

Response

to the proposal of the EU Commission for a reform of the regulatory framework for electronic communications networks and services (TK-Review)

25. March 2008

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The German Association for Information Technology, Telecommunications and New Media (BITKOM) represents more than 1,100 companies. Its 850 direct members generate a sales volume of 135 billion Euros annually and employ 700,000 people. They include providers of software, IT and telecommunication services, manufacturers of hardware and consumer electronics as well as digital media businesses. BITKOM is working, in particular, to improve the regulatory framework in Germany, for modernization of the education system and for an economic policy which encourages innovation.

On 13th November 2007 the EU Commission published its proposals for a review of the European regulatory framework for electronic communications networks and services. This "Telecoms Review" consists of a proposed review of the Directives on access (2002/19/EC), on authorisation (2002/20/EC) and the common regulatory framework (2002/21/EC) [COM(2007)697], of a proposed Directive amending the universal service Directive (2002/22/EC) and the data protection Directive (2002/58/EC) [COM (2007)698], and of a proposed regulation to establish a European regulatory authority [COM(2007)699]. There is, in addition, a revised recommendation on markets as well as other explanatory documents and recommendations.

The following response has been produced by the BITKOM working group on telecommunications policy and represents, with two exceptions, the consensus of all BITKOM members involved in the process. Our member companies Bertelsmann AG and BT Germany GmbH have a different opinion on specific points. Concerning the relevant positions on these topics, we draw attention to the companies' own statements in Annexes 1 and 2.

Summary

The revision of the EU regulatory framework for telecommunications offers the unique opportunity to bring the sector-specific regulation of prices and access into line with current economic conditions. This is particularly significant against the background of the considerable challenges which the European network operators have to face if they are to continue to build the high-speed networks of the next generation (NGN) and to develop innovative business models in a difficult market environment and with diminishing or stagnating returns. For this development, which will have a decisive impact on Europe's economic competitiveness in the global knowledge-based society, investment to the extent of several billion Euro will be required in the years to come.

Europe is clearly falling behind other economic regions of the world in the construction of super-fast broadband telecommunications. The Telecoms Review must provide

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answers, how investment and innovation can be stimulated. The future regulatory framework must therefore include reinforcing the foundation for even stronger and more fundamental infrastructural competition, above all in the construction and development of alternative networks for broadband access.

Regarding spectrum management, BITKOM welcomes the basic principles of the Commission's proposal. By introducing the principle of technology and service neutrality, establishing the granting of generalised authorisation as the norm, and finally by the gradual introduction of freely tradable frequencies in harmonising spectrum management, the European Union is embracing a classical theme of liberalisation to achieve an efficient and market-oriented distribution of frequencies. With regard both to the principle of technology and service neutrality and to the process of authorisation, however, we urge that the anticipated exceptional circumstances should be formulated with greater precision. With regard to the concrete organisation of the market in frequencies on the basis of the currently proposed guidelines, we ask that the industry should be involved, which can be achieved, for example, by a process of separate consultation.

We regret, in addition, that the important discussion of the "digital dividend" is being conducted in parallel with the reform of the regulatory framework for telecommunications but with no direct connection to the proposed regulatory measures. The so-called "digital dividend", that is the frequencies which will become free through the digital switchover from analogue to digital terrestrial broadcasting, offers an outstanding opportunity for more efficient spectrum use. BITKOM wishes to see a sensible balance achieved between the interests of all those involved and welcomes the proposal of the Commission in the draft Communication (Communication from the Commission of 13.11.2007, Reaping the full benefits of the digital dividend in Europe: COM(2007) 700 final) to assign some of the available frequencies to mobile broadband solutions. This will encourage new services which will be available also in less densely populated areas. BITKOM regards flexible use of the digital dividend as a significant element in a strategy to overcome the digital divide and to enable the citizen to choose freely between relevant sources of information.

BITKOM rejects the proposed introduction of the instrument for functional separation in the catalogue of remedies of the national regulatory authorities. We see the risk that, through the separation of network management into an organisationally independent entity, the incentive will be reduced for competitors of the former single incumbent operators to invest in their own infrastructures, in particular to undertake the construction of next-generation networks. The Commission should first have sought to show how far functional separation is really conducive to more competition and what, in particular, its long term effects are likely to be

BITKOM welcomes the fact that the provision of broadband access and mobile services has not been included in provisions for a universal service in the framework of the Telecoms Review. At the same time we emphasise that the inclusion of these services in a universal service also should not form part of the communication of the Commission on the concept and extent of the universal service which is mentioned in

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these proposals. With regard to the Universal Service Directive, we also see the need at a number of points for revision and clarification, in particular concerning the proposals for telephone number portability which are impossible to apply in practice.

With regard to the obligations concerning security in the Framework Directive we urge stronger emphasis that the awareness of the user of security risks must be increased and users must receive better education in dealing with these risks. Legislative activities should put less emphasis on providers of electronic communications services, who are themselves already making enormous efforts to maintain security. In addition, there is an urgent need to clarify the regulations and in particular to define the central concept of breach of security. There should be a duty of reporting only in cases where information relating to individuals is seriously at risk. Only then is risk of unsettling customers which is associated with reporting to be justified.

In conclusion, BITKOM rejects the planned introduction of a European telecommunications regulatory body. The EU Commission has yet to demonstrate the need for such a body. The European regulatory authority should exercise almost exclusively advisory functions for the Commission, but have scarcely any independent competence. If the Commission simply sees the need for further advice, this can also be met within the existing structure, or if necessary by improving its efficiency.

Annexes:

- 1 Dissenting opinion of Bertelsmann AG to points 1.3, 2.3.1 and 3.7
- 2 Dissenting opinion of BT Germany GmbH & Co. to point 2.7 (Functional Separation)

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1 Point of departure and general evaluation

The process of privatisation and liberalisation in the telecommunications industry which has up to now been encouraged by the EU, by opening up the market and regulation to encourage competition, has contributed to the strengthening of Europe's competitive position and substantially reduced the financial burdens on consumers and undertakings in the use of electronic communications services. This was a successful model as it was principally concerned with the transformation of former state monopolies into competitive markets, and on the basis of established national fixed networks. The present revision of the European regulatory framework has to face new challenges in pursuit of the goals of the Lisbon agenda and the "i2010" initiative, to strengthen the European ICT industry in international competition and to develop Europe further into a dynamic, knowledge-based economic area.

1.1 Europe is falling behind

Compared with the economies of Asia and the USA the European telecommunications industry is falling clearly behind. The growth rate of the European ICT market has declined rapidly in recent years. While in 2004 there was an increase in turnover of more than 7% compared with the previous year, growth in turnover in 2007 was only 2%. By contrast, in North American and Asian-Pacific markets the downward trend could successfully be reversed and increased growth again be achieved. In relation to GDP too, the ICT industry in Europe in recent years lagged behind both the other two economic regions.

The contribution of the telecommunications industry to the average growth in productivity presents a similar picture. At around 0.4% points in recent years, this has been around half as much as in the USA with 0.7% points. The difference is even greater compared with Japan and Korea: here the contribution of the ICT sector to growth in productivity, at 1.1% and 2% respectively, is by factors of 3 and 5 greater than the average of the EU-15. These contrasting circumstances have an effect on the attractiveness of innovation and investment. Investment in infrastructure in 2005 at around \$ 190 per head of population in the USA and around \$ 150 in Asia (Japan and Korea) was much greater than the average in the EU-15 of around \$ 125.

In particular, Europe has given up its former leading role in broadband services and in the construction of glass fibre network connections (FTTX) with around 1 million in 2006 was far behind Japan and Korea with 8 and 2 million respectively, and had also been overtaken by the USA with 1.8 million. The European telecommunications network operators are therefore faced with great challenges if they wish to advance the construction of high-speed networks of the next generation and innovative business models based upon them against the background of a difficult market environment and falling or stagnating revenues. It is necessary to distinguish between access networks (Next Generation Access) and the core networks of the next generation (Next Generation Networks), in as much as the former is concerned with providing the end users with sufficient bandwidth for all of their desired applications; in the latter case, the focus is on the creation of a core network integrating all services which enables

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the delivery of new services, functionalities and applications without modification of the technical platform. For this purpose, which will have a decisive effect on Europe's competitiveness in the global knowledge economy, investment on the scale of several billion Euro will be required in the coming years. The Telecoms Review must therefore provide answers how investment and innovation can be encouraged.

1.2 Promoting modern access networks

From the point of view of BITKOM, the Review must create the appropriate background conditions for investment in new access networks. Modern high speed networks form the infrastructural backbone of the information society, and together with the content transported over them are a decisive factor for the economic competitiveness of Europe in the knowledge-based society of the 21st century. The Review must adopt an unequivocal position in regard to the promotion of investment and innovation for new high speed access networks and show how the development of this network structure will be supported.

Care must be taken here, that the development of alternative access networks is not impeded by resale competition and similar business models on the basis of existing infrastructures. Consistent rewards in the area of advance telecommunications concessions are therefore necessary, to attract investment in network infrastructure. Reward structures which support business models on a resale basis lead to competition at the end consumer level only in the short term. Durable competitive structures can only to be achieved through investment in alternative infrastructures.

1.3 Exploiting the digital dividend

The so-called "digital dividend", that is, the frequencies which will be freed by the digital switch from analogue to digital terrestrial radio transmission, offer an outstanding opportunity for a more efficient use of the spectrum.

BITKOM wishes to see a sensible balance achieved between the interests of all those involved. The radio frequency spectrum under 1GHz is suitable for a variety of innovative services – for this reason it is especially coveted. BITKOM welcomes the Commission's proposal in its communication on the digital dividend, to make parts of the available frequencies available for mobile broadband solutions. This will encourage new services which will also be available in less densely populated areas. This will have a substantial positive effect on GDP and be conducive to achievement of the goals of Lisbon and the i2010 Initiative. A recently published study estimates that a primary application of the digital dividend for mobile communications would increase gross domestic product in Europe until 2020 by 0.6% a year (www.digitaldividend.eu). This potential has already been recognised at international level, most recently by initial decisions of the World Radio Conference (WRC 07) of the ITU which opens the way for the use of the digital dividend by mobile services. This is a step in the right direction. Bearing in mind the political goal to achieve comprehensive geographical coverage of broadband Internet services, the contribution of efficient wireless access

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as a result of assigning suitable frequencies to this specific purpose cannot be emphasised enough.

Flexible exploitation of the digital dividend is in the opinion of BITKOM a decisive element of a strategy to overcome the digital divide and to offer the citizen freedom of choice between the relevant sources of information. The freedom of information guaranteed by Article 5 of the German constitution must also apply to the diversity of information of the Internet. In our view, flexibility of use of the spectrum can make a considerable contribution to this process.

As a final point, BITKOM regrets that the discussion of the digital dividend, not least on the basis of the Communication of the Commission on this topic, is taking place in parallel with the revision of the regulatory framework for telecommunications, but with no direct relationship to the proposed package of measures, which contains proposals which offer an opportunity to establish connections. The relevant Communication of the Commission is being discussed but, by its nature, can serve only as policy guidelines, and is unable to offer the legal security which is essential to investment. The identification of spectrum from the area of the digital dividend for IMT technologies at the last WRC is a clear indication of the need and its recognition. Even if, as a result of the “switch over” at the latest by 2012, measures have to be taken to exploit the digital dividend before the revised regulatory framework comes into force, the Review should also be used to discuss this topic. Because of their considerable political significance, it would be possible to anticipate the inclusion of relevant provisions within the scope of Art. 9 of the Framework Directive. It would then, in addition, be possible also to include adequate provisions at the appropriate time in the context of reviewing the progress of changes of frequency use in this area.

2 Comments on proposals for the reform of the Framework (2002/21/EG), Access (2002/19/EG) & Authorisation (2002/20/EG) Directives; 2007/0248 (COD)

2.1 Scope of application, Art. 2 Framework Directive

BITKOM opposes the extension of the scope of application of the regulatory framework to particular aspects of provision of terminal equipment under Article 1 of the regulatory framework. This leads to a considerable extension of regulation to terminal equipment which previously was not subject to ex-ante regulation. The market for terminal equipment was and still is characterised by strong competition. There is no sign of market failure. Extension of regulation in this area is therefore not justified.

With regard to the opening of utility supply networks according to Art. 2 e) Framework Directive, BITKOM supports a symmetrical obligation to provide access to all appropriate systems. This should include not only telecommunications operators but all those responsible for the management of appropriate supply networks. This should also include putting pressure on public and communal management bodies to provide access to their channels as this will minimise distortion of competition.

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2.2 Restrictions of formerly existing legal protection, Art. 4 para. 1 Framework Directive

The proposal of the Commission to amend Art. 4 Framework Directive, to the effect that the former legal protection against instructions of the regulatory authorities should in future be retained only for the prevention of serious and irreparable damage, is to be opposed. In the opinion of BITKOM, the proposal represents an inadmissible intrusion into the system of legal protection of the member state and a further curtailment of the legal protection available to the market actor involved. In this connection, it must also be noted that rights to legal protection are also restricted where the Commission increasingly has recourse to so-called soft law (recommendations, communications etc.). This trend is continued in the latest proposals of the Commission (e.g. in the specification of the procedure for action under Art.7).

2.3 Use and allocation of spectrum

2.3.1 The principle of technology and service neutrality, Art. 9 Framework Directive

A significant principle in the proposals of the Commission for a reform of the regulatory framework is the principle of technology (Art. 9 para. 3 Framework Directive) and service neutrality (Art. 9 para. 4 Framework Directive). The companies represented by BITKOM, in respect of economic effectiveness and creation of value per channel assigned, are among the most efficient users of spectrum. In this sense, it is important not to lose sight of the specific needs of the industry. These relate primarily to the efficient use of available resources, above all through protection against interference and restriction of capacity through new uses. Furthermore, it is of the greatest importance to be able to secure reliable planned access to sufficient increased spectrum for the expansion of existing networks and services. At the same time, there must be a clear prospect of access to suitable new resources for the development of new infrastructures and to offer innovative services.

BITKOM welcomes the amendments to the Framework Directive proposed by the Commission, according to which assignment to frequencies is in future to be technology and service neutral. With this harmonisation of spectrum policy the European Union is adopting a classical theme of liberalisation to achieve an efficient and market oriented assignment of frequencies. This is not to say that a flexible and efficient use of spectrum in the member states does not also require the recognition of certain legitimate exceptions to this basic principle. It goes without saying, that exceptions from the principle of technology neutrality can be required, for example, to avoid interference (Art. 9 para. 3 lit. a Framework Directive). It seems, however, problematic that it should in principle be the member states that are allowed to define these exceptions.

This is not the only aspect in which the current proposals run the risk of being watered down in part by insufficiently precisely defined conditions for exceptions, which detract from the legal and planning security of the business sectors to which they apply. Among other aspects, the proposals allow restrictions of service neutrality if they

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serve a purpose in the general interest. These include the proposal according to Art. 9 para. 4 S. 3 Framework Directive to strengthen social and territorial integration, to promote cultural and linguistic variety as well as pluralism of the media in harmony with national legal requirements – it is in general not clear which constellations are meant here in detail. The problem is increased by the fact that these generally formulated conditions for exception are the only ones which explicitly should not be subject to the Commissions jurisdiction for harmonisation according to Art. 9c para. 1 d) Framework Directive. A general reading of the proposals for frequency policy does suggest certain conclusions about how the Commission understands, for example, the concept of services which serve pluralism of the media. This however is not congruent with, for example, radio and television content services, as is apparent from Art. 9a Framework Directive (Procedure to “Review the restriction of existing rights”). The principle of service neutrality should in BITKOM’s view, be applied to all areas of frequency without exception, to establish an equal starting point for all participants in the market.

Regarding a number of conditions for exception, BITKOM appeals for a more precise formulation, expanded as appropriate with concrete explanations in the grounds for consideration. The principle should generally be observed, that every limitation should be necessary for the achievement of a purpose in the general interest – a restriction which is already expressed in Art. 9a Framework Directive. Finally, the member states should be under an obligation to notify any exceptions from technology and service neutrality to the Commission. Reviewing exceptions from the principle of technology and service neutrality by the member states should not take place “regularly”, but within a clearly prescribed period of time, for example, of two years.

2.3.2 General authorisation as the normal case, Art. 5 Authorisation Directive

With the proposed Article 5 of the Authorisation Directive, the Commission is planning to make the use of radio frequencies no longer dependent on the allocation of an individual license but to introduce instead general authorisations with corresponding conditions of use as the normal case. Individual licenses should be possible only in the cases foreseen in Art. 5 para. 1 a) and b) Authorisation Directive. According to this, individual rights of use can be granted:

- avoid a serious risk of interference with transmissions
- in pursuit of other purposes in the general interest.

BITKOM basically welcomes the approach chosen of a more fundamental anchoring of general allocations in the system of frequency use. But hand in hand with the establishment of general allocation of rights as the normal case – as in respect of the basic principle of technology and service neutrality – the question arises of an adequate formulation of the related conditions for exceptions.

It should not be forgotten that at present the overwhelming part of the frequency spectrum is used on the basis of individual licenses. Even in the future, individual licenses

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will still be required to deliver certain services adequately in the general interest and to be able to continue to offer established services. The criteria listed in Art. 5 para. 1 Authorisation Directive, which can be applied as exceptions from general allocation and to preserve individual rights of use, are in our view, on the one hand, in part too imprecisely formulated, and on the other hand, fail to mention important constellations of interest. As in the case of the principle of technology and service neutrality, we therefore plead for a more precise formulation of the circumstances for exception:

BITKOM is convinced that here too, grounds such as effectiveness and efficiency of frequency use and interoperability in consideration of general economic must be mentioned here. We consequently cannot understand why, in the proposed revision of Annex I B Authorisation Directive under number 2, effective and efficient use of frequency has been deleted.

2.3.3 Transitional period; Art. 9a Framework Directive

The introduction of a procedure to “Review the restriction of existing rights” under Art. 9a Framework Directive is very much to be welcomed. This allows the owners of rights to frequency use to obtain a review by the national regulatory authorities of restrictions according to the measures for technology and service neutrality. In so far as a provider of radio or television content services makes such an application, the application for review can be made only for the portion of radio frequency which is required for the achievement of a purpose of general interest. According to the proposals, the review can be initiated within a period of 5 years from 1st January 2010 by the owner of the rights of use himself. Only after this period the national regulatory authorities are obliged to carry out an official review.

In this connection, a period of transition must be specified. However, in BITKOM's view, five years are too long for this. A period of about two years seems sensible. In any case, we urge that the regulations be defined so as to support an early application of the results of the WRC 2007, which aim for an opening of part of the frequency bands in the UHF band at the latest in the year 2015.

2.3.4 Gradual enabling of market in frequencies Art. 9b, 9c Framework Directive

BITKOM welcomes the proposal for a (gradual) enabling of a market in frequencies as an element of a market-oriented frequencies policy. The introduction of a trading regime in frequencies must however take full account of the European standard premises of transparency, openness and predictability. Against this background, the regulations foreseen in the proposals seem to us still too lacking in precision, as they still leave too many questions open, in particular, for example, which frequency bands come into consideration for the introduction of the frequency trading regime and over what period of time the gradual expansion into further bands is envisaged. The empowerment of the Commission to decide these conditions, as foreseen in Art. 9c Framework Directive, is not sufficient on grounds of legal security, since even now undertakings must have a clear time horizon for the introduction of the market in fre-

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quencies.

The industry should therefore be involved in the concrete organisation of the market in frequencies. In BITKOM's view, this should take place through a separate process of consultation. As this is concerned with a highly specific theme and not with the basic question "whether" to have a market in frequencies, this discussion should not take place now in the context of the general reform proposals, but separately as a second step.

Finally, the obligation for public announcement of an envisaged sale or leasing of frequencies should be deleted, as it is likely to make the trade in frequencies considerably more complicated. It should instead remain a matter for the undertakings themselves whether they make the sale or lease public.

2.4 Issuing numbers etc., Art. 10 para. 4 Framework Directive

Art. 10 para. 4 Framework Directive assigns the Commission the task of issuing numbers when authorising appropriate measures in implementing technologies, which can also include the determination of principles of charges to be applied to specific numbers or groups of numbers. BITKOM is emphatically opposed to the determination of tariffs, components of tariffs or principles for charging tariffs in the context of the administration of numbers. The determination of prices is one of the significant parameters in competition between suppliers. Regulation of prices may therefore take place only in the context of the control of market power. In this the processes laid down in the regulatory framework are to be observed (market analysis, determination of market power, determination of supporting measures). In general, the principle applies that the administrator of the participatory network can decide where the ability lies to determine the level of charges. From the point of view of harmonisation this principle should be established in Community law.

2.5 Market analysis and market definition, Art.15 f. Framework Directive

According to Art 16 para. 7 in the case of absence of action by the national regulatory authority within the two-year time limit specified under Art. 16 para. 6 Framework Directive, the Commission has the right to order a market analysis by the Authority. According to the proposals, the Commission should subsequently be directly entitled to reach a decision itself, naming undertakings with significant market power and specifying remedial measures according to Art. 8 – 13 Access Directive and Art. 17 Universal Service Directive respectively.

BITKOM basically welcomes the effort to ensure efficient action by the national regulatory authorities through measures to enforce the obligation to conduct market analysis and market definition.

The extension of the powers of the Commission proposed in Art.16 para. 7 Framework Directive, however, is rejected as excessive. In our opinion it is particularly prob-

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lematic that the Commission should be empowered to act immediately on expiry of the time limit.

An extension of powers of this nature would permit a European authority to take decisions directly in the place of a national authority. This raises significant considerations of a legal nature. It would undermine the existing system of checks and balances, whereby European law is substantially applied in national jurisdictions.

2.6 Provision for exception, Art. 8 para. 3, hyphen 2. Access Directive

The imposition of a resale obligation independently of market power, as foreseen in some of the licenses of German mobile telephone networks is a contradiction in principle of the regulatory framework to date, since resale obligations may only be imposed on undertakings with significant market power. The obligations in the licenses referred to can only be “rescued” by a corresponding exceptional proceeding (Art. 8 para. 3 hyphen 2 Access Directive). Since the new market proposals of the Commission no longer regard mobile telephony (formerly Market Nr. 15) as requiring regulation and the German Regulator (BNetzA) in addition has recently declared the German market to be free of dominant players, undertakings in this market should no longer be subject to resale obligations. In the course of the Review, the procedure for exceptions of Art. 8 para. 3 hyphen 2 Access Directive must accordingly be deleted. The resale obligation intended to open up the then still youthful market has lost its justification in times of market saturation and is obstructing innovative business models.

2.7 Functional separation, Art. 13a Access Directive

BITKOM rejects the proposal to give the national regulatory authorities the power to impose a separation of functions on undertakings.

Functional separation obliges the undertakings affected to divide their network infrastructure into separate business activities, but not to divest themselves of ownership of the relevant branches. In the draft framework the Commission provides functional separation as the instrument of last resort for the national regulators, to be applied only following other measures and after evidence has been provided to the Commission of their ineffectiveness.

BITKOM takes the position, in particular against the background of the situation on the German market, that questions of the structure of undertakings should be left in principle to the undertakings themselves. This includes the possibility of voluntary separation, as covered also in Art. 13b Access Directive.

BITKOM sees the risk, through the separation of management of the network into an organisationally separate unit, that the attractiveness will be reduced for competitors of the holder of the former monopoly to invest in their own infrastructures. In BITKOM’s view, experience in a single member state is generally insufficient to justify

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the adoption of functional separation for the whole of Europe as the instrument of sector-specific ex ante regulation. BITKOM recognises that the application of the instrument, according to the Commission's proposals, still remains exclusively in the hands of the national regulatory authorities, but is afraid that, if it is included in the toolbox of the national regulatory authorities, it will be applied also in Germany.

The Commission should first have shown to what extent functional separation is really appropriate for the creation of more competition and in particular what are the long term effects. This must also include a comparison with the possibility of an ex post consideration under general anti-monopoly legislation and other anti-discrimination instruments already implemented. Finally, there should have been a country-specific analysis, since the markets in the European member states display considerable differences in their basic conditions. Because of these very different points of departure, our judgement of the instrument of functional separation is critical, in particular in view of the accompanying right of veto for the Commission.

Furthermore, the Impact Assessment of June 2006 did not discuss the topic of functional separation. There has also been no exchange of views with undertakings on possible consequences prior to the proposals. A measure as drastic as this should be introduced, if at all, only on the basis of exhaustive knowledge of the circumstances. From the point of view of BITKOM, this requirement has currently not been fulfilled.

In particular, no analysis has taken place with regard to the question what influence functional separation has on competition of infrastructures. BITKOM takes the position that innovation and investment is best achieved through intensive competition of infrastructures, also on the basis of different technologies. From the point of view of BITKOM, there is a considerable danger that through separation of functional areas there will ultimately be a reduction of the various competing infrastructures with a consequent threat to the emergence of sustainable competition based on infrastructures. Beyond this, the danger is not to be underestimated that a regulatory instrument of this kind presents for the creation of networks of the next generation. The willingness of undertakings to invest heavily in the construction of new infrastructures, which will replace the classical telecommunications networks and enable innovative applications and services, must not be impaired by unconsidered regulatory measures.

3 Comments on the proposals for the reform of the Directive on universal service (2002/22 EC), the Directive on data protection in electronic communications (2002/58 EC) and the Regulation on consumer protection cooperation (No. 2006/2004); 2007/2048 (COD)

3.1 Scope of universal service

BITKOM welcomes the fact that the provision of broadband connections and mobile services has not been made part of the universal service Directive in the context of the Telecoms Review. At the same time, we emphasise that the inclusion of these services in the universal service should also not become a consideration of the Green

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Book of the Commission on the concept and scope of the universal service which is announced with these proposals.

Universal service obligations guarantee basic access. They serve primarily to provide a basic telecommunications service. Universal service obligations in this way limit the freedom of action of the participants in the market and thereby restrict the development of free competition. The universal service as a regulatory instrument is therefore to be applied with restraint, particularly in new markets.

For both the mobile sector and broadband provision the Commission already conducted a comprehensive consultation in the period 2005 to 2006, which could find no reasons for the inclusion of either sector in the universal service. This finding of the Commission is still valid. Both sectors are marked by highly intense competition in the retail market which also includes the level of prices. In Germany this has led to a sufficient, and for the consumer, affordable, supply of products at the level of both infrastructure and services.

3.2 Measures for disabled users, Art. 7, 33 para. 3, 4 Universal Service Directive

BITKOM welcomes the consideration of the interests of disabled users by the member states, following Art. 7 of the universal service directive. The question remains open, however, both in the proposed regulations and in German national law, how such measures are to be financed. From a German perspective, the considerable significance of this aspect can be seen from the example of the enabling service for people with impaired hearing ability and no hearing to be established under national telecommunications legislation (§ 45 TKG).

This example shows that the costs of such measures can run into millions. BITKOM acknowledges in principle a shared responsibility of the private sector in the development of corresponding services, but sees the matter of finance as primarily a duty of the member states. In addition, those taking advantage of these measures can also be involved in payment for them, to a reasonable degree.

3.3 Art. 20 para. 2 Universal Service Directive

According to Art. 20 para. 2 S. 1 Universal Service Directive, on applying for services offering a connection to a public telecommunications network or publicly available telephone services, consumers should have the right to a contract with an undertaking providing these services or connections. Article 20 para. 2 of the Universal Service Directive establishes minimum requirement for these contracts.

We do not regard the obligations to provide information under Art. 20 para. 2 S. 2 h) Universal Service Directive in their present form as capable of application in practice. Every violation of security necessitates an individual investigation in the individual complex networks and structures of the network operator or service provider. Designation of measures in advance cannot be made with confidence on account of the

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individual nature of every security problem.

3.4 Art. 20 para. 7 Universal Service Directive

A right of the customer to terminate the contract on the grounds of changes in the contractual conditions should be restricted to changes which affect the customer adversely, i.e. represent a worsening of the previous conditions of the contract. However, at least changes in the contract which are necessary on the grounds of (new or further) technical developments or on the grounds of changes in legal requirements, as well as changes which have exclusively positive consequences for the customer, should be explicitly excluded from the regulation.

3.5 European prefixes, Art. 27 Universal Service Directive

In Art. 27 para. 2 and 3 Universal Service Directive the EU Commission makes reference to the “European Telephony Numbering Space (+3883)“. From the point of view of BITKOM the concept followed by the EU Commission for ETNS is mistaken, due to lack of concrete demand from the market. As a result of this experience, the EU Commission should draw the appropriate conclusions and abandon the concept. The corresponding passages of the proposal are accordingly to be deleted.

3.6 Portability of telephone numbers, Art. 30 para. 4 and para. 5 Universal Service Directive

We reject the requirement for portability of a telephone number within one working day. This is much too short a period. With a limit of only one working day an increased error frequency is to be expected in changing the connection to another supplier.

If the transfer of the number is connected with the rental of a subscriber line, this constitutes the limiting factor. The number cannot be transferred until the subscriber connection line has been switched to the new provider.

For the telephone customer wishing to change supplier, it is, however, of importance above all the transfer of the number functions successfully and without problems, and less so, that it is carried out within a specific period of time. BITKOM therefore requests that no specification should be made for the time period to transfer a number. To this extent, the existing regulation on portability in Art. 30 should be retained. It offers sufficient flexibility also to allow the special characteristics of national processes for implementing the existing obligation for portability to be taken into account. Finally, it must be borne in mind that the regulation applies to the greatest variety of calling numbers and independently of the individual provider (network operator or service provider). The precise form which the process takes must accordingly, as in the past, largely be left to the participants in the market.

Art. 30 para. 5 Universal Service Directive aims at the introduction of portability of numbers between fixed and mobile subscriber connections. In consideration of the

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serious consequences in terms of transparency for the customer, we do not regard this extension as reasonable, and propose the deletion of the paragraph. Amendments with such far-reaching implications should only be decided after comprehensive analyses and market consultations.

3.7 Must Carry, Art. 31 Universal Service Directive

In spite of minor changes in expression Art. 31 para. 1 Universal Service Directive allows too much scope for interpretation and leads to very different Must Carry regulations in the member states (and particularly in Germany in the individual federal states). Due to the use of relatively imprecise legal concepts the Must Carry regulations in the federal states are justiciable only with difficulty, particularly with regard to their reconcilability with European law.

The requirement alone that Must Carry obligations may only be imposed in so far as they are necessary for the “achievement of clearly defined goals in the general interest” is far too non-specific and allows the national authorities too much room for interpretation and discretion. It is therefore urgently necessary that there is an explanation is given of the correct implementation in national law. Initial clarification – for example a statement on the reconcilability of sovereign authorities or reconcilability with a compulsory feeding of programmes broadcast by DVB-T into the analogue cable – are to be awaited from the EuGH, on which relevant procedures are dependent.

3.8 Security obligations, Art. 13a para. 3 Framework Directive, Art. 4 para. 3 Data Protection Directive

3.8.1 General remarks

The proposals on questions of the security of electronic communication services focus strongly on the ICT industry and in doing so neglect the role of the user. This overlooks the fact that it is primarily the users who are able to protect themselves against threats from the services which they use. Legislative activities should therefore be devoted less to the providers of electronic communication services, who already undertake enormous efforts to ensure security. There is a much greater need to sharpen the awareness of users of risks to security and to provide them with even better education in dealing with them.

We urge furthermore that the regulations proposed in Art. 4 para. 3 Data Protection Directive and Art. 13a para. 3 Framework Directive be combined as both are devoted to duties of reporting in case of a breach of security. This would avoid a formal fragmentation of the schedule of obligations concerning breaches of security.

3.8.2 Lack of clarity in formulation

The content of the reporting obligations also does not meet with our approval. The proposed regulations suffer from frequent lack of precision with consequent substan-

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tial legal uncertainties for the industry concerned. In the first place, in many respects conceptual difficulties exist. Thus, the question arises, what is to be understood by “violation of security” or “publicly accessible communications services.” There is a need for exact definition of these terms.

3.8.3 Requirements for reporting

In addition, reporting obligations in case of a violation of security must be related to stricter preconditions than is foreseen in the regulations so far available. An obligation to report should only arise in the case of a serious hazard for personally related data. Only then is the unsettling of the customer which reporting also entails to be justified.

At the same time it must be taken into account that in particular public reporting of security violations can be counterproductive for the general state of security, since making the information available can immediately offer encouragement to the exploitation of security loopholes. It must therefore at least be made clear that public notification can only be given when further exploitation of the breach in security has been excluded.

3.8.4 Opportunity for choice by the national authorities, Art. 13a para. 3 Framework Directive

BITKOM rejects the possibility foreseen in Art. 13a para. 3 Framework Directive for the national regulatory authorities to choose whether, in addition to the national regulatory authorities of the other member states, they also inform the public, as it is to be feared that different practices of the individual national regulatory authorities will arise. Consistent reporting behaviour of the individual national regulatory authorities requires more precise legal provisions.

3.8.5 Technical enforcement measures, Art. 13a para. 4 Framework Directive, 4 Abs. 4 Data Protection Directive

As stated under point 3.8.4, there is a need for more precise provisions to ensure consistency of reporting behaviour by the national regulatory authorities. The power of the Commission foreseen in particular in Art. 13a para. 4 Framework Directive to adopt technical enforcement measures in case inconsistent practices by the regulatory authorities are identified is inadequate. It is not acceptable first to wait until an irregular application of the reporting obligations is observed. Rather, it is necessary that the guidelines for the reporting behaviour of the national regulatory authorities are laid down in the regulatory framework itself. This is the only way to achieve the degree of legal certainty necessary for the industry.

3.9 Active proof of identity with SPAM, Art. 13 para. 6 Data Protection Directive

The Commission proposes that natural and juridical persons should have the possibility to take legal action against originators of uninvited messages (Spam). The possibil-

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ity in particular to pursue juridical persons is here of significance. The extended proof of identity should not, however, lead to further controlling or other obligations for the provider.

Point 35 of the Preamble of the regulatory framework correctly notes that the providers of electronic communications services undertake considerable efforts in the battle against Spam. The form of words chosen could however give rise to misunderstanding. A clarification should follow that liability on the part of the provider of electronic communications services is excluded in the case that insufficient measures against Spam have been taken.

4 On the planned establishment of a European regulatory authority for telecommunication; proposed regulation COM (2007)699

We reject the establishment of a so-called European Electronic Communications Market Authority. The necessity for such an authority has so far not been demonstrated by the EU Commission. For the establishment of a new authority the same applies as for every form of state business. Only if there are associated benefits for the common good in the sense of effecting state regulation is such a procedure to be justified. Required interventions in the market can also be carried out in other ways, namely through the national regulatory authorities and the Commission. In addition, a strengthening of the group of European regulators is also to be considered when it comes to the harmonisation of regulatory practice in the individual member states.

The Commission has not shown convincingly why a new bureaucratic institution is required for the new challenges it has identified. The European regulatory authority should almost exclusively exercise an advisory function for the Commission, but have scarcely any powers of its own. If the Commission simply sees a need for increased advice, this can be developed within the existing structure – a new authority for this is not necessary. The situation may have been different a few years ago, but now such plans are coming too late.

The introduction of a European regulatory authority is also not justified from the point of view of resolving a possible problem of efficiency in ENISA. This argument involves a questionable association of substantive questions with institutional themes.

5 Clarification of the envisaged structure of responsibilities

General consideration of the proposals advanced leaves the impression of an inconsistent collection of responsibilities. It is not apparent what basic role the Commission sees for each of the regulatory institutions involved: Authority, Commission and national regulators.

Apart from our general rejection of the establishment of a European regulatory authority, there is consequently an urgent need to present a general understanding of the future distribution of powers between Commission and national authorities.

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Appendix 1: Dissenting opinion of Bertelsmann AG to points 1.3, 2.3.1 and 3.7

On 1.3. The “digital dividend” according to the definition of the Commission takes completely different forms in the member states, on the one hand according to topography and with regard to the specific demands for agreement of frequencies with their neighbouring states (EU-Eastern boundary, etc.), on the other, because of the differing relevance of the (Digital-)Terrestrial in the field of tension between the competing forms of distribution. The provision of the member states with frequencies on the basis of the principle of “equitable access to spectrum” according to the RRC 06 was the obligatory starting point to guarantee the existence and development of broadcasting also in its terrestrial form. It must lie within the power of the member states to administer a possible digital divide for themselves. Private and public-service broadcasters together perform a socio-political function, protected by the constitution and defined in legislation governing the media, in the formation of individual and public opinion and preservation of the diversity of culture and opinion. Together with a wide range of regulatory conditions, this status also entails privileged access to transmission capacities. Since, as with the question of discontinuities in provision of broadband services, it is concerned with regionally separable, local phenomena, within the area of use of a particular language use, the national regulatory authorities are in the best position to implement this shared objective of the Commission and the member states, to strengthen the information society. We strongly support this. The UHF band, however, is not the correct solution to the problem, as it cannot provide the customary broadband in terms of an appropriate data transmission rate and band width. The discontinuities in supply can be bridged in future with Internet via satellite as well as with other wireless transmission technologies such as BWA or WiMAX. Conversely, shifting broadcasting to other frequency ranges is not a practicable procedure.

On 2.1.3. In so far as UHF band frequencies were to be made available for services other than broadcasting, so-called “guard bands” would have to be introduced to avoid serious interference. Broadcasting technologies currently in use are not designed to work in direct proximity with mobile services. The introduction of the aforementioned “guard bands” for reasons of avoiding interference is not efficient. On exhausting the spectrum allocated to them, Member states should be able to meet demands on the basis of clearly formulated objectives in achieving coverage, after detailed examination of the situation with interference, in a manner which is adequate to the specific service, and not per se service neutral.

On 3.7. Must Carry provisions support the pluralistic character of broadcasting provision and the supplementary services associated with them such as videotext in an environment of vertically operating network providers with their own business models (Triple Play). It is essential to preserve this variety, in particular the non-discriminatory conditions for transmission and broadcasting and the ability to locate broadcast offerings. Must Carry provisions designed to preserve variety must therefore apply, not only for all electronic and wireless networks, but also to the operation of all platform.

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Appendix 2: Dissenting opinion of BT Germany GmbH & Co. concerning Point 2.7 (functional separation)

The member company BT Germany GmbH observes that functional separation undertaken in agreement between the regulator and regulated companies can have exceptionally positive consequences for infrastructural competition and the level of investment in the connection network. In Great Britain, for the financial year 2007, from a surplus of £1,177 billion, the functionally separated subsidiary company BT Openreach reinvested a sum of £1,108 billion (94.1%). Functional separation is positively regarded also in other countries, such as Sweden, Ireland and Italy.