

Review of the Electronic Communications Regulatory Framework

Executive Summary 2: Electronic communications services and end-user rights

1 General context and objectives

1.1 Definitions/OTT

End-users increasingly substitute traditional voice telephony, text messages (SMS) and electronic mail conveyance services by functionally equivalent online services such as Voice over IP, messaging services and web-based e-mail services. This evolution has brought about, as a positive effect, more intense competition between traditional telecoms services and communications services provided over the internet (over-the-top communications services). OTTs provide their services in the form of applications running over the internet access service and are de facto in general not subject to the current EU telecom rules.

Some of such OTT communications services make use of telephone numbers and can for this reason be considered to be subject to the rules of the current framework. However, the rules of the framework have not been consistently applied to them in all Member States. Hence, the definitions should be clarified and be built on a functional approach from the end-user perspective.

Sector-specific end-user protection rules complement general consumer protection and aim at a high level of consumer protection in the electronic communications sector. These sector-specific rules cover in particular areas such as contractual information, transparency, quality of service (QoS), contract duration, switching, privacy and security, and access to emergency numbers. It is justified to apply these rules to all communications services that make use of telephone numbers, i.e. traditional telephone services and also those OTT services which connect with and hence benefit from the public resource 'numbers' and a publicly assured interoperable ecosystem. Moreover, there are areas where the end-users of all types of OTT services are exposed to the same risks that sectorial rules were designed to address, for instance regarding security of communications or accessibility by disabled end-users.

Therefore, the **new definitions** contained in the review aim at:

- (i) Increasing the end-user choice and competition in the single market by ensuring a European-wide pro-competitive regulatory framework for networks, internet access services and communication services;
- (ii) Improving the trust of the end-users of new communications services by creating certainty about their rights and closing gaps in end-user protection;
- (iii) Creating comparable regulatory conditions for functionally comparable services.

1.2 End-user provisions

The primary objective is to achieve adequate end-user protection in a competitive internal electronic communications market that provides consumer benefits in terms of choice, price and quality. This objective is pursued by enhancing simplification and consistency, modernisation and harmonisation of the rules.

- Simplification and consistency of the framework: deregulation and streamlining of sector-specific provisions which are outdated or overlap with horizontal consumer protection

legislation, while keeping those sector-specific rules that are still necessary, for instance on end-user information related to contract terms, transparency, quality of service or switching. Those necessary provisions should appropriately apply to all equivalent communications services regardless of the mode of provision, in parallel to a revision of the definition of electronic communications service that fits technology and market developments.

- Modernisation and improvement of the sector-specific end-user protection by addressing new end-user problems, which have emerged as a consequence of market and technology developments. An example is the rapid adoption of bundles, namely packages of several communications services with other services (e.g. content) and/or devices, which were used by more than 50% of EU households in 2015. Modernisation of rules will foster end-user trust and make sure the sector-specific end-user protection rules are proportionate and well-adapted.
- Harmonisation of the end-user protection rules to increase coherence and legal certainty for both end-users and providers, and to avoid fragmentation of the Digital Single Market.

2 Proposed solutions

2.1 New ECS definition: Three types of service categories

In order to reflect the market and regulatory developments over the past years and the continued need for sector-specific rules, the European Electronic Communications Code (Article 2(4)) redefines the term 'electronic communications service' (ECS) based on a functional approach. It contains three types of service categories: (i) internet access service, (ii) interpersonal communications service (ICS), distinguishing between number-based and number-independent ICS, and (iii) services consisting wholly or mainly of the conveyance of signals, such as transmission services used for M2M communications and for broadcasting signals.

2.1.1 Internet access service (IAS)

Internet access service is defined in Article 2(2) of Regulation (EU) 2015/2120.

2.1.2 Interpersonal communications service (ICS) with 2 sub-categories

Interpersonal communications services are services that enable interpersonal and interactive exchange of information, covering services like traditional voice calls between two individuals but also all types of emails, messaging services, or group chats.

ICS only cover communications between a finite, i.e. not potentially unlimited, number of natural persons which is determined by the sender of the communication. Communications involving legal persons are within the scope of the definition where natural persons act on behalf of those legal persons or are involved at least on one side of the communication.

Interactive communication requires that the service allows the recipient of the information to respond directly. Services such as linear broadcasting, video on demand, websites, social networks, blogs, or exchange of information between machines, are therefore not considered as interpersonal communications services.

A service is not considered as ICS if the interpersonal and interactive communication facility is a purely ancillary feature to another service which for objective technical reasons cannot be used without the principal service, and its integration is not a means to circumvent the applicability of the rules governing communications services (possible example for exception, depending on the circumstances: communication channel in online games or help-line chat on an eCommerce website would not be considered as ICS). A merely commercial bundling with other services would not suffice to avoid application of the ICS concept.

2.1.2.1 Number-based ICS

In order to ensure that end-users are effectively and equally protected when using functionally equivalent services, a future-oriented definition of electronic communications services should build on a functional approach rather than on technical parameters. The Code therefore makes a distinction between "number-based" ICS and "number-independent" ICS.

Number-based ICS comprise both (i) services to which end-users numbers are assigned for the purpose of ensuring end-to-end connectivity and (ii) services enabling end-users to reach persons to whom such numbers have been assigned. Examples are "traditional" telephony and SMS, VoIP services where users are assigned a "traditional" phone number and/or can call such a number.

The mere use of a number as an identifier is not considered equivalent to the use of a number to connect with the public switched telephone network.

It is justified to treat "number-based" ICS differently from "number-independent" ICS (definition, see below) for several reasons. First, certain services-related provisions have a direct link with numbers (e.g. number portability, 112 emergency services). Second, number-based ICS participate in and hence also benefit from a publicly assured interoperable ecosystem. Third, having regard to the concept of functional substitutability from an end-user point of view, only number-based ICS allow to connect to/from services with public numbers and to assure end-to-end connectivity. Fourth, it is moreover legitimate to establish a high level of sector-specific end-user protection for those using services associated with this "public good", and to support high end-user expectations that can in turn reinforce the network effects in favour of this public good. "Number-based" ICS are therefore subject to more sector-specific regulatory requirements than number-independent ICS. Fifth, in practice, certain obligations, like those on switching (Article 99), appear less relevant to number-independent ICS, as the lock-in effects which justify those provisions for number-based ICS are less significant for where numbers are not involved.

2.1.2.2 Number-independent ICS

Number-independent ICS are subject to obligations, where public policy interests require applying specific regulatory obligations to all types of ICS, regardless of whether they use numbers for the provision of their service.

This relates in particular to security provisions (Article 40) and equivalent accessibility for disabled end-users (Article 103). Additionally, in the event of an actual threat to end-to-end connectivity or to effective access to emergency services, the Commission may identify a need for measures to ensure interoperability of interpersonal communications services, for instance through the launch of a standardisation process. Such interoperability obligations may then be imposed by national regulatory authorities (NRAs) where necessary (Article 59). This need could arise from a significant decline in usage of the numbers-based communications system, so that the public interest in end-to-end connectivity can no longer be assured through that system - either because a single number-independent ICS becomes the predominant mode of interpersonal communication; or because of a market fragmentation with a large number of different, non-interoperable communications applications.

2.1.3 Services consisting wholly or mainly in the conveyance of signals, such as transmission services used for M2M and broadcasting signals

For consistency reasons "conveyance of signals" remains an important parameter for determining one of the categories of services falling into the scope of the Code, but is further clarified by giving examples of transmission services. With respect to machine-to-machine (M2M) communications the status quo is confirmed and clarified: only the transmission element continues to fall within the scope of the ECS definition whereas M2M services at the applications layer remain outside the scope.

This fine balance ensures the necessary protection at the transmission layer while being open for innovative M2M services, irrespective of the undertaking providing them.

2.2 Scope of services provisions

Most services/end-user provisions apply to all ECS except number-independent ICS confirming an approach that had been identified by regulators¹ but has not been applied consistently in practice. The reasons for treating "number-based" ICS differently from "number-independent" ICS were explained in section 2.1.2.1 above.

2.3 Adaptation of sector specific rules to general consumer legislation and increased consistency

While removing rules that overlap with general consumer legislation, the Code proposes to complement this general legislation with a more focused protection that is specific to electronic communications. According to Article 25 for instance, out-of-court dispute resolution procedures have to comply with the quality requirements set out in Directive 2013/11/EU on alternative dispute resolution, which only covers consumers. The article thus enables Member States to grant access to this procedure to micro and small enterprises whose bargaining position is comparable to that of consumers and should therefore benefit from the same level of protection regarding connectivity inputs that are vital to their businesses.

In a similar vein, Article 95 on information requirements for contracts refers to the information required pursuant to Articles 5 and 6 of Directive 2011/83/EU on consumer rights and Articles 3(5) and 4(1) of Regulation 2015/2120 on open internet. The article however establishes an additional set of focused and necessary sector-specific information requirements that complement and are consistent with the general information requirements set out in the above mentioned horizontal rules.

Another example is Article 96 on access to independent comparison tools to compare and evaluate prices and quality of service: such tools have *inter alia* to be operationally independent, include a broad range of offers covering a significant part of the market, use plain and unambiguous language and base the comparison on clear and objective criteria. The range and complexity of communications offers justifies the establishment of such sector-specific tools, but consistency has been sought with sector-specific tools in other domains, in this case the criteria of Directive 2014/92/EU on the comparability of fees related to payment accounts.

Consistency is also ensured within the framework, for instance when the same maximum period of one working day for a loss of service is set for switching between providers of internet access services and for porting of telephone numbers.

2.4 Adapted sector specific end-user protection on end-user contracts, transparency and quality of service in response to new market developments

Article 95 of the Code defines a detailed and streamlined list of sector-related information requirements - going beyond those of the Consumer Rights Directive - that have to be provided prior to the conclusion of a contract. This includes information on the technical characteristics of the service(s), price, duration of the contract and conditions for switching, details on products and services designed for disabled end-users, procedures for the settlement of disputes, action to be taken in security and integrity incidents, any constraints on access to emergency services and the right of end-users to have their data included or not in a directory.

By introducing a contract summary template for end-user contracts which identifies the main elements of the information requirements, Article 95 ensures that end-users get the required relevant information prior to the conclusion of the contract in a clear and understandable language.

¹ ERG Common Position on VoIP, December 2007

The new provisions on contracts should not only apply to consumers but also to micro and small enterprises whose bargaining position is comparable to that of consumers. Medium sized enterprises are no longer covered by this provision as it is considered that, like large enterprises, they have a stronger bargaining power and do not depend on the same contractual information requirements.

The Code also broadens the existing information list on essential quality of service parameters which enables end-users to make sure they get the quality they paid for (Article 97), and applies it also to number-based interpersonal communication services. NRAs will also have the power to require providers to publish comprehensive, comparable, and reliable user friendly information on QoS parameters that is up-to-date. These enhanced transparency measures further contribute to ensuring end-users' right to open internet access.

The Code introduces an obligation for NRAs to ensure end-users have access to at least one independent comparison tool which provides clear, complete, comprehensive and up-to-date information in one place, enabling them to compare and evaluate prices and tariffs, and the quality of service performance of different services (Article 96). The comparison tool shall be free of cost for the end-user.

By introducing new tools to monitor and control the usage of internet access and number-based interpersonal communications services (Article 95), the Code increases transparency and enable end-users to better control their communications budget.

The amended provisions set a higher standard of end-user protection across the EU. The harmonized approach also benefits operators, facilitating and incentivizing service provision in more than one Member State. The resulting end-user benefits are assessed to clearly outweigh possible additional costs or burdens for operators. For example, the main elements of the information requirements summarized in the contact template will provide a clear and concise overview for end-users while operators will be completing the template with the information they anyhow provide. Similarly, the introduction of usage monitoring mechanisms should not present a significant burden as these are already in place for billing purposes or offered as apps by many operators.

2.5 New provisions to ease switching

The possibility for a user to switch providers is one of the primary tools to keep markets competitive, dynamic and contestable. Any barriers to switching are curbing consumer choice and hence reducing competitive pressure on operators to perform better in terms of network quality, customer service, innovation etc. The Code facilitates switching by entitling consumers to terminate automatically prolonged contracts at any time after the expiration of the initial contract period. Termination requires a one month notice and is free of charge, except for the costs of providing the service during the notice period.

In the case of changes in the contractual conditions by the provider, and unless the changes are exclusively to the benefit of the end-user (i.e. only positive, no mix of positive and negative changes) or they are necessary to implement legislative or regulatory changes, the Code maintains the end-users right to terminate the contract with one month notice and without incurring any costs, so that they are not contractually locked-in. On the other hand, the provision keeps an incentive for providers to improve service quality or reduce prices without risking that such unequivocal improvements are used by end-users to terminate the contract (Article 98(3)). Incentives for investments are fostered by clarifying that the maximum contract duration (Article 98(1) 2nd subparagraph) does not apply to instalment contracts for network connection, i.e. where the consumer has agreed to instalment payments for the deployment of a physical connection in a separate contract. This can be an important factor in facilitating deployment of very high capacity connectivity networks up to or very close to end-user premises, including through demand aggregation schemes which enable network investors to reduce initial take-up risks. However, longer reimbursement periods in contracts on physical network connections, which enhance affordability for end-users, must not restrict the rights of consumers to switch between providers of electronic communications

services.

By introducing a time frame for the switching of Internet Access Service (IAS) providers, Article 99(1) will ensure efficient switching procedures and ensure continuity of the IAS which is nowadays critical for end-users. According to the new provision, end-users shall i) have adequate information before and during the switching process ii) have their service activated at the date agreed with the receiving provider and iii) be reimbursed for loss of service during the porting process, if it exceeds one working day.

The receiving provider shall lead the switching and porting process (Article 99(4)). Such an approach provides a one-stop-shop to the switching end-user and relies on the receiving provider whose interest to make the switching process as smooth and quick as possible coincides with the end-user's interest (whereas the former provider is losing a customer and therefore has no incentive to facilitate the change). The same maximum time frame for loss of service remains applicable for traditional number portability (Article 99(5)). In case of failure of the porting process, the transferring provider shall reactivate the number of the end-user until the porting is successful, according to the same provision.

2.6 New provisions to meet new market conditions and bundled services

The problem that certain bundles restrain the switching rights of end-users regarding their ECS, because divergent contractual rules on contract termination and switching apply to the different services included, is addressed through a new provision. Article 100 proposes that in case at least one of the bundled services falls within the scope of the Code, the rules on contract information, transparency, comparison, QoS, contract duration and termination and change of provider/number portability shall apply to the whole bundle, *mutatis mutandis*. If there are provisions applicable to another non-electronic communications element of the bundle that are more favourable to the end-user, those more favourable rules will apply.

2.7 Full harmonisation approach in order to increase legal certainty for providers and end-users and to lower transaction costs

Full-harmonisation of end-user rights at a high level of protection increases the trust of end users in the Digital Single Market. By excluding the possibility for Member States to maintain or introduce diverging provisions on end-user protection, including more or less stringent provisions to ensure a different level of protection (Article 94), the Code helps overcome barriers to the single market stemming from national end-user provisions.

At the same time, a measured approach has been taken. First, relevant exceptions are recognised: Article 98(1) allows Member States to adopt or maintain shorter than 24 months maximum duration for the initial contract commitment period. Second, maximum harmonisation, as set out in Article 94 of the proposed Code, applies only in subject-matters governed by the rules of the Code, and Member States can thus react quickly to newly emerging challenges. Third, Member States retain flexibility to adapt implementing rules to national contexts as the legal form of a Directive has been employed for the Code.