

**Intellect Response to Public
Consultation on the Review of EU
Regulatory Framework for
Electronic Communications
Networks and Services**

**Launched by the European
Commission**

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A. General comments

Intellect welcomes the Commission's proposals for review of the 2003 Directives – but notes that in some areas there is a lack of detail on the proposed changes which makes it very difficult to provide focussed comments. It also notes that the world is fast changing with the emergence of dynamic and fast moving markets for new services. The traditional telecommunications market needs continuing governance but the Commission should recognise that the transition to convergence will result in far reaching changes. The competition between different digital systems is likely to render unhelpful the traditional approach of imposing the structure in the industry which was intended to address the competition problems of the end of the last century as well as imposing attributes of previous generations of technology on the new services, which emerge during the period during which the framework resulting from this review is likely to be in place. Prevention of abuse of SMP and consumer protection are important, but should not be used to limit the services offered to those offered in the past.

In general, the 2003 Framework, when implemented properly, tends to work well. It provides a mechanism that allows NRAs to withdraw from regulation where a market is found to be effectively competitive and to regulate additional markets if necessary.

There is clearly scope for some fine-tuning, particularly in harmonisation of remedies to ensure competitive business-to-business cross-border services, but major changes are not needed at this stage. There are a number of areas in the Commission's consultation where the case even for fine-tuning has not been made.

Given the relatively short period of operation of the current framework, the inchoate nature of competition in some markets and Member States, and the variation in effectiveness of competition law across the EU, it would be particularly inappropriate at this time to consider regulatory moratoria or deadlines for the withdrawal of ex-ante regulation.

B. Position on proposed changes

1. New approach to spectrum management

1.1 Introduce freedom to use any technology in a spectrum band (technology neutrality)

In general Intellect supports the introduction of more flexibility and market based mechanisms in spectrum management. It also supports the Commission's proposal to make technology and service neutrality the default policy, while maintaining the exception, only where fully justified, to technology or service neutrality. This technology and service neutrality is not inconsistent with the benefits of harmonisation of spectrum bands across the EU. The need to prevent undue interference between networks and services is an important consideration and in this respect Intellect welcomes work to address this within the WAPEC initiatives. It is noted that the Commission is taking into account the need to ensure that there is fair competition between new and incumbent spectrum users.

It will also be important for all Member States to implement the new framework in a prompt and co-ordinated way. Radio waves do not stop at borders so it is important that the benefits to be obtained from these flexibilities are not limited by the implementation pace of the slowest Member States.

1.2 Introduce freedom to use spectrum to offer any electronic communications service (service neutrality)

See comments above.

1.3 Coordinated introduction of trading in rights of use

Intellect supports European Commission proposals for the joint identification of tradable bands by Member States and the Commission, so that tradability under common conditions can be applied throughout the EU. Tradability should be the default assumption for all bands – but there should be room for exemptions in special cases, so the benefits to be obtained from this tradability are not limited by the implementation pace of the slowest Member States.

Intellect agrees that where spectrum might be allocated to a specific service or technology then this should involve appropriate public consultation and be based on objective, transparent, proportionate and non-discriminatory criteria.

1.4 Establish transparent and participative procedures for allocation

See above

1.5 Introduce a procedure for coordinated spectrum management at EU level (comments related to specific options identified in the Impact Assessment can also be made in section C.2. "Radio spectrum" of this template)

Intellect does not believe it is necessary to introduce a new procedure for coordination of spectrum management at EU level, as systems already established (RSCOM) are sufficient. However the procedure is not working especially well and we would welcome a consultation to see how it could be improved.

2. Streamlining market reviews

2.1 Relaxing notification requirements for the Article 7 procedures

Intellect appreciates the advantages inherent in the proposals for simplified market review notifications in a number of circumstances – but would emphasise the requirement for at least one full review and notification to have been made before the streamlined process is invoked. It is not entirely clear whether the market review process itself might be less thorough in these circumstances and the Commission could usefully issue some additional guidance on this. Intellect believes that normal market analysis will be necessary before a NRA can conclude that a market remains competitive or that no, or minimal, change to remedies is needed.

The Commission also proposes to tidy up a number of procedural points relating to market reviews by adopting a Regulation. Intellect generally welcomes this approach – particularly the imposition of a precise and legally binding timetable for market analyses, the assignment or removal of remedies, and re-notification after a veto.

2.2 Rationalising the market review procedures in a single instrument

See comments above.

2.3 Introduce minimum standard for notifications

2.4 Require re-notifications after vetoes within a given deadline

See comments above.

3. Consolidating the internal market

3.1 Commission to review the timeliness and effectiveness of remedies

The Commission notes that in the past it has had to comment on remedies that solved only part of the competition problem identified, appeared to be inadequate, or might have produced effective results too late. It also notes that NRAs have not always applied similar sets of remedies to similar market failures. Intellect agrees that such differences hinder the creation of pan-European players and that greater consistency in the application of remedies is needed.

There are at least two approaches to this problem. NRAs advocate a greater role for the ERG, whilst the Commission proposes to extend its veto powers under the market review procedures to include remedies. These are of course not mutually exclusive – if the ERG can ensure greater harmonisation, then the Commission veto will only be needed as a form of “backstop” encouragement to get the

remedies recipe right first time. Absent a veto there will be little leverage to persuade an NRA to change its approach – even if it chooses to depart significantly from ERG guidance or EU norms.

Therefore Intellect believe that the Commission should be more active with regards to enforcing a common European approach, especially regarding the uniform implementation and enforcement of the regulatory framework as well as providing guidance and support to national regulators with regards to the definition of markets; the application of remedies and the way to deal with new technologies and services.

As a long term governance model, Intellect believes that the “European Central Bank model” could have its merits, where NRAs would remain independent working together through ERG, but would have to act in accordance with the guidelines and instructions issued by the European regulator. Prerequisites for a successful functioning of this model would be a balance between coordination, expediency, bureaucracy and subsidiarity and a clear division of competencies between EU regulator and NRA’s. In addition there should be adequate market knowledge of the European regulator.

However, for the time being, maintaining the current decentralized model and strengthening the Commission’s role to achieve internal market objectives in selected areas appear to be the most realistic option. Strengthening the Commission’s role should not lead to more bureaucracy and more decision making layers that would slow down processes and increase costs for industry players. From an industry perspective, transparency throughout the policy-making and implementation process is essential, as well as opportunities for involvement by industry.

3.2 Making the appeals mechanism more effective

The Commission notes that some countries “...have systems that take years to reach a final outcome and systematically suspend regulatory decisions during the appeal process”. Accordingly it proposes to lay down legal criteria, based on European case law, that national courts must use in deciding whether to suspend NRA decisions on appeal. In effect, NRA decisions would only be suspended where irreparable harm to the appellant can be shown. Intellect welcomes this approach but regrets that the Commission has not also decided to impose maximum time limits for appeals or to limit the number of instances (levels) of appeal.

The Commission’s proposal to monitor the appeal processes in Member States may provide evidence for further measures in the next revision of the Framework.

3.3 Common approach to authorisation of services with pan-European or internal market dimension

Regulation should recognise pan-European services (including wholesale services) and ideally especially in the case of roaming global services. Establishing pan-European services should not be more difficult than establishing national services. To this end, a more uniform authorisation process across member states could reduce costs for service providers and could stimulate market entry.

3.4 Amend Article 5 of the Access Directive: non-Significant Market Power access and interconnection

Intellect agrees with the Commission’s intention to scrutinise obligations imposed on non-SMP undertakings under Art 5(1).

3.5 Introduce a procedure for Member States to agree common set requirements related to networks or services

The Commission asserts, though it adduces no evidence, that stakeholders active in the standardisation bodies may not reach consensus on developing standards for regulatory purposes. To address this problem it proposes “to establish a mechanism whereby a common set of requirements for certain features or certain forms of interoperability needed to support regulation in critical areas could be agreed at EU level. These common requirements would then be passed to European standards bodies for development of the appropriate standards.”

It is not obvious there is a problem that needs to be addressed here. Intellect believes that the existing mechanisms and the work of the SDOs and their processes are satisfactory. Intellect would agree there are on occasion delays but it is hard to say without a better understanding of how alternative methods might be employed, how the expected application of such powers would be used and what assumptions are being made as to the intended scope or definition of EC&S, whether any benefits would be seen.

3.6 Broadening the scope of technical implementing measures taken by the Commission on numbering aspects

The Commission maintains that the current legal provisions, which only allow it to take technical implementing measures in the field of numbering where there is a need for harmonisation of numbering resources to support the development of pan-European services, represent a limitation which hinders the development of a common EU approach to the use of certain numbers which might facilitate cross-border business and the movement of citizens in the EU. Accordingly the Commission proposes to broaden the scope of technical implementing measures it can adopt, assisted by a comitology procedure.

The Commission has neither cited any specific problems nor made any specific proposals so Intellect finds it difficult to comment on this issue. The Commission states that national approaches stand in the way of a common approach to certain specific numbers and the associated services within the EU – yet the Commission fails to state what services or numbers it considers significant here. There is also a lack of clarity about what is meant by “the same number” in the context of access to services. In general, tariff arrangements should evolve under normal commercial arrangements rather than be imposed by the Commission as implied by the consultation.

In general, Intellect members tend to the view that existing arrangements for numbering are perfectly adequate and an extra layer of EU involvement is not required.

3.7 Amend Article 28 of the Universal Service Directive on non-geographic numbers

The Commission proposes to clarify that end-users have a right to access services using non-geographic numbers, including Information Society services, across borders. Clearly this raises substantial issues about the need for multiple cross-border commercial agreements on interconnection and charging, as well as concerns about the right of free-phone number holders (who pay the communications bills and are in many senses the “end-users”) to determine whether they are willing to handle calls from other countries. There are also issues about different national approaches to adult services, political speech, consumer protection, etc.

Intellect is not convinced that this is a feasible area to tackle from a regulatory viewpoint and it would be better left to the market and NRAs to test various solutions.

3.8 Improving enforcement mechanisms under the framework

Spam is a complex area where definitions of spam and spammers may not be universally agreed and where there is a delicate balance to be found between privacy and spam countermeasures. It is not clear that a right of action against spammers would be helpful and it could conceivably create additional problems. There is of course a key requirement to respect the immunity of service providers as per the e-commerce directive. There is an argument for some test of intent to flout rules before imposing a fine.

3.9 Strengthen the obligation on Member States to review and justify ‘must carry’ rules

Intellect suggests a short review be carried out.

3.10 Adapting the regulatory framework to cover telecommunications terminal equipment, ensuring constancy with the R&TTE Directive

Intellect is concerned about the proposal to relax the obligation in the RTTE Directive for network operators to publish their network-terminal interface specifications (in order to encourage manufacturers to co-operate with network operators on innovative products). Under the current obligation there can be a problem if operators do not own the Intellectual Property (IP) relating to a proprietary network interface for a new product and thus cannot introduce that interface unless the IP owner agrees to publication. It is possible that the Commission can develop an exclusion based on emerging markets or small volumes – but it is important that such forbearance be applicable to all network operators (and conversely that publication obligations where applicable are enforced on all operators). It is difficult to see how such forbearance could be limited to eAccessibility.

The Commission’s proposal to review the definition of NTP is unclear.

4. Strengthening Consumer Protection and User Rights

4.1 Improve the transparency and publication of information for end-users

The Commission is seeking changes to a) give NRAs powers to require from operators better tariff transparency (with the possibility to agree technical implementing measures at EU level), b) ensure that third parties have the right to use without charge or hindrance publicly available tariffs...for the purpose of ...comparative price guides, and c) empower NRAs to make price guides available where the market has not provided them. The Commission also asserts that technical feasibility is no longer an obstacle for provision of caller location information (even for VoIP by 2010) and proposes to specify that caller location information be “pushed” to emergency services with the transmission cost borne by the network operator.

The Commission does not cite any evidence that tariff transparency is a problem requiring action at EU level and Intellect is unclear what the Commission means by “technical implementing measures” in this context. In consequence, Intellect suggests that tariff transparency is not an issue which needs additional Commission powers. Intellect does however agree that comparative price guides are desirable and measures that encourage their local production are desirable.

On caller location detection and signalling, the Commission may be over-optimistic in assuming that the VoIP problems will all be solved by 2010. As far as push versus pull is concerned, the important point is that the information be available when the call is answered – and the details should be left to national authorities. The case for mandated “push” is a weak one as many emergency services are not equipped to use this and/or find the “pull” approach perfectly adequate. There are also complications associated with location information from VoIP and mobile systems which make a pull approach more sensible.

4.2 Strengthen the obligation for network operators to pass caller location information to emergency authorities

See concerns detailed in last paragraph above.

4.3 Separate the provision of access to public communications networks from the provision of telephone services

Intellect agrees that it would be sensible to introduce separate obligations on providers of access infrastructure and providers of services but notes that the Commission has not been at all specific about its intentions – particularly with respect to the updating of definitions of PATS and NTP.

4.4 Remove provisions on universal directories and directory inquiry services from the scope of universal service

Intellect supports the proposals to remove the provision of directories and directory enquiry services from the scope of universal service.

4.5 Adapt ‘telephone service’ specific’ provisions to technology and market developments

4.6 Update the provisions on number portability to ensure transfer of all relevant data

The Commission also wishes to “adapt the concept of number portability” to include identifiers other than traditional telephone numbers. It is not clear what other identifiers the Commission has in mind but the issues around portability of IP or e-mail addresses are significant and it may be very unwise to introduce regulation at this stage. We would suggest deferring this issue at present

Concerning central storage of personal directory and profile information – while this may represent a deterrent to switching between suppliers, this is an emerging market where trends are highly unclear and there seems no compelling evidence that regulation (other than a requirement for clarity of information to consumers) is needed.

4.7 Ensure that regulators can impose minimum quality of service requirements

The Commission notes that NRAs already have powers to impose obligations on SMP and non-SMP operators to address degradation of transmission so it is not clear why a specific additional power is needed. As NGNs are an evolving area we suggest it would be inappropriate to attempt to regulate them in this way.

4.8 Strengthen the right of disabled users to access to emergency services via the number ‘112’

It is not clear what measures the Commission is proposing to strengthen the right of disabled users to call the emergency services via 112, so it is difficult to comment. However it is worth noting that there are a number of very serious issues limiting the use of text terminals direct to 112 call centres. For this to be feasible, ALL 112 centres AND associated emergency authorities to which calls might be forwarded would need to be equipped to receive calls from ALL types of text terminal in the market. Furthermore, there would need to be new procedures for operators to be able to switch to text reception when receiving what appeared to be a silent call, and switch back to voice if necessary. there would also need to be procedures for the possible use of voice in one or both directions to supplement the text.

Taking all these factors into consideration, an emergency service based on a separate dedicated number for text phones seems a far more proportionate and safe solution than routing all emergency calls via 112.

4.9 Introduce a Community mechanism to address eAccessibility issues

Intellect understands the Commission’s wish for a mechanism to address e-accessibility issues but feels that there is still a lack of clarity in the Commission’s explanation of how the terminal and network regulatory environments will be co-ordinated. The Commission also needs to have realistic

expectations of the limited ability of trade associations to represent and/or commit their members in this complex area.

5. Improving Security

5.1 Oblige operators to take security measures, and grant powers for NRAs to determine and monitor technical implementation

Intellect is concerned that without citing evidence of problems or demonstrating the proportionality of its approach, the Commission proposes a significant expansion of EU regulation in this area – coupled with an ongoing comitology process to amend or extend it.

5.2 Require notification of security breaches by network operators and ISPs

The proposed requirement to notify users and NRAs of security breaches raises a number of concerns about the definition of a breach, the type of information to be communicated, and the cost/benefit ratio of doing this for various types of problem. It is far from clear that this requires EU-level action.

5.3 Future-proof network integrity requirements

6. Better regulation: Removing outdated provisions

6.1 Delete the minimum set of leased lines

Intellect welcomes the deletion of the minimum set of leased lines – but notes that the argument for doing so does not lessen the need for regulation to ensure greater competition in leased lines markets across Europe. Intellect believes that wholesale private network regulation is not yet sufficiently effective in many member states and there is a particular need for technologically neutral market analyses and remedies unconstrained by the contents of the minimum set.

6.2 Withdrawal of Article 27(2) of the Universal Service Directive on ETNS

Intellect welcomes the removal of Article 27(2) of the USD on ETNS.

6.3 Repeal of Regulation 2887/2000 on unbundled access to the local loop

6.4(a) Delete Annex I of the Framework Directive

6.4(b) Delete Article 27 of the Framework Directive

6.4(c) Delete Article 5(4) of the Access and Interconnection Directive

C. Comments to the Impact Assessment Report

1. Investment and growth

Intellect believes that the current regulatory framework where it has been implemented has had a positive effect on investment and innovation in the EU. But given the patchy and recent implementation of the framework by the different member states, we think it is too early to quantify the framework as a key driver for investment and innovation. There is also a strong requirement to hasten the full implementation of the existing framework in a number of the member states. We are of the opinion that the current regulatory model is basically sound, but strongly feel that the effectiveness of the framework as a tool to strengthen incentives for investment in infrastructure should be enhanced by limiting ex ante regulation and clarifying the definition of emerging markets. The concept of "emerging markets" could be an important tool to stimulate investment in new technologies and services but without further clarification, there is a risk of rendering this concept into a theoretical model without practical value.

2. Radio Spectrum

3. Regulatory models and the Internal market

4. Market review procedures**5. Consumer protection and universal service**

The Commission's proposal to update the Universal Service Directive via a committee procedure gives Intellect members some concerns about the transparency and accountability of such a process if applied to fundamental aspects of the Directive which would be better handled through a formal revision (co-decision) process. The Commission should make clear that the comitology approach will be limited to minor modifications dictated by technological change.

6. Security

7. Other areas