

# Which services and networks are subject to the Electronic Communications Act?

Guidance



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## Foreword

Growth is rapid within the area of electronic communications and new services are being provided all the time. These new services are primarily IP-based services provided over the Internet, or over other kinds of IP-based communications network. In many cases, it may be difficult to draw up boundaries when assessing whether such a service should be deemed to be an electronic communications service.

The National Post and Telecom Agency (PTS) is the public authority responsible for the area of electronic communications, and in this report it presents its views on how the terms 'electronic communications service' and 'electronic communications network' should be interpreted. PTS has also produced a model to be used as a basis when making real assessments

However, it should also be emphasised that the content of this report should be regarded as guidance, and neither the examples of models nor services included in this report constitute any preliminary ruling or binding position for the Agency.

Marianne Treschow  
Director-General

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## Sammanfattning

Lagen (2003:389) om elektronisk kommunikation (LEK) trädde ikraft den 25 juli 2003. Regleringen i LEK omfattar fler kommunikationstjänster och kommunikationsnät än den tidigare gällande telelagen (1993:597). I LEK anges inte närmare vilka tjänster eller nät som omfattas, utan de generella begreppen elektronisk kommunikationstjänst och elektroniskt kommunikationsnät används.

En elektronisk kommunikationstjänst definieras i LEK som en tjänst som vanligen tillhandahålls mot ersättning och som helt eller huvudsakligen utgörs av överföring av signaler i elektroniska kommunikationsnät. PTS har i rapporten tagit fram en modell för att analysera de olika delarna i definitionen, och fastställt ett antal kriterier som ska vara uppfyllda för att en tjänst ska anses vara en elektronisk kommunikationstjänst.

En kort sammanfattning av kriterierna ger att om

- tjänsten tillhandahålls till en annan (extern) part, på kommersiella grunder och
- tjänsten huvudsakligen utgörs av överföring av signaler och
- tjänsteleverantören har rådighet över överföringen

så är det en elektronisk kommunikationstjänst. Rådighet över överföringen av signaler är en betydelsefull faktor vid bedömningen.

Elektroniska kommunikationsnät definieras i LEK som ett system för överföring och i tillämpliga fall utrustning för koppling eller dirigering samt andra resurser som medger överföring av signaler, via tråd eller radiovågor, på optisk väg eller via andra elektromagnetiska överföringsmedier oberoende av vilken typ av information som överförs.

Ett kommunikationsnät utgörs, enligt PTS, av både fysiska och/eller logiska nät inklusive växlar och annat som utgör en väsentlig förutsättning för nätets förmåga att överföra signaler både inom kommunikationsnätet självt och mellan olika kommunikationsnät. Tyngdpunkten i bedömningen ligger därmed på om systemet eller den ingående delen är en väsentlig förutsättning för just egenskapen att överföra signaler. Rena stödsystem i sig utgör genom detta resonemang inte en del av kommunikationsnätet.

Slutligen gör PTS i sin konsekvensanalys bedömningen att tillämpningen av modellen inte kommer att påverka konsumenter och andra slutanvändare i någon avgörande utsträckning, men kan komma att innebära minskade kostnader för marknaden samt viss effektivisering av PTS verksamhet.

## Abstract

The Electronic Communications Act (2003:389), or LEK, entered into force on 25 July 2003. The provisions contained in LEK encompass more communications services and communications networks than the formerly applicable Telecommunications Act (1993: 597). LEK does not go into detail about the services or networks that are encompassed; instead, the general concepts of 'electronic communications service' and 'electronic communications network' are used.

An electronic communications service is defined in LEK as a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks. In its report, PTS presents a model for analysis of the various components of the definition and establishes a number of criteria which must be fulfilled for a service to be considered an electronic communications service.

Very briefly, a summary of these criteria means that if:

- the service is provided to another (external) party, on commercial grounds, and
- the service consists mainly in the conveyance of signals, and
- the service provider has the power to control the transmission,

then it is an electronic communications service. The power to control the conveyance of signals is an important factor when making an assessment.

'Electronic communications networks' are defined in LEK as transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire or radio waves, by optical or by other electromagnetic means, irrespective of the type of information conveyed.

According to PTS, a communications network consists of both physical and/or logical networks, including switches and other parts that are crucial to the capacity of the networks to convey signals both within the communications network itself as well as between different communications networks. Consequently, the main emphasis of the assessment is on whether the system or the component part is an essential prerequisite for this capacity to convey signals. In themselves, true support systems – through this line of reasoning – are not a part of the communications network.

Finally, in its impact analysis, PTS makes the concluding assessment that application of this model will not affect consumers or other end users to any

appreciable extent, but it may lead to reduction of costs for the market and also improve the efficiency of PTS's own operations.

# 1 Introduction

## Introduction

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- There is a need to produce guidance that can be used as a point of departure when assessing whether a service or network is covered by the system of rules contained in the Electronic Communications Act (LEK).
- The aim of this report is to provide outsiders with an insight into the Agency's points of departure when assessing whether a service or network should be deemed to constitute a publicly available electronic communications service or a public communications network.

## 1.1 It is necessary to clarify how the terms 'electronic communications service' and 'electronic communications network' should be interpreted

The Electronic Communications Act (2003:389 – LEK) entered into force on 25 July 2003. The rules contained in LEK include more communications services and communications network than the previous Telecommunications Act (1993:597).<sup>1</sup> In this respect, LEK is technology-neutral and does not specify in detail the services or networks covered. Instead, the general terms 'electronic communications service' and 'electronic communications network' are used.

So far, PTS has not produced any general position on how the Agency considers that these terms should be interpreted. However, the Agency has dealt with the subject in previous decisions and reports; for example, in a policy that was published concerning IP-based telephony.<sup>2</sup> In this policy, the Agency adopted a position on which IP-based telephony services are subject to a notification obligation under LEK.

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<sup>1</sup> Further details regarding the differences between LEK and the Telecommunications Act can be found in PTS's report entitled 'The Internet and Electronic Communications Act', PTS-ER-2003:36

<sup>2</sup> PTS Policy concerning IP-based telephony vis-à-vis a number of concrete substantive issues, PTS-ER-2006:39

Considering the convergence of technological developments and the impending new functions for PTS, it would be good to have a clear point of departure (model) when assessing which services and networks are covered by the system of rules. This is particularly important as regards obligations that are general and which relate to all providers of a particular service or network. One example of such an obligation is the proposed Storage of Traffic Data Act.<sup>3</sup>

PTS has identified a need to produce guidance on its own initiative that can be used as a point of departure when assessing whether a service or network is covered by the system of rules contained in LEK.

## **1.2 The aim of this report is to provide guidance when assessing whether services and networks are covered by LEK**

The aim of this report is to provide outsiders with guidance as regards the Agency's points of departure when assessing whether a service or network should be deemed to constitute a publicly available electronic communications service or a public communications network.

There appeared to be a greater need to clarify the meaning of the term 'electronic communications service' than to provide guidance regarding the meaning of the term 'electronic communications network'. For this reason, when working on this report PTS has focussed predominantly on producing a model to assess whether a service should be deemed to constitute a publicly available electronic communications service. The aim of the model is to provide guidance for outsiders and also constitutes a uniform model on which the Agency can base its assessment of whether a service should be deemed to constitute a publicly available electronic communications service.

The aim of this report is not to constitute a list of the services and networks that PTS considers to be covered (or not covered) by the rules contained in LEK. Consequently, only a few services are referred to in this report to help facilitate the interpretation of the text in those parts of the report.

## **1.3 The method used when producing the model**

In order to produce the model, the legal preconditions laid down in LEK have been examined, and an international review has been conducted to investigate whether other EU Member States already have corresponding models or opinions concerning the terms in question.

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<sup>3</sup> *Lagring av trafikuppgifter för brottsbekämpning* [Storage of traffic data to combat crime], Official Government Report – SOU 2007:76

The various parts of the definition of 'electronic communications service' and 'electronic communications network' contained in LEK have been the point of departure for our work in producing the different criteria in the model. Finally, an impact analysis has been conducted regarding the effects that the model is considered to have on the market, consumers and PTS.

#### **1.4 Views from the market**

During the period 30 October 2008 to 1 December 2008, this report was circulated for consultation with operators/service providers, public authorities and other organisations. Appendix 3 contains a schedule of the consultation instances. The 21 consultation instances that provided responses have agreed on the assessment model produced by PTS, but some have asked for various sections to be clarified (for example, relating to dark fibre). Otherwise, the views presented primarily involved a wish for the report to include more substantive examples of the services that the legislation covers, or conversely does not cover.

PTS has taken these views into account and has made clarifications where the Agency has considered that it would be valuable to do so. However, PTS has chosen not to include any further examples of services in the report, as had been sought. There is a risk that a list containing a large number of services may be perceived as comprising an exhaustive list, which is not the aim of this report. The aim of this report is stated in Section 1.2.

#### **1.5 Description of the terms used in this report**

Terms are explained as they appear in the report. This section provides an explanation of a few key terms.

In this report, an *Internet service* means the basic service offered by an Internet service provider, which includes the assignment of IP addresses and the transmission of IP packets. A subscriber gains access to different services on the Internet via such a service; for example, surfing to different web pages, exchanging e-mail messages, etc.

In this report, an *Internet service provider* means the party providing private individuals or organisations with access to the Internet. Besides providing Internet services, the provider may also provide, for instance, web hotels, e-mail, IPTV and IP-based telephony.

## **1.6 Structure of the report**

Chapter two describes the overall aim of the report, the legal preconditions contained in LEK as well as the content of the international review.

Chapter three describes how the model for electronic communications services is structured and the criteria that PTS considers should be met if a service is to be deemed to be an electronic communications service, and whether it should be deemed to be publicly available. Each section of the respective criterion commences with a box summarising the criterion.

Chapter four describes the points of departure for PTS's assessment of whether a network is an electronic communications network.

Chapter five describes the criterion that PTS considers should form the basis for assessing who provides an electronic communications service.

Chapter six describes the impact of the model on the market, consumers and PTS.

Appendix 1 reports on the legislation in the area

Appendix 2 provides a summary of the responses from the international review.

## 2 Points of departure for the model

### Points of departure for the model

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- The legislation covers all services that facilitate electronic communications. However, this does not mean that the regulation covers all forms of service through which communication takes place.
- An electronic communications service is defined in LEK as a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks.
- An electronic communications network is defined in LEK as transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire or radio waves, by optical or by other electromagnetic means, irrespective of the type of information conveyed.
- None of the countries that responded to PTS's enquiry have produced any general models for assessing services and networks.

The model described in a later chapter is based on LEK and the *travaux préparatoires* to the Act. Regard has also been taken to the assessments that other countries have made in specific cases to conclude whether various services and networks constitute electronic communications services or electronic communications networks.

### 2.1 Overall aim of the regulation

Sweden has implemented the EU Directives relating to the electronic communications market into Swedish legislation through LEK. The primary aim of the EU Directives is to create the preconditions for competition, which is achieved by creating a common market with harmonised legislation in all Member States. This requires a common regulatory framework for the market sector providing the potential to communicate by conveying signals and the communications networks over which signals are conveyed. There was no intention to create uniform legislation for all kinds of communication.

LEK covers electronic communications networks and communications services with associated facilities and services together with other radio use. It

is explicitly stated in LEK that the Act does not apply to content transmitted using electronic communications networks with the aid of electronic communications services. LEK aims to ensure that private individuals, legal entities and public authorities in Sweden shall have access to secure and efficient electronic communications and the greatest possible benefit regarding the range of electronic communications services and their price and quality. It should be possible to achieve this aim by, for example, enabling competition and international harmonisation.

One aim of the legislation is thus to facilitate competition. Harmonised legislation within the European Union is required in order to make this possible. This legislation covers all services that facilitate electronic communications. However, this does not mean that all forms of service through which communications take place are subject to the regulation. Examples of the latter kind of service are certain types of Internet chat service.

In the view of PTS, it is important to bear this aim in mind when assessing which services and networks are covered by LEK.

## **2.2 Electronic communications service – a service which consists wholly or mainly in the conveyance of signals**

An electronic communications service is defined in LEK as a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks.

The criterion that the service consists wholly or mainly in the conveyance of signals on electronic communications networks intends to distinguish the service from pure content services. LEK does not cover the provision of content transmitted using electronic communications networks with the aid of electronic communications services.

Appendix 1 contains a more comprehensive description of the legal preconditions for assessing what constitutes an electronic communication service.

## **2.3 Electronic communications network – a system for the conveyance of signals**

An electronic communications network is defined in LEK as a transmission system and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire or radio waves, by

optical or by other electromagnetic means, irrespective of the type of information conveyed.

Besides all kinds of telecommunications network according to the definition contained in the previously applicable Telecommunications Act, the term 'electronic communications network' also covers networks for radio and television broadcasting.

Appendix 1 contains a more comprehensive description of the legal preconditions for assessing what constitutes an electronic communication network.

#### **2.4 This report does not deal with the term 'associated services'**

As mentioned in Section 2.1, *associated services* also fall within the scope of the Act under Chapter 1, Section 4 of LEK. It is consequently possible that various kinds of service that are not deemed to constitute electronic communications services could possibly be regarded as an associated service. As these associated services are neither defined in LEK nor linked to the obligations or rights contained in the legislation to any great extent, there is no reason to consider the meaning of the term in more detail. 'Associated services' are therefore not dealt with further in this report

#### **2.5 The international review shows that none of the countries has produced a model and that control over the conveyance of signals is important**

A study has been conducted regarding how other Member States within the European Union view the terms 'electronic communications service' and 'electronic communications network'. The aim of the study has been to gain an insight into how these terms are dealt with internationally.

The study shows that none of the countries have produced any general models to assess services and networks. However, the responses do include a number of discussions about how countries have arrived at the position adopted for specific kinds of service; for example, VoIP, WLAN, e-mail (see the summary in Table 1 below). However, there are variations in how different countries have assessed different services. For example, one country considers that e-mail should be regarded as content and consequently not as an electronic communications service. Other countries hold the opposite view.

All of the countries have assessed IP-based telephony in the same way. The reason why this view is so unanimous is probably due to the fact the ERG<sup>4</sup> has raised the issue and has dealt with it in various documents (for example, in the document<sup>5</sup> concerning a common position on VoIP). According to ERG's position, a software-based service, where communication occurs directly between the computers of end users (pure 'peer-to-peer' - P2P communication), is not an electronic communications service. This is because the service provider itself does not have any influence (or control) over the transmission of the communication. The service provider has only provided the software and an opportunity for the user to find other users. The users must themselves ensure that they have a communications service (for example, an Internet service) that facilitates the use of the service.

Table 1 below summarises the positions adopted by different countries regarding specific kinds of service. The responses contained in the table are based on what can be discerned from the responses that PTS received from the different countries, and sometimes constitutes an interpretation of the responses. Appendix 2 provides a more complete report of the international study.

Specific kinds of service	Only e-mail	E-mail from an ISP	Peer-peer VoIP	VoIP with access to telephone number	Internet in cafes and hotels
Country					
Finland	Yes	Yes	No	Yes	No
Denmark	No	No	No	Yes	Yes (if large)
Latvia	No	No	No	Yes	No
Norway	Unknown	Unknown	Unclear	Yes	Unclear
The Netherlands	Yes	Yes	No	Yes	No
Germany	Yes	Yes	No	Yes	Yes
Spain	Yes	Yes	No	Yes	No
UK	Yes	Yes	No	Yes	Unknown

<sup>4</sup> European Regulators Group

<sup>5</sup> ERG common position on VoIP, ERG(07)56rev2

### 3 Model to assess what constitutes an electronic communications service

#### Model to assess what constitutes an electronic communications service

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- A service is regarded as an electronic communications service if the service is provided to another (external) party on a commercial basis and if the service consists mainly in the conveyance of signals, where the service provider has control over the transmission.
- The power to control the conveyance of signals is an important factor when making an assessment.
- The fact that the service provider provides identities (for example, IP addresses) is another important factor when making an assessment.
- An electronic communications service is publicly available if it is provided openly on the market.

The aim of model contained in this report is to provide outsiders with guidance as regards the points of departure when the Agency assesses whether a service should be deemed to constitute an electronic communications service and whether it is publicly available. A further aim is that the Agency should have a uniform model on which to base these assessments. The point of departure for the model is the definition of the term *electronic communications service* contained in LEK.

Assessments and conclusions are reported in this chapter. A more detailed description of the legal preconditions for this assessment can be found in Appendix 1.

In particular, it should be emphasised that the model represents guidance on how to make an assessment. Ultimately, an overall assessment must always be made of the circumstances of each individual case.

### **3.1 Assessment of whether a service is an electronic communications service**

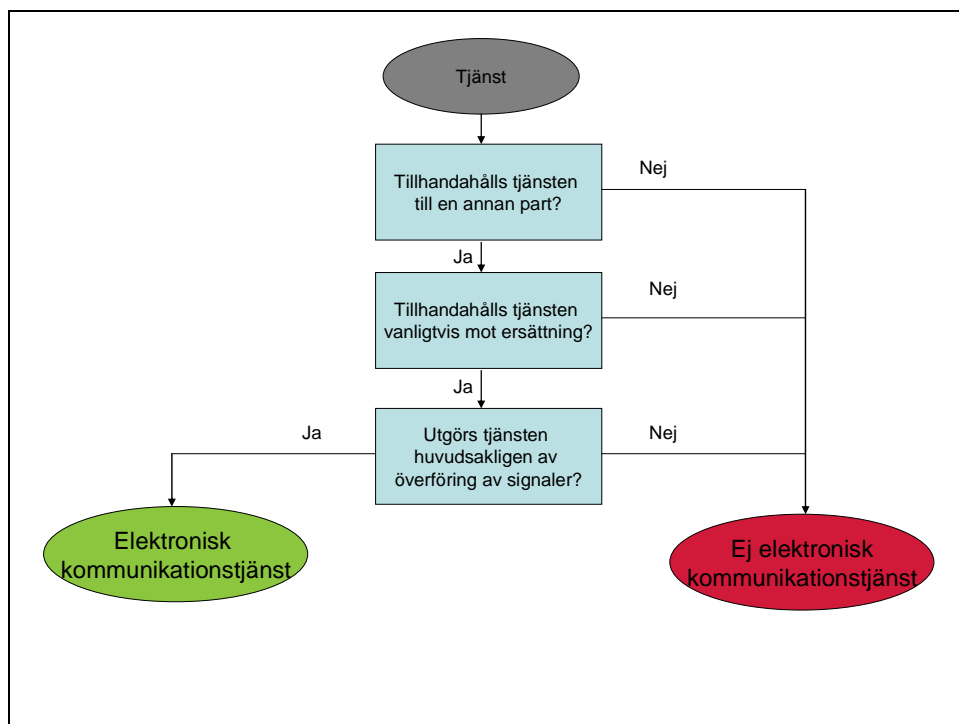
As mentioned above, the point of departure for the assignment is the legal definition of the term 'electronic communications service'.

*electronic communications service:* a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks.

PTS has identified the various components of the definition and has analysed them one by one. The analysis mainly focuses on the factors that may indicate which IP-based services are considered to be covered by LEK. The reason behind this being the main focus is that most new services that are developed are IP-based. In addition, it is often difficult to draw up boundaries when assessing whether such services should be considered to be electronic communications services. Specific criteria have been produced on the basis of this analysis. Even though the description contained in the various sections below to a large extent relates to services provided over the Internet, the point of departure is that the criteria should also apply to services in other IP-based communications networks, such as, for instance, NGN and 3G, as well as to services in communications networks that are not IP-based.

This analysis is explained in the respective section (3.1.1 to 3.1.3) and the criterion are specified in a separate box introducing the respective section. If a service is to be deemed to comprise an electronic communications service, all of the criteria identified in Section 3.1.1 to 3.1.3 must be satisfied. A number of factors that may be considered to indicate whether or not a particular service has satisfied the criterion have been set down for each criterion. Figure 1 provides an illustration of how it is intended to apply the criteria contained in the model.

**Figure 1 Model to assess whether a service constitutes an electronic communications service**



[Text for figure above:

	Service	
	Is the service provided to another party?	No
	Yes	
	Is the service normally provided for remuneration?	No
	Yes	
Yes	Does the service consist mainly in the conveyance of signals?	No

Electronic communications service Not an electronic communications service]

### 3.1.1 Is the service provided to another party?

If a party supplies some kind of benefit to at least one other (external) party, this constitutes a service that is provided.

The term 'service' implies that it involves the supply of some kind of benefit that is carried out by one party for another. If the supply in this context is to

be viewed as a service, the two parties must belong to different organisations. Services that are provided, for example, within one undertaking or a group are not covered.

At least two parties must be involved, where one party is the party providing the service (retailer or wholesaler) and the other party (end user, retailer or wholesaler) is the party gaining access to the service.

### **3.1.2 Is the service normally provided for remuneration?**

If the service is provided on some form of commercial basis, then it is a service that is normally provided for remuneration.

Only services provided on a commercial basis are subject to the legislation.

The phrase 'normally provided for remuneration' is intended to be interpreted as covering remuneration models other than direct payments, for example, in settlement of or in exchange for other services.<sup>6</sup> The service should thus be provided on a commercial basis. The fact that a service is provided on a commercial basis does not have to mean that use of the service must be paid for directly, but may also comprise for instance financing through advertising or some other means of indirect payment.

### **3.1.3 Services that are clearly non-profit making in nature fall outside this legislation. The example provided in the *travaux préparatoires* to LEK is the provision of 'research networks' within the academic world**

### **3.1.4 Does the service mainly comprise the conveyance of signals?**

The service shall be deemed to be a service that comprises the conveyance of signals if the service provider providing the service has control (through ownership or agreement) over the signal (the bearer of the information), and thereby has influence over factors such as, for instance, transmission and quality.

If the service has been designed so that it comprises several sub-services where one of the sub-services includes the conveyance of signals, which is a prerequisite for being able to offer the other sub-services, the entire service (that is, including all sub-services) shall be characterised as mainly comprising the conveyance of signals.

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<sup>6</sup> Government Bill 2002/03:110, page 122

Initially, it can be observed that a 'signal' means the bearer of the information, where the information may be, for instance, speech, music or video. The word 'signal' may of course mean different things depending on the context. In relation to electronic communications services, it is reasonable to consider that the signal is made up of radio waves, light waves, electronic impulses, etc., that convey the information between the transmitter and receiver. **Delimitation of such services that involve the conveyance of signals**

It may be difficult to make a clear delimitation between, on the one hand, a pure content service or a service that involves communication and, on the other hand, a communications service regulated by LEK. There are currently a large number of services and/or communities<sup>7</sup> that provide various kinds of 'instant messaging', e-mail, speech service and other services. Most of these services may involve communication through two or more people being able to exchange information with one another. However, this is not synonymous with all such services being deemed to be subject to the legislation.

In the opinion of PTS, it follows from the legislation (see Section 2.1) that only those services that *facilitate* communication (that is, convey signals) shall be deemed to constitute electronic communications services and fall within the scope of the Act. For this reason, not all forms of more refined service (such as Internet chat services) that involve people communicating with each other are to be deemed to be electronic communications services and are consequently subject to the regulations contained in LEK.

It is not possible to find any more precise guidance on the interpretation of the phrase 'conveyance of signals' in the *travaux préparatoires* to LEK. The only example specifically stated is that the 'Internet service providers' subject to the legislation are those that control a network through which they convey signals.<sup>8</sup> The *travaux préparatoires* consequently suggest that there is a delimitation in relation to stakeholders that provide services and that have some form of association with the communications network where the signals are conveyed. The only example provided for services that are not subject to regulation are web hotels and portals; that is, pure storage services or content services.

**The control over the communication service is key to assessing the meaning of the phrase 'conveyance of signals'**

As mentioned above, the *travaux préparatoires* to LEK suggest that control over the conveyance of signals constitutes an important factor. It may also be noted

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<sup>7</sup> A meeting place on the Internet

<sup>8</sup> Government Bill 2002/03:110, p.122. The term 'Internet service provider' is derived from the *travaux préparatoires* to LEK. In other parts of the report, the term 'Internet service provider' is used for service providers that fall within the ambit of the description contained in Section 1.4

that a common denominator in the responses to PTS's questions that were provided by the other Member States was that all of the countries considered that a provider of an electronic communications services (see Section 2.5) did not include communication services where the stakeholder providing the service did not have any influence or control over the conveyance, that is over the signal, (the bearer of the information). This approach also corresponds with PTS's previous statements concerning IP-based telephony.<sup>9</sup> In this context, the Agency stated that only IP-based telephony that is provided in such a way that the party providing the service has control over the conveyance of signals should be deemed to provide an electronic communications service and consequently be subject to a notification obligation.

When providing a service (in the example below, an IP-based service over the Internet, though it may also be via another kind of IP-based communications network), control over the conveyance of signals may have the following profile: *One stakeholder* may control the communications network while *another stakeholder* (the service provider supplying the end user with the Internet service) provides a communications service comprising the allocation of IP addresses and the transmission of IP packets. At the same time, *a third stakeholder* (for instance, an Internet telephony provider) provides a kind of call service via the communications network and the communications service above. The third service provider in this example does not have any specific agreements with any of the two other service providers and cannot be deemed to have an influence on factors such as quality and the way in which the transmission of its call service is conveyed. In its turn, the end user only has a relationship with the two last-mentioned service providers. Figure 2 provides an illustration of the above example; that is, the relationship between the different stakeholders when providing a service to end users.

Skype Classic and communities on the Internet are examples of services that do not themselves constitute an electronic communications service under LEK. These kinds of service only involve communication over a pre-existing electronic communications service. Here, the communication is effected via the end user's existing Internet service, which enables and has influence over the conveyance of signals (transmission of IP packets).

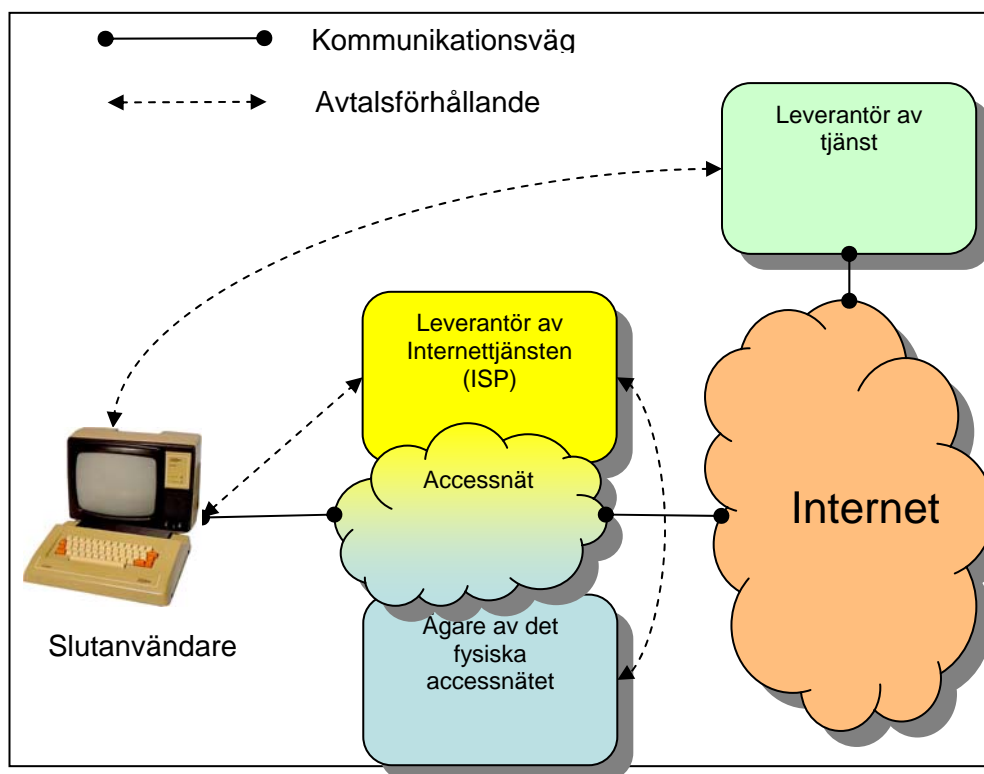
One key precondition for enabling communication via an IP-based network is that every terminal connected to such a network is linked to an IP address. Usually, it is the stakeholder providing the communications service (e.g. the

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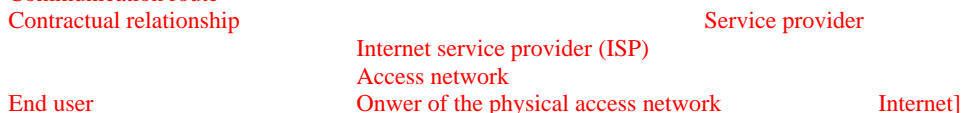
<sup>9</sup> PTS Policy concerning IP-based telephony vis-à-vis a number of concrete substantive issues, PTS-ER-2006:39.

Internet service) that also provides the IP addresses for the end users' terminals and thereby enables communication. Furthermore, it is often the stakeholder providing IP addresses that also enables the transmission of IP packets through routing. Accordingly, the party providing IP addresses usually controls the conveyance of signals. The provision of IP addresses is thereby a circumstance that suggests that the provider of the service has control over the conveyance of signals and that the service provider is consequently providing an electronic communications service.

**Figure 2 Relationship between different stakeholders when providing a service to end users**



[Text for figure above:  
Communication route  
Contractual relationship



**Description of the difference between 'communication' and 'the facilitation of communication' by means of a reference model for 'layered' communication**

Communication in an IP-based communications network can be divided into different levels in a reference model.<sup>10</sup> The lower levels represent the physical infrastructure, systems, protocols, routing and addressing for the actual transmission of packets, regardless of the information contained in the packet.

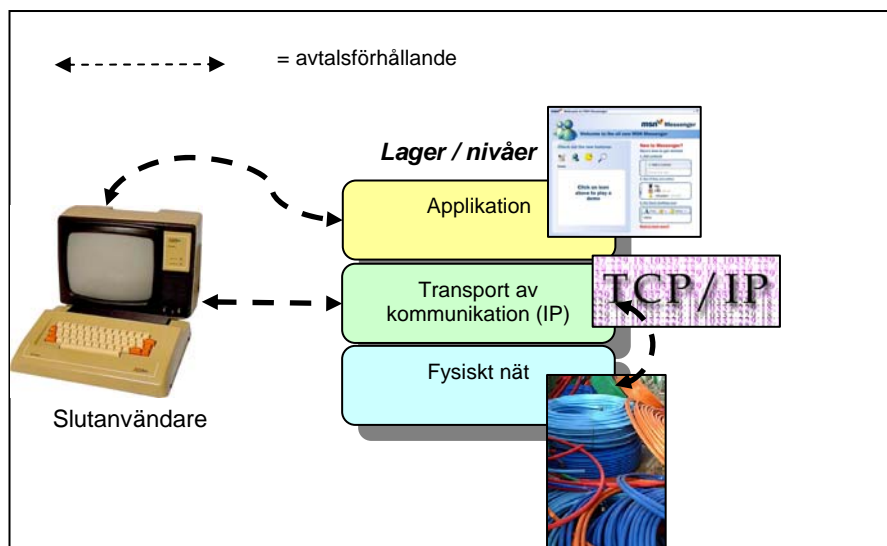
These packets can then be used by other services/applications that 'fill' the packet with information. These services/applications work in the levels above the basic communication level and use the capacity of the basic communication level to transmit the packet without having to interact with it.

Consequently, as regards function, the overlying services/applications can expect the basic communication level to work. For this reason, stakeholders providing services that only use functions at the upper levels do not have to have any relationship with the stakeholders providing services that apply to the lower levels of the reference model. Stakeholders providing services that only use functions at the upper levels consequently do not usually have any control over the conveyance of signals. Figure 3 provides an illustration of how the different levels relate to each other.

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<sup>10</sup> Primarily the 'TCP/IP model'

**Figure 3 The different levels in a reference model for 'layered' communications**



[Text for figure above:

= contractual relationship

Layers/levels

Application

Transmission of communications (IP)

Physical network

End user]

### Factors that suggest that a service involves the conveyance of signals

One factor, when assessing whether a service constitutes the conveyance of signals is whether the party providing the service also has control (either through physical ownership or by agreement) over the actual conveyance of signals. If the service relies on there being another communication service that functions as a bearer for its own service, this is a factor that suggests *per se* that the service provided does not involve the conveyance of signals.

If the party providing the service also supplies IP addresses or other kinds of identity (such as telephone numbers (E.164) or SIP URIs<sup>11</sup>) for the end users' terminals, this is a factor that suggests that the service is a communications service that involves the conveyance of signals.

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<sup>11</sup> Session Initiation Protocol Uniform Resource Identifier

**A service that comprises one or more sub-services is regarded as a whole when assessing whether the service consists mainly in the conveyance of signals**

In order to be regarded as an electronic communications service, the service should to some extent comprise the conveyance of signals. It is thus not sufficient for the service to involve some conveyance. The service must consist *wholly* or *mainly* in the conveyance of signals. According to the statements made in the *travaux préparatoires* to LEK, this criterion has been included to distinguish communications services from pure content services.<sup>12</sup>

In many cases, the service provider supplies several services that are provided together as a bundled offer for the end user. It is, for example, more or less standard within the industry for Internet service providers to also provide e-mail services.

What is considered to be an appropriate focus when assessing what constitutes a service may be subject to debate. The issue is whether all of the sub-services that are jointly supplied as a bundled offer should together be regarded as a whole when assessing what mainly characterises a service bundle. A different approach is to divide the bundled offer up and assess the individual sub-services separately; that is, to make a separate assessment of whether, for instance, the Internet service and/or the e-mail service constitute electronic communications services.

In the opinion of PTS, there could be difficult problems related to the drawing up of boundaries if a bundled offer of services were to be divided up and each one assessed separately. In such a case, it may in the first instance be complicated to determine the level of detail that should be applied to such a division. The most predictable and reasonable alternative is that the Agency looks at the entire bundled offer of services provided and makes an assessment based on what predominantly characterises the offer. However, this approach should not result in services that should clearly not be regarded as communications services (for example, pure content services, such as the sale of ringtones) being viewed as an electronic communications service solely because they are provided by an electronic communications service provider.

In the case of Internet service providers, the actual Internet service itself is probably the service that predominantly characterises the service, regardless of the other services covered in the subscription with the Internet service provider. As the Internet service also consists mainly in the conveyance of signals, the entire service bundle as a whole is considered to be an electronic

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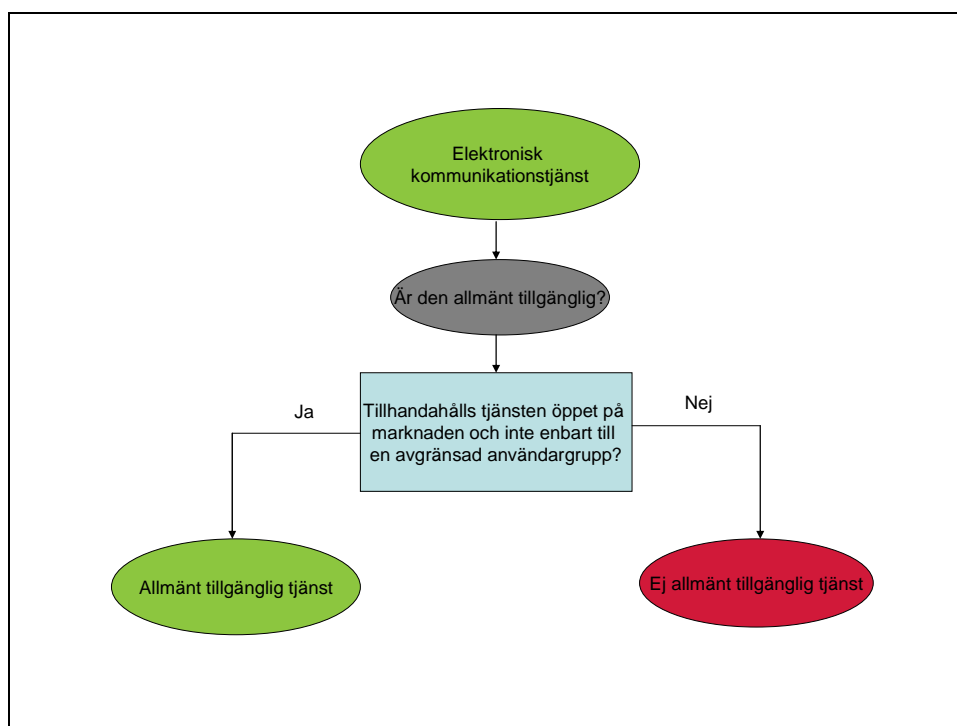
<sup>12</sup> Government Bill 2002/03:110, p. 355

communications service provided by the Internet service provider. It should also be possible to draw this conclusion owing to the fact that an Internet service provider always has control over the conveyance of signals, for which reason even other services provided by the service provider satisfy the criterion concerning control over the conveyance.

### 3.2 Assessment of whether an electronic communications service is publicly available

In most cases, an electronic communications service is publicly available if the provider of an electronic communications service is subject to the obligations and rights contained in LEK.

**Figure 4 Illustration of the various components when assessing whether an electronic communications service is publicly available**



[Text for figure above:

	Electronic communications service	
	Is it publicly available?	
Yes	Is the service provided openly on the market and not just to a defined user group?	No
Publicly available service	Service that is not publicly available]	

### 3.2.1 Is the service provided openly on the market and not just to a defined user group?

The service is 'publicly available' if it is provided openly on the market and not just to a predetermined user group.

One indicator of a service being available to the publicly available is that the service is provided openly on the market, and is consequently available to anyone who is willing to both pay for the service and comply with the conditions for its provision.

The *travaux préparatoires* have clarified that 'publicly available' means that the service is open so that a wide range of users can connect to it. There is no further determination as to what a 'wide range' means, but in the opinion of PTS this should not be viewed as a certain number of people. The number of customers to which a service is provided cannot alone indicate whether a service is publicly available. A service that only has one customer may be deemed to be publicly available. More specifically, the term 'publicly available' should be interpreted to mean that there is a general opportunity to connect to the service. According to LEK's *travaux préparatoires*, the fact that a service provider has actively recruited customers in the market and consequently offers access to its service on fixed terms results in the service being considered to be publicly available.

Instead, a factor that suggests that the service does not constitute a publicly available service is services provided to a pre-determined user group. Examples of services that may be considered to be provided to a predetermined user group, and thereby are not deemed to be publicly available, are Internet services provided by cafés and hotels.

Even if the latter operators provide electronic communications services to their customers in the form of Internet services, this service is only provided subject to the precondition that customers are located at and use the other operations provided by the café or hotel. A previous relationship between a user and service provider is consequently required for the communication service to be available. This conclusion presupposes that the hotel or café have also limited the use of the service in some way to include those using other services.

An Internet service that is offered within an area where the user group is not predetermined should be deemed to be publicly available. A 'WLAN'<sup>13</sup>

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<sup>13</sup> Wireless Local Area Network

covering parts of a city or 'hotspots' that are situated at different places should not typically be deemed to be limited to a predetermined user group, even if those wishing to use the service must be located somewhere within the area of coverage *per se*.

Explanatory comments to the proposed legislation to LEK refer to networks within apartment blocks and internal company networks as examples of networks that are not publicly available.<sup>14</sup> This then means that electronic communications services that are only provided in such networks are not publicly available either.

Even if a network as such is not deemed to be public, electronic communications services in such a network can still be deemed to be publicly available. An electronic communications service that an external service provider provides to, for instance, home owners in such apartment blocks will normally be deemed to be publicly available.

Finally, it should be emphasised that the positions adopted above, as well as the assessments made in other parts of this report, should be viewed as guidance. There will undoubtedly be situations where a service, even if it is limited to a predetermined user group, may be deemed to have been designed in such a way or be so extensive that it should still be deemed to be publicly available. An assessment needs to be made in each individual case.

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<sup>14</sup> Government Bill 2002/03:110, p. 362

## 4 Assessment of what constitutes an electronic communications network

### Assessment of what constitutes an electronic communications network

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- An electronic communications network is a system for the conveyance of signals.
- When making this assessment, the main focus is on whether the system or system component comprises a fundamental precondition for the capacity to transmit signals, either within one's own communications network or between different communications networks.
- An electronic communications network is public if it is possible for a wide range of users to connect to it and if the communications network is mainly used to provide publicly available electronic communications services.

Electronic communications networks are subject to LEK. If such a network is also public and is mainly used to convey publicly available electronic communications services, it is also a public communications network. Electronic communications networks and communications services are closely linked, as the terms contain references to each other. This chapter describes the points of departure for PTS's assessment of whether a network is an electronic communications network and a public communications network respectively.

Assessments and conclusions are reported in this chapter. A more detailed description of the legal preconditions for this assessment can be found in Appendix 1.

### 4.1 A system for the conveyance of signals

An electronic communications network is a system for the conveyance of signals. Some functions that primarily improve the efficiency of or simplify the conveyance of signals, but do not comprise a precondition for doing so, may form part of an electronic communications network, but are not deemed

to constitute an electronic communications network as such.

Electronic communications networks are defined in LEK as follows:

*electronic communications service*: transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire or radio waves, by optical or by other electromagnetic means, irrespective of the type of information conveyed.

This definition states that a communications network should be a *system* for transmission. At the same time, the definition states that switching or routing equipment is also included, where applicable, and other resources which permit conveyance. In summary, a reasonable assessment is that the term 'communications network' comprises physical and/or logical networks, including switches and other parts that are crucial to the capacity of the networks to convey signals both within the communications network itself as well as between different communications networks. The main emphasis of the assessment should always be on whether the system or the component part is an essential prerequisite for this particular feature. Pure support systems for, for example, handling CDR<sup>15</sup> (documentation for billing customers) and storing subscriber data do not constitute part of a communications network.

Pure transmission systems that translate between different kinds of identity (names, numbers or addresses) do not constitute their own electronic communications network as such, but may often be viewed as part of such a network. Other kinds of function that only simplify or improve the efficiency of the conveyance of signals normally fall outside the term 'electronic communications network'.

The part of the system that is deemed to be subject to the term 'communications network' may appear to be slightly unclear. For example, mention may be made of the drawing up of boundaries between communications networks and associated facilities. PTS does not deal with the term 'associated facility' in more detail in this report.

The schematic illustration (Figure 5) that is referred to below shows how an electronic communications network may be set up. For educational purposes, this figure includes parts that fall outside the network, such as certain support systems. When assessing whether parts of the network should be included in the regulatory term 'electronic communications network', one should ask

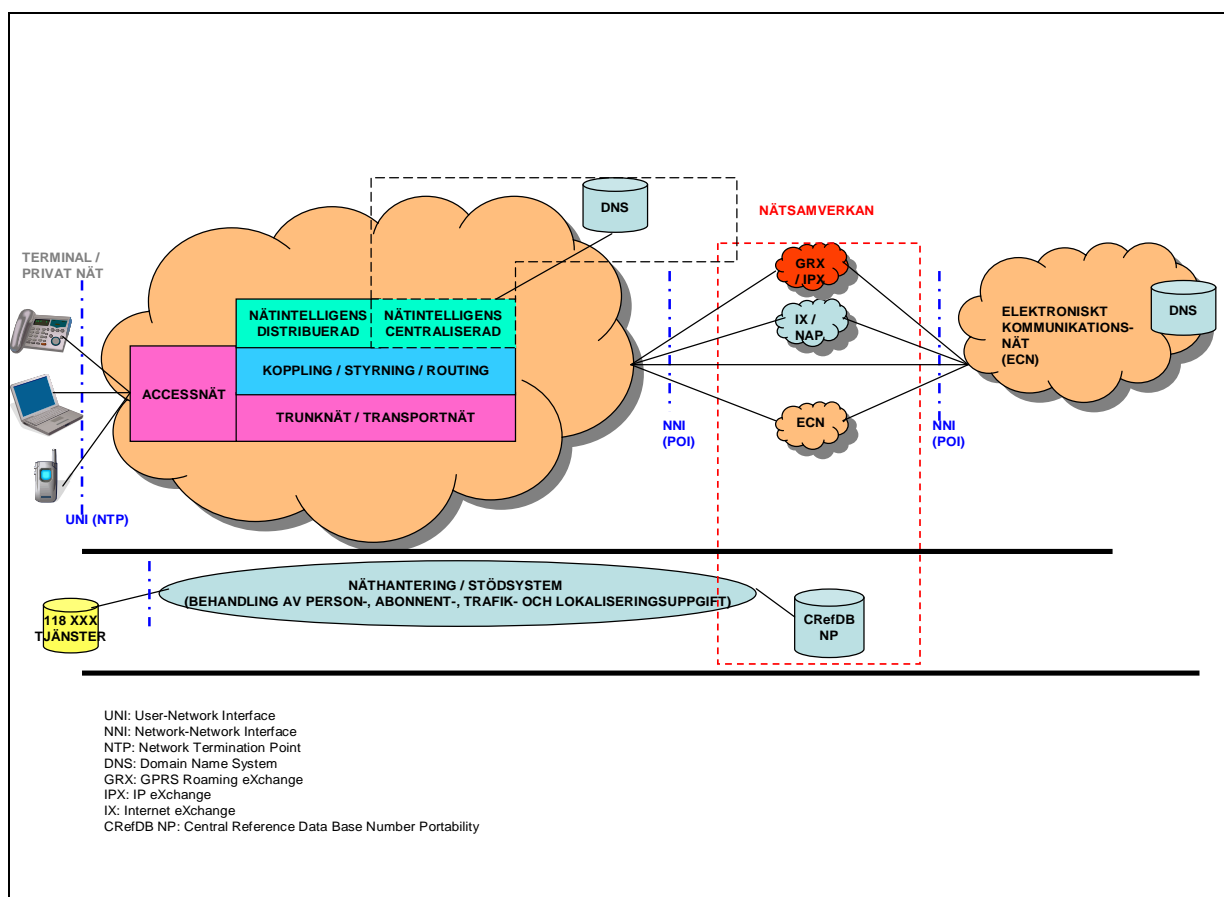
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<sup>15</sup> Call Data Record

whether the part is essential in any way for effecting the conveyance of signals within or between networks, regardless of the part of the network involved and where it is schematically situated

One example of a part of the network that represents a fundamental precondition for the conveyance of signals is the transmission medium itself, which may also be a passive fibre network ('dark fibre'). It may be part of the access network and/or the transmission network.

**Figure 5 Generic network model of electronic communications networks with examples of the functions, equipment and support systems included**



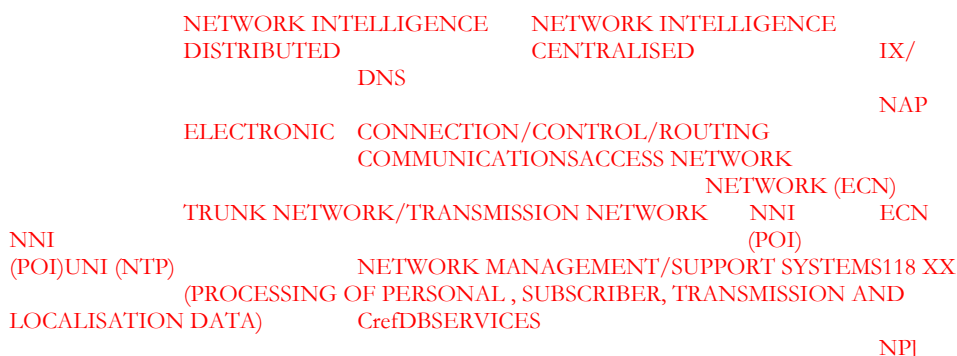
[Text for figure:

TERMINAL/  
PRIVATE NETWORK

DNS

NETWORK INTERACTION

GRX/  
IPX



Networks that are used to broadcast sound radio and television are also deemed to be electronic communications networks under LEK, but these are not explicitly illustrated in the generic network model shown in Figure 5.

#### 4.2 A communications network that a wide range of users can connect to is 'public'

A public communications network is also a communications network that a wide range of users can connect to *and* which is wholly or mainly used to provide publicly available electronic communications services.

If a network is deemed to constitute an 'electronic communications network' according to the section above, the issue is also whether it can be deemed to constitute the term *public communications network*, as defined in LEK. The network must mainly be used to provide publicly available electronic communications services if it is to be a 'communications network'.

It is stated in the *travaux préparatoires* to the Telecommunications Act, which are referred to in the *travaux préparatoires* to LEK, that property networks and internal networks are not deemed to be subject to a notification obligation as they are not publicly available.<sup>16</sup> Such networks are not deemed to be open for a wide range of users to connect to them. PTS is of the view that a network that only has a few users may be deemed to constitute a public communications network if it is offered to a wider group.

On the other hand, if a communications network is only offered to a predetermined group of users (for example, based on another contractual relationship), the network may nonetheless not be deemed to be public. Residents within a particular property may be referred to as an example. The *travaux préparatoires* state that a property network in an apartment block, regarding which the property owner does not make any special charge for the

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<sup>16</sup> Government Bill 2002/03:110, p. 121

operator, is not deemed to constitute a public communications network.<sup>17</sup> On the other hand, the network may constitute part of a public communications network that is provided for remuneration by the operator with whom the property owner has concluded a contract.

Pure geographical restrictions should not mean that the network is not public. In several cases, there are local networks where for practical reasons only residents within a particular area can connect to them. Nonetheless, the network can be deemed to be publicly available as long as this group is not predetermined in advance.

There will be situations where there are no obvious boundaries. However, the aim of the assessment is that the network should be deemed to be publicly available if it is provided to an undefined group of users and there are no restrictions regarding who can connect to it, beyond purely technical limitations or restrictions relating to capacity.

The requirement that the network is wholly or mainly used to provide electronic communications services means that closed private networks (for example, those primarily intended for communications within a limited group such as, for instance, within a corporate group or the like) are not deemed to be public.

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<sup>17</sup> Government Bill 2002/03:110, p. 362

## 5 Assessment to determine who provides the electronic communications service

Assessment to determine who provides the electronic communications service

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- The party providing the service is the stakeholder that concludes a contract with another party for use of the service and who at the same time controls the communication service through ownership or contract.
- This regulation also applies to stakeholders who only sell communications services or access to communications networks at a wholesale level.

Even when it is established that an electronic communications service exists, it is not always obvious who actually provides it. However, it is important to be able to determine the identity of the party providing the service in order to be able to determine which stakeholders are subject to the particular obligations and rights contained in the legislation. This may involve determining which stakeholder should notify an operation to PTS or the stakeholder at which various decisions or supervision should be directed.<sup>18</sup>

PTS has analysed the issue of who provides a service. This analysis is presented in Section 5.1, and the criterion referred to in the separate box at the start of the section has been used to consider which stakeholder provides the electronic communications service.

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<sup>18</sup> The issue of which legal person within a group is covered by a decision on obligations has also been recently explained in PTS's written communication, reference no. 08-7860, *Behov av förtydliganden i LEK när det gäller till vem beslut kan riktas m.m.* [Need for clarification in LEK as regards the parties to whom decisions may be directed, etc.]

### **5.1 The party providing the service is the party that has a contract with another party to use the service and control over the communications service**

The party providing the service is deemed to be the party that concludes an agreement with another party regarding use of the service and at the same time controls the communication service through ownership or contract.

A strict interpretation of the term 'conveyance of signals' would mean that only the legal entity that actually effects the conveyance of signals in a communications network is the party providing the service. However, such an interpretation is hardly reasonable, as in most cases communications services are not provided merely by conveying signals in one's own communications network. On the contrary, communications networks, communications services and associated facilities are complicated networks comprising interconnected networks through interconnection agreements.

The stakeholder that assumes responsibility in relation to an end user and is the party that concludes contracts with the end user is the party that the end user perceives to be responsible for the service. This stakeholder is thereby the party that the end user expects to be able to turn to if any problem should arise or if there are any issues regarding the function of the service. It is therefore reasonable that the stakeholder that actually markets, receives payment for and provides the service to the end user is also the stakeholder that holds the regulatory rights and obligations that ensue from such provision.

A provider of electronic communications services is considered to be the stakeholder that, through a contract, ensures that signals are conveyed in a communications network to enable it to provide its service. This also applies if such a party does not own the network itself or even have use of the entire stage of the communication.

However, it should be emphasised that there is a distinct difference between those stakeholders that through contracts ensure that they have control over or the use of some part of the communications service and those stakeholders who quite simply rely on such communications services being available and functioning without being able to influence them themselves. As explained above, the latter already falls completely outside the regulatory scope due to the fact that they do not provide the conveyance of signals, regardless of how the end user perceives the service.

Finally, it should also be pointed out that the reasoning above is aimed at stakeholders who have end user contracts. Of course, the regulation also applies to stakeholders who only sell communications services or access to communications networks at a wholesale level. In these cases, it is probably less complicated to assess whether or not the stakeholders are deemed to provide an electronic communications service, as all wholesale suppliers for obvious reasons probably have control over the conveyance of signals or, when appropriate, have the use of a communications network.

## 6 Impact analysis of the application of the model

### Impact analysis of the application of the model

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- Applying the model may result in reduced costs for the market.
- It is considered that applying the model will not affect consumers and other end users to any decisive extent.
- It may be expected that applying the model will involve improving the efficiency of the operation to some extent.

In this chapter, PTS makes an assessment of the impact that applying the model may have on the market, consumers and the Agency. The Agency considers that the model may possibly result in a uniform assessment of what is to be regarded as an electronic communications service and an electronic communications network.

### 6.1 Impact on the market

The model produced by PTS should make it clearer and simpler for the industry to assess which operations are covered by LEK. The assessment model is based on existing regulations and does not involve any further rules for the industry.

The model makes it clearer to see how PTS assesses the meaning of the terms 'electronic communications service' and 'electronic communications network'. A reduction in the regulatory uncertainty may result in reduced costs for the industry, as it is expected that market stakeholders will not have to expend as much time and resources to investigate whether a certain operation is subject to LEK.

It is possible that PTS's assessment model could affect the number of market stakeholders that are subject to a notification obligation. A stakeholder that is subject to a notification obligation must pay a processing charge when notifying PTS. An annual charge is paid thereafter. The present assessment model represents a step in clarifying PTS's position as regards those market

stakeholders that are subject to a notification obligation. The assessment model may mean that some stakeholders who are not currently notified become aware that they are subject to a notification obligation, and conversely that other stakeholders that are currently notified become aware that they are not subject to a notification obligation. Taken overall, the total number of stakeholders notified would consequently not be significantly affected by the assessment model presented here.

The application of PTS's model could possibly result in the negotiation obligation being affected as regards the interconnection of a provider of a public communications network to a service provider if the latter is not deemed to provide a publicly available electronic communications service. It is considered that any differences that may arise will not significantly affect the possibility of interconnection.

Similarly, PTS's assessment model could, purely theoretically, affect the opportunities of a market stakeholder that is not assessed to provide an electronic communications services to gain access to and use a network. However, PTS considers that applying the model in practice will not influence the conditions in the market for access to and use of networks and associated facilities.

If an application of PTS's guidance model were to involve a change in the number of market stakeholders notified, this would have consequences on the processing of traffic data. The proposed provisions concerning traffic data are linked to stakeholders that are subject to a notification obligation.<sup>19</sup> If anyone who is not subject to a notification obligation has information about traffic data, such a party may not process this information for as long as the data is being conveyed.

**6.2** Changing the number of stakeholders that are deemed to provide electronic communications services also involves a potential change in the number of stakeholders that need to observe the rules concerning the duty of confidentiality contained in LEK (Chapter 6, Section 20). In that case, this would also change the number of stakeholders subject to the obligation to release information to law enforcement authorities. However, it is nevertheless difficult to draw any general conclusions in light of the fact that the rules concerning the duty of confidentiality that are contained in LEK include a broader group than just providers of services ('a party that in

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<sup>19</sup> *Lagring av trafikuppgifter för brottsbekämpning* [Storage of traffic data to combat crime], Official Government Report – SOU 2007:76

conjunction with the provision<sup>1)</sup>. **Impact on consumers and other end users**

If an application of PTS's guidance model means a change in the number of market stakeholders subject to a notification obligation, this will have consequences on the protection of end users' privacy as regards the processing of traffic data. The provisions contained in LEK concerning traffic data are linked to stakeholders that are subject to a notification obligation. The provisions also contain both a prohibition and rights to process traffic data for those market stakeholders subject to a notification obligation. However, if any stakeholder that is not subject to a notification obligation is in possession of traffic data, such party should probably have a limited opportunity to process the data as long as it is being conveyed in light of the general prohibition contained in Chapter 6, Section 17 of LEK.

LEK contains special rules concerning the duty of confidentiality regarding details of subscriptions and the content of electronic messages that are directed at stakeholders providing electronic communications networks or electronic communications services. Changing the number of stakeholders that are deemed to provide electronic communications networks or electronic communications services also involves a change in the number of stakeholders that need to observe the rules concerning the duty of confidentiality contained in LEK (Chapter 6, Section 20). The Personal Data Act (Swedish Code of Statutes – SFS 1998:204) may start to apply in those cases where the rules concerning the duty of confidentiality that are contained in LEK no longer apply as a consequence of a change to the number of stakeholders subject to the duty of confidentiality contained in LEK. However, a precondition for it being possible to apply the Personal Data Act is the issue regarding the processing of personal data, which means that it is difficult to draw any conclusions regarding the effects on end users in those cases where stakeholders are not deemed to be subject to the regulations contained in LEK. In combination with the expectation that the application of PTS's guidance model will not involve any major changes as regards the number of providers of electronic communications networks and electronic communications services, it is also considered that the protection of end users' privacy will not be affected to any great extent.

As explained above, the total number of service or network providers that are subject to a notification obligation should not be significantly affected. Nor should the assessment model presented here entail any change to the range of providers of publicly available electronic communications services and public communications networks for consumers and other end users. This consequently results in a negligible impact on end users as regards end user

rights when these rights are linked to the providers of electronic communications networks and electronic communications services referred to in LEK.

Finally, the present assessment model is not expected to involve any increased costs for the end user collective, as the charges associated with the notification obligation are relatively low and because there not expected to be any change in the total number of providers of publicly available electronic communications service.

### **6.3 Impact on PTS**

It is expected that PTS will be able to make some improvements to the efficiency of its operation, as the Agency will have a tool for reducing the time spent analysing whether a service or a network is subject to LEK. The questions received by the Agency regarding these assessments should also reduce in the long run.

The precision provided by the PTS model may change the number of market stakeholders subject to a notification obligation. When an operation is notified, it is conceivable that a review will not have been conducted on the part of the stakeholder as to whether the operation really is such that it should be notified under LEK. Consequently, it is possible that stakeholders who are unsure about whether they are subject to a notification obligation have given notice in order to be sure. The model produced by PTS should make it clearer and simpler for the industry to assess which operations are subject to the notification obligation. This may result in some market stakeholders that did not consider that they were subject to a notification obligation giving notice, but also that others withdraw such a notice. In other words, the total number of stakeholders notified should not be affected to any great extent by the assessment model presented here. For this reason, the assessment model should not have any major impact on the charges made by the Agency.

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## THE NETHERLANDS

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## NORWAY

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## UNITED KINGDOM

Statement of 5 December 2007 - Regulation of VoIP Services: Access to the Emergency Services,  
<http://www.ofcom.org.uk/consult/condocs/voip/voipstatement/voipstatement.pdf>

Statement of 29 March 2007 - Regulation of VoIP Services,  
<http://www.ofcom.org.uk/consult/condocs/voipregulation/voipstatement/voipstatement.pdf>

Statement of 31 March 2005 - Designation and Relevant Activity Guidelines for the purposes of administrative charging,  
<http://www.ofcom.org.uk/consult/condocs/designation/statement/statement.pdf>

Oftel's Statement of 23 May 2003 - Guidelines for the interconnection of public electronic communications networks,  
[http://www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/2003/intercon0503.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/intercon0503.pdf)

Which services and networks are subject to the Electronic Communications Act?

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## Appendix 1

### Report on the legislation in the area

This Appendix describes the legal preconditions laid down in LEK and statements contained in the *travaux préparatoires* to the Act. These preconditions form the basis of the model for electronic communications services produced in Chapter 3 and the description of what constitutes an electronic communications network contained in Chapter 4.

#### 1. Overall provisions of LEK

##### 1.1. Provisions of LEK relevant to assessing what is meant by an electronic communications service and an electronic communications network

According to Chapter 1, Section 4 of the Electronic Communications Act (2003:389 – LEK), the provisions of the Act apply to electronic communications networks and electronic communications services with associated facilities and services together with other radio use. It is also stated that the Act does not apply to content transmitted using electronic communications networks with the aid of electronic communications services.

Chapter 1, Section 7 of LEK contains definitions of the terms 'electronic communications networks' and 'electronic communications services'. It is also stated in Chapter 2, Section 1 of LEK that public communications networks of such a kind as are normally provided for remuneration or publicly available electronic communications services may only be provided following notification to the supervisory authority (PTS).

A review of the relevant provisions of LEK is provided below together with the comments made in the *travaux préparatoires* to this legislation regarding the precise meaning of the terms 'electronic communications networks' and 'electronic communications services', and when such may be deemed to be public communications networks and publicly available electronic communications services. In this context, reference is also made to the provisions of the EU Directive, which is implemented through this legislation.

##### 1.2. Scope of the Act

The scope of the Act is stated in Chapter 1, Section 4 of LEK as follows:

This Act applies to electronic communications networks and electronic communications services with associated facilities and services together with other radio use.

The Act is not applicable to content transmitted using electronic communications networks with the aid of electronic communications services.

According to Chapter 1, Section 7, an 'associated facility' is an arrangement, function or something else that does not constitute but is related to an electronic communications service or an electronic communications network, and which facilitates or supports that service or the provision of services via that network. In the *travaux préparatoires*, subscriber directory services are referred to as examples of 'associated services'.<sup>20</sup> According to the *travaux préparatoires*, 'other radio use' means rules concerning the use of radio equipment, etc., that are consequently subject to the Act, but that cannot be said to constitute electronic communications networks, communications services or associated facilities and services.

Content transmitted using electronic communications networks with the aid of electronic communications services is exempted from the scope of the Act. According to the *travaux préparatoires*, this involves services that do not consist wholly or mainly in the conveyance of signals on electronic communications networks.<sup>21</sup> The content of radio and television programmes together with services involving the provision of content on the Internet are referred to as examples. However, it is emphasised that Chapter 6 of LEK contains provisions protecting the information contained in electronic messages exchanged between a limited number of parties through a publicly available communications service.<sup>22</sup> The legislation consequently also applies to the information contained in messages in certain circumstances.

The 'Framework Directive' contains basic formal provisions regarding the application of the Directive in the area in question.<sup>23</sup> Article 1, which has been implemented into Swedish legislation through Chapter 1, Section 4, establishes the scope of the framework for regulating electronic communications networks, electronic communications services, associated facilities and associated services. The preamble to the Framework Directive also states that voice telephony and electronic mail conveyance services are covered by this Directive. However, it also states that the same undertaking, for example, an

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<sup>20</sup> Government Bill 2002/03:110 The Electronic Communications Act, etc., p. 355

<sup>21</sup> Ibidem

<sup>22</sup> Government Bill 2002/03:110, pp. 356 and 389

<sup>23</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), clause 10, third sentence

Internet service provider, can offer both an electronic communications service, such as access to the Internet, and services not covered under the Directive, such as the provision of web-based content.

## 2. Electronic communications service

An electronic communications service is defined in Chapter 1, Section 7 of LEK as follows:

*electronic communications service*: a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks

This provision implements Article 2c) of the Framework Directive, which defines an electronic communications service as follows:

*electronic communications service*: a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but excludes services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks.

In the *travaux préparatoires* to LEK, it has been observed that there must be some kind of benefit that someone supplies to someone else if it is to be deemed to be a 'service'. For this reason, at least two parties must be involved. For an electronic communications service to be deemed to exist, one party must convey signals in an electronic communications network for another party.<sup>24</sup>

The *travaux préparatoires* also state that the reason behind an electronic communications service being defined as a service normally provided for remuneration is that the legislator considers that services involving the commercial provision of services to others should be covered by this term.<sup>25</sup> It has also been observed that commercial services are sometimes provided for free and that the commercial element is then manifested in some other way, normally financed through advertising. When a service is provided on a purely non-profit basis, such as, for instance, the provision of research networks in the academic world, it is not regarded as an electronic communications service.

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<sup>24</sup> Government Bill 2002/03:110, p. 120

<sup>25</sup> Government Bill 2002/03:110, p. 358

According to statements contained in the *travaux préparatoires*, the criterion that the service must consist wholly or mainly in the conveyance of signals on electronic communications networks distinguishes such services from pure content services. Programme operations at software companies for sound radio and television, and content services provided by the Web, such as web pages that provide music or games or websites for electronic commerce<sup>26</sup>, are referred to as examples. As shown above, there are corresponding statements in the *travaux préparatoires* regarding Chapter 1, Section 4. In this context, the legislator has stated that the content of radio and television programmes and services that involve the provision of content on the Internet are not services which consist wholly or mainly in the conveyance of signals on electronic communications networks.<sup>27</sup>

### **2.1. Publicly available electronic communications service**

If an electronic communications service is also to be regarded as publicly available, Chapter 2, Section 1 of LEK prescribes that it may only be provided following notification to the supervisory authority (PTS). According to the *travaux préparatoires*, the fact that the electronic communications service is to be publicly available means that the provision of a predetermined range of programmes through radio and TV broadcasts, and similarly broadcasts in digital form, are not subject to the notification obligation. However, if the broadcasts do not contain a predetermined range, such broadcasts shall be regarded as a publicly available electronic communications service.<sup>28</sup>

According to the *travaux préparatoires* to LEK, the statements contained in the *travaux préparatoires* to the Telecommunications Act regarding the definition of a publicly available telecommunications network could provide guidance when assessing whether an electronic communications service may be regarded as publicly available (see 3.1 Public communications networks).

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<sup>26</sup> Government Bill 2002/03:110, p. 358

<sup>27</sup> Government Bill 2002/03:110, p. 356

<sup>28</sup> However, according to statements contained in Government Bill 2002/03:110 (p. 362), such broadcasts as are considered to be publicly available electronic communications services and which are made by wire are not covered by the notification obligation according to Chapter 2, Section 2 of LEK.

### 3. Electronic communications networks

An electronic communications network is defined in Chapter 1, Section 7 of LEK as follows:

*electronic communications network*: transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire or radio waves, by optical or by other electromagnetic means, irrespective of the type of information conveyed.

The definition contained in Chapter 1, Section 7 implements Article 2a) of the Framework Directive. Article 2a) corresponds to the definition provided in the provision contained in LEK, but also specifies satellite networks, fixed networks and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of conveying signals, networks used for radio and television broadcasting, and cable television networks as examples of electromagnetic transmission means.

According to the *travaux préparatoires*, the term 'electronic communications network' covers all kinds of telecommunications network according to the definition contained in the former Telecommunications Act.<sup>29</sup> In accordance with Section 1 of the Telecommunications Act, the scope of the Telecommunications Act included telecommunications operations and subscriber directory services. However, 'telecommunications operations' did not mean broadcasting sound radio programmes to the general public or otherwise as referred to in Chapter 1, Article 1, third paragraph, first sentence of the Fundamental Law on Freedom of Expression (YGL). There is no corresponding restriction in LEK, for which reason the scope has been extended by LEK. However, Chapter 2, Section 2 of LEK exempts broadcasts of sound radio programmes to the general public that are subject to the said provisions contained in YGL from the notification obligation prescribed by Chapter 2, Section 1 of LEK (see 3.1).

#### 3.1. Public communications networks

If an electronic communications network is regarded as public, the provision of the network may in certain circumstances be subject to the notification obligation under Chapter 2, Section 1 of LEK. A public communications network is defined in Chapter 1, Section 7 of LEK as follows:

*public communications network*: an electronic communications network wholly or mainly used for the provision of publicly available electronic communications services

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<sup>29</sup> Government Bill 2002/03:110, p. 357

This definition corresponds to Article 2d) of the Framework Directive. According to the *travaux préparatoires*, statements contained in the *travaux préparatoires* to the previous Telecommunications Act (1993:597) may provide guidance when assessing whether an electronic communications network should be deemed to be public.<sup>30</sup> These statements indicate that one characteristic for a telecommunications network being publicly available should be that it is open so that a wide range of users can connect to the network. As an example, in a situation where an operator actively recruits customers in the market and offers connection on fixed terms, the network created should be deemed to be publicly available. The *travaux préparatoires* to LEK mention internal company networks and networks within authorities and organisations as examples of closed networks, where the services provided are only accessible to a limited group and thereby should not be regarded as a public communications network.<sup>31</sup> It has been observed that virtual private networks (VPN) can use some of the resources of the public communications network for an organisation's internal communications, but that this may also involve secure connection through, for instance, encryption over a public communications network for employees or customers at locations outside the organisation's own network. According to the *travaux préparatoires*, parties providing VPNs are not subject to a notification obligation, on the other hand, the party providing the public communications network is if it is provided for remuneration.

It is also stated in the *travaux préparatoires* to LEK that an Internet service provider that controls a network in which the service provider conveys signals is subject to LEK.<sup>32</sup> However, a party that provides, for instance, a web hotel or a portal is not covered.

### **3.2. A public communications network that is normally provided for remuneration is subject to a notification obligation**

Chapter 2, Section 1 of LEK prescribes that a public communications network that is normally provided for remuneration may only be provided following notification to the supervisory authority (PTS). For the notification obligation to apply under Chapter 2, Section 1 of LEK, the public communications network is required to be "of such a kind as are normally provided for remuneration". According to the *travaux préparatoires*, this delimitation is intended to cover cases where networks are provided on a commercial basis

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<sup>30</sup> Government Bill 2002/03:110, p. 120, Government Bill 1992/93:200 p. 88, 91 f. and 99. See also Government Bill 2002/03:110, p. 362

<sup>31</sup> Government Bill 2002/03:110, p. 362

<sup>32</sup> Government Bill. 2002/03:110, p. 122

for the purpose of sharing costs and not for payment.<sup>33</sup> It is also intended to exempt from the notification obligation property networks in apartment blocks that comprise property fixtures and regarding which the property owner does not make any special charge for the operator.<sup>34</sup> In that case, the property owner is not subject to a notification obligation. On the other hand, the network may constitute part of a public communications network that has been provided for remuneration by the operator with whom the property owner has concluded a contract.

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<sup>33</sup> Government Bill 2002/03:110, p. 122

<sup>34</sup> Government Bill 2002/03:110, p. 362

## Appendix 2

### Summary of the responses to PTS's enquiry to other countries within the European Union

#### 1. Summary

On 31 January 2008, a formal enquiry was sent to the corresponding authorities to PTS in eight Member States of the EU concerning responses to a number of questions regarding the definition of 'electronic communications services' and 'electronic communications networks'.<sup>35</sup> Answers were also sought on a more unofficial basis via other contacts. PTS received responses from Finland, Denmark, Norway, Germany, UK, Spain, Latvia and the Netherlands.

##### **1.1. None of the countries have produced a general model for assessing electronic communications services and electronic communications networks**

The responses received to PTS's enquiry showed that none of the countries had produced a model corresponding to the one that the Agency intends to produce. However, some reasoning is contained in the responses concerning the positions adopted by the countries as regards various specific situations; for example, with reference to VoIP, WLAN and e-mail. PTS may benefit from taking this reasoning into account when working on the model.

As regards the more specific issues relating to different services, it can be concluded that there may be a considerable variation in the assessments made by the different countries relating to one and same service. For example, some countries consider that e-mail should be regarded as content and should consequently not be regarded as an electronic communications service, while other countries hold the opposite view.

##### **1.2. All countries make the same assessment as regards control over the conveyance of signals**

It is shown from the responses received that all countries make the same assessment as to how IP-based telephony should be treated. This reason why

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<sup>35</sup> Finland, Denmark, Norway, Germany, France, UK, the Netherlands and Estonia

this assessment is so uniform is probably due to the fact that ERG<sup>36</sup> has raised the issue and dealt with it in various documents (for instance, 'ERG common position on VoIP', ERG (07)56rev2). This opinion is of particular importance, as the assessment of IP-based telephony is unanimous among all of the EU countries that responded to our enquiry.

The general opinion among those countries that responded to the enquiry is that a software-based service, where the communication takes place directly between the computers of end users (pure peer-to-peer (P2P) communication), should not be considered as an electronic communications service as the service provider does not control (or have power over) the actual communication in any way. The supplier has only provided the software and an opportunity for users to find other users. The users are then dependent on ensuring that they themselves have a communication service (Internet service) that enables use.

## **2. Summary of the responses received to PTS's enquiry**

### **2.1. The official position adopted regarding the assessment of electronic communications services and electronic communications networks**

*PTS asked whether the authorities had produced any official explanation or question/response concepts regarding an interpretation of what constitutes an electronic communications service and an electronic communications network, as defined in Article 2 of the Framework Directive (2002/21/EG).*

The responses received to PTS's enquiry indicate that none of the countries asked have released any official explanation or guidance regarding how the assessment should be made. However, a number of countries clarified the authorities' position either in their answers or in documents that they referred to, indicating the general reasoning applied when making assessments or how the assessment should be conducted in relation to specific services or networks.

The questions that PTS presented to the countries are shown in more detail below, following which a summary is provided of the countries' responses to these questions.

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<sup>36</sup> European Regulators Group

## 2.2. Assessments regarding various terms and specific communications services

*PTS asked how the authorities interpreted 'wholly or mainly' and 'conveyance of signals' when assessing whether the service constitutes an electronic communications service. The Agency also asked whether the provision of e-mail without the same provider providing access to the Internet, and the provision of e-mail including access to the Internet, constitutes an electronic communications service. If this was not considered to be the case, they were asked whether these services should instead be regarded as associated services. Similarly, an enquiry was made about the position adopted concerning whether the provision of IP-based services without simultaneously providing an underlying communications service (e.g., Skype Classic) or the provision of IP-based services including the provision of an underlying communications service (e.g., Skype In/Out) is regarded as electronic communications services. PTS also asked whether the authorities considered that an Internet café provides an electronic communications service to its customers, and similarly whether a traditional hotel's provision of access to telephony and Internet for its guests should be regarded as electronic communications services.*

### Finland

The Finnish regulatory authority refers to published statements on the application of the legislation regarding VoIP and WLAN. These statements include some interpretation of the definitions used in the Finnish legislation, which differ slightly from the Directives in the area. For example, it is stated that the term 'network operator' means an operator that provides a communications network that the operator itself owns or has the use of in some other way for the purpose of sending, distributing or conveying messages. Furthermore, a service offered by a network operator is considered to be a 'network service'. A 'service operator' means an operator that sends messages over a communications network that the operator has the use of or which it has been leased by a network operator, or distributes or conveys messages in a mass communication network. A service provided by a service operator is deemed to be a 'communications service'. As regards the issue of what is considered to be a 'public communications network', the authority considers that such a network exists when a network (e.g., WLAN) is provided to a group of users that are not predefined. There may be a delimitation of users through previous customer relationships or membership of an association. For instance, reference is made to WLAN connections that an undertaking (e.g., hotel or café) provides to its customers or that an educational institution provides to students or staff.

In the Agency's documents regarding VoIP, it is stated that peer-to-peer solutions do not constitute electronic communications services. The reason for this is that the provider of the service does not provide any part of the transmission; they do not have any control over the actual communication. As

regards e-mail, the Finnish authority considers that e-mail as such should theoretically constitute an electronic communications service. However, the authority has not had any reason to adopt a position as regards this issue up until now. As regards pure web-based e-mail services, these are also deemed to constitute electronic communications services. With reference to Internet services offered via hotels and cafés, the authority considered that the Internet service as such is an electronic communications service. On the other hand, café owners, etc., are not considered to be providers of a publicly available electronic communications service, as the service is provided to a predetermined number of people.

### **Denmark**

The Danish regulatory authority has conducted a discussion that is similar to the Finnish authority's approach. As regards the term consist 'wholly or mainly' in the conveyance of signals, the authority is currently investigating the meaning of this term. The point of departure is that this term should be read as a whole (that is, 'consist wholly or mainly in the conveyance of signals') and that the aim of wording is to distinguish communications services from pure content services. The Danish authority also considers that e-mail constitutes a content service and is not an electronic communications service. The reason for this is that the service as such does not entail any 'transmission of signals'. An Internet connection is required in order to use an e-mail service. The party providing the e-mail service is not in control of whether the end user has an Internet connection and cannot consequently influence whether or not it is possible to use the e-mail service. For this reason, an e-mail service should not be deemed to be an electronic communications service. The fact that an ISP as such also provides an e-mail service does not change the assessment *per se*.

Furthermore, Denmark considers that cafés and hotels that provide Internet connections should normally be regarded as providers of electronic communications services. This assessment is not affected by the fact that they are in a situation resembling a distributor. However, the service must be of a sufficient size ('available to several end-users on a commercial basis'). The assessment is made on a case by case basis.

### **Latvia**

The Latvian regulatory authority states that up until now they have not experienced any problems when applying the legislation in question. In the event that the authority should need to make an assessment of the meaning of this term, this would be conducted based on an OSI model. According to the authority, the term 'conveyance of signals' can only be considered to relate to some of the lower parts of the OSI model. This means that services that use

the lower layers of the OSI model, or alternatively all of the layers, should be regarded as services that wholly or mainly comprise the conveyance of signals. Stakeholders that supply services that only function in the upper parts of the model should not be deemed to be involved in the actual conveyance of signals and consequently do not provide an electronic communications service. Providers of e-mail should be regarded as stakeholders that only function at the upper levels of the OSI model, for which reason they are not providing an electronic communications service in the opinion of the authority.

The authority does not consider that hotels and cafés provide an electronic communications service. In its response, the Latvian authority has not provided arguments concerning the position adopted. PTS makes the assessment that the position adopted is based on the authority's view of the OSI model and that these stakeholders are not considered to be involved in any way in the provision of services in the OSI model.

#### **Norway**

The Norwegian authority's response to PTS's questions states that the provisions regarding electronic communications services contained in Norwegian law and its *travaux préparatoires* do not provide any further guidance regarding the definition contained in the Framework Directive. Nor has Norway adopted a position on any of the questions presented by PTS in its enquiry. However, it is shown that routing is considered to be covered by the term 'conveyance of signals', which presupposes certain activities by the party providing the service. They are currently investigating whether localisation services may be deemed to constitute an electronic communications service. The authority also refers to a legal case where a provider of IP-based telephony gave users the opportunity of receiving and making calls to numbers in the national numbering plan and where the service was considered to constitute a telephony service.

The authority states that hotels and cafés may be deemed to be end users themselves and consequently are not subject to the rules, but that at the same time they provide a service to their customers. What is provided is an electronic communications service, for which reason these hotels and cafés, according to the authority, should perhaps also be deemed to be the parties providing the service.

#### **The Netherlands**

The Dutch regulatory authority states that it has chosen not to officially explain the authority's position on what is meant by 'conveyance of signals' or what an electronic communications service is. The assessment is made in each

individual case. However, a description of 'relevant' and 'non-relevant' communications services has been produced, but is only available in Dutch. Among other things, it has been stated in this list that e-mail should be deemed to constitute an electronic communications service. However, the Dutch authority has chosen not to amplify on its position, either in any official document or in its response to PTS. It has only been established that the authority does not consider that hotels and cafés provide an electronic communications service for 'practical' reasons. However, it is not indicated what this assessment is based on or what the practical reasons are.

### **Germany**

The German authority explains in its response that their interpretation of the term 'electronic communications service' is rather wide. The authority considers, for instance, that the expression 'wholly or mainly' means that even services that are not just communications should be included. It considers that it would be inappropriate to provide stakeholders with the opportunity of avoiding sector-specific legislation, by supplying communications services and other services as part of a package. As regards the meaning of the term 'conveyance', the authority has not had any cause to make a more detailed assessment. As regards P2P VoIP, it has been assessed that this is not an electronic communications service as the service provider only provides software and does not have anything to do with the conveyance. As regards e-mail, the authority states that this is a service that is covered by the term 'electronic communications service' as it includes the conveyance of signals when e-mails are sent and received. The authority considers that this cannot be viewed in any other way considering the preamble (Item 10) of the Framework Directive.

Furthermore, the German authority considers that hotels and cafés provide an electronic communications service. When assessing who provides the service, issues that are relevant are who the end user concludes the contract with, the person who receives payment and the party that the end user perceives to be the provider of the service. Who performs something from a purely technical point of view is irrelevant. Consequently, an electronic communications service is being provided in cases where cafés or hotels are providing Internet connections, receiving payment for the connection and have customer relations.

### **Spain**

The Spanish authority has not announced an official position as regards the meaning of the terms in question either, except as indicated by the legislation, which basically reiterates the content of the Framework Directive. The

authority states that it has not had any problems applying the legislation, for which reason it has not investigated the meaning of the terms in more detail. However, routing is considered to be included within the meaning of the term 'conveyance of signals', which presupposes certain activity from the provider of the service. As regards e-mail, the authority considers that this service constitutes an electronic communications service, as e-mail cannot be deemed to be one of the information society's services. PTS perceives that the position adopted by the authority is an interpretation *a contrario*; i.e., if the service is not regarded as an information society service it is consequently an electronic communications service. As regards VoIP, the authority, like the other authorities questioned, considers that P2P VoIP is not an electronic communications service. However, the authority is of the opinion that VoIP that enables communication to and from national numbers via gateways constitutes an electronic communications service.

Nor does the Spanish authority consider that cafés and hotels providing the Internet can be deemed to provide an electronic communications service. The reason is that they are a 'final provider of a number of services (Internet, open shop to the public, café...)'. PTS understands the position adopted by the authority to mean that the reason for these services not being deemed to be an electronic communications service is that they are also provided in conjunction with the provision of other kinds of service, not because they should be compared with resale products. However, the Spanish authority considers that Skype In/Out could possibly be deemed to constitute a resale product as Skype does not conduct any gateway independently, but only has contracts with telecom operators regarding access to such a gateway.

### **United Kingdom**

The British authority states that the issue of how a service should be classified depends on the circumstances in each individual case, for which reason the authority makes an assessment on a case by case basis, taking account of the actual and technical circumstances. However, the authority has provided information about some general standpoints (regarding, for example, VoIP, charges and interconnection). It has been concluded that services can be divided into three categories (basic, advanced and more advanced services) based on how much network resources and supplementary functions the services require, and also whether they involve interaction with, processing of or storage of content. It is also stated that more advanced services that involve interaction with, the processing or storage of content may constitute electronic communications services if they consist wholly or mainly in the conveyance of signals. As examples, reference is made to telephone calls using interactive

voice response, e-mails through e-mail servers and voice mail through a voice mail server.

However, the authority does not consider that services, such as the provision of Internet banking and on-line betting, should be regarded as electronic communications services. The reason for this is that these services are mainly characterised by the provision of information and that the conveyance of signals is only of subordinate importance in this context. However, the British authority also observes that services that are not deemed to wholly or mainly comprise the conveyance of signals may be expected to have an underlying transmission service that is an electronic communications service. Distance selling is referred to as one example, where the provider of the content service is a different stakeholder to the provider of the electronic communications service. As regards which stakeholder is to be deemed to be the party providing the electronic communications service, the assessment is conducted in each individual case, taking account of the contractual relationship between the stakeholders.

The British authority also stated that a 'publicly available' electronic communications service means that such a service is available to anyone who is willing to both pay for the service and comply with the conditions for the provision. A service that is limited to a restricted group of individuals and identifiable customers is not a 'publicly available' service. The number of customers a service is provided to cannot alone indicate whether a service is publicly available. A service that has only one customer may be deemed to be publicly available if the said preconditions are satisfied. Conversely, the authority considers that a service provided by a landlord to a large number of tenants is not publicly available. Geographical restrictions are regarded as irrelevant in this context. What is decisive to the assessment instead is the fact that access to the group of potential customers is generally not possible for everyone, but depends on a previous relationship between the provider and customer. The authority also concludes that the way in which a service is marketed may provide guidance in cases that are difficult to assess.

## Appendix 3

### Schedule of consultation instances

During the period 30 October 2008 to 1 December 2008, this report was circulated for consultation with operators/service providers, public authorities and other organisations. The documents circulated for consultation were sent to the following:

Stakeholders notified for the provision of an electronic communications service

Stakeholders notified for the provision of an electronic communications network

Swedish Consumer Bureau for Telecom and Internet (KTIB)

National Police Board (RPS)

Swedish Security Service (Säpo)

Swedish IT and Telecom Industries

Data Inspection Board

Swedish Consumer Agency

Swedish Competition Authority

Swedish Association of Local Authorities and Regions (SALAR)

Swedish Radio and TV Authority (RTVV)

BITOS

MORGAN

NTK

II Stiftelsen (Internet Infrastructure Foundation)

Malin Forsman, Westermark Anjou Law Offices