

News brief special



EU: And now the Digital Agenda

BRUSSELS - With the ink barely dry on the parliamentary signing of Europe's new telecom framework package, bureaucrats and legislators have lost no time in announcing the next big info-legislative cycle: a Digital Agenda 2015.

This Agenda — or, more precisely, the convergence of several parallel initiatives from various parts of the European constellation — remains as yet nebulous, but with a defined remit to bring the benefits of the digital society to the consumer and further enhance trans-border benefits of a networked Europe.

At the time of writing, details of this remained sketchy but it clearly aspires to shape and motivate a consumer-centred digital internal market in Europe. Spanish MEP Pilar del Castillo Vera, who has been closely associated with the passage of the revised telecom framework through the European Parliament, says she has been tasked with writing a report due Spring 2010 to establish the next phase of the vision.

Consumer-friendly

Ms del Castillo, speaking at the ECTA conference for alternative operators in Europe, says she envisages a consumer-friendly digital society to depict a consumer benefitted by connectivity, rights and competences in the Agenda. As part of the push towards the Agenda, the European Commission is restructuring its organization to permit the creation of Directorate General for the Digital Agenda which will be headed by the current Competition Commissioner, Neelie Kroes.

Says Fabio Colasanti, Director-General, European Commission DG Information Society and Media, "When we are talking about the Digital Agenda, we are talking about a very different and complex reality... it is a very wide concept that essentially boils down to arguing the case for the better use of ICT in many different contexts...we are at the position where the gains that can be derived from the use of ICT are enormous."

He points to an irony however: that there was almost more excitement in ICT a decade ago when facilities were much less mature. So one of the implicit targets of the European approach is to re-energize the potential impact of ICT application across the economy, and in effect create a Digital Single Market. "It will be necessary to intervene in many different areas," says Mr Colasanti. "So, the Digital Agenda is in all the decisions taken by the public sector, there is a reminder of the importance of using ICT better and more effectively."

A consumer agenda had, in any case, been foreshadowed in the debate and refinement of the just-adopted revised telecom framework in Europe, although its antecedent legislation was much more focused to the sectoral technical and infrastructural needs of the telecom sector in the EU.

Alongside institutional and network regulations, the new rules, for example, mandate a same-day number portability amongst operators for customers, the provision for 12 month contracts, and the speci-

fication of quality of service obligations for customers, data breach and privacy legislation that is regarded as some of the most stringent in the world by observers, and significantly, aspirations towards internet freedom and the right to be connected.

All change?

If the consumer will be king in 2015, executives are mulling the incoming framework for its near-term commercial implications. Those at the centre of the passage of the revised telecom framework after three years of discussion and debate also acknowledge that the onus is now on Europe's member states to ensure that it is implemented as intended.

The new framework will become obligatory after formal publication expected mid-December 2009, but will require transposition into national law by June 2011. Experts expect there will be at least six months of fine-tuning before the transposition process begins. Meantime, the December publication will trigger off various activities including the formalized establishment of BEREC, a permanent body with national regulators as members. BEREC, in replacing the ERG, essentially a co-operative body of national regulators, may affect the delicate balance of power and authority that has existed between national regulators and the European Commission.

But after the planning, talking, and negotiating, how much has actually changed as a result of this mammoth project? Ann LaFrance, Co-ordinating Partner European

Telecoms, at law firm Squire Sanders and Dempsey, comments that several commentators have suggested that the changes seem “marginal...but they may be something more than marginal depending on how they are interpreted, and how they are implemented.” The 12 key reforms in the package have a wide ranging coverage. Apart from the customer

contracts provision, the sectoral regulation establishes BEREC, stresses the independence of national regulators, provides for spectrum harmonization, incorporates a mandatory functional separation tools that the NRAs may use as an exceptional measure to deal with “important and persistent market failures”.

There is reference to regulatory

principles to reinforce competition and incentives to invest and the possibility of allowing collaborative business models involving infrastructure sharing providing they comply with competition law. NGA however is the subject of a separate discussion currently at a draft recommendation stage by the European Commission.

The Commission will in future be required to take “utmost account” of the opinions of BEREC in reaching regulatory decisions but no one really knows how this will work out in practice. Likewise, a question mark hangs over the interpretation of some of the measures in the revised framework, in particular, the actuality of a veto power over remedies proposed by national regulators in their markets when the Commission disagrees.

The issue of the veto – or lack of one – has been the focus of intense interest in the months leading up to the approval of the revised framework amongst market watchers who see a power game being played

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Events Diary

January 2010

- » **PTC '10**
17-20 JANUARY
Honolulu, HI, USA
www.ptc.org
- » **Embedded Communications-Forum**
26-27 JANUARY
London, UK
www.embeddedconnectivity.com

February 2009

- » **Digital Switchover Strategies**
2-3 FEBRUARY
London, UK
www.digitalswitchoverevent.com
- » **IIC Digital Communications Literacy**
9 FEBRUARY
Doha, Qatar
www.iicom.org

- » **IIC Telecommunications and Media Forum**
10 FEBRUARY
Doha, Qatar
www.iicom.org
- » **Mobile World Congress**
15-18 FEBRUARY
Barcelona, Spain
www.mobileworldcongress.com

March 2009

- » **FT Digital Media and Broadcasting Conference**
1-2 MARCH
London, UK
www.ft.com/conferences



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out and confusion still seems evident. "The whole issue of SMP remedies has been discussed and there is still debate," says Ann LaFrance, "The general view is that the Commission along with BEREC has the authority to veto remedies that the NRAs impose but there has been a declaration by a number of member states calling in question if this power does extend to remedies – so watch that space."

However, in reality, says one observer with experience of Commission behaviour, the Commission is unlikely to be involved – nor want to be involved – in the detail of individual national regulator assessments, preferring instead to set the big picture scope of individual regulator practice.

"As an observer, the balance of power does seem to be rather complex between the Commission and BEREC," says Ms LaFrance.

More progress

If regulatory life gets more complicated, market success has also probably been mixed at least in the developing broadband sector. But consumers in the most competitive markets in Europe seem to have been the undoubted beneficiaries of broadband rollout. On the figures available, European subscribers may enjoy much more service benefit for much less cost, at least compared to their US and Canadian counterparts – a fact that is widely attributed to the appearance of aggressive competition at the infrastructure level.

OECD analyst Taylor Reynolds says that the most competitive European

markets offer better services at far lower costs to consumers: "if you can get competition right, the market can essentially take care of itself in most cases".

Mr Reynolds says he makes comparisons with the explosive growth of the electricity network in developed countries following the Second World War in considering what might be in the future for broadband. "Broadband is becoming a general purpose technology [in the same way as electricity grids]."

Substantial benefits

"Competition is delivering substantial benefits," agrees James Allen, Partner, Analysys Mason, a UK consultancy, "with lower prices, better quality and faster penetration growth. If it's cheaper, if it's better value, if it's better designed for what people want – unsurprisingly they will go and buy it."

Mr Allen points out competitive offers do not have to be too different to succeed: "Even if the offers are rather similar [the presence of] multiple competitors means that penetration increases faster...this is probably to do with advertising intensity and people getting out there and selling the products against each other – it does increase the size of the overall market."

The price benefits are not accidental. He says, on available competition analysis, lower prices arise in markets with more competition; in particular, where local loop unbundling has been vigorous in creating a wholesale market, the same applies.

Life is more difficult

However, this conceals an unfortunate truth: on available analysis, most alternative operators in Europe in wireline broadband businesses are not seeing profit in this competitive success. "Only some of the entrants are profitable," says Mr Allen, "and this is not a good sign. In the short run we can sustain that but in the long run [it] will kill competition: there just isn't enough margin to be made to fund their current business let alone investing billions in NGN."

He suggests market share analysis tells a similar story. In 2002, the market share of new entrants was decreasing, it then increased for around five years, but it has recently started to stall. That in itself may be because incumbents have become more efficient. However, given the fact that their margins are very high, it also suggests that in certain markets or, in certain countries, competition may not be working as it should be".

He continues: "In the five largest markets, Germany, France, UK, Italy and Spain, figures indicate new entrants do seem to be getting some fraction of the market – although even here, market shares vary widely. Then, you get a big swathe of countries where most of the market growth in the last year came from the incumbent. So, regulators need to be aware that the market situation today is not as good as it was three or four years ago."

OECD's Taylor Reynolds says it is likely investment in broadband will decrease as a result of the economic

crisis. But he dismisses other fears in the industry: that fixed broadband will be supplanted by mobile broadband, and possibly a changing polarity between wireless, cable and DSL technologies and their competitive aspects.

He singles out Portugal — a vigorous market — where, he says, the presence of cable operators offering uncapped high-end triple-play offers shows that technologies may exist side by side. He suggests that mobile broadband and fixed broadband are complementary because they have different delivery capabilities: “You are not going to see triple play offers coming over the mobile broadband network...I don’t know anywhere in the OECD where this is taking place.” Mr Reynolds suggests that what the market is faced with is rather a DSL versus cable scenario in several countries.

Too powerful

Competitor operators are clearly concerned that incumbents will continue to be too powerful in the European marketplace and that barriers — in spite of vigorous legislative processes — still exist. “There is no Single Market in telecom in Europe”, says Stan Miller, CEO of KPN International, flatly.

His company is the former Dutch incumbent that has challenger operations in several European countries but Mr Miller suggests that, apart from Scandinavia, the Netherlands and the UK, national regulatory attitudes leave a lot to be desired. He singles out several countries, in

particular, Belgium and Germany, where regulatory outcomes consistently appear to favour incumbents. Mr Miller says regulators take differing attitudes in terms of specific implementation of the same fundamental European telecom legislation resulting in differing outcomes.

Moreover, says Mr Miller, the problem also relates to both the structural independence of NRAs vis a vis their own governments and the conflicted agenda where national governments maintain a residual shareholding in otherwise privatized incumbent operators.

The regulatory battle

New operators and their association, the European Competitive Telecommunications Association (ECTA), have welcomed the revised EU framework. But competitive operators in many markets concur with Mr Miller in disputing whether, in any case, existing framework and regulatory practices are being properly applied, or at least applied in a way where they see a level playing field in operation. And they are guarded about the possibility that the simplification of the existing sectoral regulations and a gradual move towards a planned replacement by competition law will give incumbents more weapons rather than fewer.

Many fret that resolution through the courts mean proceedings in competition disputes simply take too long to reach an outcome — 5 years is not unusual if appeals to Europe’s higher courts are involved — by which time market conditions may

be very different. “Will competitors survive that long?” questions one regulatory affairs specialist. Competition case law likewise is relatively complicated and also foundationally is concerned with *ex post* abuse in inter-business agreements and abuses of a dominant undertaking. In the telecom market, the focus is likely to be on the abuse of a dominant position by incumbent operators.

Useful remedies?

Some question the impact current remedies — usually fines — have in deterring behavior such as margin squeezes and other business practices regarded as unfair. Large well-resourced companies, say competitors, may frequently take the attitude that they will ride out the storm, and even accept the fine, if they are found to infringe, as a — relatively small — cost of doing business. Tiziana Talevi, the regulatory affairs director for FastWeb, a challenger in Italian broadband market says the incumbent, Telecom Italia, has been fined “around 14 times” in recent years.

Tactics, claim competitors, can vary widely — from sheer inertia in providing open access, and issues and squeezes arising from differential QoS, to predatory pricing, for example, offering subscribers free services in an area that is designated a commercial trial but is, in fact, targeted straight at the challenger operators.

More worryingly, competitors say, such tactics will end up deterring

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future broadband investment in Europe. Some even muse that investment and competition do not go together, and crowded markets may be underserved ones in future. Incumbent strategy — particularly in the NGN transition — is also complex.

Several challenger operators say that, in their view, incumbents are wringing every penny they can from their national copper networks, providing the incumbent with exceptionally high margins at the expense of the competitor — and the market.

A complex future

The complexities of regulatory implementation across Europe seem sure to dog, not merely the short term, but the larger picture of the proposed Digital Agenda and the Digital Internal Market. “What we are seeing at the moment is the development of ICT showing all the limitations that we have today in the internal market...we are discovering that there are a series of obstacles such as transitional arrangements, copyright, commercial practices and so on,” says the European Commission’s Fabio Colasanti.

In telecom, he says, there are three priorities that must be achieved to support future aspirations: implementation of the regulatory framework, support from the EU to member states to deploy high speed networks, and spectrum allocation. Whilst the documents concerned

with the revised framework have been signed, Mr Colasanti acknowledges the practical difficulties, particularly those that stem from lack of regulator expertise. “This legislation, which consists of application of competition law, is very complex and difficult to apply and it requires regulators with the capacity and independence to take a number of difficult decisions.”

He continues: “Let’s be frank, we have many countries where the regulator simply does not have the technical capacity to implement the regulatory framework.” He acknowledges the situation that even under the old framework, there were several countries that did not implement correctly. Mr Colasanti says this is an area where the Commission will have to help and says he welcomes the collaborative approach and the creation of BEREC.

Plan v regulation?

National broadband networks deployed for economic developments are yet another consideration. He says discussion that seemed to suggest there was an alternative between the emerging European regulatory approach and the need by governments to deploy broadband networks as soon as possible is “exaggerated”.

Rather he says “we have closed the regulatory discussion and should be concentrating on everything else, and ‘everything else’ is a very large and important area but, at the same time, outside the responsibility of the European Union.”

He gives an example as the deployment of European broadband networks that are environmentally friendly because they are buried in ducts rather than carried in aerial networks — but more expensive as a result.

This inevitably leads to a question of who should carry the extra financial burden of such deployments. The complex and different provisions between countries for rights of way for installing the networks is another example of the national dimension, says Mr Colasanti.

He says it is clear that in some cases “public money will have to be spent” but says he is “disappointed” that the European Euro 1 billion initiative designed to stimulate broadband networks in rural areas as part of a recovery programme from the economic crisis was, in the end, only one-third subscribed by member states. Reportedly, at least some of the remaining money went eventually outside telecom altogether — to milk producers.

Finally, spectrum continues to be a major issue and Mr Colasanti calls for “a certain amount of political pressure on all countries to move on to digital broadcasting as quickly as possible” given that “progress is very uneven in Europe”.

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