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EU Telecoms Reform Package Adopted

On November 24, 2009, the European Parliament approved a package of rules to reform the current EU telecommunications regulatory framework (the “telecoms package”).¹ Approval of the telecoms package, which had been expected last summer, was delayed by disagreements over provisions on Internet access rights. The telecoms package will enter into force with publication in the EU’s Official Journal, which is expected on December 18, 2009. Transposition of the package into national legislation should be completed by June 2011.

The new rules will expand the role of EU-level institutions in telecommunications regulation in Europe, both through the creation of a new European body tasked with supervision of regulatory activity at the national level and through the extension of the Commission’s oversight powers. National regulators will also gain a new regulatory tool, however; the power to impose functional separation on vertically integrated operators.

I. NEW EU TELECOMS BODY

The telecoms package provides for the creation of a new entity, the Body of European Regulators for Electronic Communications (“BEREC”), which will replace the so-called European Regulators Group (“ERG”). The ERG is an informal forum of high-ranking national regulatory authority (“NRA”) officials, who exchange best practices and issue opinions on draft Commission decisions. The ERG acts by unanimity, and its opinions are not binding on the Commission.

A key objective of the telecoms package is to create a stronger body to better support the Commission in reviewing national regulatory measures. BEREC will provide the Commission with technical and regulatory advice when reviewing NRAs’ draft regulatory measures. BEREC’s opinions to the Commission will be adopted by majority, which will improve the decision-making process. The Commission will not be bound by BEREC’s opinions, but it will be required to take them into the “utmost account.” BEREC should be established in Spring 2010.

¹ http://ec.europa.eu/information_society/policy/ecomm/tomorrow/index_en.htm.

II. NEW REGULATORY POWERS

The telecoms package extends the Commission's powers in reviewing national regulatory measures. Under the existing rules, following the Commission's binding identification of markets susceptible to *ex ante* regulation, NRAs define the relevant markets in their Member States, designate operators with significant market power ("SMP") and may impose "remedies" on undertakings with SMP. When imposing remedies under the current framework, NRAs can choose from a list of standard behavioral remedies.

NRAs are required to notify the Commission before adopting decisions defining relevant markets, finding that an operator has SMP, or imposing remedies. Upon receipt of a notification, the Commission issues comments, which NRAs are required to take into the "utmost account." The Commission has the power to veto NRAs' proposed decisions on market definition and SMP, but it does not have the power to veto NRAs' decisions on remedies, which NRAs can thus adopt even if the Commission believes that other remedies (or no remedies) should be imposed.

Under the new rules, the Commission's powers to require NRAs to modify draft regulatory measures are extended in two ways:

- The Commission will have a "quasi-veto" power over remedies imposed by NRAs; and
- The Commission will be equipped with a new power of last resort in cases where wide inconsistencies exist in the regulatory treatment of a given issue across Member States.

Moreover, in addition to behavioral remedies, NRAs will gain the power to impose a structural remedy, namely functional separation, which is not included in the NRAs' current list of available remedies. These developments are discussed in more detail below.

A. NEW COMMISSION POWER OVER REMEDIES

As noted, under the existing rules, the Commission can prevent an NRA from adopting decisions only with respect to market definition and SMP. Under the new rules, if the Commission disagrees with remedies proposed to be adopted by an NRA, it can require the NRA to defer adopting remedies until completion of a conciliation procedure. If no agreement can be reached, the Commission will issue a formal recommendation to the NRA. The NRA will still be entitled to adopt the originally proposed measure, but it will be subject to a reinforced duty to state reasons for departing from the Commission's approach. During the conciliation procedure between the Commission and the NRA, BEREC will play the role of mediator.

B. NEW COMMISSION INSTRUMENT FOR LONG-TERM HARMONIZATION

In case of severe inconsistencies in regulation across Member States, the Commission can currently issue a non-binding recommendation setting out guidelines for a harmonized approach.

Under the new rules, where divergence in NRAs' regulatory approaches may create a barrier to the internal market, the Commission may take binding decisions on market definition and remedies. The Commission will be able to exercise this new power only in exceptional cases and to address EU-wide systemic failures. It is thus conceived as a tool of last resort, which the Commission can only use after a waiting period of two years after issuing a non-binding recommendation.

C. NEW REMEDY AVAILABLE TO NRAS

Under the existing rules, the only remedies NRAs may impose on undertakings with SMP are behavioral remedies. These include transparency obligations, non-discrimination, cost accounting separation and price control.

Under the new rules, NRAs will be able to impose a structural remedy, functional separation, *i.e.*, separation within a vertically integrated operator between its network infrastructure and other parts of its business.

The Commission will be closely involved in any imposition of functional separation. Before imposing functional separation on an operator with SMP, NRAs will have to submit a detailed proposal to the Commission showing that (i) traditional behavioral remedies are failing on a persistent basis and (ii) functional separation would be the most efficient way to address the competition problems identified by the NRA. The Commission will then follow the new procedure on remedies, and it is likely to take an active role in cases where NRAs decide to impose functional separation.

III. INTERNET REGULATION

One of the other novelties of the telecoms package compared to the existing rules concerns the establishment of minimum requirements that national authorities must meet before limiting end-users' access to the Internet. In particular, the new rules mandate the respect of privacy and due process before any action is taken against an end-user that is charged with unlawful use of the Internet, such as copyright infringement.

Although limited, and to a large extent peripheral to the telecoms package's core provisions, which focus more on telecoms operators than on end-users' rights, this rule met with significant opposition from certain Member States, which sought to preserve complete freedom to take action against illegal use of the Internet. As noted, this dispute

led to a delay in adoption of the telecoms package, which had been expected for summer 2009.

IV. CONCLUSION

The telecoms package is designed to address the fragmentation in NRAs' regulatory approaches, which has hindered the development of a truly pan-European telecoms market. The new rules can be expected to lead to more uniform regulation of telecommunications operators in the EU.

Indeed, BEREC's foremost task will be to ensure that regulatory action at the national level is consistent with EU principles. Moreover, the Commission's involvement in the adoption of remedies will increase the level of EU oversight of national regulation. The Commission will also have a new power to adopt binding decisions on market definition and remedies in cases of severe inconsistencies across Member States.

NRAs will also gain a new regulatory power, the ability to impose functional separation on vertically integrated operators. In doing so, however, NRAs will be subject to the Commission's increased oversight role.

Finally, the introduction of rules on Internet access introduces a new human rights element into the EU telecommunications regulatory framework. It will be interesting to see how these rules are applied in practice and whether future measures also address end-user rights.

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If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under Antitrust and Competition under the "Practices" section of our website at <http://www.clearygottlieb.com>.

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