

## The future of connectivity in Europe

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**TMT analysis: Daniel Preiskel, partner, and Stephan Buck, senior associate, at Preiskel & Co LLP explain the practical effect of the new European Electronic Communications Code and its impact upon practitioners.**

### What is the background to this development?

On 17 December 2018, the Directive establishing the European Electronic Communications Code (EECC) was published in the Official Journal of the EU. This EECC Directive EU 2018/1972 (EECC Directive) reforms and incorporates into a single Directive the following Directives which had been the cornerstone of European telecommunications regulation for some 15 years:

- [Directive EU 2002/21/EC](#) (Framework Directive)
- [Directive EU 2002/20/EC](#) (Authorisation Directive)
- [Directive EU 2002/19/EC](#) (Access Directive)
- [Directive EU 2002/22/EC](#) (Universal Service Directive)

This new legal framework is of utmost importance for the electronic communications sector and the future of connectivity in Europe.

### What major changes will be introduced via the EECC?

The new EECC Directive is in general terms a 'modernisation' of the [EU Common Regulatory Framework](#) (which includes the Directives mentioned above) that underpins the [Communications Act 2003](#) and the [Wireless Telegraphy Act 2006](#). These pieces of UK legislation set out the regulation of the telecoms markets, guarantee basic user rights and set out the powers and duties of Ofcom as the national regulator, including how radio spectrum in the UK is managed.

The intention and strategy behind the new EECC Directive is to help facilitate certain important objectives, involving a slight shift away from a pure competition law approach. However, it remains to be seen how it will be implemented and enforced by the National Regulatory Authorities (NRAs) and accordingly whether it will be sufficiently effective.

The EECC Directive introduces a number of key changes.

Firstly, consumers will benefit from strengthened consumer rules that will make it easier to switch between providers and offer better protection for people who subscribe to bundled services, for example. They will also benefit from a cap on the cost of intra-EU calling to €0.19/min (which is set out in the Body of European Regulators for Electronic Communications (BEREC) Regulation). Member States will also have to establish rules for compensation in case of misconduct by providers of electronic communications networks or services.

Secondly, certain regulatory obligations on 'over-the-top' (OTT) services will be introduced which:

- ensure that end-users are equally protected regardless of the type of services they use to communicate
- ensure that 'electronic communications services' also covers services provided over the internet such as messaging apps and email
- require that certain characteristics of the service—rather than the underlying technology—will determine which rules of the EECC Directive will apply

Thirdly, affordable and adequate internet access will be included in the list of universal services that must be available to all consumers, irrespective of their location or income. People with disabilities should have equal internet access.

Fourthly, in order to promote investment in 5G, Member States will, as a general rule, be required to provide operators with regulatory predictability over a period of at least 20 years regarding spectrum licensing for wireless broadband. However, the mobile network operators had been pushing for 25 years.

Moreover, after seven years and then every five years, the European Commission will carry out a review to evaluate in particular whether the ex ante and other intervention powers pursuant to the EECC Directive have proved sufficient to enable NRAs to address uncompetitive oligopolistic market structures and to ensure that competition in electronic communications markets continues to thrive to the benefit of end-users.

Finally, on 17 December 2018, an accompanying regulation was also published in the Official Journal of the EU to turn BEREC into a fully-fledged agency with a broader mandate.

## **What will be the practical effect of the EECC Directive and how will it impact upon practitioners?**

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

### **Access regulations**

The EECC Directive provides for the revision of market analysis procedures, which includes:

- codification of current best practices to provide for legally certain access regulations intended to reinforce the existing significant market power (SMP) access regime
- NRAs to consider commercial access agreements as well as regulatory obligations imposed in market analysis
- the maximum market review period is extended of five years
- the rules for the imposition and revision of regulatory obligations are revised to provide greater flexibility

Furthermore, improvements of infrastructure competition and network deployment must be carried out to ensure access to civil infrastructure (eg ducts and poles) held by SMP operators and non-replicable network assets (eg in-house wiring and cables).

BEREC must identify transnational markets and demand. The European Commission, with BEREC's support, will establish harmonised technical specifications for certain wholesale access products to meet the demand for cross-border communications.

A new 'EU-level process' is 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, further steps need to be taken. These steps will 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 will 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—they can 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 included 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 also can give a more durable basis for sustainable competition if appropriate conditions on the design of the co-investment are met which 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 is introduced, and is limited to fair, reasonable and non-discriminatory access rules and 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 (eg when switching off legacy copper networks), as a means to further support the transition to new networks, is clarified

### **Spectrum management**

Spectrum management is improved through:

- the clarification of general objectives and principles to guide Member States when managing spectrum at national level
- addressing consistency and proportionality in authorisation procedures
- 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 and fostering shared spectrum use as well as spectrum trading and leasing
- introducing 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, including:

- minimum licence duration of 20 years
- 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
- strengthened enforcement roles for NRAs

The European 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**

Modernisation of the universal service regime, suggested removal of legacy services (eg public payphones, directories and directory enquiry services) and focus on broadband must be a priority. New obligations for Member States to ensure affordable access to all end-users to functional broadband internet access services and voice communication must also be taken into account.

### **Services and end-user protection rules**

The new definition of ‘electronic communications service’ will include:

- internet access service
- interpersonal communications service (including OTT number-based and number-independent services)
- 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 will be lifted where they are no longer needed or adequately covered by general consumer law (eg 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 will 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) and a provision prohibiting discrimination based on nationality or the country of residence.

The maximum service contract period will 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 EU.

### **Emergency communications provisions**

The Commission will 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 powers of NRAs are strengthened by establishing a minimum set of competences and enhancing their independence requirements and by providing for appointment requirements and reporting obligations.

There are also changes to the general authorisation regime. General authorisation of electronic communications networks and services other than number-independent interpersonal communications services, should not require any explicit decision or administrative act by the NRAs who in turn must limit any procedural requirements to a declaratory notification only. Where NRAs require notification by providers of such networks and services before they start their activities, such notification should not entail administrative cost for the providers and could be made available via an entry point at the website of the NRAs. In order to support effective cross-border coordination, BEREC is expected to establish and maintain a database of such notifications.

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

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

Practitioners will not only need to carefully review and understand the EECC Directive, but also 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.

The evolution of the telecoms sector has not only brought formerly unknown types of market players (eg OTT services) to compete with traditional telecom operators but has also increased the demand for high-quality fixed and wireless connectivity.

All electronic communications service providers will have to carefully review their contracts with end-users, to ensure they will still be compliant after any new obligations introduced under the EEC Directive have come into force (eg regarding the maximum contract duration).

## What is the likely impact of Brexit upon implementation of the EEC Directive in the UK?

If the UK leaves the EU in March 2019 with no deal in place, parts of the UK electronic communications regulatory framework would no longer be appropriate without corrections (eg the requirement to notify matters to the European Commission would not be applicable because the UK would cease to be a member of the EU).

As regards the EEC Directive, the UK government has indicated that as the EEC Directive was adopted before EU exit day of 29 March 2019, albeit with a transposition date post-exit, it is minded to implement its substantive provisions according to a similar timetable. The timetable in the EEC Directive for transposition into national law is two years.

After March 2019, irrespective of the outcome of the negotiations between the UK and the EU, we do not expect there to be a significant impact on how businesses operate under the telecoms regulatory framework and how consumers of communications services are protected. This is because the EU-derived rules applicable to communication providers and governing the way Ofcom regulates telecoms markets are already implemented in UK law. In any event, the Member States have two years in which to implement the EEC Directive and during this period the UK communications regime would remain consistent with Member States legislation based upon the [EU Common Regulatory Framework](#).

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*Interviewed by Kate Beaumont.*

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