

What Yankee Lawyers Need to Know About European Telecommunications

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On June 18, 2002, the European Union (EU) put the finishing touches on a new regulatory framework that will revolutionize telecommunications regulation throughout Europe. As a result of the EU action, each of the fifteen member states must reconfigure its national laws on telecommunications, broadcasting, and data privacy. The action is similar in impact to the landmark Telecommunications Act of 1996 but is in some ways much broader. In addition to covering traditional communications issues, the framework covers unsolicited commercial e-mail, cookies, digital broadcasting, and electronic programming guides.

The new framework caps a decade-long shift in the EU's approach to regulating electronic communications. Historically, most regulation was national, sector-specific, and focused on monopolies that were previously state-owned. But the force of three dynamic trends pushed the EU into rewiring its fundamental approach:

- *Technological convergence.* In an era in which video programming and voice communications are transmitted over the Internet, telephone conversations travel over cable television infrastructure, and mobile phones surf the Web, many of the boundaries among the various sectors have been eliminated. The traditional regulation of each sector was not able to keep up with technology. The new framework is designed to regulate all electronic communications platforms in a consistent manner.
- *Spectacular growth of the knowl-*

edge-based economy. Electronic communications services are increasingly viewed as strategically vital infrastructure that allows EU companies and workers to compete in rapid growth and high-margin industries. Because it recognizes the shift from a manufacturing and service economy to a knowledge-based one, the EU has issued new directives on e-commerce and copyright,¹ as well as proposals to reform the telecommunications infrastructure.

- *Competitive threat.* The EU peered across the ocean and saw the U.S. electronic communications market producing greater innovation and lower-cost services for customers as the result of deregulation. Closer to home, some of its own member states, such as the United Kingdom, started to move ahead with liberalized markets, reaping the benefits of lower prices and greater diversity.

These dynamics ultimately convinced the EU to compel member states to relinquish their electronic communications services monopolies, open access to the local loop for new competitors, reduce licensing and administrative costs, and remove other barriers to new entrants.

The New Framework

The framework is a coordinated collection of four directives, a European Community regulation, and a European Community decision:

- *Framework Directive.* This directive defines the boundaries of the new framework's scope and spells out broad policy objectives that justify action by National Regulatory Agencies (NRAs). It also transfers more responsibility for EU policymaking and rulemaking to the European Commission and away from member states and the member-dominated European Parliament and Council.
- *Access and Interconnection Directive.* This directive encourages and sometimes mandates competition and network integration by re-

moving obstacles to network access and interconnection.

- *Authorizations for Electronic Communications Networks and Services Directive.* In a single stroke, this directive eliminates virtually all communications licenses. Nearly all electronic communications services may be subject only to general authorizations, comparable to the U.S. class license, and limited fees. Qualified service providers may start service to the public, connect with other public providers, seek rights-of-way, and participate in universal service obligations without prior government approval. Individual licensing requirements are permitted only for radio frequencies and telephone numbers.
- *Universal Service and Users' Rights Directive.* As its name implies, this directive seeks to ensure that all EU residents enjoy access to a basic set of electronic communications services and protections.
- *Data Protection Directive.* This directive expands the scope of prior data protection² to include all electronic communications services. It also provides additional notice and consent protections covering use of traffic and location data, inclusion in directories, the blocking of call forwarding, spam, and cookies.
- *Local Loop Unbundling Regulation.*³ This regulation forces providers with significant market power (SMP) to offer unbundled access to the local loop and related facilities to new entrants, much as the U.S. 1996 Telecommunications Act opened up local telephone markets to new competitors.
- *Radio Spectrum Decision.*⁴ This decision still permits individual countries to conduct rulemaking for radio spectrum assignments, but requires EU-wide coordination of spectrum use. It calls for the formation of an EU-wide radio spectrum committee to advise the Commission and also requires member states to publish national radio frequency allocation

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tables and information on rights, conditions, procedures, and fees.

The new framework splits the electronic communications infrastructure into three parts: networks, services, and associated facilities. Essentially, the definition of networks encompasses all physical infrastructure that carries electronic communications. Covered services include “the conveyance of signals on electronic communications networks,” but exclude any services that control content.⁵ “Associated facilities” is a more ambiguous concept, consisting of any facilities “associated with” a network or

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service or that “enable and/or support the provision of services.”⁶

The new framework opens up European telecommunications markets. It guarantees the rights of providers to negotiate interconnection, access, and interoperability of their services without government interference. It permits NRAs to mandate these arrangements in certain cases and forces SMPs to offer unbundled access to local loops and related facilities. Furthermore, it empowers NRAs to require that SMPs offer cost-based access to a variety of unbundled network elements, software, and support services. It provides a new expedited dispute resolution mechanism if certain private negotiations among providers fall apart. It simplifies procedures for granting authorizations that permit companies to provide telecommunications service. It sets new rules for SMP designation that may result in heavier regulation of the big players, and it includes an assortment of other provisions that seek to promote competition while safeguarding the interests of customers.

Who’s Calling, Please?

The new framework guarantees the rights of competitive telecommunications providers to negotiate interconnection with other providers and to demand access to network elements controlled

by SMPs. The Access Directive specifically grants public telecommunications providers the right to negotiate the physical and logical linking of their networks with those of other providers. Furthermore, to the extent necessary to ensure end-to-end connectivity, NRAs may require providers that control access to end-users to interconnect their networks with other providers. Should the parties fail to reach an interconnection agreement, either can request that the NRA intervene and impose a commercially fair interconnection agreement on an expedited basis.

The Local Loop

Regulation pushes access to SMP networks a step further. Previously, competitors could obtain access to certain parts of SMP networks, such as leased line transmission capacity and telephony services, but the new regulation also gives them the right to demand col-

location rights and support services equivalent to the SMP’s own. The SMP may refuse access only if: (1) technically and commercially viable alternatives to unbundled access exist, or (2) the requested access is “inappropriate” in relation to the resources available to meet the request.⁷ It must also justify any refusals on a line-by-line basis.

When NRAs deem it necessary to level competition, they may require SMPs to give third parties access to specified network elements in addition to the local loop, offer specified services on a wholesale basis to third parties for resale, provide services needed to ensure interoperability of end-to-end services for users, make collocation available, and provide operational support or software systems.

New entrants will also find it easier to compete for wireline SMP customers. The new framework guarantees telephone service providers the right to offer services directly to customers of wireline SMPs on either a preselection or call-by-call basis.⁸ NRAs have the option, but not the obligation, to require SMP cellular phone providers to do the same.

Hang Up, Please: Goodbye to Licensing

The Authorization Directive removes the single greatest administrative obsta-

cle to the EU communications market: licensing. It forbids member states from imposing any licensing requirements on the provision of telecommunications services, except for radio frequencies and telephone numbers. For example, the United Kingdom plans to discard more than 400 types of communications licenses, replacing them with a single general authorization. Furthermore, although a new service provider may be required to notify its NRA, it does not have to wait for approval before starting service.⁹ Thus, under most circumstances, a new entrant may immediately begin offering service and exercising its rights under the new framework (e.g., interconnection, competing for universal service contracts, etc.).

The only exceptions concern radio frequencies and telephone numbers. In the case of radio spectrum licensing, NRAs must, whenever possible, minimize interference through general restrictions, not by granting individual rights of spectrum use. Moreover, where individual rights of use are necessary for either radio spectrum or numbering, they must be made available in “open, transparent and non-discriminatory procedures,”¹⁰ subject only to specific, objectively justified conditions.

Untangling Crossed Wires

Under the new framework, any telecommunications provider in dispute with another provider over its new framework obligations has the right to request that the NRA issue a binding decision “in the shortest possible time frame,” meaning almost always within four months.¹¹ The NRA must follow the policy objectives set forth in the Framework Directive. This right is without prejudice to the party’s right to seek remedy in a judicial proceeding, and for obvious reasons should be very useful to new players in European telecommunications.

The Last Frontier?

Perhaps the greatest obstacle to the EU’s vision of a deregulated and competitive future is the legacy of its state-owned monopolies. In many EU member states, existing providers retain key strategic assets, such as control of last-mile connectivity, ownership of the local switch, an installed customer base, broad offerings capable of providing (and concealing) predatory cross-subsidization, and long-standing relation-

ships with their national regulators. Because of the inherent advantages held by SMPs, the EU believed that without greater latitude and flexibility to protect competition, deregulation could actually give SMP providers greater freedom to obstruct a free and open marketplace.

To prevent this, the Framework Directive broadens the requirements for SMP designation and opens the door to more intensive regulation of their activities. Essentially, a provider will be designated an SMP if it, either individually or jointly with others, is in a position of economic strength that allows it to behave independently of competitors and customers to an appreciable extent¹². The definition of joint-SMP designation includes not only those companies that enjoy a dominant position through structural links, but also those operating in a market that is conducive to coordinated anticompetitive effects, such as price signaling.

On June 17, 2002, the Commission issued its draft recommendation, which identifies three basic retail markets and nine basic wholesale markets, for SMP designation.¹³ Each of these markets may be segmented for purposes of SMP analyses on the basis of relevant competitive characteristics, many of which the recommendation discusses.

Once the Commission has designated the relevant markets, NRAs will determine whether their domestic markets are, in fact, competitive. When relevant markets cross borders, NRAs are to cooperate in their analyses. Only upon a finding that a company is an SMP may an NRA impose additional obligations, such as unbundled network access and universal service.

Universal Service: Please Deposit 25¢

Member states must make available a single narrowband network connection to its public telephone network and service, from at least one operator at a reasonable price, to all end-users through any technical means. The available connection must allow for local and international calls, facsimile service, and data communications at rates sufficient to permit functional Internet access.¹⁴ Users will also retain the right to keep their own numbers when they change telephone providers, a fact that should lower switching costs and increase competition.¹⁵ Providers are not required to have a national footprint or to offer a full bundle of services to com-

pete for universal service contracts. Member states are free to designate multiple providers to supply universal service so long as the selection process is open to all providers.¹⁶

The Universal Service Directive gives NRAs the power to require public telephone network providers to offer tone dialing and caller ID, subject to technical and economic feasibility. It also permits member states to make additional services mandatory, but forbids them from requiring providers to subsidize these services.

New Facilities and Rights of Way

The Framework Directive requires that NRAs, in considering applications to install facilities on public rights of way, act in a transparent, nondiscriminatory, and expeditious fashion. This right is supported by a mechanism that permits providers to appeal to a body independent of the regulator. The end result should be faster approval for network build-out involving public rights of way.

Data Privacy

Data protection and privacy have been at the forefront of the EU's electronic communications concerns. Several European countries enacted data privacy and protection legislation within the past thirty years, but the differences among these laws obstructed the flow of information across national borders and posed an obstacle to the EU's goal of economic integration. In response, the EU tried to coordinate data protection through a series of measures, including, most notably, Directive 95/46/EC on the protection of individuals with regard to the processing of personal data, and Directive 97/66/EC concerning the processing of personal data and the protection of privacy in the telecommunications sector.

The proposed Data Directive seeks to keep pace with new technological developments, most importantly, the Internet, and to rebalance data protection rules. Key provisions are outlined in the side bar on page 20.

The 21st Century Equivalent of Ma Bell

The Universal Service Directive gives customers of public telephone networks

the right to contract with their providers for services subject to minimum terms. At the very least, the contract must specify the quantity and quality of available services, what compensation is available in case of service failure, the types of maintenance offered, particulars of prices and tariffs, and, perhaps most important to the end user, the availability of dispute resolution procedures. Member states must create "transparent, simple and inexpensive out-of-court" procedures for resolving disputes between customers and providers.

Broadcast Provisions

Although fully subject to the general provisions of the new framework, broadcasting is the focus of several specific regulations resulting from the EU's concern with the one-time changeover from analog to digital broadcasting. The ultimate goal is for end users to enjoy guaranteed interoperability of all digital broadcast equipment and services that

Data protection and privacy have been at the forefront of the EU's electronic communications concerns.

they purchase in the EU. The new framework requires minimum uniform standards; encourages open application program interfaces (APIs); and prevents equipment makers and network/service providers from creating bottlenecks.¹⁸ For the most part, these measures are carried forward from the TV Standards Directive (95/47/EC). But some changes have been made and, more important, the Commission has signaled its interest in digital broadcast and interactive services.¹⁹

Alphabet Soup: APIs/EPGs

The new framework regulates APIs and electronic programming guides (EPGs) in two ways: (1) as associated facilities generally; and (2) as APIs and EPGs in particular. APIs and EPGs fall squarely (and in the case of EPGs, explicitly) within the Framework Directive's definition of an "associated facility." As such, they are subject to the new framework's full array of regulations.

But APIs and EPGs are the focus of

additional measures because of their impact on digital transmissions. The new framework requires that member states “encourage” equipment makers and service providers to implement an open API that conforms to a European Standards Organization (ESO) standard. Migration to open APIs is to be encouraged through devices such as memoranda of understanding among market players. The threat of more stringent approaches looms over the entire process. If, after one year, interoperability and freedom of choice for users has not been “adequately achieved” in one or more member states, the Commission may make standards compulsory for all providers.

The new framework carries forward and expands two mandatory measures from the TV Standards Directive (95/47/EC):

- **Equipment.** All consumer equipment made available in the EU and intended for the reception of digital television signals must be capable of unscrambling the common European scrambling algorithm. Furthermore,

all televisions of a prescribed size²⁰ must have at least one open interface socket, conforming to a recognized standard, that permits the connection of decoders, interactive and conditional access peripherals, and other accessories.

- **Widescreen Service.** Public networks established for the distribution of digital television services must be capable of distributing “widescreen television services”²¹ and programs and must maintain the “widescreen” format of any program that they distribute.

Must Carry

Member states retain the power to impose “must carry” obligations for the transmission of specified public interest television and radio content and services upon networks in their jurisdiction that provide “a significant number of end-users” with their principal means of receiving television or radio broadcasts.²² Thus, the “must carry” provision will not apply to Internet transmission until “a

significant number of end-users” receive their broadcast content over the Internet.

Structural Changes

The new framework also changes the division of regulatory authority and oversight. It places greater power and discretion in the hands of the Commission, at the expense of the European Parliament and reassigns responsibilities between the EU and member states. These changes are intended to empower the Commission to lead Europe-wide coordination efforts and to react more quickly to changes in technology and markets. This very flexibility and power could also permit the Commission to engage in rulemaking with less involvement by industry and other interested participants.

The Commission is endowed with wide-ranging powers to define relevant markets for competition analysis purposes, to override NRA determinations of market competitiveness and SMPs, and to encourage greater uniformity within the EU marketplace. NRAs re-

Keeping Privacy Up to Speed with Technology

One of the most sweeping changes in the EU framework, the Data Directive, deals with the interface between data protection and new technologies, including the Internet. Major provisions include:

Scope: Applies to “communications,” defined as any information conveyed between a finite number of parties by means of a publicly available electronic communications service, including Internet traffic. Significantly increases the number of providers subject to its provisions.

General Obligation: Requires providers to take technical and organizational measures necessary to safeguard the security of their services, and to inform subscribers of potential security breaches and suggest possible individual remedies where the provider’s measures are inadequate.

Traffic Data: Requires providers to erase or remove identifying information concerning users when the data are no longer necessary for transmission or billing.

Location Data: Similar restrictions apply to location data, which are defined as any data that indicate the geographic position of a user’s terminal equipment.¹⁷

Can the Spam: Bans all automated direct marketing without prior consent. Direct marketing is allowed to people who provided their e-mail addresses or telephone numbers in connection with an earlier sale, as long as there is a simple and free way for them to opt out with each solicitation. Also prohibits direct marketing communications, such as personalized calling, without user consent, but lets the member states decide whether that consent is opt-in or opt-out.

No Cookies, Please: Prohibits the placement of cookies or use of other data interception mechanisms without a user’s informed consent, although that consent need not be opt-in, with two exceptions: (1) where technical storage or access of data is used for the sole purpose of transmitting data over a network; and (2) where the storage or access of data is “strictly necessary” to provide a service that the user has specifically requested.

Directories: Requires providers to inform users of the purpose and intended usage of any directories and give them an opportunity to verify, modify, or withdraw their information.

Call Forwarding and Caller ID: Requires providers to make available to both callers and recipients simple and cost-free methods to block caller IDs on a per-call or per-line basis and to stop automatic call forwarding by a third party.

Nonitemized Billing: Gives subscribers the right to receive nonitemized bills.

Equipment: Opens the door for technical standards to ensure that telecommunications equipment allows users to protect their personal data. The Commission has the option of mandating standards for mobile phones, PCs, and personal digital assistants—a prospect with obvious implications for manufacturers.

Data Retention: Authorizes member states to retain data for law enforcement purposes for a limited period. A uniform data retention requirement may be in the works on an EU-wide basis.

tain the power to determine whether Commission-defined markets are competitive within their territories, to designate SMPs, to impose universal service obligations, and to dictate access/interconnection agreements when parties have been unable to reach accord through good faith bargaining.

Through the New Looking Glass

The success of the framework depends on implementation and enforcement. Early signs are encouraging that the EU intends to play an active role in enforcing the new framework's measures. However, those potentially affected by the new framework would be well advised to monitor two aspects of implementation: (1) national transposition legislation to put the framework in place; and (2) initial determinations by the NRAs.

Companies should scrutinize national transposition legislation for both riders and errors. The EU rules regarding the implementation of directives basically require that the transposition legislation "implement all and contradict none" of the directives' measures. This leaves governments with latitude to add additional measures as long as they are not inconsistent with the new framework. The political attention focused on formulating transposition legislation makes these bills attractive vehicles for other related communications regulations.

Of equal importance is the risk of simple error. Although the text of some directives may be imported essentially verbatim into transposing legislation, few national legislatures can resist the temptation to tweak wording or terms in an effort to clarify them or to make them consistent with existing national legislation. As a result, the scope of definitions and the effect of measures may be changed inadvertently. For example, questions have been raised before the House of Commons concerning the scope of the definition of "associated facilities" in the UK's Draft Communications Bill. Under the proposed definition, the national regulatory agency in the UK could arguably obtain regulatory power over a much broader array of facilities than under the new framework. Although the government may be compelled to correct terms in transposing legislation inconsistent with directives, in practice this could prove to be a costly and lengthy process for affected parties.

NRAs are given discretion to imple-

ment or refrain from imposing a variety of regulations. Most important are the designations of SMPs and decisions about whether to impose access and interconnection obligations on them and providers that control access to end users. Even though NRAs have a continuing duty to reevaluate SMP and access obligations, their initial decisions will be especially important, as through them NRAs will establish their regulatory strategies. Companies whose interests are implicated may wish to concentrate their efforts to educate the NRAs about the merits of their positions at this initial stage.

The EU has signaled that it intends to enforce the new framework actively. For example, although its directives have not been implemented, the Local Loop Unbundling Regulation passed in December 2000 and has taken full effect. Not surprisingly, incumbent local exchange carriers in the EU, like those in the United States,²³ have proven reluctant to offer unbundled access to the local loop, even when mandated by law. However, the EU has aggressively pursued infringement proceedings against both foot-dragging member states²⁴ and individual SMPs.²⁵ The Commission held a public hearing on the problem in early July as part of an ongoing effort to ensure full implementation.

Most important, any look to the future of telecommunications regulation in Europe now requires a coordinated approach. Even after the new directives are implemented, it will still remain crucial to investigate fully the national law of each country in which a client wishes to compete, but there now will be effective mechanisms for ensuring that new competitors do have a fair chance for access to Europe's telecommunications markets. It also will be crucial to take a broader view; those providing services over the Internet or via new technologies now must take care to comply with the European Union's new framework. ☐

Endnotes

1. See, e.g., Directive 2000/31/EC of June 8, 2000, on electronic commerce and Directive 2001/29/EC of May 22, 2001, on the harmonization of certain aspects of copyright and related rights in the Information Society.

2. Directive 97/66/EC of December 15, 1997, concerning the processing of personal data and the protection of privacy in the telecommunications sector.

3. Regulation (EC) No 2887/2000 on unbundled access to the local loop (Dec. 18, 2000) (Local Loop Regulation).

4. Decision /2001/EC on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision).

5. See Framework Directive, art. 2(c).

6. See *id.* at art. 2(e).

7. Local loop Reg., art. 16(1).

8. See Universal Service Dir., art. 19(1).

9. Member states are explicitly forbidden from making the notification costly or burdensome. The directive provides that the notification cannot entail more than a declaration that the telecommunication intends to provide service and submission of the minimal information that is required to allow the national regulatory authority to keep a register of providers of electronic communications networks and services. See Authorization Dir., art. 3(3). Similarly, member states are prohibited from imposing burdensome reporting requirements. See *id.* at art. 11.

10. See *id.* at art. 5(2).

11. Framework Dir., art. 20(1). The Framework makes an exception where NRAs believe that alternative dispute resolution (ADR) such as mediation would be more timely and effective in resolving the dispute. In such instances, the NRA can refer the parties to the ADR mechanism. However, if that mechanism is not successful within four months, the NRA has only four additional months in which to impose a binding resolution. See *id.* at art. 20(2).

12. See Framework Dir., art. 14(2).

13. European Commission Public Consultation on a draft Commission Recommendation of 17 June 2002: On Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services.

14. The term "functional Internet access" is flexible and is meant to take "into account prevailing technologies used by the majority of subscribers and technological feasibility." Universal Service Dir., art. 4.

15. See *id.* at art. 30(1). However, it is important to note that portability only exists between providers of the same service—that is, a traditional telephone customer who decides to "go wireless" for all calls will not be able to keep her home number and switch it to a mobile service provider, and vice versa.

16. See *id.* at art. 8(2).

17. For a general description of issues relating to mobile location privacy in Europe, see Kurt Wimmer, *Privacy and Mobile Telecommunications*, 19 COMM. LAW. 3, at p. 20 (2001).

18. See Universal Service Dir. at Recital 33; Framework Dir. at Recital 31.

19. *See* Framework Dir., art. 18.

20. The threshold for analogue sets is 42 cm visible diagonal as it was in the TV Standards Directive. However, the new framework adds a separate and lower threshold for digital sets, covering all sets with a greater than 30cm visible diagonal. *See id.* at Annex VI(2).

21. The reference format for widescreen television services is 16:9. *See* Access Dir., Art. 2(d).

22. *See* Universal Service Dir., art. 31; Recital 43.

23. *See* Jean L. Kiddoo and Anthony A. Hansel, THE AFTERMATH OF THE 1996 TELECOMMUNICATIONS ACT: A SURVEY OF THE LABORIOUS ROAD TO EFFECTIVE LOCAL EXCHANGE COMPETITION—THE COMPETITIVE PERSPECTIVE, 544 PLI/Pat 117 (Dec. 1998), at 126.

24. *See* Telecommunications: Commission

takes further action on unbundling infringement proceedings against five Member States, EU Press Release (20 March 2002) (announcing the launch of infringement proceedings against Germany, France, Ireland, the Netherlands, and Portugal).

25. European Commission Press Release, Commission suspects Deutsche Telekom of charging anticompetitive tariffs for access to its local network (May 8, 2002).