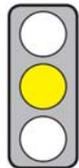


## MAIN ISSUES

**Objective of the Communication:** The Commission wishes to maximise the economic and social use of Information and Communication Technologies (ICT), most notably the internet.

**Parties affected:** All users of digital applications, the IT and telecommunication sector, payment service providers.



**Pros:** (1) An area-oriented monitoring of competition levels leads to an appropriate regulation of high-speed networks.

(2) A legal framework for an optional EU-wide licensing improves the possibility of establishing an EU-wide online offer for audiovisual ICT contents.

**Cons:** (1) The EU may not adopt any measures for fixing roaming fees or any maximum price per minute for telephone calls.

(2) "Cost-oriented" access prices delay the development of high-speed networks.

(3) Collective redress is not compatible with the legal systems of many Member States.

## CONTENT

### Title

Communication COM(2010) 245 of 19 May 2010: **A Digital Agenda for Europe**

### Brief Summary

#### ► Background and target

- The market for Information and Communication Technologies (ICT) generates an annual value of € 660 billion in the EU (5% of EU GDP). However, according to the Commission it contributes far more to overall productivity growth due to its innovation and dynamism.
- The Commission believes that in future the EU can only ensure that living standards continue to rise steadily through "smart" work, i.e. the increased use of ICT.
- The Commission complains that to date for many reasons it has been impossible to establish an EU-wide open market for digital services ("Digital Single Market").
- On the basis of current and future issues, the "Digital Agenda" designates "key actions" which will facilitate "smarter work" and the establishment of the Digital Single Market (see [CEP Overview](#)). The Communication aims at a sustainable economic and social use of the Digital Single Market, rooted in fast internet connections for EU-wide services.

#### ► Digital Single Market

##### – Opening up access to content

- The Commission complains that there are numerous barriers impeding access to EU-wide ICT services. In the audiovisual sector (e.g. online music business), licenses are usually issued to one country exclusively, which is why for EU-wide licensing it is necessary to negotiate with 27 right holders. According to the Commission, cross-border licensing should be simplified by improving the governance and transparency of collective rights management through right holders.
- The Commission wishes to preserve the contractual freedom of right holders, who should not have to issue EU-wide licenses but should continue to be able to restrict their licenses to certain territories.
- In 2010, the Commission intends to present a framework Directive on collective rights management and EU-wide licensing and a Green Paper on the opportunities for the online distribution of audiovisual works.

##### – Building trust to promote online business

- According to the Commission, the main reasons for consumers refraining from online shopping are concerns about payment security and privacy and a general lack of trust; it refers to the survey of the European Statistical Office (Eurostat 46/2009: Data in Focus, p. 5).
- The Commission is of the opinion that trust can be enhanced and online trading simplified if EU contract law is harmonised to include a common focus on consumer protection.
- It further believes that internet sites providing a comparison of consumer prices and product tests strengthen competition and consumer protection.
- The Commission names the following "key performance targets" for 2015:
  - 50% of the population buy online (in 2009 the share of online shoppers was 39%),
  - at least once a year 20% of the population buy online across borders (2009: 9%) and
  - 33% of small and medium-sized enterprises (SMEs) conduct their purchasing and sales online (2008: 24% of purchasing and 12% of selling).
- The Commission intends to:
  - review the EU framework for data protection in 2010,

- create an EU online trustmark by 2012, notably for retail websites,
- complement the Consumer Rights Directive [COM(2008) 614; see [CEP Policy Brief](#)] with an optional contract law instrument to overcome the fragmentation of contract law by 2012 and
- explore proposals in the field of collective redress [COM(2008) 794; see [CEP Policy Brief](#)] in 2012.
- **EU-wide electronic payment**
  - According to the Commission, online trading is limited because digital payment is too complicated. Very soon 17 Member States will have a common currency but the market for electronic payment and invoicing is still fragmented.
  - Amongst other things, the Commission wishes to:
    - complete the Single Euro Payment Area (SEPA) [COM(2009) 471; see [CEP Policy Brief](#)] and fix an end date for the final move to SEPA payment services in 2010,
    - publish a Communication on the promotion of invoicing in 2010 and
    - review the Directive on secure electronic authentication systems (1999/93/EC) in 2011.
- **Telecommunication**

One of the top priority “performance targets” is the removal of tariff differences between telephone calls at home and abroad (“roaming”) and an average price per minute of 13 cents (including roaming).
- ▶ **Fast and “ultra fast” internet access**
  - The Commission proposes a “gradually” increasing broadband provision with internet speeds of above 30 megabytes per second (Mbps) and the provision of “ultra fast” networks (“Next Generation Access Networks”, NGA) with speeds of above 100 Mbps “in a large part of the EU territory.” It expects positive effects (“spill-over effects”) for the overall economy.
  - The Commission is afraid that without public intervention, infrastructure providers will only establish broadband networks in a few high-density zones in profitable regions. According to the Commission, this scenario justifies “strong public intervention” in order to guarantee broadband coverage in less populated and less profitable zones. For that purpose, “financial instruments” of the Member States, the EU and the European Investment Bank (EIB) are to be used.
  - The Commission emphasises that wireless networks – i.e. terrestrial radio and satellite links – can ensure access to broadband. However, this requires a forward-looking spectrum policy. Therefore, the frequencies which become vacant through the switch from terrestrial to digital TV (“digital dividends”) must be issued “efficiently”.
  - The Commission intends to improve the framework conditions for the deployment of NGA networks. For instance, the investment risk should be taken “duly” into account when establishing “cost-oriented” access prices, and “co-investments” and “risk-sharing mechanisms” should be promoted. Moreover, national regulatory authorities should impose “the most appropriate” access remedies “in each case”, taking into account the level of competition in the “given area”.
  - In 2010, the Commission plans to:
    - publish a Communication on a strategy to spread broadband networks in order to reduce costs for taking-up broadband and to achieve lower administrative costs (e.g. through mandatory broadband connections for building projects and the inclusion of existing infrastructures),
    - examine the potential role of a universal service for broadband provision – i.e. the provision of a prescribed minimum offer of services to all end users at an affordable price,
    - propose an ambitious European Spectrum Policy Programme coordinating the technical and regulatory spectrum use conditions and
    - present a Recommendation for the promotion of investments in the deployment of NGA networks.
- ▶ **Interoperability and standardisation**

According to the Commission, a “digital society” must demonstrate effective “interoperability” so as to ensure that users can use all IT products and services. The standardisation framework must keep pace with the rapidly developing innovation, since standards form the basis for interoperability. Therefore, the Commission wishes, amongst other things, to:

  - continue reviewing the EU standardisation policy in 2010 and take follow-up regulatory action on the White Paper “Modernising ICT standardisation in the EU” [COM(2009) 324],
  - propose conduct guidelines regarding intellectual property rights and the licensing conditions for standardisation to reduce licensing fees in 2011 and
  - issue a Communication in 2011 to provide guidance to authorities to promote competition in public procurement and standards to be complied with by all interested providers.
- ▶ **Research and innovation**
  - According to the Commission, Europe does not invest enough in ICT-related research and development (R&D). The current ICT share of R&D expenses is only 17% in the EU compared to 29% in the USA.
  - The Commission would like annual Member State public spending on ICT R&D to grow to € 11 billion by 2020 and for private spending to double to € 70 billion.
- ▶ **IT Qualifications**

The Commission believes that by 2015 more than 700,000 IT jobs will have become vacant due to the expected lack of experts. Therefore, EU citizens must be instructed in the use of ICT and digital media.

To this end, the Commission wishes to include "digital competence" as a top priority in the Regulation on the EU social funds [(EC) No. 1081/2006] in order to promote education and training in the field of ICT.

► **ICT-based advantages for EU society**

The Commission deems a cooperation between the ICT sector and authorities necessary, for instance in introducing ICT systems for the "efficiency-enhancing steering" of the conduct of power producers and consumers ("smart grids", (see [CEP Policy Brief](#) on the Commission's consultation on an energy strategy 2020) and for the support of transport ["smart transport systems"; COM(2008) 887 see [CEP Policy Brief](#) and [CEP-Monitor](#) (in German)].

### Statement on Subsidiarity by the Commission

The Commission does not address the issue of subsidiarity.

### Policy Context

On 26 March 2010 the European Council accepted the Strategy Europe 2020 in many parts [COM(2010) 2020; see [CEP Policy Brief](#)] as the successor of the failed Lisbon Strategy. The European Council requested that the Commission "quickly" develop "target-oriented integrated guidelines". The Digital Agenda is one out of seven flagship initiatives. It is rooted in several consultations, the report on digital competition in Europe [COM(2009) 390], the Conclusions of the Council (Transport, Telecommunication and Energy) of December 2009, the contribution of the ICT industrial cooperations on the strategy of the Spanish Council Presidency for a Digital Europe ("2015.eu") and the declaration of the informal ministerial meeting of April 2010 in Granada (all documents can be found under: [http://ec.europa.eu/information\\_society/europe/i2010/index\\_en.htm](http://ec.europa.eu/information_society/europe/i2010/index_en.htm)).

### Options for Influencing the Political Process

Leading Directorate General:

DG Information Society and Media

## ASSESSMENT

### Economic Impact Assessment

#### Ordoliberal Assessment

The establishment of a Single Digital Market is – if in line with the principle of contractual freedom – to be welcomed: The EU should indeed – as proposed by the Commission – remove all existing impediments which might be an obstacle to the opening of the markets, also for digital services.

However, **expectations regarding the Single Digital Market should not run too high**. The Commission itself mentions – with reference to a survey conducted by the EU Statistical Office (see Eurostat 46/2009: Data in Focus, S. 5) – that the main reasons for people's unwillingness to order online are their concerns about payment security and privacy, which the Commission is attempting to tackle by creating EU online trustmarks. In so doing, the Commission ignores the fact that in the same survey the Statistical Office identified the main reason why people choose not to shop online is that they do not see the need to do so and that they consciously prefer buying in shops: **Apparently, many EU citizens do not wish to shop online.**

**This is already reason enough to reject the required "key performance targets" for (cross-border) online trading.** The EU could merely set the framework conditions for their development.

A simplification, i.e. a full harmonisation of the fragmented contract law would, in fact, simplify cross-border (online-)trading. However, as a full harmonisation is currently not enforceable, the Commission's proposal for the development of an optional common "contract law instrument" is appropriate [COM(2010) 171; see [CEP Policy Brief](#)].

Contrary to the Commission's position, it cannot simply be taken for granted that the provision of broadband networks in sparsely populated territories should be funded through the public purse. For the choice of residence is based on an individual decision. Besides, the general public does not benefit from the financial benefits which remote regions offer, such as lower rents. Moreover the Commission itself stresses that also wireless and thus significantly cheaper networks can contribute substantially to broadband provision. If at all, subsidization should be decided by individual Member States and not by the EU.

The deployment of NGA networks constitutes a high investment risk, as end user willingness to pay is not certain. **Therefore, it is to be appreciated that the Commission proposes to improve the framework conditions of NGA networks and facilitate risk sharing.**

The key challenge to be addressed in regulating NGA networks is the free-rider issue: all potential investors refrain from deploying NGA networks themselves and wait for other competitors who, after completion, must grant them access to the network for a charge. Since all investors share this attitude, the deployment of NGA networks continues to be delayed. The issue become all the more serious the lower the due access prices are.

Although the Commission argues in favour of the "appropriate" taking into account of the investment risk, by simultaneously **propagating a "cost-oriented" access price**, as is already applied under strict regulation practices to existing networks, it **imposes on the investor the major investment risk unilaterally and in advance**. This approach does not tackle the free-rider issue. Clarification is necessary here.

**The called for taking into account of the level of competition "in any given area" facilitates an appropriate regulation of NGA networks.** For currently, national regulatory authorities normally monitor

national total markets and not concrete competition levels in specific areas, although they might vary significantly between sparsely and densely populated regions [see [CEP Policy Brief](#) on the Commission Proposal for Guidelines regarding the public funding of broadband deployment].

#### Impact on Efficiency and Individual Freedom of Choice

**“Performance targets” for telephone call prices are not only wrong from an ordoliberal standpoint** [see [CEP Policy Brief](#) on the Commission Proposal COM(2008) 580 (“Roaming Regulation” (EC) No. 544/2009), in German]. Although the possible consequences of non-compliance remain unclear, with its Proposal for the Roaming Regulation **the Commission has demonstrated in the past that in such a case it would not hesitate to intervene massively into price fixing. Such interventions are harmful to overall economic efficiency**, since prices lose their price-steering effect. If price intervention means that a sustainable economy is not (longer) possible, market entries decrease in the medium to long term and the risk of undertakings exiting the market increases. This is harmful to competition and to consumers.

#### Impact on Growth and Employment

The "spill-over effects" for growth and employment expected by the Commission are uncertain.

#### Impact on Europe as a Business Location

The comprehensive provision of modern communication networks increases the quality of Europe as a business location.

## Legal Assessment

### Legislative Competence

**The EU is not empowered to adopt any measures related to the fixing of roaming fees or any maximum price per minute. Art. 114 TFEU** entitles the EU to “approximate the regulation and administrative action in Member States” only and therefore it **is not entitled to apply this rule to private telecommunication providers**. As for the rest, there is no current threaten of nationally differing price regulations at the moment.

### Subsidiarity

Not foreseeable.

### Proportionality

Many Member States hold the view that civil procedure law serves to enforce individual rights. **Collective redress**, which the Commission is considering introducing, **is therefore incompatible with the legal system of many Member States**; to this end, it is disproportionate.

In its action plan to implement the Stockholm Programme [COM(2010) 171; s. [CEP Policy Brief](#)], the Commission therefore aims to introduce a European contract law which could be applied optionally as the "28<sup>th</sup>" law instead of the 27 national codes in cross-border business cases. In order to avoid any system collisions, the "facultative contract law instrument" proposed in this Communication should become an integral part of the "28<sup>th</sup> law" and should not be regulated separately. A legal framework for an optional EU-wide licensing improves the possibility of establishing an EU-wide online offer for audiovisual ICT content.

### Compatibility with EU Law

Unproblematic.

### Compatibility with German Law

In reviewing the legal framework for data protection, the EU must observe the ruling of the German Federal Constitutional Court (BVerfG). According to this ruling, the provisions on data protection must prescribe an "extremely high" security standard in a binding and clear manner, be oriented towards the state of the art, continuously stay up-to-date with the latest knowledge and ideas and is not subject to reservations of general economic aspects (BVerfG, Decision of 2 March 2010, 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08).

## Possible Follow-up Actions by the EU

It is conceivable that the Commission might propose renewed interventions into the price fixing of telecommunication services if the "key performance targets" set are not met.

## Conclusion

Expectations regarding a Single Digital Market should not run too high. It is obvious that many EU citizens simply do not want to buy online. "Key performance targets" for online trading are therefore to be rejected. The Commission wishes to improve the framework conditions for the deployment of high-speed networks; however, this deployment is delayed due to "cost-oriented" access prices. The taking into account of competition levels in "any given area" facilitates an appropriate regulation. "Key performance targets" for telephone call prices are wrong from an ordoliberal point of view and threaten to lead to a price regulation which is unlawful under EU law. Collective redress is incompatible with the legal systems of many Member States.