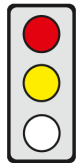


KEY ISSUES

Objective of the Directive: The Commission wants to create a level playing field for providers of conventional electronic communications services and new types of communications services (OTT services) and largely harmonise end-user rights.

Affected parties: Providers of electronic communications services and end-users.



Pro: The inclusion of OTT communications services within the scope of the Directive alleviates distortions of competition.

Contra: (1) There is no justification for the numerous exceptions for number-independent interpersonal communications services in the area of end-user rights.

(2) Interoperability obligations should only be imposed by the national regulatory authorities where an OTT provider has an unassailable market position.

(3) Statutory maximum durations for contracts and inalienable termination rights cannot be justified by the end-user's special need for protection because there is intense competition.

CONTENT

Title

Proposal COM(2016) 590 of 12 October 2016 for a **Directive** of the European Parliament and of the Council **establishing the European Electronic Communications Code**

Brief Summary

► Background

- 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). These Directives will be combined into one new Directive.
- According to the Commission, providers of conventional electronic communications services are increasingly competing with providers of new types of communications services being offered over the internet (over-the-top or OTT service providers, Explanatory Memorandum p. 2). The Commission therefore wants
 - to include them into the scope of the Directive by extending the definition of electronic communications services (ECSs) and
 - make the providers subject to requirements on security, interoperability and end-user rights.
- The Commission also sees a fragmentation of end-user rights which increases the administrative burden for providers (Explanatory Memorandum p. 5). It therefore proposes a large degree of full harmonisation of end-user rights (Art. 94).

► Scope

- The Directive creates a "harmonised framework" for regulating inter alia ECSs. ECSs are services provided via electronic communications networks in return for remuneration (Art. 1 (1) in conjunction with Art. 2 (4)). The remuneration can also be made up of user data or advertising (Recital 16).
- There are three types of ECS (Art. 2 (4)):
 - internet access services,
 - interpersonal communications services and
 - services consisting wholly or mainly in the conveyance of signals such as fixed-line telephony and transmission services used for machine-to-machine communications and broadcasting.
 These three types of ECS can sometimes overlap (Recital 15).
- Interpersonal communications services (ICSs) are services which allow the direct interpersonal exchange of information between a finite number of persons. There is a distinction between
 - number-based ICSs which connect with the public telephone network, e.g. fixed-line telephony and certain internet telephony services such as Skype In and Skype Out (Art. 2 (6)) and
 - number-independent ICSs which do not connect to the public telephone network, e.g. instant messaging services such as WhatsApp (Art. 2 (7)).
- ECSs are not services which
 - provide, or exercise editorial control over, content transmitted using electronic communications

- networks and services, e.g. online newspapers (Art. 2 (4)), or
- enable interpersonal communication merely as a minor ancillary feature that is intrinsically linked to another service, e.g. chats in online games (Art. 2 (5) in conjunction with Recital 17).

► **Security provisions**

- Providers of all ECSs must take "appropriate" technical and organisational measures to manage the risks posed to security of networks and services (Art. 40 (1)).
- They must notify the competent authority without delay of a breach of security that has had a "significant impact" (Art. 40 (3)).

► **Interoperability provisions**

- National regulatory authorities (NRAs) can oblige providers of ECSs who control "access to end-users", to make their services interoperable. This provision does not apply to providers of number-independent services. (Art. 59 (1), sub-para. 2 (b) in conjunction with Art. 12 (2))
- "In justified cases", NRAs can oblige number-independent ICSs to make their services interoperable if the Commission (Art. 59 (1) sub-para. 2 (c) and sub-para. (3)),
 - on the basis of a report from the Body of European Regulators for Electronic Communications (BEREC), finds an "appreciable threat" to access to emergency services or to "end-to-end connectivity between end-users" in at least one Member State, and
 - has specified the nature and scope of any obligations that "may be imposed" in an implementing act.
 The implementing measures will be adopted in the so-called examination procedure, i.e. Member States have a right of veto via their representatives in the Communications Committee (Art. 53 (1) sub-para. 3, Art. 110 (4) in conjunction with Art. 5 Regulation [(EU) 2011/182]).

► **End-user rights**

End-user rights are - apart from a few exceptions - fully harmonised (Art. 94).

Information requirements for contracts

- Before conclusion of the contract, providers of ECSs must inform consumers of the main characteristics of the services, such as the minimum service quality level, compensation and refund arrangements for failure to meet agreed quality levels, prices and duration of the contract and the conditions for renewal and termination of the contract. This provision does not apply to providers of number-independent ICSs. (Art. 95 (1))
- Providers of number-based ICSs must also inform consumers of any constraints on access to emergency services (Art. 95 (2)).
- These information requirements also apply to small and micro-enterprises unless they explicitly waive them (Art. 95 (3)).
- BEREC issues a contract summary template for the information requirements which providers must include in their contracts (Art. 95 (5)).
- Providers of internet access services and number-based ICSs must allow end-users to monitor their consumption according to time or data volume. They must make timely information available to the end-users on the level of consumption of services. (Art. 95 (6))

Transparency

- NRAs must ensure that either they themselves or providers of ECSs publish certain information such as contact details of the provider, its range of services and the prices for services. This provision does not apply to providers of number-independent ICSs. (Art. 96 (1) in conjunction with Annex VIII)
- NRAs must ensure that the end-users in every Member State can compare the prices and performance of ECSs free of charge via at least one independent comparison tool certified by the NRAs. This provision does not apply to number-independent ICSs. (Art. 96 (2) in conjunction with Recital 239)

Contract duration and termination and change of provider

- As regards contracts with consumers relating to ECSs, an initial 24-month maximum duration applies. This provision does not apply to providers of number-independent ICSs. Member States can adopt shorter initial maximum durations. "Separate" instalment contracts for the deployment of a physical network connection are not subject to an initial maximum duration. (Art. 98 (1))
- Where it is provided that a fixed-term contract can be automatically extended, consumers can terminate the contract at any time after expiry of the fixed term subject to one-month's notice free of charge unless they have expressly agreed to an extension of the contract. (Art. 98 (2))
- Where the contractual conditions for ECSs change, end-users can terminate their contracts free of charge. This does not apply if the changes are exclusively to the benefit of the end-user or they are strictly necessary following legislative or regulatory changes. Providers must notify end-users, at least one month in advance, of the changes of their right to terminate their contract. This provision does not apply to providers of number-independent ICSs. (Art. 98 (3))
- Providers of internet access services must ensure continuity of the service in the event of a change of provider. The service must not be interrupted for longer than one working day. (Art. 99 (1))

Bundled offers

- In the case of bundled offers for end-users with at least one ECS which is not a number-independent ICS, such as for example a bundle made up of mobile communications services and a terminal, the provisions on duration and termination of the contract as well as on change of provider apply to the whole bundle. This does not apply if the provisions applicable to non-ECS-elements of the bundle are more favourable to the end-user. (Art. 100 (1))
- Subscription to additional services or goods from the same provider cannot generally restart the initial duration of contracts for ECSs. This provision does not apply to number-independent ICSs. (Art. 100 (2))

Emergency calls

- Providers of number-based ICSs must allow end-users to make free emergency calls via the single European emergency number 112 and any national emergency numbers to the "most appropriate public safety answering point". NRAs can also oblige providers of number-independent ICSs to do this if there is "an appreciable threat to effective access to emergency services". (Art. 102 (1) and 2 in conjunction with Art. 59 (1) sub-para. 2 (c) and sub-para. (3))
- Caller location information must be made available to the public safety answering point without delay after the emergency communication is set up (Art. 102 (5)).

Main Changes to the Status Quo

- ▶ Currently, some ICSs are either not subject to the telecoms legal framework or it is uncertain whether they are covered. This is particularly true of internet telephony services such as Skype, web-based email services and messenger services such as WhatsApp.
- ▶ Currently, the rules on security, interoperability and end-user rights do not apply to some ICSs.
- ▶ Currently, there is no full harmonisation of end-user rights.

Statement on Subsidiarity by the Commission

According to the Commission, competition between local providers of electronic communications services that bundle network access with services and global providers of OTT services, reinforces the right of the EU to act to ensure a level playing field. In addition, the fragmentation of end-user rights is to be reduced.

Policy Context

In a Communication in 2015, the Commission announced a revision of the EU legal framework for the telecommunications sector [COM(2015) 192, see [cepPolicyBrief](#)]. In 2013, it proposed a range of changes to end-user rights (see [cepPolicyBrief](#)), which were largely rejected by the legislator, however.

Legislative Procedure

12 October 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

Directorates General:	DG Communications Networks, Content & Technology (leading)
Committees of the European Parliament:	Industry; Rapporteur: Pilar del Castillo Vera (EVP, ES); Internal Market, Rapporteur Dita Charanzová (ALDE, CZ)
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

The inclusion of OTT communications services within the scope of the Directive alleviates distortions of competition. OTT communications services compete with conventional communications services, such as fixed-line telephony or short messaging services (SMS), because they are increasingly being used as a substitute by end-users. They are often not subject to the same rules, however - or there is a lack of clarity on this point. This gives rise to distortions of competition and to differing levels of protection for the end-user.

The many proposed exceptions for number-independent ICSs in the area of end-user rights should be rejected. This applies in particular to information and transparency obligations and rules on the duration of contracts and on emergency calls. **The question of whether services are provided via the telephone network or via the internet is irrelevant as regards the end-user's need for protection.** There are no convincing arguments for exceptions to the rules for number-independent ICSs in these areas.

The fact that, in future, all ECS providers - including OTT service providers - will have to meet "appropriate" security requirements, prevents distortions of competition and leads to greater consistency of protection for consumers.

Interoperability requirements – whether for all ECSs or just for number-based ICSs – constitute a major intervention in the freedom to conduct a business and in the arrangement of services. They **should only be imposed by the NRAs where an OTT provider has an unassailable market position.** This would require NRAs to carry out a market definition and a market analysis in advance. **The Directive, however, contains no mandatory provisions for this** but instead refers vaguely to "control of access to end-users" and "end-to-end connectivity" as the conditions for such requirements.

The question of whether market power exists is by no means trivial however. The fact that there are a variety of alternatives ("substitutes") to many ECSs generally tends to contradict the existence of market power. Powerful lock-in effects could however support the existence of market power. These may arise from the fact that, although users can simply change the ECS provider, their communication partners continue to use the services of other providers so that accessibility is not always achieved. Finally, interoperability obligations may also have a damaging impact on competition because service providers, who would have to open up their services to users of other services without profiting from them e.g. by way of advertising income, would then be forced to market their own services more expensively due to increased costs. This would in turn put them in a worse position in the competition for customers.

If, as the Commission postulates, OTT services are in competition with conventional communications services and treated by the Directive as equivalent in regulatory terms, **this should also be given greater consideration in the definition and analysis of the telecoms markets to be regulated** (see cepPolicyBrief). This is likely to mean that the regulation of prices of network operators for providing calls in other networks will be relaxed.

Although an extensive harmonisation of end-user rights may reduce the costs of providers of ECSs operating in several Member States, it also tends to result in lower prices for the end-user. Statutory maximum durations for contracts and inalienable termination rights cannot however be justified by the end-user's special need for protection because there is intense competition in the sector. The contractual partners should therefore be free to decide how to draw up the contract. Rigid regulatory requirements not only restrict competition by reducing the providers' ability to differentiate their products, but are also patronising towards the end-users.

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

Unproblematic.

Impact on German Law

The Telecommunications Act, particularly Sections 43a et seq. relating to customer protection, will have to be changed according to the requirements of the Directive.

Conclusion

The inclusion of OTT communications services within the scope of the Directive alleviates distortions of competition. The many proposed exceptions for number-independent ICSs in the area of end-user rights should, however, be rejected; whether services are provided via the telephone network or via the internet is irrelevant as regards the end-user's need for protection. Interoperability obligations should only be imposed by the NRAs where an OTT provider has an unassailable market position, but the Directive contains no mandatory provision for this. If OTT services are in competition with conventional communications services this should also be given greater consideration in the definition and analysis of the telecoms markets to be regulated. Statutory maximum durations for contracts and inalienable termination rights cannot however be justified by the end-user's special need for protection because there is intense competition.