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Convergence and Privatisation in Telecommunications

«Regulation of access to limited resources in telecommunications sector in Europe»

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ABSTRACT

Access to frequencies on the radio spectrum is vital to any private telecommunications operator. The radio spectrum and usable frequencies are considered limited natural resources and, as such, their assignment is highly regulated at international, regional and national level. In light of the liberalisation of the telecommunications market in Europe and its opening up to competition, it has become evident that preferential or unfair access to this limited resource may distort competition, contrary to principles of EC competition rules. The European Union has approached this problem by establishing that regulation of the spectrum should fall, at national level, on the independent National Regulatory Authority. This authority must ensure that radio frequencies are assigned according to objective, non-discriminatory and transparent procedures¹.

¹ Cf. Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets of electronic communications networks and service, OJ L 249, 17.09.2002, pp. 21-26.

However, while community-wide harmonisation appears to ensure equality of access to all actors entering the market, recent cases have illustrated the inherent weakness of new operators seeking access to spectrum or numbering resources, compared to those pre-existing operators, who may already have gained considerable access to these resources under the old regime. This paper examines the struggle to ensure fair competition in regulating access to these resources.

(I) INTRODUCTION

Regulatory moves undertaken to date for telecommunication at European and international level have all borne witness to the acknowledged longer-term aim of a single regulatory framework.

Whilst the concept of radio waves seems distant at first glance, their availability is essential to the telecommunications industry. Radio frequencies are hot property. Like oil they are a natural resource in short supply² and great demand. The risks of a laissez faire approach to the radio spectrum are high since interference above a certain level renders all radio spectrum use ineffective. The Framework Directive³, Authorisation Directive⁴ and Radio Spectrum Decision⁵

² Art. 44 International Telecommunications Union Constitution describes the radio spectrum as a limited natural resource.

³ Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ L 108, 24.4.2002, pp. 33-50.

⁴ Directive 2002/20/EC of 7 March 2002 on the authorisation of electronic communications networks and services, OJ L 108, 24.4.2002, p. 21-32.

⁵ Decision 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision), OJ L 108, 24.4.2002, pp. 1-6.

in the 2002 Telecommunications package⁶ introduce a re-organised regime for the harmonised allocation and management of the radio spectrum in the EU.

The 2002 package faces the monumental task of overcoming unfair access to a limited natural resource in possibly the most infamously anti-competitive market known. Now, three years on, we are in a position to judge how effective this regulation has been. This article looks at the physical and legal factors at play, assesses the changes introduced by the package and proposes possible improvements for the future. In the following, the background to the radio spectrum is first summarised, followed by an analysis of the regulatory structure and its success.

(i) Radio Spectrum Information

Underlying all telecommunication is the radio spectrum. This invisible yet precious commodity lies within the electromagnetic spectrum, situated between 9kHz and 3000GHz⁷. Stray too far to the left of the scale and you are dealing with electric waves, too far to the right and you come across infrared, visible light and no end of x-, gamma and cosmic rays.

Management of the radio spectrum must be exact since most radio frequencies are already in use. The most highly used, and therefore sought after, bands of radio spectrum for electronic communications systems are those within Very High Frequency (VHF) and Ultra High Frequency (UHF). At these frequencies there is the possibility of using a wider bandwidth, which enables more information to be transmitted per channel than at lower frequencies. VHF radio broadcasting accounts for relatively little

⁶ Hereafter 'the 2002 package'. The 2002 package came into force on 7 March 2002.

⁷ According to Art. 2 Radio Spectrum Decision.

use of the spectrum. However, spectrum use for electronic communications systems occupies a much larger proportion of the spectrum. Thus, the avoidance of 'harmful interference'⁸ poses an organisational challenge.

(ii) The 2002 Package In Brief

The radio spectrum measures in the 2002 package are founded on the principle of the promotion of the European internal market⁹. Against this backdrop it is clear that the objective of the 2002 package is to avoid the restriction of access to the telecommunications industry's essential resource, thereby aiding the functioning of the internal market through competition.

The aim of the EU regulation is to avoid the distortion of competition in the telecommunications market through unfair access to the radio spectrum. The modus operandi of the regime introduced is, quite simply, international crowd control. The convergence in telecommunication markets in conjunction with ever increasing cross-border interaction exposes the telecommunications industry to the risk of radio spectrum chaos. The 2002 package sets out a clear regulatory regime to manage and allocate access, inter alia, to the radio spectrum for the provision of electronic communications networks or services. Most significantly, the 2002 package sets up a permanent regime to replace the existing collection of ad hoc measures.

Some of the changes the 2002 package brings are simply "re-organisation" rather

⁸ Defined in Art. 2(2)(b) Authorisation Directive as 'interference which endangers the functioning of a radio-navigation service or of other safety services or which otherwise seriously degrades, obstructs or repeatedly interrupts a radiocommunications service operating in accordance with the applicable Community of national rules'.

⁹ Art. 1(1) Authorisation Directive, Art. 1(1) Radio Spectrum Decision.

than "revolution". The 2002 package introduces some fundamental changes but also continues many principles originating in earlier measures. However, in an area that was previously governed by twenty legal instruments, merely streamlining the number to six amounts to a drastic improvement. Other predictable aspects of the 2002 package are, for example, the increased harmonisation between Member States and the Commission's role as overseer of policy.

The more drastic changes include the switch from individual licences to minimalist general authorisations in one fell swoop, with the rule that more onerous conditions can only be imposed upon Significant Market Powers¹⁰. Further powerful measures are the National Regulatory Authority's¹¹ duty of technological neutrality and a procedure for radio spectrum trading. Whether old or new, the observable theme of the 2002 package is the reoccurrence of the familiar principles of objectivity, transparency, non-discrimination and proportionality.

(II) REGULATORY STRUCTURE

(i) The Structure

The Framework Directive establishes 'a harmonised framework'¹², providing a comprehensive overview of the principles extended in the four specific directives. Chapters II and III are those relevant to the radio spectrum, the former regulating the bodies responsible (the NRA's) and the latter their radio spectrum tasks.

¹⁰ Hereafter referred to as 'SMP's'. According to Point (25) Preamble the definition of a 'Significant Market Power' used in the Framework Directive is equivalent to the concept of dominance as defined in the case law of the European Court of Justice and the Court of First Instance.

¹¹ Hereafter referred to as 'NRA'.

¹² Art. 1(1) Framework Directive.

The Authorisation Directive governs the harmonisation and simplification of authorisation rules and conditions¹³. It is here that the pivotal switch from individual to general rights of use is regulated.

The Radio Spectrum Decision establishes more leeway for radio spectrum management than other areas of the 2002 package. The Decision places the bulk of the power in the hands of the Member State but also establishes a Radio Spectrum Committee¹⁴. The RSC acts as the 'middle management' of European radio spectrum policy by coordinating the implementation of policy and liaising between the Commission and Member States.

(ii) Three-tiered System of Management: Commission, RSC, NRA's

The three-tiered management hierarchy of the radio spectrum consists of the European Commission, the RSC and the NRA's interlinked by the duty to consult and co-operate.

(a) The Commission

The policy-making power is placed with the Commission and not the more Member State dominated European Parliament and Council, this is indicative of a truly European-led policy. The Commission acts as radio spectrum Senior Manager, co-ordinating and harmonising policy¹⁵ to increase efficiency and ensure that operators do not face wildly varying licensing schemes in each Member State.

The Commission's duties range from the most basic level of checking compliance

¹³ Art. 1(1) Authorisation Directive.

¹⁴ Art. 3 Radio Spectrum Decision. The Radio Spectrum Committee shall be hereafter referred to as 'RSC'.

¹⁵ Art. 19 Framework Directive.

with the terms of the 2002 package (e.g. the registration of NRA's and their duties at the Commission¹⁶). The Commission's strongest powers relating to the radio spectrum are the power to set guidelines for the definition of relevant markets and in this regard to override NRA decisions¹⁷. NRA's are also obliged to make draft measures accessible to the Commission when taking measures regarding market definition and analysis or which may affect trade between Member States¹⁸. This illustrates the European standpoint that radio spectrum must largely be left to Member State sovereign powers, but ultimately controlled by the competition rules of the EC Treaty.

In practice much of the Commission's role involves delegation, but always with a reserved authority to override. For the development of technical implementing measures such as the harmonisation of radio frequency allocation and information availability, the Commission shall issue mandates to the European Conference of Postal and Telecommunications Administrations (CEPT)¹⁹. Upon receiving the results of such mandates the Commission is to decide if and when to apply them throughout the Community²⁰. In the case of this system failing the Commission may bypass the CEPT and adopt any kind of technical implementing measures to achieve its objectives²¹.

Finally, the Commission also plays an ambassadorial role, representing EU interests on the global stage. The Commission must monitor developments outside the EU that could affect radio spectrum policy²² and ensure that Community undertakings obtain fair and

non-discriminatory access to radio spectrum in third countries in line with the aim that Community requirements for radio spectrum are reflected in international planning²³.

(b) RSC

The RSC assists the Commission in radio spectrum matters²⁴ and can be termed the 'middle management' of the EU telecommunications policy. The RSC is borne out of the need to coordinate policy approaches and, where appropriate, harmonise conditions²⁵. Essentially the RSC deals with the technical implementation of policy.

The RSC co-ordinates the strategic planning and harmonisation of radio spectrum use, effective implementation and general methodology to ensure harmonized conditions for use, coordinated and timely provision of information regarding radio spectrum allocation and use and international representation of EU interests²⁶.

The RSC is endowed with technical implementing measures from the Commission to ensure the harmonised availability and efficient use of the radio spectrum²⁷. The Commission periodically consults the RSC on the matters within its mandate²⁸. The RSC is not however, involved with the NRA's' assignment and licensing procedures nor the decision whether to use competitive selection procedures for the assignment of radio frequencies²⁹.

¹⁶ Art. 3(6) Framework Directive.

¹⁷ Art. 16 Framework Directive.

¹⁸ Art. 7 Framework Directive.

¹⁹ Art. 4(2) Radio Spectrum Decision.

²⁰ Art. 4(3) Radio Spectrum Decision.

²¹ Art.s 4(4) and 4(6) Radio Spectrum Decision.

²² Art. 6(1) Radio Spectrum Decision.

²³ Point (18) Preamble to the Radio Spectrum Decision.

²⁴ Art. 3 Radio Spectrum Decision.

²⁵ Art. 1(1) Radio Spectrum Decision.

²⁶ Art. 1(2)(a)-(d) Radio Spectrum Decision.

²⁷ Art. 4(1) Radio Spectrum Decision.

²⁸ Art. 4(7) Radio Spectrum Decision.

²⁹ Point (11) Preamble Radio Spectrum Decision.

(c) NRA's

Member States are required to establish a competent NRA³⁰, to encourage the efficient use and effective management of radio frequencies as a means to promoting competition in electronic communications networks and services³¹. NRA's are required to be autonomous and legally distinct from all organisations involved in the electronic communications industry and state-controlled undertakings³². Considerable power is awarded to the NRA's, which is to be exercised according to the principles of objectivity, transparency, non-discrimination and proportionality³³.

The NRA's are under a duty to provide the Radio Spectrum Committee and Commission³⁴ with information. NRA's are also bound by the duty to co-operate in harmonisation attempts with both the Commission and other Member State NRA's, attempting to agree on the most suitable legal instruments and remedies to be used³⁵. Co-operation is required in the co-ordination between NRA's to resolve cross border disputes³⁶. The duty to co-operate applies on the home as well as European front. There is provision for consultation and co-operation³⁷ and an information exchange³⁸ between the NRA and national competition authority.

³⁰ Art. 3(1) Framework Directive.

³¹ Art. 8(2)(d) Framework Directive. Furthermore, Art. 1(4) of the same instrument stipulates that Member States retain full control over use of their radio spectrum for public order and public security purposes and defence.

³² Art. 3(2) Framework Directive.

³³ Art.s 8, 9 Framework Directive.

³⁴ Art. 5(2) Framework Directive.

³⁵ Art. 7(2) Framework Directive.

³⁶ Art. 21(2) Framework Directive.

³⁷ Art. 3(4) Framework Directive.

³⁸ Art. 3(5) Framework Directive.

(iii) NRA Operative Principles and Tasks

NRA duties consist of radio spectrum management, allocation of radio spectrum frequencies, harmonisation promotion and spectrum trading organisation³⁹. NRA's are obliged to complete their radio spectrum duties in conformity with the binding principles applicable in the general exercise of their powers⁴⁰, with the additional duty not to discriminate⁴¹. These general principles state that NRA's must be technologically neutral, can contribute to other policies, promote competition, contribute to the development of the internal market and promote EU citizens' interests⁴² proportionally to these objectives⁴³.

(a) Objectivity

NRA's must manage⁴⁴ and, according to objective, transparent, non-discriminatory and proportionate criteria, allocate radio spectrum frequencies⁴⁵. The final two principles do not receive further elaboration in the 2002 package. The NRA duty of objectivity for the radio spectrum includes remaining technologically neutral⁴⁶. This duty must not be seen to constitute technological disinterest, but rather not unduly favouring one form of technology. The requirement enables NRA's to promote certain services where justified, for example, digital television as a means to increasing spectrum efficiency⁴⁷. This should avoid bureaucracy hindering technological

³⁹ Art. 9(1)-(4) Framework Directive.

⁴⁰ Art. 8 Framework Directive.

⁴¹ Art. 9(1) Framework Directive.

⁴² Art. 8(1), (2)(a)-(d), (3)(a)-(d), (4)(a)-(f) Framework Directive.

⁴³ Art. 8(1)(i) Framework Directive.

⁴⁴ Art. 9(1) Framework Directive.

⁴⁵ Art. 9(1) Framework Directive.

⁴⁶ Art. 8(1) Framework Directive.

⁴⁷ Art. 8(1)(ii) Framework Directive.

progress and is in line with the NRA duty to promote efficient use of spectrum.

(b) Transparency

The duty of transparency is further detailed in the NRA consultation and transparency mechanism⁴⁸, which requires consultation with interested parties on draft measures and publication of these consultation procedures. Decisions on rights of use shall be taken, communicated and made public within 6 weeks in the case of radio frequencies that have been allocated for specific purposes within the national frequency plan⁴⁹.

Member States must publish the NRA's tasks in an "easily accessible form"⁵⁰ and establish a single information point through which all current consultations can be accessed⁵¹. Also, (except certain cases⁵²) where NRA's take measures that have a significant impact on the relevant market, interested parties have the opportunity to comment on the NRA's draft measure within a reasonable period⁵³.

Transparency of radio spectrum measures has improved. Previous European measures⁵⁴ which required Member States to publish or make available on request the allocation scheme of radio frequencies, including plans for future extension of such frequencies, only covered mobile and personal communication services. Under the 2002 package this is now a general duty for each Member State to make

information available⁵⁵. National radio frequency allocation tables and information on rights, conditions, procedures, charges and fees concerning the use of radio spectrum shall be published⁵⁶. Obviously, the protection of confidential information is continued⁵⁷ and disclosure to authorities must be proportionate to their objectives⁵⁸.

(c) Right of Appeal

Every Member State is required to have in place an independent appeal body to which legal subjects can appeal the decision of the NRA. Any party subject of a decision by a NRA has the right to appeal to an independent body. This may but need not be a court of law; it must, however, have the appropriate expertise to enable it to carry out its functions⁵⁹.

(iv) Management and Allocation of Radio Spectrum

In place of individual licences to use the radio spectrum, general rights of use are granted with a few necessary exceptions. Member States are discouraged from granting individual rights of use for radio frequencies but shall include the conditions for usage of such radio frequencies in the general authorisation⁶⁰. Where necessary to grant individual rights, Member States shall grant such rights, upon request, to any undertaking providing or using networks or services

⁴⁸ Art. 6 Framework Directive.

⁴⁹ Art. 5(3) Authorisation Directive.

⁵⁰ Art. 3(4) Framework Directive.

⁵¹ Art. 6 Framework Directive.

⁵² Cases falling within Art. 7(6), 20 or 21.

⁵³ Point (15) Preamble, Art. 6 Framework Directive.

⁵⁴ Commission Directive 96/2/EC of 16 January 1996 amending Directive 90/388/EEC with regard to mobile and personal communications, OJ L 20, 26.1.1996, pp. 59-66.

⁵⁵ Art. 5 Radio Spectrum Decision, Art. 15 Authorisation Directive.

⁵⁶ Art. 15 Authorisation Directive. The UK NRA (The Radiocommunications Agency) complies with this requirement, publishing a yearly report on a particular range of frequencies to determine how effectively it is being used and recommend improvements for its use. More information at www.radio.gov.uk.

⁵⁷ Art. 8(1) Radio Spectrum Decision.

⁵⁸ Art. 8(2) Radio Spectrum Decision.

⁵⁹ Art. 4 Framework Directive.

⁶⁰ Art. 5(1) Authorisation Directive.

under the general authorisation⁶¹. Such awards shall be in pursuit of general interest objectives⁶². Again the theme of objective, transparent, non-discriminatory and proportionate criteria crops up.

Furthermore, where the usage of radio frequencies has been harmonised, access conditions and procedures have been agreed, and undertakings to which the radio frequencies shall be assigned have been determined, Member States shall grant the use of radio frequencies in accordance with this use⁶³.

(a) Selection Procedures

Within this fairytale allocation of radio frequencies, there is room for Member States that so wish to use competitive or comparative selection procedures for the assignment of radio frequencies⁶⁴. Such procedures must be run in accordance with the afore-mentioned general principles of NRA's⁶⁵. In the case of frequencies of exceptionally high economic value being granted through competitive or comparative procedures, Member States may extend the allocated period by up to three weeks in order to ensure the correct procedure is followed through⁶⁶. This allowance pays homage to the considerable financial factors at play just as the following procedural duties must act as a disincentive to unnecessary limitation of radio spectrum available. The regime

⁶¹ Subject to Arts 6, 7 and 11(1)(c) Authorisation Directive.

⁶² Art. 5(2) Authorisation Directive.

⁶³ Art. 8 Authorisation Directive.

⁶⁴ Whilst the issue of market dominance clearly comes into play here, the wider competition issues are beyond the confines of this Art.. It suffices to summarise that the European competition rules target restrictions to competition through Arts 81 (former Art. 85) and 82 (former 86) Treaty Establishing the European Community, OJ C 325, 24.12.2002, pp. 33-184 (EC Treaty).

⁶⁵ Art. 8 Framework Directive.

⁶⁶ Art. 5(4) Authorisation Directive.

established by the Authorisation Directive sets out detailed rules for a Member State considering limiting the number of rights of use to be granted for radio frequencies and for when granting rights of use needs to be limited⁶⁷.

(b) Conditions upon General Rights of Use

The prohibition of individual licensing does not apply to the radio spectrum, but NRA's are obliged to use general rather than individual measures wherever possible. And when individual rights of use are required they must be assigned according to the familiar principles of objective, transparent, non-discriminatory and proportionate procedures. The general authorisations for rights of use of the radio spectrum may only be subject to the limitations set out in the Annex B of the Authorisation Directive. These conditions must be objectively justified in relation to the network or service concerned, non-discriminatory, proportionate and transparent.⁶⁸ Additionally, the conditions should be limited to what is strictly necessary to ensure compliance with EC law⁶⁹.

NRA's may require undertakings enjoying rights of use of radio frequencies to provide information to confirm their compliance with the terms of their general rights of use or specific obligations⁷⁰. However, this is not a condition to be applied to restrict access to the frequencies. As part of the application procedure for granting rights to use a radio frequency, Member States may verify whether the applicant will be able to comply with the conditions attached to such rights. For this purpose the applicant may be requested to submit the necessary information to prove his ability to comply

⁶⁷ Art. 7(1)(a)-(e) Authorisation Directive.

⁶⁸ Art. 6(1) Authorisation Directive.

⁶⁹ Point (15) Preamble Authorisation Directive.

⁷⁰ Art. 6 Authorisation Directive.

with these conditions. Where such information is not provided, the application for the right to use a radio frequency may be rejected⁷¹.

(c) Spectrum Trading

The NRA duty of overseeing the practice of 'spectrum trading'⁷², amounts to a 'bring and buy sale' of radio frequencies and aims to avoid wasted spectrum. The discretion to make provision for the trading of radio frequencies is left to the MS⁷³. NRA's must oversee spectrum transfers, which must be completed in accordance with the procedures laid down by the NRA and the transfer made public⁷⁴. NRA's must also regulate the second-hand market this creates, ensuring that competition is not distorted as a result of any such transaction. Where radio frequency use has been harmonised within the Community, spectrum trading cannot veer from that use⁷⁵. When granting rights of use of radio spectrum, Member States shall specify whether those rights can be transferred at the initiative of the right-holder and under which conditions⁷⁶.

The potential for chaos here seems never ending. If it is compared with the issues arising from satellites sold on to third parties once launched, there is clearly the possibility of problems relating to proof of ownership and liability in the case of misconduct. An effective tool for cataloguing such satellites is lacking, perhaps similar problems will arise relating to second-hand spectrum.

(v) NRA Powers

⁷¹ Point (13) Preamble Authorisation Directive.

⁷² Art. 9(3) Framework Directive.

⁷³ Art. 9(3) Framework Directive.

⁷⁴ Art. 9(4) Framework Directive.

⁷⁵ Art. 9(4) Framework Directive.

⁷⁶ Art. 5(2) Authorisation Directive, Art. 9 Framework Directive.

(a) Provision of Information

NRA's have the power to gather information from market players in order to carry out their tasks effectively⁷⁷, in accordance with considerations of confidentiality⁷⁸. Where the undertaking fails to provide the approved information⁷⁹, the NRA is empowered to impose financial penalties⁸⁰. Reporting and information obligations should be kept to a minimum and objectively justified. It is not necessary to require systematic and regular proof of compliance with all conditions under the general authorisation or attached to rights of use⁸¹.

(b) Dispute Resolution

In the case of a dispute arising NRA's are well equipped to deal with it, but also are bound by a number of procedural rules ensuring transparency. In the case of non-compliance the NRA shall notify the undertaking of its findings and give the undertaking a reasonable opportunity to state its views or remedy any breaches within one month (or shorter in the case of repeated violations or longer if the NRA decides). If the undertaking does not remedy its actions within these periods, the NRA shall take measures aimed at ensuring compliance which shall be communicated within one week and state a reasonable amount of time for the undertaking to comply with the measures. If this is unsuccessful, in cases of serious or repeated breaches of terms, NRA's may disqualify the undertaking from providing electronic communications networks or services⁸². If such breach amounts to a serious threat to public safety, security or health, the NRA is empowered to take urgent interim measures to counteract the

⁷⁷ Art. 5(1) Framework Directive.

⁷⁸ Art. 5(3) Framework Directive.

⁷⁹ Art. 11(a)-(f) Authorisation Directive.

⁸⁰ Art. 11(4) Authorisation Directive.

⁸¹ Point (28) Preamble Authorisation Directive.

⁸² Art. 10(5) Authorisation Directive.

threat⁸³. Penalties for failing to comply with the general authorisation must be proportionate – except in exceptional circumstances it is not appropriate to suspend or withdraw the right to use frequencies⁸⁴.

(c) Fees For Rights of Use

Fees for rights of use of radio spectrum are not limited to covering merely the administrative costs, as in general authorisations, but may rather ‘reflect the need to ensure the optimal use of these resources’⁸⁵. Such fees must be ‘objectively justified, transparent, non-discriminatory, proportionate in relation to their intended purpose’ and correspondingly in line with the guiding principles listed in Art. 8 Framework Directive. In principle it is not bad to raise public revenue from a public resource since those bidding are private profit-making companies. However, such fees should not hinder the development of innovative services and competition in the market⁸⁶.

III INTERACTION WITH OTHER BODIES

It is clear that regulation of radio spectrum use must be cross-border in order to be effective. The new European measures and bodies exist in a complex international regulatory context. Although the mapping the international players results in a mess of acronyms, the hierarchy is quite clear.

(i) International

The European radio spectrum policy must take account of such international organisations⁸⁷. Of these, the International Telecommunications Union (ITU) is the

most well established. The ITU, a specialised agency of the United Nations, regulates global communications, allocating radio spectrum. Most importantly for this topic, the ITU Radiocommunications sector (ITU-R) maintains the Table of Allocation of Frequencies for both world-wide (i.e. satellites) and regional (i.e. terrestrial) use. When a state wishes to authorise a new user of a frequency the registry is referred to and depending on whether the frequency is already assigned the would-be user will either co-ordinate or reserve the usage of that frequency. In order to avoid false notification the due diligence requirements include proving the existence of the contracts to build and launch the satellite.

The ITU-R organises World Radio Communications Conferences, which are used to update the Radio Regulations (procedural and substantive rules regarding radio spectrum use). Also within this sector lies the Radio Regulations Board, which approves procedures within the sector and can act as an appellate body in this area.

However, regarding the allocation of radio spectrum within the European Union, ultimate decision-making power lies with the individual Member States in line with Commission harmonisation of policy.

(ii) European

The European radio spectrum policy is contributed to by a number of bodies, most notably, the Radio Spectrum Policy Group. The Radio Spectrum Policy Group⁸⁸ although not part of the 2002 package was adopted directly after the Radio Spectrum Decision. The group adopts non-binding opinions to advise the

⁸³ Art. 10(6) Authorisation Directive.

⁸⁴ Point (27) Preamble Authorisation Directive.

⁸⁵ Art. 13 Authorisation Directive.

⁸⁶ Point (32) Preamble Authorisation Directive.

⁸⁷ Art. 1(3) Radio Spectrum Decision.

⁸⁸ Established by Commission Decision 2002/622/EC of 26 July 2002 establishing the Radio Spectrum Policy Group, OJ L 198, 27.7.2002, pp. 49-51.

Commission on policy issues, harmonising conditions and efficient use of the radio spectrum. Its mandate extends to co-ordination of technical implementation of CEPT and measures the Commission should adopt towards ensuring legal certainty. The members are representatives of the Member States and the Commission with the European Telecommunications Standards Institute (ETSI) and CEPT as permanent observers.

The 2002 package takes account of the CEPT⁸⁹, which is a European policy-making and regulatory body for post and telecommunications that deals with, inter alia, telecommunications issues. The CEPT drafts measures to promote the harmonisation of radio spectrum use outside the borders of the European Union, making it a vital tool for the success of European radio spectrum policy.

The ETSI is an independent, non-profit organisation created by the CEPT to deal with all telecommunication standardisation matters. Included within ETSI's official duties is the standardisation of telecommunications within Europe, although members stretch far beyond the borders of the EU.

Finally, the Electronic Communications Committee (ECC)⁹⁰ publishes non-binding decisions and recommendations to be followed by national administrations in regulating frequencies nationally. The European Radiocommunications Office (ERO) and European Telecommunications Office (ETO) were both established to conduct radio communication studies on behalf of the EU.

IV CONCLUSION

⁸⁹ Point (13) Preamble Radio Spectrum Decision.

⁹⁰ Administered by the European Communications Office (ECO).

The five founding principles behind the 2002 regulation are that the rules be based on clearly defined policy objectives: the minimum necessary to meet those objectives (e.g. introduce mechanisms to reduce regulations further where policy objectives are achieved by competition.), the enhancement of legal certainty in a dynamic market, being technologically neutral and subject to enforcement as closely related as possible to the activities subject to regulation⁹¹. It is questionable whether these objectives have been achieved to the fairy-tale extent envisaged in the 2002 package. However, that is not to say that considerable progress, particularly in transparency, has not been achieved. All in all, the 2002 package succeeds in its goals of clarifying and modernising radio spectrum policy in the EU.

Beyond these five goals lies the central objective of the regulation - to enable new operators to compete with old through equal access to the radio spectrum frequencies. Frankly, this is not yet the case. The previous system still casts its shadow and the oligarchic remains of the powerful few still prevail. However, this is not due to the failure of the legislation, but more to the fact that these measures will simply take longer to filter down to any observable change in the structure of the telecommunications industry. What matters is that the practices have changed. The measures have been implemented successfully and radio spectrum, although still ultimately decided at a localised level, is now conducted in line with the principles of objectivity, transparency, co-operation and non-discrimination which all feature so highly in the 2002 package.

Ultimately, examination of the 2002 package reveals that mechanisms for

⁹¹ A new Framework for Electronic Communications Services. Available at www.europa.eu.int/scadplus/leg/en/lvb/l24216.htm.

avoiding long-term radio spectrum chaos have, indeed, been put in place. An effective level playing field at the operative level must now be developed.