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**RESPONSE TO THE COMMISSION COMMUNICATION
ON THE REVIEW OF THE REGULATORY
FRAMEWORK FOR ELECTRONIC COMMUNICATIONS
NETWORKS AND SERVICES**

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UK Response to Commission Communication on the Review of the EU Regulatory Framework for electronic communications networks and services.

1. Introduction

The United Kingdom is grateful for the opportunity to comment on the European Commission's Communication on the EU Regulatory Framework. This response reflects the position of the UK Government and the independent UK communications regulator, the Office of Communications (Ofcom). We have also responded, in a separate paper, to the Commission's consultation on the revised Recommendation on relevant product and service markets.

1.1. Executive Summary - General

The Commission's Communication begins with the assessment that the Framework has been a success and delivered on its aims, including: more choice, lower prices and innovative products and services for users and consumers; high penetration of mobile services; increasing broadband availability and take-up; and investment - overall growth in the sector is strong. We agree that the Framework, where effectively implemented, has indeed been a success in terms of competition, investment, prices and choice.

However, despite the Commission's assessment of the current Framework as an overall success, it is now proposing to increase its prescription, direction and oversight across several areas, in the name of the promotion of the internal market. As the UK noted in our response to the Call for Input, the internal market aspects of the Framework are indeed critical, and regulatory harmonisation can stimulate its further development. We strongly support the Commission's proposals for liberalisation in relation to spectrum, where we believe tangible benefits can be expected from a more liberalised and coordinated European approach. However, an excessive focus on regulatory harmonisation must be avoided, given the undeniable heterogeneity of markets. Inappropriate harmonisation measures could have significant economic dis-benefits, and prove inconsistent with other principles and objectives of the Framework. The best way of promoting the internal market will ultimately be through raising the quality bar of regulation across Member States with a view to achieving a common standard of competitive effectiveness in the market across Europe.

In this respect, as we noted in our response to the Call for Input, we believe that the biggest barrier to achieving the benefits of a single market has been ineffective, late or inadequate implementation of the Framework. We therefore believe that ensuring effective implementation should be a Commission priority, and that this review of the Framework should build on its successes, rather than overhaul it or the principles that underpin it.

Even in those areas where harmonisation may be appropriate and indeed desirable, the Commission will not necessarily always be best placed to deliver it, and the principle of subsidiarity dictates that it must justify any move to increase its role or powers relative to NRAs for this purpose. Some of the Commission's proposals are currently short on detail in this respect and we look forward further discussions with the Commission once its detailed proposals are presented.

We strongly believe that full use must be made of the regulatory knowledge and experience that has been garnered in the last three years, and that the potential for the European Regulators Group (ERG) to have a material impact on appropriate

harmonisation has yet to be fully exploited. We note in particular that the ERG has recently issued a statement (the Madeira Statement) setting out the commitment of its members to a series of operational and regulatory disciplines aimed at increasing its effectiveness in achieving a consistent implementation of the Framework. We advocate giving the ERG time to prove how effective it can be before looking at the need for greater intervention at EU level.

1.2. Executive Summary – Specific Proposals

The following paragraphs highlight how our responses to the Commission's proposals reflect our belief in the principles of the current Framework and its division of labour and responsibility between the Commission and NRAs. While we support justified, evidence-based proposals for increased coordination and harmonisation, we oppose proposals for an increase in Commission powers and oversight where the benefits of enforced harmonisation have not been proven, or are outweighed by the costs.

1.2.1. Veto on remedies

While we agree with the Commission that there have been problems of full and proper implementation with respect to the imposition of regulatory remedies by NRAs under Article 7 of the Framework Directive, we do not believe that the Commission's proposal to extend its power of veto is the appropriate solution. We advocate giving the European Regulators Group (ERG) a reasonable amount of time to demonstrate its ability to address the problem before considering alternative solutions, any of which should, in any event, balance the benefits of a single market against the needs dictated by different national market conditions.

1.2.2. Streamlining market reviews

The UK welcomes the Commission's desire to simplify and rationalise the market notification procedures under Article 7, but does not believe that the Commission's proposals will achieve its aims as hoped. The UK recommends that the Commission take account of the views of the consultants from whom it commissioned a study of its proposals, as further discussed below. The UK is also not convinced by the Commission's proposal for a Regulation on the procedural aspects of market notifications. While late or incomplete implementation of the Framework is an identified problem, artificial time-scales will undermine NRAs' necessary flexibility and risk negatively impacting the quality of market reviews.

1.2.3. Article 5 of the Access Directive

The UK is unconvinced by the Commission's case for proposing that NRAs use of their powers under Article 5 be subject to a prior approval procedure. The Commission asserts that this would be in the interests of the single market, but has not explained how, particularly as this power has been rarely used in practice. The UK would welcome some clarification and tightening of the application of Article 5, as described in further detail below. This should serve to limit any adverse impact on the single market which the Commission may be concerned about.

1.2.4. Spectrum

The UK emphatically supports the Commission's proposals in relation to spectrum liberalisation, including its emphasis on service and technology neutrality and its support for spectrum trading. However, moves to coordinate approaches to spectrum

management across Europe should not prevent those who wish to liberalise more quickly from doing so. At the same time, the coordination of authorisation conditions for Pan-European services requires significant further thought before the full effects of such a proposal can be understood and possible procedures can be defined.

1.2.5. Standards and numbering

While we support the Commission's aims of improving the degree of harmonisation where appropriate, its proposals to increase its role in the development of standards, and increase its powers (through "technical implementing measures") in relation to the harmonisation of numbering resources, are not convincing based on the evidence presented. The Commission has not justified such an increased role for itself, nor described explicitly how such powers would be used (in particular, any consultation and decision in conjunction with Member States). It has also not clearly identified the particular anticipated internal market benefits from the proposed harmonisation, nor explained why it would be best placed to deliver them. We would welcome further discussion on how best to achieve the Commission's aims through existing mechanisms.

1.2.6. Security

The UK notes that the Commission proposes to extend significantly the scope of regulatory interventions in relation to security, to include compliance obligations on operators and enforcement obligations on NRAs in this area. Given the significant implications that this could have on both regulators and operators throughout the EU, the UK would welcome clarification on the scope of the Commission's proposals, recognising that there are two clearly distinct types of security concern, that relating to the integrity of critical national infrastructure, and that relating to users of electronic communications services.

1.2.7. Consumers

The UK welcomes the Commission's desire to address the needs of consumers, recognising that contributing to the internal market is only one of the duties of NRAs under Article 8 of the Framework Directive, and that another such duty is to promote the interests of the citizens of the European Union. In this respect it particularly welcomes the Commission's proposal to increase and improve NRAs' powers of enforcement. However, many of the other proposals in this area lack sufficient detail to enable us to respond definitively, and we therefore look forward to receiving further information and clarification from the Commission in due course.

2. DETAILED RESPONSE TO THE SUMMARY OF PROPOSALS

2.1. New approach to spectrum

The UK welcomes the Commission's proposals in relation to spectrum management and supports the focus on facilitating rapid access to spectrum and increasing flexibility for spectrum users.

2.1.1. Technology and service neutrality

We believe that spectrum users should, subject to minimum necessary constraints (e.g. to prevent harmful interference and take account of the public health, public safety and national security), be given freedom to decide how spectrum should be used and fully support the Commission's commitment to technology and service neutrality. In a converging world we consider that it is essential that both these principles are pursued in order to bring benefits to consumers through increased innovation and competition. Such an approach will drive EU competitiveness and help to meet the goals of the Lisbon agenda.

2.1.2. Open selected bands to trading of rights of use

The UK also supports the Commission's aims in relation to the introduction of trading in rights of use. We agree that spectrum trading – combined with technology and service neutrality and applied to a sufficient amount of spectrum across the EU – will increase spectrum efficiency and maximise the benefits available from use of spectrum.

2.1.3. Improve coordination at EU level through a wider application of committee mechanisms

However, while we fully support wider implementation of spectrum trading, we think that care needs to be taken in the way that it is introduced across the EU. In particular, while we can see merit in using a committee mechanism to identify a common minimum set of bands for trading, Member States should be free to introduce trading in a wider range of bands if they so wish. This will allow earlier take-up of trading in some countries and will likely encourage wider take-up across other Member States as the benefits of trading become clear. It will also enable Member States and the Commission to learn from the experience of first movers. Furthermore, given that spectrum use and service priorities vary across the EU, Member States should have sufficient flexibility in the way in which trading is introduced to ensure that national needs can be appropriately taken into account. The UK believes that such an approach represents the best way of promoting dynamic spectrum markets across the EU.

2.1.4. Establish transparent and participative procedures for allocation

The Staff Working Document also proposes that exclusive rights through individual licences should only be granted where clearly justified. The UK supports the Commission's aim to minimise regulatory constraints imposed through individual licences. However, we do not believe that this leads to a conclusion that regulators should always licence-exempt wherever possible, as this does not always lead to the most efficient use of spectrum.

2.2. Streamlining market reviews

The UK is fully supportive of the Commission's Better Regulation agenda, which mirrors our own focus on following better regulation principles in national policy making. As we said in the UK response to the Call for Input, better regulation does not necessarily mean less regulation for the sake of reduction alone. Simplification is a valid way of reducing regulatory burdens and the UK welcomes the Commission's aim of simplifying the notification process for market reviews (Article 7 of the Framework Directive). However, we have some doubts about the practical effect of the Commission's proposals as outlined in the Communication and Staff Working Document

2.2.1. Relax notification requirements under Article 7 procedures

We fully support the proposals to reduce the burden on administrations that have completed market reviews, and where national conditions have not changed substantively by the time the next review is due. However, we do not consider that the Commission's proposals actually constitute a "considerable decrease" in the administrative burden of NRAs.

The UK believes that the impact of these proposals on the time and resources devoted by NRAs to market notifications and national market review processes will be marginal at best, even with relaxed notification requirements for the submission of information. NRAs will still have to carry out detailed and time-consuming preparatory work (e.g. carry out national public consultations and collect evidence). The only effect that we can see of the proposed revised standard notification form is that NRAs will no longer need to submit the entire market analysis decision.

The UK supports the proposal of Hogan & Hartson and Analysys in their expert report prepared for the Commission, for a "white list" of criteria to be agreed between NRAs and the Commission, identifying markets which would not need to be notified. These could include, for instance, stability in market shares, de minimis impact on the internal market and limited technological change. Such an approach would reduce the burden on both NRAs and the Commission, and allow all parties to concentrate their attention on the more contentious, and fast-changing, markets

2.2.2. Rationalise the market review procedures in a single instrument, including timetables

The UK is concerned that the establishment by the Commission of deadlines for the market analyses, as proposed in item 4.2 of the Staff Working Document, is unlikely to improve the quality of the analyses carried out by NRAs. We note that the Framework currently allows NRAs some discretion over market reviews, and experience of the market review process thus far teaches us that some degree of flexibility is necessary in order to ensure the effective deployment of regulatory resources and to enable the proper prioritisation of market reviews. The publication of a new Recommendation should not create a new rigid cycle of mandatory market reviews – instead, market reviews should be timed according to the needs of the national market, which may vary considerably from product/service market to market. Deadlines for the starting of market reviews following the adoption of a revised Recommendation, for instance, would ignore the timing and lifetime of previous market reviews (including the lifetime of remedies imposed, e.g. a glide path), and both are important factors that should be taken into account by an NRA when deciding how to prioritise its market reviews.

Based on practical experience over the past three years, the UK does not agree that any vetoed decision ought to be re-notified within a specified time period, e.g. 6 months. Cases where vetoes may be considered by the Commission may raise major issues of principle for the NRA concerned. Resolution of these issues may be difficult and consume significant resources - and an NRA may have higher, more immediate, priorities, or may feel that more evidence needs to be gathered before re-analysing the market (which could take time). It should not, therefore, be bound to a specific time-scale.

Finally, the Commission has yet to make a convincing case for the need to formalise the Article 7 procedures by way of a Regulation, rather than relying on the implementation of the revised Framework in each Member State. As explained above, NRAs need flexibility in meeting their obligations under Article 7. We have seen to date that the Framework has been a huge success where it has been effectively implemented and where market reviews have been concluded within an acceptable timescale. It would be disproportionate to respond to problems which might have arisen in some Member States as a result of the incomplete or delayed implementation of the Framework through the issuing of an instrument which would seriously constrain the proper performance by all NRAs of their duties.

2.2.3. Reduction in the number of retail markets in the revised Recommendation

We also support in principle the aim to reduce the number of markets that have to be reviewed. Clearly, where effective wholesale remedies are in place, there should be scope for the removal of downstream, retail regulation, as Ofcom has already done in the UK. However, we feel that the Commission has not provided sufficient justification that this is now the case across the majority of the 25 EU Member States. For this reason, it may be too early to remove these markets from the list, and we would support retaining the current list, with another review of the Recommendation in two years' time, before the amended Framework comes into effect in 2009/10, when there may be a better case for the removal of retail markets. This is discussed in more detail in the UK response to the revised Recommendation.

2.2.4. Next generation networks and services

The UK welcomes the Commission's recognition that the introduction of next generation networks and services will result in a more heterogeneous development of the electronic communications sector across the European Union. In an age of convergence and uncertainty, it is the UK's view that NRAs will need flexibility to take account of such developments, such as the early deployment of NGNs, in their respective markets. We provide more detailed comments in this respect in our response to the revised Recommendation.

2.2.5. Functional separation

We welcome the debate initiated by the Commission over whether the introduction of a new remedy imposed on SMP operators (to provide non-discriminatory access to all operators by separating infrastructure provision from service provision) would help to accelerate and complete the process of market liberalisation in the electronic communications sector. In the UK we have found that the problem of enduring bottlenecks can be better dealt with by employing a suite of functional and governance provisions that address the fundamental need for equality of access to those bottlenecks. These remedies were imposed under UK national competition law. This approach addressed legacy problems of ineffective, micro-managed regulation

of the past. We consider that such a holistic approach addresses some of the difficulties that arise from imposing SMP remedies that depend on the compartmentalised analysis of individual markets, as we mentioned in our response to the Commission's Call for Input. While the same, identical, solutions may or may not be applicable in full to other Member States, the UK considers that, at a minimum, a remedy of functional separation should be explicitly included within a revised Access and Interconnection Directive. This would empower NRAs to impose obligations on a designed SMP operator to prevent price and non-price discrimination by means of a separation of specific inputs used for electronic communications access products and other downstream services, including the creation of a single, separated access service applying to several relevant markets. We are of the view that such a remedy would be consistent with stimulating competitive investment and, by focusing regulation at the level of upstream inputs, would provide greater scope to deregulate downstream markets subsequently, in line with the aims of the EU Regulatory Framework.

We note that the Commission considered structural separation in its Impact Assessment, and agree that it would be extremely disruptive and cause the loss of certain legitimate advantages that may be derived from vertical integration.

2.3. Consolidating the internal market

2.3.1. Commission veto under the 'Article 7 procedure'

The UK authorities are also concerned, as we have made clear previously, about the lack of rigour in the implementation of the Framework across the EU, including in the timeliness of market reviews by NRAs. UK stakeholders active in the EU marketplace have also raised, with us, questions about the quality of reviews. We, in concert with the Commission, therefore believe that a new approach is required to ensure that there is an increase in quality of the market reviews undertaken, and of the remedies selected where dominance is found.

The Commission's view that a veto on remedies would be an effective tool for the promotion of the internal market is based on an assumption that the Commission is better placed than NRAs to assess the most appropriate remedies in particular national markets. Local conditions differ and NRAs have the experience and detailed local knowledge to enable them to understand such nuances and to design remedies most appropriate to national market conditions.

In any event, it should be noted that a veto over remedies would at best allow the Commission to deter over-regulation. A veto on remedies would not address the most frequent complaint of UK stakeholders, which relate to cases where a remedy has not been specified or where there have been problems with implementation of the Framework (sometimes relating to deficiencies in NRA independence). We are also aware that the Commission's consultants, Hogan & Hartson and Analysys, have strongly advised against an extension of the Commission veto at present, taking account of the views of stakeholders.

The UK believes that in the first instance the responsibility for improvement should lie with the ERG and the outcome of the October ERG meeting already provides promising evidence of effective change within the group in this respect. We are pleased to hear that the ERG has agreed to a process whereby NRAs will adopt a consistent methodology for the application of remedies that might apply to particular issues in the key markets they analyse pursuant to Article 7. NRAs will also provide reasoned justification for the remedies they choose, by reference to ERG Common

Positions. It will of course be important that this process is open and transparent to all relevant stakeholders, and we understand that the ERG intends to increase its own monitoring and data collection activities in this area. It is important that the expertise of the ERG is fully utilised to achieve appropriate harmonisation and regulatory quality across the EU. We would therefore support continued impetus being given to the ERG's development programme in this Framework review. In this context, strengthening ERG's mandate to reflect its increased role should be considered as a priority.

The UK believes that this approach, allowing NRAs the discretion they need to adapt remedies to the market conditions they encounter, but also ensuring there is more transparency and accountability for such decisions, would be more effective than the Commission simply having a power to veto remedies that have already been selected by NRAs.

However, if there is insufficient evidence within a reasonable timescale that the ERG process is proceeding towards an effective solution then the UK authorities would look to work with the Commission and Member States to consider alternative regulatory approaches. This would have to be in time for the Council to prepare alternative legislative text if needed. Ultimately, any regulatory approach should seek to achieve the objectives of a competitive regulatory environment, while balancing the benefits of a single market against the needs dictated by (often very) different national market conditions.

2.3.2. Make appeals mechanism more effective

The UK supports the Commission's desire to address the too frequent suspension of regulatory decisions pending appeals, which for too long has given dominant operators across Europe the opportunity to unjustifiably use the legal system to delay the effective implementation of the EU Framework.

However, we do not agree with the Commission's proposal to impose binding criteria which national courts would be required to consider in deciding whether or not to suspend a regulatory decision pending appeal. Commission prescription of the legal tests which national courts must apply represents an encroachment on national competence for the operation of national legal systems, and contravenes the principle of subsidiarity.

The UK supports the Commission's proposal to report on the progress of appeals across the European Union. While the Commission cannot direct national courts, this information would be useful when considering the overall effectiveness of the Framework.

2.3.3. Common approach to authorisation of services with pan-European or internal market dimension

A potentially significant Commission proposal concerns the development of a common approach to the authorisation of services with a pan-European or internal market dimension. The UK would welcome further clarity as to what is intended here and to better understand the problem this proposal is intended to address. We support the commitment to the internal market and the emphasis on developing interoperability, promoting cross-border services and enabling economies of scale to be obtained. However, we do not see why, in most cases, EU-wide authorisations are required, and instead believe that a more flexible, market-based approach is the most effective way of achieving these aims.

The one exception to this would be for genuine cross-border services which need to operate on a pan-European basis. This is the case with Mobile Satellite Services (MSS) where the footprint from an individual satellite will cover a number of countries. In such instances we believe there is a strong case for authorising on a pan-European basis. However, we have serious doubts that other potential candidates such as mobile multimedia services could practicably be subjected to a pan-European authorisation regime, due to differences in spectrum allocations and national approaches to authorisations across Member States. The UK would, however, welcome further dialogue with the Commission to investigate whether there may be any other services where such an approach is merited.

2.3.4. Amend Article 5 of the Access Directive: non-Significant Market Power access and interconnection

The UK does not support the Commission's proposal of making the use by NRAs of their powers to regulate non-SMP operators under Article 5 subject to the Commission's authorisation, possibly issued following an advisory committee procedure. In particular, given that this provision has so rarely been used, it is not clear what problem of harmonisation the Commission is proposing to address, and the justification for the proposed extension of the Commission's power has therefore not been made.

The UK believes that Article 5 is to some extent a legacy of the previous Framework which no longer fits very well with the current one. Especially since it has been so little applied in practice, this would be a good opportunity to clarify the drafting so as to increase certainty as to the scope of the Article and the standard of proof required to justify its use.

We have carefully examined the benefits of an open list (the ability to respond to future, unanticipated challenges) versus its dangers (potential uncertainty and false expectations of future regulation). On balance we have concluded that a closed list is preferable (i.e. that Article 5 should only be able to be used in those specific circumstances expressly described in paragraphs 1(a) and 1(b)).

In addition, while the UK recognises that there can be public policy justifications, as outlined in paragraphs 1(a) and 1(b) of Article 5, for application of remedies to market players without recourse to a finding of Significant Market Power (SMP) the inter-relationship between the Article 5 route and the SMP-based route needs to be clarified. In certain circumstances, it may be appropriate to apply the Article 5 remedies to SMP players only after a Market Review in accordance with Articles 14-16 of the Framework Directive. The UK would welcome clarification of the drafting to place it beyond doubt that NRAs are able to take either course, according to the circumstances of the case.

2.3.5. Introduce a procedure for Member States to agree common requirements related to networks or services

The Commission is concerned to address the variation in interoperability requirements that sometimes exists between Member States, and the resulting multiplicity of technical specifications and standards. It has therefore proposed an EU-level mechanism to agree common requirements (which would then be passed to European Standards Organisations (ESOs) for the development of the relevant technical standards). In the absence of any information or detail as to the

composition, function and powers of such an EU-level mechanism, we cannot agree further to such a concept.

We note that there already exist mechanisms for Commission involvement in the development of standards under the New Approach (e.g. the EMC and R&TTE Directives), and through the list of standards issued by the Commission under Article 17 of the Framework Directive. Both mechanisms rely primarily on industry involvement, with limited governmental/Commission prescription. Indeed, we believe that a competitive market is the best means of ensuring that the necessary interoperability standards are developed and that the time, resources and intellectual property rights committed by market players to the development of these standards is rewarded appropriately. The UK believes that regulatory authorities and/or national/international governmental organisations are not best placed to develop interoperability standards (lacking the necessary technical expertise) and that to increase the role of the Commission in this process could distort the market. The Commission should focus its efforts on carefully defining the regulatory requirements it is concerned may not be met otherwise. These requirements will then be responded to by industry in the most innovative manner, in the development of the appropriate technical standards.

Having said that, the UK does believe that there could be scope for the increased involvement of Member States under the current New Approach at the early stage of developing ESO mandates, in those circumstances where there is a particular and justified concern about harmonising technical requirements in areas such as security and emergency services, where there may be less tangible commercial interest or fewer commercial incentives. The ongoing ICT standardisation survey which the Commission is carrying out should inform further deliberations in this area, and its results should be reflected in the Commission's proposals under the present Framework review.

2.3.6. Broaden the scope of technical implementing measures taken by the Commission on numbering aspects

In the Staff Working Document, the Commission has indicated that variations among national numbering schemes across Member States act as an impediment to the development of a common approach to certain numbers and associated services within the EU. For this reason, the Commission now proposes to extend the scope of such technical implementing measures that it can adopt. However, the Commission has not explained why it believes its current powers to be insufficient. Under Article 10(4) of the Framework Directive, the Commission may already take appropriate technical implementing measures to harmonise numbering resources within the Community where this is necessary to support the development of pan-European services. Furthermore, the UK notes the Commission's recent consultations in relation to harmonised European short codes (HESC and in particular, 116), in respect of which the Commission has not indicated any limitations to its powers, which would impede the harmonised implementation of HESC services across Member States. The UK therefore cannot support this proposal in the absence of a justification for the proposed broadening of the Commission's powers in this respect, and details on the precise nature and extent of such proposed broadening.

2.3.7. Amend Article 28 of the Universal Service Directive on non-geographic numbers

The Commission believes that Article 28 of the USD applies only to telephone-based services, and that in any event it should be made clear that end-users can access

any service (including information society services) using non-geographic numbers. Furthermore, the Commission proposes that the only limitations on this obligation should relate to the combating of fraud and abuse. The UK supports the Commission's proposal to improve cross-border access to non-geographic numbers and agrees that technical restrictions may be reduced with the roll-out of NGNs. However, the UK believes that limitations for commercial considerations remain valid. In certain circumstances, the ability to limit access from certain geographic areas, particularly by the called party, should be preserved. Furthermore, the extension of access across borders for premium rate services using non-geographic numbers (and their substitutes) should be approached with extreme care in order to ensure adequate consumer protection. Finally, the UK does not necessarily consider that the current Article 28 is limited to telephone-based services. Indeed, Article 28 makes no reference to access to services, only to access to numbers.

2.3.8. Improve enforcement mechanisms of the framework

The UK welcomes and fully supports this proposal to improve the enforcement mechanisms available under the Framework, and in particular the removal of restrictions on imposing penalties until the undertaking in question has been given the opportunity to remedy the breach. The UK would welcome a provision simply acknowledging NRAs' general power to impose appropriate penalties on undertakings in order to ensure their compliance with the relevant regulatory obligations.

2.3.9. Strengthen the obligation on Member States to review and justify 'must carry' rules

The UK is content that the current powers are adequate to permit Member States to ensure, where necessary, the carriage of specified broadcasting services over electronic communications networks. The UK has established such a scheme under the Communications Act 2003 but no specific requirements have been imposed on operators under the relevant powers. It follows that the UK would not object to a requirement to review the application of "must carry rules" one year after the application of the new legislation.

2.3.10. Adapting the regulatory framework to cover telecommunications terminal equipment, ensuring consistency with the R&TTE Directive

The UK welcomes the Commission's intention to address inconsistencies between the Universal Service Directive and the R&TTE Directive in relation to terminal equipment. One of the ways the Commission proposes to do this is through a review of the definition of Network Termination Point (NTP), though the Commission does not provide any detail of its proposal. Whatever the details of the Commission's proposal might be, NRAs' discretion to define the location of the NTP (in accordance with Recital 6 of the Universal Service Directive) should be preserved.

We accept that in the context of the Framework, a flexible definition of the NTP is useful, as we adapt to an evolving scenario of IP technology, services and infrastructure. This allows the NTP to be defined to meet the needs of particular situations as they arise. There will inevitably be circumstances, driven by commercial or standardisation pressures, where a commonly defined NTP would serve the interests of the internal market. Where this is the case, we believe that the identification of a harmonised NTP should remain within the competence of NRAs, collaborating through the ERG.

As the Commission's Staff Working Paper recognises (and in the Commission's proposals relating to universal service), the migration to IP-based services tends towards a separation of access provision from service provision. In particular, there will increasingly be situations where the location of a physical network connection may be different from the location where the service is provided. It is worth considering, therefore, whether the concept of NTP might be usefully complemented by the concept of the "service termination point".

As noted by the UK in our response to the Call for Input, disability stakeholders consistently raise the issue of the exclusion of terminal equipment from the networks and services package, and the "artificial" severing of the ideal of end-to-end service. Article 3(3)f of the R&TTE Directive has never been invoked by the Commission, and while Article 7 of the Universal Service Directive enables Member States to ensure access (and affordability) for disabled users to publicly available telephone services, it makes no express reference to the terminal equipment that would be required to give effect to this provision (thus potentially not guaranteeing end-to-end service). The UK already interprets Article 7 in the wider sense, but would request that the Commission expressly confirm, to put beyond doubt, the scope of NRAs' powers under Article 7(2) (in particular that they include the power to require operators to satisfy themselves that suitable devices are available on the market to enable disabled users to access those services).

The Commission proposes to relax public operators' obligations to publish network terminal interface specifications, which appears to be aimed at leading equipment manufacturers and network operators to collaborate on introducing innovative services. The UK welcomes a relaxation in principle, but requires additional detail of the specifics of the Commission's proposal and in particular, information on how the Commission proposes to achieve this without a review of the R&TTE Directive itself. In particular we need to ensure that we have mechanisms to ensure that the removal of an obligation to automatically publish a specification does not allow network operators to unreasonably limit interoperability with their network, or restrict interoperability to a few manufacturers.

There have been a number of initiatives around the R&TTE Directive, the Universal Services Directive and this Framework relating to accessibility. Indeed, there are parts of each directive that can be related either explicitly, or by implication, to the area of accessibility. It is suggested that a coordinated approach is needed to define coherent objectives in this area and then ensure that all three mechanisms are rationalised within the approach. This would make it easier for manufacturers, operators, providers, accessibility interest groups and others to work together.

2.4. Strengthening Consumer Protection and Users' Rights

2.4.1. Improve the transparency and publication of information for end-users

The UK wholeheartedly agrees with the objective of increasing transparency and facilitating access to third-party price information for comparison purposes. However, the UK believes that this is largely possible under the existing Framework, and would therefore welcome a clarification of NRA powers. As a related point, the UK would welcome additional information on what new measures to increase transparency the Commission is contemplating introducing. The UK would welcome early discussions with the Commission about how this would be implemented, particularly with regard to mandatory solutions (such as price information appearing on terminals on a per-call basis) as the technical issues remain complex and costly to operators.

2.4.2. Strengthen the obligation for network operators to pass caller location information to emergency authorities

In principle, the UK supports a robust obligation on operators to provide caller line identification (CLI) and location data to emergency services, as well as the preservation of exceptions so as not to stifle innovation. However, the UK requires additional information on the intended scope of such strengthened obligation (and exception). The UK notes that there are various scenarios where a technical feasibility exception could legitimately continue to apply, such as private or virtual private networks (where an internal numbering system may not yield geographic information about the source of the call), or SIM-free emergency access (where no CLI will be presented). In respect of VoIP in particular, the UK requests that the Commission provide evidence for its assertion that technical feasibility is not expected to be an obstacle to the provision of CLI by VoIP providers by 2010. At present, VoIP calls are routed via many diverse paths, and the CLI of the final leg may not yield useful information to the called party. Furthermore the UK would welcome the use of alternative means of achieving some degree of consumer protection where the provision of CLI is not possible or feasible, such as the obligation to make clear and prominent declarations on the limitations of the service in question. This has worked well to date in the UK with the development of the VoIP Code of Practice at an early stage of market development, with the cooperation of industry. We would also welcome the voluntary cooperation of the VoIP industry to provide defined solutions (ideally through a single definition) for passing location and call-back information.

2.4.3. Universal service: separate the provision of access to public communications networks from the provision of telephone services

The UK agrees that separation seems reasonable and notes the impact of such separation on definitions of terms such as PATS and NTP.

The UK notes that the Commission intends to issue a Green Paper in 2007 which will re-examine the concept and scope of universal service. We welcome this initiative and look forward to contributing to it.

2.4.4. Universal service: Remove provisions on universal directories and directory inquiry services from the scope of universal service

The UK welcomes this proposal.

2.4.5. Adapt 'telephone service specific' provisions to technology and market developments

The UK notes the Commission's observation that many provisions of the USD are likely to need to be updated during the life of the revised USD (e.g. provisions relating to additional telephone facilities, carrier selection and pre-selection). However, the UK also notes that the Commission intends to consult on a wholesale review of the USD in 2007 and therefore requests that the Commission justify its proposal for an additional, effectively "interim", mechanism to deal with this. Further details on the contemplated "mechanism" are also required.

2.4.6. Adapt the provisions on number portability to ensure transfer of all relevant data

Number portability plays an important role in reducing the barriers to a subscriber changing communications provider, and thereby promotes competition. To ensure that number portability obligations retain their value, the UK agrees that provisions relating to number portability may need to be revised in light of technological changes. The particular scenario contemplated by the Commission in the Working Document (i.e. the need to port directories held on operators' servers) is only one of many possible scenarios that may present difficulties for consumers in relation to number portability in the future. However, the extent of this particular problem (or indeed other issues that may arise, e.g., if numbers are allocated directly to end-users) is presently unknown and is likely to vary between Member States.

The UK believes that NRAs should have a broad range of powers to ensure their ability to respond to and remove barriers to switching providers, as they arise. This will include the discretion to amend the number portability obligations applicable in their respective jurisdictions, as and when technological developments in their jurisdictions require it. A single common solution would not be appropriate in this case and care should be taken to ensure that solutions provide an increase in consumer benefits.

2.4.7. Net neutrality: Ensure that regulators can impose minimum quality of service requirements

The UK recognises that not all forms of discrimination are detrimental to customers and end-users, and that in fact, offering different grades of products or services may actually stimulate demand and increased consumer benefits. Where discriminatory behaviour by an operator with SMP is demonstrated to be anti-competitive, however, there are already sufficient powers available under the Framework and under competition law to deal with any issues arising. Having said that, while we believe that network degradation or blocking by a single SMP operator can be adequately addressed under the current EU Framework in principle, we recognise that in practice the current Framework is unable to deal with all competition problems, as demonstrated clearly by the Commission proposing a regulation on international roaming. This is further discussed below in relation to collective dominance.

The UK believes that the overarching aim should be to ensure that end-users have access to comparable quality of service information which allows them to make informed choices when switching provider. The UK believes that transparency and publication of information for end-users is best achieved through industry-led initiatives which are more flexible (e.g. with regard to the parameters used) as these are more likely to be capable of keeping pace with the dynamics of the marketplace. For example, if an end-user has full price and quality of service transparency, and can switch provider easily and cost-effectively, then unfair net discrimination should not be an issue. We believe that the Framework should remain flexible enough to deal with any future issues, whilst keeping the situation under review. The UK therefore does not support the introduction of new powers for NRAs to ensure minimum quality of service levels which are based on EU-level standards, though we would support the introduction of service level definitions which allowed for the ready comparison of services from different providers. We believe that the focus should be on ensuring that the Framework has the scale of future-proof powers to deal with issues arising out of abuse of a dominant position, especially bottleneck access, rather than on a stand-alone set of new rules specific to a problem that may never occur in the EU (at least not in the way that we currently understand it).

2.4.8. Interconnection issues

We welcome the Commission's statement that alternative models to cost-based termination may be accommodated.

2.4.9. Strengthen the right of disabled users, notably deaf people, to access to emergency services via the number '112'

While it seems entirely reasonable that deaf users should be able to access the emergency services using 112, there are legitimate reasons why this is not at present practicable in the UK. Users with profound hearing loss in the UK use textphones to dial 18000 to access the emergency services and have their call handled by an experienced Typetalk operator, who hands the call over to the emergency services. This works well in practice. Textphones cannot be used to dial 112 because textphones do not declare themselves as such to the network – if a textphone were to be connected to a conventional phone bypassing the relay service, the called party would hear nothing and assume a silent call. Furthermore, the number of emergency textphone calls is so comparatively low (about one in every one thousand emergency calls) that their equal among all emergency operators in the UK would lead to a loss of experience and know-how that the dedicated relay service operators have accumulated. This would have significant implications for training and experience-building of operators.

The Commission should also take technical developments into account. It is likely (though not of course guaranteed or timely) that access to the emergency services will become easier for people with hearing difficulties. For example, IP services via a PC or handheld device via a broadband hub in the home could offer a practical alternative via an instant messaging service. Mobile services are also evolving fast and instant text messaging will be appearing soon. The Commission should also recognise that there can be limitations at the emergency services' receiving end when proposing additional demands on industry. Investment and training are also necessary at the receiving end. For these reasons the UK advocates a balanced approach that takes all aspects of the services into account.

In any event, additional information is required from the Commission in order to understand the full implications of its proposal. For instance, does the proposal extend to distinct modes of communication such as SMS or video relay access to the emergency services?

2.4.10. Introduce a Community mechanism to address eAccessibility issues

Disabled stakeholders have long been frustrated by the lack of clarity over which EU body or on which piece of EU legislation they should focus their efforts. The current legislative split between services and terminals has been a consistent barrier issue. The UK would emphatically welcome a Community mechanism if one can be devised that will bring together all the e-Accessibility issues, stakeholders and legislation (with the potential to have a material impact). The promotion of dialogue between the relevant players is in itself beneficial, and recognises the increasing complexity of eAccessibility issues. To bring the issues and debate within a single point of focus would be of significant benefit to all stakeholders.

However, having looked at the current EU initiatives and bodies looking at e-Accessibility (see summary in Annex), the UK notes that a potential appropriate body, INCOM, already exists and plays this role (we think that INCOM is the right

model, with the right mix of stakeholders). It is important that any new mechanism does not create any unnecessary duplication, but adds value to work currently undertaken. Therefore we would welcome additional information from the Commission as to what exactly it is proposing in this respect. In setting up a mechanism and to make sure that it has the impact that it would need to make a real difference to the lives of disabled EU citizens, the body will need sufficient power and influence across the whole spectrum of e-inclusion issues in all the relevant legislative areas within the Commission.

2.5. Improving Security

Given the clear and present threats faced by all members of the international community, the UK considers that greater attention needs to be given to ensuring the integrity of critical national infrastructure (including electronic communications networks). Clearly, the responsibility for critical national infrastructure and emergency planning lies with national governments, working in cooperation with each other, and with relevant stakeholders and international agencies.

Equally important, but separate, are security- and privacy-related issues relating to users of electronic communications services. The UK notes that the Commission proposes to extend significantly the scope of regulatory interventions, to include compliance obligations on operators and enforcement obligations on NRAs in this area. Given the significant implications that this could have for both regulators and operators throughout the EU, the UK would welcome clarification on the scope of the Commission's proposals that recognises these two clearly distinct types of security concern.

2.5.1. The case for more prescriptive security requirements

The Commission states that the growth of spam, viruses and spyware is reducing users' confidence in electronic communications, and that the market has so far failed to address security problems to the satisfaction of users. However, the Commission provides no evidence in support of these statements. While the UK accepts that threats have increased, we have also seen that user competence and service/network provider intervention has improved. The counter-response to increasing and ever-innovating threats is an on-going arms race. Regulation alone can never be as effective or timely as a combined approach, working with industry, regulators and Governments to improve security across the EU. There are four factors essential to improving security of infrastructure, services and personal data/possessions:

- regulation
- technical solutions
- end-user education
- global enforcement cooperation

While the UK is confident that appropriate levels of security can be achieved through cooperation with industry and education of end-users (i.e. in support of the "no change" proposal in the Commission's Regulatory Impact Assessment), we do recognise that in the current climate some new regulatory measures may be proportionate.

The Commission's proposals are, however, short on critical detail. We would therefore welcome more information on the Commission's proposals and in particular the precise areas to which they relate.

The e-Privacy Directive sets out the regulatory regime for the treatment of personal data within electronic communications networks and services. It fits within the context and principles of the Data Protection Directive and should not, therefore, be seen as a convenient vehicle on which to attach prescriptive infrastructure/national security requirements. The e-Privacy Directive should also not be seen as a panacea for solving spam (see 2.5.2 below).

It is important to appreciate the distinctions between each type of threat when considering a proportionate response via the electronic communications framework:

- spam, spyware, malware
- data protection (security and treatment of personal data)
- network security (especially critical national infrastructure)
- network integrity (including continuation of supply)

These are discussed individually below.

2.5.2. Spam

We should be clear that the e-Privacy Directive is not "anti-spam" legislation, as some understand it to be. The Directive sets out the consent rules for unsolicited commercial communications - email and telephone/fax - and the rules covering the treatment of personal data in an electronic communications space, e.g. cookies and on-line directories. The Directive is essentially an extension of data protection rights to electronic communications.

Most, if not all, of the harm done by spam is through the content (e.g. dissemination of viruses, scams and prescription drugs), where the content either causes harm directly (to your PC) or breaks a law (e.g. prescription drugs offered without a prescription, or financial scams). On the consent point, the end-user is at most annoyed by receiving unsolicited emails that they do not want. There are network resource implications of dealing with spam but the consent rules were drawn up to protect end-users rather than networks.

How, then, do we best tackle spam if not through the e-Privacy Directive alone? The UK has long advocated taking a three-pronged approach, involving all stakeholders and especially internet providers alongside government: (1) cooperation with enforcement agencies (has to be global to be effective, e.g. the London Action Plan); (2) technical solutions (filters, spyware, firewalls, network solutions); and (3) education (putting security software on PCs, choosing email addresses carefully/having more than one address for personal use/shopping; not responding to spam; reporting spam, etc.). We welcome the Commission's forthcoming Communication on spam, and our response to it will focus on the importance of taking this approach.

2.5.3. Oblige operators to take security measures, and grant powers to NRAs to determine and monitor technical implementation

The Commission has identified two problems with the current regime: lack of NRA involvement in determining minimum security requirements (e.g. issuing guidance)

and the adverse impact on the single market of having differing requirements across the EU (some much more prescriptive than others). The Commission's proposal is to either mandate the technical requirements at EU-level (e.g. via a recommendation) or that NRAs mandate minimum technical requirements, with the practical implementation being left to Member States.

The UK does not support the proposal for EU-prescribed technical requirements or a Recommendation for the following reasons:

- Over-prescribing security measures at the network and service levels will not address the issue of user responsibility in keeping their systems and details secure (and in fact may reduce the amount of end-user intervention if people feel "safer" because the network/service is "safer");
- Hardwired regulations will never be able to keep pace with the ever-changing threats, and could suppress innovation (the EU is host to some of the world leaders in innovative security solutions); and
- For the requirements to be effective in every Member State, detailed consultation with industry is essential. This can only be practically and usefully achieved at the NRA level.

The UK would be willing to explore with the Commission how the next level down in its proposals might be shaped, accepting that there appear to be reasonable grounds for NRAs to take a more active role with industry in (1) setting technical/operational requirements that are proportionate to the threats, (2) carrying out cost-benefit analyses, and assessing technical constraints, and (3) (together with government) educating end-users.

On the Commission's specific proposals:

- *Networks and services to implement and maintain security measures; respect any guidance issued by regulators; and insert promises to customers in contracts* – the UK can see merit in discussing the first two proposals but is not convinced by the need for customer contracts to include promises that they will be told by providers of breaches in contracts. Major customers (e.g. banks) for whom security is a priority will already have security factored into their contracts (for which they will pay a premium).
- *NRA powers: to require information of emergency plans, security policies, audits, and to enforce and issue binding instructions* – while the UK accepts in principle the proposals to do more than is currently done, we do have some concerns about the level of intervention proposed, even with this intermediate option that gives implementation flexibility. The resource requirements on the NRA are potentially huge, especially where audits and proactive enforcement is concerned. Since the Framework was implemented in the UK in 2003, we have found from experience that emergency planning has been effectively managed by working in close cooperation with industry and by concentrating NRA resources on investigating major outages (which are rare) after the event, to assess whether the planning and protocols were compliant with the associated General Condition (based on the current Framework). Expecting NRAs to audit and proactively check, when instances of major loss are rare, does not seem proportionate.

On the single market point, to the extent that NRAs have lead responsibility for the security issues in question, there could be scope for the ERG to work, with industry, to influence proportionate and effective requirements across the EU.

2.5.4. Require notification of security breaches by network operators and ISPs

The UK draws an important distinction between security breaches involving the compromise of personal data and those affecting continuity of supply.

The proposal to mandate that electronic communications network and service providers inform the relevant NRA (the Information Commissioner's Office in the UK) when a security breach affecting personal data has occurred seems reasonable in principle. In many studies of customers' concerns about using electronic communications, the protection of personal data has been found to be important. In the UK, this proposal would result in an extension of good practice that helps the regulator and companies to work together to inform and advise customers. However, the UK has serious reservations about the extension of this principle just to electronic communications network and service providers. We urge the Commission to review this requirement in the context of wider data protection (i.e. via a review of the general Data Protection Directive) so that all citizens can benefit and all industries are handled proportionately. Incidences of security breaches via the mail system (such as bank statements sent out in wrongly addressed envelopes) are as much, if not more, of an issue than any electronic breaches.

On continuity of supply we have some serious reservations about the need for NRAs to be notified over and above the general requirements in the existing Framework. The responsibility for network integrity and continuity of supply does not always fall on the service provider, and in the UK, to date, we have found no enduring detriment to users from working with network providers on a case-by-case basis pursuant to the General Conditions. The UK therefore does not support the proposals relating to security breaches which affect supply.

2.5.5. Future-proof network integrity requirements

We would welcome clarification and further detail on the Commission's proposals, including in relation to the extension of current requirements to future networks. The definition of what constitutes "IP" for the purposes of this requirement is key and we should seek a balance so that critical national infrastructure is covered and innovative services are not faced with unacceptably high barriers to market entry. The UK supports a progressive approach, based on cooperation with industry, that allows requirements to apply as appropriate and when technically feasible.

2.6. Modernisation and updating

2.6.1. Delete the minimum set of leased lines

The UK supports this proposal.

2.6.2. Withdraw Article 27(2) of the Universal Service Directive on ETNS

The UK agrees with the Commission's assessment of the ETNS position and supports the withdrawal of Article 27(2) of the USD.

2.6.3. Repeal Regulation 2887/2000 on unbundled access to the local loop

The UK supports this proposal.

2.6.4. Delete Annex I of the Framework Directive, Article 27 of the Framework Directive

The UK supports this proposal.

2.6.5. Delete Article 5(4) of the Access and Interconnection Directive

The UK agrees with this proposal.

2.7. Areas where the Commission is not proposing changes

2.7.1. Adjacent markets

As the Commission recognises, in order to deal effectively with a position of SMP, an NRA may occasionally need to impose remedies which apply across markets (such as accounting separation) to ensure the remedies in the SMP market are effective. While the UK believes that such remedies have already been applied under the existing Framework and notes that the principle is covered in the ERG Common Position on Remedies, it considers that the language of the Framework is rather opaque on the point. Therefore, for the avoidance of doubt, it proposes that the language of the Directives should be suitably clarified. This is discussed in more detail in the UK Response to the revised Recommendation.

2.7.2. Collective dominance

As we noted in our response to the Call for Input, we have found that the AirTours case provides an inadequate test for dealing with potential competition concerns in some forms of oligopolistic markets. In particular, while the test may be appropriate for dealing with situations of tacit collusion, it is conceptually incapable of dealing with oligopolistic situations characterised by non-coordinated, non-collusive (but nonetheless less than effectively competitive) behaviour. Market players may simply behave like rational economic actors, taking decisions based on their rational assessments of other players' likely behaviour, without any collusion with those other players. The longer players coexist in such a market, the more likely it is that they will have learned how to read each other's (unintentional) signals in this way. This behaviour, while rational and non-collusive, may nonetheless yield outcomes where competition is muted.

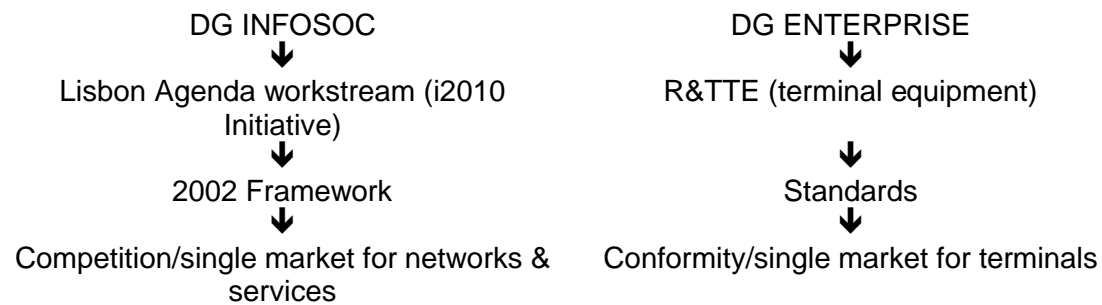
This is of particular concern to us where the form of the detriment caused is by way of denying access to services valued by the consumer, with possible impacts on consumer choice generally and on innovation. It is easy to envisage that the increasing rate of convergence may bring an increased concentration of market players (whether through consolidation or other changes in market structures). At present AirTours would not give us the ability to address this uncompetitive outcome, and in that way it would prevent us from fulfilling our duties under Article 8 of the Framework Directive, namely to promote competition and the interests of citizens. While we are satisfied with the need to follow the test set out in AirTours in situations of tacit collusion, it would be helpful if the Commission could acknowledge the inability of AirTours to address the non-coordinated, non-collusive form of collective dominance, enabling Member States to take appropriate action outside the scope of the AirTours test.

It has been suggested that it would not be appropriate to impose ex-ante controls in situations of non-collusive oligopoly because, usually, the consequential detriment is less than arises from monopoly or collusive oligopoly. This does not, however, mean that some regulatory action will not be warranted. A number of markets currently dominated by an incumbent may become oligopolistic in nature – whether or not they will generally be effectively competitive oligopolies is unpredictable at present. It would therefore be useful for Member States to be able to impose remedies in these situations following a finding of non-collusive collective dominance, subject of course to the principles of appropriateness, proportionality and efficiency, and as long as these ex ante remedies are necessary.

In this context it is worth noting that the Commission itself, unable to prove collusion in the international wholesale roaming market, felt that there was nonetheless sufficient detriment to warrant a regulatory response. The Framework proved inadequate to deal with a competition issue which the designers of the Framework clearly believed should be dealt with, as a result of which the Commission has proposed a Regulation. Looking forward, there is no reason to believe that this example will prove to be unique. If such cases cannot be accommodated in the revised Regulatory Framework, and have to be dealt with through one-off market-specific regulations, this will simply produce legal and regulatory uncertainty for market participants and NRAs alike, which is in no one's interest.

Annex – Summary of existing mechanisms for co-ordinating e-disability and e-accessibility issues

EU Groups and initiatives



Group	Membership	Status
COCOM	Member States (MS)	Permanent body; advises the Commission on competition decisions under the Framework
INCOM	MS, industry, Non-Government organisations (NGOs) (e.g. RNID, Phoneability), Commission?	Temporary working group of CoCom – reported March 2006
TCAM	Industry, MS, Commission, and NGOs.	Regulatory & advisory committee on R&TTE; has two working groups looking at specific issues, e.g. real-time text communications for mobiles and an inclusive design approach for all terminals (although the focus is on mobiles).
i2010 e-Inclusion Working Group – eAccessibility Sub-Group	MS and invited Stakeholders only.	Advisory committee to i2010 High level Group on e-Inclusion issues.
ICT Standards Board	CEN, CENELEC, ETSI + commercial fora	Advisory body