

The new European Electronic Communications Code (EECC)

A concise legal appraisal of its final draft

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By

Ioannis Tzionas

Professor of European & International Economic Law

Historical & introductory elements

- Historical landmarks
 - 2002 → First generation of legislation (5 directives)
 - 2009 → Second generation of legislation (amendment and development of the above directives)
 - 2010 → The “Europe 2020 strategy” was launched by the Commission
 - ◆ It underlined the importance of broadband deployment in order to provide affordable communications to businesses and consumers
 - 2010 → The Digital Agenda of Europe (DAE) was adopted
 - ◆ It was conceived as one of the seven flagship initiatives of the “Europe 2020” in order to define the key enabling role that the use of ICTs will have to play if Europe 2020 wanted to succeed in its ambitions
 - 2015 → The Commission endorsed the Digital Single Market (DSM) Strategy
 - ◆ This is so significant EU initiative that it has been regarded as the “Fifth Fundamental Freedom” of the EU, alongside with the free movement of goods, persons, services and capital

- On 14 September 2016, the Commission proposed a new **European Electronic Communications Code [EECC]** (hereinafter referred to as “The Code”) which was designed to overhaul the existing legislative framework for telecommunications.
- The Code takes into account market dynamics, consumer trends and technological developments, all of which have significantly changed since 2009 when the framework was last amended.
- The proposal was followed by views expressed by advisory committees, national parliaments and stakeholders
- Currently trilogue negotiations (European Parliament, the Council and the Commission) are conducted.
- It is expected to become legislation during next spring.

Existing legal framework

- The **“Framework Directive”** 2002/21/EC on a common regulatory framework for electronic communications networks and services as amended by Directive 2009/140/EC and Regulation 544/2009
- The **“Access Directive”** 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities as amended by Directive 2009/140/EC
- The **“Authorisation Directive”** 2002/20/EC on the authorisation of electronic communications networks and services as amended by Directive 2009/140/EC
- The **“Universal Service Directive”** 2002/22/EC on universal service and users' rights relating to electronic communications networks and services as amended by Directive 2009/136/EC
- The **“Directive on privacy and electronic communications”** 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector as amended by Directive 2006/24/EC and Directive 2009/136/EC
- The **“BEREC Regulation”** 1211/2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office
- The **“Roaming Regulation”** 531/2012 on roaming on public mobile communications networks within the Union

BRIEF REFERENCE TO THE AMENDMENTS INTRODUCED BY THE CODE

- As a general remark at the outset, the draft Code introduces amendments both to policy objectives and to the core regulatory areas
- Code amendments to the current policy objectives
- The existing regulatory framework serves three fundamental policy objectives:
 - To promote competition
 - To improve the functioning of the internal market
 - To safeguard and reinforce the interests of end-users/consumers
- In this respect, the Code streamlines the presentation of the current objectives and complements them with a new one of wide spread access to, and take-up of, Very High Capacity (VHC)* connectivity across the EU

Amendments related to access regulation

- The Code limits the conditions under which **market access** obligations can be imposed and gives regulators the possibility to review markets every 5 years (currently every 3 years). In order to support **infrastructure competition** the NRAs may oblige SMP operators to meet reasonable requests for access to their civil infrastructure (antennae, towers and poles). However, access to non-replicable network assets is limited in order to safeguard investment incentives, and can be widened only in limited circumstances (e.g. to enable alternative network deployment in sparsely populated areas).
- It proposes deployment of **VHC networks** (of fibre-optic cables at least up to the distribution point, or other networks of similar performance). SMP operators which make investments in such networks may benefit from lighter price regulation.
- New network elements contributing to network deployment may be exempted from SMP obligations if they are open to **co-investment** from other operators. SMP operators who do not have retail activities but fund networks privately and sell or rent access to them to operators (**wholesale-only networks**) also gain the possibility to benefit from lighter market-access obligations and pricing flexibility.
- The Code requires NRAs to examine the state of broadband networks and investment plans so that their interventions and analyses are based on a good understanding of local specificities. The NRAs are obliged to identify '**digital exclusion areas**' without high-capacity networks and may organise calls for interest to deploy networks there.
- The proposal also modifies the current system of **voice termination fees** payable by the operator of the person making the call.

Amendments to spectrum management

- The Code contains improved harmonisation measures and procedures as well as common objectives and principles to guide spectrum management at national level.
- New provisions include giving more prominence to general authorisations rather than individual licenses, promoting shared use of spectrum, obligations on sharing infrastructure and coordinating the timing of spectrum assignments.
- The Code also contains common provisions on spectrum authorisation such as minimum license durations of 25 years.
- The Code makes provision for spectrum-sharing in 5G networks easier and for promoting end-user access to wi-fi based connectivity.

Amendments to the universal service regime

- The Code updates the Universal Service Directive by removing from its scope legacy services (such as public payphones and user directories) and focusing instead on **basic universal service broadband**. Universal service would be defined by a list of online services (*e-mail, search engines, news, basic training and education online tools, job-search tools, professional networking, social media, e-government service use, buying services, internet banking, calls and video calls*), which use the broadband connection. Member State intervention should concern primarily the affordability of these services.
- Under the Code, Member States are obliged to ensure that all end-users have affordable access to functional broadband as well as voice communications, at least at a fixed location. Member States are empowered to demand that undertakings provide special tariffs for vulnerable users (those with low income or special social needs), who under the new law have the right to contract.

Services and end-users protection rules

- The Code redefines the term '**electronic communications service**' to include three types: (i) internet access, (ii) interpersonal communications, divided into two sub-categories: number-based and number-independent, and (iii) services consisting wholly or mainly of the conveyance of signals, such as transmission services used for broadcasting.
- The Code envisages that **end-user-related** provisions (notably, those regarding contracts) are to be applied mainly to internet access services and number-based interpersonal communication services (e.g. Skype). This means that similar rules which apply to traditional telecoms operators (offering voice telephony, text messages and internet) would apply to new online players providing equivalent communications services. The Code clarifies that these services will have to respect the rules on end-user contracts, provide contractual information to their customers, apply switching rules and allow users to call emergency services.
- Regulatory obligations for **number-independent services** (e.g. WhatsApp) will mostly be limited to security requirements.

Numbering and emergency communication provisions

- In order to address competition issues in the M2M* market (most importantly, the lock-in with a given operator), the Code allows NRAs to assign numbers to undertakings other than providers of electronic communications networks and services.
- The Code deems it the Member States' responsibility to ensure that citizens have access to the missing children hotline number, and adds legal clarity concerning access to emergency services by all number-based interpersonal communications providers.

Governance

- The Code is intended to strengthen the role of NRAs, by establishing a list of their minimum competences and introducing enhanced independence requirements.
- Once adopted, the Code will transform BEREC* into a single fully fledged agency. BEREC is to act as single contact point for operators who submit notifications for access, and to establish a register at EU level.
- BEREC will also be tasked with the **determination of a single maximum termination rate** for the EU.
- BEREC would also be empowered to identify **transnational markets** as well as transnational demand, and give guidelines to NRAs encouraging a common approach when giving remedies to help to meet such demand. In order to avoid hampering the internal market, the Commission, supported by BEREC, may establish harmonised technical specifications to meet demand for cross-border communications.

Comments - Conclusions

- The proposal takes the form of a Directive, thus leaving a wide margin of freedom to the Member States to decide on certain regulatory measures at National level during its transposition into domestic legislation.
- The draft not only integrates the dispersed pieces of legislation into a coherent legal text, but also simplifies the existing rules, thereby ensuring legal consistency, legal safety and predictability.
- Essentially, the Code consolidates the existing legal framework, while at the same time updates certain rules, disposes of some regulatory redundancies (inefficiencies) and adds a number of new provisions.
- In principle it integrates four existing Directives (Framework, Authorisation, Access and Universal Services) into a single legal text.
- It can not be judged as a radical reformation of the existing legal framework. However, it can be regarded as an indispensable step, indeed to the right direction.