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A. General Information

I. Reference Documents

Proposal for a Directive of the European Parliament and of the Council amending Directive 2002/21/EC on a common legal framework for electronic communication networks and services, Directive 2002/19/EC on access to and interconnection of electronic communication networks and associated facilities and Directive 2002/20/EC on the authorization of electronic communication networks and services COM(2007) 697 final - 2007/0247 (COD)

Proposal for a Directive of the European Parliament and of the Council amending Directive 2002/22/EC on universal service and users' rights relating to electronic communication networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and regulation (EC) No. 2006/2004 on consumer protection cooperation COM(2007) 698 final - 2007/0248 (COD)

Proposal for a Regulation of the European Parliament and the Council for establishing the European Electronic Communications Markets Authority COM(2007) 699 final - 2007/0249 (COD)

Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on reaping the full benefits of the digital dividend in Europe: A common approach to the use of the spectrum released by the digital switchover COM(2007) 700 final.

II. Introductory Remarks

On November 13, 2007, the European Commission submitted its legislative proposals for revising the existing EU legal framework for electronic communications. The so-called Telecom package is intended to revise the legal framework from 2002 which currently consists of five directives¹.

The Commission's proposals can be divided according to the following criteria: Better laws for electronic communications competitiveness, completion of a single European market in the area of electronic communications and improving consumer protection and usage rights (in line with citizens' needs).

The package of measures also includes a proposal for establishing a European regulatory agency in the form of the "European Electronic Communications Market Authority (EECMA)" which is to support the European Commission in an advisory function regarding all regulatory issues. In addition, the European Network and Information Security Agency (ENISA) is to be integrated into this new agency.

In addition to expanding the commission's authority, the European Commission's proposals also consider a separation of functions as a possible remedy for national regulatory agencies.

Based on the joint decision-making procedure according to Article 251 of the EC Treaty, the commission has submitted its proposals to the European Parliament and the Council for further deliberation. The VATM (Association of Telecommunications and Value-Added Service Providers) will comment on the following main points of the EU Commission's reform package:

¹ Directive on a common legal framework for electronic communication networks and services (2002/21/EC), Directive on access to and interconnection of electronic communication networks and associated facilities (2002/19/EC), Directive on the authorization of electronic communication networks and services (2002/20/EC), Directive on universal service and users' rights relating to electronic communication networks and services (2002/20/EC), Directive concerning the processing of personal data and the protection of privacy in the electronic communications sector (2002/58/EC)

B. Improved application of laws for competitive electronic communication

I. Expanding the European Commission's veto power

Article 7, paragraph 4 of draft directive COM (2007) 697 provides for an expansion of the EU Commission's veto power. This means that the European Commission can veto the regulatory provisions proposed by the national regulatory agencies, if a national regulatory agency's decision is considered an obstacle to the single European market or a violation of EU law.

In VATM's view, the European Commission still needs to be able to exercise control over key issues concerning the development of competition in Europe. After reducing the number of markets for which ex-ante regulation was recommended from eighteen to only seven, the EU Commission's veto power regarding market analysis and market delineation is less important than previously. Therefore, a correct definition of remedies will be extremely important in the remaining markets to be regulated ex-ante. The EU Commission's proposal to extend the veto power also to remedies in the future, is logical and welcome from a competitive perspective, but it needs to be amended since the role of a stronger ERG (European Regulators Group) has not yet been taken into account.

Such veto power in the form of an objection by the EU Commission does not limit the decision-making options of the national regulatory agencies. Rather, it is an objective control function and ultimately ensures - as has been the case several times in the past - that the regulator is independent of national political influences to the largest extent possible. In addition, experience has shown that the mere possibility of a veto decision has led to considerably improved decisions by the regulatory agencies when it came to bilateral reconciliation processes with the Commission.

In case of a veto, the ERG or a comparable institution might be granted a right to make recommendations for the design of the remedy. To promote the idea of European harmonization and a broad implementation of best practices approaches, the Association sees this as a strengthening of the ERG's role without requiring a separate agency structure. By

granting a - limited - right to make changes to an international regulatory entity rather than to the Commission itself in such individual cases, a unilateral expansion of the EU Commission's authority could also be prevented.

The deliberations outlined by the Association in this document which need to be discussed in the coming weeks constitute a consistent attempt to achieve a distribution of authorities and powers which is even-balanced and based on facts, which leaves untouched the final decision-making autonomy of the national regulator and adapts the European Commission's intervention options to a market and competitive situation which has changed in the past ten years. To allow for efficient regulation, specific procedural deadlines, particularly the option of majority decisions within the ERG, will have to be specified while ERG operations have to be supported by establishing, for instance, a secretariat which in organizational terms should preferably be affiliated with the European Commission or the European Parliament.

II. Streamlining and simplifying Article 7 procedure

In Article 7, paragraphs 5 and 6, Article 7a, Article 16, paragraphs 6 and 7 of the draft Directive COM (2007) 697, the EU Commission suggests changes to the Framework Directive (2002/21/EC) providing for streamlining several procedural aspects of market reviews. To create more legal certainty, one suggestion is to specify more precisely within which time limits the EU Commission - in cooperation with the EU regulatory agency to be established - can take decisions on the measures planned by the national regulatory agencies. In addition, a new Article 7a is to be included in the Framework Directive which will authorize the EU Commission to specify details of the notification procedures using implementation regulations.

VATM believes that the procedure according Article 7 of the Framework Directive has largely proved successful. Therefore, the Association generally welcomes the EU Commission's efforts to clarify the legal aspects of and streamline the Article 7 procedure.

However, we are highly critical of the proposal to let the EU regulatory agency to be created participate in Article 7 procedures. As explained in more detail under subsection 2.1, we consider the establishment of a new agency not only unnecessary, but counterproductive.

To enforce the efficient and speedy implementation of procedures in all member states, a stipulation should be added to the EU Commission's proposal to the effect that the national regulatory agencies must submit to the EU Commission market definitions and analyses as well as the resulting regulatory measures at the same time. This single-step procedure is already being applied successfully in the majority of EU member states. The VATM considers this especially important since in the past, the German regulator usually communicated the market analysis and definition to Brussels first, and the proposed specific regulatory provisions were submitted only after this procedure had been completed. Among other things, this resulted in massive delays.

III. Improved regulation of radio frequency use and frequency assignment

To allow for a more flexible consideration of market requirements, the Commission proposes the elimination of unnecessary restrictions on frequency usage by strengthening technology and service neutrality and wants to allow the highest degree of freedom for frequency spectrum usage – in exceptional cases, reservation of frequency bands for specific usages which are in the public interest will be taken into consideration². Even though the national regulatory agencies decide on the awarding of usage rights to enterprises, broad European harmonization measures³ should be possible in the future, which can lead to the regulation, change or withdrawal of permits or usage rights to radio frequencies.⁴

The VATM welcomes the proposal to decide the awarding of usage rights at the national level. However, it is still unclear what powers the national regulatory agency, the European Commission and the planned EU regulator will have. The European Commission's proposal does not contain a clear statement as to who will be responsible for awarding frequencies in the future. Therefore, the proposals must be specified much more precisely in this regard so that the awarding of the scarce frequency resource can lead to innovative usage and application in the market. The planned removal of restrictions on frequency usage (principle of technology and service neutrality) must be competitively neutral, and regulations must not

² COM (2007) 697, Article 9, par. 1, 3 and 4, Framework Directive, and Article 5, par.1, Authorization Directive.

³ Specifically, the directive drafts provide for the following Commission powers in this regard: Acc. to Art. 9c, Framework Directive, the Commission may take appropriate implementation measures, such as for harmonizing the conditions attached to these rights and the conditions, procedures, limits, withdrawals and transitional rules applicable to such transfers or leases. Similarly, Art. 6a, Authorization Directive allows the Commission to adopt implementation measures to harmonize the conditions specified in Appendix II. These conditions include a listing of the conditions specified in Appendix I, Part B which can be attached to frequency usage rights.

⁴ COM (2007), new Article 6a, par. 1 letter e Authorization Directive

lead to a distortion of competition among market participants. When usage of frequencies dedicated to mobile radio service will be made more flexible, care must be taken that all mobile radio network carriers will profit from the greater flexibility at the same time. In addition, an expansion of harmonization measures should be allowed only in such areas where they are absolutely necessary (an example would be technical aspects). A harmonization of other conditions such as the number of usage rights each enterprise is awarded and the obligation regarding equal treatment of services providers (*Diensteanbieterverpflichtung*) violates the subsidiarity principle and disregards special national situations.

C. Completing the single European market in the area of electronic communication

I. Establishing an independent European regulatory agency (EECMA – European Electronic Communications Market Authority)

Draft Regulation COM (2007) 699 contains a proposal for establishing a new EU regulatory agency. The new agency's mission would be broad support of the EU Commission – for instance, in connection with market analyses, market definitions, remedies and specific suggestions for regulatory measures. It is the Commission's wish to replace the European Regulators Group (ERG) with a new EU agency to be created; in the future, national regulatory agencies should be represented in the agency's regulatory council by one member each.

The VATM rejects the establishment of a new EU regulatory agency as unnecessary. In previous years, the EU Commission and the Article 7 Task Force in particular successfully processed more than 600 notification procedures and developed extensive know-how. At this time – far more than ten years after adoption of the first directives package on electronic communication in the European Union and the simultaneous considerable reduction of the EU Recommendation of Relevant Markets from eighteen to seven markets requiring ex-ante regulation⁵ – the EU Commission's goal of ensuring improved harmonization seems to be attainable without an agency and additional bureaucracy.

⁵ Official Gazette, L 344/65 of 12.28.2007, p. 65

II. Strengthening national regulatory agencies' enforcement powers

The European Commission's regulation proposal would allow⁶ national regulatory agencies to impose functional separation on enterprises having significant market power subject to prior review and approval by the Commission (ultima ratio). Moreover, the national regulator can require enterprises to grant competitors access to conduits and "inactive network elements" (e.g. unconnected fiber optics lines).⁷

The VATM welcomes a strengthening the national regulatory agencies' enforcement powers – in particular against the background of the European Commission's influence (see item 1.1). Since the current legal framework does not exclude the option of imposing functional separation and can be applied in several member states today (e.g. in Italy), the German position should not exclude the option of a functional separation for Europe as a matter of principle (particularly in the new EU member states). However, we believe that this can be avoided through thoughtful and far-sighted regulation or contractual solutions.

The Association also welcomes the possibility that the national regulator may impose an obligation to grant access to cable channels or not switched fiber optics lines. Even though not enough in itself, such an access model is necessary so that competitors can offer broadband-intensive connections and related services based on their own infrastructure. However, access models must take into consideration a situation where no free fiber optics capacities can be made available. For this case, granting usage of a wavelength (color) would be an appropriate means for connecting the cable distributor (KVz) to the competitors' network.

⁶ See COM (2007) 697 final, Article 13a, Access Directive and Article 13a, Framework Directive

⁷ See COM (2007) 698 final, Article 21, paragraphs 2 to 6, Universal Service Directive

D. Improving consumer protection and usage rights

I. Consumer protection improvements

In its directives package, the European Commission is submitting numerous proposals for increasing network and services security as well as data protection, improving the conditions and rights for handicapped users⁸ which the VATM assesses as follows:

From a VATM perspective, the proposed increase in the price transparency for the benefit of consumers by requiring operators to publish comparable, adequate and current information in an easily accessible form⁹ is already being accomplished today. The VATM considers transparent, up-to-date rate information to be an essential requirement for a well-functioning competition, since it allows consumers to compare the offerings available in the market. Provider information currently available in the market such as price announcements, available pricing data in print media and on the internet already provide the customer with sufficient transparency. Therefore, an expansion with additional transparency obligations is unnecessary since past competition in particular has led to a considerably improved situation for consumers.

The Commission states further that consumers must not be prevented from switching providers by legal, technical or practical obstacles such as contractual provisions, procedures or fees, and should "fully benefit from the advantages of a competitive environment" when "reasonable minimum contract periods" are determined.

From a VATM perspective, the option to switch providers is one of the most successful achievements of market liberalization and has contributed considerably to developing competition. However, it became apparent that due to their considerable market shares in the area of end-user connections (e.g. Deutsche Telekom AG: 83%), the previous monopolists are able to withhold customers from the competition for longer periods by simply converting the contract to a bundled product (e.g. telephony plus internet). It is therefore debatable

⁸ Proposal for a Directive to change the Directive on universal service and users' rights relating to electronic communication networks and services and the processing of personal data and the protection of privacy in the electronic communications sector and the regulation on consumer protection cooperation (COM /2007) 698 final.

⁹ See COM (2007) 698 final, p. 8 and Article 9, par. 1

whether previous monopolists with their ability to transfer market power should enter into long-term contracts in certain markets, since these make competition impossible. Therefore, we basically welcome the idea of specifying reasonable minimum contract periods envisioned by the Commission, but differentiation and more specifics are needed (e.g. taking into account market shares).

The Association further supports the goal of an "information society which excludes nobody" as defined in the Commission's proposals. However, the VATM believes that requiring special measures for handicapped users¹⁰ falls under national jurisdiction. The instruments which have been available on a national level in this area offer effective protection for handicapped users even today and allow their active participation in the achievements of the information society (e.g. text messaging, faxing for deaf and telephony for blind people).

II. Retaining phone number transfer and carrier selection

The Commission plans to eliminate the regulations covering the obligations regarding carrier selection / carrier pre-selection. The reason given is a possible obstruction of the development of technical progress¹¹. However, the reasons given by the Commission for the planned elimination of EU specifications in the areas of carrier selection and carrier pre-selection are extremely imprecise. On the one hand, the Commission suggests eliminating Article 19 of the Universal Service Directive, at the same time, recital 11 states that the obligations resulting from carrier selection and carrier pre-selection will be monitored by national regulatory agencies. This argumentation leaves open whether regulation will continue to remain on a European level based on the Access Directive or whether the obligation is to be checked and monitored completely at a national level.

At this point, the VATM states emphatically that the figures published by the Commission in 2006¹² demonstrate convincingly that carrier selection and carrier pre-selection are widespread in Germany and have contributed greatly to the development of competition resulting in favorable rates for consumers. Therefore, the EU specifications must ensure that carrier selection will continue to be imposed on enterprises with significant market power regardless

¹⁰ Ibid., Article 7

¹¹ Ibid., Recital 11 and Article 2 Universal Service Directive

¹² Commission Staff Working Document. Annex to European electronic communications regulation and markets 2006 (12th REPORT), SEC(2007) 403, Vol. 2, p. 23

of the type of connecting technology used. This can best be accomplished by retaining the Universal Service Directive. If the Universal Service Directive will be eliminated, at least a regulation has to be included in the Access Directive stating that carrier selection can be imposed as a remedy to ensure sufficient planning security.

The proposed portability of telephone numbers within one workday does not take into consideration different market conditions. The speedy transfer of telephone numbers within one workday is technically possible for landlines (without unbundled local loops) and in the mobile telephony market and is basically desirable and supported by the Association. For technical and administrative reasons it is not possible to guarantee the porting of numbers one day after the customer placed his order. If the customer adheres to a certain lead time, porting within one workday can be guaranteed. In our view, this meets the customer request for "seamless" porting.

However, with today's procedure, individual market participants are not able to port a telephone number within one day since the underlying processes do not permit transfer within one day. In particular, if telephone number porting is combined with leasing a subscriber access line, the latter constitutes a limiting factor. Porting only makes sense once the subscriber access line has been switched to the new provider. For that reason, the proposal needs to be more differentiated and take into account the specifics of various business models.

III. Changes regarding data protection¹³

The Commission's proposal does not indicate why existing rules regarding data protection need to be tightened. The planned regulations regarding data protection will result in additional effort and cost for enterprises and are totally unfounded. In VATM's opinion, the planned introduction of a requirement to report security violations which result in the accidental or unlawful destruction, loss, change, unauthorized disclosure or unauthorized access to transmitted, stored or otherwise processed personal data does not at all explain how the Commission defines the term "security violation" and which violations require notification. The proposal to store information in a subscriber's or user's terminal for the purpose of comprehensive information for processing is extremely unspecific and does not

¹³ COM (2007) 698 final, Article 3, new paragraph 3 and Article 5, par. 3, Privacy Policy

VATM Position Statement on reviewing the EU legal framework for electronic communication networks and services (EU Review)



answer the question which data should be stored and how they should be used. Therefore, the VATM does not share the Commission's views on data protection.

Brussels, March 27, 2008