

## **CBI position paper on the EU Telecoms Framework Review**

### **Preamble**

The CBI appreciates the opportunity to comment on the review of the EU's Regulatory Framework for Electronic Communications Networks and Services. The CBI represents the broad range of British businesses, including both business users and providers of electronic communications networks and services. As such, the views expressed here cannot and do not represent the views of all our individual members on all the issues involved, as these are both diverse and in a number of areas, highly contentious. Rather this submission is a representation of what, in our view, constitutes the overall interests of British business.

### **Introduction**

Businesses in the European Union are facing daunting challenges. The current economic slowdown and credit crunch mean that companies are under increasing pressure to improve competitiveness. Globalisation, cheap communications and the World-Wide-Web are making information about and interaction with customers ever more precise and transaction costs low, resulting in pervasive competition for businesses large and small. Moreover, low-cost international rivals are rapidly moving up the value chain in both manufacturing and services, making continuous value-adding the *only* real basis for increasing competitiveness. But, of course, this situation poses both threats *and* opportunities for businesses and society in Europe.

In trying to establish frameworks in which to optimise opportunities for economic and social progress, Member States also confront a range of immediate challenges: global warming and environmental degradation; energy and resource costs increasing faster than standards of living; stress on financial markets and the threat of growing unemployment; and decaying or absent physical infrastructure; and geo-political tensions and multi and bilateral trade conflicts. Broader challenges include demographic imbalances, new security threats, and tremendous demands for education, training, retraining and improved social welfare. While economic growth – or perhaps, more accurately, unbalanced growth - has often brought about these growing challenges, new value-adding forms of growth also provide a means by which they can be met and overcome, through enhancing innovation and widening the breadth and nature of services available to EU citizens.

The EU's review of the telecoms framework can make a critical contribution to addressing these challenges. In a number of areas, the existing framework has promoted competition, service innovation and lower prices, boosting business competitiveness and value-adding capabilities in Member States. However, the

limitations of the framework - particularly the inconsistent application of its principles - constrain the economic and social benefits of technological and commercial innovation and convergence at a national and pan-European level.

With the EU still a long way from having a single communications-supply market, demand-side service development is constrained in terms of maximising the potential of the largest consumer market in the developed world.<sup>1</sup> Business users of information and communications technology services (ICTs) waste resources on meeting differing national and service regulations, hampering a clear and determined effort on value-added service development. In order to offer sophisticated content, applications and services, businesses large and small require more consistent bandwidth, quality, resilience, and innovative communications networks and services.<sup>2</sup> Businesses are less interested in the technical nature of broadband networks than in how they can use them to gain economies of scale, greater operational efficiencies and new service capabilities. Yet at a time of growing economic uncertainty and tightening credit, service providers are unclear as to the level and timing of investments they need to make to meet demand for value-adding converged next-generation networks, as well as the credit facilities they will need.<sup>3</sup>

The measures originally proposed by the Commission constitute an inter-related package of mutually supportive measures. The telecoms framework review needs to create conditions of regulatory clarity and certainty that will enable business users and suppliers of ICTs to more clearly identify how they can boost investment and international competitiveness. The key to this lies in linking more clearly and compellingly the regulatory practices proposed in the review with consumer, business and public service demand in a next-generation environment in line with the goals of the i2010 programme. The European Parliament and Council of Ministers have an important responsibility to clarify and improve the integrity of the framework, as outlined in detail below.

### **Summary of positions on key issues**

We strongly support completion of the internal market and promoting competition through increased political independence and operational effectiveness for national regulatory authorities (NRAs). We support the removal of sectoral ex-ante regulation where competition is sufficient and sustainable (with finely tuned and timely application of competition law preventing anti-competitive behaviour). However, certain reserve powers for regulators may continue to be needed to intervene swiftly

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<sup>1</sup> I2010 Mid-term review (pg 4).

<sup>2</sup> See CBI submission to Ofcom 2007 consultation on Ofcom's policy approach to the regulation of next-generation access networks – <http://www.ofcom.org.uk/consult/condocs/nga/responses/CBI.pdf>

<sup>3</sup> The exact magnitude of financial requirements will depend on how the competitive strategy of an operator determines whether it invests on a local, national, regional or international scale, as well as whether it invests in next generation local-loop or backbone networks or a combination of these.

if economic or technological bottlenecks re-emerge and cannot be dealt with solely or sufficiently swiftly by competition law.

- To achieve a clearer, more compelling and more consistent framework for competition and investment in networks and services, a more differentiated ability to respond to business, consumer and public services demand for current and next generation broadband services along the value chain needs to be developed. To achieve this, NRAs' ability to differentiate regulation on a geographical basis will help promote investment in next-generation networks, particularly at the access level.
- Functional separation could be a valuable regulatory remedy for NRAs in cases where an enduring bottleneck and competitive failure exists but only as a last resort after extensive and robust analysis of other possible remedies and its impact on the national market by an NRA, and linked to a system of market benchmarks and sunset clauses whereby it can eventually be lifted.
- Strengthening the political independence of national regulators and of the oversight and internal discipline of the ERG, both in relation to its members and as an advisory body to the Commission, is vital for achieving greater consistency in the application of competition and regulation and to prevent technically ill-advised remedies being imposed at a national and Community level.
- The organisational structure of any centralised advisory body should contain a formal division of responsibility between administrative tasks and regulatory tasks to help comply with principles of good governance and enable improved operational effectiveness. Any administrative board should represent the views of multiple stakeholders, and the exact circumstances and areas in which the opinion of the body will need to be provided must be clearly established.
- In order to prevent rash or ill-advised behaviour by NRAs, or where they are ineffectual or create inconsistencies that may hinder the development of cross-border competition, a qualified increase in the powers of the Commission over national remedies would be useful. This power should be qualified by a robust and well-functioning appeals process for market players, combined with technically expert advice from the European advisory body representing a range of stakeholders and a comitology process with the Council.
- The principle of spectrum trading, liberalisation and technical and service neutrality is vital as a means for stimulating innovation and greater market efficiency. However, a market-based approach to spectrum allocation needs to give due consideration to the benefits for consumers and general principles of business viability, sustainability and fairness whilst protecting competition.
- The imprecision of the proposed breach notification law may result in unnecessary burdens on businesses. Moreover, on targeting specifically the telecoms sector, its provisions are potentially market distorting and

discriminatory. A general review of the Data Protection Directive is a better place to consider the benefits, drawbacks and appropriate mechanisms for such ideas.

### **Next-generation networks and geographical market differentiation**

The i2010 programme sets an important policy orientation and set of goals for European economic growth and social benefit through more effective and widespread use of ICTs. However, the vision it provides of how this orientation and goal set can be realised in relation to next generation networks and services is sparse. To achieve such vision within the context of next generation networks and services, greater collaboration and dialogue between different players within the value chain will be needed.

Broadband networks in general increase the ability of network operators and service providers to customise services and thus add value. In regard to next-generation networks, business demand could be a crucial driver of investment in next-generation networks, particularly at the access level, if regulation within national markets is differentiated on a geographical basis according to where businesses believe economic demand for services actually lies. Such differentiation could allow for regional partnerships between various demand-side and supply-side players (in purely private sector or in public-private finance models) to build-out NGA networks, recognising the different topological challenges companies looking to roll-out NGA will face.

Such demand-side partnerships do not only have to be media types often mentioned in current NGA debates: a range of other demand-side actors might see value in joint investments with NGA infrastructure providers in geographic areas where they were able to identify online value-adding possibilities. The UK regulator, Ofcom, has received permission from the Commission to implement geographical definition of markets where competition is sufficient to allow for the removal of ex-ante regulation.<sup>4</sup> The framework review needs to produce a clear and consistent regulatory definition of geographic markets, enabling a standardised regulatory methodology to become the norm across the EU. The European Parliament has outlined a clear framework for geographical differentiation to take place through the concept of sub-national markets. The Council needs to similarly recognise the potential benefits for NGA roll-out in the EU within its internal deliberations.

### **Functional separation**

The settlement reached by Ofcom and BT Group in 2005 has shown that functional separation of an incumbent operator's network and services divisions can, if implemented appropriately, open the local network to greater competition in service provision without fundamentally harming an operator's investment capability. Whilst

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<sup>4</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/232&format=HTML&aged=0&language=EN&guiLanguage=en>

functional separation is not a panacea, it can serve to promote competition in national markets where, for one reason or another, sustainable competition has been unable to take hold at the local level. Despite functional separation (or perhaps partly as a result of its competitive pressure), BT is currently investing £12 billion in its next-generation network.

Yet functional separation is by definition relatively extreme as a regulatory remedy for establishing equivalence of local access in national markets. It needs to be seen as a measure of last resort for NRAs and competition authorities, rather than as a catch-all solution. Extensive consultation is needed of functional separation's impact on consumers, businesses and commercial investment in next-generation networks before it is implemented as a remedy. A relevant system of benchmarks is also needed to act as a framework to clarify what the regulatory triggers might be for its implementation and removal. The applicability of functional separation by an NRA could be vetoed by the Commission based on formal advice from the ERG - or any advisory body that replaces it – and a comitology process with the Council.

### **Reform of market analysis and expertise**

Businesses currently have difficulty achieving economies of scale and value-adding capabilities that could arise from cross-border European networked services due to national disparities in current regulatory practices. In reality, disparities in communications markets act as trade barriers, detracting from the smooth cross-border implementation and operation of other service markets. NRAs are best placed to implement the principles and conditions of the telecoms framework and i2010 programme through the detailed market analyses required to understand the specific conditions of national markets.

Whilst the current system of market reviews, based on national and EU-level consultation has played a positive role in promoting competition around Europe, the CBI believes it is necessary to simplify and streamline the market review process and reduce regulatory bureaucracy if a broad range of investors are to be attracted to enter the market. However, any streamlined procedure should aim to improve the quality of market analysis through inculcation of better regulation principles and best practice. Yet fundamental to NRAs regulatory effectiveness will be ensuring they have adequate political independence, funding and expertise to implement best practice.

The current institutional structure could be improved for implementing existing regulatory principles at a national level, but also at the pan-European level. However the CBI, along with its national business counterparts across Europe<sup>5</sup>, is concerned that the creation of a Euro-regulator is unnecessary and would result in additional layers of bureaucracy and decision making being created in the EU. But the CBI does still see potential benefit of a more practical *advisory* body offering expert advice to

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<sup>5</sup> See BusinessEurope's Position Paper on the Telecoms Framework Review, 28 February 2008.

the Commission, particularly in the eventuality of an extension of the Commission's power to veto and impose regulatory remedies.

The European Regulators Group (ERG) has played a useful role in providing expert advice in some significant EU telecoms debates. It has significantly improved its operational efficiency and decision-making, such as agreeing regulation of EU Voice-over-IP services and regulatory principles for next-generation access, and its letter to Commissioner Reding of 6 November 2007 indicates means by which it could function more effectively. Improvements to the current system can best be achieved by strengthening the technical capabilities and improving decision-making disciplines within the existing set-up, rather than through imposing more political control over the ERG, as in the Commission's original proposals.

### **Commission powers over proposed remedies**

Clearer and more consistent implementation of regulatory framework's principles by NRAs is needed to facilitate investments in new networks and services by a broad range of actors. NRAs are closest to the market and should be best placed to make regulatory decisions; but the CBI recognises that NRAs are not always able to deliver the necessary level of consistency and certainty. In trying to resolve such issues, the Commission is constrained in the competencies it can realistically marshal. But within the context of a standardised set of available remedies, a limited extension of its powers over remedies could be valuable in constrained rash, ill-considered or inadequate regulators' action in certain markets – so long as it is based on expert advice from a technically competent advisory body focused on developing regulatory best practices. In light of its impact on Member State competencies and in line with the principle of subsidiarity, any extension of the Commission's veto powers would need to be carried out in conjunction with strong checks and balances through mandatory consideration of the advisory body's opinion. The availability of a fully functioning appeals process would also be crucial to ensuring that the proposals do not drastically increase the Commission's competencies without adequate checks and balances.

The principle of regulators' political independence, or at least political balance, ought to be increased at an EU as well as a national level. An advisory body will be most effective if it is shielded from political pressure as much as possible, with safeguards in the Regulation putting it at arm's length from such pressures from either the Commission or Member States. This is vital to build confidence in its decisions which, in line with better regulation principles, should be consistent in order for market players making large-scale and long-term investments, and the best way of ensuring this is through including key stakeholder representatives in its administrative board.

Only if such a body is structured and incorporated as a politically-balanced centre of expertise for EU telecoms regulation will it add any real value. One way of pursuing this could be through enabling a multi-stakeholder composition of the administrative board. There is no reason why nominees from the ERG, European Parliament and

industry could (and should) not have representatives on the administrative board of an advisory body.<sup>6</sup>

We are concerned that the Parliament's revision of the Commission's original proposals may have gone too far and might recreate an ERG in which there is cosy neglect of important but difficult issues. Removing the Administrative Board in its entirety (as proposed in the Parliament), whilst obviously resolving concerns over the Commission-proposed Board being overly political, at the same time takes away the potential benefits of having an Administrative Board with a multi-stakeholder composition. In that regard, the Parliament's proposals do not seem to enhance the current institutional make-up of the ERG, or its decision-making capacity.

It may be worth considering the comitology procedure as an additional means of increasing political balance. The co-decision process presents an important opportunity for this issue to be finalised.

### **Spectrum**

The CBI strongly supports the principle of technology and service neutral spectrum trading and liberalisation as a means for stimulating innovation and greater market efficiency. In general, auctioning of most spectrum licenses can extract greater economic and social value from this scarce resource than centrally planned allocation. Opening up spectrum licensing to commercial trading could potentially remove barriers to market entry for new entrants to deliver wireless and combined wireless and fixed line services, helping promote competition and stimulating value-adding.

However, a market-based approach to spectrum allocation may not be appropriate in all cases. In some cases, alternate arrangements for ensuring the most effective and efficient use of spectrum may need to be considered in order to maximise benefits to the consumer. Similarly, whilst the CBI believes that innovations can be expected as a result of liberalisation, this needs to be done in a way that maintains general principles of business viability, sustainability and fairness whilst protecting competition. It will be crucial to ensure that spectrum licenses continue to mandate non-interference conditions on licensees.

### **Data processing and security**

For businesses to deliver higher value and ever-more customised goods and services to customers, they need increasingly to share information and interact quickly and efficiently with employees, customers and business partners. Such interaction is overwhelmingly achieved through the active choice of individuals as a result of the benefits they receive; consumers can be proactively empowered not only

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<sup>6</sup> None of the Administrative Boards of the European Food Standards Agency, European Environment Agency, European Medicines Agency, European Railways Agency and European Chemicals Agency are comprised solely of representatives of the Commission and of the Council.

as providers of their own information but, increasingly in how it can be shared with others customers and businesses.<sup>7</sup> However, it also means that new processes can be complex and challenging in organizational and operational terms.

When outsourcing and electronic service delivery is common place, businesses, regulators and politicians are rightly increasingly concerned over how sensitive data is handled on electronic networks. Businesses also have a strong interest in protecting personal data – along with other electronically held operational, financial and intellectual property data - as a competitive asset for aiding value-adding. As a result, the CBI believes a regulatory approach is needed that facilitates market-led adoption of data protection technologies and standards as the best way of protecting both the privacy interests of individuals and businesses' need for continuous performance improvement.

Such an approach is best developed within the context of an overall review of the EU's Data Protection Directive. The value of the Directive lies precisely in providing a single frame of reference for all businesses, enabling them to standardise data protection processes. Purely sectoral approaches undermine this benefit, as they encourage different standards and processes that multiply the risks of unforeseen vulnerabilities and the chance of breaches. In the context of convergence, where firms from different sectors are merging and entering new markets, this is of particular concern.

Furthermore, the proposal for a mandatory requirement on the telecomms industry to notify NRAs of data security breaches fails to adequately consider the operational burdens such a proposal would entail, its possibly discriminatory and anti-competitive implications for market players, and its potentially counter-productive impacts on customers of that sector – both corporate and consumer.<sup>8</sup> The wording of the relevant Articles<sup>9</sup> in the Commission's proposals is dangerously vague and imprecise, even after consideration of the amendments suggested by the Parliament's LIBE Committee.

A sectoral breach notification regime could inhibit innovation and value-adding capabilities of European communications providers – especially small and start-up ISPs – and harm competition in converging sectors without any clear additional benefit to consumers. This does not mean the e-Privacy Directive should be broadened to services or networks that have traditionally been outside the framework, as has been proposed within the LIBE Committee, as such a fundamental shift in data protection legislation seems entirely inappropriate within what is, in

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<sup>7</sup> See *CBI/Google Survey of Internet Trends for Business and Consumers*, 2006, for both businesses' and consumers' view that the Internet empowers the latter relative to the former.

<sup>8</sup> Such a 'silver bullet' approach would place a major burden on communication providers (especially those developing international business). And over-reporting of security breaches by companies is likely to make consumers confused and erode rather than sustain confidence in the authenticity of breach notifications.

<sup>9</sup> Particularly Article 4 - Security of processing

essence, a sectoral legislative review. Nor does it mean that the CBI opposes a breach notification requirement *per se*. What it means is that change could have significant negative consequences without a proper impact assessment, and that this can only adequately be undertaken within the context of a wider review of the Data Protection Directive.

2 September 2008