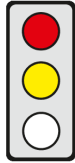


KEY ISSUES

Objective of the Directive: The rules on the use of radio spectrum will be further harmonised.

Affected parties: Providers of electronic communications networks and services and end-users.



Pro: The “peer review”-process is appropriate as a tool for non-binding coordination. It rightly avoids binding European resolutions.

Contra: (1) In view of the Commission’s vague power to adopt implementing measures on the “modalities of application” relating to requirements for radio spectrum licences in the Member States, there is a danger that the requirements for radio spectrum licences will become harmonised. This is counterproductive.

(2) Competition-based requirements may be necessary. The national regulatory authorities should have to provide a market definition and analysis for this however.

(3) The long minimum duration of 25 years for time-limited harmonised radio spectrum licences should be abolished because, in the technologically fast moving telecommunications sector, it may result in the inefficient distribution of licences.

CONTENT

Title

Proposal COM(2016) 590 of 12 October 2016 for a **Directive** of the European Parliament and of the Council **establishing the European Electronic Communications Code**

Brief Summary

► Background

- The Commission wants to revise the EU regulatory framework for the telecommunications sector – Framework (2002/21/EC), Authorisation (2002/20/EC), Access (2002/19/EC) and Universal Service Directive (2002/22/EC). These Directives will be combined into one new Directive.
- The Directive comprehensively regulates the operation of telecomms networks and the supply of telecoms services. Particularly relevant are the provisions on
 - the “asymmetrical” regulation of access to network infrastructure by telecomms network operators with significant market power (see [cepPolicyBrief](#)),
 - the “symmetrical” – i.e. independent of market power – regulation of access and the regulation of termination charges (see [cepPolicyBrief](#)),
 - the supervision of the telecommunications industry (see [cepPolicyBrief](#)),
 - new types of communications services (OTT services) and end-user rights (see [cepPolicyBrief](#)),
 - universal services (see [cepPolicyBrief](#)) and
 - radio spectrum policy (this [cepPolicyBrief](#)).
- The Commission wants to create a “consistent single market approach” to radio spectrum policy. The EU will “lead the rest of the world” in new technologies such as the fast mobile communications network 5G. (Explanatory Memorandum, page 2 and 5)

► Radio spectrum policy

Tasks of the national regulatory authorities

- The national regulatory authorities (NRAs) are inter alia responsible for stipulating (Art. 35 (1))
 - the selection process for the allocation of individual radio spectrum licences,
 - the duration of individual licences and their renewal or transfer,
 - the criteria regarding the eligibility of the bidder and
 - the parameters of economic valuation measures for individual radio spectrum licences.

Peer review and cooperation

- Peer review process: The Body of European Regulators for Electronic Communications (BEREC) must, and the Commission can, assess the drafts of the aforementioned stipulations of the NRAs. The respective NRA must “take utmost account” of the opinion of BEREC and the Commission. It must justify any deviations from the opinion of BEREC (“comply or explain”). (Art. 35)

- Two or more Member States can establish a cross-national allocation procedure for individual radio spectrum licences on a voluntary basis. They can also involve the Commission and BEREC in this. (Art. 37 (1) in conjunction with Art. 13, 46 and 54)

Fees for radio spectrum licences

- Member States can impose fees for individual radio spectrum licences (Art. 42 (1)).
- Minimum fees for the licences (“reserve prices”) must cover the additional costs arising from the requirements imposed - e.g. coverage obligations - (Art. 42 (2)).
- “Payment modalities” for the fees must “not unduly burden” any investments in networks and services for which the licences are granted (Art. 42 (3)).

Requirements for radio spectrum licences

- In order to improve the coverage of radio spectrum services, the competent authorities in the Member States can attach the following conditions to the granting of radio spectrum licences (Art. 47 (1) and (2)):
 - the “sharing” of passive or active infrastructure - e.g. transmission cables, masts and conduits - or of radio spectrum,
 - roaming access agreements for mobile telephone networks,
 - the joint roll-out of radio-spectrum infrastructures for the provision of communications services or networks,
 - a minimum level of use of licenses (“use it or lose it”).
- In the event of a serious breach of, or repeated failure to comply with, the requirements, the competent national authorities can suspend or withdraw licences and impose sanctions (Art. 30).
- The Commission can adopt implementing measures to specify the “modalities of applying” the said conditions but not in relation to the licence fees or to establish specific coverage obligations (Art. 47 (3)).
- These implementing measures are adopted in the comitology procedure (examination procedure), i.e. Member States can propose changes by way of their representatives in the Communications Committee and block the measures with a qualified majority (Art. 47 (3)).

Promoting competition

- The NRAs must promote “effective competition” and avoid distortions of competition when granting, amending or renewing radio spectrum licences (Art. 52 (1)).
- They can also inter alia (Art. 52 (2)):
 - attach conditions to licences, allowing competitors to have access at the wholesale level,
 - limit the number of licences granted to any company or
 - reserve certain parts of a frequency band for new market entrants.

Duration of individual licences for harmonised radio spectrum

- Member States can limit the duration of individual licences for harmonised radio spectrum - i.e. radio spectrum for which the Commission has specified harmonised conditions on availability and use. If they do so, the duration must be at least 25 years (Art. 49 (2) and 3 in conjunction with Art. 35 (1), sub-para. (d)).
- Extension of the licences must be decided at least three years prior to their expiry. Requests for a decision on renewal cannot be made earlier than 5 years prior to expiry of the licences. (Art. 50 (1))

Coordination of timing by the Commission

- For licences relating to harmonised radio spectrum, the Commission can adopt implementing measures regarding (Art. 53)
 - common dates by which radio spectrum bands, currently under other use, must be authorised for use by telecomms network operators,
 - an extension or a reduction of the duration of individual radio spectrum licences in order to adapt to the common date of authorisation of the use of certain radio spectrum bands.
- These implementing measures are also adopted in the examination procedure (Art. 53).

Transfer and lease of individual licences

Holders of radio spectrum licences can transfer or lease them to other companies but any requirements on the use of radio spectrum continue to apply. Transfers and leases should take place by way of the “least onerous procedure possible”. (Art. 51 (3))

Main Changes to the Status Quo

- ▶ In future, radio spectrum policy will be controlled or coordinated to an even greater extent from Europe. In particular, the peer review process and coordination of the timing of authorisation of harmonised radio spectrum by way of implementing measures do not yet exist.
- ▶ Until now, EU law did not permit national authorities to link the granting of licences to conditions on shared use and on the roll-out of radio spectrum infrastructure.
- ▶ Until now, there has not been a minimum validity period for time-limited, harmonised radio spectrum licences.
- ▶ Until now, there has not been any special requirement to promote competition.

Statement on subsidiarity by the Commission

Uniform EU provisions on radio spectrum are inter alia necessary in order to facilitate cross-border operations and to ensure “sufficient market scale”.

Policy Context

In a Communication in May 2015, the Commission announced a revision of the EU legal framework for the telecommunications sector [COM(2015) 192, see [cepPolicyBrief](#)]. In 2013, it had already proposed a range of changes to the provisions on radio spectrum (COM (2012) 627, see [cepPolicyBrief](#)). These proposals were however rejected by the European Parliament and the Council.

Legislative Procedure

14 September 2016	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Directorates General:	DG Communications Networks, Content & Technology
Committees of the European Parliament:	Industry, Research, Energy, Rapporteur: Pilar del Castillo Vera (EVP, ES); Internal Market and Consumer Protection, Rapporteur: Dita Charanzová (ALDE, CZ)
Federal Ministries:	Federal Ministry for Economic Affairs
Committees of the German Bundestag:	Economic Affairs (leading); Transport, EU
Decision-making mode in the Council:	Qualified majority (acceptance by 55% of Member States which make up 65% of the EU population)

Formalities

Competence:	Art. 114 TFEU (Internal Market)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

EU action on radio spectrum policy may, on the one hand, increase efficiency. Coordination at EU level, such as by convergence of procedures for the allocation of radio spectrum licences or by coordinating the timing of auctions, increases the necessary ability of network operators to plan for procedures and makes it easier for them to utilise economies of scale. As a result, willingness to invest increases. On the other hand, there are also good arguments for maintaining the powers of the Member States in the area of radio spectrum policy. Telecomms markets are shaped by national circumstances. It is therefore crucial for Member States to be able to specify different fees, conditions and validity periods for the use of radio spectrum licences.

In view of this tension, **the “peer review”-process is appropriate as a tool for non-binding coordination. It resembles the consultation procedure** which has existed for years in telecomms regulatory frameworks for issues of market definition and analysis and for access obligations, **but** by contrast with the latter, **it refrains from using binding European decision-making powers.** This is probably due to the political opposition which it is likely to meet in the Council.

By allocating individual licences for radio spectrum, the state enables companies to offer services which have to be transmitted via radio spectrum. At the same time, however, with this allocation, the state also restricts competition. Only providers with licences can participate in the market. The efficient allocation of these licences is therefore important. The best tool for this is market-based pricing. The willingness of each provider to pay depends on its estimation of the future profit potential. Efficient providers will therefore be willing to pay more for the licences.

Requirements for radio spectrum licences aimed at achieving better coverage of radio-based services are therefore either superfluous because the provider would fulfil them anyway, or economically inefficient because it is not economically worthwhile for the provider to fulfil them voluntarily. They reduce the maximum price achievable for the licences and are at best only justifiable for socio-political reasons. In any case, such requirements must be identified at the start of the allocation procedure otherwise providers have no planning security which has a negative impact on their willingness to invest.

In view of the Commission’s vague power to adopt implementing measures on the “modalities of application” relating to requirements for radio spectrum licences in the Member States, there is a danger that the requirements will also become harmonised. This is counterproductive because national authorities are better at assessing national market peculiarities which are important for the design of the requirements.

Competition-based requirements which are intended to safeguard competition at the services level, **may certainly be necessary**. The Directive largely fails to specify the procedure and criteria to be used by the national regulatory authorities when deciding on these. As is mandatory in “standard” telecoms legislation, **however, the national regulatory authorities should have to provide a market definition and analysis in this regard** - which is not provided for here.

It is generally unclear why ex-ante regulation by the national regulatory authorities is preferable to the ex-post application of general competition law by the courts or competition authorities. The former allows the authorities to intervene as soon as significant market power exists. The latter requires proof of abuse. In view of the complexity of market conditions as well as difficult and constantly changing market definitions, there is a lot to be said for the ex post application of general competition law.

The proposed long minimum duration of 25 years, for time-limited harmonised radio spectrum licences, increases planning certainty and thus, in some circumstances the willingness of operators to invest. It should, however, be abolished because, in the technologically fast moving telecommunications sector in particular, it may result in the inefficient distribution of licences and market foreclosure. In view of technological innovations, there is a lack of knowledge, both among market operators and national regulatory authorities, about the most efficient use of a spectrum band over such a long period of time.

The Commission’s powers for coordinating the dates by which certain radio spectrum bands have to be authorised for use by telecoms network operators, are unnecessary: the European Parliament and the Council can make comparable decisions - on recommendation of the Commission - independently and have already done so. Allowing the Commission to act by way of implementing measures has no apparent added value and weakens the democratic legitimacy of such decisions.

The ability to transfer and lease radio spectrum licences facilitates, in the case of clear rights of ownership and low transactions costs, the efficient allocation of scarce resources, even where the distribution of resources is initially inefficient. The practical relevance is likely to be small however because many telecoms markets have oligopolistic structures. In addition, the owners of such rights will probably refuse to transfer them to competitors for strategic reasons. The offer of licences is therefore generally very low which makes pricing difficult.

Legal Assessment

Legislative Competency

The Directive is correctly based on the internal market competence (Art. 114 TFEU)

Subsidiarity

The Commission’s ability to harmonise requirements by way of implementing measures and coordinate the timing of radio spectrum policy, is in breach of the principle of subsidiarity because the NRAs are in a better position to assess the peculiarities of the national markets which are of relevance to the design of regulatory measures.

Proportionality with respect to Member States

Unproblematic.

Compatibility with EU Law in other Respects

Unproblematic.

Impact on German Law

The Telecommunications Act, particularly Sections 52 et seq. relating to spectrum requirements, will have to be changed in accordance with the requirements of the Directive.

Conclusion

The “peer review”-process is appropriate as a tool for non-binding coordination. It rightly avoids binding European resolutions. In view of the Commission’s vague power to adopt implementing measures on the “modalities of application” relating to requirements for radio spectrum licences in the Member States, there is a danger that the requirements for radio spectrum licences will become harmonised. This is counterproductive. Competition-based requirements may be necessary. The national regulatory authorities should have to provide a market definition and analysis for this however. The long minimum duration of 25 years for time-limited harmonised radio spectrum licences should be abolished because, in the technologically fast moving telecommunications sector, it may result in the inefficient distribution of licences.