

Review of the Electronic Communications Regulatory Framework

Executive Summary 1: Access to networks

1. General context and objectives

Over the past years, the role of the electronic communications sector as an enabler of the online economy has hugely increased. Data and internet access services have taken the place of traditional telephone services as the key products for both consumers and businesses. This means that the sector needs to contribute to meeting increasing user demand and socio-economic development needs arising from the increase in data communications.

The current regulatory framework is built on three main objectives: promotion of competition, of the internal market and of end-users' interests, all of which remain relevant guiding principles for the future European Electronic Communications Code. However, it is necessary that the current objectives are flanked by **a new connectivity objective**. Deployment and take-up of very high capacity connectivity was broadly recognised in the preparation of the proposal, including the public consultation, as the underlying driving force for a digital society and economy, underpinned by technological changes and evolving consumer and market demands. The proposals in the area of network access aim at creating the conditions for the competitive deployment of very high capacity fixed and mobile infrastructures across the EU, with an emphasis on:

- a more predictable investment environment for all network investors, with varying business models;
- regulation focused on promoting infrastructure competition wherever possible;
- regulation focused on the real bottlenecks to the provision of competitive services to end-users; and
- regulation adapted to the risks and challenges of deploying substantially new networks, with rewards for early movers.

The Code thus seeks to ensure a more focused and legally certain approach to network access regulation. It will ensure that access obligations are imposed only where in the absence of those obligations one or more retail markets would not be effectively competitive, in areas where these cannot be sufficiently addressed commercially by the market. It will encourage **market-driven solutions leading to infrastructure deployment** re-using existing civil engineering wherever possible, and encouraging commercial agreements, **including co-investment or access agreements**, between operators, where these have a positive effect on competition. It will aim to assure positive end-user outcomes, including improved connectivity for all EU citizens, as well as European solutions for business end-users with a European footprint.

2. Proposed solutions

2.1 Updating the rules for imposing regulation on operators, so that they are robust and predictable in light of market and technological changes

The Code updates the market analysis procedures applied by national regulatory authorities (NRAs) when identifying markets that are susceptible to *ex ante* regulation and operators with significant market power (SMP), on which regulatory obligations should be imposed. It **codifies current best practices**, such as some elements of the Commission's Recommendation on Relevant Markets¹.

More specifically, the **definition of SMP** (Article 61) **is left substantially unchanged**. The Code therefore upholds the principle that SMP should correspond to competition law concept of dominance, a principle that has been central to *ex ante* regulation since 2002. In this way, the definition of SMP maintains its solid basis in economic theory and in the Court of Justice's jurisprudence, and NRAs have a robust framework to determine whether certain operators are so strong that they can behave independently of customers, consumers and competitors. Like competition law dominance, SMP can be held by an operator individually or by several operators jointly (joint SMP).

SMP can only be measured within the boundaries of a defined product and geographic market, and the Code maintains the process of **market analysis** for the identification of markets in accordance with competition law principles, starting from the non-binding guidance provided by the Commission in the Recommendation on Relevant Markets and in the SMP Guidelines² (Article 62).

The Code provides that **NRAs have to determine whether a specific market should be regulated** (Article 65), codifying the "three criteria test" (currently in the Recommendation on Relevant Markets) - high barriers to entry, no dynamic tendency towards effective competition, insufficiency of competition law. The amendments would also require NRAs to take into consideration all relevant aspects of the market context in their market analyses, such as commercial access agreements or offers as well as any other regulatory obligations already imposed independently of the market analysis in question, e.g. obligations imposed on all operators regardless of their market power, such as access to in-house cabling (Article 65(2)).

The amendments also ensure that access obligations are imposed only where in the absence of those obligations one or more retail markets would not be effectively competitive and to assure positive end-user outcomes. In other words, wholesale access regulation is not an end in itself, but should only be imposed only if end-user markets cannot function effectively without it (Article 65(4)).

Furthermore, the proposal extends the current **maximum market review period** from three-years to five years (Article 65(5)), without prejudice to the possibility of the NRAs to conduct such analysis at shorter intervals if market developments require it. Such longer periods will provide greater predictability for all market participants, both SMP operators and alternative operators, whose business case builds on regulated wholesale access.

¹ Commission Recommendation 2014/710/EU of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

² Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

The rules for **imposing specific obligations** on SMP operators are also updated and amended. Although the core principles of appropriateness and proportionality of the obligations (remedies) are maintained, and therefore leave flexibility to NRAs to adjust remedies to sometimes very different national or regional situations, specific provisions are made for the revision of regulatory obligations, for example when market conditions change due to new commercial agreements, new co-investment agreements or the breach of existing commercial agreements (Article 66(6)).

Aside from *ex ante* regulation of operators with SMP, and also with a view to supporting infrastructure competition, the conditions for imposing **obligations applicable to all operators** (symmetric obligations) are also clarified (Article 59(2)). Provisions to ensure access to non-replicable network assets, such as in-house wiring and cables, existed in the previous framework (Article 12 of the Framework Directive), but the Code would allow the obligations to be expanded beyond the first concentration point (typically inside or in front of a building) in limited circumstances, to facilitate alternative network deployment in less densely populated areas where infrastructure competition is more difficult. In this way, a network operator that deploys its own network, can have the certainty of reaching the end customer in its home, once it has rolled out a fibre cable up to the distribution point (for example by renting space in the civil engineering network of an SMP operator or a utility). At the same time, exceptions are included for open networks, or for smaller local initiatives for which providing access could compromise their business case.

The internal market procedures mentioned above on market analysis and remedies are complemented by a **'double-lock'** system whereby in cases where BEREC and the Commission agree that a draft remedy would create a barrier to the single market, the NRA could be required to amend or withdraw the draft measure. NRAs maintain their competence on market regulation decisions based on national or local specificities, to appropriately regulate their national and increasingly sub-national markets. In order to ensure the consistency of the proposed obligations (remedies), this local focus must be balanced by a robust consistency check at the EU level to ensure consistency of regulatory and investment conditions. BEREC will continue therefore to play a key role in identifying whether a particular remedy proposed by an NRA may undermine these consistency objectives (Article 33(5)).

A new approach is proposed for the **voice termination rates** markets (Article 73). It aims at alleviating the administrative burden of NRAs when imposing remedies in these stable markets, which are currently regulated in a similar way across the EU, but on the basis of non-binding principles which increase the administrative burden and litigation risks for NRAs. The proposals allow NRAs to focus their efforts on the analysis of the most complex broadband markets. Operators designated with SMP in termination markets will have to charge rates that are equal to or below a single EU maximum rate, set by the Commission in a delegated act on the basis of a set of principles provided in the Code (Article 73 and Annex III). This maximum rate will be set according to a single EU-wide model.

2.2 Promoting unconstrained connectivity by means of ubiquitous, very high-capacity fixed and mobile infrastructures for a digital single market

The proposal requires NRAs to **survey the state of broadband networks and investment plans across their national territory**, to enable them to better take geographic specificities into account in market analyses (Article 22). As infrastructure competition advances often at a local level, there can be highly relevant differences between areas within a single Member States, which need to be taken into account to ensure that regulation is focused on remaining barriers to competition and investment. NRAs would be tasked with identifying so called '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 publish the designated digital exclusion areas and organise a call for interest therein, with a view to promote very high capacity network deployment in these areas. Companies will be bound to provide complete and accurate information (Article 20(1)). This will provide much greater predictability for those opting to invest in such digital exclusion areas, where there would normally not be a business case for more than one network.

The proposal also updates the specific obligations that can be imposed on operators that have been designated with SMP (Articles 67 to 78) to add tools with a specific focus on the deployment of very high capacity networks. As in the existing Framework, the list of obligations that can be imposed is a closed list, unless exceptional circumstances apply. While many of the rules of the current framework are maintained they are also updated in significant ways, to sharpen the focus on investment and on the roll-out of very high capacity networks. These measures are highly synergetic and have to be viewed as a coherent package that will encourage new deployments and their financing.

The amended SMP obligations are:

The Code would clarify that NRAs can require **access to civil infrastructure**, such as ducts, poles etc., held by SMP operators, as a stand-alone remedy in order to support greater infrastructure competition (Article 70). Such obligations go further than, and complement, the rules on reasonable access applicable to all owners of physical infrastructure irrespective of SMP, in the Cost Reduction Directive³. This article, read together with the general article on access obligations (Article 71), will make sure that civil engineering obligations are considered before other more intrusive access obligations, thereby giving priority to remedies favouring competitive infrastructure deployment wherever feasible.

Amendments are proposed to the rules regarding price controls on regulated services offered by SMP operators (Article 72). Pricing flexibility for new or upgraded networks can facilitate commercial strategies to promote take-up in the short term and spread the risks over time. Where non-discrimination by the SMP operator is assured at wholesale level, and there are significant competitive constraints at retail level, regulated price control, the most intrusive remedy, should not be imposed on SMP operators' next generation networks. This would codify Commission guidance provided in its **2013 Recommendation on consistent non-discrimination obligations and costing methodologies**. Before imposing any price-related measures, NRAs should also take into account their likely effect on long-term investments in new and enhanced networks, without compromising downstream competition.

New provisions are introduced to **facilitate commercial co-investment in new infrastructures**, as this model can be particularly suitable to deploy very high capacity networks beyond their traditional geographic reach, reducing the risk faced by single operators (Article 74 together with Annex IV). The joint roll-out of new network elements by an SMP network owner and alternative operators entails a greater degree of risk-sharing compared to traditional regulated wholesale access, and can provide a sustainable basis for competition if some key conditions are respected. These conditions include: i) the offer is transparent with reasonable and non-discriminatory terms offered to potential co-investors (explained in detail in the Annex IV). Co-investors have the possibility to contribute for the amount and at the time that they deem best, though conditions may become more onerous over time; ii) the network deployed is a very high capacity network; and iii) access seekers that do not

³ Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks.

participate in the co-investment can continue to enjoy the same quality of access they had prior to the investment by means of commercial agreements or regulated access. If these conditions are all met, NRAs should not impose regulated access on the co-invested new networks, enabling all co-investors to benefit from a first-mover advantage, compared to other undertakings.

A simplified regulatory model is proposed for **wholesale-only networks** with SMP (Article 77), limited to fair, reasonable and non-discriminatory access rules, and to the possibility of intervention with other obligations if problems arise at a later stage. This model may be particularly appropriate for local very high capacity networks, which currently are not typically found to have SMP, but might nevertheless be considered to have it in the future. The provisions apply to wholesale-only companies, defined according to competition law principles, regardless of whether they were set up as such, or whether they became wholesale only by way of a process of voluntary separation. The rules on **voluntary separation** (Article 76) exist in the current framework. Until now they were never used, and are therefore simplified, in particular with the introduction of the possibility that the operator undergoing a process of separation can make binding commitments, increasing the level of certainty of the regulatory outcome as well as facilitating its enforcement by NRAs.

The proposal also clarifies the role of NRAs in accompanying SMP operators that **migrate from legacy to new networks** (e.g. when switching off legacy copper networks), as a means to further support the transition to new networks (Article 78).

Finally, in order to support network roll-out through instalment-based contributions to network capital costs by end-users (the 'demand aggregation' approach), the Code allows longer separate agreements with end-users, to facilitate the reimbursement over time of the cost of the deployment of a physical connection (Article 98).

2.3 Overcoming the inability of the framework to serve the needs of international business users

Businesses with activities in several Member States need integrated, high-quality connectivity on competitive terms. Up to nearly 90bn EUR per year in efficiency gains could be achieved⁴ if the current fragmentation is overcome. The Code empowers BEREC to identify **transnational markets** (Article 63). Empowering the body gathering the NRAs with this task is expected to encourage NRAs, who are the closest to the markets that they regulate, to remain vigilant as regards the existence of transnational markets where intervention may be required.

BEREC is also tasked to identify **transnational demand** (Article 64), even where markets remain national or sub-national, particularly because of national or sub-national patterns of supply (i.e. different SMP operators in different countries or regions). BEREC guidelines should steer NRAs to adopt a common approach when imposing remedies that can help such transnational demand to be met. Article 64 also empowers the Commission, on the basis of BEREC's guidelines, to establish harmonised technical specifications for certain wholesale access products to meet the demand for cross-border communications, in particular from business users, in cases where the absence of such harmonised products hinders the internal market. In this way, companies that need connectivity to thrive in the internal market can have the certainty of seamless service provision across borders, despite the differences in regulatory regimes and market structures.

⁴ Study by WIK (2013) on "Business communications, economic growth and the competitive challenge".