Entering New and Converging Media Markets: How to Take a Proactive Approach to Legal Issues in the Electronic Communications Sector

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Abstract

The vast technological developments in the information and communication sector are rapidly changing the media markets. The Internet, telecommunications and broadcasting media markets are converging, and new technologies, services and markets arise. A number of regulatory amendments have been passed on EU level recently in order to adjust the regulatory framework to the changing market conditions. However, regulation is still lacking behind the technological developments. Moreover, the delimitation and interpretation of the new rules are not always clear. This creates legal uncertainty for companies seeking to enter the new and promising media markets. Legal uncertainty makes it imperative to take a proactive approach in order to predict and solve legal issues before they arise. Otherwise, the companies' investments will be endangered. So will the tremendous possibilities for economic growth and innovation that the information and communications sector represent. The purpose of the article is to present the main principles of the – relatively new – regulatory framework of the electronic communications sector, and highlight some of the typical legal questions and issues that providers of infrastructure and/or content services on the new media markets face.

1 Introduction

The electronic media are developing rapidly these years due to the conquests within the field of information and communications technology (ICT). The Internet is becoming a key media for all kinds of communication. At the same time the Internet and the whole data communications technology influences the more traditional media such as voice telephony and broadcast. As a result the different electronic media, which previously could be clearly distinguished from each other, are converging and new media arise. A few examples can illustrate this point: IP telephony (Voice over IP, VoIP) is a result of convergence between Internet technology and traditional voice telephony. Text messages and other data services over mobile phones are a result of convergence between data communication and infrastructure developed for mobile voice telephony. Digital or interactive television (iTV) is a result of convergence between traditional broadcasting and data communication technology. And so forth.

The media convergence and the new media deriving from it have created tremendous new market possibilities for the companies in the information and communications sector. It is no coincidence that this sector is among the most rapidly growing sector in the EU. In terms of infrastructure the emergence of new technologies such as optical fibre, xDSL, UMTS, EDGE, WI-FI, WiMAX etc. have created demand and thus business opportunities for new as well as existing players that produce these technologies (as well as software and devices supporting them). Not to mention producers of handheld terminals such as mobile phones, PDA's, portable PC's etc. These terminals are becoming multimedia terminals capable of displaying voice, data and sound services and combinations thereof. In terms of content a whole palette of new services has

arised, such as the above-mentioned IP telephony, mobile data services and interactive television services.

No surprise that the converging electronic communications sector attracts a great number of players coming from all kinds of "old" media markets and in all steps of the value chain, from infrastructure, production of content, distribution and end-user reception.

However, the converging media markets and the vast technological developments also create legal uncertainty, both in terms of delimitation of the applicable rules that regulate a given legal issue, and in terms of how to interpret these rules in light of the new media. Is broadcast networks regulated the same way as Internet networks? Does the answer hereto depend on whether the broadcast network is able to carry interactive data communication services? Is IP telephony regulated the same way as traditional telephony? If so, is it possible for a provider of IP telephony to comply with the requirements applicable to (and basically written for) traditional telephony? As it appears, the questions are numerous – and new legal questions seem to appear every day.

The legal uncertainty makes it imperative for companies entering new media markets to take a proactive approach in order to predict and solve legal issues before they arise. Otherwise, their investments will be endangered. The purpose of this article is to present the main principles of the – relatively new – regulatory framework of the electronic communications sector, and highlight some of the typical legal questions and issues that providers of infrastructure and/or content services on the new media markets face.

The legal framework mainly consists of EC regulation and is thus essentially common in the Scandinavian countries that are EC members. Because the regulation is included in the EEC Agreement it also covers Norway.[1]

Below, the principles of the regulatory framework for electronic communications will be presented. Then, certain legal issues that most companies entering the new media markets need to address will be described. First in terms of infrastructure, then in terms of content services.

2 The EU Regulatory Framework

Until around 1990 the regulation of electronic media mainly only consisted of separate regulatory frameworks for the transmission of voice telephony (over fixed lines) and broadcast, respectively. EU harmonisation was little, so regulation was mainly left to the member states. The public accessible Internet, as we know it now, did not exist. Then up through the 90's EU progressively liberalised the telecom legislation and replaced the state monopolies with free competition in order to gain full benefit of the vast business opportunities that laid hidden in the emerging digital economy and promising innovations in the ICT industry. The liberalisation was in 2002 followed by a new regulatory framework ("the 2002 telecom package") aiming at adjusting and shaping the

1 *Cf.* the legislative history behind the Norwegian "Lov om elektronisk kommunikasjon (Act 2003-07-04-83).

regulation to the growing media convergence and rapidly changing market conditions in general.[2]

The 2002 telecoms package – as the telecoms regulation in general – is mainly concerned with *infrastructure* matters, not *content*. EU has, however, also introduced regulation on several areas related to electronic media content, including TV advertising, contract formation on the Internet and similar public data networks, consumer protection, protection of privacy online, copyright protection of online works, electronic money etc.

Thus, companies entering new media markets need to be aware of significant amount of rules and regulations, regardless of whether the company's activities concern infrastructure or content.

3 Infrastructure Issues

3.1 Scope of the 2002 Telecoms Framework

As mentioned, infrastructure issues are regulated in the 2002 telecoms package. The package consists of 5 directives and a Council decision: directive 2002/21/EC (the Framework Directive), 2002/19/EC (Access Directive), 2002/20/EC (Authorisation Directive), 2002/22/EC (Universal Service Directive), 2002/58/EC (data protection in the telecoms sector) and Council decision 2002/676/EC (radio spectrum policy).

As the words indicate, the overall framework for the new regulatory regime is laid down in the Framework Directive.[3] Recital 5 of the Directive expresses the overall reason behind and purpose of the regulatory reform, namely that the convergence of the telecommunications, media and information technology sectors means that all transmission networks and services should be covered by a single regulatory framework. Thus, when the media technologies are converging, so shall the regulation of the media. The telecoms package replaced 26 directives that made up the prior regulatory framework.[4]

The way to create a single, harmonised and coherent EU framework in a world of converging media is to take a *technology neutral* approach. Previously, regulation of the different electronic media closely reflected the technological characteristics of each media. The result was that voice telephony services and networks had its own regulation, as had broadcasting services and networks etc. When the media converge, this regulatory approach leads to overlapping rules, unclear delimitations and general legal uncertainty.

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2 The adoption of the package realized the socalled "99 Review" carried out by the European Commission (COM 1999 539). For further background on the road from state monopolies to the 2002 telecom framework *see* Koening, Bartosch and Braun, *EC Competition and Telecommunications Law*, Kluwer Law International 2002, chapter 2.

3 For further reading on the Framework Directive *see* Bell & Ray, *EU Electronic Communications Law*, Richmond Law & Tax 2004, chapter 3, or Koenig, Bartosch & Braun, *EC Competition and Telecommunications Law*, Kluwer Law International 2002, chapter 7.

4 Bell & Ray, *EU Electronic Communications Law*, Richmond Law and Tax 2004, p. 31-32.

Under the 2002 telecoms package's principle of technology neutrality the term "electronic communications networks" covers *any* network (including switching and routing equipment etc.) that permit the conveyance of electronic signals, whether it be networks for transmitting voice telephony, Internet content, data services for mobile terminals, radio or TV programmes etc., and whether the network is based on cable, wireless technologies or satellite, is circuit or packet switched,[5] is an electricity cable system etc.[6] The effect of the principle of technology neutrality is that a company providing communications networks to the public will most likely fall under the telecoms regulation – regardless of the underlying technology and the character of the content that the network shall convey.

Likewise, the principle of technology neutrality means that the term "electronic communications service" is a horisontal concept covering the *conveyance* of signals in an electronic communications network, whether the information being conveyed is voice telephony, data, Internet service, radio and television programmes or other kinds of electronic information. A company conveying IP telephony, Internet traffic or radio/TV programmes, is a provider of an electronic communications service within the meaning of the regulatory framework.

The service consisting of conveying signals must, however, not be confused with mere *content services* such as the provision of Internet websites, radio or TV programmes etc. Content services are (with a few exceptions, re below) not covered by the 2002 telecoms package. Thus, a company entering new media markets should carefully consider if the services provided are dealing with conveyance of information or information content as these concepts are defined under the framework.[7]

3.2 Authorisation and Licensing

The Authorisation Directive has set forth new principles regarding authorisation from public authorities when entering the electronic communications sector. Previously, there was no harmonised approach to authorising market entry for communications service providers, but a patchwork of 15 national regimes, which were widely divergent in their basic approach and specific detail.[8] Some Member States' authorisation systems were quite burdensome for an applicant

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5 While the traditional public telephone network (PSTN) is circuit switched, the Internet and other newer networks are packed switched. For further reading on these concepts *see* for instance Dodd, *The Essential Guide to Telecommunications* (2000), chapter 1.

6 *Cf.* Article 2 and 8, para 1 of the Framework Directive. *See* also Bell & Ray, *EU Electronic Communications Law*, Richmond Law & Tax 2004, p. 19-20.

7 *Cf.* recital 5 of the Framework Directive. The distinction between conveyance and content sometimes give rise to uncertainty. As mentioned, the framework will cover a provider of IP telephony. A company that only provides software necessary for carrying out IP telephony (e.g. first generation of Skype) is not conveying signals and is thus not covered by the regulation (unless the company also conveys signals through a communications network or provides switches, routers or other network facilities).

8 Bell & Ray, *EU Electronic Communications Law*, Richmond Law & Tax 2004, p. 56.

with a vast number of conditions, administrative procedures, charges and fees attached in order to obtain an individual license. Other Member States had much fewer requirements or none at all.[9] This made entry into new markets or geographical territories difficult and costly.

Under the new Authorisation Directive individual licenses are abolished and replaced with general authorisations (except for use of radio frequencies and numbers where the Directive allows granting of specific rights).[10] This means that when a company wishes to provide electronic communications networks or services it may only be required (by the Member State) to submit a notification to the National Regulatory Agency (NRA). It must not be required to obtain an explicit decision or any other administrative act before exercising the rights which stem from the authorisation.[11]

The company is entitled to begin its activity upon notification to the NRA. The notification itself shall not entail more than a declaration of the intention to commence the activity and the submission of the minimal information which is required to allow the NRA to keep a register of the providers. The information must be limited to what is necessary for the identification of the provider, a short description of the activity to be provided, and an estimated date for starting the activity. The NRA must issue a declaration within one week, confirming the reception of the notification.

The new, harmonized rules on notification represent a welcome simplification that makes it significantly easier for companies to plan and arrange their entry into new media markets, be it in their own country or other EU countries.

3.3 Allocation of Scarce Radio Frequencies and Numbers

The Authorisation Directive still allows the use of license instruments in the case of allocating numbers and radio frequencies. This does not mean, however, that there are no restrictions on the Member States in these areas. Pursuant to Article 5 of the Authorisation Directive Member States shall, where possible, in particular where the risk of harmful interference is negligible, not make the use of radio frequencies subject to the grant of individual rights of use but shall include the conditions for usage of such radio frequencies in the general authorisation.

In any circumstance, the individual rights shall be granted through open, transparent and non-discriminatory procedures.[12] Similarly, the conditions

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9 Denmark, for instance, already in 2000 abolished all authorisation requirements for providers of electronic communications network or service, except where the provision of network/services rests on allocation of scarce frequency resources. Thus, no authorisation is required under Danish law (with the exceptions regarding use of radio frequencies and numbers).

10 *Cf.* Article 3 and 5.

11 Farr & Oakley, *EU Communications Law*, Palladian Law Publishing 2002, p. 91.

12 The Directive does not prejudice whether radio frequencies are assigned directly to e.g. radio and television broadcast content providers in order to pursue general interests objectives, *Cf.* Article 5, para 3, and recital 12. In Denmark, for example, radio frequencies

attached to the rights of use for radio frequencies and numbers shall be objectively justified in relation to the network or service concerned, non-discriminatory, proportionate and transparent.[13] Further, decisions on rights of use shall be taken, communicated and made public as soon as possible after receipt of the complete application by the national regulatory authority, within three weeks in the case of numbers, and six weeks in the case of radio frequencies.

Even though Member States still have considerable discretionary powers in terms of allocation of frequency (and number) resources, the restrictions outlined above provide companies with a legal safeguard when applying for frequency or number resources on new media markets, especially in foreign countries where they often have little knowledge of the national legal system and the procedural rules of the national NRA.

3.4 Access and Interconnection

The telecommunications markets all over Europe are asymmetric in the way that the former state monopolies own the majority of the infrastructure and customer relationships. Due to this reality, access to new media markets would in many cases be financially and practically impossible if every company had to establish its own infrastructure or services. Therefore, in order to balance the asymmetry the Access Directive[14] set forth provisions that – subject to certain conditions – entitle new providers to gain access to or be interconnected with existing providers' networks, associated facilities and services on reasonable terms. That way the existing owners or operators of the infrastructure (mostly the former monopolies) are prevented from acting as bottlenecks able to constrain the emergence and growth of new markets and innovative services.[15] The sector specific regulation in the Access Directive supplements the general EC competition law, primarily Article 81 and 82 of the Treaty.[16]

In accordance with the definitions set out in the Framework Directive, the Access Directive applies to all forms of communications networks carrying publicly available communications services whether used for voice, data or pictures.[17]

The provisions ensuring new players access and interconnection are fundamental to the creation of effective and competitive telecoms markets. However, the provisions previously expressly defined the relevant telecoms markets as well as the criteria for providers holding a strong market posision (SMP providers). This *ex ante* regulation was deemed to be too unflexible in a

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are assigned directly to the two national public service broadcasters under the Broadcasting Act due to general interests.

13 *Cf.* Article 6, para 1.

14 Directive 2002/19/EC.

15 Bell & Ray, *EU Electronic Communications Law*, Richmond Law & Tax 2004, p. 75.

16 For a further description of the relationship between the general EC competition law and the access and interconnection rules in the EC telecoms regulation *see* Garzaniti, *Telecommunications, Broadcasting and the Internet*, Sweet & Maxwell 2003, Part II.

17 *Cf.* Article 2 of the Access Directive and Article 2 of the Framework Directive.

world of dynamic and converging media markets where the market conditions are changing rapidly.[18] In such a situation the regulatory regime known from the general competition law is better suited. The general competition law regime is an *ex post* regulation where markets and SMP providers are defined and determined currently by the NRA's (on basis of market analyses), and where the NRA's can impose proportionate sanctions from a toolbox of sanctions.[19]

Consequently, under the 2002 telecoms package the rules are adjusted to the principles known from the general competition law.[20] This way it will also be easier to "roll back" the sector specific competition rules (in the telecoms package) and let the general competition law framework take over as effective competition is gradually achieved on the telecoms markets.[21]

For companies trying to access new media markets the change in regulatory regime is an improvement in the way that the principles from the general competition law are well known and therefore easier to work with. Further, a more flexible and dynamic regulatory regime able to quickly identify and respond to market changes will, all things being equal, be an advantage to new players trying to concur market shares from SMP's. On the other hand, the fact that market definitions, specific SMP criteria etc. are no longer laid out directly in the regulation, but depend on current market analysis and decisions from the NRA, means that it will be more difficult for new players to foresee their legal position, including who (if any) will be appointed SMP on the relevant market and what obligations the SMP will be imposed from the "toolbox" of possible obligations.[22]

The new sector specific competition rules regarding access and interconnection may, however, not be sufficient on the new emerging market for digital/interactive TV services (iTV). This is due to the fact that iTV platforms are based on different kinds of software, hardware and equipment (e.g. set top boxes) to which potential service providers need to get access or be able to develop systems that are interoperable. If not, the operator of the iTV platform can act as a bottleneck that reduces competition on the market.[23]

Consequently, the 2002 telecoms package introduced provisions specially aimed at preventing such bottleneck or "gatekeeper" situations on the emerging iTV market. First, pursuant to Article 18 of the Framework Directive Member

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18 *See* recital 25 of the Framework Directive.

19 The obligations comprising, inter alia, of transparency, non-discrimination, accounting separation, acceptance of reasonable requests for access, and price control, *Cf.* Article 9-13 of the Access Directive.

20 *Cf.* chapter 4 of the Framework Directive. In addition, the EU Commission has issued a recommendation on relevant markets within the electronic communications sector (2003/311/EC).

21 *Cf.* recital 13-15 of the Access Directive. For a thorough introduction to the access and interconnection rules in the present and past *see*, inter alia, Koenig, Bartosch and Braun, *EC Competition and Telecommunications Law*, Kluwer Law International 2002.

22 In order to ensure a harmonised and consequent implementation of the new regime, the EU Commission has issued Guidelines on market analysis and the calculation of significant market (COM 2002/C/165) and, as mentioned above, Recommendation on relevant product and service markets within the electronic communications sector (COM 2003/C/311).

23 *Cf.* recital 10 of the Access Directive.

States shall encourage[24] providers of digital TV services and equipment to use an open API (Application Programme Interface, a common concept under the telecoms package for software interfaces and equipment for iTV)[25], and encourage API proprietors to provide information necessary to enable providers of iTV services to provide their services on the iTV platform.

Second, the telecoms package imposes special obligations on potential bottleneck applications or equipment. Under Article 6 and Annex I, Part I, of the Access Directive Member States are required to ensure that access to all conditional access systems[26] shall be provided on fair, reasonable and non-discriminatory terms, in order to ensure that a wide variety of programming and services is available. The provisions regarding conditional access systems already existed before the adoption of the 2002 telecoms package,[27] but were – as part of the 2002 telecoms package – removed from the broadcasting regulation to the telecoms regulation (in accordance with the principle of horisontal regulation).

Under the Access Directive, however, the obligations for conditional access systems can be *extended* to new gateways such as EPGs[28] and APIs[29], either subject to the conditions set forth in Annex I, part I, or subject to new competition framework, i.e. if the operator of the iTV platform has a SMP position on the relevant market.[30]

3.5 Universal Service

In a liberalised market based on free market forces there is a risk that none finds it profitable to provide telecommunications services to e.g. people living in remote areas. Universal Service Obligations are obligations imposed on one or more providers to provide a defined minimum set of services to all end-users at an affordable price. Pursuant to the Universal Service Directive[31] this set of services cover ordinary voice telephony and services closely related to ordinary voice telephony. Because the concept of "new markets" mainly consist of other markets than ordinary voice telephony (such as Internet services or interactive TV), and because only companies with a significant market position are appointed Universal Service providers, companies entering new media markets

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24 In accordance with the procedure prescribed in Article 17.

25 Re the definition of API in Article 2(p) of the Framework Directive.

26 Article 2(f) defines conditional access systems as "any technical measure and/or arrangement whereby access to a protected radio or television broadcasting service in intelligible form is made conditional upon subscription or other form of prior individual authorisation". Pay-per-view channels are an example of an iTV system based on conditional access.

27 *Cf.* Directive 95/47/EC on the use of standards for the transmission of television signals.

28 An EPG is an Electronic Programming Guide, i.e. the end users' start-up interface showing the programmes and other services available on the iTV platform.

29 As defined above.

30 *See* Farr & Oakley, *EU Communications Law*, Palladian Law Publishing 2002, p. 130-31.

31 Directive 2002/22/EF.

need normally not at first worry about the provisions regarding Universal Service. This may, however, change in future.[32]

3.6 Privacy in the Electronic Communications Sector

General rules on data protection follow from EU's Data Protection Directive of 1995.[33] The principles set out in the Directive were in 1997 translated into specific rules for the telecommunications sector by the adoption of Directive 97/66/EC concerning the processing of personal data and the protection of privacy in the telecommunications sector. As part of the 2002 telecoms package this Directive was adapted to developments in the markets and new technologies in order to provide an equal level of protection of personal data and privacy for users of publicly available electronic communications services, regardless of the technologies used.[34] The result was Directive 2002/58/EC (the "new Directive").

The new Directive distinguishes between two kinds of data that is or can be generated in the telecoms sector, traffic data and location data, respectively. *Traffic data* is any data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing thereof.[35] Because processing of such traffic data is fundamental for telecoms operators in order to direct calls and correctly bill the customers, operators are as a main rule entitled to process traffic data for these purposes.[36]

Location data means any data processed in an electronic communications network, indicating the geographic position of the terminal equipment of a user of a publicly available electronic communications service.[37] The provisions regarding location data, which are new in the Directive, reflect recent technological improvements in network infrastructure that enables operators of mobile networks to locate mobile terminal users' geographic position down to a few meters. Consequently, location data have given rise to a whole new market for location services, e.g. services where retailers send SMS messages with special offers to end-users located in their neighbourhood, services that provide motorists with current road information etc.

Under the Directive, Article 9, location data may only be processed when they are made anonymous, or with the *consent* of the users or subscribers to the

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32 As an example it can be mentioned that because "voice telephony" in future may be more associated with IP telephony than traditional PSTN, the principle of technology neutrality enables the Universal Service provider to fulfil the obligations with IP telephony rather than PSTN. Thus, markets and services that are new today can quickly become "fundamental" services for the end-users. For the same reason recital 25 of the Universal Service Directive states that because the communications markets continue to evolve due to the technological development, the Universal Service Obligations "should be periodically reviewed with a view to proposing that the scope be changed or redefined".

33 Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

34 *See* recital 4 of Directive 2002/58/EC.

35 Directive 2002/58/EC, article 2 b).

36 *Ibid*, article 6. Traffic data must, however, be erased or made anonymous when it is no longer needed for the purpose of the transmission.

37 *Ibid*, article 2 c).

extent and for the duration necessary for the provision of a value added service. The service provider must inform the users or subscribers, prior to obtaining their consent, of the type of location data which will be processed, of the purposes and duration of the processing and whether the data will be transmitted to a third party for the purpose of providing the value added service. Users or subscribers shall be given the possibility to withdraw their consent at any time. Obviously, the new provisions on location data are important to any company contemplating to enter the new market for location based services.

Besides the new provisions regarding location data, the Directive also introduces important provisions regarding so-called "cookies"[38] and unsolicited communications.[39] The Directive recognizes that cookies can be a legitimate and useful tool, for example, in analysing the effectiveness of website design and advertising, and in verifying the identity of users engaged in on-line transactions.[40] On the other hand, users shall be ensured appropriate protection against the potential intrusion of privacy that cookies also represent. Reflecting this, the Directive does not in general prohibit the use of cookies. But Article 5, subsection 3, states that Member States shall ensure that cookies (and similar on-line tools) are only allowed on condition that the subscriber or user concerned is provided with clear and comprehensive information (in accordance with the general Data Protection Directive, 95/46/EC) about the purposes of the cookie. In addition, the user shall be offered the right to refuse the use of the specific cookie. Cookies are widely used on the Internet, so companies need to be aware of the new restrictions on the use of cookies.

Under the previous Directive (97/66/EC), the Member States were allowed to choose between an "opt-in" or an "opt-out" solution regarding unsolicited communication for direct marketing purposes, in particular by means of e-mail (so-called "spam"). Opt-in means that such unsolicited communication is prohibited, unless the user has given his prior explicit consent. Opt-out means that unsolicited communication is allowed, unless the user has rejected to this direct marketing method.

Due to the growing use of unsolicited communication via e-mail, and the costs and intrusion of privacy this represent to the user, the 2002 Directive, Article 13, requires that an opt-in solution be implemented in the Member States. Thus, unsolicited communication for marketing purposes now requires a prior explicit consent from the recipient. However, when a customer himself in conjunction with a previous purchase has provided his e-mail address, the company may use the e-mail address for direct marketing of similar products or services, provided the customer clearly and distinctly are given the opportunity to object, free of charge and in an easy manner.

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38 A cookie is a file that is automatically – and wihtout the user's knowledge – being placed on the user's PC when the user is visiting a website. The cookie then gathers information on the user's (or, more precise, the user's PC's) traffic on the Web.

39 *See* Garzaniti, *Telecommunications, Broadcasting and the Internet*, Sweet & Maxwell 2003, p. 209-10.

40 *Cf.* recital 25.

4 The Supervisory System

Before the 2002 telecoms package the organisational structure and functioning of the national NRA's were to a large extent determined by the Member States. So was the NRA's interpretation of EU telecommunications law. This resulted in uncertainty with respect to the NRA's independency of government (and the former state monopoly) and the transparency of their decisions. Further, the autonomy of the different NRA's resulted in a lack of coherence and harmonisation in terms of the application of the EU legislation.

Consequently, under the 2002 telecoms package,[41] Member States shall guarantee the independence of the national NRA. Member States shall ensure that NRA's exercise their powers impartially and transparently, and that undertakings have the right of appeal. Further, they shall ensure that all relevant information is provided and that the interested parties are given the opportunity to comment on the draft measure within a reonable period. In addition, Member States shall ensure that information submitted to an NRA can be made available to another NRA in the same or different Member State.

Finally, in order to secure a harmonised and coherent development within the EU, the NRA's shall cooperate with each other and with the Commission in a transparent manner in order to agree on the types of instruments and remidies best suited to address a certain issue. The Commission can require decisions made by the NRA's suspended if they are not justifiable according to the new regulatory framework.

All these measures should improve companies' legal position vis-à-vis the respective NRA's and thus improve their possibility to take a proactive approach to entering new media markets.

5 Content Services

5.1 Broadcasting Content

Broadcasting content, in particular the use of advertising in radio and television programmes, has since 1989 been regulated in EU's "Television without frontiers" Directive.[42] The scope of the EU telecoms package is not content services, but infrastructure matters (provision of networks and conveyance of information through the networks). There are, however, exceptions hereto with regard to interactive TV. The special provisions regarding application software and equipment for iTV are described above. Further, the 2002 telecoms framework also addresses the question of must-carry provisions. These provisions, which are contained in most member states' broadcast legislation, seek to ensure that certain radio and television broadcast channels and services are made universally available to users. Such political considerations are not

41 Re chapter 2 of the Framework Directive. *See* also Bell & Ray, *EU Electronic Communications Law*, Richmond Law & Tax 2004, p. 34-39.

42 Directive 89/552/EC, as amended by Directive 97/36/EC.

always compatible with effective competition. Thus, the Framework aims at preventing an excessive use of must-carry provisions.

Article 31 of the Universal Service Directive states that Member States must impose reasonable must carry-obligations for broadcast channels and services provided a significant number of end-users use the platform in question as their principal means to receive radio and television broadcasts. Such must carry-obligations shall, however, only be imposed where they are necessary to meet clearly defined general interests objectives and shall be proportionate and transparent.[43] At present, the condition regarding "principal means to receive radio and television broadcasts" ensures that must-carry provisions only apply to broadcast via traditional broadcast network, not broadcast via e.g. the Internet or 3G mobile networks. This may change as broadcast via such new media quickly becomes a realistic alternative.

Besides providers of radio and television broadcast services, other content providers on new media platforms must also observe different rules under the EU law on electronic communications.

5.2 Internet Content

While not regulating Internet infrastructure, certain aspects related to the providers of commercial Internet content services have been regulated by the e-commerce Directive.[44] These aspects include 1) the country of origin principle (stating that a provider of Information Society services is subject only to the law of the member state where the provider is established, regardless of whether it directs its e-business to other member states within the EU),[45] 2) a number of information and contractual obligations imposed on providers,[46] and 3) provisions regarding the liability of infrastructure providers and other intermediaries regarding the content carried through their network or infrastructure.[47]

In terms of e-commerce on new media platforms the e-commerce Directive only has an indirect but yet important impact. This is due to the fact that the Directive applies to the broad concept of Information Society services. This concept must be construed as to comprise all kinds of commercial online services, i.e. services that require use of computers and are transported by means of an electronic network (and services which are not traditional broadcast or voice telephony). As convergence matures, online services are no longer just traditional data communication services sent between traditional computers by means of traditional data communication networks. Rather, online services include various wireless and mobile content services as well as digital broadcast services – since these services too are delivered by electronic networks by means of devices with similar characteristics as computers (the ability to store and

43 *See* also recital 43 to the Directive.

44 Directive 2000/31/EC.

45 *Cf.* Article 3.

46 *Cf.* Articles 5-6.

47 *Cf.* Articles 12-14.

process digital information). Thus, the scope of the e-commerce Directive is constantly broadened as convergence and e-commerce via new media grows. In this sense all content service providers, regardless of what technological platform they deploy, must be aware of that Directive.

Besides the e-commerce Directive, the EU has also passed other directives which, although not directly aimed at the Internet, have significant impact on the Internet and similar online media. As examples the distant selling Directive, the electronic signatures Directive and the Directive on protection of personal data should be mentioned.[48] In particular the distant selling Directive and the Directive on protection of personal data contain provisions of significant importance in relation to the formation of e-commerce contracts on all electronic communications network, primarily in the field of business-to-consumer e-commerce.

5.3 Copyright Issues on Interactive Media

Copyright protected content plays an important role on electronic media, both as a commodity to be traded and as elements of the websites etc. where e-commerce is exercised. In relation to the Internet and other new digital media it has been unclear as to whether copyright protected content on such new media was subject to copyright protection similar to content on traditional analogue media.

Pursuant to Directive 2001/29 (the Infosoc Directive) EU has now determined that copyright-protected works that are made available on demand on the Internet or other new media, e.g. mobile or digital broadcast media, are comprised in the author's copyright similar to analogue works.[49] This will no doubt have a significant impact on e-commerce on new media.

In addition, the Directive prohibits the circumvention of any effective technological measures to avoid the making of a copy and thus protect copyright protected content.[50] Since the Directive will apply not only to on demand content delivered from PC to PC, but also on other infrastructure platforms and terminals, the prohibition is likely to apply also on new media and thus has broad application.

48 Directive 97/7/EC, 99/93/EC and 95/46/EC respectively.

49 Directive 2001/29/EC, Article 3.

50 *Ibid*, Article 6.