

ECTA's response to the European Commission's request to provide feedback on its proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing the European Electronic Communications Code (Recast)

December 2016

1. Introduction

ECTA welcomes the opportunity to provide comments on the proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing the European Electronic Communications Code.

ECTA and its members welcome the proposed new code, and in particular its new objective of access to, and take-up of, very high capacity data connectivity, while retaining the existing objectives of promoting competition, contributing to the development of the internal market and promoting the interest of the European citizens.

ECTA members are not only committed but also strongly engaged for years in helping to realise those objectives. Indeed, in proportion to their revenues, alternative operators usually invest more than incumbent operators in new networks.

ECTA members are further committed by supporting all initiatives to promote competition and enable efficient investments in fibre infrastructure by all market players and prevent/remove any obstacles to fibre deployment and take-up. They are thus ensuring the progressive and efficient deployment of future-proof networks with the highest performance on quality parameters derived from future needs such as speed, reliability, latency, and energy efficiency.

Firstly, the existing regulatory framework has been instrumental in the emergence of a vigorous European ecosystem for electronic communications networks and services based on affordable and innovative offers to the benefit of end-users. Secondly, it has been essential for the emergence of dynamic and innovative telecoms companies, both to the benefit of the European economy and competitiveness as a whole. Today, the regulatory framework, and tomorrow the proposed European Electronic Communications Code, remain crucial to ensure that competition, through the sustainability of its actors, remains vibrant in the B2C markets. However, key benefits for the European economy and European welfare will arise from intense competition within the B2B markets. Hence the proposed new code should be adapted accordingly.

The realisation of the connectivity objective with its necessary investments is a journey over time, and reaching our common target will be a collective effort. No one should fall out of the boat.

For all these reasons, we believe that the best way to achieve the EU objectives is for the provisions of the proposed code to enable all players to invest in new networks, and to avoid over-emphasis on construing multiple deregulatory incentives for the incumbent operators, who are only a part of the solution. Hence, alternative operators should be able to continue to climb the ladder of investment at an appropriate pace of investment, i.e. commensurate to their investment capability.

Any introduction of regulatory holidays would result in less affordable offers, and the risk of lower take up, with no guarantee on the investment side. It is also worth noting that without new regulatory leeway, incumbents are already regaining very significant market shares in the Next Generation Access (NGA) context.

We call on policy makers to maintain competitive pressure from alternative operators to foster the take-up of very high capacity data connectivity by end-users (consumers, businesses, and public administrations). Bridging the digital divide would be useless if it would result in the emergence of a new divide between the rich who can afford connections and the poor who can't afford them: there is no point in building networks if prices are so high that many can't afford the services.

We welcome the simplification trend in the regulatory framework, and we commend the Commission on having integrated four existing directives into one in a coherent manner. However, policy makers should make a clear difference between simplification and deregulation as this would otherwise lead to significant adverse consequences for European welfare.

Although ECTA is still in the process of analysing in detail the implications for its members, we can already say that we are extremely concerned by various provisions included in the proposed code.

Those concerns are explained hereafter:

2. Summary of main concerns (non exhaustive)

a. Physical access is essential

Physical (passive) wholesale access products have played a decisive role in the observed level of competition on the broadband markets in Europe. These products have enabled alternative operators to innovate in terms of services and to offer higher speeds irrespective of incumbents' offers. This 'standard' on wholesale access should not be abandoned or mitigated by the Commission. The proposed code falls short on specifying that virtual access products are complementary but not substitutable to physical access. Analysis of the competitive dynamics in the major European countries shows that active wholesale access (e.g. bitstream access) does not allow the emergence of significant and sustainable competition in the long term.

An additional simplification that could be included would be to avoid that NRAs, under pressure from dominant operators, replace physical access with complex and poorly designed active wholesale access products.

b. Two is not enough

The wording of recital 175 (177 in initial version of the proposed code), which seems to indicate that the European Commission would be satisfied with the mere presence of two (competing) fixed networks (at least one of which providing wholesale access that is unspecified in the recital and in the articles) raises major concerns. The well-known example of Belgium, where two infrastructures compete, resulting in high retail prices with regular tariff increases and low choice demonstrates that two is not enough.

Also, exclusive reliance on general competition law should not be the rule under a scenario with two competing networks as the issue at stake should not be the number of players

This recital should be deleted.

c. Significant Market Power (SMP) needs to remain the standard

A proper SMP analysis, relying on an assessment of all SMP criteria, must remain the standard. This is even more justified in a period where we see a re-monopolisation trend in fibre infrastructure. Symmetric regulation should not lead to regulating inappropriately alternative operators where regulation on dominant operators might at the same time be relieved.

d. Deregulation, commercial and co-investment agreements

Any promises of dominant operators or presence of existing or potential commercial agreements should not be taken as a trigger for deregulation. There is a considerable risk that, in a few years, one may find that promises did not materialise or that the commercial agreements did not deliver their expected results, whilst in the meantime the deregulatory approach would have produced strong adverse effects on the markets and would not allow anymore to take timely corrective measures. Hence it would irreparably delay the realisation of the objectives of the proposed new code.

Neither commercial agreements nor co-investment arrangements should justify a substantive deregulation of an NGA network (or at the level of the copper network). In markets where FTTH will be massively rolled out and once the take up will become significant, any operators not able to propose a retail offer with the same level of quality will be evicted from the market.

In general, NRAs must be able to impose ex-ante wholesale access obligations in case of SMP and not act only in case of failure of commercial negotiation or co-investment.

Co-investment models can deliver positive outcomes provided that they allow all players to invest, obtain effective ownership of physical assets, and avoid useless duplications of network. Co-investment needs however to provide sufficient safeguards to avoid market foreclosure by the operators with the highest cash flows. Conditions should be fair, reasonable, non-discriminatory and proportionate.

e. Focus on retail markets

The amendments in the market analysis procedures proposing that *ex ante* regulatory obligations would only be imposed where there is no effective and sustainable competition on the retail markets concerned could turn out to be extremely detrimental to competition. The absence of market failure at retail level does not mean that sustainable competition would remain in the absence of regulation.

Wholesale access is also instrumental to innovation, as it enables challenger operators to offer new services, choice and offers for higher speeds at more affordable prices and facilitate further developments towards very high capacity networks.

Furthermore, the Commission's guidance in its Explanatory Note accompanying the 2014 EC Recommendation on Relevant Markets Susceptible to Ex-Ante Regulation already states that *"although the final SMP analysis will be carried out at wholesale level, the starting point should be the competitive conditions at the retail level"*. This provision is sufficient to ensure that NRAs do not unduly regulate a market as NRAs are thus expected to *"identify – following a 'modified Greenfield approach' – whether, absent regulatory intervention upstream, there is a risk of consumer harm on the retail market due to a lack of competition"*.

f. Pro-competitive conditions for spectrum

Competitive access to spectrum is crucial for vibrant and sustainable competition. Spectrum must be used where there is a need and not be an asset the big players can use to limit competition.

We welcome the Commission proposal to give NRAs the power to set the relevant conditions in relation to spectrum, e.g. caps, reservation, competitive renewal conditions.

g. Simplification of USO

We welcome the valuable simplification by focusing the Universal Service Obligation on social inclusion, and the newly proposed financing principle for Universal Service. Indeed, the current model of financing has led to severe financial and legal uncertainty for operators in several Member States.

h. Transnational markets

The provisions included to allow the identification of transnational markets are insufficient to provide a new impetus for the B2B markets and structurally solve the lack of competition for business connectivity and related services. B2B markets remain highly concentrated with incumbents still having very important market shares, often well in excess of their market shares on consumer markets.

3. Conclusion

ECTA welcomes the overall very high capacity connectivity objective that needs to be achieved by competitive drive. However, the proposed new code contains several provisions that need to be significantly adapted to sustain the required competitive pressure, as only true competition drives investment. Failing to adapt the code accordingly might result in detrimental outcomes for which Europe would pay a high price for decades.