

The background of the entire page is a repeating pattern of small, teal-colored stars or snowflakes on a light cream or off-white background. The pattern is dense and covers the entire surface.

# **EU COMMUNICATIONS LAW**

## **2ND EDITION**

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## **PREFACE TO THE SECOND EDITION**

When we wrote the first edition of this book we described the new Directives as rather like one of those wooden puzzles which you give to children. Once you take it apart and try to put it together again, you are either left with one piece too few, or, perhaps more worryingly, one piece too many.

This second edition analyses the way in which the Directives have been implemented in practice, with particular regard to the United Kingdom and the Republic of Ireland. We have several market analyses and appeals from their outcomes to describe.

The book has more than doubled in size since the first edition but that is the nature of a book which seeks to describe the regulatory framework of an industry which moves at the speed of light in terms of new products, services and appeals from National Regulatory Authorities. From now, 2006, into the next few years the European Commission and the regulatory authorities will be reviewing the regime and will need to ensure that the regime accommodates the fast and significant changes occurring in the industry.

The European Commission, the European Regulators Group and various National Regulatory Authorities (NRAs) have done well to publish a vast amount of information and guidelines on various aspects of the regulatory framework and how it is working out.

We have sought to guide the reader through the significant maze of legislation and the non-legislative texts which exist in this complex area.

There will of course be areas adjacent to matters covered in the book and readers may wish to advise themselves by reading other texts which deal with such matters.

Overall, the book is a guide to regime and how it applies in practice. It does not (nor can it) purport to be a definitive guide to everything that has gone on in each Member State in the implementation of the EU Directives.

We would like to thank Sweet & Maxwell for the opportunity to produce this second edition of Farr & Oakley and also Palladian Law Publishing who published the first edition.

We would also like to thank our respective spouses. Without their outstanding support the second edition of Farr & Oakley on EU Communications Law simply would not have happened.



All views expressed in the book are the views of the authors and do not necessarily reflect the views of the Irish Regulator (ComReg) nor that of Telecom New Zealand Limited.

The law is stated as at August 1, 2006.

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## INTRODUCTION

Significant technological and service changes are occurring in 2006, some 130 years after the invention of the telephone and 169 years after the invention of the electric telegraph.<sup>1</sup> The importance of electronic communications is now explicitly linked to growth, jobs and social inclusion. The regulatory regime in Europe is directly linked to the European Commission's i2010 initiative<sup>2</sup> announced on June 1, 2005 which stresses the role of information communication technologies (ICTs) to such objectives.

Int-001

The 11th implementation report<sup>3</sup> published in February 2006 states that the e-communications sector represents the largest segment of the overall ICT sector increasing slightly to 44 percent of the total value—a sector worth €614 billion in 2005, €273 billion of which derives from e-communications services.

Business models are changing. Broadband, or high speed internet, has become a key focus in Europe and other worldwide jurisdictions and continues to be driven by regulatory focuses around local loop unbundling and xDSL products. Nevertheless broadband and mobile are still not proposed to be part of universal service obligations which form the social aspects of regulation.<sup>4</sup>

Competition is increasing through access to the incumbent networks and a key focus is a movement to incentivising not only investment by the incumbent but by alternative providers. To this end, the concept of the ladder of investment is a current focus in Europe and is discussed in the revised common position on remedies<sup>5</sup> set out by the European regulators group.

Int-002

With broadband comes VoIP (voice over internet protocol) and VoB (voice over broadband) threatening traditional voice revenues, although not yet having a significant impact. With these technological changes come challenges to regulatory policies and models.

The anticipated convergence between fixed and mobile is starting to occur. Third generation mobile services are being rolled out with an increased number of subscribers adding to mobile penetration. In addition business

<sup>1</sup> The ITU was established in 1865 to manage the first international telegraph networks and has a useful history of telecommunications on its website [www.itu.int](http://www.itu.int).

<sup>2</sup> COM (2005) 229.

<sup>3</sup> COM (2006) 68 final.

<sup>4</sup> See Chapter 6 and COM (2006) 163 Final of April 2006, being a European Commission review of universal service.

<sup>5</sup> ERG document ERG (06) 33, dated May 2006.



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models are adapting such that fixed/mobile offers<sup>6</sup> are being developed along with plans from mobile operators to encourage substitution from fixed to mobile.

**Int-003** The EU regime for which this book provides a practical guide sought to anticipate these changes that are occurring in the market. It brought in a regime intended to stand the test of time and bring about flexibility of regulation to a fast changing industry. To this end it moved away from “artificial” market power tests (*ex ante* thresholds of 25 per cent market share) to align itself with competition law and the test of dominance as the main trigger for regulation in electronic communications markets. The regime created a new goal of striving to a situation of regulation, then increased competition followed ultimately by de-regulation and reliance upon competition law alone. It can be debated whether the regime has in fact led to an increase or decrease in regulation and whether ultimately there will be greater de-regulation. There is some movement to de-regulation in retail markets in the review which is to be pursued over the next couple of years. Wholesale inter-connection and access to the incumbent’s bottleneck facilities remain key to policies going forward.

While price of course remains a major point of contention and a continued subject of regulatory intervention, increased focus has recently occurred on non price terms and discrimination that may arise. To this end, structural and organisational separation has reappeared on the agenda. Organisational design of fixed incumbents has been significantly advanced in the United Kingdom with BT voluntarily giving undertakings to re-organise its business in September 2005 (this occurred outside the Directive regime under competition legislation in the UK). Added to the existing retail and wholesale divisions BT already had, there has now been a further organisational separation of its network business into a separate division. The aims are to promote greater transparency and to require that BT retail and other operators are treated in an equivalent way. There’s been a fundamental shift in the way non discrimination is being interpreted (notwithstanding that the legislation has not changed) in the UK and by the European Regulators Group.<sup>7</sup>

**Int-004** Next generation networks (NGNs) or IP based networks are being developed in a number of jurisdictions by fixed incumbents as they seek to change their business models to re-position themselves. NGNs are presenting new challenges—will they create new bottlenecks and how does a regulator secure incentives to make substantial investments (commercial outcomes) while ensuring access and interconnection (regulatory outcomes to promote competition) at the same time?

<sup>6</sup> See for example BT Fusion which consists of a handset operating as a mobile but when in the office operates over a BT broadband connection.

<sup>7</sup> See Chapter 5 for more detail on non discrimination and Chapter 2 for more detail on BT’s undertakings.



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There are calls for regulatory certainty to ensure investment and in some Member States there have been calls for regulatory holidays to ensure commercial incentives exist. In others (such as the UK) there are calls for increased transparency for the industry as well to ensure that competition can continue in an NGN world.<sup>8</sup> The NGN brings with it the issue of IP interconnection seeking a fundamental revisit to the traditional PSTN interconnection models that have been in place.<sup>9</sup> Of first order importance an assessment needs to occur as to how the transition from PSTN interconnection to IP interconnection will be managed. Other issues arise such as the need for extension of network integrity issues traditionally focused on fixed networks to mobile and IP networks as they gain increased importance.

All of these matters will in turn challenge the economic assessment of market definition and competition assessment. At what point could fixed and mobile services move into the same market—an existing market or a new and emerging market? Given the harmonisation promoted in the Directives, how and when will the European Commission tackle such issues in its pre-defined markets for *ex ante* regulation?<sup>10</sup>

Significant consumer issues arise also. While NGNs, increased broadband and converged offers potentially offer greater competition, more choice, personal customisation and lower prices for consumers, new risks arise as well. In particular issues as to quality of service and security will become significant issues and these have already been foreshadowed in the pending review of the Directives. In addition the traditional universal model is to undergo a fundamental review in Europe with initial views indicating a division between infrastructure provision on the one hand and service provision on the other.

Most Member States still have fixed and mobile numbers for fixed and mobile services and ensure that geographic services are allocated to a fixed termination point or certain geographic area. Some Member States however have already commenced consideration of how to deal with numbers where nomadic abilities of services are becoming available through converged mobile services and/or VoIP.<sup>11</sup> Trade offs may have to be made between promoting competition and dealing with end user confusion issues. Consideration also needs to be given to whether VoIP services are considered

Int-005

<sup>8</sup> See Ofcom's March 2006 Statement entitled: "*Next Generation Networks: Developing the Regulatory Framework*" and [www.ngnuk.org.uk](http://www.ngnuk.org.uk) which is a new industry body set up to facilitate such matters.

<sup>9</sup> Section 9.3 of the Commission staff working document on the review of the regulatory framework SEC (2006) 816 accompanying COM (2006) 334 final of June 2006 notes that the regulatory framework does not propose any particular method of interconnection charging. Accordingly there is an option of moving to a bill and keep model.

<sup>10</sup> See the first edition 2003 Recommendation and the consultation on a draft second edition 2007 Commission Recommendation dated June 28, 2006 SEC (2006) 837.

<sup>11</sup> See COCOM 06-14 dated March 23, 2006 and relevant documents regarding VoIP and numbering on Ofcom's website—for example "*Regulation of VoIP services*"—statement and further consultation dated May 10, 2006.



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to be publicly available telephone services (PATs) under the regulatory regime (a subset of services to which different obligations attach). Emergency services are a key area of concern along with divergence throughout the EU.

We are expecting a substantial degree of change in the industry, the markets and the application of the regulatory regime by 2009/2010 when the pending review of the framework is estimated to be completed. The amendment and updating of the regime will then undoubtedly be followed by a further interesting period of implementation in the 25 Member States in Europe.



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