Interpretation of the Directive 1999/5/EC

The European Commission and the Member States received many questions on the interpretation of the Directive. This document contains detailed answers on the following questions.

See also the *Frequently Asked Questions (FAQs) concerning Directive 1999/5/EC*.

1. Ambiguity in Annex III to the Directive

2. Application of Article 6.4 to receivers and discussion on the scope of equipment to be notified

3. Clarification of the relation of the R&TTE Directive with the EMC and LVD Directives

4. Interpretation of Article 6.3 for equipment whose use is harmonised

5. Can an equipment identifier be empty?

6. Application of Article 9.5 of the Directive to receive-only equipment

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33. Should a notified body number be on the packaging?

34. A question has arisen, whether manufacturers, using these procedures should in their declarations of conformity claim compliance with the R&TTE Directive or whether they alternatively could declare compliance to the LVD and EMC Directives for electrical safety resp. EMC aspects.

35. Installations, conformity assessment and marking of installations

36. Passive RFID tags at the stage of placing on the market and the R&TTE Directive

37. Jammers

1. Ambiguity in Annex III to the Directive

1. Issue

Annex III to the Directive obliges Manufacturers to include the number of the notified body, which prescribed radio test suites, in the marking of radio equipment. When however the harmonised standard contains such test suites, such is not the responsibility of the notified body.

In the latter case, it is however not possible for the manufacturer to introduce the notified body number in the marking, although the Annex prescribes it.

2. Legal analysis

Article 12.1, 2nd paragraph states that:

"Where the procedures identified in Annex III, IV or V are used, the marking shall be accompanied by the identification number of the notified body referred to in Article 11(1). Radio equipment shall in addition be accompanied by the equipment class identifier where such identifier has been assigned. Any other marking may be affixed to the equipment provided that the visibility and legibility of the EC marking is not thereby reduced".

According Article 11.1, notified bodies are designated by Member States "to carry out the relevant tasks related to the operation of this Directive".

Annex III to the Directive foresees that:

(...) For each type of apparatus, all essential radio test suites must be carried out by the manufacturer or on his behalf. The identification of the test suites that are considered to be essential is the responsibility of a notified body chosen by the manufacturer except where the test suites are defined in the harmonised standards. (...)

The manufacturer or his authorised representative established within the Community or the person responsible for placing the apparatus on the market must declare that these tests have been carried out and that the apparatus complies with the essential requirements and must affix the notified body's identification number during the manufacturing process.

From the previous it follows that, if the essential radio test suites are chosen from a harmonised standard, a notified body does not intervene in the conformity assessment process. In that case there is no notified body which exercises on of the relevant tasks foreseen in Article 10 of the Directive. Therefore the obligation to affix the number of the notified body, even if this obligation is formulated in the Directive, does not apply. The affixing of the notified body number makes him responsible. Such a responsibility he can only exercise, when he played a role in the conformity assessment process.

As discussed in our meeting it would be logical to assume that when using the test suites of a harmonised standard, the manufacturer is not obliged to include a reference to a notified body.

3. **Conclusion**

When a harmonised standard contains the essential radio test suites a manufacturer, which chooses to use them does not need to affix a notified body number on the equipment.

2. Application of Article 6.4 to receivers and discussion on the scope of equipment to be notified

1. Issue

Article 6.4 prescribes that manufacturers have to notify their intention to place certain radio products on the market and subsequently wait 4 weeks before doing so. This is to enable surveillance authorities to be aware of radio equipment, which might cause interference on their territory where they operate in frequency bands, which are not harmonised throughout the Community. Receivers are also radio equipment but as they do not transmit cannot cause interference.

Obliging manufacturers to notify such equipment wouldn't serve a regulatory purpose under this Directive. Such notification would not be instrumental in providing national authorities information on products likely to cause interference. A notification requirement would be introduced for many receiver types, which currently can be placed on the market without any administrative procedure.

A further question to be clarified is the meaning of the term "Frequency bands whose use is not harmonised throughout the Community". This term isn't defined in the Directive or in international agreements. It however determines whether radio equipment needs to be notified.

2. Legal analysis

Article 1.4 of the Directive exempts the types of equipment, enumerated in Annex I. This applies notably to receive only radio equipment intended to be used solely for the reception of sound and TV broadcasting services.

Article 6.4 of the Directive states:

"In the case of radio equipment using frequency bands whose use is not harmonised throughout the Community, the manufacturer or his authorised representative established within the Community or the person responsible for placing the equipment on the market shall notify the national authority responsible in the relevant Member State for spectrum management of the intention to place such equipment on its national market. (...)".

Article 2.c of the Directive provides for the following definition: "'radio equipment' means a product, or relevant component thereof, capable of communication by means of the emission and/or reception of radio waves utilising the spectrum allocated to terrestrial/space radiocommunication".

A literal interpretation of these provisions leads to the conclusion, that the notification obligation foreseen in Article 6.4 applies not just to transmitters but also to those receivers, which are not explicitly excluded from the scope of the Directive.

It is however also true, that all provisions of Community legislation have to be interpreted in the context of the objectives it pursues. One of the objectives of Directive 1999/5/EC is to ensure that radio equipment shall

be so constructed that it effectively uses the spectrum allocated to terrestrial/space radio communication and orbital resources so as to avoid harmful interference (Recital 22, Article 3.2, Article 9.5a). It is clear, that receive-only equipment cannot create harmful interference and one can therefore question, whether the obligation to notify under Article 6.4 applies also to receivers.

Such an analysis is only possible when it is necessary to interpret the text, i.e. when that is not sufficiently clear. Any analysis can however not lead to an interpretation, which directly contradicts the text. The Directive has defined the term "radio equipment". It is therefore not possible to interpret Article 6.4 as only applicable to transmitters.

On the other hand the Directive does not define the term "frequency bands whose use is not harmonised throughout the Community". It therefore is possible and even desirable to look for a common interpretation of this term in the Committee. Such an interpretation could exempt certain classes of receivers from the obligation to notify under Article 6.4.

3. Conclusion

The term "frequency bands whose use is not harmonised throughout the Community" is not defined in the Directive and a common understanding of it is required with the TCAM to arrive at a uniform application. In defining the term it is possible to exempt receivers from the notification obligation. The following definition was agreed by a majority of Member States in TCAM3:

Notification under Article 6.4 of Directive 1999/5/EC is required for equipment covered by the following definition: Radio equipment which uses frequency bands whose use is not harmonised throughout the Community. This is considered to be all radio equipment except those:

- which do not transmit; or
- which can only transmit under the control of a network; or
- which use a frequency band which is allocated to the same radio interface in every Member State in the following way:

  - there is a common frequency allocation; and

  - within this allocation, the allotment and/or assignment of radio frequencies or radio frequency channels follows a common plan or arrangement; and

  - the equipment satisfies common parameters (e.g. frequency, power, duty cycle, bandwidth, etc.).

Notification of radio equipment which uses frequency bands whose use is not harmonised throughout the Community should be made to relevant Member States, i.e. Member States upon whose market it is intended to place the equipment but where the equipment is not complying with the national frequency use.

3. Clarification of the relation of the R&TTE Directive with the EMC and LVD Directives

1. Issue

Questions were raised whether harmonised standards in the field of EMC and electrical safety should be published under the R&TTE Directive or whether they should remain to be mandated and published under the EMC and LVD Directives.

In addition the Directive apparently has the effect of modifying the provisions of the LVD. It seems to align the LVD with the new approach for equipment within its scope by stating that standards for electrical safety only give a presumption of conformity with the Directive once a reference to the standard is published in the Official Journal under this Directive.

As regards the EMC Directive, the R&TTE Directive repeals Article 10.5 for radio equipment within its scope. There are classes of radio equipment, which are covered by the EMC Directive and are NOT covered by the R&TTE Directive (e.g. aeronautical equipment). It seems that Article 10.5 would therefore continue to apply for such classes of equipment and notified bodies would continue to function under the EMC Directive for e.g. aeronautical equipment.

2. Legal analysis

Article 18.1 of the Directive states that:

"Standards under Directive 73/23/EEC or 89/336/EEC whose references have been published in the Official Journal of the European Communities may be used as the basis for a presumption of conformity with the essential requirements referred to in Article 3(1)(a) and Article 3(1)(b)".

Article 20.2 of the Directive indicates that this Directive is not a Directive in the sense of Article 2.2 of Directive 89/336/EEC. This Article however also indicates that the provisions of Directive 89/336/EEC do not apply to equipment within the scope of Directive 1999/5/EC, with a few exceptions.

Article 2.2 of Directive 89/336/EEC states that:

"Insofar as protection requirements specified in this Directive are harmonized, in the case of certain apparatus, by specific Directives, this Directive shall not apply or shall cease to apply with regard to such apparatus or protection requirements upon the entry into force of those specific Directives".

Article 10.5 of Directive 89/336/EEC states that:

"The conformity of apparatus designed for the transmission of radiocommunications, as defined in the International Telecommunication Union Convention, with the provisions of this Directive shall be certified in accordance with the procedure laid down in paragraph 1 once the manufacturer or his authorized representative established within the Community has obtained an EC type-examination certificate concerning

this apparatus issued by one of the notified bodies referred to in paragraph 6 below".

From the above, the following conclusions can be drawn:

Directive 1999/5/EC does not repeal Directive 89/336/EEC, does not modify its regime but however reduces its field of application. In addition it disapplies in a selective manner the application of its provisions to equipment within the scope of 1999/5/EC.

Likewise, Directive 73/23/EEC is neither repealed nor modified by Directive 1999/5/EC. Its scope of application is reduced as regards certain of its provisions for equipment within the scope of Directive 1999/5/EC.

3. **Conclusions**

Harmonised Standards as foreseen by Directive 73/23/EEC and 89/336/EEC continue to be elaborated and published according to the procedures foreseen by those Directives. In particular the provisions of Article 5 of Directive 73/23/EEC, following which "Standards shall be regarded as harmonized once they are drawn up by common Agreement between the bodies notified by the member states in accordance with the procedure laid down in Article 11, and published under national procedures" continue to apply. However, for these standards to give a presumption of conformity to the essential requirements of the Directive of Article 3.1.a of Directive 1999/5/EC, a reference needs to be published in the Official Journal (Article 18.1 of Directive 1999/5/EC).

Where equipment within the scope of Directive 1999/5/EC is not within the scope of Directive 73/23/EEC, harmonised standards published under the latter do not apply. They therefore cannot be used to give a presumption of conformity with the essential requirements of Article 3.1.a of Directive 1999/5/EC. In order for standards to give a presumption they need to be elaborated and published under Directive 1999/5/EC.

For equipment, which is not within the scope of Directive 1999/5/EC but is within the scope of Directive 89/336/EC, the provisions of Article 10.5 continue to apply normally.

4. Interpretation of Article 6.3 for equipment whose use is harmonised

1. Issue

Article 6.3 of the Directive obliges manufacturers to inform users of any geographic limitations of usage of radio equipment, notably where the use of frequency bands is not harmonised. The aim of this provision is to alert the user not to use transmitting radio equipment in areas, where they cannot be used, i.e. where the frequency bands have been allocated to other services. Since receive-only equipment does not transmit, they can be switched on without risk anywhere in the Community even though they might operate in frequency bands, which are not harmonised in the Community.

2. Legal analysis

Article 6.3 foresees that the purchaser is informed on the packaging and the manual information on the geographic areas, where such equipment is allowed to be used. As discussed in section 2 above, one can argue, that the provision aims to avoid that equipment, which could create interference in bands allocated to certain public services is avoided. This reasoning leads to the conclusion that this extra labelling requirements would not apply to receive-only equipment. However, likewise to what has been stated in section 2, the term radio equipment as defined by the Directive includes receive-only equipment, with the exception of receive only radio equipment intended to be used solely for the reception of sound and TV broadcasting services. One could wonder if Article 6.3 has not only as objective to avoid harmful interference but also to inform the user of the circumstances/locations under which the equipment is capable of being used. However, the second sentence of Article 6.3 which defines its application to radio equipment ("…potential restrictions or requirements for authorisations…") refers only to legal constraints imposed for avoiding interference. It does not refer to the geographical availability of radio signals. Thus, being never able to create interference, receive-only radio equipment never has geographical restrictions in the sense of the Directive, and cannot be requested to carry an equipment class identifier.

3. Conclusion

No obligation exists to give information about geographical areas in user manuals for Class I equipment without an alert sign. In particular, Article 6.3 does not apply to radio receive-only equipment.

5. Can an equipment identifier be empty?

1. **Issue**

Ad Hoc Groups B and D arrived at the conclusion, that there should just be 2 types of equipment class identifiers:

- an alert sign, indicating that transmitting radio equipment operates in non-harmonised frequency bands and can cause interference;

- a non-alert sign, indicating that the equipment can be switched on anywhere in the Community;

The group proposed to shape the alert sign like the traffic danger sign and proposed to have an empty sign for the non-alert sign. The question here is whether the latter is possible.

2. **Legal analysis**

Article 4.1 of the Directive states that: "Member States shall notify the interfaces which they have regulated to the Commission insofar as the said interfaces have not been notified under the provisions of Directive 98/34/EC. After consulting the committee in accordance with the procedure set out in Article 15, the Commission shall establish the equivalence between notified interfaces and assign an equipment class identifier, details of which shall be published in the Official Journal of the European Communities". Article 12.1, 2nd para, 2nd sentence of the Directive states that: "Radio equipment shall in addition be accompanied by the equipment class identifier where such identifier has been assigned".

3. **Conclusion**

From the above it follows, that the Commission is not obliged to assign an equipment identifier for all types of equipment. Therefore the Commission could envisage to only foreseeing such an identifier for transmitting equipment, which is likely to cause interference and refrain from assigning an identifier for other types of equipment. This conclusion was used in taking decisions on equipment classes and identifiers.

6. Application of Article 9.5 of the Directive to receive-only equipment

1. Issue

Currently some Member States prohibit or restrict the placing on the market of receive-only equipment able to receive signals in frequency bands used by emergency services or other specific bands. The question is to what extent the free movement of such receivers could be limited through application of Article 9.5.

2. Legal Analysis

Article 9.5 contains safeguards for a Member State to restrict the placing on the market or to require the withdrawal from its market, radio equipment, including types of radio equipment, which has caused or which it reasonably considers will cause harmful interference. This provision is a derogation from the principle of free movement of equipment, which complies with the provisions of the Directive. As is the case for other derogations, it needs to be interpreted in a narrow sense. It cannot be interpreted to apply to receive-only equipment.

3. Conclusion

Article 9.5 cannot be used to bar receive-only equipment from the market.

7. Aspects on which a notified body could give an opinion

1. Issue

The conformity assessment procedure of Annex IV to the Directive was introduced as an additional safeguard to avoid that radio equipment, for which no harmonised standard exists, causes harmful interference. The notified body is charged with giving an opinion on the technical file, which is produced by the manufacturer. Where a manufacturer of transmitting radio equipment does not apply harmonised standards covering the requirements of Articles 3.1 or 3.3 (i.e. the non-radio related essential requirements) it seems that they are automatically subject to the procedures of Annex IV, which may not have been the intention of the legislator.

2. Legal analysis

Article 10.4 to the Directive states: "Where a manufacturer has applied the harmonised standards referred to in Article 5(1), radio equipment not within the scope of paragraph 3 shall be subject to the procedures described in any one of Annex III, IV or V at the choice of the manufacturer". Article 10.5 of the Directive states: "Where a manufacturer has not applied or has only applied in part the harmonised standards referred to in Article 5(1), radio equipment not within the scope of paragraph 3 of this Article shall be subject to the procedures described in either of Annexes IV or V at the choice of the manufacturer". Where a manufacturer cannot or does not apply harmonised standards covering the essential requirements of Article 3.1 or 3.3, such equipment can be submitted to either the procedures of Annex IV or Annex V. The manufacturer can even choose to apply Annex IV when he applies harmonised standards.

3. Conclusion

A notified body could give an opinion on all essential requirements.

8. Possibility for Member States to introduce requirements to enable interception of calls

1. Issue

Articles 3.3.c and d. give the possibility to the Commission to decide that R&TTE apparatus shall be so constructed that:

- it incorporates safeguards for the protection of the personal data and privacy and
- it supports avoidance of fraud.

Such could for instance imply that it is imposed on equipment to enable encryption of data. Some Member States currently actually limit the length of the keys used for data encryption in order to be able to intercept data. Is it possible for Member States to maintain such restrictions?

2. Legal analysis

A Member State could invoke Article 30 EC (ex-Article 36) if Community Directive do not envisage to harmonise the necessary measures to obtain a specific objective, which it aims to protect. A Member State can justify limiting the length of encryption keys on the grounds that police services need to be able to decrypt every communication. Such a specific objective is not covered by article 1999/5/EC as it is not an essential requirement contained in Article 3.

3. Conclusion

Member States could invoke Article 30 in such cases, subject to being able to demonstrate that the measure is necessary and proportional to achieve the objective.

9. Possibility to place products on the market in the Community, which cannot be used in the Community

1. Introduction

The Directive introduces the principle of free movement for radio equipment. Also where equipment cannot be used it can be marketed, provided that the user is duly informed and the essential requirements are properly met (when the equipment is used for its intended purpose).

In the extreme case, one could thus argue, that equipment, which cannot be used in the Community could also freely move, provided that the user is informed.

2. Analysis

There aren't any legal provisions in the Directive preventing an interpretation, which would forbid such products to freely move.

The question is however, whether such equipment could meet the requirements of the Directive, i.e. notably whether they wouldn't cause harmful interference when used for their intended purpose.

This leads to a paradoxal but correct assessment: if the intended use is to not put them into service in the Community, they by default comply with the essential requirements! So even high power radio equipment would comply with the Directive (as long as they remain switched off!).

There are however classes of equipment, which can comply with the Directive, even though they are put into service (i.e. switched on). This notably applies to equipment operating as terminal for modern cellular communication systems, which only transmit under the control of networks and therefore would never transmit in the Community as a controlling network does not exist.

The proper way to deal with harmful interference caused by such equipment is to apply the safeguards already contained in the Directive. It is likely that such products would be placed on the market anyway, regardless of whether such would be allowed (e.g. direct e-mail orders to the US). It therefore is beneficial to subject them to the rules of the Directive, which notably obliges manufacturers to notify their intention to place on the market and obliges them to properly inform the user.

If such equipment is operating under the control of (non-existing) networks, the risk of interference does not exist. The manufacturer could therefore declare that it can be switched on (albeit without any useful purpose of which he would have to inform the user if he does not want to create the impression of willing to deceive him). If such is not the case and such equipment would likely be causing harmful interference, Member States could consider applying Article 9.5 of the Directive.

3. Conclusion

Radio products, which cannot operate anywhere in the Community, can freely move in the Community and manufacturers should abide by its

rules. Where there is a high likelihood of harmful interference Member States can invoke Article 9.5 of the Directive.

10. Transitional provisions

1. What role can and should notified bodies play for products, marked according old regulations?

Article 18.2 of the Directive defines until when equipment, which is approved to national and Community regulations can continue to be placed on the market. The objective of the Article was to allow such equipment to be placed on the market until 2 years after the entry into force of the Directive but not to allow any new approvals under the existing regulations.

This would mean that in the period between 8/4/2000 and 8/4/2001 such equipment could continue to be marked according Directive 98/13/EC, i.e. CE <Notified Body Number> [crossed-hockey sticks] or national regulations.

There seems to be an ambiguity in the legal text as Directive 98/13/EC is repealed and therefore the legal basis seems to disappear for the Notified Bodies of which the number is put on the equipment. It therefore seems that a notified body cannot further be responsible for the product and further is unlikely to be willing to continue to exercise its role under Annexes II and III to 98/13/EC.

2. Can equipment, which is approved and marked according to old national regulations, circulate freely?

The Directive introduces the concept of free movement for goods for technically non-harmonised products, currently covered by national approval regulations. In the period 8/4/2000-8/4/2001 such equipment can continue to be marked under such national approval regulations. The question is raised, whether such equipment could actually freely move.

3. Definition of concept "first placed on the market"

The R&TTE Directive has defined an extremely short transitional period in comparison with other Directives. This implies that before 8/4/2000 it will not be possible to declare compliance with the R&TTE Directive, whereas after 8/4/2001 one has to declare compliance with the R&TTE Directive before placing a product on the market.

4. Legal analysis

Article 18.2 of Directive 1999/5/EC, titled "transitional provisions" states:

"Member States shall not impede the placing on the market and putting into service of apparatus which is in accordance with the provisions in Directive 98/13/EC or rules in force in their territory and was placed on the market for the first time before this Directive entered into force or at the latest two years after this Directive entered into force".

The Directive entered into force on 7 April 1999. It has to be implemented before 7 April 2000 and must be applied as of 8 April 2000.

The first version of the "*Guide relatif à la mise en application des Directives d'harmonisation technique communautaire élaborées sur la base des dispositions de la nouvelle approche et de l'approche globale*"(published in 1994, page 28 and further) states that the transitional period foreseen in such Directives should notably allow that "*aux fabricants qui ont acquis des droits au titre des règlementations préexistantes à la Directive, d'épuiser ces droits » and « d'écouler leurs stocks de produits fabriqués conformément à la réglementation nationale en vigueur avant la date d'entrée en application de la Directive*". It is further stated that "*à la fin de la période transitoire, les Etats membres ont l'obligation de mettre fin aux régimes nationaux qu'ils avaient maintenus en vigueur jusqu'alors*", "*les mesures nationales de transposition de la Directive seront les seules réglementations obligatoires en vigueur pour les produits et les exigences qu'elles couvrent dans tous les Etats membres, à l'exclusion de toute autre*".

The second version of this guide, which currently is under preparation, will state (point 2.4):

"During the transitional period, products conforming to all applicable Directives may be placed on the Community market and put into service in any Member State. Products manufactured in line with national regulations or with non-mandatory technical specifications move freely according to the principles laid down by Article 30 and 36 of the Treaty".

A footnote further precises: "However, where the national regulations to be replaced have transposed existing Community harmonized legislation, all products – whether in accordance with the old or new system – are subject to free movement during the transitional period. For instance, the draft Directives on radio and telecommunications terminal equipment and on noise emissions are intended to replace existing Community Directives".

Further on the draft states that: "During the transitional period Member States make no changes to the system in question, which would modify product requirements or the conformity assessment procedure, or which would otherwise have an effect on acquired rights ...At the end of the transitional period Member states are obliged to terminate the national systems kept in force until then ... products may no longer be manufactured according to type approvals or other certificates issued under the system to be repealed".

The draft finally states that:

"According to the general rule, CE marking indicates that products, which are subject to several Directives providing for its affixing, are presumed to conform to the provisions of all these Directives. However, where one or more of these Directives allow the manufacturer, during a transitional period, to choose which arrangements to apply, the CE marking indicates conformity only to the Directives applied by the manufacturer. Consequently, during a transitional period the CE marking does not

necessarily indicate that the product conforms to all applicable Directives providing for its affixing. Therefore, the documents, notices or instructions required by the Directives and accompanying the product must clearly indicate the Directives applied by the manufacturer ...".

In the context of the New Approach "placing on the market" is defined as: "A product is placed on the Community market when it is made available for the first time. This is considered to take place when a product is transferred from the stage of manufacture with the intention of distribution and/or use on the Community market. Moreover, the concept of placing on the market refers to each individual product, not to a type of product, and whether it was manufactured as an individual unit or in series".

5. Conclusion

The following interpretation therefore needs to be given to the transitional provisions of the Directive:

Before 7/4/2000

Since the provisions of national implementations of Directive 1999/5/EC only apply as of 8 April 2000, the national implementation of Directive 98/13/EC apply to equipment within its scope and the provisions of Articles 28 and 30 EC for other equipment.

Between 8/4/2000 and 7/4/2001

The transitional regime applies and manufacturers can place on the market and put into service equipment:

- Which complies with Directive 1999/5/EC
- Which complies with Directive 98/13/EC (for equipment within its scope)
- Which complies with national regulations (e.g. for radio equipment, which do not fall within the scope of Directive 98/13/EC)

In the first 2 cases, equipment can freely move according to the provisions of the Directives. In the 3rd case Articles 28 and 30 CE apply.

In order to avoid confusion on the meaning of the CE mark for the first 2 cases, the documentation of the equipment should clearly specify, which Directive has been applied (1999/5/EC or 98/13/EC).

In the 3rd case the documentation should mention, that the CE mark indicates that the equipment complies with the EMC (89/336/EC) and LVD (73/23/EC) Directives and not with Directives 98/13/EC or 1999/5/EC.

It is not correct to state that as of 8 April 2000 notified bodies under Directive 98/13/EC would legally not further exist. The repeal of Directive 98/13/EC (Article 20.1) is without prejudice to the provisions on the transitional period (Article 18.2). A precision of the provisions of Directive 98/13/EC, which are maintained during the interim period, should therefore be made.

Article 18.2 mentions the obligation on Member States to allow "the placing on the market and putting into service of apparatus which is in accordance with the provisions in Directive 98/13/EC...". This includes equipment, which is produced before 8 April 2001 but has not been placed on the market by that date. Such is compatible with the objective of the transitional period, i.e. to allow a manufacturer to get rid of his stock. This also includes equipment, which has been produced between 8 April 2000 and 7 April 2001 on the basis of rights obtained by manufacturers before this period. A manufacturer, who obtained from a notified a type examination certificate before 8 April 2000, can use this certificate to produce and market until 7 April 2001 equipment and declare their conformity to type (Annexes II and III). The same applies for a manufacturer who obtained full quality assurance certification according to Annex IV. Notified bodies therefore need to continue their surveillance tasks foreseen in those Annexes during this period.

It is difficult to assume, that the provision (Article 18.2) would cover equipment, which has been produced between 8 April 2000 and 7 April 2001 on the basis of rights obtained by manufacturers under 98/13/EC within this period. Such an interpretation would not be compatible with the aim of the transitional period, which is to have rights progressively disappear. New rights should therefore not be created and only the rules of the new regime should therefore be applied.

This might actually be an academic case as there would be little interest for a manufacturer to obtain certificates, which would cease to have a value after 8 April 2000, when he can use the procedures of the new Directive 1999/5/EC.

As of 8 April 2001

Only Directive 1999/5/EC applies. Equipment, which has been placed on the market before that date can however be put into service, provided that it was ready for use when it was placed on the market.

Article 18.2 does not explicitly mention that as of 8 April 2001 it is not further allowed to place on the market equipment, which conforms to national regulations nor does it specify whether they can freely move. Such is in fact not necessary since as of 8 April 2001 the transitional regime no further applies. The normal regime of the Directive applies and by virtue of art.6.1 equipment it is not further possible to place on the market equipment, which does not comply with the Directive.

11. Interface publication for innovative services, possibility for Member States to position an NTP at the user side of the terminal

1. Introduction

Article 4.2 obliges operators of telecommunication networks to publish their interfaces in advance of offering public services over it. The Directive does apply this obligation to all operators, regardless of market power. There is opposition to such an obligation with certain network operators, who argue that it would hamper the development of innovative services. They claim that innovation would be done outside the Community, where such an obligation does not exist.

It was suggested to exempt certain classes of equipment from this obligation. Another suggestion would be to define the Network Termination Point (NTP) at the user side of the terminal (a definition for the NTP can be found in Directive 97/51/EC).

2. Legal analysis

Article 2.e of Directive 1999/5/EC lays down, that for the purpose of this Directive the following definition of an interface applies:

"(e) 'interface' means

a network termination point, which is a physical connection point at which a user is provided with access to public telecommunications network, and/or

an air interface specifying the radio path between radio equipment and their technical specifications;"

Article 4.2 of Directive 1999/5/EC states that:

"Each Member State shall notify to the Commission the types of interface offered in that State by operators of public telecommunications networks. Member States shall ensure that such operators publish accurate and adequate technical specifications of such interfaces before services provided through those interfaces are made publicly available, and regularly publish any updated specifications. The specifications shall be in sufficient detail to permit the design of telecommunications terminal equipment capable of utilising all services provided through the corresponding interface. The specifications shall include, inter alia, all the information necessary to allow manufacturers to carry out, at their choice, the relevant tests for the essential requirements applicable to the telecommunications terminal equipment. Member States shall ensure that those specifications are made readily available by the operators".

Article 4.2 therefore foresees an obligation for network operators to publish technical specifications of the interfaces before offering services over such interfaces. All interfaces, which are defined by Article 2.e are subject to this obligation. It therefore is not possible to allow the publication of such interfaces after having offered the service to the public.

The Directive does however not specify the delay between the publication of the interface specification and the public offering of the service. Therefore, Member States can envisage variable delays. They can notably lay down short delays for operators offering new services in order not to penalise innovation and competition.

3. Conclusion

It is not possible to allow publication of the interface after the service has been offered for the first time to the public. It further is not possible for the NTP to be positioned outside the telecommunications network.

12. What limitations, posed by the WTO and the Treaty limit Member States in regulating interfaces?

1. Introduction

The Directive, whilst removing many barriers, resulting from diverging national regulations does not harmonise the use of the frequency spectrum. Lack of harmonisation of spectrum in the Community without doubt has the effect of creating quantitative restrictions to trade, which are incompatible with Article 28 of the Treaty. The Member States therefore are obliged to maximise harmonisation of the use of the spectrum. Community Harmonisation of the spectrum is, taking into account the installed base of equipment and long term licenses for use, an issue that can only be addressed progressively and in the longer term. The European Radiocommunications Committee (ERC) is studying ways to progress this issue. The Commission recently issued a Green paper to discuss the role of the Community in this area.

The Directive recognises the lack of harmonisation of spectrum by introducing the notion of "nationally regulated interfaces" (Article 4.1), which must be notified to the Commission, either through the procedures of Directive 98/34/EC or the R&TTE Directive itself.

The US government recently challenged the EU policy on the introduction of 3rd generation mobile systems and notably on the EU intention to prescribe that at least one operator per MS should use a certain technology to ensure pan-European roaming.

This triggered a discussion on what Member States can actually regulate nationally (see attached document from the ERC). The issue was notably raised by the French delegation in TCAM 2 (TCAM 2 (99) 26) in which they seek a position from the Commission and make some proposals.

2. Legal analysis

Recital 32 of Directive 1995/5/EC states that:

"Whereas radio equipment and telecommunications terminal equipment which complies with the relevant essential requirements should be permitted to circulate freely; whereas such equipment should be permitted to be put into service for its intended purpose; whereas the putting into service may be subject to authorisations on the use of the radio spectrum and the provision of the service concerned".

Article 3 of the Directive lists among the essential requirements applicable to radio equipment that equipment shall be so constructed that it effectively uses the spectrum allocated to terrestrial/space radio communication and orbital resources so as to avoid harmful interference.

Article 7.2 foresees that "Member States may restrict the putting into service of radio equipment only for reasons related to the effective and appropriate use of the radio spectrum, avoidance of harmful interference or matters relating to public health".

Where the allocation of Member States of non-harmonised frequency bands leads to barriers to free movement of radio equipment and services, the Community can decide to harmonise the spectrum in order to achieve the single market by introducing measures, which attribute frequencies to services and which lay down technical conditions.

Where Community harmonisation measures on the use of the spectrum have not been adopted, Member States can adopt measures in that domain, whilst respecting the rules of the Treaty EC and notably Articles 28-30 thereof.

Directive 1999/5/EC does not harmonise the use of the radio frequency spectrum and it recognises that Member States can regulate the use of the spectrum. It however also lays down, that national regulations limiting the putting into service of radio equipment can only be based on a limited number of justifications.

This does not exclude that Member States can bar from their markets equipment for reasons, which are not covered by the Directive under Article 30 of the Treaty EC. Article 30 lists a number of general interest reasons that could justify a national measure restricting the free movement of goods (public order, public security, protection of health). The jurisprudence of the Court of Justice allows also other "imperative reasons" provided that the national measure is not discriminatory.

In any case, the measure needs to be proportionate, i.e. necessary to obtain the general interest requirement.

For these reasons, Member States can in principle not impose that a single technology be used in certain frequencies, except when it is possible to demonstrate, that such is the only way in which the general interest requirements, recognised by Community law can be met and notably when the usage of several technologies on the same frequencies would lead to harmful interference.

The WTO rules are comparable. Annex 1A to the Agreement on Technical Barriers to Trade (TBT-GATT 1994), specify lays down in Article 2.2:

"*Les membres feront en sorte que l'élaboration, l'adoption ou l'application des règlements techniques n'aient ni pour objet ni pour effet de créer des obstacles non nécessaires au commerce international. A cette fin, les règlements techniques ne seront pas plus restrictifs pour le commerce qu'il n'est nécessaire pour réaliser un objectif légitime, compte tenu des risques que la non-réalisation entraînerait. Ces objectifs légitimes sont, entre autres, la sécurité nationale, la prévention de pratiques de nature à induire en erreur, la protection de la santé ou de la sécurité des personnes, de la vie ou de la santé des animaux, la préservation des végétaux ou la protection de l'environnement. Pour évaluer ces risques, les éléments pertinents à prendre en considération sont, entre autres, les données scientifiques et techniques disponibles, les techniques de transformation connexes ou les utilisations finales prévues pour les produits*".

Article 2.8 of the agreement adds that:

"*Dans tous les cas où cela sera approprié, les membres définiront les règlements techniques basés sur les prescriptions relatives au produit en fonction des propriétés d'emploi du produit plutôt que de sa conception ou de ses caractéristiques descriptives*".

These provisions impose on the Community and the Member States provisions, comparable to those under Community law, with the difference that it concerns barriers to the import of goods of 3rd countries.

3. **Conclusions**

In principle interface regulations should aim at achieving the objectives of Article 7.2 of the Directive (effective and appropriate use of the radio spectrum, avoidance of harmful interference and matters relating to public health). Only where it can be demonstrated that harmful interference can only be avoided by prescribing a technology such would be justified (under both Community and WTO rules).

13. What notified body number is to be affixed if more than one notified body is involved (Annex IV, or a different notified body is involved for annex III and Annex IV)?

1. Introduction

In principle the manufacturer has to put a notified body number on the equipment for radio equipment (Article 12.1). When he however uses essential test suites from a harmonised standard and uses the Annex III procedure, this is not feasible.

The Directive offers the manufacturer the possibility to approach more than one notified body in the conformity assessment process of a terminal (Annex IV). He could for instance ask one notified body to prescribe the test suites and submit his technical file to 2 notified bodies for opinion (1 giving its opinion on e.g. safety aspects, another one on radio aspects).

The question then arises, which notified body number should then be put on the equipment.

2. Legal analysis

Article 12.1, 2nd paragraph of Directive 1999/5/EC states: "Where the procedures identified in Annex III, IV or V are used, the marking shall be accompanied by the identification number of the notified body referred to in Article 11.1. Radio equipment shall in addition be accompanied by the equipment class identifier where such identifier has been assigned. Any other marking may be affixed to the equipment provided that the visibility and legibility of the EC marking is not thereby reduced" (i.e. of the body, involved in the conformity assessment procedures of Annexes II to V).

Annex IV to the Directive (Technical construction file) states:

"... The manufacturer, his authorised representative established within the Community or the person responsible for placing the apparatus on the market, must present the file to one or more notified bodies, each of the notified bodies must be informed of others who have received the file".

Whenever a notified is involved on the selection of essential test suites or when it examines a technical file, his identification number must be affixed as part of the marking.

3. Conclusion

If more than one body is involved, the identification number of each body must be affixed.

14. Manufacturers, representatives or persons responsible for placing on the market

1. Introduction

The Directive uses several terms relating to the economic actor responsible for a product. As regards the affixing of the mark Article 12.1 seems to be in contradiction with the provisions of the conformity assessment procedures mentioned in Annex II.1 and Annex V.1:

- Article 12.1: manufacturer, representative or person responsible for placing on the market

- Annex II.1: manufacturer or representative (Annex III and IV refer back to Annex II)

- Annex V.1: (FQA) manufacturer

They further pointed out, that in annex III it is stated that the main responsibility is put on the manufacturer. The radio test suites are carried out by him or on his behalf, he chooses the notified body. However it is also stated in Annex III that the person responsible for placing the product on the market may declare that the tests have been carried out and that the apparatus complies with the essential requirements (DoC). Annex III refers however to Annex II in which it is stated that only the manufacturer or his authorised representative can make a DoC.

2. Proposed analysis

Recital 35 of Directive 1999/5/EC states that: "...the manufacturer, his authorised representative or the person responsible for placing the apparatus on the Community market is liable according to the rules of the law of contractual or non-contractual liability in the Member States".

In the 2nd version of the Blue Guide the following statements are made:

- point 3.3. "Importer/Person responsible for placing on the market":

"According to New Approach Directives, the importer (person responsible for placing on the market) must be able to provide the surveillance authority with a copy of the EC declaration of conformity, and make the technical documentation available. This responsibility is placed on the importer (person responsible for placing on the market) only where the manufacturer is not established in the Community, and has no authorized representative in the Community"

- point 7.3. "Affixing of the CE marking":

"A manufacturer, established either inside or outside the Community, is the person ultimately responsible for the conformity of the product with the provisions of the Directive and the affixing of the CE marking. For carrying out these responsibilities the manufacturer may appoint an authorized representative established in the Community. In exceptional cases the person responsible for placing the product on the market is deemed to assume the responsibilities of the manufacturer".

Article 12.1 of Directive 1999/5/EC is a general provision, which lists 3 options, as to the person responsible for placing the product on the market. It is complemented by the specific provisions contained in the Annex to the Directive.

Annex II.1 states that: "The manufacturer or his authorised representative established within the Community must affix the CE marking to each product and draw up a written declaration of conformity". Annex II.3 states that: "Where neither the manufacturer nor his authorised representative is established within the Community, the obligation to keep the technical documentation available is the responsibility of the person who places the product on the Community market". In the latter case the importer has to be able to provide the declaration of conformity of the manufacturer.

Annexes III and IV include these requirements from Annex II.

It follows, that in the case of Annex II.1, the manufacturer established in the Community or in the absence thereof or otherwise applicable, his authorised representative are responsible for the marking. This responsibility falls on the person responsible for placing the product on the market, where neither the manufacturer nor his authorised representative are based in the Community.

Annex III states that: "The manufacturer or his authorised representative established within the Community or the person responsible for placing the apparatus on the market must declare that these tests have been carried out and that the apparatus complies with the essential requirements ...". This has to be read in the light of the provisions of Annex II, which apply in the context of the procedure of Annex III. It therefore follows that the person, who is responsible for the placing on the market can only make the declaration of conformity, where neither the manufacturer nor his authorised representative are based in the Community.

Annex V does not refer to Annex II. Annex V.1 indicates that:

"Full quality assurance is the procedure whereby the manufacturer who satisfies the obligations of point 2 ensures and declares that the products concerned satisfy the requirements of the Directive that apply to them. The manufacturer must affix the marks referred to in Article 12(1) to each product and draw up a written declaration of conformity".

This does not contradict with Article 12.1: Annex V specifically limits to only one of the options of Article 12.1: only the manufacturer can affix the CE mark.

3. **Conclusions**

From the above it is demonstrated that the Directive does not contain contradictions in this respect.

15. Should manufacturers notify radio equipment to Member States where equipment can be used or where it is marketed?

1. Introduction

The Directive uses in Article 6.4 the wording "... to place such equipment on its national market". A possible problem occurs if a manufacturer does not place a product, for which he declares, that it is for use in a Member State, on the market in that Member State.

In such case, the Directive does not seem to oblige him to notify to the spectrum authority of the Member State. They seek an interpretation of the Directive, in which the manufacturer would be obliged to do so.

2. Legal analysis

Recital 31 of Directive 1999/5/EC:

"Whereas manufacturers should notify Member States of their intention to place radio equipment on the market using frequency bands whose use is not harmonised throughout the Community; whereas Member States therefore need to put in place procedures for such notification; whereas such procedures should be proportionate and should not constitute a conformity assessment procedure ...".

Article 6.4 of the Directive:

"In the case of radio equipment using frequency bands whose use is not harmonised throughout the Community, the manufacturer or his authorised representative established within the Community or the person responsible for placing the equipment on the market shall notify the national authority responsible in the relevant Member State for spectrum management of the intention to place such equipment on its national market".

3. Conclusion

From the above it follows that the Directive is clear and that only the spectrum authority of the Member State, where the product is placed on the market needs to be notified.

16. Is the person signing a declaration of conformity personally liable?

1. Introduction

We received a question from industry seeking clarification on the personal liability of the person signing a declaration of conformity vis-à-vis the liability of the organisation on behalf of which he signs the declaration.

If such a person would be personally liable, then a de facto discriminatory situation would develop as such liability is difficult to be enforced on persons, based outside the EU.

2. Analysis

Chapter 3.1.1 of the New Approach guide states that:

"New Approach Directives do not require the manufacturer to be established in the Community. Thus, the responsibilities of a manufacturer established outside the Community are equal to those of a manufacturer established in a Member State.

In addition Recital 35 of Directive 1999/5/EC states that:

"Whereas manufacturers are liable for damage caused by defective apparatus according to the provisions of Council Directive 85/374/EEC; whereas without prejudice to any liability on the part of the manufacturer, any person who imports apparatus into the Community for sale in the course of his business is liable according to that Directive; whereas the manufacturer, his authorised representative or the person responsible for placing the apparatus on the Community market is liable according to the rules of the law of contractual or non-contractual liability in the Member States".

The question of personal liability of the person signing the declaration of conformity needs to be examined in the context of the rules set-up by Directive 85/374/EEC. This Directive establishes the general principal that the producer is liable for damages. Article 7 of said Directive enumerates a limited set of cases where a manufacturer can waive his responsibility. Article 7 a) in particular foresees the case where he hasn't placed the product on the market. Article 8.1 indicates however that the responsibility of the manufacturer is not reduced when the damage is caused jointly by a defect of the product and intervention by a third party.

3. Conclusion

It is highly unlikely that, where national law allows prosecution of the person that wrongly signed the declaration of conformity, only the personal liability of that person is withheld and that the liability of the manufacturer is waived. The liability of the manufacturer, regardless of whether he is based in the Community or not, remains the principle, even though other persons could be co-responsible in certain cases.

17. Do operators, already offering services have to publish their interfaces?

1. Introduction

Article 4.2 of the Directive obliges operators to publish their interfaces so as to enable any manufacturer to construct products accessing services provided through those interfaces:

"2.Each Member State shall notify to the Commission the types of interface offered in that State by operators of public telecommunications networks. Member States shall ensure that such operators publish accurate and adequate technical specifications of such interfaces before services provided through those interfaces are made publicly available, and regularly publish any updated specifications. The specifications shall be in sufficient detail to permit the design of telecommunications terminal equipment capable of utilising all services provided through the corresponding interface. The specifications shall include, inter alia, all the information necessary to allow manufacturers to carry out, at their choice, the relevant tests for the essential requirements applicable to the telecommunications terminal equipment. Member States shall ensure that those specifications are made readily available by the operators".

The provision does not explicitly pronounce itself on the obligation on operators already offering services. Therefore confirmation is required as to whether the Directive also obliges those operators to publish before the Directive becomes operational, i.e. on 8/4/2000.

2. Analysis

According to the jurisprudence of the Court of Justice, new rules in the Community apply also to existing situations existing at the date it has to be applied.

Article 4.2 of Directive 1999/9/EC refers to the "the types of interface offered" in the Member States by telecommunications network operators.

The obligations of Article 4.2 apply to all interfaces, which exist, including those in existence before the Directive was adopted.

Member States have to adopt measures in their transposition, which oblige public network operators to publish the technical specifications of their interfaces. Member States have to implement the provisions of the Directive before 7 April 2000 and are only allowed to apply the provisions of the Directive as of 8 April 2000 (Article 19.1 of the Directive).

From the previous it follows that Member States have to oblige operators to publish their existing interfaces, regardless of whether they predate the adoption of the Directive or were first offered after that date. The obligation to publish can however only be imposed as of 8 April 2000.

3. Conclusion

The objective of the Directive is to unbundle equipment from service supply by creating transparency to manufacturers on the characteristics of

network interfaces. Also for existing network interfaces such transparency is required and therefore it must have been the intention to publish existing interfaces as well. The legal analysis supports such an interpretation.

However: Member States can only oblige operators to publish as of 8 April 2000. Since publication is an essential element of the operation of the Directive, Member States should therefore ensure that those operators, who do not publish such information on a voluntary basis before 8 April 2000, publish on that date.

18. Is there an obligation to disclose radio interfaces in national bands whose use is for equipment not in the R&TTE domain (defence, state security...)?

1. Introduction

Do Member States have to disclose radio interfaces that aren't in use for civil purposes?

2. Analysis

The EC Treaty applies in principle to all products, including those used by the armed forces and the police.

Member States can however invoke the safeguard clause of the EC Treaty (Article 296.1) to waive application of Community law in the case of arms, ammunition and equipment exclusively used for military purposes, as long as such products are in the list established by the Council on 15 April 1958.

Other equipment used by the armed forces or security services is covered by the harmonisation measures, adopted under Article 95 EC, or where those do not exist by the rules on free movement of goods laid down in Articles 28 and 30 EC.

Directive 1999/5/EC has chosen to exclude from its scope equipment exclusively used for activities concerning public security, defence and State security (Article 1.5). As a consequence, the obligation to notify interfaces (Article 4 of the Directive) does not apply to this type of equipment, not any other provision of the Directive.

19. Does Article 12.4 of the Directive oblige manufacturers to include their name as part of the marking?

1. Introduction

Article 12.4 of the Directive lays down that "apparatus shall be identified" notably "by the name of the manufacturer or the person responsible for placing the apparatus on the market".

This provision does not explicitly indicate that the name of the manufacturer should be put on the equipment.

2. Analysis

Annex VII.3 obliges a manufacturer to affix the CE mark on the equipment or to its data plate.

This only applies to the CE mark as the name of the manufacturer is not a part of the marking. The Council Decision of 22 July 1993 (the global approach, 93/465/EEC) only foresees as possible additional elements (Annex I B) to the CE marking the notified body number (item g) and a usage class (item h). Since the name of the manufacturer thus is not foreseen as part of the CE marking, the conclusion should be drawn that the name of the manufacturer shouldn't necessarily be placed on the equipment itself.

One should however also reflect on the aim of the provision of Article 12.4 of the Directive. Since the main aim of the provision is to facilitate market surveillance (in addition to the name of the manufacturer also the type, batch and serial numbers are mentioned) this information should be on the equipment itself as packaging and the user manual are not kept by the buyer.

3. Conclusion

The name of the manufacturer, the type, the batch and/or the serial numbers need to be put on the equipment.

20. Procedure to use for the notification of interface regulations

1. Introduction

The Directive acknowledges that the radio frequency spectrum in the Community is not fully harmonised and therefore Member States have non-harmonised regulations on its use. The Directive does not harmonise those regulations, but requires that they be notified. Article 4.1 states that:

"Member States shall notify the interfaces which they have regulated to the Commission insofar as the said interfaces have not been notified under the provisions of Directive 98/34/EC. After consulting the committee in accordance with the procedure set out in Article 15, the Commission shall establish the equivalence between notified interfaces and assign an equipment class identifier, details of which shall be published in the Official Journal of the European Communities".

It should be clarified whether interface regulations should be notified under Directive 98/34/EC or whether notification would only be required under this Directive.

2. Analysis

Clearly, the Community legislator envisaged that national interface regulations could qualify as technical regulations under Directive 98/34/EC. This explains the wording in Article 4.1 that no notification is required under the R&TTE Directive where there has already been a notification under Directive 98/34/EC. However, whether a national interface regulation is a technical regulation can only be determined on a case-by-case basis. Where it defined technical requirements that products have to meet in order to be used in that Member State, it would qualify as a technical regulation. Such normally is the case.

The question then arises as to which procedure to follow. The Commission Services consider that the procedure in Directive 98/34/EC should be followed, since this requires notification of technical regulations when they are still in draft. This is to be contrasted with Article 4.1 which requires Member States to "notify the interfaces which they have regulated ...". In other words, since the procedure in Directive 98/34/EC applies at an earlier stage, in practice it will apply instead of the notification in Article 4.1 of the R&TTE Directive.

3. Conclusion

Where national interface regulations define technical requirements, which products have to meet in order to be used, their drafts need to be notified under Directive 98/34/EC. Otherwise they need to be notified under Article 4.1 of the R&TTE Directive.

21. Are antennas covered by the Directive?

1. Antennas may be subdivided into "active" and "passive" types. In this categorisation, an "active" antenna is one that, as supplied, includes one or more electronic components interacting with the signal. All other antennas are in principle considered "passive", irrespective of gain or directional properties.

2. Active antennas are relevant components under Article 2(c) of the R&TTE Directive, and thus are subject to the full requirements of the Directive if placed on the market as a single commercial unit for distribution or final use.

3. In principle, passive antennas are not considered as relevant components in their own right under Article 2.c of the R&TTE Directive, and thus generally fall outside the scope of the R&TTE Directive if placed on the market as a single commercial unit for distribution or final use. Passive antennas, if they are marketed in conjunction with a radio product, will be subject to all the requirements of the Directive as part of the overall radio product.

4. Manufacturers who place on the market radio products without an antenna or with an antenna which is intended to allow replacement have a responsibility to provide information on the general types and/or characteristics of antennas that may be used with their equipment in order that the overall radio equipment will remain compliant.

5. Manufacturers of antennas are under an obligation, including through consumer laws, to ensure their products are fit for purpose. Where the relevant ETSI harmonised standards include antenna requirements (for instance antenna radiation pattern for point to point systems) or where the manufacturer of the intended radio equipment has provided information on the types and characteristics of antennas suitable for his radio product, this requires manufacturers to ensure that these requirements are met.

6. Where a radio system is integrated on site – as for microwave point to point and point to multi-point systems – the system integrator is responsible for ensuring compliance of the system with the Directive when the system is brought into service.

7. The above guidance takes into account that in practice there is a low risk of harm to people or of harmful interference resulting from the separate sale of passive antennas, and that it would be in general disproportionate to consider them as relevant components. However, in exceptional cases, TCAM can decide that an a priori passive antenna can nevertheless be treated as "active" when it is possible to identify a reasonable risk that failure to meet the essential requirements of the Directive will result from its use.

8. Such an exceptional case are the antennas supplied separately and intended for use in fixed radio systems within the scope of harmonised

standard ETSI EN 302 217-4-2 V1.1.2. These are "relevant components" in the meaning of Directive 1999/5/EC.

9. ETSI was instructed to refer to TCAM for approval those exceptional cases where ETSI envisage drafting a harmonised standard for such antennae. As a result, the existence of a harmonised standard providing Article 3.2 requirements for a certain type of antennas is a criterion indicating that all the appropriate provisions of the Directive apply, such as the DoC and EC marking. However, national authorities should take into account a proportionate delay after the publication of the above Points 8 and 9 to Item 23 R&TTE interpretations (June 2009).

22. Coverage of blinking antennas by the R&TTE Directive

1. Introduction

During 2000 a trendy gadget was marketed, which starts to blink when used as an antenna for a GSM mobile phone. It typically was sold to the young. It has however been discovered (e.g. by a study done by the market surveillance authority of the Netherlands) that the gadget can affect the radio characteristics of the phone to an extent that it does not further meet the essential requirements of the Directive (Article 3.2).

The device is in itself not a transmitter but a passive device. The question therefore arises, whether the Directive covers it and whether it for instance needs to be CE marked. The question further arises, who is actually responsible for the incompliant GSM phone, fitted with the antenna.

2. Proposed analysis

The Directive defines a radio transmitter as (Article 2.c):

"'radio equipment' means a product, or relevant component thereof, capable of communication by means of the emission and/or reception of radio waves utilising the spectrum allocated to terrestrial/space radiocommunication".

The question posed is whether such equipment, when sold separately, can be considered as "radio equipment" within the meaning of Article 2.c of the Directive. This answer depends on whether the product can only serve as a component of the mobile phone or has a separate function. In answering this question, it is relevant to consider whether the device causes the mobile phone to fail to meet the essential requirements, or whether independently of the mobile phone it causes the interference. In both cases if the former applies, the device should be treated as "a relevant component" of the radio equipment and thereby covered by the Directive.

3. Conclusion

The Directive covers blinking antennas. Manufacturers should specify the intended use of the antenna and ascertain whether the essential requirements of the Directive are met, when the GSM handheld is used with the antenna.

Likewise the manufacturer of the GSM handheld could specify the antennas which he deems are to be used with the handheld and warn against the usage of inappropriate add-ons.

23. Form of the manufacturers' declaration to be put into the users manual

1. Introduction

Article 6.3 of the Directive obliges a manufacturer to insert a declaration of conformity with the essential requirements of the Directive into the manual.

The form, in which the declaration is to be made, hasn't been specified in the Directive. Directive 89/336/EEC on Electromagnetic Compatibility however contains a model. In addition a European Standard EN 45014 exists.

It needs to be analysed, whether the provision allows for the manufacturer to include in the manual a simple, unsigned statement from the manufacturer or whether indeed a copy of the declaration, which is to be held with the technical file needs to be included.

Manufacturers indicate, that copying the original declaration in the manual is unpractical as manuals are developed in parallel with the conformity assessment process and it may not even be known who the actual person is, who will sign the declaration at the time the manual is written. Most likely it would lead to a situation that manufacturers would have to add a separate leaflet to all products, which leads to extra and unnecessary costs.

2. Analysis

The central issue seems to be the wording of Article 6.3, which refers to "the declaration of conformity" and not to "a declaration of conformity". From this it seems to follow that a copy of the declaration, which is held with the technical file needs to be copied into the manual.

As to the form that this declaration should take, the R&TTE Directive is silent, but it would seem (section 5.4 of the blue guide) that the purpose underlying the standard EN45014 was to lay down the general criteria for the declaration of conformity. It therefore serves as useful guidance as to the form that the declaration of conformity should take.

3. Conclusion

Manufacturers indeed need to make available to the user with each product a copy of the declaration of conformity held in the technical file with each product. Member States in the TCAM discussed how this DoC can be made available and elaborated a compromise:

1) The original Declaration of Conformity is to be made available to the user;

2) An informal statement on compliance with the Directive is to be made in the same languages as used in the user manual.

As regards 1) it was agreed to allow a manufacturer to make available the copy by referencing a website address in the user manual. The DoC itself

may be provided on paper or in another form (e.g. CD-ROM). The standard EN54014 has been drawn up with the objective of providing the general criteria for the DoC, and it can also be used as a guidance document in view of the New Approach directives. Where a manufacturer uses it the declaration is considered to be appropriate but he may use another format as long as it is compliant with the Directive and the guidelines.

As regards 2) it was agreed that the following informal statement (given in the 11 languages of the Community is appropriate) is to be put in the user manual:

English	Hereby, [Name of manufacturer], declares that this [type of equipment] is in compliance with the essential requirements and other relevant provisions of Directive 1999/5/EC.
Finnish	[Valmistaja = manufacturer] vakuuttaa täten että [type of equipment =laitteen tyyppimerkintä] tyyppinen laite on Direktiivin 1999/5/EY oleellisten vaatimusten ja sitä koskevien Direktiivin muiden ehtojen mukainen.
Dutch	Hierbij verklaart [Naam van de fabrikant] dat het toestel [type van toestel] in overeenstemming is met de essentiële eisen en de andere relevante bepalingen van Richtlijn 1999/5/EG.
	Bij deze verklaart [Naam van de fabrikant] dat deze [naam /type van het apparaat] voldoet aan de essentiële eisen en aan de overige relevante bepalingen van Richtlijn 1999/5/EC.
French	Par la présente [Nom du fabricant] déclare que l'appareil [type d'appareil] est conforme aux exigences essentielles et aux autres dispositions pertinentes de la Directive 1999/5/CE.
	Par la présente, [nom du constructeur] déclare que ce [type d'équipement] est conforme aux exigences essentielles et aux autres dispositions de la Directive 1999/5/CE qui lui sont applicables.
Swedish	Härmed intygar [företag] att denna [utrustningstyp] står I överensstämmelse med de väsentliga egenskapskrav och övriga relevanta bestämmelser som framgår av Direktiv 1999/5/EG.
Danish	Undertegnede [fabrikantens navn] erklærer herved, at følgende udstyr [udstyrets typebetegnelse] overholder de væsentlige krav og øvrige relevante krav i Direktiv 1999/5/EF.

German	Hiermit erklärt [Name des Herstellers], dass sich dieser/diese/dieses [Gerätetyp] in Übereinstimmung mit den grundlegenden Anforderungen und den anderen relevanten Vorschriften der Richtlinie 1999/5/EG befindet". (BMWi)
	Hiermit erklärt [Name des Herstellers] die Übereinstimmung des Gerätes [Type des Gerätes] mit den grundlegenden Anforderungen und den anderen relevanten Festlegungen der Richtlinie 1999/5/EG. (Wien)
Greek	ΜΕ ΤΗΝ ΠΑΡΟΥΣΑ [Name of manufacturer] ΔΗΛΩΝΕΙ ΟΤΙ [type of equipment] ΣΥΜΜΟΡΦΩΝΕΤΑΙ ΠΡΟΣ ΤΙΣ ΟΥΣΙΩΔΕΙΣ ΑΠΑΙΤΗΣΕΙΣ ΚΑΙ ΤΙΣ ΛΟΙΠΕΣ ΣΧΕΤΙΚΕΣ ΔΙΑΤΑΞΕΙΣ ΤΗΣ ΟΔΗΓΙΑΣ 1999/5/ΕΚ.
Italian	Con la presente (nome del costruttore) dichiara che questo (tipo di apparecchio) è conforme ai requisiti essenziali ed alle altre disposizioni pertinenti stabilite dalla Direttiva 1999/5/CE.
Spanish	Por medio de la presente (nombre del fabricante) declara que el (clase de equipo) cumple con los requisitos esenciales y cualesquiera otras disposiciones aplicables o exigibles de la Directiva 1999/5/CE.
Portuguese	[Nome do fabricante] declara que este [tipo de equipamento] está conforme com os requisitos essenciais e outras disposições da Directiva 1999/5/CE.

24. Obligations of operators to include information relating to essential requirements

1. Introduction

Article 4.2 of the Directive specifies that operators shall publish the technical characteristics of interfaces to their networks, thereby providing sufficient information to manufacturers enabling them to construct products that work and that meet the essential requirements.

Some operators are concerned, that this Article obliges them to specify as part of their interface publication elements, relating to essential requirements beyond their control. They for instance fear, that GSM operators would have to specify the characteristics, which hand-helds would have to meet in order not to exceed electromagnetic exposure levels or the levels, ensuring that other radio services are not interfered with. Such requirements derive from physical and physiological phenomena, rather than from the design of network interfaces.

2. Analysis

The Commission Services consider that given that operators of public telecommunications networks should be able to define the technical characteristics of their interfaces (recital 24), the purpose underlying Article 4.2 is that they do so subject to the condition that they act in a transparent manner. Clearly if there are matters extraneous to the definition of the technical characteristics, then the operators are not in a position to provide that information. However, if a matter plays a role in the design of the network interface/definition of the technical characteristics, then the operator should specify what that role is.

3. Conclusion

Telecommunication operators only need to publish the technical characteristics of their interfaces. There may be requirements, which are beyond the control of the operator, for which he is not in a position to provide them.

25. Requirements that products, which are only sold over the Internet need to meet

1. Introduction

With the globalisation of the R&TTE market, there will be an increase in products, which are sold over the Internet and are delivered by post/express service to the customer.

Some of these products will not even be physically placed on the Community market and only be sold by legal entities outside the Community. Where such products wouldn't meet the requirements of the Directive the surveillance authority would not have recourse to any legal entity based in the Community.

Although theoretically the surveillance authority could approach the end-user/consumer such does not seem to be fair. A consumer buying on the internet cannot know, whether he is buying from a company inside or outside the Community. He therefore shouldn't become liable for damages caused by an incompliant product.

The problem notably poses for radio products. Under the Directive a manufacturer is obliged to inform the user on intended use and limitations of use. He should for instance inform the user that radio equipment could interfere with essential services in certain Member States and therefore shouldn't be used. Such information obligation is relevant in the Community, as the radio frequency spectrum isn't harmonised.

2. Analysis

The provisions of the Directive apply to the product, regardless of whether it is physically placed on the Community market. A manufacturer or other entity selling a product over the Internet to EU consumers is placing that product on the EU market and therefore is bound by all the provisions of the Directive, including compliance with the essential requirements and the provision of information.

The Directive does not cover liability.

3. Conclusion

The Directive applies to such products. The issue of liability is beyond the scope of the Directive.

26. Relation of Article 1.5 of the Directive with Article 30 of the Treaty and obligations of Member States to notify exemptions under Decision 3052/95

1. Issue

Article 1.5 of the Directive exempts equipment from the Directive, which are exclusively used for certain activities.

Some Member States argued that without explicit exemption from the Directive, such products could be CE marked, appear on the market and move unnoticed on their territory.

Two questions arise in this context:

- Is a Member State obliged to identify certain classes of equipment as "exclusively used" from the scope of the Directive, when it is asserted that they are only used for that purpose?
- If a Member State exempts the product from the Directive, should it notify this act under the provisions of Decision 3052/95?

2. Proposed analysis

Member States are free to determine, whether equipment is to be exclusively used for the purposes mentioned in Article 1.5 and therefore are free to exempt them from the Directive and the principle of free movement.

Exemption by a Member State to certain apparatus pursuant to Article 1.5 in itself is not to be notified under Decision 3052/95. The notification requirement under that measure is triggered where a Member State "takes steps to prevent the free movement or placing on the market" of a particular model or type of product within the meaning given by Article 1 of the Decision. This does not necessarily equate with a Member State's decision that Article 1.5 applies. Moreover, Article 3.2 of the Decision provides that the notification requirement does not apply to measures relating solely to the protection of public order.

3. Conclusion

Member States are not obliged to exempt equipment from the Directive. Member States have to notify measures under Decision 3052/95, where the free movement or placing on the market is prevented.

27. Can Member States regulate the technology of network infrastructural equipment and introduce or maintain a type approval system?

1. Introduction

At least one Member State currently has a type approval system for network infrastructure equipment. Should such approval regulations be withdrawn with the introduction of the R&TTE Directive?

2. Analysis

The Directive does not cover network infrastructure equipment and therefore it does not force the withdrawal of type approval regulations on such equipment. Taking into account the fact of deregulation of the sector maintaining such regulations may however be disproportionate and the compatibility of the measures with the Treaty should be studied. Furthermore Directive 97/13/EC on the licensing of telecommunications networks and services does allow network operators and services the freedom of choice of technology and therefore maintaining such approval regulations might be incompatible with that Directive, if such regulations would prescribe the use of certain technologies.

3. Conclusion

Such regulations do not have to be withdrawn, although the Commission Services in the spirit of the Directive, advice their withdrawal.

28. What kinds of aeronautical equipment does the Directive cover?

1. Introduction

The Directive exempts classes of equipment from the Directive, which are covered by other Community measures (Annex I). Amongst those are 2 measures covering aeronautical equipment:

- **Article 2 of Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation provides for the following definition:**

(b) 'product` means a civil aircraft, engine, propeller or appliance;

(c) 'appliance` means any instrument, equipment, mechanism, apparatus or accessory used or intended to be used in operating an aircraft in flight, whether installed in, intended to be installed in, or attached to, a civil aircraft, but not forming part of an airframe, engine or propeller;

(d) 'component` means a material, part or sub-assembly not covered by the definitions in (b) or (c) for use on civil aircraft, engines, propellers or appliances;

- **Article 1 of Council Directive 93/65/EEC of 19 July 1993 on the definition and use of compatible technical specifications for the procurement of air-traffic-management equipment and systems states that:**

This Directive shall apply to the definition and use of compatible technical specifications for the procurement of air-traffic-management equipment and systems, in particular:

- communications systems,
- surveillance systems,
- systems providing automated assistance to air-traffic control, and
- navigation systems.

It needs to be asserted which products are covered by the R&TTE Directive.

2. Analysis

The exclusions are to a certain extent ambiguous. The Directive only excludes ATMS from its scope. Radiocommunication equipment used for other purposes is covered by the Directive. Although not known to cause practical problems this ambiguity needs to be addressed when the Directive is reviewed.

29. Are Radars covered by the Directive?

1. **Issue**

The Directive provides for the following definition of radio equipment within its scope (Article 2.c):

"c.'radio equipment' means a product, or relevant component thereof, capable of communication by means of the emission and/or reception of radio waves utilising the spectrum allocated to terrestrial/space radiocommunication".

The question has arisen, whether Radar falls within this scope. Radar uses reflections of radiowaves they transmit to determine the position of objects in their environment. Radar is used both for short distances (e.g. police radar for cars) and for positioning large objects (e.g. Radars on ships).

In certain usage conditions, they provide essential functions to ensure safety (e.g. installations on inland waterway vessels).

2. **Analysis**

It needs to be determined, whether Radar is capable of communication by means of the emission and/or reception of radio waves utilising the spectrum allocated to terrestrial/space radiocommunication.

The answer to this question depends on the meaning to be given to the words "capable of communication" in the definition given to radio equipment in Article 2(c). If communication is to be considered as meaning transmitting a signal to another person/machine or receiving signals from another person/machine, then radar is not covered, because it transmits signals to itself. If on the other hand, a broader interpretation is taken, so that "communication" is considered as merely the act of transmitting or receiving signals, then radar would be covered. The Commission Services consider that of the two interpretations the broad interpretation is the more convincing. It is noted that recital 7 refers to the "broad scope" of the Directive. Likewise, the objective of ensuring the effective use of the radio spectrum so as to avoid harmful interference (recital 22) would also suggest that radar should be included, since this is an issue also pertinent to the use of radar. Finally, the equipment excluded from the scope of the Directive by Annex 1 includes certain radar equipment falling within the scope of Council Directive 96/98/EC on marine equipment (see Annex 1, heading 1 (life saving equipment) and heading 5 (radio-communication equipment)). In that measure, therefore, radar equipment falls under the heading "radio-communication equipment". Moreover, there would be no need to exclude this equipment if the R&TTE Directive did not otherwise cover it.

3. **Conclusion**

The Directive covers radar. In this context it should however be noted, that coverage of radar by the Directive does not imply, that additional

regulation is ruled out. Article 3.3 of the Directive does not contain specific provisions to ensure functional safety (e.g. resolution of images, so as to avoid collisions or requirements on operation under extreme weather conditions). Therefore since the Directive cannot cover such aspects, additional requirements on equipment intended for use under special circumstances may, where compatible with the provisions of the Treaty be imposed.

30. When do Commission Decisions have to be applied?

1. Issue

Some confusion seems to exist on the date on which Commission Decisions, which will be adopted under the Directive (e.g. under Article 4.1 or 3.3) should be applied. Is it the date of adoption by the Commission, the date of notification to the Member State or the date of publication in the Official Journal?

2. Analysis

Article 254(3) of the Treaty indicates that decisions shall be notified to those to whom they are addressed. The principle for decisions is that they enter into force upon notification to the addressees. If there is a publication in the OJ, it is for other purposes. Only in the case of decisions of the European Parliament and Council (i.e. co-decision acts) is the publication in the OJ established as a condition that affects the entry into force.

It in fact is not necessary to introduce rules on this issue in the implementing text. These are general applicable rules under the Treaty; therefore there should not be the need to have ad hoc provisions: the national Act executing the Treaty being enough.

3. Conclusion

Commission Decisions have to be applied as of the date of notification to the Member State.

31. What is the relation of the R&TTE Directive with Medical Devices Directives?

1. Introduction

We received questions from manufacturers asking to clarify, what aspects of a medical device within the scope of the Directive are covered by the R&TTE Directive and which are covered by the medical devices Directives.

2. Analysis

Articles 1.2a and 1.2.b of the Directive state that:

"Where apparatus as defined in Article 2(a) incorporates, as an integral part, or as an accessory:
a medical device within the meaning of Article 1 of Council Directive 93/42/EEC of 14 June 1993 concerning medical devices(1), or an active implantable medical device within the meaning of Article 1 of Council Directive 90/385/EEC of 20 June 1990 on the approximation of the laws of the Member States relating to active implantable medical devices(2), the apparatus shall be governed by this Directive, without prejudice to the application of Directives 93/42/EEC and 90/385/EEC to medical devices and active implantable medical devices, respectively".

The Directive thus clearly confirms that this Directive applies in addition to the medical devices Directive and the Directive on implantable medical devices.

As regards the requirements of both Directives there is however overlap, as both Directives regulate electrical safety and EMC requirements. Almost by definition the requirements of the 2 medical devices Directives are however more stringent, taking into account the specific circumstances in which they have to be used. Therefore compliance with these Directives implies compliance with the technical requirements of the R&TTE Directives as regards EMC and electrical safety. In order for manufacturers to be able to declare compliance with the R&TTE Directive, without having to go through the Annex IV procedure, it therefore is important that the harmonised standards, covering such requirements under the medical devices Directives are also harmonised standards under the R&TTE Directive.

Such recognition is however not foreseen in Article 18.1 of the Directive as this Article only foresees that standards under the LV and EMC Directives are automatically becoming harmonised standards under the R&TTE Directive.

Therefore harmonised standards under the medical Devices need to be mandated under the R&TTE Directive in order for them to be used to declare compliance with the R&TTE Directive.

3. Conclusion

Both the medical Devices and R&TTE Directive cover LV and EMC requirements of the products within their scope and products therefore

need to undergo the conformity assessment procedures of BOTH Directives for these aspects. In order however to ensure that this system is not too burdensome, it needs to be ensured that the same harmonised standards are recognised under both Directives as giving presumption of conformity with the Directives.

32. Can equipment, which is covered by the Marine Directive (96/98/EC), be installed on non-SOLAS ships or should such equipment in addition be assessed to the R&TTE Directive?

1. Introduction

The question has arisen whether such equipment in addition has to comply with the R&TTE Directive, be marked accordingly and needs to be compliant with its administrative provisions.

2. Analysis

Equipment, which meets the requirements of the maritime Directive, clearly meets the technical requirements of the R&TTE Directive, including those imposed by Decision 2000/638/EC. There are therefore no technical reasons, which should lead to reassessment of such products for installation on other than SOLAS ships.

Products covered by the maritime Directive furthermore can freely move in the Community and be used. The maritime Directive does not lay down any restrictions of use.

In this context it should be noted that it already has been asserted that such equipment can be installed on some types of non-SOLAS vessels so as to meet the safety objectives of these Directives. A logical conclusion would therefore be to assume that there are no barriers for installation on other type of vessels.

One could try and argue that it would be necessary for such equipment to comply with the administrative provisions of the Directive, i.e. notification, marking and user information. However, such equipment does not need to be notified as it operates in harmonised bands and is marked to indicate that it can freely be marketed in the EU (albeit with a steering wheel, which deviates from the CE mark). As regards user information there is no need to indicate geographic restrictions, whereas it may reasonably be assumed that any buyer is aware of its intended purpose.

3. Conclusion

There are no reasons to forbid the usage of equipment covered by the marine Directive (96/98/EC) as being incompatible with the R&TTE Directive.

33. Should a notified body number be on the packaging?

1. Introduction

A question was raised, whether the notified body numbers have to be put on the packaging, in addition to being put on the equipment.

2. Analysis

Annex VII.3 indicates that:

"The CE (conformity) marking must be affixed to the product or to its data plate. Additionally it must be affixed to the packaging, if any, and to the accompanying documents".

Whether or not the numbers of the notified body or bodies (see also issue 13) involved in the conformity assessment process need to be put on the packaging thus depends on the question whether or not these numbers form an integral part of the marking.

Article 10.4 of the Directive states that this is the case as it defines both the notified body number as the equipment class identifier as elements accompanying the CE mark. It further states that other markings MAY be affixed, presuming that these elements HAVE to be affixed:

Apparatus complying with all relevant essential requirements shall bear the EC conformity marking referred to in Annex VII. It shall be affixed under the responsibility of the manufacturer, his authorized representative within the Community or the person responsible for placing the apparatus on the market.

Where the procedures identified in Annex III, IV or V are used, the marking shall be accompanied by the identification number of the notified body referred to in Article 11.1. Radio equipment shall in addition be accompanied by the equipment class identifier where such identifier has been assigned. Any other marking may be affixed to the equipment provided that the visibility and legibility of the EC marking is not thereby reduced.

3. Conclusion

Notified body numbers and the equipment class identifier, being part of the CE marking need to be put on the packaging and in the manual.

During the negotiations on the Directive, provisions were introduced, which allow manufacturers to continue to use some of the conformity assessment procedures of the EMC and LVD Directives.

34. A question has arisen, whether manufacturers, using these procedures should in their declarations of conformity claim compliance with the R&TTE Directive or whether they alternatively could declare compliance to the LVD and EMC Directives for electrical safety resp. EMC aspects.

1. Analysis

It seems that the EMC Directive would require a declaration against that Directive, whereas the LVD does not seem to be specific. It should further be clarified that usage of the EMC or LVD procedures does not deprive the manufacturer from having to comply with the administrative provisions of the Directive (information requirements, marking, notification, DoC in the manual etc.).

The TCAM shared the view of the Commission services, that it is relatively unimportant, whether the original DoC, which is kept by the manufacturer and may be requested by a market surveillance authority, would declare against the R&TTE or the other Directives. Any market surveillance authority is sufficiently aware of the legal situation when he receives for instance a declaration against the EMC Directive as a statement of compliance with the R&TTE Directive.

The situation may be different for the informative statement on compliance with the Directive in the information to be provided to the user (Article 6.3) on which an agreement was reached in TCAM 6.

2. Conclusion

Noting the fact that the conformance to the essential requirements of Article 3.2 and 3.3 can only be declared against the R&TTE Directive it is agreed to:

- Leave it to the manufacturer to declare in the original DoC the conformance of a product to the requirements of Article 3.1.a (electrical safety) and Article 3.1.b (EMC) either against the EMC resp. Low Voltage Directive or the R&TTE Directive.
- Insist on the reference to the R&TTE Directive in the user documentation.

35. Installations, conformity assessment and marking of installations

The Directive does not prescribe how installations shall be treated under the R&TTE Directive and how such installations shall be marked. Therefore the issue has been studied and guidance agreed upon.

Guidance to manufacturer and suppliers concerning installations

Apparatus subject to the R&TTE Directive (i.e. radio equipment and telecommunications terminal equipment) must meet its provisions when placed on the market, properly installed, and brought into service. Apparatus should continue to meet the essential requirements of the R&TTE Directive throughout its useful working life. The person putting an installation into service must assume the responsibilities of the manufacturer and perform appropriate conformity assessment. The R&TTE Directive does however not specify what appropriate conformity assessment procedure for installations is, unless these are sold as a complete product.

"Fixed installation" is understood to mean a particular combination of several types of apparatus and, where applicable, other devices, which are assembled, installed and intended to be used permanently at a pre-defined location.

"Additional apparatus for fixed installations" is understood to mean apparatus which is specifically designed for incorporation into a given fixed installation, and which is otherwise not commercially available.

(a) The concept of placing on the market is considered not to apply to fixed installations or to any extensions or functional amendments thereof. Hence requirements for CE marking or declaration of conformity are also considered not to apply.

(b) The concept of placing on the market is considered not to apply to apparatus meeting the definition of "additional apparatus for fixed installations", provided that the documentation accompanying the apparatus specifies the fixed installation concerned and the precautions to be taken for the incorporation of the apparatus into the installation in order not to compromise the conformity of the installation. Hence requirements for CE marking or declaration of conformity are also considered not to apply.

If non-compliance?

Where there are indications of non-compliance of a fixed installation with the essential requirements, for example where there are complaints about disturbances being generated by the installation, the competent authorities may request evidence of the compliance of the installation, and, when appropriate, initiate an assessment.

The identification of the person or persons responsible for compliance of a fixed installation is a national matter. By default this responsibility would

fall on the user of the installation or such other person as is able to reduce any disturbances that the installation might cause.

Where non-compliance of a fixed installation is identified, the competent authorities may impose appropriate measures to bring the installation in compliance with the essential requirements of the R&TTE Directive.

Where particular apparatus in an installation is found to be non-compliant, the competent authorities may consider that further market surveillance or enforcement action regarding that type of apparatus is justified.

Is testing or measurement equipment covered by the Directive?

The R&TTE Directive covers Radiocommunications equipment. Testing equipment is not intended for Radiocommunications and hence is not covered by the Directive. It furthermore does not fall within the scope of equipment for which the EMC Directive requires a type examination certificate.

Where it is used in a set-up, which has the effect of transmitting radio signals, such use may require a national authorisation from the spectrum regulator.

Of course radio equipment that transmits measurement data is not within this category and is covered by the Directive.

36. Passive RFID tags at the stage of placing on the market and the R&TTE Directive

1. Introduction

RFID tags are small objects that can be read remotely and are to be attached to products. With RFID the theft of these products can be prevented, whereas they further can facilitate the running of sales outlets (e.g. for pricing, inventory, tracing, etc.). When being read these devices emit radio signals and thereby legally are covered by the R&TTE Directive. However, tagged products are not covered by the R&TTE Directive. As a consequence its provisions (DoC and manual) do not apply.

2. Analysis

Effects of tags operating in the LF and MF range cannot be measured as of a meter or so from the reader, tags operating in the UHF or 2.4 GHz ISM band operate at power levels up to 10 µW but normally a factor 100 below it (albeit with a duty cycle that is negligible). While those electromagnetic effects of passive tags are rather benign, passive RFID tags are covered. As a result the manufacturer of the tag must follow the procedures of the Directive (technical file, DoC, user information).

The question arose whether the end user of the tag would be the end user of a tagged product. This question is legally pertinent as it would imply that this user would have to receive a manual and DoC from the manufacturer. TCAM 20 agreed that the user of the tag is in fact the shop owner or otherwise the organisation that uses the tag for security, logistics or other purposes. He and not the buyer of the tagged products thus would have to be informed.

Since tags themselves are products covered by the Directive they are covered by its provisions and hence the manufacturer should draw up a technical file, issue a DoC and inform his client about its intended use. His client, normally a company that would tag products, would thus have to be informed. The tag was formally placed on the market when it was offered (normally as a batch) for sale for being embedded in products. Tags should be CE marked. When too small to be tagged, the obligation of marking and appropriate information can be fulfilled on the packaging. Similarly, the obligation of appropriate instructions for use together with the simplified DoC can remain proportionate since those pieces of information are provided only to those that need them.

Where it comes to RFIDs in passports, the attention is first drawn to the fact, that passports are not products that are placed on the market. They are documents that after production are transferred to authorities without being made publicly available and after that remain at all times the property of the issuing authority. Passports containing a tag therefore do not need to be CE marked, even though they are covered by the Directive, where it comes to putting into service. The tags in such passports could of course be seen as relevant components in the sense of the Directive. Because of their size, there is no need for CE marking on the tag itself

however. The marking and labelling should thus be done through the information provided by the manufacturer of the tag to the authority issuing the passport, who in this case is the end user of the tag.

3. Conclusion

Passive tags transmit when activated by an RFID reader. However, the administrative provisions of the Directive only apply at the stage of its placing on the market, i.e. before it is embedded in a product.

1. **Passive tags destined to be attached to products are relevant components in the sense of the Directive and as such covered by its provisions. Its administrative provisions only apply to when the tag is placed on the market. Its embedding into products happens after this.**
2. **Nevertheless, when possible by size, passive tags need to be CE marked and labelled according to the Directive.**
3. **It suffices for the user information of Article 6.3 to be supplied with a shipment of tags instead of on each tag.**
4. **Products that are tagged are not radio equipment; but contain relevant components.**
5. **Tag Readers are full fledged radio equipment and must meet all the pertinent provisions of the Directive, whether administrative or technical.**
6. **Passports or some official documents containing passive RFID tags do not require to be CE marked when they remain public property.**

37. Jammers

The legality of jamming, including GSM and GPS jamming, has been discussed on several instances in the context of the R&TTE (1999/5/EC) and the EMC Directives (2004/108/EC). These discussions have made clear that Member States neither permit nor wish to permit radio communications to be disrupted by jamming devices operated by members of the public.

It is not possible to construct jammers that comply with R&TTE or the EMC Directives. Such devices cannot therefore be legally placed on the market within the Community for use under these Directives.

Therefore, where such products claim compliance with the R&TTE or the EMC Directive, Member States' market surveillance authorities are under an obligation to take them from the market under the provisions of those Directives and to notify such actions to the Commission.

For reference see also the *Electronic Communication Committee (ECC) recommendation (04/01)* with regard to forbidding the placing on the market and use of GSM jammers in the CEPT member countries.