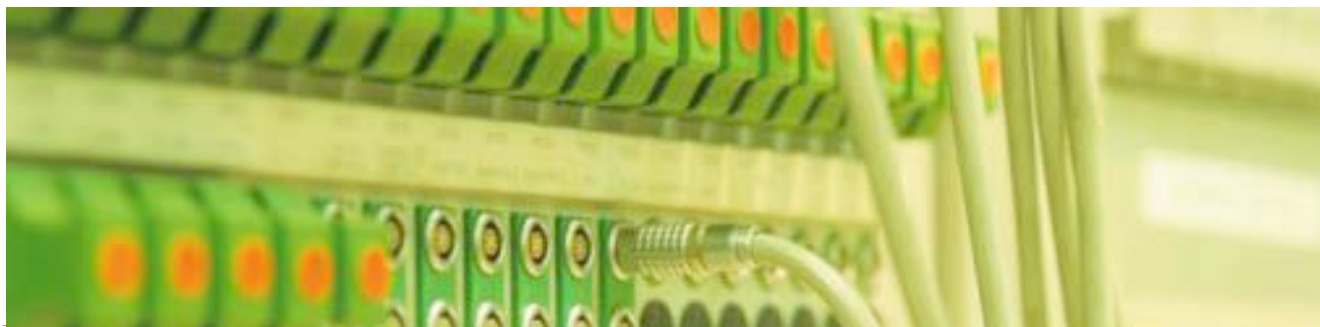


# IP, IT & Media News from Luxembourg

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## Intellectual Property, Information Technologies & Media

### Focus on the new European regulation on electronic communications

On 25 November 2009, the European Union enacted a new set of rules regarding electronic communications, the so-called new "Telecom Package". This new regulation is composed by two directives which must be implemented by the Member States by 25 May 2011 and one regulation which is immediately applicable. In Luxembourg, a draft of law has been filed on 30 March 2010 in order to implement into national law some of the new provisions related to the independence of the national regulatory authorities ("NRA").

This reform notably aims at strengthening consumers' rights in the electronic communications sector (1) but also at supporting competition and investment in new generation networks within the internal market (2). Finally, the new set of rules tend to improve the regulation of the telecommunication with the creation of a new European supervisor, which is already operational, and the stiffening of the independence of the NRAs (3).

#### 1. The new consumers' rights

The new Telecom Package sets out a significant number of measures tending to stronger consumers' rights, the most significant of which measures are as follows:

##### - Stronger protection for data privacy

European citizens' privacy is a priority for the first part of the Package on telecommunications which is composed by directive 2009/136 amending directive 2002/22 on universal service and users' rights relating

to electronic communications networks and services and directive 2002/58 concerning the processing of personal data and the protection of privacy in the electronic communications sector ("**Directive 2009/136**").

This Directive, which must be implemented by 25 May 2011, introduces the obligation, for the providers of publicly available electronic communications services ("**Providers**"), to notify, "*without undue delay*", any security breach to the personal data they store, to the competent NRA but also, when the personal data breach is likely to adversely affect privacy, to the subscriber or individual.

The Providers must also obtain the prior consent of the subscribers or users in order to install a "cookie" or a similar device.

##### - Increased fight against unsolicited communications ("**spam**")

Directive 2009/136 reasserts the opt-in principle in the context of commercial communications, which means that the use of electronic communication system for the purpose of direct marketing requires the prior consent of the recipients.

However, the new regulation goes further than this and offers to any natural or legal person, including Providers, the possibility to bring legal proceedings against spammers. Such provisions give Providers, who are - within the meaning of the Directive - "*in a better position than end-users in that they possess the knowledge and resources necessary to detect and identify spammerprocessing*", the opportunity to protect their commercial interests but also, indirectly, their subscribers.

Finally, the new Telecom Package sets out the possibility, for Member States to lay down specific rules on penalties applicable to Providers, which, by their negligence, would have contributed to the proliferation of spam.

#### **- Better transparency of the conditions of electronic communication services**

The new package of rules strengthen the pre-contractual obligation of information of the Providers by imposing them to publish "*transparent, comparable, adequate and up-to-date information*" especially on applicable prices and tariffs, termination charges and standard terms and conditions in respect of access to, and use of, services provided by them to end-users but also on the quality of the provided services.

#### **- Facilitation of the change of Provider**

Additionally, Directive 2009/136 states that all subscribers with numbers from the national telephone numbering plan who so request can retain their number(s) independently of the undertaking providing the service in accordance but also that subscribers who have concluded an agreement to port a number to a new undertaking shall have that number activated within one working day.

#### **- Towards a right to access Internet ?**

A fundamental right to the Internet seems to be created by the second part of the Telecom Package, that is to say, the directive 2009/140, which amends directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services ("**Directive 2009/140**").

Indeed, the new Directive explicitly states that any measure taken by Member States regarding end-users access' to, or use of, services and applications through electronic communications networks must respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law. Even more, any measure likely to restrict such access or use must respect the principle of the presumption of innocence and guarantee the right to an effective and timely judicial review.

#### **2. Improvement of the competition on the telecommunications services market**

Directive 2009/140, which must be implemented by 25 May 2011, contains in particular a series of rules in order to promote an effective competition on the telecommunications markets.

Notably, the Directive states that a NRA may impose, a Provider, as an exceptional measure, to proceed to a separation between its activity of networks provision and of communication services provision and to confide one of these activities to an

independently operating business entity in case of a lack of effective competition in some markets.

Besides, the right to issue recommendations or decisions is granted to the Commission, where this latter finds that divergences in the implementation by the Member States of the regulation regarding telecommunications may create a barrier to the internal market.

The NRAs are also required to promote and ensure an adequate access and interconnection, along with the interoperability of services, in order to promote economic efficiency, to favour sustainable competition, to encourage efficient investment and innovation, and to give the maximum benefit to end-users.

#### **3. The improvement of the regulation of electronic communications**

The new Telecom Package finally aims at improving the European regulation regarding electronic communications.

The European Regulation n°1211/2009 of 25 November 2009, which is the last part of the Telecom Package, creates the Body of European Regulators for electronic communications ("**BEREC**").

Composed by the 27 NRAs and devoid of legal personality, this new body replaces the European Regulators Group created in 29 July 2002 by the European Commission which was in charge of ensuring the development of a consistent application of the regulatory framework in the telecommunications sector. The BEREC will, in particular, provide expertise on the functioning of the telecommunications market throughout the Union, advise and support the NRAs and complete the independent reports issued by these authorities, notably when they have a transnational impact.

In this respect, Directive 2009/140, contains provisions which purpose is to strengthen the independence of the NRAs at a national level. Luxembourg has already presented in 30 March 2010 a draft of law n°6123 in order for the law of 30 May 2005 creating the Luxembourg Institute of Regulation ("**LIR**") to comply with these new provisions. This draft notably states that the LIR should perform its mission independently and that its directors are irremovable for the length of their mandate.

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