

Client Alert

The European Union Adopts a New Telecoms Code

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Overhaul of the Regulatory Framework for the Telecommunications Sector Aims to Bolster Investments in High-Speed Networks

On December 20, 2018, a directive establishing the European Electronic Communications Code (the Code) entered into force. The new Code represents the first complete overhaul of the regulatory framework for the telecommunications sector since 2002; the last significant update dates from 2009. The Code consolidates and replaces the four existing directives that constitute the EU regulatory framework for the electronic communications sector, *i.e.*, the Framework Directive, the Access Directive, the Authorization Directive, and the Universal Services Directive. The Member States have until the end of 2020 to transpose it into national law. Price caps for intra-EU calls and texts will kick in as soon as May 15, 2019.

The Code extends the scope of the regulatory framework to “over-the-top” (OTT) services that provide similar functionality to traditional telecommunications services; tweaks the access regime in various ways to make it more investment-friendly; includes measures to ensure a swift and coordinated roll-out of 5G mobile systems across the Union; and reinforces consumer rights. The Code marks a subtle, but unmistakable shift in regulatory emphasis, from promoting competition to encouraging investments in very high-capacity networks, such as fiber networks and fifth-generation (5G) mobile systems. The promotion of access to, and take-up of, very high-capacity networks by citizens and businesses is even elevated to the status of a general objective, alongside the promotion of competition.

Much of the press attention surrounding the new Code has focused exclusively on the “reverse 112” public warning system in case of major calamities and on the caps on retail tariffs for intra-EU voice calls (€0,19/minute) and texts (€0,06/text), which were debated in the context of the Code, but are set out in a separate Regulation. In this Alert, we highlight some of the most significant new features of the Code for industry actors, focusing on four key areas: the scope of application, access regulation, radio spectrum management, and consumer protection.

Expanded Scope of Application of the Regulatory Framework

One of the most significant developments in the telecommunications sector in recent years has been the development of so-called “over-the-top” (OTT) services, *i.e.*, services provided over a public internet connection. Some of these services (*e.g.*, messaging services such as Whatsapp, Facebook Messenger, Skype, Viber, WeChat etc.) compete with “traditional” telecommunications services (*e.g.*, voice telephony and SMS), thereby eroding the revenues of telecommunications operators precisely at a time when they have to invest heavily in next-

generation network infrastructure to keep up with ever-increasing demand for bandwidth (which is partially driven by the use of these OTT services).

Currently, it is unclear whether and to what extent many of these OTT services are within the scope of the regulatory framework for electronic communications services, as attested by conflicting case law of national courts and pending cases before the Court of Justice, such as the *SkypeOut* and *Gmail* cases (C-142/18 and C-193/18). This arguably leads to a distortion of competition, as these services are increasingly used by consumers as substitutes for traditional telecommunications services while escaping most of the regulatory obligations applicable to the latter.

The Code attempts to address this through a more functional definition of “electronic communications services”. The concept of electronic communications services is expanded to include so-called “interpersonal communications services” (ICS), *i.e.*, services that enable interpersonal and interactive exchange of information over electronic communications networks between a finite, as opposed to a potentially unlimited, number of natural persons, which is determined by the sender of the communication. According to the recitals, this covers services like voice calls between two individuals, but also all types of emails, messaging services, or group chats, but does not include linear broadcasting, video on demand, websites, social networks, blogs or machine-to-machine communications. Also excluded are interpersonal communications facilities which constitute only a minor and ancillary feature to another service and cannot be used without that principal service (*e.g.*, the chat facility of video games).

The Code makes a distinction between number-based and number-independent ICS. The former include services such as SkypeOut or Viber Out, which allow users to make calls to national or international telephone numbers rather than only so-called “peer-to-peer” (P2P) communications. In the initial proposal of the Commission, number-independent ICS (such as P2P VoIP services) were only subject to a minimal set of obligations concerning network security and service accessibility for disabled persons. In the final text, many of the exceptions for number-independent interpersonal communications services have been removed. For instance, most of the consumer protection provisions apply to both types of ICS. Nevertheless, the distinction is maintained in some areas. Most notably, regulators’ ability to impose interoperability obligations is much more limited for number-independent than for number-dependent ICS. Overall, number-independent ICS are subject to a lighter regulatory regime than number-dependent ICS.

Access Regime

Like the current framework legislation, the access regime of the Code provides for both symmetric access obligations, which can be imposed on all operators, and asymmetric obligations, which can only be imposed on operators which have been designated as having “significant market power” (SMP) in a relevant market, based on a market analysis carried out periodically by the national regulatory authorities (NRAs). The concept of SMP is equivalent to that of “dominance” in competition law.

Regarding **symmetric obligations**, the NRAs retain their powers to impose obligations on undertakings that control access to end-users to interconnect their networks or to make their services interoperable, where

necessary to ensure end-to-end connectivity (a.k.a. “any-to-any obligations”). However, as already mentioned, NRAs can now also impose interoperability obligations on providers of ICS (although only under very restrictive conditions as far as providers of number-independent ICS are concerned).

The powers of NRAs to impose symmetric access obligations on owners of non-replicable network assets (“bottleneck facilities”) are expanded. In this case, the regulated entities are not necessarily operators of electronic communication networks or services, but owners of non-replicable wiring and cables and associated facilities. Whereas currently, NRAs can only impose access to such assets inside buildings and up to the first concentration or distribution point outside buildings, the Code also enables them, under certain conditions, to impose access beyond the first concentration or distribution point. Thus, symmetric regulation may in the future be applied to network elements previously reserved to asymmetric (SMP-based) regulation. However, symmetric regulation remains subject to strict proportionality requirements.

The **asymmetric (SMP-based) access regime** does not undergo fundamental changes, but is tweaked in various ways to make it more investment-friendly. The general approach to asymmetric access regulation – periodic market reviews to identify markets where a single operator or several operators jointly have SMP – remains the same, but the review periods are lengthened from three to five years in order to improve regulatory stability. The Code now also provides for the definition and assessment of transnational markets. The task of defining such transnational markets, as well as that of identifying transnational demand even where markets remain national or subnational, is entrusted to the Body of European Regulators for Electronic Communications (BEREC). If transnational markets are defined and warrant regulatory intervention, NRAs should cooperate to identify the appropriate regulatory response.

In addition, some guiding principles for the NRAs’ market analysis, which are currently only set out in Commission Recommendations (*i.e.*, soft law instruments), are now codified, *e.g.*, the “three criteria test” for identifying markets which are susceptible to *ex ante* regulation or the conditions for not imposing or withdrawing regulated access prices.

In relation to the concept of SMP, we note that proposals to introduce new concepts to make it easier for NRAs to deal with so-called “tight oligopolies”, even in the absence of demonstrable single or joint SMP, have not made it into the final text. BEREC in particular had argued that the high threshold to demonstrate joint SMP created a regulatory gap for highly concentrated oligopolistic markets. However, the Code requires NRAs to take the utmost account of the Commission’s SMP Guidelines which, in their 2018 revision, closely adhere to the approach in competition law and therefore do not recognize a third regulatory concept, besides single and joint dominance. The introduction of such a concept would have been a significant departure from competition law principles and does not seem to have a foundation in sound economic theory.

Overall, the proportionality requirements for the imposition of remedies are strengthened, in accordance with the principle that market regulation should apply only where end-user interest requires it and commercial arrangements between operators do not deliver competitive outcomes.

An example of the increased emphasis on proportionality is the codification of the principle that NRAs should give priority to less intrusive forms of access. The Code provides in particular that NRAs should not impose

network access where access to civil engineering (*i.e.*, access to structures supporting or surrounding network elements, such as buildings, antennae, masts, towers, ducts, poles, inspection chambers, manholes, cabinets etc.) alone would be a proportionate means to promote competition. Furthermore, they should not consider mandating access to active network elements unless passive or virtual access is not sufficient to bring about effective competition.

In addition, the Code provides for several ways in which SMP operators may lighten the burden of regulation, in particular with respect to newly deployed very high-capacity networks.

An important innovation of the Code is that SMP operators will be able to offer voluntary commitments to NRAs which aim to address competition concerns identified by the NRA and which the NRA then takes into account in deciding the appropriate regulatory obligations. The NRA, taking into account the views of other market participants by means of a market test, may make such commitments binding. In that case, it shall take them into account in its market analysis and not impose further obligations for issues that are already adequately addressed by the commitments.

The Code also provides for a specific type of commitment, namely a commitment of voluntary separation by vertically integrated undertaking, *i.e.*, a separation of the retail and wholesale business. The Code more generally seeks to promote wholesale-only models by providing that wholesale-only undertakings which offer network access to all retail providers on fair and non-discriminatory terms should only be subject to light-touch regulation.

Under the Code, SMP operators can also avoid burdensome regulation by offering voluntary commitments to open the deployment of new very high-capacity networks to co-investment, again on fair and non-discriminatory terms. The durability of such co-investment schemes should however be guaranteed by giving co-investing operators “rights of a structural character”, enabling co-investors to compete effectively and sustainably in the long term in downstream markets where the SMP operator is also active. Furthermore, NRAs should also safeguard the rights of access seekers who do not participate in a given co-investment. It is hoped that such co-investment schemes will stimulate investment in next-generation networks, by allowing operators to share risks and costs.

The Commission initially proposed repealing the possibility for NRAs to impose *ex ante* regulatory obligations in retail markets, such as price controls for retail services. However, in the final text, this possibility is left open, albeit under strict conditions of proportionality: namely, only where the imposition of regulation in the corresponding wholesale markets would not suffice to fully address the market failure identified at the retail level. This is consistent with the already well-established principle that NRAs should first consider regulation on the market most upstream in the value chain, and regulate further downstream only if such upstream regulation falls short of creating the conditions for effective competition.

Notwithstanding this emphasis on proportionality, the powers of NRAs are also expanded in certain respects. Notably, NRAs will not only be able to impose regulatory obligations in the market where the regulated operator has been designated as having SMP, but also in closely related markets, where the links between the two markets allow leveraging of market power from one market to the other.

Procedurally, we note that the final text of the Code abandons the European Parliament’s proposal to introduce a “double-lock” system for notified draft NRA decisions, under which the Commission would have been able to require an NRA to amend or withdraw a notified draft decision only if BEREC shared the Commission’s serious doubts about the measure.

Radio Spectrum Management

To promote investments in the deployment of 5G mobile services, the Code includes provisions enhancing the predictability and consistency of spectrum assignment and management across the European Union, as well as some new rules aimed at maximizing flexibility, sharing, and efficiency in the use of spectrum.

The Member States shall facilitate the roll-out of 5G by making available sufficient appropriate radio spectrum by the end of 2020. More generally, they shall ensure that spectrum harmonized at the EU level for use by electronic communications networks and services is made available for such use in a timely manner and coordinate as much as possible the timing of such assignments. They shall also ensure that spectrum assignments at the national level do not cause cross-border harmful interference.

The Code encourages Member States to favor general authorizations over individual licenses, as well as to facilitate shared use of spectrum. So far, the fact that spectrum usage rights were usually assigned on an individual basis, as well as competition law considerations, have discouraged mobile operators from engaging in spectrum sharing. However, differences in both the technological characteristics and the economics of 5G compared to previous generations of mobile communications technology, make spectrum pooling an attractive and sensible option, especially in sparsely populated areas, without sacrificing too much in terms of service differentiation.

The Code also harmonizes key aspects of individual spectrum usage rights (*i.e.*, mobile licenses), including the minimum license duration, the process for granting and renewing rights (including by introducing a peer review mechanism for spectrum assignment procedures), and the conditions for restricting and withdrawing rights (including by establishing a “use it or lose it” principle).

Whereas the Commission had initially proposed to mandate a minimum license duration of 25 years to give investors legal certainty, the final text only provides for a minimum duration of 15 years. At the same time, the Code also requires Member States to ensure regulatory predictability for the holders of the rights over a period of at least 20 years regarding the conditions for investment in the infrastructure which relies on the use of the licensed radio spectrum.

The Code also provides for cooperation between Member States regarding the authorization process for individual rights of use for spectrum, including by jointly conducting the selection process to grant such rights. This opens the possibility of *e.g.*, multi-country or even pan-EU spectrum auctions.

Consumer Protection

The Code strengthens consumer rights in various ways.

It imposes some new obligations of transparency towards end users regarding terms and conditions, prices and service levels. End users have to be provided with best tariff information at least annually.

Several provisions aim to encourage provider switching and to protect end users against “lock-in” effects, including for bundled offers. The initial commitment period in service contracts is capped at 24 months (although the Member States can mandate shorter maximum initial commitment periods), but an exception is made for agreements to support network roll-out (*e.g.*, to cover the higher cost of connecting remote households). Where the end user has agreed in a separate contract to pay in installments for the deployment of a physical connection, the duration of the contract may exceed 24 months and run until the infrastructure has been fully repaid.

Where a contract provides for the automatic extension of a fixed-duration contract, end users are entitled to terminate the contract at any time with a maximum one-month notice period (which may be shortened by the Member States), and without incurring any costs other than the costs of receiving service during the notice period.

In addition to already existing number portability requirements, the Code also provides for the possibility of keeping a telephone number for up to one month after the end of the contract and the right to a refund of unused prepaid credit. End users also have a right to compensation in case of delays in, or abuses of, the porting or switching processes.

The Code modernizes the universal service regime, removing obsolete requirements (such as the provision of public payphones and telephone directories) while introducing a new mandate to provide a basic (fixed) broadband connection enabling internet access and voice communications services at an affordable price.

Conclusion

The adoption of the Code is the culmination of a long and arduous legislative process that started over 2 years ago, in September 2016, when the Commission first tabled a proposal for a new Telecoms Code on the occasion of President Juncker’s State of the Union speech. In this speech, President Juncker singled out the promotion of investments in, and the widespread availability of, high-speed connectivity as one of the main policy objectives of the European Union for the following years. The proposal was also part of an ambitious package comprising several measures aimed at transforming the Union into a “Gigabit Society”, including plans to fully deploy 5G mobile systems across the European Union by 2025 and to make free WiFi access available in all local communities by 2020.

While promoting competition remains a core objective of the EU regulatory framework for the telecommunications sector, the Code marks a shift in a more investment-friendly direction, in particular as regards next-generation networks (fiber networks and 5G mobile networks). However, the lengthy legislative process has also produced an extremely complex, almost unreadable piece of legislation that is liable to confuse and bewilder the uninitiated. It is fair to say that in some respects, the Code falls short of its initial ambitions. For instance, it does not create a fully level playing field between telecommunications operators and OTT providers; the initially proposed 25-year minimum duration for spectrum licenses was watered down to a

guarantee of 20 years of “regulatory predictability”; and measures to coordinate the roll-out of 5G and harmonize the rules for spectrum awards were also toned down. As always, the proof of the pudding will be in the eating, but we are hopeful that the Code will contribute to the achievement of the European Union’s ambitious goal to become a “Gigabit Society”, where very high-speed connectivity (both fixed and wireless) is available for all.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Thomas De Meese

Partner – Brussels

Phone: +32.2.282.1842

Email: tdemeese@crowell.com

Karl Stas

Senior Counsel – Brussels

Phone: +32.2.214.2888

Email: kstas@crowell.com