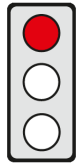


KEY ISSUES

Objective of the Directive: Regulation of the telecommunications industry independent of market power ("symmetrical regulation") will be revised in order to speed up the deployment of very high capacity networks. Standard calculation methods and upper limits for termination charges will reduce the administrative burden on national regulatory authorities and indirectly bring down prices.

Affected parties: Companies in the telecommunications sector, end-customers, national regulatory authorities.



Pro: –

Contra: (1) Overall, the proposed symmetrical regulation of access is inappropriate. What would be appropriate is a market-power dependant and geographically differentiated regulation or the strict application of competition law.

(2) Whether symmetrical regulation favours or is in fact detrimental to the deployment of very high capacity networks, is uncertain. The multitude of vague provisions holds back network deployment.

(3) EU-wide upper limits on termination charges constitute politically-controlled pricing. They are in breach of the freedom to conduct a business (Art. 16 CFR) and the right to property (Art. 17 CFR).

CONTENT

Title

Proposal COM(2016) 590 of 14 September 2016 for a **Directive** of the European Parliament and of the Council **establishing the European Electronic Communications Code**

Brief Summary

► Definition, context and objectives

- The Commission wants to revise the EU regulatory framework for the telecommunications sector – Framework (2002/21/EC), Authorisation (2002/20/EC), Access (2002/19/EC) and Universal Service Directive (2002/22/EC). For this purpose, these Directives will be combined into one new Directive.
- The Directive comprehensively regulates the operation of telecoms networks and the supply of telecoms services. Particularly relevant are the provisions on
 - the "asymmetrical" regulation of access to the network infrastructures of telecoms network operators - with significant market power (see [cepPolicyBrief](#)),
 - the "symmetrical" – i.e. independent of market power – regulation of access and the regulation of termination charges (this [cepPolicyBrief](#)) as well as
 - the supervision of the telecommunications industry ([cepPolicyBrief](#) to follow).
- "Symmetrical access regulation" means the obligation for telecoms network operators - irrespective of whether they have significant market power - to allow other companies in the telecommunications sector ("telecoms companies") to have access to their infrastructure in return for a fee.
- "Termination charges" are wholesale charges which telecoms network operators invoice reciprocally for providing calls to the other respective network.

► Context and objectives

- According to the Commission, existing access regulation did not sufficiently contribute to network investment (p. 7). In future, symmetrical regulation of access to wiring and cables and to network infrastructure for services that rely on the use of spectrum, will promote, in particular, the "deployment of very high capacity networks" (Art. 59 (1)).
- The Commission also proposes an EU-wide standard calculation method and upper limits for termination charges. This aims to reduce the "administrative burden" on national regulatory authorities (NRAs). (p. 16)

► Symmetrical regulation of access to wiring and cables

- Until now, the NRAs have been able to require the NRAs and/or those entitled to use wiring and cables to allow their "sharing" inside buildings, or outside buildings up to the first concentration or distribution point, where replication of this infrastructure is "inefficient or physically impracticable" (Art. 59 (2), sub-para. (1)).
- In future, in such cases, NRAs will be able to impose "access" to such wiring and cables "upon reasonable request". "Access", by contrast with "sharing", involves sole use by the potential user. (Art. 59 (2), sub-para. (1))

- The NRAs can also require access to wiring and cables beyond the first concentration or distribution point but "as close as possible to end-users" and only where strictly necessary "to address insurmountable economic or physical barriers to replication in areas with lower population density" (Art. 59 (2), sub-para. 2)).
 - The NRAs cannot impose this access obligation where (Art. 59 (2), sub-para. 3 in conjunction with Art. 77 (1) (a) and (b))
 - the potential user is offered access to a very high capacity network by a vertically separate network operator, i.e. a telecoms network operator that does not operate at end-user level, or
 - the granting of that access would compromise the economic or financial viability of investment in new network components, particularly "smaller, local" projects.
 - As before, access will be subject to charge. The access price must "take into account risk factors" and/or access must take place on "fair and reasonable terms" (Art. 59 (2), sub-para. 1 and 2).
- **Symmetrical regulation of access to network infrastructure for services that rely on the use of spectrum**
- In future, in the case of network infrastructure which is necessary for providing services that rely on the use of spectrum at local level, the NRAs will be able to require the telecoms network operators, "on the basis of fair and reasonable terms and conditions", (Recital 142, Art. 59 (3))
 - to share passive network infrastructure - including trunk lines, masts and conduits - ,
 - to share active network infrastructure - including routers,
 - to conclude agreements on access to mobile telephone networks ("localised roaming access agreements") and
 - to deploy infrastructure jointly.
 - The NRAs can only impose these obligations where (Art. 59 (3), sub-para. (1))
 - the replication of such infrastructure is "inefficient or physically impracticable" and
 - the connectivity in that area or the choice and quality for the end-customer is severely restricted.
 - In making their decision, the NRAs must have particular regard for (Art. 59 (3), sub-para. 2):
 - the aim of maximising connectivity,
 - the existing intensity of competition,
 - the technical feasibility and
 - the creation of investment incentives.
- **Regulating termination charges**
- As before, NRAs will be able to fix the fees to be charged reciprocally by network operators for providing ("termination") calls on their land-line or mobile networks. The requirement for this is that the network operators have significant market power on the termination market. (Art. 73 (1))
 - In future, when regulating termination charges, the NRAs will have to use a cost model which only takes account of the long-term incremental costs – and not the fixed costs – of termination (pure long-run incremental costs, pure LRIC) (Art. 73 (1), sub-para. (2)).
 - Until now, the Commission has only recommended this model (Recommendation on termination charges 2009/386/EC).
 - In future, the Commission will establish, by way of delegated acts, two EU-wide upper limits – for the fixed and mobile networks respectively – for termination charges. The NRAs must not exceed them. (Art. 73 (2))
 - The upper limits established by the Commission can amount to a maximum of (Art. 73 (4)):
 - € 1.23 per minute on mobile networks and
 - € 0.14 per minute on fixed networks.
 - When establishing the upper limits, the Commission must take account of the number of end-users in each Member State as well as national circumstances (Art. 73 (5)).
 - The Commission must review the upper limits every five years (Art. 73 (7)).
 - The Commission can request BEREC to develop an economic model to assist the Commission in determining the maximum termination rates (Art. 73 (6)).

Statement on Subsidiarity by the Commission

Without EU-wide symmetrical regulation of access, there is a risk of negative consequences for the internal market.

Policy Context

In May 2015, the Commission published a Communication announcing the revision of the EU legal framework for the telecommunications sector [COM(2015) 192, see [cepPolicyBrief](#)] and changes to the regulation of network access. In 2014, the EU already passed measures to reduce construction costs for network deployment, including symmetrical regulatory requirements (Directive 2014/61/EU, see [cepPolicyBrief](#)).

Legislative Procedure

14 September 2016	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Directorate General:	DG Communications Networks, Content & Technology (leading)
Committees of the European Parliament:	Industry (leading), Rapporteur Pilar Del Castillo Vera (EVP)
Federal Ministries:	Federal Ministry of Economics (leading)
Committees of the German Bundestag:	Economic Affairs (leading); Digital Agenda; Transport
Decision-making mode in the Council:	Qualified majority (adoption by 55% of the Member States making up 65% of the EU population)

Formalities

Legislative competence:	Art. 114 TFEU (Internal Market)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (Ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

With the realignment and the additional instruments for symmetrical regulation of access, the Commission wants to take account of the gradual erosion of the market power of individual telecoms network operators at national level and competitive bottlenecks at local level.

Basically, the following applies: Telecoms network operators should only have to allow competitors to have access to their networks where they have unassailable market power in a materially and geographically defined market. Where essential network elements do not constitute a natural monopoly or where end-users can also be reached using other technologies - e.g. radio - there is at least potential competition. In that case there is no need for regulations requiring network access.

The proposed symmetrical regulation of access – to both wiring and cables and network infrastructure for services that rely on the use of spectrum – **is generally inappropriate** because it is not based either on a serious analysis of market power or on a product and geographical definition of the market. **What would be appropriate is a market-power dependant and geographically differentiated regulation** ("Regionalising Regulation", see also [cepStudy](#)) **or the strict application of competition law**. The latter leaves room for voluntary access agreements between network operators.

Whether symmetrical regulation does actually - as envisaged by the Commission - **favour the deployment of very high capacity networks, or is in fact detrimental to it, is uncertain**.

On the one hand, symmetrical access to wiring and cables up to an access point short of the first concentration or distribution point may prevent network operators from actually deploying their networks as many of these operators have not so far been subject to access regulation. Investment in network deployment between the end-customer and this access point would thus tend to be held back where the network operator is not vertically separate or where regulation of access is rejected because it jeopardises the financial viability of the deployment project. On the other hand, symmetrical access to wiring and cables may favour network deployment beyond this access point: in cases where network operators, despite symmetrical regulation, have extended their networks up to the access point, other network operators can reach the end-customers more easily which increases their incentive to deploy the network beyond the access point. It is not possible to provide a reliable assessment of whether the incentive for deployment will increase or decrease as a result.

Many of the provisions proposed by the Commission **are too vague**. The **network investment** envisaged by the Commission, **however, requires the regulation of access to be predictable**. That is particularly true for the deployment of network infrastructure for services that rely on the use of spectrum. The future extent of access or deployment requirements is unclear. Operators are therefore unable to include the accompanying costs when calculating prices for rights to use radio spectrum - such as those awarded by auction. Policy-related access and deployment requirements should therefore already be specified in the conditions of use when rights to use radio spectrum are awarded.

In the case of the regulation of termination charges, the Commission's aim is not - as it claims - to reduce the administrative burden on the NRAs. In fact, for years it has been trying to bring about lower termination charges and thereby lower retail prices, but prices should basically be formed by the market and only regulated where a lack of competition makes this necessary. This must take place by way of the independent national regulatory authorities that are designated for this purpose, and not by way of intervention by the legislator or the Commission.

The requirement directed at the NRAs, that they must use the "pure LRIC" cost model when regulating termination charges, represents the means to an end in this regard. This model, as a result of the extremely questionable masking of fixed and shared costs, necessarily leads to lower regulated termination charges (cf.

[cepStudy](#)) and thus means that the envisaged network deployment is obstructed rather than supported. Further harmonisation of termination regulations at EU level further restricts the NRAs' scope for discretion. Alternative regulatory approaches for termination - such as the "bill and keep" approach whereby network operators do not invoice any fees for termination and the costs of termination are borne solely by their own customers - are not even examined.

The fact that the Commission, on the one hand, requires the "pure LRIC" model, and on the other, by **setting EU-wide upper limits on termination charges, predefines the result of using the "pure LRIC" model, means that the Commission is practising politically-controlled pricing** which is incompatible with ordoliberal principles.

Legal Assessment

Legislative Competency

The Directive is correctly based on the internal market competence (Art. 114 TFEU) because it facilitates the exercise of the freedom of establishment and freedom to provide services and reduces distortions of competition.

Subsidiarity and Proportionality with Respect to Member States

Unproblematic.

Compatibility with EU Law in other respects

The obligation to allow symmetrical access to wiring and cables beyond the first concentration or distribution point is a - legally - justified encroachment upon the freedom to conduct a business [Art. 16 Charter of Fundamental Rights of the EU (CFR)] and the Right to Property (Art. 17 CFR). This obligation is not obviously unsuitable to achieve the aim - deployment of very high capacity networks - as it is arguable that overall this provision does in fact promote network deployment (see Economic Assessment). In any case, the exemptions increase the likelihood of network deployment for the cable section between the first concentration or distribution point and the access point located beyond it. The provision is also necessary. Although it is possible to use the less severe instrument of asymmetrical regulation of access, it is uncertain whether it would be equally as effective for network deployment as symmetrical regulation of access. The access obligation is also proportionate. Supplying the population with telecommunications services represents an important public service objective. The burden of wiring and cables on the individual property owner or authorised person is limited by the fact that the access obligation has to be "strictly necessary to address insurmountable economic or physical barriers to replication in areas with lower population density". In addition, access must be granted based on "fair and reasonable conditions".

The obligation to grant symmetrical access to network infrastructure for services that rely on the use of spectrum is also - legally - justified. It aims to ensure the deployment of very high capacity networks, particularly in areas with lower population density, through radio-based coverage. It is not obviously unsuitable for this because its effects on network deployment are uncertain (see Economic Assessment). It is also necessary because it is uncertain whether asymmetrical regulation of access is equally as effective. In view of the public service objective of network deployment, it is also proportionate because it can only be imposed where "replication of such infrastructure would be inefficient or physically impracticable". A supply bottleneck is also required. In addition, these obligations can only be imposed subject to "fair and reasonable conditions".

Standard EU-wide upper limits for termination charges are however in breach of the freedom to conduct a business (Art. 16 CFR) and the right to property (Art. 17 CFR). According to the Commission, the aim of the provision is to reduce the burden on NRAs. It is questionable whether the provision is in fact suitable for that because the NRAs still have to carry out the procedure to establish termination charges as well as now having to comply with additional requirements. Assuming that it is suitable, the provision is also necessary because there does not appear to be a less severe instrument. The provision is not, however, reasonable: a standard EU-wide termination charge may not be able to take sufficient account of national circumstances or the actual situation of a telecoms network operator. This applies even more to the Directive's absolute upper limits than to the values established by the Commission in delegated acts: Where, on examination, an NRA comes to the conclusion that a higher termination charge is payable than required by the Directive, the Directive would be subject to time-consuming modification in the ordinary legislative procedure.

Impact on German Law

In Germany, the Telecommunications Act must be amended in accordance with the provisions of the Directive.

Conclusion

Overall, the proposed symmetrical regulation of access is inappropriate; what would be appropriate would either be a market-power dependant and geographically differentiated regulation or the strict application of competition law. Whether symmetrical regulation favours or is in fact detrimental to the deployment of very high capacity networks, is uncertain. The multitude of vague provisions in any case tends to hold back network deployment. EU-wide upper limits for termination charges constitute politically-controlled pricing and are in breach of the freedom to conduct a business (Art. 16 CFR) and the right to property (Art. 17 CFR).