Scuppered by Amendment 138: Revising the Communications Regime

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The Electronic Communications Network & Services ('ECNS') regime, adopted in 2002, is generally considered to be a success. However, as could have been anticipated with such a sweeping change to the communications regulatory framework, there were some elements that were less successful than others. Subsequent market developments have highlighted the inability of the framework to accommodate some issues that were not at the forefront of the drafters' minds almost 10 years ago. The last few years have seen much work and determination to put together a package of revisions intended to further improve the framework – it was a long road to the infamous European Parliament plenary vote on 6 May 2009.

Leading into 6 May, it looked as though it agreement had been reached on the package of revisions to the ECNS framework. Compromises were found on significant issues including the push for a Commission 'veto' right over remedies and the creation of a 'Euro-regulator'. Nonetheless, it was not to be. Last minute manoeuvering over the so-called 'Amendment 138' stalled the process.

This article briefly considers a number significant issues on which compromises had been found before the European Parliament's vote, noting the substance of the proposals and some of the issues that conciliation could potentially reopen. It also briefly describes the so-called Amendment 138, the 'stalling' provision, before concluding with a look at the potential next steps in the legislative process.

While the revisions could go many ways, it would be unfortunate if the process were to be so protracted and resource-intensive that the whole of 2009 is effectively lost to further policy development. There are a number of key areas, including next generation access and net neutrality, where further delays in policy formulation will not help the European economy, market participants, regulators or, perhaps most importantly, consumers.

BEREC

The creation, form, role and functioning of a 'Euro-regulator' was one of the most contentious issues in the process. These debates went well beyond the issue of what can and cannot be done within the constraints of European law (as set out in *Meroni* and elsewhere). The key issue was balancing the Commission's desire for enhanced co-ordination and consistency of national measures against decentralisation and the desire of Member States to protect the principle of subsidiarity.

A hard fought agreement regarding the Body of European Regulators of Electronic Communications ('BEREC') was struck at the end of March. Contrary to expectations, it seems that the compromise is, at least for now, one with which the various stakeholders can live. The national regulators ('NRAs') and DG Information Society were still expressing support for BEREC on 20 May, some two weeks after the parliamentary vote. It would be unfortunate if BEREC were to be reopened in conciliation.

BEREC would be a two-tier organisation, with NRAs represented on a board, supported by an administrative office of 20 staff (largely Community officials). It would have a budget of €5.5 million. BEREC would deliver opinions on market definition and remedies proposed by NRAs, effectively wielding 'peer pressure' rather than a veto, in trying to increase consistency in relation to the remedies imposed by NRAs. Further, its legal personality and funded secretariat are intended to enable it to fulfil an advisory role – to the European Council, European Parliament, Commission – and to establish official links to the Radiospectrum Policy Group, CoCom, NRAs and audiovisual regulators.

Revisions to the Article 7 Process

The Commission's desire to modify the ECNS regime in order to allow itself a right of veto over remedies that NRAs seek to impose was another of the controversial issues in the package. The Commission has expressed concerns for a number of years over a perceived lack of consistency in the remedies imposed by NRAs, and saw a veto right as the means to address this.

The compromise ultimately reached is complex, and is inextricably linked to the BEREC proposals, highlighting the great care that would need to be taken in expanding the conciliation process, unless the underlying intention is to reopen a broad raft of issues.

In sum, the revisions to the so-called 'Article 7' process would be the following:

- Article 7 would require NRAs to communicate draft measures simultaneously to the Commission, BEREC and other NRAs.
- The Commission would retain the power under Article 7 to compel a notifying NRA to amend or withdraw any draft measure that would define a relevant market departing from the list in the Recommendation or designates an entity as having Significant Market Power ('SMP'). However, the Commission would be required to take utmost account of BEREC's opinion before requiring such an amendment or withdrawal.
- A new Article 7(a) aims to increase consistency in remedies across Member States. In relation to draft measures that aim to impose, amend or withdraw access obligations, the Commission would have the ability to freeze the implementation of such measures for three months. Within six weeks of instituting such a freeze, BEREC would be required to issue an opinion. If BEREC shares the Commission's doubts about at least one remedy, the NRA must take utmost account of the concerns of the Commission and BEREC in deciding whether to withdraw or amend the measure. If BEREC does not share the Commission's concerns, the Commission may, within one month of the end of the three-month period, either issue

a recommendation requiring the NRA to amend or withdraw the draft measure, or it may decide to lift its reservations.

Clearly, the proposed amendments do not address the 'accountability' concerns that have been raised about the existing framework, since they would only create additional soft law instruments and opinions that are unlikely to be judicially reviewable. If the conciliation process were to reopen the debate over the Article 7 process, we could expect there to be some attempts to put this issue back on the table.

NGAs

Next generation networks (and access) ('NGAs') is one of the current hot issues for European communications regulation. The proposed amendments to the ECNS regime include provisions relating to cost-sharing for NGA. After a significant debate between the European Parliament and Council, the Parliament's proposal for *ex ante* cost-sharing was supported, such that there would be *ex ante* cost-sharing arrangements between investors in NGA and parties seeking access (subject to a non-discrimination requirement and the preservation of competition in the market). In other words, the proposal on the table is for a 'risk-sharing' approach to costing, rather than an *ex post* 'risk premium' approach.

Aside from the risk that conciliation could allow this issue to be reopened, NGA costing is one of those areas where the delay in the adoption of package could have unfortunate and long-lasting ramifications for regulatory policy. The Commission is soon to publish its final 'Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks' and will adopt a 'Recommendation on regulated access to Next Generation Access Networks'. Both instruments will address access costing (the former for NGAs using state aid and the latter for NGAs provided by entities with SMP). It is clearly important that European policy regarding NGA pricing is consistent, and particularly that soft law instruments are not inconsistent with amendments that may be made to the ECNS legislative instruments themselves. Delays in the adoption of these sections of the amended package like this would be unfortunate, and could create market, policy and regulatory confusion for some time to come.

Net neutrality

While the net neutrality debate in Europe has had less heat than the US debate, access limitations and traffic management policies were policies were key issues in the issues in the debates about the amendments to the Universal Service Directive. However, many market participants take the view that the proposed provisions relating to quality of service and transparency of service terms do not truly engage on the net neutrality issue.

Whatever one's view as to the merit of these measures, they are clearly insufficient as a statement of European policy regarding net neutrality. The adoption of guidelines at national level (for example, by the Norwegian NPT) and ongoing questions in the European Parliament clearly suggest that there is the potential for fragmentation across Europe regarding the extent to which network operators are able to set traffic priorities and engage in other traffic management activities. It would, again, be unfortunate if conciliation were to mean that issues such as net neutrality could not be given the attention that they warrant in 2009.

The stumbling block: Amendment 138

Amendment 138 relates to the mechanism for disconnecting end-users from the internet (essentially where end-users are illegally sharing files online). This issue was not initially considered to be a key provision in the reforms. However, it essentially crystallised a number of overarching themes in the broader reform debate: the extent to which the European Parliament can effectively prescribe changes to the broad structure and functioning of national criminal and civil law, and the growing emphasis on consumer protection .

The version of Amendment 138 put to the European Parliament for vote on 6 May requires the prior decision by a judge before an internet connection can be disconnected. However, this approach had already been expressly rejected by the Council – many Member States viewed it as amounting to the European Parliament imposing conditions for the applications of (national) criminal or civil law. The compromise text (which the Rapporteur had intended to be voted on by the Parliament) stated that measures taken regarding end-users' access require only a prior determination by an independent and impartial tribunal established by law.

The concern of Member States about the European Parliament dictating the structure and functioning of national criminal and civil law was brought sharply into relief by the French 'Hadopi' law.[1] The Hadopi law (approved by the French Parliament on 12 May) provided that individuals found to have illegally shared files online were to be given two warnings, before being blacklisted – blocking them from subscribing to an internet service for three months. While there is an avenue for appeal, the law established an administrative (not judicial) procedure. The text voted by the European Parliament on 6 May would clearly have rendered the Hadopi law illegal. However, on 10 June, the French Conseil Constitutionnel found that the Hadopi law was unconstitutional, on the basis that only a judicial authority can order the suspension of internet service.

In sum, the French Hadopi law prescribed an administrative process. The Amendment 138 text actually voted on by the European Parliament requires prior judicial intervention. The compromise text (not put to the vote) required a prior determination, but only one by an independent and impartial tribunal. However, the decision of the French Conseil Constitutionnel means that the Hadopi law will have to be amended, in any event.

The scope of the task for the incoming Swedish Presidency and (likely new) Rapporteur in resolving the Amendment 138 impasse is not clear at this stage. Given the ruling of the Conseil Constitutionnel, the Hadopi law will have to be amended to provide for judicial intervention. Does this take the pressure off the Presidency to find an agreement that permits non-judicial determination? In any event, they will be under pressure to resolve the issue quickly.

1 Loi favorisant la diffusion et la protection de la création sur internet.

Next steps

The European (Telecoms) Council is scheduled to meet on 12 June to discuss how to proceed. The European Council could decide to approve the majority of the amendments, so that the conciliation with the European Parliament can focus on Amendment 138. However, since Amendment 138 relates to the Framework Directive, there could be real difficulties in adopting amendments to the other Directives that make up ECNS regime without the amendments to the Framework Directive, since, as its name suggests, the Framework Directive essentially provides the skeleton on which many of the other ECNS instruments hang. In addition, the European Parliament's secretariat is not currently expected formally to hand over the dossier to the European Council until 16 June.

The alternative is, of course, that the entire package goes to conciliation. This materially increases the likelihood that other aspects of the package could be reopened, as bargaining chips.

Whatver the European Council's decision, the institutions will have four months to reach a conciliation agreement. In many senses, the six-month delay resulting from the 6 May vote is the real danger for communications policy. While the legislative process has been paralysed, policy development on State Aid for broadband, net neutrality, next generation networks and access regulation and other issues has continued according to the timetable set when it was expected that the amendments would be adopted by May. The potential for divergence between these policies and the legislative provisions that are ultimately adopted is, to say the least, unfortunate.