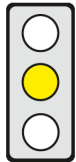


KEY ISSUES

Objective of the Directive: The Commission wants to speed up the deployment of fast telecommunications networks.

Affected parties: Customers and companies in the telecoms sector, national regulatory authorities (NRAs).



Pro: (1) The Commission emphasises that ex-ante regulation is only necessary to safeguard competition at retail level.

(2) In future, NRAs will impose access obligations principally in respect of "civil engineering assets", thus starting at the earliest possible stage in the value chain.

Contra: (1) The regulatory preferential treatment given to "very high capacity networks" represents undue intervention in market processes. In particular, the preferential treatment of co-investment models for new network elements should not be restricted to very high capacity networks.

(2) The sector-specific ex-ante regulation of vertically separate network operators is unnecessary.

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 "asymmetric" regulation of access to the network infrastructures of telecoms network operators - with significant market power (this cepPolicyBrief),
 - the "symmetric" – i.e. independent of market power – access regulation and the regulation of termination charges (cepPolicyBrief to follow) and
 - institutional issues (cepPolicyBrief to follow).
- "Asymmetric access regulation" means the obligation for telecoms network operators with significant market power to grant other companies in the telecommunications sector ("telecoms companies") access to their networks in return for a fee.
- "Very high capacity networks" consist wholly of optical fibre technology at least up to the distribution point - i.e. in the case of land-line connections the cellar of an apartment building - or of technology with a "similar" network performance (Art. 2 (2) Recital 13).

► Aims of asymmetric access regulation

- Until now, asymmetric access regulation aimed, in particular, to strengthen the internal market and competition, initiate efficient investment and innovation in the area of "new and improved infrastructure" and promote the interests of end-users (Art. 8 (5) of Directive 2002/21/EC).
- In future, asymmetric access regulation will also promote:
 - the deployment of "very high capacity networks" (Art. 59 (1)) and
 - access and use of these networks by citizens and companies ("connectivity target"; Art. 3 (2)).

► Procedural steps of asymmetric access regulation

- As before, asymmetric access regulation basically involves the following steps (Art. 59):
 - Definition of the relevant markets ("market definition"),
 - Analysis of the markets ("market analysis"),
 - Identification of access obligations for telecoms network operators "with significant market power".

► Market definition

- As before, the Commission lists all markets for electronic communications products or services in a non-binding recommendation ["Markets Recommendation" (2014/710/EU)] which it considers to be in need of regulation (Art. 62 (1), Recital 158).

- As before, the national regulatory authorities (NRAs) then define these markets in more detail according to national circumstances ("market definition") (Art. 62 (3)).
- In future, the NRAs will have to carry out geographical surveys of current and planned broadband network coverage within their territory and take account of their results when it comes to market definition (Art. 62 (3) in conjunction with Art. 22 (1)).

► **Market analysis**

- As before, the NRAs examine the need for regulation in every defined market ("market analysis"). In future, they will have to apply the "three criteria test" - the extent of barriers to market entry, the existence of effective competition and the potential for applying competition law (Art. 65 (1)). Until now, this test has only been mentioned in the non-binding market recommendation (2014/710/EU).
- As a rule, the NRAs will in future analyse the markets every five years instead of every three (Art. 65 (5)).
- In future, when conducting the market analysis, the NRAs will also consider whether "from a forward-looking perspective" the following developments render asymmetric regulation superfluous:
 - "other types of regulation or measures" which have already been undertaken in the relevant market or in other related markets, particularly in retail markets (Art. 65 (2) (c) and (d));
 - "all relevant competitive constraints" (Art. 65 (2) (b)), including, in particular, those at retail level,
 - which are derived from other networks or other services,
 - these networks or services being comparable with the services in the relevant market but not necessarily part of the relevant market;
 - "symmetrical" access obligations, i.e. those which are imposed irrespective of market power (Art. 65 (2) (c)).
 - co-investment or access agreements between network operators (Art. 65 (2) (a));
- If the results do not justify asymmetric regulation, no new obligations will be imposed and existing obligations will be withdrawn (Art. 65 (3)).

► **Obligations for telecoms network operators with "significant market power"**

Main principles

- As before, NRAs can impose certain obligations on telecoms network operators with "significant market power" in the relevant market. In future, however, they will only be able to do so if the obligations
 - are necessary to promote effective competition in "one or more retail markets" (Art. 65 (4)),
 - correspond to the nature of the problem "in particular at retail level" (Art. 66 (4)),
 - are proportionate having regard to the "costs and benefits" and the objectives of the Directive (Art. 66 (4)).

Network infrastructure access

- In future, the obligation upon network operators with significant market power to grant access to "civil engineering assets" – buildings, conduits, masts, antennae – will have to be considered by the NRAs first, prior to other network access obligations (Art. 70 (1) sub-para. (1)).
- In future, NRAs will be permitted to impose an additional "conventional network access obligation" on telecoms network operators with significant market power only where access to civil engineering assets is insufficient to (Art. 71 (1))
 - develop a competitive market at the retail level and
 - achieve the general objectives of the Directive.
- "Conventional network access obligations" include access to "network elements and associated facilities". That covers e.g. access to the unbundled local loop and to physical infrastructure such as conduits and masts. (Art. 71 (1), sub-para. (2))
- Whether and how the NRAs impose "conventional network access obligations", must be dependent on whether "other forms of access" to wholesale products in the same or "a related" wholesale market could also solve the competition problem at the retail level (Art. 71 (2)).
- In future, NRAs will not be permitted to impose any access obligations on telecoms network operators of "new network elements" with significant market power insofar as (Art. 74, Annex 4)
 - these network elements contribute "significantly" to the deployment of very high capacity networks,
 - the operators make "offers" to other network operators of co-investment in the deployment of the elements on "fair, reasonable and non-discriminatory terms" which favour sustainable competition in the long term,
 - these "offers" are open to investors over the entire construction phase and
 - access seekers not participating in the co-investment can still reach their customers on the existing terms; this may also mean that the NRAs keep the access obligations to old networks.

Price control

- As before, NRAs can stipulate prices for mandatory network access (Art. 72 (1)).
- In future, NRAs shall take into account "long-term end-user interests related to the deployment and take-up of very high capacity networks" (Art. 72 (1)).

"Vertically separate" network operators

- "Vertically separate" network operators are operators that (Art. 77 (1))
 - only have activities in wholesale markets and not in any retail markets and
 - have not entered into exclusive agreements with any companies at retail level.
- In future, in the case of "vertically separate" network operators with significant market power, NRAs will only be able to impose obligations on "conventional network access" and access to "civil engineering assets" and not on price control, transparency or equal treatment (Art. 77 (2)).

Statement on Subsidiarity by the Commission

Without EU-wide asymmetrical access regulation, there is a risk of negative consequences for the internal market and consumer interests.

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](#)].

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

Ordoliberal Assessment

Access regulation for telecoms network operators with significant market power is a sector-specific advancement of general competition law. Any access regulation, however, bears the risk that companies will refrain from making risky investments in the set-up or deployment of their own networks and instead prefer access to the networks of other network operators. Asymmetric access regulation must deal with this problem because network investments can contribute to sustainable competition at retail level and make asymmetric access regulation superfluous.

In ordoliberal terms, when it comes to access regulation, **preferential regulatory treatment of "very high capacity networks"**, particularly fibre-optic-based networks, **constitutes undue intervention in market processes** because it leads to political control of network access prices - and thus also of retail prices - for various network technologies. This may result in a failure to invest in networks which are less powerful but which have a positive influence at least on parts of the retail market. The question of when and where faster networks are appropriate should be decided by customer demand and not according to the Commission's own wishes which are motivated by industrial policy.

An appropriate balance between the promotion of competition, on the one hand, and investment incentives, on the other, is provided by a regulatory concept which identifies, at the earliest possible stage of the value chain - i.e. as far away as possible from the end customer - the competition bottleneck at retail level which is inaccessible to competitors, and regulates access to this bottleneck in accordance with the risk. The concept proposed by the Commission only partly fulfils these requirements:

As the Commission here emphasises, more strongly than it has done before, ex-ante regulation of companies with significant market power is only necessary to safeguard competition at retail level.

The requirement that NRAs should consider "all relevant competitive constraints" and "other types of regulation or measures" both on the relevant market and on other related markets - preferably retail markets - is therefore appropriate. The same applies to the consideration of geographical data about current broadband network coverage in the NRAs' market definition (see [cepStudy](#) on Regionalisation of TK Regulation (in German only)). Both increase the likelihood that the respective value chain will be correctly defined and that any market power will be correctly assessed and regulated at the earliest possible stage in the value chain. This makes

over-regulation, and its deleterious effect on the willingness to invest, less likely. At the same time, sector-specific ex-ante regulation becomes more complex and cumbersome due to the - necessary - consideration given to the above factors and its advantages over general competition law become less and less.

Ensuring that the obligation for telecoms network operators with significant market power to grant access to "civil engineering assets" has priority over "conventional network access obligations" correctly aims at the earliest possible stage of the value chain.

When examining whether network operators will be subject to access obligations for civil engineering assets, the NRAs should however consider that the Directive on reducing broadband development costs (2014/61/EU, see [cepPolicyBrief](#)) already contains a comprehensive access obligation to such assets for all companies with their own networks – including for example electricity and gas providers. Likewise, they should also consider that a vertically separate company with significant market power may be subject to an access obligation for civil engineering assets in the wholesale market.

The ban on NRAs imposing access obligations on operators of "new network elements" with significant market power, insofar as they make co-investment "offers" on "fair, reasonable and non-discriminatory terms", is a development of the existing risk-based access pricing for fast next-generation networks (NGN). This is a justifiable trade-off between investment incentive and competition. Firstly: With the co-investment model, the NRAs also indirectly control the network access prices via implied approval of the conditions of the investment offer. The basis on which the NRAs classify these conditions as "fair" and "reasonable" is doubtful however. Secondly: **Any misuse of the dominant market position as a result of the lack of access obligations can be punished under general competition law. The fact that the preferential regulatory treatment of co-investment models for "new network elements" only applies to very high-capacity networks is, however, particularly problematic.**

Although the planned sector-specific **ex-ante regulation of vertically separate network operators** represents a relaxation of the current legal situation, it **is** however misplaced because it is **unnecessary**: These companies have a primary interest in offering their networks for use by other companies; special measures for opening up the networks to third parties are therefore unnecessary in this regard. The application of general competition law is sufficient.

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

To a certain extent, the Directive allows access obligations dependent on market power to be reduced. The provisions do not infringe the right to property [Art. 17 Charter of Fundamental Rights of the EU (CFR)] or the freedom to conduct a business (Art. 16 CFR) of the telecoms network operators because they will inter alia promote the construction and deployment of very high capacity networks as well as safeguarding competition and they are clearly not unsuitable for this purpose. A less severe method does not appear to be available. Considering the aforementioned public service objectives and the economic peculiarities of network companies, they are also proportionate.

Neither do the provisions breach the competitors' freedom to conduct a business because this fundamental right is only a defence against intervention by the EU and thus does to constitute a "right to regulation".

Impact on German Law

In Germany, the Telecommunications Act, particularly Part 2 relating to market regulation, will have to be amended in line with the Directive.

Conclusion

As the Commission here emphasises more strongly than it has done before, ex-ante regulation is only necessary to safeguard competition at retail level. In future, NRAs will impose access obligations principally in respect of "civil engineering assets", thus starting at the earliest possible stage in the value chain. In ordoliberal terms, the regulatory preferential treatment given to "very high capacity networks" represents undue intervention in market processes. In particular, the preferential treatment of co-investment models for new network elements should not be restricted to very high capacity networks. Sector-specific ex-ante regulation of vertically separate network operators is unnecessary.