

## The New European Electronic Communications Code

24/11/2017

**TMT analysis: In September 2016, the European Commission published its proposal for a new Directive establishing the European Electronic Communications Code (EECC) which shall merge and amend the existing Framework, Authorisation, Access and Universal Service Directives. This new legal framework is of utmost importance for the telecoms sector and the future of connectivity in Europe. Stephan Buck, senior associate, and Daniel Preiskel, partner, at Preiskel & Co LLP explain the practical effect of the EECC and its impact upon practitioners.**

### Original News

Council of the EU and Parliament to negotiate on EU telecoms rules [LNB News 11/10/2017 94](#)

*The Estonian presidency of the EU has been granted a general mandate to begin negotiations with the European Parliament on new rules for the electronic communications sector. The rules aim to prepare Europe for the era of 5G by promoting investment, competition, consumer protection and the development of new services.*

### What will be the practical effect of the new Code and how will it impact upon practitioners?

The evolution of the telecoms sector has not only resulted in formerly unknown types of market players, such as over-the-top content (OTT) services (eg WhatsApp) competing with traditional telecom operators, but it has also increased the demand for high-quality fixed and wireless connectivity. Recognition of the need to better regulate the sector in light of these new market dynamics is why it is so important for the European institutions to agree and adopt a new EECC that is fit for purpose.

In contrast to the existing legal framework which mainly promotes competition, the internal market and end-user interests, the EECC supports widespread access to, and take-up of, very high capacity data connectivity, including fixed, mobile and wireless, across the EU.

The newly proposed code includes substantial amendments to the existing legislative framework, as set out below.

### Access provisions

The EECC revises present market analysis procedures, as follows:

- it codifies current best practices on access, which is intended to reinforce the existing significant market power (SMP) access regime
- national regulatory authorities (NRAs) will be required to consider commercial access agreements, as well as regulatory obligations imposed in market analysis
- the maximum three-year market review period will be extended to five years
- the rules for the imposition and revision of regulatory obligations will be revised to provide greater flexibility

There will also be a revision to the improvement of infrastructure competition and network deployment, ensuring access to civil infrastructure, for example ducts and poles held by SMP operators, and non-replicable network assets, such as in-house wiring and cables.

In addition, the Commission, with the support of the body of European regulators of electronic communications (BEREC), shall establish harmonised technical specifications for certain wholesale access products in order to meet the demand for cross-border communications.

A new 'EU-level process' will also be introduced to determine a binding methodology for setting voice termination rates, and to create a mechanism for establishing maximum termination rates at EU level, with a view to alleviating the administrative burden for NRAs.

To sustain the deployment of very high capacity networks throughout the EU, changes to the existing framework include:

- NRAs will survey the state of broadband networks and investment plans across their national territory, and consider 'geographic specificities' in their market analyses
- NRAs shall identify 'digital exclusion areas' where no operator or public authority has deployed or plans to deploy a very high capacity network or has upgraded or extended their legacy network to a performance of at least 100 Mbps download speeds, or is planning to do so

NRAs may organise a call for interest therein with a view to promoting very high capacity network deployment in these difficult areas, and will have powers to act against operators who deviate from their declared intention in digital exclusion areas. The circumstances are clarified in which pricing flexibility can be granted to SMP operators, without compromising competition (pricing flexibility can be beneficial to investors in new networks, provided it does not impede downstream competition).

New provisions are proposed to facilitate commercial co-investment in new infrastructures. The sharing of new network elements between an SMP network owner and access seekers entails a greater degree of risk sharing compared to traditional access products, and can also give a more durable basis for sustainable competition if appropriate conditions on the design of the co-investment are met. This should allow adaptation of regulated access, enabling all co-investors to benefit from first-mover advantages relative to other undertakings. The continued availability of regulated access products to non-participating undertakings, up to the capacity that was available prior to the investment, may still be appropriate.

A simplified regulatory model for wholesale-only networks with SMP will be introduced. This is limited to fair, reasonable and non-discriminatory access rules and will be subject to dispute resolution as necessary. The provisions require strict conditions for a network to be seen as truly 'wholesale-only' and may be particularly appropriate for local very high capacity networks, which might nevertheless be considered to have SMP in the future.

The role of NRAs in accompanying SMP operators that migrate from legacy to new networks, for example, when switching off legacy copper networks, as a means to further support the transition to new networks, is also clarified.

## Spectrum management

The EECC clarifies general objectives and principles in order to guide Member States when managing spectrum at national level. This addresses:

- consistency and proportionality in authorisation procedures
- the importance of ensuring appropriate coverage
- timing considerations when making spectrum available
- the prevention of cross-border or harmful interference, establishing the 'use it or lose it' principle
- fostering shared spectrum use as well as spectrum trading and leasing

The EECC also introduces a mechanism for allowing temporary alternative use for harmonised spectrum subject to clearly defined conditions. More prominence is given to general authorisations, as opposed to individual licences, as well as to shared use of spectrum, in order to ensure that NRAs prospectively develop the authorisation models most appropriate to 5G developments. The conditions attached to a general authorisation for radio frequencies and their rights of use are defined.

Key aspects of spectrum authorisations are proposed to ensure consistency between Member States, for example:

- a minimum licence duration of 25 years
- a clear and simpler process for spectrum trading and leasing
- objective criteria for consistent application based on competition law principles for measures to promote competition-such as spectrum caps, spectrum reservation for new entrants and wholesale access obligations
- clearer conditions for the restriction or withdrawal of existing rights, including by means of the 'use it or lose it' solution and strengthened enforcement roles for NRAs

The Commission may adopt measures to set common maximum deadlines for authorising the use of harmonised spectrum in all Member States and for coordinating the major elements of selection processes and setting criteria for their design.

## Universal service regime

The universal service regime is to be modernised under the EECC, including the suggested removal of legacy services, for example public payphones, directories and directory enquiry services, with a shift towards a focus on broadband. There will be a new obligation upon Member States to ensure affordable access to all end-users to functional broadband internet access services and voice communication.

## Services and end-user protection

There is a newly proposed definition of 'electronic communications service' to include:

# LexisNexis

- internet access service
- interpersonal communications service (including number based and number-independent services (number independent services including services like Skype to Skype calls))
- services consisting wholly or mainly in the conveyance of signals, such as transmission services used for machine-to-machine communications and broadcasting

Regulatory burdens on NRAs shall be lifted where they are no longer needed or adequately covered by general consumer law, for example the power to directly impose retail price regulation on SMP operators. Overlaps with horizontal rules and redundancies in relation to contract, transparency, equivalence of access by disabled users, directory services and interoperability of consumer digital television equipment provisions are streamlined and partly deleted.

New provisions shall address new challenges such as:

- better readability of contracts through a short-form summarising the essential contract information
- the provision of consumption control tools to inform end-users about their current communications usage
- enhanced provisions on price and quality comparison tools, switching rules for the rapidly increasing number of bundles to avoid lock-in effects (key sector-specific provisions, such as maximum contract duration and rights to contract termination, would apply to the entire bundle)
- a provision prohibiting discrimination based on nationality or the country of residence

The maximum service contract period shall be generally two years, but longer separate agreements with end-users will be allowed to facilitate reimbursement of contributions to the deployment of a physical connection and to support network roll-out through instalment-based contributions to network capital costs (the 'demand aggregation' approach).

## Numbering provisions

NRAs may assign numbers to undertakings other than providers of electronic communications networks and services. NRAs will be required to determine certain numbering resources for extraterritorial use of national numbers within the European Union.

## Emergency communications provisions

The Commission shall have the power to adopt delegated acts to ensure effective access to the single European emergency number 112 with regards to caller location, call routing to the 'public safety answering points' and access for disabled end-users in Europe.

## Governance

The governance of NRAs will be strengthened by establishing a minimum set of competences and enhancing their independence requirements, and by providing for appointment requirements and reporting obligations.

There will also be changes to the general authorisation regime. Providers will be required to submit notifications to BEREC, which shall act as a single contact point, establish a register at EU level and forward the notifications to relevant NRAs. A procedure for resolution of cross-border disputes between undertakings shall be introduced by obliging NRAs to consult BEREC.

A double-lock system is introduced in cases where BEREC and the Commission agree on their position regarding the draft remedies proposed and notified by an NRA. The NRA could be required by the Commission to amend or withdraw the draft measure and, if necessary, to re-notify its market analysis to them.

Practitioners will need not just to carefully review and understand the new EECC, but to see how various Member States interpret and enforce it. Seeking guidance by directly contacting the relevant NRA can also help in understanding their interpretation of the new regulatory framework.

## What preparations should practitioners be advising their clients to make in readiness for it?

Practitioners should be advising electronic communications service providers to review carefully their contracts with end-users, to ensure that they will still be compliant after any new obligations introduced under the EECC have come into force, for example regarding the maximum contract duration.

Since the European Parliament, the Council of the EU and the Commission have not yet agreed on the final version of the EECC, which shall thereafter need to be implemented in the Member States, practitioners can assure their clients that there is no need to panic or rush. However, the proposed changes to the original draft—in particular to the access regulations and on spectrum management, that are likely to be approved—could already have a bearing on investment

returns on new telecoms infrastructure. Communications operators planning to invest in fibre roll-out should specifically be advised by practitioners to keep a close eye on the developments leading up to a final EECC.

## **What changes have been introduced to the original proposal during the legislative process and what will be the effect of these changes?**

While the Commission is sticking to its proposal, the European Parliament and Council of the EU have suggested a number of changes, notably in relation to:

- lighter regulation for operators that agree to co-invest in new networks—Member States have proposed granting deregulation on new network elements for a minimum seven years, something that has raised opposition particularly from alternative operators, who warn of the dangers of potential ‘regulatory holidays’ for incumbents
- new spectrum licence terms—several Member States oppose the proposed minimum licence duration of 25 years, but want to maintain national control of the licence terms
- end-user rights-level of harmonisation—while the European Parliament is seeking to allow exemptions from requirements imposing additional consumer protection measures for contract information requirements, financial or volume consumption limits, transparency and early contract termination, the Council of the EU has proposed a transition period allowing current more stringent national measures to continue for two years after the transposition date
- new measures to combat oligopolies

## **What is the likely timeframe for the new Code coming into force?**

This reform will now follow the ordinary legislative procedure, with some particularities imposed due to the fact that it is partly a review and partly a codification of existing law.

It is hard at this stage to predict the likely timetable to a finalised EECC, though we would be surprised if it were to be adopted within the next 12 months. It still needs to go through further debate, amendments and agreement in the European Parliament and in the Council of the EU before it is finally voted as EU law.

After the EECC is agreed and adopted, Member States will likely have a further two years to implement the changes in their national legislation.

*Interviewed by Julian Sayarer.*

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.*

FREE TRIAL