

# COMMENTARY



## A New Telecoms Code for Europe

The European Commission has proposed an ambitious overhaul of EU telecoms rules. Announced concurrently with the State of the (European) Union address of President Juncker, the main objective of these reforms is to encourage investments in very high capacity networks, such as fiber networks and fifth-generation mobile systems ("5G"). By 2025, the Commission wants to make 5G mobile communications systems commercially available in all urban areas and major transport corridors in Europe and ensure that all households have access to internet connectivity offering a download speed of at least 100 Mbps and upgradeable to gigabit speed.

The Commission's intervention is timely, as international benchmarks show that Europe is lagging behind the United States and other developed economies in fast broadband access and needs to do more to attract investments. Market players with infrastructure investment plans will generally find this reform a positive development, although some provisions may expand the leeway for regulatory intervention by national regulatory authorities ("NRAs").

The centerpiece of the set of legislative proposals put forward by the Commission is the new European Electronic Communications Code ("EECC"), which

consolidates and replaces the four main directives of the current EU regulatory framework for the electronic communications sector—the Framework Directive, the Access Directive, the Authorisation Directive, and the Universal Service Directive. In addition, the Commission proposed a new structure for the Body of European Regulators of Electronic Communications ("BEREC"), which would become a full-fledged EU agency, as well as EU subsidies for free Wi-Fi access in urban areas (known as the "WiFi4EU" initiative).

In this *Commentary*, we discuss the implications of the proposal for the telecoms industry, focusing on four key areas: access regulation, spectrum management, consumer protection, and the role of NRAs and BEREC.

### Access Regulation: Reducing Regulatory Pressure and Introducing Alternative Access Models

The access regulation proposals do not revolutionize the existing regime, which is solid and well-established, but make a subtle shift in the emphasis from the promotion of competition to the promotion of investments, while alternative access models are also being introduced.

The availability and take-up of very high capacity connectivity are now elevated to a core objective of the EU regulatory framework for the telecoms sector, next to more traditional objectives such as promoting competition and consumer protection. In the same vein, the access regulation is tweaked in various ways to make it more investment-friendly.

The general approach to the identification and definition of relevant markets, the market analysis and significant market power (“SMP”) assessment, and the imposition of remedies remains essentially the same. The review period is extended from three to five years, and some principles and best practices are now codified, such as the “three criteria test” for identifying markets that are eligible for *ex ante* regulation.

The proportionality requirements for the imposition of access regulation are tightened. Thus, the draft EECC explicitly provides that wholesale access regulation can be imposed on SMP operators only when and where necessary to address *retail* market failures. The aim is to avoid unnecessary wholesale regulation in the absence of end-user harm. At the same time, the proposal repeals the possibility for NRAs to directly impose remedies on SMP operators at the retail level.

The same proportionality consideration is also reflected in the proposed access pricing regulation, which allows for more pricing flexibility, in particular by codifying the core principles of the European Commission’s 2013 Recommendation on consistent nondiscrimination obligations and costing methodologies. According to these principles, NRAs should not impose or maintain price controls (such as an obligation to apply cost-oriented prices) where a demonstrable retail price constraint is present and other obligations, including in particular an economic replicability test, already ensure effective and nondiscriminatory access. In addition, when considering access remedies, NRAs are required to first consider mandating access to civil engineering (such as ducts and poles) and to impose other access remedies only if they conclude that access to civil engineering alone would not be sufficient to achieve the objectives of the regulatory framework.

The Commission is also proposing alternative regulatory models to the traditional SMP-based access regulation. For example, the draft EECC provides that NRAs must not impose access obligations on SMP operators with respect

to network upgrades that are open to co-investment offers on reasonable and nondiscriminatory terms, provided that: (i) such upgrades significantly contribute to the deployment of very high capacity networks and (ii) access seekers not participating in the co-investment scheme continue to benefit from an access product with the same quality, speed, conditions, and end-user reach as was available before the network was upgraded.

The draft EECC also aims to promote wholesale-only models, where the business case of the network owner is to sell capacity to as many retail providers as possible. SMP operators adopting such a model would benefit from a lighter regulatory regime than vertically integrated SMP operators, limited to the obligation to provide wholesale access on fair, reasonable, and nondiscriminatory terms, with only *ex post* monitoring by the NRAs. While this may create incentives for voluntary functional separation, mandatory functional separation looks set to remain an exceptional remedy under the proposals, meaning that UK regulator Ofcom’s decision earlier this year to force BT to more fully separate its networks business (Openreach) will not become the norm in Europe.

A potential source for increased regulatory intervention, however, could be the Commission’s proposal to allow for symmetric access obligations on the owners of nonreplicable network assets, even if they have not been designated as having SMP. In principle, this will be limited to access to wiring and cables inside buildings or up to the first concentration or distribution point outside the building. NRAs may extend those obligations to strictly nonreplicable assets beyond the first concentration or distribution point, while remaining as close as possible to the end user. The need for well-defined checks and balances for such interventions could be a concern for the network owners and is likely to be debated as the legislative process unfolds.

Another driver of reform of the access regulation is the Commission’s attempt to increase uniformity and lighten the regulatory burden for NRAs. For instance, the draft EECC introduces a binding methodology for setting voice termination rates and creates a mechanism for establishing maximum termination rates at the EU level, in order to alleviate the administrative burden for NRAs, allowing them to focus their attention on the analysis of the broadband markets.

Finally, the proposal requires NRAs to monitor SMP operators' initiatives for decommissioning legacy network infrastructure (known as the copper switch-off) and, in particular, to ensure a smooth transition of alternative operators to suitable alternative access products. The proposal foresees that NRAs may withdraw access obligations to the legacy copper network in order to avoid a "hold up" by access users resisting migration despite appropriate conditions for migration being in place (including adequate notice and the availability of comparable NGA access products). However, the proposal does not require operators to switch from copper to fiber networks, and it defines "very high capacity networks" in a technology-neutral way, which may also include vectoring solutions on copper networks.

## Spectrum Management: Increasing Flexibility and Harmonizing Spectrum Usage Across the EU

To promote investments in 5G deployment, the European Commission aims to enhance predictability and consistency of spectrum assignment and management across Member States and maximize flexibility, sharing, and efficiency in the use of spectrum.

The Commission's proposals give more prominence to general authorizations as opposed to individual licenses as well as to shared use of spectrum. They promote more flexible use of spectrum by facilitating leasing and trading of radio frequencies as well as the more general use of spectrum sharing, especially in less densely populated areas.

The draft EECC also harmonizes key aspects of individual spectrum usage rights, including minimum license duration (25 years), the process for granting and renewing rights, and the conditions for restricting or withdrawing existing rights (in particular by establishing the "use it or lose it" principle). Consistency is further enhanced by the introduction of a peer review mechanism within BEREC for draft NRA decisions on spectrum assignments.

Finally, the proposal introduces a framework for voluntary pan-EU or multi-country spectrum assignment procedures and simplifies the conditions for access to Wi-Fi and for the deployment and operation of small cells, in order to reduce the costs of deploying very dense networks.

## End-User Protection and Universal Service: Capturing OTTs and Focusing Universal Service on Broadband Affordability

Recognizing the growing importance of "over-the-top" ("OTT") services, the draft EECC amends the definition of "electronic communications services" to include "interpersonal communications services," which are services allowing interactive (bidirectional) communication between two or a determined number of natural persons. Such services include Skype, Facetime, WhatsApp, Facebook Messenger, and WeChat. The proposal extends the application of various end-user protection rules to these services. In doing so, it distinguishes between number-based and number-independent interpersonal communications services. Whereas the former will be subject to largely the same end-user protection rules as more traditional electronic communications services, the latter will be regulated only to the extent that public policy interests (such as security of communications) require.

The proposal modernizes the universal service regime, removing outdated requirements (such as the provision of public payphones and telephone directories) while introducing a new requirement to provide a basic broadband connection enabling functional internet access services and voice communications at an affordable price (to be monitored by the NRA).

In addition, the proposal contains various amendments to the consumer-protection provisions, including switching rules for bundles to avoid lock-in effects. The proposal provides for a maximum service contract period of 24 months (although Member States can adopt or maintain a shorter maximum initial commitment period) but allows longer agreements with end users to support network roll-out (e.g., to cover the higher costs of connecting remote households). Where the end user has agreed in a separate contract to installment payments for the deployment of a physical connection, the duration of this contract may exceed two years and run until the infrastructure has been fully repaid. If the end user wants to switch providers before the infrastructure has been fully repaid, he can choose to either pay off the remainder of the infrastructure cost at switching, or continue paying the infrastructure provider.

## Institutional Aspects: Improving Coordination and Efficiency but No European Regulator

To strengthen the role of independent NRAs, the Commission proposes a set of minimum competences and guarantees for independence.

Short of establishing a European regulator, BEREC is being strengthened in various ways, which should contribute to regulatory consistency across the EU. We will list only some of the most salient examples here.

BEREC will provide guidance to NRAs called upon to cross-border disputes between operators, except for cross-border disputes with respect to radio spectrum coordination, for which the Radio Spectrum Policy Group will play an advisory role instead.

In the context of the SMP analysis, the draft EECC introduces a “double-lock” system for notified draft NRA decisions: if BEREC shares the Commission’s serious doubts about a notified draft measure (but only then), the Commission may require the NRA to amend or withdraw the measure and, if necessary, to re-notify it.

BEREC is also empowered to identify transnational markets, as well as to identify transnational demand even where markets remain national or sub-national. If BEREC identifies a transnational market, the NRAs concerned must conduct a joint analysis of such market and decide whether to impose regulatory obligations on this market. If BEREC concludes that a transnational end-user demand exists and is significant, it may issue guidelines to NRAs on common approaches to meet the identified demand (including, where appropriate, the imposition of remedies).

## Conclusion

The legislative package proposed by the Commission still has to go through the legislative process, and it is likely to undergo significant changes in the hands of the European Parliament and the Council. We will probably have to wait for two more years before the final package is adopted.

Nevertheless, we can already draw conclusions as to the future of the EU regulatory framework. While the promotion of competition will remain a core objective of this framework, the proposals of the Commission, if successful, should contribute to the availability and take-up of very high capacity connectivity, both fixed and mobile. As a result, EU telecom rules may become more “investment friendly” going forward. This being said, the institutional and legal architecture proposed remains largely decentralized and still allows room for regulatory interventionism, which could undermine the ambitious connectivity objectives set for 2025.

Read the [EC’s proposed directive of 14 September 2016](#).

## Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com/contactus](http://www.jonesday.com/contactus).

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