising regulatory measures can be framed in such a way that a given measure only has to be notified to the Commission.

4.7. The Committee is also concerned that for instance, under Article 14, the Commission is formally obliged to consult with NRAs only. In its view, it is necessary that consumers and industry too should be consulted in a manner compatible with the short time limits needed. The Committee is concerned about Article 14(6) of the Directive, under which any decision taken by a national regulatory authority can be amended or annulled by the Commission.

4.8. Under the framework directive the Commission has the right — at least temporarily — to prevent the implementation of measures decided by the national authorities on the strength of the articles mentioned above, and with regard to radio-spectrum administration. This encroachment on Member State discretionary powers is motivated by the important role market definitions and interconnection play in the smooth operation of the single market. In accordance with the subsidiarity principle, the Community level is the lowest possible level for these decisions. The Article must, of course, be implemented fairly, and in accordance with the proportionality principle. The limitation must not be extended to regulatory measures other than those mentioned in the Article.

4.8.1. If the allocation of spectrum licenses under Article 8(6) is to be governed by the Article 6 procedure, a more precise definition is needed of which part of this procedure has such cross-border implications that it is not handled better domestically. Most frequency licenses would seem to be for domestic use and not to have major implications for the EU in general. A tried and tested international procedure based on the ITU radio regulations exists to provide a practical solution to any disturbance problems in border areas. Hence the Article 6 procedure should be limited to key areas for IT competition as a whole, such as GSM and UMTS.

4.9. The wording of Article 4 on the right of appeal against an NRA decision seems not to be perfectly clear in one important respect. Article 4(1) states, *inter alia*, that pending the outcome of an appeal, 'the decision of the national regulatory authority shall stand'. It should be made clear that this must not affect a stakeholder's ability to get enforcement of an NRA measure postponed while the proceedings are in progress — if such an inhibition procedure is available in a Member State.

4.10. The Committee finds the Commission's ambition of technological neutrality commendable, but wishes to point out that it is not simple to achieve in the short term.

4.10.1. Technical neutrality must not be interpreted as the carrying forward of regulatory measures devised for traditional services into new areas. The Committee believes that the proposed interconnection regulation provides an example of how this can lead to error.

4.10.2. Interconnection regulations take their starting point in telephony, which is a standardised transmission service with standardised user terminals. In this case interconnection is easily defined; everyone must have access to a telephone service, regardless of what network they are connected to. With the development of new telephony-based services this means that interconnection covers e.g. fax services.

4.10.3. Internet Protocol (IP) based services, especially the Internet itself, are in no way uniform, narrowly defined and closed to customer choice to the same extent as telephony. Depending on their mode of use customers will choose different access to IP services. A customer can have a UMTS telephone or a PC to communicate on the net. He/she can be connected up to the telephone network by modem, or have a broadband connection with a 10-20 times higher capacity. To pay for expensive broadband, for example, is only justifiable if customers are also prepared to pay for the downloading of services like moving pictures. A tenth of the necessary capacity for moving pictures will accommodate 'normal surfing'.

4.10.4. In the IP world, telephony networks therefore do not all have that basic similarity which underpins the traditional notion of interconnection. It is not in fact possible for all electronic communications networks to carry all IP services, since there can be considerable differences in capacity. Networks with lower capacity would quite simply crash if interconnection was mandatory. The alternative would be costly upgrading.

4.10.5. The Committee is of the opinion that a lack of interconnection rights would hardly be a problem. In most Member States, different companies are currently vying to roll out their own broadband infrastructure. They therefore have strong economic reasons to be transparent, so as to attract as much traffic as possible — and transparency is also an Internet-user requirement. Rather than stemming the flow of electronic information, there would seem to be more of a risk of some new infrastructures engaging in unfair competition by relying on remaining specific rights in areas such as electricity distribution and physical communication.

4.10.6. Clearly, new rapidly expanding markets such as that for broadband services can at times betray real competitive shortcomings which, from a narrow, formal, statistical standpoint might seem to warrant SMP status. The Committee believes that if this argument were then used to defend a cost-based fee structure, it could be a disincentive to investment

and reduce competitiveness in the long term. It is important to remember that these new market climates differ radically from the traditional backdrop for 'interconnection' — i.e. conventional fixed telephony — where most of the investment in the network has already been made, and the purpose of regulation is the optimum exploitation of historical assets.

Brussels, 24 January 2001.

The President
of the Economic and Social Committee
 Göke FRERICHS

Opinion of the Economic and Social Committee on the 'Proposal for a Decision of the European Parliament and of the Council on a regulatory framework for radio spectrum policy in the European Community'

(2001/C 123/14)

On 4 October 2000 the Council decided to consult the Economic and Social Committee, under Article 95 of the Treaty establishing the European Community, on the above-mentioned proposal.

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 9 January 2001. The rapporteur was Mr Hernández Bataller.

At its 378th plenary session of 24 and 25 January 2001 (meeting of 24 January 2001), the Economic and Social Committee adopted the following opinion by 80 votes to one with one abstention.

1. Introduction

1.1. The Community institutions have concerned themselves with this question for a number of reasons, including the intensive use of radio spectrum, the complex decision-making process for its allocation and assignment, huge global expansion generated by the technological convergence of various services, and economic trends, as well as the need to apply internal market principles and protect Community interests at world level.

1.2. The Green Paper on Radio Spectrum Policy in the context of European Community policies such as telecommunications, broadcasting, transport, and R&D⁽¹⁾ addressed five key issues:

- strategic planning of the use of radio spectrum;
- harmonisation of radio spectrum allocation;
- radio spectrum assignment and licensing;
- radio equipment and standards; and
- the institutional framework for radio spectrum coordination.

1.3. The Green Paper was welcomed by the Economic and Social Committee, which considered radio spectrum to be the backbone for a very wide range of important industrial sectors, and argued that in addition to technical grounds, future decisions needed to reflect the economic, social and political importance of spectrum usage.

⁽¹⁾ COM(1998) 596 final; ESC opinion in OJ C 169, 16.6.1999.