

UMTS Forum Response to the
RADIO SPECTRUM POLICY GROUP
Public consultation on
Wireless Access Platforms
for
Electronic Communications Services
(WAPECS)

1. SUMMARY

1.1 On the Concept of WAPECS

The UMTS Forum appreciates the extensive work of the RSPG to review the European spectrum management regime to identify areas where changes or improvements could be made to better accommodate the requirements of today and tomorrow.

While there is some need for improvements in spectrum management policies and rules to allow for more flexibility in some aspects of spectrum use the goal of spectrum harmonization must remain one of highest priority to facilitate European and global markets and to reap the resulting benefits for consumers, society and industry. Examples of improvements cited already in the Request for an RSPG Opinion are the removal of unnecessarily inflexible spectrum allocations or licensing conditions that restrict the possibilities to migrate spectrum bands as services and technologies evolve.

Considering the overall policy goal of developing the EU internal market and European competitiveness and the observations made in the Request for Opinion the UMTS Forum finds the whole issue of WAPECS much too vaguely defined and unclear in the Consultation. The definition of the concept, the criteria for spectrum bands or services to be included, and the goals are unclear.

Although the Forum agrees that some more flexibility is needed, the Forum is not convinced that a WAPECS concept is a helpful tool to achieve this. This Forum response points out some issues that need to be clarified and enhanced before this concept can be taken further.

The WAPECS concept seems to focus entirely on spectrum availability for “new technologies” while disregarding the spectrum needs of existing services and technologies. These are subject to strong evolution based on the incorporation of new innovations that improve both functional capabilities and spectrum efficiency.

1.1.1 – On “platform”

The Forum does not see the word “platform” as clearly delineating a certain subset among the very broad family of all the possible electronic communications systems, which provide wireless access.

The word “**platform**” implies some un-known societal, legal, practical implication of openness. Therefore it seems to introduce policy goals in the definition.

“Platforms” in the definition (although not in the acronym) should be **replaced by the expression “systems”** which is “society/competition neutral”.

1.1.2 – Weaknesses in the proposed WAPECS concept and definition

The commonality factor

In this definition¹, the commonality factor is missing, i.e. a reason for considering these systems together as a whole. From the explanatory text and today’s Information Society evolution, the Forum understands that this commonality factor could be that we currently see various technologies in various bands, previously operating on separate markets, used for the provision of services that are increasingly competing directly with each other. This is mainly because of the content delivered becoming increasingly common across these services (moving pictures, still pictures, music, voice, messaging, videophony...), and to some extent because of converging (or rather combined) modes of conveying these contents (broadcast, multicast, point to point, real time, delayed, streaming...).

The commonality factor i.e. that many systems are competing in similar end-user markets should be added in the WAPECS concept description and to WAPECS definition.

Systems and their regulatory regime

This leads to the idea that these competing systems/services should be regulated in a coherent way, and most of the desired coherence lies in fair and equal competition conditions. But this is a regulatory concept and not a system issue. Therefore what is also missing in the proposed definition **is a distinction between systems and their regulatory regime**.

Therefore, there is the need for an associated concept designating the regulatory regime covering the above systems.

1.2 –Constraint related to competition in the proposed WAPECS-concept

When granting new rights of use, or when there is an exchange of rights between players, NRAs are obliged to ensure that competition is not distorted between services on the corresponding relevant market. Since different systems are more and more entering the same market, relevant markets will have a tendency to get larger and larger, and encompass more legacy systems/services and candidate systems/services.

The scope of each competition investigation by NRAs in each granting of rights, or each exchange of rights, is bound to expand considerably.

¹ “Wireless access platforms for electronic communications services (WAPECS) are the platforms used for radio access to electronic communications services, regardless of the bands in which they operate¹, or the technology they use.”

1.3 – On flexibility

The Forum would like to stress the inherent contradiction between flexibility on the one hand and harmonization and the creation of large competitive markets on the other. Harmonization is one of the key tools in the creation of competitive European and global markets. A very careful balance has to be struck between flexibility and harmonization. The convergence trend increases the size of the relevant markets that need to be analyzed and serves to make such analyses more complex.

There is a need to make old licenses more flexible to allow service and technology evolution. There are however risks associated with uncontrolled flexibility, such as spectrum fragmentation and equipment market fragmentation. To a certain extent flexibility will also lead to lower spectrum efficiency.

In conclusion, flexibility can be applied in some bands but is less suitable in others. Flexibility should be considered on a band-by-band basis.

1.4– On the association of WAPECS and Services of General Economic Interest

The Forum believes that 2G/3G services, or a subset of 2G/3G services, could fulfil some pan-European Information Society SGEIs criteria. The Forum suggests exploring the benefits of a specific category of pan-European Services of General Economic Interest, which cannot be accessed satisfactorily without universal radio access compatibility. .

1.5 – On the legacy issue

The Forum recognises the issue of legacy licenses as being a major one for Member States. The Forum encourages RSPG to design, or recommend the design of, common transition rules in cases where spectrum prices have reached a high financial level for some systems/licenses, whether by auctions or fixed fees.

Such rules could take into account: appropriate amortization rules for existing systems; the extent to which the existing and new systems are likely to compete commercially in the near and medium term; the need for a legal certainty commensurate with investments; the possibility of direct compensation between existing and new undertakings; revision of coverage obligations.

2 – Forum REMARKS ON the WAPECS EXPLANATORY TEXT

In the introductory part

“...demand for certain services (such as mobile and Internet) has grown far beyond earlier predictions, and developments in radio technology have led to far more efficient methods of sharing spectrum amongst a wide range of users. “

It is unclear what developments of radio technologies are meant here? What kind of sharing is referred to? Are mitigation techniques (and which of them) considered as such developments? It is not clear what is the relationship with WAPECS here?

“... Rapid innovation has created a need for speedier access to spectrum for individuals and service providers than is possible under traditional methods.

What are these rapid innovations? The UMTS Forum is not aware of any significant innovations that have not received timely access to spectrum in Europe. New serious services and applications are treated favourably already in the current regulatory regime. In the past services such as DSRR, ERMES, TFTS were provided with spectrum access. Regarding innovations, UMTS Forum would like to point out the degree of innovations made in the development of mobile communications – GSM, EDGE, GPRS, UMTS/IMT-2000 – has been and is an enormous achievement by European industry. It has been facilitated by the clarity, timeliness and stability of European regulations. Lately, the innovations have been focused on IMT-2000 and its evolution. This IMT-2000 standards platform has also sparked the innovative power among smaller European companies in the component, services and applications industries.

“...This points to the need for greater flexibility in the management of spectrum resources for wireless electronic communications, while maintaining harmonisation where necessary...”

Here the meaning of the terms harmonisation and flexibility in the management of spectrum resources for wireless electronic communications are mixed in a confusing way.

Let us use the example of voice telephony and traditional broadcasting. Both of these services can now be provided over the Internet. Internet itself is accessible via several wired and wireless technologies like xDSL, EDGE or UMTS, which partly causes the current regulatory discussions.

Spectrum should be considered as a medium for optimised/effective transport of these services. However, there are different technological methods (referred to as ITU-R Service categories like Mobile, Broadcasting etc.) that use the spectrum in different ways and this has been and should still remain the basis of the management and usage of radio spectrum.

“...Wherever possible, constraints attached to the usage of specific radio spectrum bands must be removed and spectrum management made more relevant to the rapid development of new markets and services. “

It is difficult to see the linkage of this sentence and the previous text. Quite often the regulations that may look like constraints from a new entrant's point of view are very relevant as providing regulatory certainty for industry. However, UMTS Forum supports the smooth removal of unnecessary restrictions that may e.g. limit the possibilities of evolution of existing systems (e.g. EDGE and subsequently IMT-2000 use in 'GSM bands').

3 – RESPONSES QUESTION BY QUESTION

Q.1 Do you agree with this operating definition of WAPECS? Do you consider that the WAPECS concept should include spectrum intended for private, as well as public, applications?

Response to Q1, Part One About the proposed definition

The definition is open to different interpretations. Is WAPECS a concept, a policy or tangible systems?

In this definition², the commonality factor is missing, i.e. a reason for considering these systems together as a whole. From the explanatory text and today's Information Society evolution, the Forum understands that this commonality factor could be that we currently see various technologies in various bands, previously operating on separate markets, used for the provision of services that are increasingly competing directly with each other. This is mainly because of the content delivered becoming increasingly common across these services (moving pictures, still pictures, music, voice, messaging, videophony...), and to some extent because of converging (or rather combined) modes of conveying these contents (broadcast, multicast, point to point, real time, delayed, streaming...).

The commonality factor i.e. that many systems are competing in similar end-user markets should be added in the WAPECS concept description and to WAPECS definition.

The Forum understands that the proposed WAPECS definition to refer to **systems**, a variety of which are already deployed or will be deployed in the future.

This leads to the idea that those competing systems should be regulated in a coherent way, and most of the desired coherence lies in fair and equal competition conditions. But this is a regulatory concept and

² “Wireless access platforms for electronic communications services (WAPECS) are the platforms used for radio access to electronic communications services, regardless of the bands in which they operate², or the technology they use.”



not a set of systems. Therefore what is also missing in the proposed definition is distinguishing systems and their regulatory regime.

The EU electronic communications regulatory framework requests to take into account the objective of undistorted competition as early as the stage of selection criteria for individual rights of use (second sentence of Article 7.3 of Authorisation directive, in conjunction with Article 8.2 and 8.2.b of Framework directive). This means that before organising a selection, NRAs are bound to explore what will be the impact of the process and ensuing operations on competition.

In addition, in the case of transfers of rights of use, Article 9.4 (second sentence) of the Framework directive requests that NRAs "... ensure that competition is not distorted as a result of any such transaction".

Whether there is a selection of licensees by authorities or an exchange of rights between market players the WAPECS regulatory regime would expand the relevant markets to be considered by NRAs until it becomes ideally a "unified" market (or a set of 2 or 3 different ones), covering a very large part, or the majority, of spectrum for commercial uses, significantly contributing to the Information Society/Knowledge Economy. See also Annex 1.

The Forum proposes to split this "ideal" relevant market at least in two: SGEI or non SGEI (Services of General Economic Interest)

Response to Q1, Part Two

on the issue of "private" services (in fact "not open to the public")

The concept of "private services" does not exist in the 2002 regulatory package, nor in the previous telecom packages of 1997 or 1990. The opposite of "public" (publicly available service) being "non public" (non publicly available service) the Forum assumes that Question 1 refers to not publicly available services.

Based on the text of this consultation document, and based on the fact that the Forum proposes in this document to consider a few of the many WAPECS systems as Services of General Economic Interest, the WAPECS concept and the WAPECS regulatory regime seem more applicable to public networks and services.

However, making a service publicly available, or on the contrary making it available only to some customers, is a commercial issue. The 2002 regulatory package allows service providers to freely change their commercial strategy under very few conditions such as no interference, some interconnection constraints, etc. Thus the borderline between public and non public is a changing one, and one not under the control of NRAs. It is not a very pertinent characteristic. Or at least, it is not one to be used as a regulatory criterion.

Since the Forum proposes that in fact NRAs take into account very broad markets when regulating WAPECS spectrum, sometimes NRAs will certainly have to consider:



- systems which are non public but nevertheless impact the business of some public services, and
- systems which first were non public but are becoming public.

In conclusion, although public services delivered through radio interfaces are primarily those in the scope of a WAPECS regulatory regime, at this stage there is no need to decide anything on “public” or “non public”. The real issue up to the NRAs is to consider who competes with whom, and to what extent (see Part1).

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Q.2 Do you consider that the term “platform” should be more closely defined? If so, what definition do you propose?

The Forum recognises that the word “platform” usually characterises a certain “openness” of a system on which others can build their applications or businesses. In electronic communications this concept is close to interoperability, and often designates a material base allowing interoperability, or fair access to a market, etc.

The Forum does not see the word “platform” as clearly delineating a certain subset among the very broad family of all the possible electronic communications systems, which provide wireless access. The word **“platform”** implies some un-known societal, legal, practical implication of openness. Therefore it seems to introduce policy goals in the definition.

“Platforms” in the definition (although not in the acronym) should be **replaced by the expression “systems”** which is “society/competition neutral”.

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Q.3 What, if any, constraints should there be on the provision of services using spectrum primarily in the broadcast domain?

Traditional broadcast constraints were established at a time when a couple of broadcast channels constituted national monopolies on electronic image transmission and carried dangerous potentials such as public opinion manipulation. The Forum does not see any major problem in preserving some of the constraints traditionally applied to genuine national or regional broadcasting, such as those:

- originating in the nature of the broadcasted content, but impacting the holders of right of use (e.g. aiming at freedom of information)
- aiming at cultural plurality or protection of minors

While the exact intention of Question 3 is not clear the Forum however sees potential problems in transferring all traditional broadcast constraints on content to today’s diversified and individualized technical means of conveying audio-visual contents whatever band they use such as TV or VoD on XDSL, TV or VoD on WiFi, moving pictures in mobile networks, etc. This issue belongs to the process of revising the current TVWF Directive (“TV without frontiers” Directive 1989/552).

Broadcasting, or some forms of broadcasting can probably be Services of General Economic Interest (SGEIs) but as proposed by the Forum, 2G/3G systems, or part thereof, can also be SGEIs (see our response to Question 4). Therefore, the European Union needs to decide what are the SGEIs in Community electronic communications and, within the WAPECS Regulatory Regime, possibly reserve them a specific treatment.

Q.4 What specific rules should be introduced or maintained to safeguard the delivery of Services of General Economic Interest in the future? Is it most appropriate to deal with these issues through the regulation of spectrum, or through other instruments such as competition law or state aid policy?

The Forum supports the application of general Competition Law to the largest possible extent in preference to sector specific regulation. Mobile 2G / 3G services however exhibit some characteristics that make them candidate Services of General Economic Interest, services that are of profound importance to the general economic development and cohesion of society.

2G/ 3G services additionally have characteristics such as the need for coordination through standards of radio interfaces to achieve the desired level of interoperability that calls for a high level of harmonization of spectrum.

Furthermore in some geographical areas 2G/3G cannot be provided on commercially viable grounds due to lack of suitable spectrum resources that facilitate long-range coverage. Spectrum regulation could alleviate such difficulties by limiting the allocation of such suitable spectrum to services for which there are alternative transport mechanisms and which today use outdated technologies.

Q.5 How do you think changes in spectrum policy will impact on the requirement for standardisation? What policy will best ensure the timely availability of standards?

Impact of spectrum policy changes on standardisation

First, deploying standardised systems on the field is very different from availability of standards.

Having a standard elaborated and adopted does not ensure that systems conformant to this standard will be ever provided at commercial level, or even developed at R&D level.

Both developing standards and developing real systems absorb a lot of resources. Standards being a collective production they may cost little for each company, but be energy consuming anyway. Developing real systems is by far the heaviest burden.

This being said, both standards and standardised equipment need some legal certainty to emerge, a light one for standards, a heavier one for standardised equipment. The main certainty required is that of the availability of spectrum, followed by the size of this availability for economies of scale. For those systems in which some forms of interoperability are crucial; such as interoperability between each user equipment and several different networks, the needed legal certainty is even stronger. This is very acute for mobile systems for which the user terminals move often and far with their owner.

Where user equipment do not move around with people or cars (e.g. traditional TV sets) or do not see their interoperability impacted by moving around (e.g. personal music players), etc., the need for



interoperability is smaller. Nevertheless, this need has always been experienced, for instance for non portable TV sets, at least within the country of sale.

Therefore, the spectrum policy which will best ensure availability of standards and standard conformant systems is spectrum harmonisation, followed by equipment harmonisation.

Service and technical neutralities

There are two issues, technological neutrality and service neutrality

The Forum recalls that technological neutrality is never totally reached, and that technological neutrality and service neutrality is less and less justified the more systems and services are of great social and societal importance. It is difficult to allocate spectrum to specific Services of General Economic Interest and at the same time promote neutrality.

Furthermore, harmonization is essential for interoperability and roaming but is a mathematical necessity in the air interface.

Q.6 Are there any other challenges that the RSPG should consider?

The Forum recognises the issue of legacy as being the major one for Member States.

The Forum encourages RSPG to design, or recommend to design, common transition rules for the regulatory management of legacy issues and to alleviate the discriminatory treatment that applying the WAPECS Regulatory Regime could create.

Such transition rules should cover all types of services including commercial service, public broadcasting and governmental services. They could consider: financial legacies such as different cost levels for spectrum licenses; differences in coverage obligations; restrictions or obligations on access, customers and interconnection; fixed licensing conditions.

Q.7 What is your view on the long term policy goals mentioned above and more specifically on how to achieve the right balance between “minimising and harmonising constraints” presented under point 9?

Enshrined in European law, revised three years ago, is the objective of actively promoting harmonisation of spectrum use. This was reaffirmed by the RSPG in their opinion on spectrum trading (Opinion 7 on page 5 of RSPG04-54). The views expressed in the WAPECS consultation now under study appear in at least two places to be in conflict with this.

Point 7 on page 10 suggests that “no service should have exclusive use of any band” (although providers may be obliged to provide particular services). The implication is that the market can best allocate spectrum. In reality some services provide benefits which are external to market forces, and therefore it is sometimes more efficient to use non-market mechanisms, i.e. allow the regulator to decide that certain bands should to be used for certain services.

Point 9 on page 11 describes the balance that must be struck but without justification suggests that the best approach may be to take one extreme, the neutrality end rather than the harmonisation end.

In point 9, there is a statement, which is unclear to the Forum:

“The best approach to minimising and harmonising constraints in the use of spectrum may be to adopt a neutral approach to both services and technologies. This would require adherence to defined interference limits.”

The “defined interference limits” assumes that the victim service is known, and to a certain extent even the victim technology is known. But by definition, in a service/technology neutral regime none of them are known. The only solution is to align to a worst case, which nobody wants since it would be very inefficient.

Q.8 Are there any other long term policy goals that the RSPG should consider?

On long term spectrum scarcity

The main European objective in the information society area is supporting the Lisbon agenda and the i2010 initiative. Service and technology neutrality as included in the WAPECS concept will not solve the real long-term need, which is the availability of more spectrum able to support a knowledge economy, i.e. spectrum under 6GHz.

A way to make additional spectrum available for commercial uses should be agreed. Non-commercial uses, which would have to migrate or “concentrate” their spectrum use should be reasonably compensated.

On exports and flexibility

Unless the rest of the world follows the same route, adopting an anything-in-any-band strategy will have very negative effects on the European exports. European industry will not have the proper products in the proper band, and even if they had would have very small economies of scale in their domestic market.

Q.9 Do you think that these steps form an adequate basis for achievement of the European objectives in this area? Are there any other steps that are required?

The consultation document states: *The Radio Spectrum Committee should be asked to prepare a mandate for CEPT asking for a detailed report on the frequency bands initially identified as most suitable for WAPECS, stating where it would be appropriate to remove constraints and where it would not, and what technical coexistence rules would have to be observed.*



A first difficulty is that CEPT and its usual participants, and to a good extent those in RSCOM, are not familiar with competition issues, while the whole WAPECS radio regulatory concept stems from the goal of establishing frequency management rules which do not distort competition while being fair and reasonable to those who operate today under the distorting rules applied to them in the past. The CEPT also often claims it does not deal with competition issues.

A more important difficulty is that the criterion for being “WAPECS eligible” is not really the band, but the commercial purpose of a system. It should be further studied if and how the past parallelism between bands and commercial use can be alleviated [?] for CEPT-harmonised bands.

The Forum holds the view that any further development of the WAPECS concept should be done in a forum open to industry participation / representation.

ANNEX 1

RESPONSE TO QUESTION 1 A PROPOSED RATIONALE UNDERPINNING A WAPECS REGULATORY REGIME

Administrative management

The EU electronic communications regulatory framework requests to take into account the objective of undistorted competition as early as the stage of selection criteria for individual rights of use (second sentence of [Article 7.3](#) of [Authorisation](#) directive, in conjunction with [Article 8.2 and 8.2.b](#) of [Framework](#) directive). This means that before organising a selection, NRAs are bound to explore what will be the impact of the process and ensuing operations on competition.

Exchange of rights

In addition, in the case of transfers of rights of use, [Article 9.4](#) (second sentence) of the [Framework](#) directive requests that NRAs "... ensure that competition is not distorted as a result of any such transaction. "

Undistorted competition automatically raises the issue of deciding what is the related relevant market (NB: relevant market in the general sense of competition rules, not in the specialised sense of looking for Significant Market Power players as in today's regulatory package)

Systems using various technologies and various bands, previously acting on separate markets, find themselves competing more and more clearly with each other, mainly because of the content delivered becoming increasingly common across these services (moving pictures, still pictures, music, voice, messaging, videophony...), and to some extent because of converging (or rather combined) modes of conveying these contents (broadcast, multicast, point to point, real time, delayed, streaming...).

Therefore the markets relevant to the issue of who-is-competing-against-whom are getting larger and larger. Hence, NRAs are bound to expand the scope of their systematic investigations before a selection, or a transfer of rights, and these investigations undoubtedly lead them to explore other bands and other technologies already in operation. Furthermore, in all cases of limitation of the number of licenses, NRAs are bound to regularly *"review the limitation at reasonable intervals or at the reasonable request of affected undertakings"* ([Article 7.1.e of Authorisation Directive](#)).

Therefore, a new kind of relevant market related to each selection process or exchange of rights is created, and their extension goes much beyond the sole market envisaged in the band(s) which is/are undergoing a selective process or an exchange of rights.



Spectrum management authorities will have to consult publicly at national level impacted companies when granting spectrum rights or exchange of rights that could have “a *significant impact on the relevant [WAPECS] market*” ([Art. 6 FWD](#)) and to consult publicly at EU level when this would affect trade between Member States, ([Article 7, FWD](#))

ANNEX 2

RESPONSE TO QUESTION 4

The Forum perceives Services of General Economic Interest (as described in the 2003 Green Paper on Services of General Interest³ or in the consultation document⁴ 2005-2009 Road Map for financing SGEIs) in the electronic communications sector, as a concept related to the limits of sole market forces for some service which has an overall driving effect on the whole economy, and/or is answering a strong societal need, which market forces may not fulfil completely for reasons of positive externalities or intrinsic co-ordination problems (e.g. in ensuring spectrum availability and interoperability).

Regarding the driving effect on economy, we refer to the introduction of the i2010 Communication⁵ which states that *“Information and communication technologies are a powerful driver of growth and employment. A quarter of EU GDP growth and 40% of productivity growth are due to ICT. Differences in economic performances between industrialised countries are largely explained by the level of ICT investment, research, and use, and by the competitiveness of information society and media industries”⁶. ICT services, skills, media and content are a growing part of the economy and society.”*

Not all electronic communications services are SGEIs which cannot be provided satisfactorily by market forces. 2G/3G services are however such services in some respects because they are the basic universal instrument of communications with full mobility, and cannot be deployed spontaneously by sole market forces in all geographic areas for the following reasons pertaining to categories found in the 2005-2009 Road-Map document⁷:

- there is an intrinsic co-ordination problem between market players (e.g. standards, interoperability, effects of scale, innovation, risks, etc.). In the case of 2G/3G, the impossibility to provide the desired service and economic effects without a common air interface and the related weight of investments create the intrinsic coordination problem.

³ COM(2003)270 final of 21.05.2003

⁴ Document “*Less and better targeted state aid: a roadmap for state aid reform 2005 – 2009*” (Paragraph 23, page 7 in the table “State Aid in the context of the Lisbon Strategy), and in Paragraph 25 at http://europa.eu.int/comm/competition/state_aid/others/action_plan/

⁵ Communication COM(2005) 229 of 1.6.2005 from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions “i2010 – A European Information Society for growth and employment”

⁶ The services of the information society and media industries were already described in the 1998 Green Paper on convergence of the telecommunications, media and information technology sectors and the implications for regulation towards an information society approach - COM(97) 623 – and later on, taking into account new developments, in the 2003 Communication on the Future of European Regulatory Audiovisual Policy - COM(2003) 784. These services reflect the convergence now taking place between electronic communications services, information society services and broadcasting services and the emergence of new content services resulting therefrom.

⁷ Document “*Less and better targeted state aid: a roadmap for state aid reform 2005 – 2009*” (Paragraph 23, page 7 in the table “State Aid in the context of the Lisbon Strategy), and in Paragraph 25 at http://europa.eu.int/comm/competition/state_aid/others/action_plan/

- there are also positive externalities because players are unable to reap the full benefits of their actions, which is the case in general of information in the broad sense (from audiovisual productions to internet pages) which is a product difficult to “sell”, which has no intrinsic price. [Tom: I am not convinced of the relevance of this to 2G/3G since it is the immediate mobile access to the info that is sold. There may be some initial difficulties for the providers to price their info products correctly but I would hesitate to say there is a market failure.]
- a further factor hindering the provision of 2G/3G services in some geographical areas is the lack of commercially viable spectrum resources to provide radio coverage.

Market mechanisms work well when the competing parties have comparable externalities. This is not the case when commercial services and SGEI are competing for the same raw material (spectrum.) Benefits from SGEI are in part externalities. For example the benefits derived from an ambulance service or from watching TV are not directly related to the spectrum values or advertising revenues. Therefore the market in this case would be neither fair nor efficient. Competition law is not well placed to address ‘input’ issues. State aid (provision) could be used to fund the acquisition of spectrum for SGEI but this could be expensive for the taxpayer, especially if spectrum has to be acquired from the market (rather than national holdings.)

In the same consultation document (Road map, Paragraph 63) the Commission recalls that audiovisual services are given a specific treatment by the Treaty⁸ and that it will review *its Communication on the application of state aid rules to public service broadcasting*, notably with the development of new digital technologies and internet based services.

The White Paper on SGIs states (Para. 3.2) that “*in certain situations, the achievement of a national public policy objective may need to be co-ordinated with certain Community objectives. At the level of the Treaty, these situations are addressed by Article 86(2), which provides that services of general economic interest are not subject to the application of Treaty rules to the extent that this is necessary to allow them to fulfil their general interest mission. This means that, under the EC Treaty and subject to the conditions set out in Article 86(2), the effective performance of a general interest task prevails, in case of tension, over the application of Treaty rules*”¹⁶. Thus, missions are protected rather than the way they are fulfilled.”

Additionally, there is an extra characteristic linking 3G Services of General Interests as indicated by the Green Paper, Section 3.1.1. which states : *The concept of universal service refers to a set of general interest requirements ensuring that certain services are made available at a specified quality to all consumers and users throughout the territory of a Member State, independently of geographical location, and, in the light of specific national conditions, at an affordable price*²³.

⁸ Extract of Para. 63 : Media, audiovisual services, creative industries and the cultural sector as a whole have a high potential in terms of innovation, competitiveness, growth and job creation... In examining state aid issues in these sectors, the Commission fully takes into account the relevant Treaty provisions (particularly art. 151.4 and 87.3.d) and the annexed to the Treaty of Amsterdam, ... In that respect it (the Commission) will revisit its **Communication on the application of state aid rules to public service broadcasting**. Notably with the development of new digital technologies and of Internet-based services, new issues have arisen regarding the scope of public service broadcasting activities.

The fact that authorities often impose 3G coverage conditions or try to obtain commitments of coverage, is an extra element showing that the absence of 3G services in some areas is detrimental to the general good, and therefore, 2G/3G has the characteristics of a Service of General Interest (an Economic one in this case).

The last element on which the Forum wants to point to is that although all the European reflection on SG(E)Is usually envisages national, regional or local services (and the ensuing issue of possibly funding them legally), 2G/3G services have a definite pan-European nature and dimension.

The Forum notes that this possibility is contained in “A shared responsibility of the Union and its Member States” as stated by the title of Section 2.3 of the 2003 White Paper on SGEI⁹. because this is “...underlying the provision of Article 16 of the EC Treaty that confers responsibility upon the Community and the Member States to ensure, each within their respective powers, that their policies enable operators of services of general economic interest to fulfil their missions” (cf. same Section 2.3).

The Forum is of the opinion that there is room in electronic communications for a pan-European type of SGEI relying mostly or completely on the Union, where (based on the terminology used in the 2005-2009 Road Map for financing SGEIs consultation document¹⁰),:

- (a) the “general economic interest” is the general boosting effect on economy mentioned by the i2010 communication¹¹, which in this case is a Europe-wide boosting effect.
- (b) the “*market failures*” which can prevent this boosting effect are “coordination problems” as defined in the Commission State Aid Road Map document¹² which in the case of 2G/3G are a multifaceted co-ordination on (b1) interoperability, (b2) on the need to use very wide effects of scale to limit the costs, (b3) on the need to protect investments by EU-wide legal certainty strongly attached to spectrum.
- (c) secondarily the market failure could be a type of “*positive externality*” where players are unable to reap the full benefits of their actions, which is the case of information in the broad sense (from audiovisual productions to internet pages) because information is a kind of product difficult to “sell”, which has no real intrinsic price.

⁹ Communication from the Commission to the European Parliament, to the Council, to the European Economic and Social Committee and the European Committee of the Regions, 12.5.2004, COM(2004) 374 final

¹⁰ Document “*Less and better targeted state aid: a roadmap for state aid reform 2005 – 2009*” (Paragraph 23 and page 7 in the table “State Aid in the context of the Lisbon Strategy” and in Paragraph 25). Document to be found at http://europa.eu.int/comm/competition/state_aid/others/action_plan/

¹¹ Communication COM(2005) 229 of 1.6.2005 from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions “i2010 – A European Information Society for growth and employment”

¹² Document “*Less and better targeted state aid: a roadmap for state aid reform 2005 – 2009*” (Paragraph 23, page 7 in the table “State Aid in the context of the Lisbon Strategy” and in Paragraph 25. This document can be found at: http://europa.eu.int/comm/competition/state_aid/others/action_plan/

Additionally some high level non economic general interest (this time placing 2G/3G in SGIs), such as state or public security are also to be considered in the case of 2G/3G because state or public security can benefit from a Europe-wide common interoperable solution.

This implies that EU public authorities are meant to intervene so as to ensure that the above objectives are met.

NB : It should be noted that the objective of interoperability at a pan-European dimension is already prescribed as an objective in the Framework Directive in Article 8.3.b; as “(b) encouraging the establishment and development of trans-European networks and the interoperability of pan-European services, and end-to-end connectivity. Interoperability is of various importance according to services, and there is no reason to impose interoperability in general, but 2G/3G is an appropriate case.

In the case of 3G, this vision is not new. It correspond to a very broad European-wide consensus gradually build up in between 1994 (Green Paper on mobiles and personal communications¹³) and 1997 (Communications on the further development of mobiles and wireless communications¹⁴).

This consensus was confirmed twice afterwards :

- first by the adoption of the UMTS Decision 99/128, which mandated Member States to ensure that 3G systems be deployed pursuant to standards developed or adopted by ETSI.
- second, during the period 2001-2003, in spite of a public announcement that contrary to the letter of the UMTS Decision, all IMT2000 technologies would be admitted, by the unanimous choice made by 3G licensees for systems conformant to standards developed or adopted by ETSI.

The forum recognizes that a similar consensus may exist durably on the side of Digital TV, which makes it another candidate for pan-European Information Society SGEI, for which the objectives cannot be left completely to Member State or even less to individual undertakings.

This being said, remains the need to ensure the gradual evolution of 3G networks according to technological advances.

Thus a separation could be made between innovating but incompatible or incomplete solutions, taken as experimental peripheral 3G solutions, and the core coherent universal 3G which calls for much heavier investments.

Thus the WAPECS Regulatory Regime should take into account the specific case of two services, 3G and DigitalTV, which both call for a coordinated approach . It is something that the Union, not only Member States, should pursue as appropriate.

¹³ COM(94)145 final of 27.04.94

¹⁴ COM(97)217 final of 25.09.97

One last remark on the sense of SGEIs in the consultation document (Para. 7 of Section 3) which can be interpreted as meaning that emergency services are SGEIs. They may not even be (economic) services in the sense of the framework directive (“normally against remuneration”). Nevertheless, emergency services are services of General Interest (SGIs), as in Annex 1 of the White Paper on Services of general Interest). The subset SGEIs within SGIs, is much closer to normal commercial and competitive situations than emergency services are, as one can see in Article 82(2) of the Treaty¹⁵ (and also in Para. 43 of Section 2.3 of the Green Paper on General Interest Services¹⁶).

¹⁵ Article 86 (2) provides: “Undertakings entrusted with the operation of services of general economic interest ... shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community”

¹⁶ 43. The distinction between services of an economic nature and services of a non economic nature is important because they are not subject to the same rules of the Treaty. For instance, provisions such as the principle of non-discrimination and the principle of free movement of persons apply with regard to the access to all kind of services. However, the freedom to provide services, the right of establishment, the competition and State aid rules of the Treaty only apply to economic activities. Also, Article 16 of the Treaty and Article 36 of the Charter of Fundamental Rights refer only to services of general *economic* interest.