

Digital Single Market: An Overhaul for Telecoms Regulation

State of the European Union address on September 14 reveals European Commission's next proposed steps in its Digital Single Market initiative.

Jean-Claude Juncker announced the results of the European Commission's (the Commission) substantive review and recasting of telecoms regulation. The new regulations are meant to support several of the Commission's far-reaching strategic connectivity objectives such as improving very high speed Internet connectivity to key socio-economic hubs (schools, transport hubs, hospitals, etc.), delivering very high speed (100 Mbps) Internet to all European households, and a plan to deliver 5G wireless coverage across Europe. Specifically, the proposals included:

- A new European Electronic Communications Code (the Code)
- The upgrade of the Body of European Regulators of Electronic Communications (BEREC) to a full-fledged EU agency with increased powers
- A 5G Action Plan (the Plan)
- An initiative to aid villages and cities roll out free public Wi-Fi (WiFi4EU)

These proposals follow on from the Commission's previous Digital Single Market (DSM) proposals on online platforms, geo-blocking, cross-border parcel delivery and the Audiovisual Media Services Directive updates¹ in May 2016, and were released alongside a modernization of the EU's copyright rules.²

Background

The ambitious program and policy proposals are intended to underpin the Commission's wider DSM Strategy³ (announced in 2015), which acknowledges the importance of making available a fast Internet capable of delivering the latest online services to all users in the EU. This involves proposals for Member State investment into 5G networks, to establish free public Wi-Fi in every village and city, and classifying broadband as a "universal service."

In addition, the Code aims to address spectrum policy and increase regulatory harmonization within the EU. The updates also endeavor to address new technologies not clearly contemplated by the current legislation (e.g., a number of over-the-top services (OTT)). Critically, the intention seems to be for BEREC to play a more prominent role in regulation in line with its upgrade to a full-fledged European agency.

One Code to Rule Them All: the European Electronic Communications Code

As currently drafted, the proposed Code would require recasting the four existing Directives (the Framework, Authorisation, Access and Universal Services Directives), and replace them with one Directive.

Access Regulation

In terms of defining a “market” for regulation and what constitutes significant market power (SMP) therein, the Code reinforces the existing SMP regime. The definition of SMP has not been amended, but changes have been proposed for the market analysis criteria and the procedure for identifying cross-market or transnational demand.

The Code proposes amending the market analysis procedure and would aim to codify current “best practice.” It states that a market may require regulation where (a) high and non-transitory barriers to entry are present (structural, legal or regulatory); (b) the market structure does not tend towards effective competition within a relevant time horizon, having regard to the state of infrastructure-based and other sources of competition; and (c) competition law alone is insufficient to address the market failure. In conducting this analysis, a national regulatory authority (NRA) must also consider potential future developments that may increase the likelihood of the relevant market tending towards effective competition and all relevant competitive constraints (including at the retail level), regardless of whether such constraints are part of the relevant market. The Code proposes extending the maximum review period from three to five years.

BEREC would be responsible for identifying transnational markets and demand, and coordinating regulatory responses where a significant transnational end-user demand is not met.

It is proposed that NRAs be permitted to require operators to meet reasonable access and use requests for civil engineering, *e.g.*, poles, masts, ducts, wiring and towers, etc. where a market analysis indicates denial of access or unreasonable terms of access would hinder retail competition and would not be in the end-user’s interest. Regulations would apply regardless of whether the relevant assets are part of the relevant market. An operator may be required to grant reasonable access to non-replicable network assets (*e.g.*, in-house wiring and cables) where replicating these elements would be economically inefficient or physically impracticable, provided that no viable and similar alternative is available, or where granting access would compromise the economic or financial viability of the assets’ deployment.

Regarding voice termination rates, the NRAs would be required to set a maximum symmetric termination rate based on the costs incurred by an efficient operator. The Commission will set out such cost methodology. The Code proposes that the NRAs eventually impose a single maximum termination rate (which the Commission would set out) be imposed by the NRAs on SMP entities.

Deployment of Very High Capacity Networks

NRAs would be required to conduct (and update every three years) a geographical survey of broadband networks and investment plans to identify “digital exclusion areas” (*e.g.*, an area with (i) no deployment, nor plans to deploy, a very high capacity network; or (ii) no upgrade or extension of a legacy network to at least 100 Mbps download (nor any plans to do so)). It is proposed that NRAs be permitted to issue a call for deployment to address the digital exclusion areas, and must ensure that any public funding agencies concerned with the deployment of electronic communications networks (ECNs) consider the results of these surveys and the digital exclusion areas.

An NRA will not impose obligations on new network elements if, among other requirements, the deployment of the new network elements is open to co-investment offers on fair, reasonable and non-discriminatory terms, and favors sustainable long-term competition. There is also a simplified regulatory model for wholesale-only networks with SMP.

Spectrum Management

Regarding spectrum management, NRAs would be required to follow general objectives and principles, such as: ensuring consistency and proportionality in authorization procedures; ensuring appropriate coverage; considering timing of release of spectrum; and employing a “use it or lose it” principle. Temporary alternative use for a spectrum would be permitted under certain circumstances.

The Code also specifies a minimum license duration of 25 years, sets out a simpler process for spectrum trading and leasing, and sets out objective criteria to promote competition (*e.g.*, spectrum caps, spectrum reservation for new entrants, etc.). Simplified conditions for access to local Wi-Fi and the deployment of low-power wireless broadband access points have been proposed, as well.

Disputes between Member States over cross-border interference problems must be resolved through the Radio Spectrum Policy Group (RSPG). It is envisaged that the RSPG’s opinion would be adopted by the Commission in implementing any measures to resolve cross-border interference.

Universal Service Regime

The Code proposes removing legacy services (public payphones, comprehensive directories, directory enquiry services) from the scope of universal services — though they may still be mandated by individual NRAs — and requires only that Member States ensure that end-users have access to affordable functional Internet and voice communications services. Whether something can be considered a functional Internet service would be defined by reference to a dynamic basket of basic online services delivered over a broadband connection.

Such functional Internet services must also be affordable, and the NRA would monitor the retail tariffs. Regarding ensuring affordability, the proposal would allow Member States to require special tariff options to be offered to low-income, disabled or special social needs end-users (although this can be applied via geographic averaging). The Member State can also provide support directly to the end-users to achieve affordability.

Services and End-User Protection

The Code proposes clarifying the extent of the application of the regulations to certain “information society services” (a category which would cover today’s OTT services messaging and VoIP services). The Code redefines and broadens the definition of electronic communication services (ECS) as (i) an Internet access service (IAS); (ii) an interpersonal communications service (ICS) (which is then subdivided into number-based (NB) or number-independent (NI) services); and/or (iii) services consisting wholly or mainly of conveyance of signals (*e.g.*, M2M communications).

In relation to ICSs, NIs are subject to limited public policy-related obligations (such as ensuring that the security of the ECS is appropriate to the risk presented, and ensuring the interoperability of the NI ECS if access to emergency services or end-to-end connectivity between end-users is threatened).

Among the proposed obligations for NIs are:

- A requirement to notify the proper authority of a security breach that has significantly impacted the operation of networks or services (which then could be disclosed publicly if the authority deems it a matter of public interest)
- A right for the relevant authority to conduct a security audit on the NI
- If justified, an obligation for NIs to make their services interoperable if access to emergency services (e.g. “112” dialing) or end-to-end connectivity between end-users is endangered due to a lack of interoperability between ICS

Providers of ECNs or ECSs cannot apply discriminatory requirements on access or use to end-users based on the end-user’s nationality or place of residence, unless such requirements are objectively justified.

Providers of publicly available ECSs must provide a contract summary identifying main elements of the end-user contract. Providers of IAS and publicly available NBs will need to offer end-users a facility to monitor and control usage of services billed on a time- or volume-used basis. The Code also aims to protect consumers when entering into contracts for non-NI ECSs by requiring NRAs to ensure there is at least one free, independent comparison tool which allows end-users to compare prices, tariffs and quality of service. Consumers would also be protected via required termination rights and maximum contract duration (24 months). These rules apply to bundles as well, to prevent any “lock-in” effects on any particular element of that bundle.

NRAs would also be granted the ability to assign numbers to entities other than providers of ECNs and ECSs. This is to prevent competition issues, such as lock-in with a given operator, in the M2M market.

Governance

Under the Code, NRAs must be assigned a minimum set of competencies by its Member State, including implementing *ex ante* market regulation and ensuring consumer protection and end-user rights in the electronic communications sector. NRAs can enter into cooperative arrangements with other NRAs to foster regulatory cooperation. The Code also sets out requirements for appointments to the NRAs. Any authorization issued by a Member State must be notified to BEREC, who will maintain a register of ECNs and ECSs.

Where an NRA proposes a remedy in relation to maintaining the objectives in the Code, such remedy must be circulated to the Commission, BEREC and the other NRAs for a one-month review period. The Commission will then issue a decision within a further two months which takes into account the BEREC opinion.

Decisions on spectrum assignment are subject to a “peer review” process whereby BEREC can issue an opinion on whether the decision should be amended or withdrawn to ensure consistent spectrum assignment.

5G Action Plan

The Commission also announced its Plan to foster the coordinated regulatory environment necessary for the deployment of fifth-generation mobile networks (5G) across the EU by 2025. In particular, the Code sets out rules to promote consistency among Member States in authorizing and renewing licenses for

radio spectrum, and to ensure the proper use of spectrum in line with competition law principles. The Commission aims to ensure that one major city in each Member State be 5G enabled by 2020, and that all urban areas and major transport paths have uninterrupted 5G coverage by 2025. Key aims of the Plan include:

- **A Common Timetable:** Member States are encouraged to develop national 5G deployment roadmaps by the end of 2017. Next year, a common pan-European timetable for the launch of early 5G networks should be voluntarily adopted in collaboration with Member States and commercial stakeholders.
- **Spectrum:** 5G depends on “large contiguous bandwidths of spectrum” for faster wireless broadband speeds. To satisfy this requirement, the Commission aims to designate and release 5G “pioneer” spectrum bands ahead of the 2019 World Radio Communication Conference, complemented by the identification and release of further 5G spectrum bands above 6 GHz.
- **Network Density:** The Commission anticipates that 5G networks will markedly increase the number of connected devices per square kilometer, meaning that single network access points will serve increasingly smaller areas, and so the density of deployed antennae must be increased. The Plan sets objectives for fiber and cell development targets, and aims to identify best practices to encourage denser cell deployment.
- **Standardization:** Europe’s goal to lead on the deployment of 5G is premised on standardized and interoperable global telecommunications networks. The EU’s Plan encourages Member States and industry to take the initiative to develop initial global 5G standards by the end of 2019, and to promote a holistic standardization approach encompassing radio access and core network challenges.
- **Growth:** The Commission states that it will leverage its 5G Infrastructure Public Private Partnership to emphasize the importance of pilots and experiments, and work towards the deployment of 5G trials with “a clear EU dimension” from 2018. This includes roadmaps for implementing advanced pre-commercial trials, which will be promoted at an EU level.
- **Public Sector Leadership:** The Plan encourages Member States’ public sectors to use future 5G infrastructure to improve communication services for public safety and security.
- **Investment:** Based on current investment trends, the Commission projects that there will be a €155 million shortfall in the investment needed to deliver on the Plan. While the Commission has indicated that the Code is meant in part to stimulate competition and investment in the sector, the Commission has also proposed the creation of a European Broadband Fund (EBF; composed of both private and public funds) to help compensate for this shortfall. The EBF will build on existing funds for broadband investment, such as the Connecting Europe Facility and the European Fund for Strategic Investment (EFSI). The Commission has committed to launching the EBF by the end of 2016. The Commission will also consider promoting a venture financing facility to fund service innovation, potentially supporting European startups to develop 5G technologies and related applications. In addition the Code is intended to provide guidance and predictability to operators pooling costs to better encourage investment in new infrastructure where demand is less.

The Plan aims to cement the EU’s place at the forefront of 5G development. While ambitious in its goal to bring “uninterrupted 5G coverage” to major urban areas and transportation corridors by 2025, the Plan itself is light on specifics, often leaving key areas (such as standardization) to coordinated efforts between Member States and industry.

Similarly, financing has only been sketched out in broad strokes. For infrastructure investment via the EBF, the only detail provided by the Commission is that it proposes to ‘blend’ funding, *i.e.*, combine public grants and public financial instruments to fund in areas with commercial potential. The aim with this blended funding would be to limit grant-funding to the minimum required to build a business case in unprofitable areas, while maximizing private-sector involvement in a wider area. No further specifics have been provided but, as mentioned above, more details will be announced before the end of 2016.

In terms of 5G innovation and startup financing, the Commission proposes to work with industry and the EIB Group to put specifics to its proposed venture financing facility by the end of March 2017. Under the current proposal, both companies and public authorities (including, potentially, from EFSI, or other EU financial instruments) would provide equity financing through a shared EU mechanism to provide co-investment in coordinated priority areas.

Interestingly, the Commission does not explicitly address net neutrality, an issue that operators repeatedly emphasized in their recent “5G Manifesto” as a potential roadblock to 5G innovation. The seemingly concerted de-coupling of these two issues may signal the Commission’s intention to separate a contentious regulatory issue from the potential economic impact of 5G uptake.

WiFi4EU

Noting that “all Europeans have the right to be connected,” the Commission proposes deploying free public Wi-Fi through a separate proposed regulation by enabling local authorities to offer free Wi-Fi connections in public spaces such as parks, libraries and public buildings. The regulation provides that entities with a public mission should be eligible for small EU grants (generally under €60,000) and that further assistance from Member States would be minimal. The initial scheme has a budget of €120 million to finance the installation of local wireless access points by local authorities. This is complemented by the Code, which aims to simplify the planning procedures and reduce the regulatory burden of deploying local wireless access points. If approved by the European Parliament and Member States, the scheme could be available by the end of 2017, and the Commission intends that at least 6,000-8,000 local communities will benefit from the project by 2020.

BEREC

Among the package of proposals announced alongside the Code is a regulation formally granting BEREC legal personality as a full-fledged European Union decentralized agency. BEREC assists in the regulation of the internal market for electronic communications by coordinating with Member States’ NRAs and the Commission to help ensure consistency in the interpretation and application of the EU regulatory framework.

The proposed regulation would streamline BEREC’s management into a single board, composed of two members from the Commission and one representative from each NRA. Currently, BEREC is composed of the heads or nominated representatives of each NRA (collectively, the Board of Regulators) while the BEREC Office is composed of a Management Committee (comprising one member per Member State and one member representing the Commission).

The proposal would strengthen BEREC’s role and capacity. BEREC can provide guidelines to ensure harmonization to promote a cohesive regulatory framework, adopt binding decisions on matters including the identification of transnational markets, issue opinions on the resolution of certain cross-border disputes, and draft national measures related to the internal market. The NRAs will retain competence to ensure that failures are appropriately addressed and to manage radio spectrum nationally within an EU framework. The proposals also create new annual reporting obligations from the NRAs to BEREC,

emphasizing the NRAs' accountability while also promoting consistent oversight across the DSM (see also *European Electronic Communications Code, Governance* above).

It remains to be seen how BEREC's transition into a full-fledged agency and broader mandate would work in practice. In a press release, BEREC reaffirmed its commitment to a "bottom-up structure" relying heavily on the NRAs to "promote regulatory best practice." BEREC's emphasis on "the NRAs' primary competence in defining remedies needed on national markets" suggests that BEREC would continue its coordinating role while NRAs continue the majority of the work in implementing the regulatory framework, but the agency "will release an extensive analysis" of the proposals in due course.

Next Steps

The proposed regulations on establishing BEREC and promoting Internet connectivity, as well as the proposed Directive establishing the Code, are subject to the European Union's co-decision procedure/ordinary legislative procedure. Under this mechanism, the proposals will be submitted to the European Parliament and the Council for further scrutiny and potential adoption.

As for the DSM Strategy as a whole, the EU Digital Single Market project team is expected to deliver reviews or proposals on the following topics by the end of 2016:

- ePrivacy
- VAT harmonization
- Free Flow of Data Initiative
- Extending the European Interoperability Framework for public services

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Endnotes

¹ www.lw.com/thoughtLeadership/european-commission-unveils-new-digital-single-market-proposals - *Latham & Watkins Client Alert*, No. 1974, May 25, 2016

² www.lw.com:443/thoughtLeadership/LW-European-Commission-Adopts-New-EU-Copyright-Rules

³ "A digital Single Market Strategy for Europe", <https://ec.europa.eu/digital-single-market/en/news/digital-single-market-strategy-europe-com2015-192-final>, May 6, 2015