

COVER SHEET

Public consultation on the review of

EU regulatory framework for electronic communications network and services

<p>Name of Company/Organisation <i>(or in the case of an individual responding: Title, First name, Family name)</i></p>	<p>Creative Media and Business Alliance (CMBA) http://www.cmba-alliance.eu Members of the CMBA are: Association of Commercial Television in Europe (ACT), Bertelsmann, Canal+ Groupe, European Association of Communications Agencies (EACA), EMI, European Newspaper Publishers' Association (ENPA), European Publishers Council (EPC), European Federation of Magazine Publishers (FAEP), Federation of European Publishers (FEP), International Federation of the Phonographic Industry (IFPI), International Video Federation (IVF), Lagardère, Mediaset, Motion Picture Association (MPA), Reed Elsevier, Sony Pictures, Sony Computer Entertainment, Sony BMG Music Entertainment, Time Warner, Universal Music Group International, The Walt Disney Company, Warner Music International.</p>	
<p>Address (including country)</p>	<p>[N.B. As an informal alliance of companies and trade associations, the CMBA does not have a formal address. For the purpose of this submission, please use the address below for any written inquiries]</p> <p>Creative and Media Business Alliance (CMBA) c/o ACT Rue Joseph II, 9/13 B-1000 Brussels Belgium E-mail: pp@acte.be or secretariat@cmba-alliance.eu</p>	
<p>Details of contact person</p>		
<p>Name of the person to contact in case of queries about this contribution</p>	<p>Philip Pilcher</p>	
<p>Phone: +32 2 738 76 18</p>		
<p>Fax: +32 2 735 41 72</p>		
<p>e-mail: pp@acte.be</p>		
<p>Category of represented organisation(s) – indicate the category which best describes your organisation or – in case of an association, the main activity of your members</p>		
<p><input type="checkbox"/> Fixed incumbent operator</p>	<p><input type="checkbox"/> Internet Service and Access Provider</p>	<p><input checked="" type="checkbox"/> <u>Users of e-communications</u></p>
<p><input type="checkbox"/> New entrant fixed operator</p>	<p><input type="checkbox"/> Value-added service provider</p>	<p><input type="checkbox"/> National Regulatory Authority</p>
<p><input type="checkbox"/> Cable operator</p>	<p><input checked="" type="checkbox"/> <u>Broadcaster</u></p>	<p><input type="checkbox"/> Government/Ministry</p>

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A. General comments

On 29 June 2006, the European Commission adopted a Communication on the Review of the EU Regulatory Framework for electronic communications networks and services, as well as a Staff working document which outlines in greater detail possible changes to the regulatory framework, and an impact assessment.

As an informal alliance comprising trade associations and individual companies active in the advertising, broadcasting, film, music and publishing sector, the Creative and Media Business Alliance (CMBA) represents a wide range of activities, which covers the production and distribution of many types of creative content and services as well as the development of the infrastructure and the technology which will enable the move from analogue to digital and will ensure a European offer of multiple and quality content, in an effort to make the greatest number of tools and electronic services available to the viewer.

As a preliminary remark, the CMBA would like to stress that the 2002 framework has proved to be a suitable toolkit for regulating emerging communications markets, and would caution against radical changes at this stage. Instead, the focus should be on the proper national implementation of the 2002 package as well as on concrete improvements to be introduced in furtherance of the Commission's stated aim to cater to network users' interests in the new regulatory framework (NRF).

In its June 2006 Communication on the Review of the EU Regulatory Framework for electronic communications networks and services, the Commission identified several areas for change, including the application to electronic communications of the Commission's policy approach on spectrum management – as set out in its Communication of September 2005 – as well as the need to strengthen consumers' and users' rights. The written comments of the CMBA are specifically focused on these two areas (i.e. Part 1: "New Approach to Spectrum Management" and Part 4: "Strengthening Consumer Protection and Users' rights").

We look forward to continuing this debate and would like to thank the European Commission for the opportunity to comment.

B. Position on proposed changes

1. New Approach to Spectrum Management

In so far as spectrum management is of direct relevance to some of our members, the CMBA welcomes this opportunity to comment on the changes envisaged by the Commission in this field, ahead of the legislative measures the Commission intends to propose to Parliament and Council in the course of 2007.

First and foremost, the CMBA agrees with the Commission's objective of maximising the social and economic potential of radio spectrum usage in order to achieve the objectives of the EU's i2010 policy, and to support jobs and growth. The development and roll-out by



CMBA members of new audiovisual services such as HDTV, and mobile music and television is central to these objectives, in the context of the digital dividend.

In its consultation documents, the Commission explains that exclusive usage rights are commonly granted on the basis of individual licenses, in order to guarantee an appropriate level of protection against harmful interference. This approach is then challenged by the Commission, for whom *“as a general trend, technological progress is progressively reducing the field of harmful interference and therefore making the use of individual rights less necessary in certain bands”*¹.

However, the CMBA would like to stress that the current regulatory framework on electronic communications already favours the use of general authorisations where possible². Moreover, it remains unclear that the technical constraints associated with the use of spectrum have evolved in such a way as to diminish the risk of harmful interference between services to acceptable levels. The CMBA therefore considers that safeguards in relation to protection from risk of harmful interference must be provided for, before considering whether the bands used by operators within the EU may become available for use under general authorisations.

Where a service has a pan-European scope or internal market relevance, the Commission has put forward the idea that one authorisation granted in one Member state should be valid throughout the EU and be a sufficient condition to provide the service in all Member states. However, the Commission has so far failed in explaining which pan-European services or services with an Internal Market dimension it is referring to. The CMBA would therefore welcome clarifications from the Commission, before commenting on this new approach.

Specifically on broadcasting, commercial broadcasters, whether free-to-air or pay-tv, are subject to public service obligations (such as investment in specific content, or being obliged to cater for independent suppliers of programming) in many European countries. The CMBA therefore considers that the Commission’s new regulatory approach should ensure that commercial broadcasters receive equal treatment with public service broadcasters, and that excessive reliance should not be placed on vague notions of the general interest in drafting up policy in this area.

The Commission is considering introducing to the NRF the principle of the freedom to use spectrum to offer any electronic communication service (service neutrality), in order to complement the principle of technological neutrality. The Commission considers that, subject to transitional measures, service neutrality should apply to all bands used for electronic communications.

The CMBA considers that the introduction of service neutrality in an environment where the means to address technical issues, such as the risk of harmful interference between services, has not yet been settled, appears to be premature. Any proposal in this area should seek to ensure that end users receive the quality of service that they are entitled to.

¹ Commission Staff Working Document, SEC(2006)816, of 28 June 2006, page 12.

² Article 5(1) of the [Directive \(2002/20/EC\)](#) on the authorisation of electronic communications networks and services.

4. Strengthening Consumer Protection and User Rights

The European Commission has stated its aim to strengthen the trust and confidence of users in electronic communications and services. The CMBA strongly supports this goal. It stems naturally from the growing importance played by information and communications technologies (ICT), both in general terms for the development of modern knowledge-based societies and more specifically for the development of a thriving e-commerce sector.

As a first point relating to the provision of new digital services including television, the CMBA calls upon the Commission to take stock of the digital switchover taking place in the marketplace. Specifically, we would like to emphasise the need to preserve the economic viability of a wide range of broadcast services. Indeed, the widespread problem of unauthorised retransmission of unencrypted over-the-air DTV signals on electronic communications networks could put at risk the whole business model that underpins free-to-air broadcasting. CMBA members note that business models in the audiovisual, publishing and music sectors are evolving. We submit that this process must take place in a climate of free and fair competition. The CMBA considers that the review of the Telecom Package has a key role to play in this regard, as illustrated by the concrete proposals made at the end of this document.

Secondly, as suppliers of the new services and digital content that make the roads of the information society worth traveling, the CMBA members are also acutely aware of the need to combat various forms of widespread cyber-criminality taking place on electronic communications networks and services. This challenge encompasses a much wider range of issues than just the security threats identified at this stage by the Commission (e.g. spam, malware/spyware and propagation of viruses).

The European Union therefore urgently needs to take the opportunity offered by the review of the Telecom Package to put in place the right conditions for effective joint efforts by public authorities and stakeholders to tackle law enforcement needs ranging from “identity theft” to “infringement of intellectual property rights” and from “child pornography” to “credit card fraud”. In this context, the suppliers of services must be subject to obligations to respect relevant intellectual property rights and to enforce terms and conditions to suspend or terminate contracts with subscribers who repeatedly infringe intellectual property rights or commit other legal offences.

Thirdly, the sustainable development of electronic communications networks and services can no longer be based on the pursuit of ever-larger bandwidth by operators while turning a blind eye on cyber-criminality cloaked in a broad interpretation of data privacy. These operators should not be allowed to hide behind privacy rules. Their cooperation is key to the development of a safer electronic environment and it should be encouraged. It is certainly worth recalling that important principles in the general 1995 “Data Protection” Directive – which recognizes that in certain circumstances and under certain conditions, the processing of personal data, without the prior express consent of the data subject, is allowed (see notably Articles 6-7 and 13 of the 1995/46/EC Directive) – also apply in case of the “Privacy and Electronic Communications” Directive (2002/58/EC). In this context, the NRF clearly offers

an opportunity to address the equally valid public policy objectives of the protection of data privacy and the enforcement of legal rights.

In light of the above, the CMBA would like to put forward the following concrete proposals for the Commission's consideration:

- Article 18 of the “Framework Directive” (2002/21/EC) should reflect the ongoing digital switchover taking place in the field of interactive television services by including a fourth reference – beside “free flow of information”, “media pluralism” and “cultural diversity” – to include the protection of digital television signals against unauthorised retransmission (“signal theft”).
- The “Authorisation” Directive (2002/29/EC) – which enumerates in its annex a series of specific conditions that may be attached to the general authorisation that providers of electronic communications networks and services need to obtain – should be amended to include specific references to Directive 2004/48/EC (i.e. the so-called “Enforcement” Directive) and Directive 2001/29/EC (i.e. the so-called “Copyright” Directive).
- The “Universal Service” Directive (2002/22/EC) should be amended by introducing in Article 20 (e) – which lists certain specific provisions that are always required to appear in consumers’ subscriber contracts, in particular the conditions for termination of services – the obligation to respect intellectual property rights subject to suspension or termination of contracts for repeat infringers. There should also be a general provision linking universal service obligations to a general requirement to respect the law. Suspension or termination for repeat infringement should also be treated within the framework of the above-mentioned “Authorisation” Directive
- The “Access Directive” (2002/19/EC) should be amended by introducing in Article 12 (obligations of access to and use of, specific network facilities), the obligation for operators to enforce contractual conditions requesting subscribers to respect legal provisions and in particular relevant intellectual property rights.
- The “Privacy and Electronic Communications Directive” (2002/58/EC) should be amended to reflect the notion that an individual communicating electronically with, potentially, the whole world (e.g. through a website or a peer-to-peer file-sharing service) cannot expect his/her act of communication to be treated with the same degree of privacy protection as, say, private correspondence such as phone calls or e-mails. Different options can be envisaged to make sure that data privacy rules do not have unintended consequences on legitimate enforcement efforts. The CMBA would, as one possible option, suggest that a new article be added to the Directive confirming and detailing the conditions for lawful processing of personal data in the electronic communications sector, with specific reference to data processing required in the case of illegal activities carried out online.

Brussels, 27 October 2006