

Achieving a Level Playing Field between the Players of the Internet Value Chain

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Abstract: A fully functioning ICT Single Market in the European Union requires a level playing field between all the actors in the Internet value chain. This is not currently the case as telecommunication operators face more stringent rules than OTTs for the provision of their services. This imbalance does not provide the same level of protection for customers, does not provide the same guarantees for governments and generates competition distortion, hence it has to be overcome. To achieve this purpose we propose to update the definition of the "Electronic Communications Services" deleting the "conveyance of signals" criterion and limiting ECS to access services. Such change would clarify the classification of ICT services ensuring the same level of consumer protection since substitutable services would be submitted to the same regulatory regime. This paper also presents a proposal for further reviewing the Telecom Package transferring obligations from the sector-specific to the cross-sector framework and underlines the need for efficient law enforcement and taxation. Considering the extent of the proposed changes, this paper is to be considered as a basis for further analysis.

Key words: European ICT regulation, electronic communication services, information society services, over the top.

The definitions of "Electronic Communications Services" (ECS) and "Information Society Services" (ISS) are at the basis of the current European regulatory framework. ECS providers, namely telecommunication operators, face more stringent rules for the provision of their services than do ISS providers, such as Over The Top (OTT) players ¹.

(*) Disclaimer: This paper represents the analysis of the authors and not necessarily Orange's position.

¹ The term "OTT players" was introduced in the USA in 2008 to distinguish ISP providers such as AT&T or Comcast from players providing video services "over the top" of the internet connection such as Netflix or Hulu. Nowadays it includes: video streaming (YouTube, Hulu, Netflix, Apple TV), voice or video calls (Skype, Apple Facetime, Viber, Voxer, Tango),

Hence, the heaviest regulatory obligations currently apply only to ECS providers. This generates extra costs and constraints for ECS providers compared to ISS providers.

With the generalisation of broadband access solutions, ISS, such as voice and messaging applications – which are substitutes for ECS – have been developed on service platforms, without meeting the definition of ECS and therefore avoiding relevant regulatory constraints. This situation creates uneven competition between services which are functionally substitutable. Furthermore, such ISS services, which are substitutable to ECS, do not offer customers the same level of protection (emergency services) or provide the same guarantees for governments (legal interception, interoperability).

Hence, the current rules constitute an obstacle to the creation of a single market in the Information and Communications Technology (ICT) sector and to fair competition between ECS and ISS providers, in terms of both prices and innovation. All of these elements call for the achievement of a level playing field for the Internet value chain stakeholders.

Updating the definition of ECS by limiting its scope to the "connection to the Electronic Communications Network" could be an appropriate response to the evolution of both the ICT sector and technologies at large. All telecommunications services other than the "connection to the electronic communications network" should thus be regulated as ISS rather than ECS. The on-going review of the regulatory framework, called hereafter the Telecom Single Market ² (TSM), should provide for a timely instrument to deal with the level playing field issue as part of the Telecom Package ³. In addition, the horizontal review of the cyber security, data protection and taxation rules in the European Union (EU) should also be undertaken to complete the work needed to achieve fair competition in the ICT Single Market.

messages on mobile device (WhatsApp, iMessage), gaming (Xbox 360, World of Warcraft), content, search engines (Google), hosting, e-shopping (Amazon), internet payment gateways, social networks, news aggregators, cloud computing services, application stores, etc.

² Proposal for a regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent - COM(2013) 627.

³ The complete Telecom Package: <http://ec.europa.eu/digital-agenda/en/telecoms-rules>.

The 2009 Telecom Package revision consists of:

- Directive 2009/136/EC of 25 November 2009 amending the universal service directive, the e-privacy directive and Regulation 2006/2004 on cooperation between national authorities.
- Directive 2009/140/EC of 25 November 2009 amending the framework directive, the access directive and the authorisation directive.

In the following we present proposals to reform the ICT sector regulation with the goal of achieving even competition conditions. Our proposals mainly focus on the reform of consumer protection rules contained in the Universal Service ⁴ (USD) and E-Privacy ⁵ Directives (EPD), as the Authorisation⁶ and the Access ⁷ Directives are less impacted by the updated definition of ECS we propose.

Our reasoning is based on the principle that sector-specific obligations can be removed from the Telecom Package and transferred to cross-sector instruments to avoid inconsistencies and overlaps and to grant the same level of protection for customers. In the following we develop the example of security obligations in the Framework Directive ⁸ and we give an overview of what could be done for privacy rules. Although we do not develop it, the same reasoning could also be applied to net neutrality and lawful interception obligations. The purpose of this paper is to propose what we consider as a sound structural solution to achieve a level playing field. It does not pretend to exhaustively cover all the adaptations that may be required as a consequence of this solution.

The 1st section describes the causes and consequences of the current EU regulatory framework for the ICT services market. The 2nd section recommends reforming the Telecom Package in order to achieve a level playing field. Section 3 suggests additional measures to make supervision of OTT players more effective. A conclusion, which lists the benefits of our proposals, sums up our reasoning.

Appendices are included to streamline the understanding of our proposals. Appendix I presents the current definitions of ECS and ISS. Appendix II provides a detailed list of the USD articles to be deleted or relocated.

⁴ USD unofficially consolidated version:

http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/Directive%202002%2022%20EC_0.pdf

⁵ EPD unofficially consolidated version:

http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/24eprivacy_2.pdf

⁶ Authorisation Directive unofficially consolidated version:

http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/140authorisation_2.pdf

⁷ Access Directive EPD unofficially consolidated version:

http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/140access_1.pdf

⁸ Framework Directive unofficially consolidated version:

http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/140framework_5.pdf

■ Causes and consequences of the uneven playing field

Commercial ICT services are classified on the basis of the current definitions of ECS and ISS. The services' classification determines the regulatory obligations to which they are subject. The table below provides a brief overview of the main commercial ICT services and related obligations. The classification of the commercial ICT services under European law is thoroughly discussed in Appendix I.

Table1 - Commercial services and current obligations

<i>Current categories</i>	<i>ISS provided by OTT or operators</i>	<i>ECS provided by operators</i>
<i>Commercial services</i>	E-commerce, web-based content Hosting services Search engines VoIP pc-to-pc E-mail services not "conveyed" by operators Instant Messaging services	Publicly Available Telephone Service SMS Internet access VoIP to and from PSTN E-mail services "conveyed" by operators
<i>Main cross-sector obligations</i>	Intermediary liability regime ⁽¹⁾ Cross-sector privacy rules ⁽²⁾ Consumer protection rules ⁽³⁾ Content specific regulation (copyright, media pluralism, etc.)	
<i>Main Telecom-sector obligations</i>		Interoperability ⁽⁴⁾ Net neutrality ⁽⁴⁾ Security and integrity ⁽⁴⁾ Emergency calls ⁽⁴⁾ Sector-specific privacy rules ⁽⁴⁾ Legal interception ⁽⁴⁾⁽⁵⁾

(1) Directive 2000/31/EC of 8 June 2000, called the E-Commerce Directive.

(2) Directive 95/46/EC of 24 October 1995, called the Data Protection Directive.

(3) Directive 2011/83/EU of 25 October 2011, called the Consumer Rights Directive.

(4) Telecom Package (see footnote 3).

(5) Directive 2006/24/EC of 15 March 2006, called the Data Retention Directive.

The current sector-specific regulations were drawn up to govern ECS operators in their primary function as providers of telecommunication services which are essential for society and economy, while the ISS category was designed to cover the wide range of internet intermediaries' activities. In our view, the classification of commercial ICT services as ECS and ISS was adequate at a time when these two classes of services were distinct and the development of the Internet was at its beginning.

With the growth of Voice over Internet Protocol (VoIP) and messaging applications directly competing with telecom Publicly Available Telephone

Service and SMS, the regulatory asymmetry has become significant and causes a considerable distortion in competition, with ECS providers bearing the costs of inconsistent regulation.

Such regulatory inconsistencies between commercially equivalent ICT services may be detrimental to customers, who do not understand the services' characteristics and limits and may even be at risk when using them (e.g. privacy issues on Webmail or lack of emergency calls on VoIP services). Hence, lower-priced OTT services look and feel like telecommunication services but do not offer customers the same level of protection (emergency services, data protection) or provide the same guarantees for the national authorities (legal interception).

ECS services bear the costs of both cross-sector and sector-specific regulations, which create constraints and costs that OTT players do not face⁹. The recent example of Skype refusing to register as a telecom operator in France highlights its reluctance to apply the corresponding regulatory constraints¹⁰.

This asymmetry results in a competitive disadvantage for ECS providers, which is not justified for services which are functionally substitutable like SMS and instant messaging or email services. ECS providers also face significant losses of revenues and profit (PAGE, MOLINA & JONES, 2013, p. 2) which come in addition to the cost of sector-specific regulations. Ovum estimates the worldwide losses due to OTT VoIP at \$30bn in lost revenues (OBIODU & GREEN, Ovum, 2012), about 4% of total voice revenues, and the loss due to OTT messaging at \$23bn in 2012 (DHARIA, Ovum, 2012).

European players experience competitive disadvantages in the field of innovative services *vis-à-vis* non-European players. OTT providers have had the freedom to develop innovative business models based on advertising revenues while ECS operators' efforts to develop similar audience models have encountered discouraging regulatory obligations which de facto have prevented them from using the same practices¹¹. There are also strong political and legal limitations on operators' ability to monetize statistics from customer data, even with anonymised data (OBIODU, Ovum, 2013).

⁹ These costs include direct and indirect costs including the revenue losses due to these obligations.

¹⁰ "Skype refuses to register as an operator", ARCEP, 12 March 2013, <http://arcep.fr/>.

¹¹ The Telecom Package strictly regulates personal data processing for economic purposes, as well as cross-subsidization between the various business models.

As an example, ECS providers are penalized for launching new services based on personal data processing, i.e. geo-localised services, which are growth drivers. Under this framework, ECS providers are latecomers in growing markets in comparison to players based outside the EU who have acquired major competitive advantages by using databases containing personal and geo-localisation data.

The lack of effective enforcement of EU law on large OTT providers and asymmetrical regulations handicap European players in competition with non-EU based companies, particularly concerning rules for the collection and the processing of personal data, which can serve as a basis for advertising and targeting services, as shown by the CNIL's struggle to force Google to comply with the EU privacy rules ¹².

In conclusion, the framework for OTT service delivery creates a high level of legal uncertainty for customers and regulatory fragmentation in the Single Market. A study for the ARCEP (Hogan Lovells & Analysys Mason, 2011) examined the question of how OTT services such as cloud computing, Content Delivery Networks, VoIP services, etc., should be categorised under French and European laws. While the study developed a sound methodology, it failed to provide clear answers for all these new services. The study shows that the existing regulatory definitions are impractical and subject to varying interpretations when applied to services on the borderline between the ECS and ISS categories.

■ Reviewing the Telecom Package

In this section we present our proposals for reviewing the ECS definition in the Telecom Package and we discuss the main consumer protection rules that should be relocated in cross-sector regulatory instruments.

¹² "The CNIL's Sanctions Committee issues a €150 000 monetary penalty to GOOGLE Inc.", CNIL, January 2014. <http://www.cnil.fr/english/news-and-events/news/article/the-cnils-sanctions-committee-issues-a-150-000-EUR-monetary-penalty-to-google-inc/>

The Framework Directive: "Conveyance of signals" should be deleted

According to the Framework Directive: "the [electronic communications] service consists wholly or mainly in the conveyance of signals on electronic communications network" (ECN)¹³. When the regulatory framework for electronic communications networks and services was adopted, the way the service was transported (conveyed) to render a service was key to classifying a service as an ECS.

Today, the use of the "conveyance of signals" criterion to classify a service as an ECS is no longer relevant due to the current technical reality, which allows ISS providers to deliver web-based services which do not require conveyance of signals but look like telecommunication services from the user's standpoint.

The bundling of applications and network access has rendered the delivery of digital services technically possible. With the development of broadband access, new web-based applications, which consist of platforms operated through the broadband access, provide the same main functionalities as ECS. In addition, technology is continuing to develop applications and network bundling, as is the case of proxy internet navigators. Customers are increasingly replacing traditional ECS with ISS provided by OTTs heightening the need to redefine the boundaries of ISS and ECS.

In our view, services which are substitutable from the customer's standpoint should be bound by the same rules on a neutral basis, whatever the technical means used, be it "conveyance of signals" or applications of services run on a platform accessible by users through broadband access.

In short, the technical criterion of "conveyance of signals" is an outdated way to classify services. Due to access and application bundling, ISS providers offer substitutable services. Pursuant to the regulatory principle of technical neutrality, substitutable services should be subject to identical regulations, whatever the technology they use. This is clearly not the case today for voice and messaging services, which are regulated differently depending on whether they are categorised as ECS or ISS. Furthermore, the regulatory classification of services is far from clear and leads to high levels of legal uncertainty and potential litigation.

¹³ Art. 2(c) of the Framework Directive.

Limiting the definition of ECS to the connection to the ECN

The definition of ECS should be limited to "the connection to the Electronic Communication Network" while the services currently referred to as "conveyed services" should be classified as ISS in order to achieve a level playing field between all players and progressively reduce the *ex ante* sector-specific rules as envisaged by the last Telecom Package reviewed in 2009¹⁴.

The definition of ECS should therefore cover only what is necessary for the connection to the ECN (i.e. the network access subscription) which enables access to the service platforms. The definition of ECS should thus cover network access subscriptions and exclude all other services, such as voice, SMS and email. These services should be considered ISS. In the following we will demonstrate that such an approach is not exotic, as it is the basis for the USD as modified in 2009, and is consistent with the definitions included in the proposal for a regulation on the Telecom Single Market¹⁵.

Revising the definition of ECS to remove the confusing "conveyance of signal" criterion and highlight the connection to the ECN as a characteristic of ECS would improve the ability of the European rules to serve as an international reference.

The new definition of ECS

This section proposes a new text for the definition of ECS given in the Framework Directive and a new recital justifying the revision of ECS definition itself. The text for the new recital:

"The definition of the concept of 'electronic communications services' shall be updated due to the technological evolution of services' transmission to end-users. The generalization of access to services platforms thanks to the development of broadband and very fast broadband access has led to the emergence of new services. These new services comprise services classified as 'electronic communications', defined by the regulatory framework reviewed in 2009 as consisting of signal conveyance, and other services based on other technical means. To date, such a dichotomy no longer exists since these services are functionally substitutable from a customer's point of view. The concept of conveyance of signals to classify an

¹⁴ See footnote 3.

¹⁵ See footnote 2.

electronic communications service is therefore outdated. To sustain investments, innovation, competition and a wide consumers' choice, regulation must be limited to the provision of access to the network only."

Proposed text for the revision of the definition of ECS (in track changes mode):

"(c) 'electronic communications service' means a service normally provided for remuneration which consists in **providing connection to an conveyance of signals on** electronic communications network; ~~including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;~~"

The USD already distinguishes between "connection to the network" and "provision of ECS"

The distinction between access to the network and provision of services is already recognised by the European Framework. The USD already distinguishes between "connection to the network" and "ECS provision".

The revised regulatory framework in 2009 introduced the distinction between "Provision of access at a fixed location" and "provision of telephone services" in article 4 of the USD:

1. Member States shall ensure that all reasonable requests for connection at a fixed location to a public communications network are met by at least one undertaking.
2. The connection provided shall be capable of supporting voice, facsimile and data communications at data rates that are sufficient to permit functional Internet access, taking into account prevailing technologies used by the majority of subscribers and technological feasibility.
3. Member States shall ensure that all reasonable requests for the provision of a publicly available telephone service over the network connection referred to in paragraph 1 that allows for originating and receiving national and international calls are met by at least one undertaking.

The first two paragraphs refer to "connection to the network" and the third to the provision of service. This distinction was not present in the 2002 USD ¹⁶.

The new definition of ECS which we propose, is based on the same approach: distinguishing between "access to the network" and "provision of services" makes it possible to remove the provision of current conveyed services from *ex ante* regulation.

The proposal for a "Telecom Single Market" defines "internet access service" as a specific regulatory category

The need to identify access as a specific regulatory category, to be distinguished from usage, is also acknowledged in the TSM ¹⁷ draft, where Article 2 (14) defines an "internet access service" ¹⁸.

**The Framework Directive:
security obligations should be relocated horizontally**

In 2009, the revised Telecom Package introduced security of services obligations ¹⁹ in the Framework Directive paving the way for a proposal, four years later, of a directive on Network and Information Security ²⁰ (NIS). The NIS Directive proposal introduces security obligations to a variety of cross-sector industries ranging from internet services providers to critical

¹⁶ Art. 4 of USD 2002 – "Provision of access at a fixed location: 1. Member States shall ensure that all reasonable requests for connection at a fixed location to the public telephone network and for access to publicly available telephone services at a fixed location are met by at least one undertaking. 2. The connection provided shall be capable of allowing end-users to make and receive local, national and international telephone calls, facsimile communications and data communications, at data rates that are sufficient to permit functional Internet access, taking into account prevailing technologies used by the majority of subscribers and technological feasibility".

¹⁷ See footnote 2.

¹⁸ Art 2(14) of the TSM draft, see footnote 2 - COM(2013) 627: "internet access service" means a publicly available electronic communications service that provides connectivity to the Internet, and thereby connectivity between virtually all end points connected to the internet, irrespective of the network technology used.

¹⁹ Chapter IIIa of the consolidated Framework Directive, see footnote 8.

²⁰ Proposal for a Directive of 7 February 2013, concerning measures to ensure a high common level of network and information security across the Union, COM(2013) 48 final. <http://ec.europa.eu/digital-agenda/en/news/commission-proposal-directive-concerning-measures-ensure-high-common-level-network-and>

infrastructure operators and explicitly excludes ECS from its scope as ECS are covered by similar obligations contained in the Framework Directive.

Although we share the EC's final objective of ensuring broad service security, preference should be given to the development of end-to-end horizontal measures instead of maintaining sector-specific provisions and, at the same time developing, similar provisions in instruments targeting complementary services.

To avoid inconsistencies, the NIS Directive should explicitly include all the players of the Internet value chain: ECS, ISS, software and hardware providers in order to ensure the level playing field amongst them and the current security obligations applicable to ECS should be removed from the Framework Directive, while security obligation concerning ECN should be maintained.

The Universal Service Directive should undergo a profound transformation

In recent years, the Commission has considered the possibility of extending the scope of the USD to other services such as mobile and broadband. However, given that the current level of competition offers customers widespread and affordable access to mobile services and that the usage of broadband service by the population in the EU has not yet reached a sufficient level, the Commission has decided not to pursue this option ²¹. The Commission does, however, intend to issue further recommendations to guide Member States which are willing to include broadband in the Universal Services Obligations ²².

In our view, the Commission should undertake a profound transformation of the USD in order to accommodate the changes generated by the new definition of ECS which we propose. Certain provisions would become obsolete or irrelevant while others would still apply. Sector-specific obligations should not be maintained in the long term, so it would be preferable to transfer the remaining obligations to other cross-sector

²¹ Communication from the Commission of the 23 November 2011 "Universal service in e-communications: report on the outcome of the public consultation and the third periodic review of the scope in accordance with Article 15 of Directive 2002/22/EC", COM(2011) 795 final.

²² The adoption of the second Commission's draft "Recommendation on implementing universal service for digital society" is still pending.

instruments, which would apply to all service providers. Appendix II provides a detailed list of USD articles that would be affected by the introduction of the new definition of ECS. The definition of ECS we propose focuses on network access services, as provided in the current USD provisions concerning access to fixed networks. The Universal Service provisions on social policy and consumer protection, including emergency services, should be imposed on all service providers, be they operators or OTTs, to grant customers the same level of protection whatever the service they decide to use.

The E-Privacy Directive should be repealed

Concerning privacy rules, given that the horizontal directive on data protection is being reviewed, the E-Privacy Directive (EPD) in the Telecom Package should be repealed. The draft proposal for General Data Protection Regulation (GDPR)²³ introduces several obligations laid out in the EPD without providing for the necessary corresponding update of the EPD (i.e. deletion of the obligations). In addition, the GDPR does not explicitly exclude ECS from its scope, therefore both GDPR and EPD will apply to ECS, creating overlaps and inconsistencies. This is the case of "location data" which is explicitly cited in recital 24 of the GDPR, and which is no longer data that only the telecom sector processes. The regime of sanctions is another example that gives a good illustration of the lack of consistency between the two texts. Maintaining a double regime leads to legal uncertainty for operators, as they have to comply with the obligations laid out in both EPD and the proposal for a GDPR, which are not identical.

Although the GDPR is still under discussion, the goal of this reform is to ensure that the level of protection of EU residents will be reinforced in comparison with the 1995 cross-sector directive. The EPD could therefore be repealed without decreasing customer protection. The principle of confidentiality of communications²⁴, which is currently included in the sector-specific EPD, should be transferred to the GDPR. The telecom sector is today one industry amongst all the players of the Internet value chain that process personal data and does not need specific rules anymore.

²³ Proposal for a General Data Protection Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data, COM(2011) 795 final.

²⁴ EPD: Art. 5 on the confidentiality of communications.

Customers need straightforward end-to-end privacy rules whatever the main business of the provider.

■ Public authorities do not yet have adequate tools to challenge large OTT players

Due to the global reach of the Internet, public authorities need adequate tools and must coordinate their actions at EU level in order to enforce EU rules on OTT players, create conditions for fair competition and ensure the security and confidentiality of EU residents.

Effective cross-border enforcement of EU law

To effectively achieve a level playing field between all the stakeholders involved in the Internet value chain, European regulation should be effectively enforced outside European borders whenever European users are targeted. For example, European privacy legislation currently applies to EU based companies and to non-EU based companies with equipment in the EU. The GDPR proposal goes a step further by proposing an approach based on the country of residence of the customers targeted²⁵. This is clearly a new approach which, if generalised, could serve as the basis for an effective level playing field amongst competitors. However, extra-territorial rules need to be completed with international private law mechanisms in order to ensure the enforcement of Court decisions on non-EU based companies, which the GDPR proposal does not provide for.

The European public authorities' current actions have limited impact on OTT players

OTT players' activities are currently under scrutiny from the public authorities, mainly the competition and data protection authorities, with few material consequences.

²⁵ Art. 3.2 on territorial scope of the GDPR proposal: "This Regulation applies to the processing of personal data of data subjects residing in the Union by a controller not established in the Union, where the processing. Activities are related to: (a) the offering of goods or services to such data subjects in the Union; or (b) the monitoring of their behaviour."

The competition authorities' actions focused on OTT players have limited impact

The competition authorities have started actions focused on OTTs, particularly with the aim of understanding how OTT players exercise their market power. At the European level, the Directorate-General for Competition opened a case against Google on the "search engine/advertising" market in November 2010. Another investigation on the "mobile application" market is ongoing. The French Competition authority launched an investigation on the same issue in January 2013.

These actions have had no significant positive impact on competition and customers' benefits to date, and such scrutiny remains considerably less intrusive than the *ex ante* sector-specific regulation imposed on electronic communications providers.

Efficient law enforcement for OTT players

Personal data collection, processing, storage and protection are crucial issues for both ECS and ISS. Traditionally, Data Protection Authorities (DPA) take a national approach that has been challenged by the global reach of the Internet. Recently, and for the first time, the Article 29 Working Party²⁶ gave a mandate to the French DPA (CNIL), to launch an investigation of Google after its new privacy policy came into force on March 2012. As there is currently no "one-stop shop" DPA, other national DPAs (from Germany, Spain, Italy, the Netherlands and the UK) have also decided to launch investigations into Google on the basis of the initial CNIL report.

Efforts have thus recently been made to challenge global internet players in the field of privacy protection, but these efforts remain very limited and lack coordination and consistency.

Taxation in the country of consumption should be made effective

The issue of corporate taxes also illustrates the current discrepancies in the rules, whereby OTT players still profit from lower corporate taxes. For example, the Greenwich Consulting Study commissioned by the French

²⁶ "The Article 29 Working Party invited the CNIL to take the lead in the analysis of Google's new privacy policy", February 2008. <http://www.cnil.fr/institution/actualite/article/article/googles-new-privacy-policy-raises-deep-concerns-about-data-protection-and-the-respect-of-the-euro/>

Federation of Telecommunications (FFT) in 2013 explores the topic of taxation for the five biggest OTTs (Google, Apple, Facebook, Amazon and Microsoft)²⁷. The topic of taxation covers corporate taxes and value-added taxes in the field of e-commerce. The over-taxation of telcos is estimated at 3% of turnover for sector-based taxes alone. The under-taxation of OTT players based on tax optimisation strategies represents an estimated shortfall of €377 to 754 million for France.

The implementation of the European principle of taxation in the country of consumption should be a first step to improve the situation, but will not apply until 2017-2018.

Some progress can be expected at the International level, as the OECD is developing the status of "virtual permanent establishment" which aims to restore a relevant national tax base²⁸.

■ Conclusion

The review of the outdated concept of conveyance of signals for "electronic communications service" should be one of the pillars of the forthcoming review of the EU regulatory framework. It should:

- adapt regulation to the evolution of technology and markets;
- restore fair competition on digital services between telecom operators and OTT service providers;
- provide clear horizontal guarantees to consumers and public authorities and prevent regulatory arbitrage;
- foster access to the single European market for service providers.

Other aspects of the legal framework, particularly data protection, security, taxation and net neutrality should also be reviewed to achieve a truly level playing field for all stakeholders in the Internet value chain, namely telecom operators and OTT service providers.

²⁷ "International Comparative Study of telecom operators' taxation and tax optimization schemes of Over-The-Top players." April 2013.

http://www.fftelecoms.org/sites/fftelecoms.org/files/contenus_lies/1304.24_-_etude_greenwich_-_version_anglaise.pdf

²⁸ "Attribution of profit to permanent establishment involved in electronic commerce transactions", OECD, February 2001. <http://www.oecd.org/tax/treaties/1923312.pdf>

Appendix I – Current ECS and ISS categories and asymmetrical obligations

The current ECS and ISS definitions

The current definition of ECS

The current definition of ECS states that:

"Electronic Communications Service means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but excludes services providing, or exercising editorial content over, content transmitted using electronic communications networks and services. It does not include information society services as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks" (Art. 2(c) of the Framework Directive).

According to this definition, a service must fulfil the following criteria to be classified as an ECS:

- remuneration, which may be indirect,
- conveyance of electronic signals.

The last criterion is crucial as it is used to draw the boundary between ECS and ISS services: services such as instant messaging or pc-to-pc voice over ip, which do not consist wholly or mainly in the conveyance of signals, are considered ISS and not ECS.

In addition to this definition, the Framework Directive further defines the boundaries of what services should be considered ECS. Recital 10 explicitly indicates that "voice telephony and electronic mail conveyance services are covered by this Directive":

"Voice telephony and electronic mail conveyance services are covered by this Directive. The same undertaking, for example an Internet service provider, can offer both an electronic communications service, such as access to the Internet, and services not covered under this Directive, such as the provision of web-based content."

Recital 10 explicitly excludes a wide array of services which are not considered as ECS and therefore are not subject to the obligations defined by the Framework Directive:

"The definition of 'information society service' in Article 1 of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules of information society services spans a wide range of economic activities which take place on-line. Most of these activities are not covered by the scope of this Directive because they do not consist wholly or mainly in the conveyance of signals on electronic communications networks."

The current ISS definition

The definition of an Information Society Service (ISS) is provided by the Directive on technical standards (Directive 98/34/EC as amended by Directive 98/48/EC).

- "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. For the purposes of this definition:
- 'at a distance' means that the service is provided without the parties being simultaneously present,
- 'by electronic means' means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,
- 'at the individual request of a recipient of services' means that the service is provided through the transmission of data on individual request." (Art. 1(2) of Directive 98/34/EC).

According to this definition, a service must fulfil four criteria to be classified as an ISS:

- provided for remuneration,
- at a distance,
- by electronic means,
- at the individual request of a recipient of the service.

ISS are expressly excluded from the scope of the Framework Directive when "they do not consist wholly or mainly in the conveyance of signals on electronic communications networks". (See recital 10 of the Framework directive)

Recital 17 of the E-Commerce Directive refers to the definition of ISS²⁹ while recital 18 specifies that ISS cover a "wide range of economic activities which take place on line". This recital gives examples of both ISS and services which are not ISS, based on the principle that services consisting in the transmission of information via a communication network are ISS while services which are not provided via electronic processing, such as voice telephony services or services provided via voice telephony and fax, are not considered ISS.

²⁹ ECD recital 17 states that "the definition of information society services already exists in Community law in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services and in Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access; this definition covers any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service; those services referred to in the indicative list in Annex V to Directive 98/34/EC which do not imply data processing and storage are not covered by this definition".

Obligations which apply to both ISS and ECS***The intermediary liability regime***

All activities and players which are part of the Internet value chain are covered by the ISS rules detailed in the E-Commerce Directive.

The E-Commerce Directive is based on the intermediary's activity rather than its status, so the same liability regime applies to all players providing the service.

The rules related to the intermediary liability regime were introduced to prevent intermediaries from being *ex ante* liable in case illicit content circulates on their networks. Three categories of activities are considered: mere conduit (Art. 12) designed to cover ECS services, caching (Art. 13) and hosting (Art. 14). In addition, there is a general prohibition on *ex ante* monitoring (Art. 15). ISS providers do not have any obligation to declare their activities. There is therefore no risk of legal loopholes and no possibility to escape the rules, contrary to what occurs with sector-specific regulation.

Any operator providing an ISS which does not consist in conveyance of signals is thus subject to the same rules as an OTT provider.

Consumer rights

The Consumer rights Directive defines rules for all economic sectors in the EU.

Privacy rules

The 1995 Data Protection Directive defines obligations which apply to all sectors.

Current obligations for ECS

ECS have to comply with a number of policy objectives and regulatory principles listed in Art. 8 of the Framework Directive, including social needs, access to universal services, the provision of clear information, a high level of protection of personal data, etc.

ECS are currently subject to both cross-sector and sector-specific obligations. Sector-specific obligations can be divided into the following categories: interoperability, consumer protection rules (net neutrality, transparency, quality of service, number portability), universal service obligations (emergency calls), sector-specific privacy rules (in addition to cross-sector privacy rules) and legal interception.

OTTs do not consider their services as ECS and avoid authorisation

Prior to 2002, the applicable regulatory framework established that operators had to obtain an explicit decision before exercising the rights stemming from the authorisation. Since the introduction of Art. 3(2) in the 2002 Authorisation Directive, which guarantees the freedom to provide ECN and ECS, operators are only subject to a general authorisation.

When a service complies with the definition of ECS, the service provider may declare its activities to the regulator. Therefore, the National Regulatory Authority (NRA) may experience difficulties to impose compliance with the ECS obligations when a company does not declare its activities which fulfil the conditions to be classified as ECS, as in the case of Skype in France³⁰.

The current regulatory framework establishes a balance between rights and obligations for ECS or ECN providers. Based on Art. 9 of the Authorisation Directive, the NRA shall issue, where applicable, a declaration confirming that the operator has submitted a notification in order to allow the latter to take advantage of access / interconnection rights.

Roughly speaking, the rights are attached to the provision of ECN (access and interconnection) and obligations are imposed for the provision of ECS. A company which provides services only (without ECN) has no incentive to commit to obligations that are costly to implement, in particular if they are not interested in the access / interconnection rights related to ECN. As a result, the company does not declare its activities, even if these services currently fulfil the conditions to be classified as ECS.

Appendix II – Impact of the new ECS definition on the USD

The 2002 Universal Service Directive (USD) should be repealed, in light of mobile and broadband universality and affordability and of the impact of the new ECS definition, which should submit all "conveyed" services (voice and mail) under the ISS regime. The USD articles that should be maintained could be transferred to other EU Directives.

Articles to be reviewed in light of mobile and broadband universality and affordability, which are guaranteed outside specific Universal Service Obligation mechanisms:

USO concept:

Art 3: USO scope - availability of universal service

Art 4: Provision of telephone service

Art 5: Directory enquiry services and directories

Art 6: Public pay phone and other public voice telephony access points

USO mechanism:

Art 8: Designation of undertakings

Art 11: Quality of service of designated undertaking

Art 12: Costing of USO

Art 13: Financing of USO

Art 14: Transparency

Art 15: Review of the scope

³⁰ See "ARCEP Chairman informs the Paris public prosecutor of Skype's possible failure to comply with its obligation to declare itself as an electronic communications operator in France", ARCEP Press Release of 12 March 2013.

Articles to be transferred to cross-sector texts to ensure a level playing field*Social policy:*

Art 7: Measures for disabled end-users

Art 9: Affordability of tariffs

Art 10: Control of expenditure

Consumer protection:

Art 20: Contracts

Art 21: Transparency and publication of information

Art 22: Quality of service

Art 23: Availability of services

Art 23a: Ensuring equivalence in access and choice for disabled end-users

Art 25: Telephone directory enquiry services

Other articles:

Art 24: Interoperability of consumer digital television equipment

Art 26: Emergency services and the single European emergency call number

Art 27: European telephone access codes

Art 27a: Harmonised numbers for harmonised services of social value, including the missing children hotline number

Art 28: Access to numbers and services

Art 29: Provision of additional facilities

Art 30: Facilitating change of provider

Art 31: 'Must carry' obligations

Articles to be maintained in the Telecom Package

Art 4: Provision of access at a fixed location

Art 17: Regulatory controls on retail services

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