



ACHIEVING A STRONGER DIGITAL UNION

ETNO contribution to the Digital Single Market Strategy



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1/ ACHIEVING A STRONGER DIGITAL UNION - LEVERAGING THE TELCO FACTOR



At ETNO, we believe that the telecom industry is instrumental to accelerating the implementation of a European Digital Society, leveraging its assets, expertise and knowledge and serving as a key agent of change.

ETNO has been the voice of Europe's telecommunication network operators since 1992. The association's 36 member companies and 9 observers from Europe and beyond are the backbone of Europe's digital progress and, as we evolve towards a fully digitised continent, they have become enablers of progress as a whole.

Thanks to their investment and innovation in new e-communication services, ETNO companies have been and will continue to be the enablers of a smarter, more competitive and prosperous continent.

For this reason, ETNO has consistently contributed to the policy debate around how to develop a Digital Single Market (DSM) in the European Union.

This paper puts forward the association's ideas on how a new DSM strategy should contribute to a more prosperous and smarter society by leveraging and unlocking the innovation and investment potential of Europe's telecom operators.

Building powerful networks. This is the first, big challenge that industry, institutions and all other actors need to take on if we are to empower digital growth in Europe. We need to complete the deployment of 4G networks, stimulate Next Generation Access networks (NGA) roll-out across territories and ensure the EU is ahead in the 5G race. For this to happen, we share the view of all those players who ask for an urgent and thorough reform of the traditional telecom regulatory approach. Markets have changed so dramatically that it would be impossible to leave things unchanged, or to apply only minor tweaks to existing legislation. Investment in better, faster and more pervasive networks should be at the heart of new EU policies. The same applies to harmonised access to fundamental components such as spectrum, which is the lifeblood of the mobile revolution.



Scaling-up the idea of competition. An innovative telecom operator, today, needs to work with and alongside a variety of players: from global content and application service providers to big car and white appliances manufacturers. Ultimately, scale is the key factor to thrive in such a complex, global and super-fast ecosystem as the digital one. An ecosystem in which competition and cooperation go beyond traditional boundaries. Scale can support the development of stronger companies, who will in turn deliver better services to businesses and citizens. Scale also drives competition, allowing stronger players to compete more effectively against each other, inside and outside the telecom world. In this context, scale is not the only factor. A fair, equitable and level playing field among actors delivering the same type of services should also apply. This does not necessarily mean more regulation. It means that policymakers are invited to re-think old rules in light of the new market dynamics.



Promoting a growing and innovative economy. Over the past years, many have referred to a digital revolution. Today, its pervasiveness and potential are within our reach. Not only are companies doing things differently to before, they now have the capacity to pioneer and implement new ideas. A whole range of sectors is now being digitally re-industrialised thanks to ubiquitous connectivity and technological advancements. Manufacturing will no longer be the same, even for cars or white appliances. Their digital potential is now ready to be deployed on the mass market and to generate a new wave of smarter services and growth opportunities. From a policy viewpoint, this is about letting innovation thrive and supporting the take-up of new technologies and services. In this context, innovation will require a privacy-compatible use of big data, for example and it will be critical for telecoms operators to be able to effectively manage networks and provide a diverse range of services to individuals, public administration as well as small or big companies. As for take-up, positive policies can be put in place to stimulate the adoption of smarter technologies across the private and the public sector. All of this will generate a smarter, more resource-efficient society, delivering top-notch services to citizens, consumers and governments alike.



Ensuring trust and security. None of the above will be possible unless we are all able to trust that our data are secure. For this reason, it is important that both citizens and companies feel they are safeguarded no matter who is handling their personal or commercial data. Moving away from sector-specific regulation in the field of data protection and network security is the best way to address the trust issue. All actors handling similar types of data should be subject to the same set of rules. This will ensure certainty, clarity and a fair competitive environment.



In the recent past, ETNO has published two main studies to estimate the achievable gains of such an approach.

In 2013, a [report with the Boston Consulting Group](#) calculated that a thorough reform of the current set of rules would unleash up to €110 billion in additional investments by 2020.

At the end of 2014, in [ETNO's Agenda for Europe](#), the consultants Arthur D. Little looked at the broader impact in terms of economic value creation. Depending on the set of policies put in place, the telecom investment multiplier would vary between 1.5x and 13.2x, with a maximum economic value creation potential of up to €3.3 trillion. Achieving such ambitious objectives will depend on Europe's ability to leverage its assets and create a real digital single market. ETNO believes that the potential gain is too high to allow failure.

2/ ETNO'S INPUT TO THE DIGITAL SINGLE MARKET STRATEGY



a) Building Trust and Confidence

Data protection and core principles

ETNO members have been proactively following the data protection review process and contributing to this important debate. ETNO believes that this is a unique opportunity to develop sound data protection rules which are technologically neutral, future proof and flexible enough to allow for the development of new services in Europe, many of which will be driven by Cloud Computing. We cannot miss this opportunity.

ETNO has repeatedly stressed that the proposed rules on consent should not stifle innovation in Europe. New business models, responding to European users' demands often rely on innovative ways enabling users to provide consent. The rules on consent therefore need to be consumer-friendly, practically applicable and adapted to the online world – i.e. contextual. Additionally, in line with the Council agreement¹, ETNO supports a sound definition of "personal data", excluding from its scope those pseudonymous data by which it is not reasonably possible to identify an individual, taking into account technical and organisational measures in place to prevent re-identification. This would allow a lighter regulatory approach providing the adequate balance between the rights of data subjects and the needs of data processing. A well understood Risk-Based Approach would allow the reduction of certain administrative burdens while at the same time seeking elements of flexibility. For a good protection of personal data, it is necessary to promote and encourage organisational autonomy and accountability by the data controllers.

Transparency, information, control and accountability are principles that should be the cornerstone of a new architecture that would best protect consumers in an online environment without jeopardising innovation.

¹ On 12th March, Council of Ministers for Justice reached an agreement on partial general approach on Chapter II of GDPR.

Consumer-centric

Users are increasingly concerned about their privacy and data security which implies a lack of trust regarding the use of data by commercial companies/governments and consequently, a negative impact on the take-up of communication services and products.

Awareness should be raised among consumers about their digital identity, empowering them rather than shifting the responsibility to businesses alone. The future EU legal framework should allow responsible companies to unlock the value of personal data through new digital services that consumers are demanding. In order to ensure a future-proof legal framework providing adequate answers to such new digital services demand, it is important to consider the reasonable expectations of data subjects regarding the processing of their personal data when dealing with the regulation of consent, transparency, profiling, legitimate interest, further processing and impact assessments.

The new data protection rules should strike the right balance between data protection and innovation. While continuing to invest in consumer trust and confidence, industry should be in a position to meet consumer demands for new innovative services based on an intelligent use of data and so contributing to making citizens' lives easier and better.

Same services, same rules

1. Territorial scope

Currently, European citizens cannot rely on European rules to consistently protect their personal data. This weakens confidence in the European digital ecosystem and stops consumers from fully benefitting the potential of the single market. EU policy makers need to ensure that European privacy values and regulations are equally applicable to European and non-European suppliers providing services to European citizens and businesses. We do not wish to end up with a framework that would hamper operators' ability to compete within the EU, particularly during these already stressful economic times.

From an industry perspective, a key issue is the creation of a new value chain in the Internet economy. Due to existing data protection obligations, traditional electronic communications players such as telecom operators are losing ground vis-à-vis global online players. What ETNO therefore continuously requests is that Europe strives for a regulatory framework that guarantees the same rules for the same services, while effectively protecting the privacy of EU citizens.

There is growing disconnection between the traffic increase generated by online applications and platforms (primarily video downloads) on the one hand and the revenue of operators on the other hand and the latter are faced with a huge investment challenge in fixed and mobile NGA infrastructure to cope with this traffic increase. Internet Service Providers ("Over-the-Top" players or OTTs) have no incentives to contribute to investment in additional network capacity and are not submitted to the same regulatory burdens as telecom operators.

▶ The European Commission's proposal for a General Data Protection Regulation, according to which all players providing services to EU citizens would fall under European data protection rules, was a first step in the right direction. ETNO continues to welcome the Commission's territorial scope approach to this important piece of legislation, which is not only important for all businesses to compete on equal footing in the EU, but also for consumers and citizens to enjoy a consistent privacy experience, regardless of the geographical location or the economic sector of the service provider. In this context, international data transfers should not undermine the applications of European data protection standards. That is why, for instance, the Safe Harbour agreement should be reviewed in light of the General Data Protection Regulation.

2. Review of the ePrivacy Directive

ETNO has for many years been calling for a review of the 2002 ePrivacy Directive and as such, is pleased to see this finally appear on the Commission's work schedule.

Our main concern is that the ePrivacy Directive is now outdated and can no longer be justified in a world of converged and globally connected online services. Moreover, the existence of different and unequal rules for equivalent services offered by different players does not lead to a single market in privacy or data, but rather distorts the value of data and innovation in data driven services. This greatly impacts the ability of EU telecom operators to compete on an equal footing with other online players and it creates legal uncertainty and confusion for consumers.

Telecommunication service providers are highly regulated as regards the privacy and security of customer communications and data, while OTTs are generally not regulated on functionally equivalent services and data. This seriously distorts meaningful competition on data protection and privacy between the two categories of providers and contributes to a substantial value migration from telecommunications operators to OTT players and device manufacturers.

We believe that it makes more sense from an efficiency perspective to repeal the ePrivacy Directive through the draft General Data Protection Regulation (GDPR), rather than dealing with one review after the other. However, more importantly, in the latter scenario, there will be considerable lag time between the closing of each legislative file, meaning that operators will continue to face this dual compliance regime and their competitive position will be compromised, possibly until 2020. This merely exacerbates existing market distortions and weaknesses in consumer privacy protection.

While we understand that the ePrivacy Directive is now slated for review, we continue to urge the Commission to consider this work within the scope of the GDPR, or at least, take urgent steps to ensure that the length of time during which these legislative inconsistencies exist is minimised to the greatest extent possible.

Cloud computing

Cloud computing will be a powerful engine for economic growth, productivity and trade and with this in mind, ETNO welcomed the Commission's European Cloud Computing Strategy. Many ETNO members are participating in the associated workstreams, including the European Cloud Partnership. ETNO hopes that a coherent EU approach to cloud computing can be found as a result of all these efforts and our members are ready to contribute to the debate and lend their expertise as cloud providers.

European network operators are investing heavily in broadband network deployment and up-upgrades to provide the infrastructure underpinning cloud services. As such, the industry needs to rely on a policy/regulatory framework that seeks to encourage and foster investment and innovation. Without the necessary broadband infrastructure in place, Europe will not fully realise the benefits of cloud computing and the associated economic and efficiency benefits. Moreover, Europe cannot afford to fall behind other parts of the world, that recognised the transformative effect of cloud computing a lot faster and embraced the technology and uptake well before. ETNO also believes that all cloud providers operating in the European Union should compete on a level playing field, with the same rules applicable to all.

To ensure the success of cloud computing, the rules governing international transfers of personal data from the European Union to third countries should provide an equivalent level of protection for individuals. In parallel to strong consumer protection, data protection rules must consider business interests by safeguarding the flow of data internationally, rather than cutting it off or restricting it. Thus ETNO believes that the proposed General Data Protection Regulation (GDPR) represents an improvement in facilitating the transfer of personal data to third countries. The association especially welcomes measures to codify a simplified process for adopting Binding Corporate Rules (BCRs) within the same group of companies.

Cybersecurity and the Network and Information Security ("NIS") Directive

Cybercrime has an impact on the economy, politics and society. Cybercriminals are increasingly involved in organised crime, have immense financial resources and at little risk/minimum effort can cause great damage. Cybersecurity policy is economic policy because in a globalised world, high levels of protection and data security are also an economic advantage.

As a consequence of the revelations relating to the surveillance of European Institutions and citizens, it is of utmost urgency to restore confidence in cyberspace. In line with the European Commission's recent Cybersecurity Strategy, ETNO believes that the development of an integrated European market for secure ICT solutions by service, hardware, and software providers, operators and on-line operating companies such as banks and retailers, should be developed.

ETNO sees the NIS Directive as being crucial for the proper functioning of the Internal Market and for ensuring that European citizens experience a secure and trustworthy digital environment throughout the ICT value chain.

ETNO has repeatedly stressed its view that a single European cyber-security market can properly function only if every link in the Internet value chain is considered and protected and a holistic approach is taken. As such, ETNO supports the inclusion of certain "Information Society Service providers" within the scope of application of the Directive. It is essential that minimum security requirements be imposed on the so-called "Internet enablers" and that the adoption of risk management practices and the reporting of security breaches be applied across the entire digital value chain in the interests of both consumers and businesses. For this reason, ETNO broadly welcomed the European Commission's initial Proposal, which went in this direction. This is an important level playing field issue.

A single European cyber-secure market can only properly function with an approach which addresses a large number of actors of societal and economic value who, if not already doing so today, will be managing the critical infrastructure of tomorrow. ETNO was particularly concerned by the European Parliament approach and believes that the Plenary vote compromised the ultimate goal of this Directive, which is to enhance the overall level of trust and security in the EU.

“ Imagine the Digital future and allow it to flourish in a truly connected Digital Single Market – Can Europe live up to the challenge? ”



+ Strengthening Consumer Protection and Ensuring Consistent Rules

Rationale

Today's Digital Market in the European Union is characterised by the dynamic delivery of a broad variety of innovative services. In many ways, consumers clearly benefit from this development and continuously demand new services, which increasingly digitalise nearly all areas of life. However, there is an obstacle which prevents Europe from leveraging the full potential of the Digital Market.

EU's digitalisation goes hand-in-hand with an increasing imbalance which negatively impacts the public benefit. First, consumers cannot rely on a coherent set of digital rules since consumer protection standards are fragmented. Second, commercial undertakings have to compete in a digital market that does not provide consistent rules, and puts certain players at a disadvantage due to outdated regulatory burdens.

The challenge of leveraging the Digital Market's full potential

Reasons for this imbalance lie in the outdated EU legal framework, which no longer reflects the rapidly changing Digital Market. The issue relates to several horizontal regulatory measures on the one hand and to sector-specific regulation of the telecom sector on the other.

Ex-ante regulation, designed about twenty years ago, assumed a key role in promoting competition and protecting end-users when telecommunication networks were privatised and the provision of services was liberalised. Regulation was designed for national incumbents which were both network operators and telephone service providers.

Today's digital market has considerably changed. Competition at both the network and service layer has increased dramatically with the entry of new infrastructure providers, and especially with the entry of OTTs. The latter directly compete with highly regulated telecom operators, e.g. in the area of communication services. The technological link between providing infrastructure and communication services is today outdated in a market increasingly populated by OTT services. Although markets have converged into one Digital Market, sector specific regulation

remains focused on traditional telecom operators and the presumed market power of telecom incumbents. This does not reflect the reality of the post telecoms market liberalisation era, where some OTTs have significant market positions, leveraging the network combined effects of their digital platforms and services.

The European Commission's envisaged review of the regulatory framework provides a window of opportunity to update the EU legal basis, removing outdated rules, and ensuring consistent consumer protection standards and competition in the Digital Market. This is an essential measure to reach the European Commission targets of the Digital Agenda.

Objectives

Consumers need to trust the digital world and rely on a coherent set of up-to-date and effective protection rules which are consistently applied to similar services throughout the EU DSM, irrespective of the provider's category or geographic location. This is a crucial prerequisite to stimulate demand for services and increase customer satisfaction. The proportionate costs for industry flowing from a coherent set of consumer protection rules need to relate to the proven increase of consumer' benefits.

Keeping consumer benefits in mind, a coherent regulatory framework for the whole DSM should enable fair competition. This would increase the range of choices for consumers in the Digital Market. Applying the same principles to all services is a prerequisite for an innovative and continuously dynamic Digital Market. Besides this, an updated regulatory framework would contribute to the creation of jobs and growth within Europe.

All established providers need to compete in a coherent legal framework, to ensure optimal market output through effective competition. New market entrants need to be able to rely on a framework, which allows them to compete with established players. A coherent set of rules is needed to facilitate partnering models between different players in the Digital Market value chain, based on a common legal basis (e.g. the same consumer protection obligations, when jointly providing a service to a consumer).

Identified asymmetries

Digital Market players provide different groups of services. As a general rule, these groups can be clustered as infrastructure, devices and digital services. Each of these includes further subgroups. Since required actions vary along the whole value chain, the assessment of asymmetries needs to consider these different groups in the Internet value chain..

At the digital services level, regulatory asymmetries are particularly obvious. Sector specific regulation imposes strict rules on telecoms communication services (voice, messaging, fax). These rules² supplement the horizontal regulation that applies to all Digital Market players³. From the consumer perspective, due to the convergence of traditional and new online markets in the sector, many communication services substitute each other, regardless of whether these services are provided by telecom operators or OTTs. Meanwhile, a broad range of consumer protection rules are applied exclusively to telecom operators. Some important and non-exhaustive examples of asymmetric service regulation can be seen in the obligations for data protection and data retention, in the information requirements before, during and after contract conclusion and in security obligations.

On an infrastructure level, extensive sector specific regulation, created to facilitate competition and consumer protection⁴, covers telecom operators' communication networks and Internet access services.

Besides sector specific regulation, several horizontal regulatory measures do not appropriately address the rapidly changing Digital Market. Market convergence and new business models are often not sufficiently reflected in the regulation, leading to asymmetric regulation of similar services and products. This not only leads to unfair market conditions for telecom operators, but also for other players of the Digital Market. Just one example of such asymmetry in horizontal regulation applies to media and content regulation⁵.

² E.g.: Universal Services Directive (2002/22/EC)
Directive on privacy and electronic communications (2002/58/EC)

³ E.g.: Consumer Rights Directive (Directive 2011/83/EU);
Directive on unfair terms in consumer contracts (93/13/EEC);
Directive on certain aspects of the sale of consumer goods and associated guarantees (1999/44/EC);
Directive concerning unfair business-to-consumer commercial practices in the internal market (2005/29/EC)

⁴ E.g.: Access Directive (2002/19/EC);
Authorisation Directive (2002/20/EC);
Framework Directive (2002/21/EC)

⁵ E.g.: Universal Services Directive (2002/22/EC)
E-Commerce Directive (2000/31/EC);
Audio Visual Media Services Directive (2010/13/EU);
Copyright Directive (2001/29/EC)

Solutions

To achieve a coherent framework, regulation needs to be harmonised. Generally, this should be done by replacing outdated and unfit sector specific regulation with appropriate horizontal regulation covering all parts of the Internet value chain. A new horizontal regulation may be based on present-sector specific or horizontal obligations, depending on the topic. In addition to harmonisation of the legal basis, better law enforcement is required in some areas, e.g. in cases where a product or service is provided from a destination outside the EU, often avoiding legal obligations.

One means to achieve a symmetric legal basis, is to simply update underlying definitions. This includes adjusting the scope of "remuneration" as described in the Consumer Rights Directive (to cover all commercial contracts and not discriminate business models based on monetary payments) or updating of the current understanding of "communication services" in a technology-neutral way.

Considering the wide range of different products and services along the digital value chain, a one-size-fits all approach for all services and products does not appear reasonable. Any means to ensure a coherent regulatory framework needs to ensure effective consumer protection, at proportionate costs for all market players. This includes allowing innovation to thrive in a level playing field. Although a differentiated approach is required, some general requirements are needed, to ensure coherent consumer protection standards and fair competition.

For directly competing products and services, which are substitutable from the consumers' viewpoint, the same rules need to be applied to the same services. This particularly applies to communication services, including voice, messaging and social media that facilitate forms of communication.

In more general terms, the application of a common set of general principles is required for the whole Digital Market value chain, including various products and services. Such future regulatory principles may include current rules applied to telecom operators.



b) Removing Restrictions

ETNO believes that any changes to the legislative framework should respect the European Commission's Better Regulation principles, especially in the fields of copyright, Audiovisual Media Services ("AVMS"), and eCommerce. This will facilitate the creation of a policy framework that encourages investment and increases the possibility of financing in innovative areas.

Modernisation of copyright rules

Intellectual property rights ("IPRs") are necessary for innovation and for the provision of quality services for consumers. It is therefore of the utmost importance that the European Commission adopts a forward-looking and balanced approach to copyright reform, aimed at protecting existing rights while allowing new legal business models to emerge.

Generally speaking, to allow the digital market to flourish and explore its full potential, we see a need to simplify and streamline the current regulatory framework to adapt it to evolving technologies. By way of example, browsing and hyperlinking should not be subject to ad-hoc licences, nor should any duplication of processes to request and enjoy content-related rights be allowed (by way of example, the "making-available" right should also cover the right of reproduction). In relation to user-generated content, over-regulation should be avoided with a distinction made between private and non-commercial use.

An overly restrictive approach aimed at limiting the possibility of developing new business models would simultaneously affect the offers available to consumers and prejudice the freedom of information and expression of citizens as well as the media's right to research facts as a basis for subsequent publication.

Instead of reinforcing the intermediaries' liability regime, ETNO believes that there is a general need for a strengthened harmonisation of rules and practices throughout Europe to reduce the fragmentation of markets. In particular, the current fragmented application of the private copy levy exception throughout Europe, which leads to unbalanced national situations and requires review.

The modernisation of the copyright rules should ensure a careful balance between other fundamental interests such as the right to privacy, or the right to conduct a business (ECJ, SABAM, 2011). European broadband operators invest heavily in the development of a legal and safe digital market for the wider spread of culture and information and face strong competition from other big players that have entered the market. In this context, EU broadband operators cannot reasonably be asked to carry additional disproportionate burdens such as a heavier extension of their role in addressing copyright infringement or by introducing a general compensation scheme aimed at compensating rights-holders. Instead, a pro-competitive level playing field must be ensured.



Improving access to content, geo-blocking

There is an ongoing need to facilitate a wider availability of legal content at affordable conditions, as the key means to boost the legal digital market and to address any underlying infringement concerns. In this respect, geo-blocking practices should be carefully considered: while they may limit the cross-border availability of content, they respond to business considerations that cannot be disregarded. The Court of Justice decision in the Murphy case (C-403/08 and C-429/08) made a step forward in clarifying the boundaries of any initiative in this regard. Namely, in the Court's judgment, the private viewing of a Member State's broadcast in another Member State (in the case, Greece and UK) does not represent an independent act of exploitation and is thus allowed. It is also important that any initiative to favour cross-border access to content take into account the existence of those EU players that have a small or national footprint compared to those of global dimension. In addition, the consumer's need for cross-border access to content should be assessed by, in particular, differentiating whether they are mobile across the EU or whether they want to access content offers provided in another Member State.



eCommerce

ETNO members are aware of the fact that electronic commerce is a driver for citizens' welfare and economic growth and should therefore be fostered. ETNO believes that this goal may be achieved by increasing consumer trust and confidence in using digital technologies, irrespective of the type and location of the service provider, and through an increased harmonisation of consumer protection rules.

Along the same vein, it is necessary to guarantee effective and secure payment instruments for e-commerce transactions, and define new, more efficient systems for managing copyright in the online world (the new rules for increased transparency, accountability and competition of collective rights management organisations are a first step in the right direction). The development of educational campaigns addressed to users and the availability of legal, attractive and easily accessible content offers for consumers are fundamental to increase consumer' confidence in electronic commerce.

ETNO members consider that the regime on intermediary liability set by the e-commerce Directive strikes the right balance amongst the stakeholder interests involved and is still fit for the digital age. The current regime has allowed the development of online commercial activities which respect the fundamental principles and rights recognised at EU level, in particular freedom of speech, the right to Internet access, the right to privacy and the right to conduct a business. The legal framework has also been further clarified by the European Court of Justice, specifically on the "mere conduit" concept and "hosting" activities. As a consequence, any modification of the current rules would create an imbalance since it would likely affect the part of the industry which has the ability to drive EU investment and growth and would jeopardise the development of innovative services by the European ICT sector to the detriment of users. The likely outcome would be damaging to Europe's competitiveness and welfare.

Enforcement and Notice-and-Action

A proper enforcement of copyright rules is fundamental. The effective and harmonised application of the Intellectual Property Rights Directive ("IPRED") throughout Europe is a necessary condition to achieve this goal. However, the strengthening of the existing enforcement tools through an unreasonable expansion of the intermediaries' role, without and beyond the framework of a proper judicial review, would be contrary to stakeholder roles and rights. Intermediaries should not be requested to replace a judicial authority. This would be incompatible with the necessary legal safety provided by a judge to identify the infringement, leading to the proliferation of claims and would, as a consequence, impair intermediaries' fundamental right to conduct a business. On the introduction of Notice-and-Action mechanisms aimed at blocking access to or removing illegal content from hosting platforms, ETNO members have always proven to scrupulously cooperate with the competent authorities ensuring a fair management of each case. Any initiative in this field should continue to be of a voluntary nature, should consider the specificities of the different illegal activities addressed and should not ignore the fundamental role played by intermediaries as well as the fundamental rights of privacy, freedom of expression and the right to conduct a business.

More in general and according to the Better Regulation principles, an assessment of the transposition and application of the IPRED Directive throughout Europe would be necessary before introducing a new piece of legislation.



Review of the AVMS Directive

ETNO is of the opinion that a forward-looking analysis should evaluate whether and to what extent the current form of media regulation is still appropriate and proportionate in the current global context and in light of the regulatory objectives enshrined in the AVMS Directive. The increasing transmission capacities allowed by ultra-broadband networks, the increasing market competition, the multitude of different service providers, the convergence of media and the increased user control over services provided, may raise the question of whether the current form of media regulation is still fit for purpose. We are seeing the emergence of services that are found to be functionally substitutable, to have a similar or even greater impact on society and which may pose comparable or even greater risks for regulatory objectives, but these services are still regulated differently, if at all. ETNO strongly believes that similar services should be treated equally, irrespective of the service provider's position in the value chain, its prior regulatory status, or its location. Lighter regulatory instruments should be applied to services that are provided by various different players and that may have lower societal impact (implying a lower risk for regulatory objectives) and/or which offer users a higher degree of autonomy. Moreover, it is crucial that the AVMS Directive provisions be enforced on all players in the value chain so as to ensure a level playing field in the EU market.

Convergence has led to a greater service offer: traditional broadcasters can provide linear or non-linear TV services over the Internet (as if they were OTTs), OTT players can provide linear or non-linear TV services (type "Netflix"), and distributors can re-distribute their signals, partly on a broadband circuit. The freedom to choose which content provider has access to platforms is a fundamental basis of audiovisual media services distribution activity. It grants platforms the possibility to create their own content offers and to differentiate from their competitors. The freedom to choose content is an important tool for efficient competition between players in the market. Indeed, according to articles 101 and 102 TUE, agreements and the abuse of dominant positions are sanctioned in cases where there is a restriction of competition.

Regulators should ensure a level playing field by promoting competition and applying the same rules to the same services.

In the same way, must-carry rules should not be extended to additional infrastructure/platforms; rather, they should be

focused on content of general interest with specific public value and increased potential of influencing individual and public opinion-forming. At the European level, this should continue to be monitored carefully. In addition, an extension of related obligations to innovative forms of media services other than specific linear audio-visual media services is not regarded as necessary nor in many cases feasible (by way of example, the application of the EU production and distribution quota).

From an Internal Market perspective, ETNO considers the country-of-origin principle to be the core principle of the AVMS Directive. It was introduced to ensure the functioning of the Internal Market for audiovisual media services and could be relevant in a harmonised context, where rules are balanced throughout Europe. Today, the current fragmentation of the markets and the lack of harmonisation across the national frameworks, may lead opportunistic players to forum shopping, in particular by choosing the country imposing the less stringent rules. This would lead to an unlevel playing field. The issue goes beyond the AVMS Directive and also covers tax regimes.

Finally, regarding the issue of the protection of minors and in consideration of the continuing additional efforts voluntarily implemented by the main broadband players, ETNO believes that the AVMS Directive remains valid also in an increasingly converged media context and does not require revision.



“ It is high time to move away from outdated rules and adapt to new market dynamics – Let's bridge the gap ! ”

c) Ensuring Access and Connectivity

The European Commission has rightly identified “ensuring access and connectivity” as a key pillar of its forthcoming DSM Strategy. ETNO would like to stress that the creation of the European DSM relies on the availability and development of high-speed broadband networks, both fixed and mobile. In the Commission’s Strategy, the need to improve conditions for investments in next generation broadband networks (NGN) should be a key priority in order to provide the backbone for the digitalisation of the European industry.

The EU could and should do more. As recognised by the European Commission, Europe needs to reach the same levels enjoyed by the US, Japan and South Korea as regards availability and service penetration of Next Generation Access (NGA) networks.

In the electronic communications sector, regulatory incentives are key to determining investment decisions. In ETNO’s view, the DSM Strategy should therefore set the creation of a much more investment-friendly and forward looking regulatory environment as a top and urgent priority. It should foresee a timely and thorough reform of the current regulatory framework for electronic communications. The objective of fostering network investments, in both fixed and mobile broadband, should be clearly indicated as the central objective of such a reform.

Key trends characterising the electronic communications market

The reform should take into careful consideration the following market and technological trends, which will be central to the evolution of the electronic communications sector in the coming years:

- The growth of OTT services and the need to address the regulatory challenges that this raises;
- The growing demand for bandwidth-hungry services, together with the continued migration from PSTN to all IP-technology, which requires significant investment in high-speed electronic communications networks across Europe;
- The increasing relevance of infrastructure competition across several markets;
- The need to secure sufficient spectrum resources for wireless technologies, also as a consequence of the increased use of bandwidth-hungry services.

In addition to these, the following key trends, with special relevance for the regulatory framework, should also be considered:

- The existing fixed electronic communications networks will increasingly require significant additional investments in fibre to replace a significant proportion of the copper, in order to remain competitive;
- In several Member States, local/regional fibre deployment by players such as utility companies and municipalities will lead to increasingly competitive and heterogeneous market structures in high-speed broadband access, also with the potential to significantly distort competition in competitive areas;
- In many EU countries, cable operators have been rising as strong, largely unregulated competitors in both fixed broadband and, increasingly, wireless broadband markets;
- There is a growing trend in many markets to provide retail bundles of both fixed and mobile services to consumers;
- A further tendency towards the convergence of networks and services is under way, with increasing complementarity between fixed and mobile, and also increasing substitutability between services (such as voice over mobile and fixed);
- There is lack of evidence that access network investments in NGA were achieved as a result of the application of the “ladder of investment” theory;
- There is the need to allow for price flexibility in order to foster the adoption of NGA services;
- Finally, there is a strong need to explore the full potential for 4G, including by envisaging more investment-friendly spectrum policies as a basis for competition in mobile.



The need for an urgent and ambitious review of the EU electronic communications framework

None of the above-mentioned trends were anticipated when the basis of the current European telecoms framework was being developed in the late 1990s.

This entails that, more than fifteen years after the liberalisation of the sector, the objectives of the current framework are not compatible anymore with the current market trends and the need to foster massive investments in high-speed broadband infrastructures. The focus has to shift to the promotion of investments and innovation in NGN, safeguarding the efficient level of competition that permits this level of investment. Dynamic efficiency considerations must be taken into account as a key element of effective competition.

In order to achieve this goal, slightly updating the current rules to the new market reality will not be sufficient. The EU should undertake a broad and thorough review of its electronic communications framework. Moreover, we believe that the reform should become effective as soon as possible. A period of around five years between now and the implementation of the new rules is definitely too long given the fast-changing market and technological environment.

Against this background, the Commission should consider tackling with particular urgency some pressing issues, for example in the direction of improving investment conditions in new high-speed networks and of creating a level playing field with OTT players. To achieve a fast and harmonised change to the framework, the legal instrument of a Regulation could be considered. Among the urgent actions to be considered, the Commission could, for example, limit far-reaching access requirements to NGA networks by reducing the number of regulated wholesale products and avoiding price regulation (in particular cost-orientation requirements for NGA products). An investment-friendly application of the margin squeeze test for NGA products should also be ensured. Finally, the Commission could also ensure that the same rules apply to similar services, notably OTT services provided as a substitute to current telecommunications services.

Main issues to be addressed

According to the 2013 Boston Consulting Report **“Reforming Europe’s Telecoms Regulation to Enable the Digital Single Market”**, “(…) regulatory distortion of competition in three areas is discouraging investment in advanced telecommunication networks:

1. Network owners are hindered in capturing the fair returns needed to fund investments in two ways: one is too much and inconsistent regulation of competitive markets. This results from the lack of local assessment of relevant competing infrastructures and from preferential treatment of infrastructure renters. The other is the uneven playing field in the digital-services ecosystem that contributes to a substantial value migration from European telecommunications operators to OTT players and device manufacturers from outside Europe.

2. Current approaches mandate inefficiency in the mobile sector. The problem includes the assignment and cost of mobile spectrum, which lead to delays in LTE rollout, and barriers to consolidation in a highly fragmented industry.

3. The current patchwork system of national rules mandating network access – and the price at which it must be provided – is intended to foster competition and investment by the outdated strategy of encouraging more retail competitors in any given market. The actual impact today is a de-incentivisation of investment in NGN”.

The forthcoming review of the regulatory framework should address these issues and provide for a more predictable, investment-friendly approach in both the fixed and the mobile segments. First of all, the objectives of the framework should be updated and re-prioritised: the need to incentivise investment has to become the priority objective, compared to today wide list of objectives.

As for the fixed segment, asymmetric access regulation that targets the former incumbent operators no longer responds to the current and future regulatory challenges. As next generation networks are rolled out, markets are increasingly characterised by multiple actors at network level, including municipal networks and publicly funded rural NGAs, cable operators, and increased competition from wireless broadband networks. Platform convergence blurs the traditional market boundaries between fixed and next generation mobile markets with strong effects on at least some user groups.

The high level of competition achieved in Europe and the tendency towards convergence should lead to less intrusive, complex and more equitable and future proof regulation. It is worth noting that the main success story of alternative infrastructure roll-out in the past decade have been cable networks, which have benefited from not being subject to wholesale access regulation. In fact, they did not need any access regulation to support their success.

Network access has traditionally been required in order to support unbundling and resale of the copper network by alternative operators with a view of them later becoming infrastructure-based competitors. There is, however, virtually no evidence that access network investment was supported as a result. It is high time to bury this approach, as it seems irrelevant in the NGA environment. In particular, the practice to keep multiple steps of the “ladder of investment” as regulatory remedies should be abolished. Drastically reducing the number of regulated access products for a given retail market would help to simplify and streamline regulation. Similarly, price regulation, and in particular cost-orientation obligations, appears no longer appropriate in today’s dynamic and competitive access environment.

As for the mobile segment, the EU should work towards the creation of a more forward-looking and investment-friendly framework for spectrum management. Spectrum is the “lifeblood” of mobile communications and how it is allocated remains the single most important regulatory factor in determining the market structure and hence the performance of the wireless broadband sector in Europe. Few would argue that the way in which Europe manages spectrum today – late and sub-scale in 4G and with vast differences in allocation policies between Member States with regard to any pre-defined number of networks per country – cannot be improved upon. This means that the Commission should maintain its pressure for significant changes in spectrum policy. We list below some proposals which would have a concrete and beneficial impact. The Commission should:

- Promote policy measures favoring and enhancing harmonisation in the assignment of spectrum. Various degrees of harmonisation can be foreseen, ranging from the harmonisation of the granting timetables and of the duration of the rights of use only, to a broader harmonisation of spectrum policy across the EU, at the same time taking into account the different environments in each Member State;
- Promote regulatory measures that increase market certainty, such as the definition of a longer or undetermined duration of the rights of use;
- Promote a more liquid and simplified secondary market for spectrum trading;
- Ensure an overall simplification of the regulatory requirements attached to spectrum licenses, in order to avoid creating unnecessary regulatory burden; and
- Minimise conditions that can distort market competition among players/operators, such as reserving significant portions of spectrum for new entrants.

To sum up, ETNO argues for a framework which better rewards investment in spectrum and networks and which lay the ground for more harmonisation of spectrum policies as an essential step towards a truly single market for telecommunications. Competition between wireless broadband networks and services has changed since the late 1990s. After a period of dynamic competition when regulation in mobile was minimal, much of the regulation adopted by the Commission and NRAs since then has been aimed at increasing the number of wireless providers, “narrowing the gaps” between those who invest in spectrum and those who don’t.

Policies which aim to limit or reduce the competitive advantages enjoyed by wireless broadband operators, have largely succeeded. But in doing so they have weakened the incentives of operators to invest also on a pan-European scale. The European Commission should therefore ensure a radical reform of the current spectrum management framework, to ensure that the skyrocketing increase in the consumption of wireless data traffic is supported by the necessary investments in network infrastructure.



d) Building the Digital Economy

+ Re-industrialising EU through Digital

In recent years, Europe has lost its industrial competitive edge - the leadership in manufacturing and is lagging behind in the digital world.

As the European Commission has recognised⁶, “this is happening at a time when the speed of innovation and technological development has put the world on the edge of an industrial break-through. Several new technology areas are converging to lay the foundation of the new industrial revolution based on green energy, clean transport, new production methods, novel materials and smart communication systems. These will change the global industrial landscape and our competitors in the U.S. and Asia are investing heavily in these areas. Europe needs new industrial investment at the time when lack of confidence, market uncertainty, financing problems and skills shortages are holding it back”.

This is particularly true for Europe’s high tech industry. According to a study released by AT Kearney in September 2012 on the Future of Europe’s High Tech Industry, “European companies account for less than 10 percent of global sales of the world’s top-100 high-tech companies in the information and communication technologies (ICT) sector⁷”.

Thus, according to AT Kearney, just nine of the world’s top 100 high tech firms have their headquarters in Europe (and the ranking was compiled before the acquisition of Nokia’s devices and services division by Microsoft). The DSM Strategy should focus on these key facts and help rebuild Europe’s digital leadership.

This will be relevant from two main viewpoints: it will help Europe’s reindustrialisation process since Europe needs ICTs to

compete in sectors such as automotive, industrial engineering and others, and it will reduce Europe’s dependency on non-European high-tech suppliers. The opportunities of creating a strong and competitive European Digital Economy are too relevant politically and economically to be disregarded. A new agenda for Europe’s digital economy is job-sensitive, investment-sensitive and relevant from both the security and geopolitical viewpoints.

In this respect, an area where the EU could play a key role is fostering innovative digital services in the EU economy, accompanying and promoting the digitisation process of the EU industry as a whole.

To this end, the EU should create rules and conditions favorable to the development of such services, avoid rising regulatory barriers, and adequately support cutting-edge research and innovation.

⁶ European Commission (2012) A Stronger European Industry for Growth and Economic Recovery, COM(2012) 582.

⁷ See AT Kearney (2012), European High-Tech Industry Becomes Increasingly Marginalised. For the study, the ICT industry was defined to include nine segments: IT services, IT hardware, personal computers and notebooks, software, telecommunications equipment, handsets, consumer electronics, semiconductors, and electronic components.



Fostering the development and uptake of digital services

Digital services are an essential part of the DSM. Some of the newest and most vibrant digital services will strongly benefit from a DSM vision. M2M, Cloud, e-health or mobile payments are clear examples of services that are facing difficulties to reach mass market due to lack of harmonisation among all European countries. For these services the single market is a must and the current digital agenda has not moved forward enough in these areas.

Internet of Things (“IoT”) and M2M

A huge growth of the IoT is expected in the near future. As technologies (microelectronics, communications, etc.) evolve, most objects will be connected to the Internet, allowing the provision of all kinds of new services and huge productivity improvements.

Communication networks should be ready to handle the high volume of traffic that new services will be generating in the future. To this end, the EU regulatory framework should leave enough scope to electronic communications providers to manage Internet traffic in the most efficient way and develop innovative services.

Some of the areas where IoT will have a very important impact are smart cities and connected cars. The DSM Strategy should include plans to favour fast developments in these specific areas.

Public services

The offer of public advanced services should be improved taking advantage of the new available technologies to provide advanced services like e-health services based on wearable devices, or e-justice services based on digital identity systems.

M-payments

Mobile technology unlocks new possibilities also in the payments sector, making it possible for people to use new, innovative and convenient payment services. An m-payment revolution would not only improve customers’ experience when performing payments, but it would also make the competition in payment markets more vibrant

Digital identity

The use of digital identities systems based on mobile phones could help improve dramatically the security in the use of Internet services and payment systems. The ease of use of digital identity would also enable the elderly and people with different disabilities to use them extensively and securely.

Big Data

Big Data services are an important ingredient of the future Digital Life and Europe cannot afford to move apart of this path. European citizen’s quality of life and European competitiveness are at stake. Policies and regulation must ensure that innovation and the development of information-based business proposals are fostered but that end user’s personal data are adequately protected at the same time.

Sustaining cutting-edge research and innovation

In addition to providing the necessary conditions for the flourishing of innovative services, the EU has a role to play in stimulating much-needed research and innovation (“R&I”) activities.

Under the Horizon 2020 framework, the European Commission is supporting R&I in important areas such as, for instance, Big Data and 5G. The EU should further improve its role and effort in these fields. This requires not only devoting substantial funding to R&I projects, but also putting in place the right procedures for the assignment of grants.

In particular, regarding the 5G Public and Private Partnership (PPP), ETNO believes that if Europe is to lead the 5G definition phase, there is a need for the European 5G initiative to develop all the 5G infrastructure components in a consistent and timely way and to push coherent project results to standardisation. The approach must be holistic in order to secure European leadership. If some key aspects of 5G are not covered by any 5G-PPP project, Europe will have difficulties demonstrating our comprehensive approach and we will risk that some aspects will be addressed in inconsistent ways or may be led by other regions.

Another important consideration is the interrelation between regulation and R&I. In developing and updating its regulatory framework for electronic communications, Europe should refrain from envisaging excessively rigid and prescriptive rules which could hamper the development and provisions of the services which the EU itself is supporting through its R&I policy. A clear example would be constituted by excessively rigid rules on network traffic management, which would hamper EU’s advancement in the fields of IoT and in the application of the potential of 5G to the digital economy as a whole.

+ A Fair & Sustainable Tax Framework

ETNO strongly supports the intention of the Commission to look deeply into taxation issues in the context of the DSM Strategy. Moreover, ETNO supports the principle that the possibly complex tax challenges that are posed by the evolving economic environment should be addressed in a comprehensive way at EU and even broader (especially OECD) level.

Today it is becoming more and more difficult to differentiate between the digital and the real economy. We are tending towards an era of “digitisation”, where traditional industries are being reshaped by the digital revolution. It is therefore clear that there is a growing necessity for the appraisal of the current fiscal legislative environment, identifying what aspects of the legislative architecture are optimal and what areas demand reform. At a time of increasing burdens upon business, no new legislation should be considered without a repeal of an existing statute.

Future EU rules in the field of taxation should in particular meet the following criteria:

- Be capable of ensuring a fair level of taxation, in accordance with some agreed drivers and guidelines referring to some key questions (e.g., the appropriate place of taxation both for direct and indirect taxes; the appropriate compensation in case of intergroup transactions);
- Be capable of ensuring a level playing field (as far as taxation is concerned) in the competitive scenario;
- Be workable from a business point of view (even in a cross-border scenario, which is often the rule for digital economy transactions) and easily auditable from the tax administrations' point of view.

Furthermore, it should be underlined that lack of coordination between EU countries and third countries could be very harmful: double taxation (or even double deduction) situations might arise. There should be no room for any case of double taxation, since such cases could be very harmful for the definition of a fair competition environment, and a co-operative relationship with the tax authorities.

A last, but important and fundamental principle of the digital economy's (future) taxation guidelines should be neutrality in the

tax treatment of operations and supplies, in comparison to the corresponding physical products. A lack of neutrality might result in a lowering of the digital economy's huge potential.

The same neutrality should be applied to telecommunications services and the various businesses arising from the digital economy as it is clear that the relationship between them is significant, and shall become even more so.

Currently, clear distortion exists between services being offered by nationally regulated telecoms operators and trans-national Internet service providers which offer services across borders which can offer clear advantages in terms of industry specific taxes or even corporate income taxes.

Specifically, the negative impact of mobile-specific taxes on consumers, the operators and the country's economic development should be considered and assessed carefully in order to try and avoid as far as possible the introduction of distortive measures which heavily affect the creation of even playing field.

In this context, it should be ensured that future tax rules on communications services provide a viable basis for the development of the European electronic communications sector, without a distortion of competition and without undue compliance burden.

Finally, as far as indirect taxation is concerned, ETNO supports the adoption of measures which align the VAT rules on digital content with the applicable rules on physical goods. This is a necessary intervention in order to eliminate potential inequalities which may arise.

“ We are tending towards an era of “digitisation”, where traditional industries are being reshaped by the digital revolution. ”

e) Promoting e-Society

Digital services are an essential part of the DSM and some of the newest and more vibrant digital services will benefit from a single digital market vision. Digital solutions in areas such as e-health, e-skills or smart cities and connected homes are clear examples of services that are facing difficulties to reach mass market due to a lack of harmonisation of various rules (eg. data protection rules or administrative barriers) across all European countries.

eHealth

In most countries across Europe, around 5% of patients (those with chronic health conditions) account for 50% of the annual health budget. Moreover, ageing is one of the greatest social and economic challenges of the 21st century for European societies. By 2025, more than 20% of Europeans will be 65 years or over, with a particularly rapid rise in number of over-80s. Because older people have different healthcare requirements, health systems will need to adapt so they can provide adequate care and remain financially sustainable.

New sensors and devices could make a new generation of health systems possible such that the quality of care could be improved and medical costs reduced. Besides this, national health systems are often fragmented, with a low level of standardisation, which regularly occurs as barrier for ICT solution providers to reach scale. Europe needs to be ready to embrace new innovations in healthcare technology and we need help from politicians across Europe to change the model and mindset across of sections of society, including healthcare professionals.

Accessibility for people with disabilities

The Communication of November 2010 on the European Disability Strategy 2010-2020⁸, defines 'accessibility' as meaning that people with disabilities have access, on an equal basis with others, to the physical environment, transportation, information and communications including technologies and systems (ICT), and other facilities and services in line with Art. 9 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD), to which the EU is a party.

Persons with disabilities and older persons constitute a substantial and strongly growing part of the EU population. Technology plays an essential role in improving peoples' lives and an explicit effort to narrow the gap created between those users who have the knowledge and resources to benefit from technology, and the ones who do not, is needed. When ICTs are available, affordable and accessible, they significantly improve access to all aspects of society and development.

The EU can and should play a key role in stimulating the introduction of ICT-enabled solutions adapted to the needs of persons with disabilities, increasing the availability of accessible ICTs and promoting the affordability of assistive technologies in social, educational, economic and other domains.

e-learning and eSkills

The introduction of e-learning technologies in the academic environment across different levels could help to improve access to education and the effectiveness of education in Europe. European education systems should fully embrace the new digital reality to help ensure that younger generations are equipped to take advantage of digital opportunities and to contribute to a digital society

As regards eSkills, there are two dimensions ETNO believes should be considered in the future Digital Agenda for Europe: (1) the impact that more developed skills have on the demand for ICT services and (2) from an employment perspective, the need to stimulate a higher take up of engineering, mathematics and computer science to fill the current shortage of professionals in these areas.

ETNO recently signed a Joint Declaration on Future Skills Needs and called for a close collaboration among stakeholders, to enhance the social dialogue in this field, promote young talent engagement and women's leadership, foster intercompany cooperation on skills and to develop a common terminology on skills and job profiles.

Smart Sustainable Cities

Cities are powerful engines of economic growth, fuelled by intensive interpersonal communication and high concentrations of specialised skills. There are significant sustainability challenges however, with cities today accounting for over 70 % of global GHG emissions and 60-80% of global energy consumption.

An estimated 70 % of the world's population will live in cities by 2050. According to the World Bank, the urban population of the European Union accounted for 74% of the total already in 2012.

Sustainable urbanisation has become an important policy issues for administrations across the world. ICTs have a crucial role to play by increasing environmental efficiency across industry sectors and enabling such innovations for cities and homes as intelligent transport systems and "smart" water, lighting, energy and waste management.

⁸ http://europa.eu/legislation_summaries/employment_and_social_policy/disability_and_old_age/em0047_en.htm



“ Europe needs to be ready to embrace new innovations in eHealth, eSkills and other smart technologies to create a smarter, more resource-efficient society. ”

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