

# Good Call: A New Code to Regulate Communications in Europe

## IN SHORT

**The Situation:** On December 18, 2018, the European Union published its European Electronic Communication Code ("Code").

**The Result:** The Code overhauls the current legislative framework for telecommunications with the aim of consolidating existing legislations into a single Act.

**Looking Ahead:** The Code must be implemented in national legislation by December 21, 2020, although price caps for intra-EU calls and texts will begin to apply on May 15, 2019.

The [European Electronic Communication Code](#) broadens its scope to over-the-top players ("OTT") and promotes the rollout of very high capacity networks (5G and fiber networks). The European Parliament also introduced additional measures to impose caps on retail tariffs for intra-EU voice calls and texts, which ultimately were inserted in the Body of European Regulators for Electronic Communications ("BEREC") Regulation [2018/1971](#).

The main changes brought by the Code are the following.

### Single Act

The Code will consolidate the existing EU legal framework for electronic communications: the Framework Directive, the Access Directive, the Authorization Directive, and the Universal Service Directive. Only the E-Privacy Directive will remain separate and is expected to be replaced by the E-Privacy Regulation (which still being discussed by EU Parliament and Council). Several provisions of the Code require the adoption of implementing and delegated acts by the Commission or Guidelines by the BEREC.

### Scope of Code Expanded to OTT Services

OTT services that provide interpersonal communications services are now being regulated. A distinction is made between number-based OTT services and number-independent OTT services with the latter benefiting from a lighter regulatory regime. OTTs must essentially abide to the end-users protection obligations and the security obligations (including security breach notification obligation) provided in the Code. End-users protection obligations include obligations on contractual information, pricing and quality transparency (including comparison tools), maximum contract duration, notice for termination and consumer switching.

The Code also foresees the possibility for national regulatory authorities ("NRAs") to impose interoperability obligations on OTTs, under specific circumstances.

### Enabling 5G Deployments

The Code facilitates consistent spectrum allocations across the EU. The Code introduces a minimum license duration of 15 years with an almost automatic 5 year extension. There are more detailed process for the renewal, transfer, sharing and lease of spectrum rights. To promote competition, the Code enables NRAs to impose spectrum caps, and reserve certain frequencies for new entrants. NRAs can also impose conditions on spectrum allocation



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such as passive or active sharing or commercial roaming obligations. Finally, the Code requires 5G spectrum (i.e., 3.4-3.8 GHz band and 1 GHz of the 24.25-27.5 GHz band) to be assigned by 31 December 2020.

To encourage the development of small area wireless access points (i.e., small cells expected to be widely used for 5G), operators are granted right of ways on public infrastructure suitable for deploying such cells. Furthermore, their deployment may not be subject to prior permits, fees or charges (other than administrative charges).

### Fostering Fiber Rollouts

NRAs can impose on any operator or cable owners obligations to give access to cabling and associated facilities inside buildings or until the first distribution/concentration point or even beyond that point if necessary. This applies regardless of market power but the replication of the cabling must be economically inefficient or physically impractical. Imposing such symmetrical access requirements requires conducting a market analysis and considering guidelines to be released by BEREC.

Notwithstanding the above, the Code maintains as its core the principle of significant market power ("SMP") regulation whereby only dominant firms should be regulated. It prolongs time periods for market analyses: instead of three years, NRA can now conduct market analysis every five years. This gives operators more regulatory predictability but increases the risk that obligations be imposed for longer than necessary or do not reflect new market needs. The Code introduces new access remedies for SMP operators, namely access to (i) civil infrastructure, and (ii) specific network elements (such as local loop and sub-loop). However, it is unclear whether that would really add anything as (i) civil infrastructure is already available via Directive 2014/61, and (ii) access to the local loop and sub-loop was generally already available under SMP regulation.

Finally, the Code introduces a new co-investment regime to facilitate investments in fiber to the home (FTTH) or to the base station (FTTS) networks. Under such regime, SMP operators will be exempted from regulation in case they offer commitments with regards to deploying such networks (e.g., conditions for co-ownership and co-financing, transparency of the co-invest offer, etc. ). Access seekers not participating in the co-investment may still benefit from access but (i) starting on the level of quality, reach and speeds that was available before the deployment and (ii) on financial conditions including risk premiums. The commitments must be subjected to a prior market analysis and be binding for at least 7 years. While no additional remedies should in principle be imposed on these operators, the NRA can impose *ex post* remedies in case there are significant competitive issues.

### Pricing Regulation for Termination Rates and Intra-EU Calls

By December 31, 2020, the Commission will set, by delegated act, a single EU-wide voice termination rate. Regulation 2018/1971, adopted in parallel to the Code, also foresees caps on retail tariffs for mobile and fixed intra-EU voice calls (€0,19/minute) and texts (€0,06/text).

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### THREE KEY TAKEAWAYS

1. The Code should provide a more efficient and flexible framework for the deployments of FTTH and 5G. Yet, it will not be implemented until 2020, when the deployment of these technologies might already be well underway.
2. Within the next two year, the Commission and BEREC must adopt a significant number of implementing acts and guidelines. In the meantime, Member States cannot adopt measures that would compromise the Code, and existing legislation should be interpreted by courts in conformity with the Code, to the extent possible.



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3. OTT operators should assess whether they fall within the ambit of the Code and adapt their trade practices and security measures accordingly.

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