

# committed to Europe

## consumers and digital services in the internet age a common framework for consistent protection

### introduction

The technical nature of services delivered over communication networks is rarely apparent from a user's point of view. Whether an application or service comes from a telecoms company or a pure internet provider should neither be obvious nor of much interest, so long as the consumer gets what he or she expects. However, 'behind the screen', the differences are significant - both in terms of the rules under which they are governed and the confidence which the public may reasonably have in them.

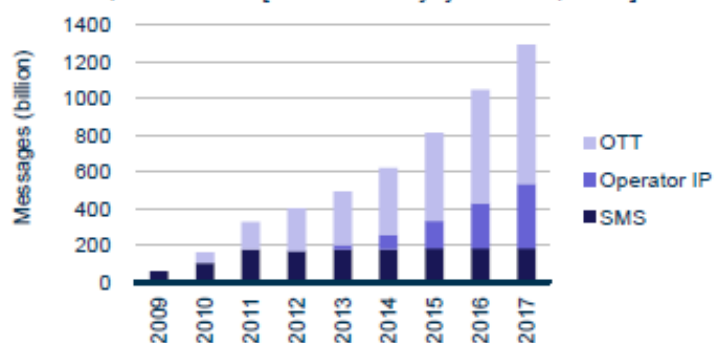
Such a divergence is harmful to the immediate interests of European consumers and to the longer-term health of our digital industries. For a clearer and indeed safer environment, obsolete regulations should be removed or remodeled into a modern framework, creating a simpler, fairer marketplace where rules apply to all players and relate to the nature of a service - and not the means by which it is provided.

### the internet delivers an ever-richer choice of digital services

While telecommunications services developed long ago, the past two decades have seen an internet revolution transform citizens' lives and support the development of a wide range of new services, some of which partly replaced those for which the networks were originally conceived.

For example, an increasing number of communications services (voice telephony, messaging or geolocation for instance) - once only provided by telecom operators as part of a 'bundle' including a connectivity service - are today provided "over the top" (over the internet) by internet players independently of the network operation, and running alongside those services still provided by telecom operators. Forecasts are unambiguous: the volume of OTT messages sent, for example, will far exceed standard SMS messages by 2017.

Messaging volumes on smartphones in Western Europe by type of service, 2009–2017 [Source: Analysys Mason, 2012]



This growing range of innovation and uses opened up by the World Wide Web has been of a great benefit for consumers: the internet has become a huge part of everyday lives. Completing transactions online has become second nature, with more and more people going online for shopping, banking, information and entertainment, a trend that will continue to increase with new services in the cloud for instance. This market evolution is definitely good for users choice, however, it also demands a fresh look at the regulation of digital services in order to ensure that similar services are governed in a similar way.

the current regulatory framework is not suited to these developments, leaving consumers often unprotected

Liberalisation of the industry in the 90's brought in its wake many new policies aimed at protecting consumers. For the consumer specifically these included: access to emergency calls; simpler number portability rules; privacy and confidentiality obligations. On the public interest side, there were interoperability requirements; universal service; provisions on legal interceptions and many financial contributions.

Yet these policies were designed at a time when internet was still in its infancy. They therefore do not cover services provided by pure internet players. This leads to a very complex situation that can be detrimental to consumers, public authorities and, last but not least, the development of fair competition between industry players. For example, customers are not protected the same way when they use internet-based services:

- they cannot access emergency services;
- they do not have data portability rights when switching providers;
- their location can be used without the same protection;
- when using a VoIP or messaging services from OTTs they are not under privacy or security rules, like the ones applying to telecoms services;
- law enforcers and regulators have no legal basis for intervention as legal provisions apply only to telecoms operators.

Some customers may neither be aware nor concerned about this situation, while others accept it for the sake of seemingly 'free' services - albeit at the cost of a lower level of privacy and security.

additional considerations for a European digital industry

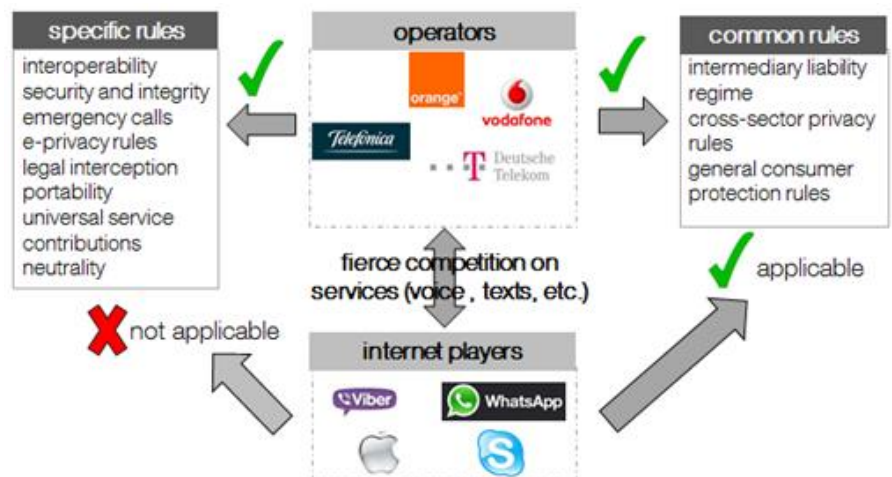
This debate is also a question about what kind of ICT industry Europe wants. The ideal objective would be to encourage a thriving and varied mix of digital players - European and overseas, large and small - for the full benefit of European consumers.

However, the paradoxical result of regulatory efforts to date, intended from the outset to grow the industry in Europe, is an increasingly stark contrast between popular international digital services and struggling European-based infrastructure.

Part of this paradox lies in the fact that the current mix of fiscal and regulatory policies in the EU combine to create a permanent and unavoidable imbalance between EU and non-EU players. The European ICT industry, telecoms and digital, is saddled with legacy regulation that does not always apply to its competitors and it remains subject to a continuing trend for more regulation at EU level. Overseas players, of course, can happily acquiesce to - even assist with - this stream of rules, safe in the knowledge they will rarely be affected by them. The fact that the majority of pan-European OTT services are developed outside Europe is thus striking but not especially surprising. While the ability to attract venture capital in the US has been important for the success of these internet players in Europe, relaxed European service regulation - as distinct from telecoms regulation - has played just as big a role.

At the same time, European telecoms operators bear the full costs of regulatory compliance and they often can't innovate in the same conditions as their internet competitors. Efforts of European telecoms operators to jointly develop innovative and interoperable services have been met with distrust by European competition authorities who have so far been unable to address the growing market power of the internet giants.

It is probably past overdue that efforts are made to bring about a more equitable environment in which all can play a part in developing Europe's digital future.



## a common framework for digital services based on the principle: “same services, same rules”

A simple principle could help address this paradox, specifically that **all digital services should be governed the same way**. This calls for a new European regulatory architecture addressing all digital services, independently of the provider. Digital services are currently subject to distinct rules depending on the legal categories they belong to: electronic communication services (ECS – covering operators’ services) or information society services (covering most internet services). With the internet revolution, those categories have now become obsolete as regards their technical or economic specifications:

- the definition of ECS is based on a technical criterion – namely “conveyance of signals” - that is not relevant anymore as, thanks to broadband access, communication services can now also be provided on service platforms independently of providers’ conveying signals. Telecommunications service regulation should in the future uniquely be dedicated to internet-access services;
- according to the current definition, information society services are services that are paid for, a characteristic which does not fit with the majority of internet services, often provided for free.

To create a foundation for this common framework, two scenarios are possible:

1. extend the ECS definition to include other web services. This could be a fast-track solution but the risk is that it would become obsolete with the evolution of technology. In addition, the remit of national regulators cannot be indefinitely expanded and, more importantly, this option would not be consistent with the objective of having the framework shift from specific rules to general law.
2. **develop a new European legislation covering all digital services**, whereby:
  - electronic communication services would be limited in scope to internet-access services, with corresponding obligations (provisions on consumer protection, interoperability and net neutrality for example);
  - the specific framework on electronic communications would then focus on networks and internet access services;
  - a new European legislative text would apply to all digital services (voice, text, etc.) being provided by telecoms operators (part of former ECS) or by OTTs (internet services). Following a proportionality test, this text

would ensure that rules on legal enforcement, data protection, openness, transparency, security, portability, emergency services, consumer rights, measures for disabled users and so on, apply to all digital communication services.

This second option appears preferable as it would be future-proof, holistic and technology / “provider” neutral. However, this is an ambitious design exercise which will require a thorough review of several existing directives. To tackle that issue as quickly as possible, **a review of the framework** should be launched as soon as possible with a report by the Commission, **no later than early 2016**.

## implementing common rules on digital services requires a multifaceted action plan

### an open customer experience thanks to neutrality over all internet platforms

The current policy debate focuses on how to defend an open internet from the network side while preserving its smart functioning and innovation. However, to ensure consistent protection, **neutrality should not stop with networks and should apply to all internet actors**. Openness and transparency are required over the entire ‘value-chain’ - app stores, smart phones or tablets, as well as browsers and operating systems, not to mention search engines.

When establishing a common framework for digital services, the new European legislative text should encompass provisions on internet neutrality such as transparency (e.g. clear separation of advertising from information, with information on results selection by platforms); openness (or non-blocking so customers can reach legal content and applications); interoperability and switching.

#### Report on internet platform neutrality

The French “Conseil National du Numérique” published in May 2014 a report highlighting that today, large platforms are the internet gatekeepers. As a consequence, the council has drawn up “recommendations deemed as priority areas to ensure that the upholding of the principle of neutrality by and within platform ecosystems”

[http://www.cnnumerique.fr/wp-content/uploads/2014/06/PlatformNeutrality\\_VA.pdf](http://www.cnnumerique.fr/wp-content/uploads/2014/06/PlatformNeutrality_VA.pdf)

### data protection for all services and users

A **high and consistent level of data protection** would mean that European citizens using internet services - email, payment or cloud services for example – could enjoy the same level of protection with non-European companies as they would expect from local service-providers. Moreover,

protection should be consistent regardless of the company involved (telecoms, OTT), or the technology. In short, here again, the same services should follow the same rules, no matter where, how or by whom they are provided.

This protection would apply as long as these services store and process personal data outside the European Union: this is why the scope proposed for the **draft Regulation on General Data Protection** is welcome (see for more details the specific paper on the GDPR).

In addition, a 'level playing field' for data protection should also grant the same rights for European telecoms operators as for non-European players when developing innovative services based on Big Data analytics.

**Better consistency on data protection also calls for a repeal of the e-privacy directive**

In addition to the 1995 data protection directive, the telco industry also abides to sector specific rules defined in the 2002 e-privacy directive. To establish level playing field and better consistency on data protection, the General Data Protection draft Regulation should go together with a repeal of the e-privacy directive.

security rules for a comprehensive cyber-security chain

The 2009 Framework directive aimed at improving security coordination by having telecoms operators comply with specific rules such as notification of security breaches. However, beyond this laudable intention, **security can only be as strong as the weakest link**: the best level of security would require that the digital value-chain be included as a whole in this effort, with involvement of critical internet players, software and hardware providers.

This understanding was the focus of Commission's draft **Directive on Information and Network Security**. The report adopted by the Parliament in March 2014, however, drastically reduced its scope, removing its applicability to other industry players. We therefore call on the EU institutions to re-assess the issue so that critical equipment and services of the entire digital economy comply with holistic security rules. Partial security would not be efficient or effective.

safeguards for balanced relationships between businesses also in the digital economy

Because unbalanced contractual provisions between business partners are detrimental to a healthy economic ecosystem, several European Member States have already implemented legal provisions (such as prohibition of unfair provisions between business partners with unbalanced bargaining power). Nothing similar exists at European level. The digital ecosystem being no exception to this phenomenon, a cross-sector European law would help to ensure fairness, especially as a **framework of contractual relations between European companies and digital global giants**.

fairness in taxation

Another key dimension of level playing field in the digital value chain is taxation. European operators are major contributors to Member State economies via common and activity-specific taxes. Meanwhile, some internet players are able to take advantage of their oversea status to perform aggressive tax planning, thus escaping taxes and avoiding a contribution to local economies. While these practices are legal, the **disparity in tax treatment results in unfair tax bases** (asset based versus immaterial) but also **competitive distortion** (EU based vs. overseas).

The various initiatives launched by the European Commission on taxes are welcome, especially the recommendation on aggressive tax planning, work on the common consolidated corporate tax base or investigation of those aspects of competition that relate to taxes.

**aggressive tax planning – a competitive leverage?**

A study (2013) by Greenwich for the French Federation of Telecommunications concluded that "In 2011, OTT players paid € 37.5 M in corporate taxes in France, **22 times less than what they would have paid**" in the absence of aggressive tax planning.

[http://www.fftelecoms.org/sites/fftelecoms.org/files/contentus\\_lies/1304.24\\_-\\_etude\\_greenwich\\_-\\_version\\_anglaise.pdf](http://www.fftelecoms.org/sites/fftelecoms.org/files/contentus_lies/1304.24_-_etude_greenwich_-_version_anglaise.pdf)

