

ETNO POLICY PAPER TOWARDS A NEW TELECOMS FRAMEWORK

This Policy Paper summarises the ETNO position on the Review of the Telecoms Framework





I. REASONS FOR CHANGE

The EU telecoms regulatory framework played an important role in the context of the liberalisation of formerly monopolistic telecommunications markets.

Since then, markets have changed dramatically, with the emergence of new players, convergence in technology and services, and radically different patterns of consumer behaviour. Today, increased choice and innovation provide citizens and businesses with a wide range of choice of services, at affordable prices. The market dynamics show a continuing trend of transformation in a fast-paced and rapidly changing environment.

ETNO welcomes the drive of the European Commission to conduct a review aimed at dealing with the current policy challenges, acknowledging the more complex market structure and increased competition between different technologies and services in telecom markets.

The EU should create the right conditions for European operators to maximise investments in advanced digital infrastructures, by simplifying regulation and stimulating competition between undertakings ready to invest.

Old rules designed primarily to spur competition in existing networks should be replaced by a technology neutral framework that provides the right incentives to innovate and deploy new networks, thereby supporting sustainable infrastructure-based competition. In today's highly competitive markets the priority should be to maximise investment incentives and innovation, while ensuring that end-users continue to benefit from competitive markets. Infrastructure-based competition encourages market players to gain a competitive and technological edge over competitors, moving away from the "wait and see" environment that has been so far deterring investors.

The overall objective should be to provide all users – consumers, businesses and all organisations at large – with best-in-class connectivity. Only in this way we can empower new opportunities for citizens and fresh growth streams in the economy.





In this context, a new set of rules is required to address barriers to innovation, investment in network deployment and to operate across markets, thereby enabling the provision of better services for citizens and businesses.

The coherence of the current rules and the consistency of consumer protection standards are also highly important. As Internet-based services have become substitutes for more traditional communication or media services and various sectors in the digital value chain are increasingly integrated, the regulatory framework needs to assess whether to maintain the complex and fragmented set of rules applicable to telco operators. The progress towards the adoption of horizontal rules would provide far more flexibility and show a higher degree of harmonisation across the EU. This would facilitate the cross-border provision of services, creating a fair balance in the digital value chain and providing end-users with consistent protection standards.

Regulation must also take into account proportionality to avoid imposing extremely costly obligations that only deliver minor benefits, but have an impact on product development and innovation processes.



II. THE OBJECTIVES OF THE NEW FRAMEWORK

All activities in the digital economy depend on networks. The availability of high-speed fixed and mobile broadband infrastructure is a precondition for the European Digital Single Market. Such new networks will be widely used by citizens and businesses to increase societal welfare and achieve the DSM goals.

Therefore, the EU should prioritise the wide availability of state of the art connectivity services, permanently integrating innovative technologies by promoting sustainable investment, the competitiveness of the EU industry and the alignment of the industry policy with regulatory goals. Overall, the Framework should aim at maximising European societal welfare.

To achieve this overarching vision we should focus on the following key priorities:

- Promote innovation and quality of services, focusing on sustainable benefits for EU citizens and businesses by maximising availability, quality and choice of communication networks and digital services;
- Promote sustainable investment and innovation, ensuring the good functioning of competitive markets;
- Address converging technologies and services, through a technology neutral approach, and ensure a level playing field across the whole digital value chain, maintaining competition between all digital market players, based on non-discrimination and light-touch regulation;
- Ensure that consumer protection standards for EU citizens are consistent, proportionate and effective across the digital single market.

The next step towards the achievement of the single market should ensure the necessary flexibility to take into account that mobile and fixed networks are deployed at national, or regional level. The internal market should first and foremost be a space for free initiative by market players, instead of being designed and planned under regulatory obligations.



KEY TAKE-AWAY

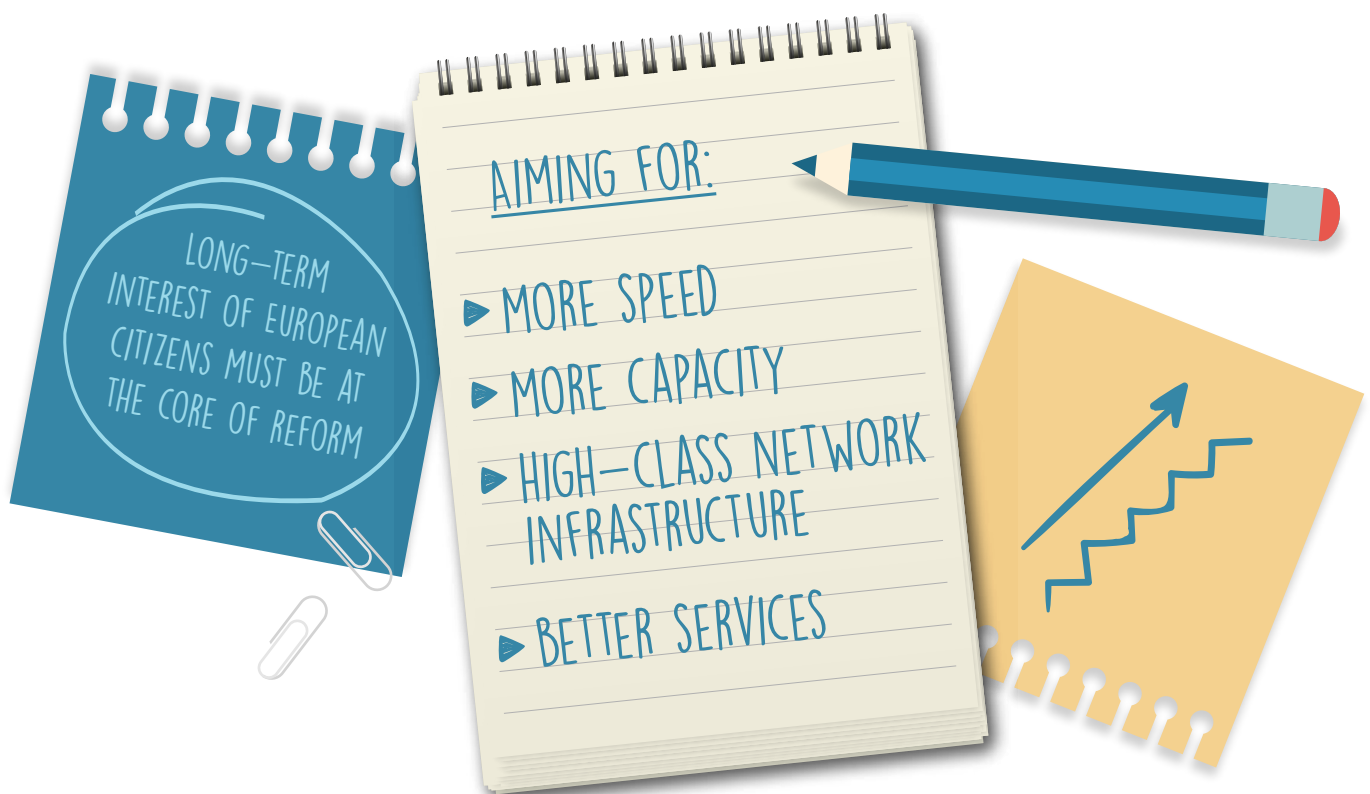
- ➔ Prioritise the availability of state-of-the-art connectivity
- ➔ Focus on maximising social welfare



Incentivising the take-up of high-performance services is extremely important for the future needs of the European digital economy and society. To this regard, the framework should also seek to encourage the development of end-to-end open and interoperable innovative services and to support and secure industrial and commercial cooperation between market players.

The long-term interest of European citizens must be at the core of the reform. This means more speed, more capacity, high-class network infrastructure, better services.

The regulatory framework must therefore be adjusted to the new reality, to provide the EU with a set of rules fit for purpose beyond 2020. A user-oriented approach is essential to re-balance the value chain and tackle the significant obstacles to innovation, investment in networks and the operation of businesses in Europe.



III. NETWORK ACCESS REGULATION

The current regulatory regime for network access was conceived almost 20 years ago, with the liberalization of telecom markets. Between then and today, the EU telecoms sector has undergone dramatic changes, of both economic and technological nature. Several trends are now reshaping the sector. The following stand out:

- The growing **demand for bandwidth-hungry services**, together with the continued migration from PSTN to all-IP technology, requires significant investment in high-speed electronic communications networks across Europe;
- The emergence of new industry trends such as the **Internet of Things** and the digitization of the industry also require substantial changes in both the performance and the characteristics of NGA networks, which in turn require massive investments;
- **Infrastructure competition** has gained increasing relevance across several markets;
- The existing fixed electronic communications networks will increasingly require significant **additional investments** in fibre to partly or fully replace copper, in order to remain competitive;
- In several Member States, local/regional fibre deployment by players such as **utility companies and municipalities** is leading to increasingly competitive and heterogeneous market structures in high-speed broadband access, also with the potential to significantly distort competition in competitive areas;
- In many countries, **cable operators** have been rising as strong, largely unregulated competitors in both fixed broadband and, increasingly, wireless broadband markets;
- A further tendency towards the **convergence of networks** and services is under way, with increasing complementarity between fixed and mobile, and also increasing substitutability between services (such as voice over mobile and fixed);
- There is lack of evidence that access network investments in NGA were achieved as a result of the application of the **“ladder of investment” (LoI) theory**.



KEY TAKE-AWAY

- ➔ Modernise & simplify the regulatory framework
- ➔ Focus on retail markets & infrastructure competition
- ➔ Reduce ex-ante regulation by favouring ex-post regulatory oversight
- ➔ Give precedence to commercial agreements
- ➔ Ensure technology-neutrality



None of the above-mentioned trends were anticipated when the basis of the current European telecoms framework was being developed in the late 1990s. This entails that the objectives of the current framework are not compatible anymore with today's market trends and the need to foster massive investments in high-speed broadband infrastructures.

The focus of the new access framework has to shift to the promotion of investments and innovation in NGA networks, safeguarding the efficient level of competition that permits this level of investment. In order to achieve this goal, slightly updating the current rules to the new market reality will not be sufficient. The EU should undertake a broad, bold and thorough review of its network access regime.



Shortcomings of the current regulatory framework

In ETNO's view, the assessment of the functioning of the current framework points to several shortcomings. The forthcoming Review provides a unique occasion to fix them. The main issues to be addressed are as follows:

A static form of competition

The framework has privileged a service-based form of competition with a focus on static efficiency, over a more dynamic and sustainable one. Promotion of entry in already existing networks, based on the LoI (Ladder of Investment) theory and on its strong emphasis on price competition, have taken the precedence over more pro-investment and pro-innovation forms of competition (e.g. infrastructure-based competition). The current model discourages the massive investment in next-generation networks that the completion of the DSM Strategy requires¹.

In fact, strong emphasis on access-based competition has often undermined the investment incentives of both new entrants and incumbent operators.

Overregulation

The framework has also led to overregulation. It has provided an excessively complex regulatory setting, with high implementation costs. Overregulation has had a negative impact on operators' costs and commercial flexibility and ultimately on citizens.

Regulation has been particularly costly for SMP operators (Significant Market Power), which are obliged to provide a full set of wholesale services to make the "investment ladder" possible. In addition, the concept of "associated facility/ ancillary service" has been used to include any

possible network element, information or access to systems. This concept has created significant regulatory uncertainty regarding the scope of regulation.

As a result of the above, regulators have – wrongly – struggled in many cases to adjust the type of networks and services that should enter in the scope of the regulatory analysis to the evolutions of technologies and of market players active on the markets². Furthermore, revocation of unwarranted access obligations has been very rare even in cases where data showed them being ineffective and irrelevant³.

An untapped investment and innovation potential

There is substantive evidence that Europe could do much more in terms of deployment and adoption of next generation networks, the cornerstone of the Internet economy. While individual countries vary (Sweden has better NGA coverage and higher adoption than the US, for example), overall the EU is far behind nations such as the US, Japan and South Korea in both coverage and penetration of critical technologies (eg. LTE and NGA technologies). Even setting aside comparisons with other regions of the world, it is clear that the EU should do more to meet future requirements.

Infrastructure competition not taken into account

The way in which product markets are defined has



made it very hard to properly take into account infrastructure competition in the market. In fact, self-supply of competing infrastructures is normally not included within the market definition. By focusing regulation on the incumbents' legacy networks, and extending such "default regulation" also to investments in new networks by the same operators, the regulatory framework has generally lost sight of other actors' activities and their market positions.

The adverse impact of cost orientation

Cost orientation, and more generally price regulation, is a very intrusive regulatory intervention and one which inevitably shifts market dynamics away from investment and innovation to a "price only" competition. Price control of wholesale prices, in particular if based on cost orientation, drastically reduces the value of the networks and definitely discourages investment. In order to build new NGA networks it is necessary to attract high levels of investment. No one would be willing to invest and run significant risks in order to just get a regulated price.

The positive impact of symmetric obligations

Symmetric obligations have had a positive impact in some countries where competition is infrastructure-based (e.g.: France, Portugal, Spain) and these kinds of measures have been used.

Evidence shows that, in those cases, symmetric regulation for in-building wiring, together with an effective regulation for granting access to ducts, have been instrumental in allowing alternative operators to deploy their own networks and create infrastructure-based competition.

Lack of impact assessments and prospective analysis by NRAs

It should also be noted that NRAs have normally not followed a rigorous impact assessment methodology, evaluating and quantifying costs and benefits in a prospective approach. Impact assessments should be key for NRAs to determine if a specific draft decision is justified and can thus be pursued.

The issue of NGA take-up

Regarding the take-up of high-quality services, there is clearly an adoption problem, as reflected by the Commission's Staff Working Document "Implementation of the EU regulatory framework for electronic communications – 2015". As an example of this:

- The share of >30 Mbps subscriptions (% of fixed broadband subscriptions) in 2014 was 26%;
- The share of >100 Mbps subscriptions (% of fixed broadband subscriptions) in 2014 was 9%.

¹ It is worth recalling that the Boston Consulting Group has estimated the existence of a 106 billion euros gap towards achieving the Digital Agenda Targets. This already takes account of existing and foreseen private and public investments. Such a large figure would need to be revised upwards if more substantial targets were set by the EU in the context of the DSM. https://etno.eu/datas/publications/studies/FINAL_BCG-Five-Priorities-Europes-Digital-Single-Market-Oct-2015.pdf

² For example, in recent cases, ACM argued that VULA could not be delivered on a HFC cable network (which was a key argument in order to exclude cable competition from the relevant product market). However, a truly forward-looking analysis on the technological characteristics of such wholesale access services (e.g. VULA) not only on copper networks, but also on HFC networks, would lead to the conclusion that these networks are sufficiently interchangeable forming therefore a substitute. Consequently, they should be part of the same relevant product market.

³ See for instance how CS and WLR were maintained in Portugal in 2014 (despite the fact that these account for less than 1% of traffic and customers) or the situation in Belgium, where WLR and multicast were imposed without any take-up.

What should the future framework look like ?

Decreasing and re-focusing regulation

Access and interconnection should not continue to be regulated ex-ante in the same way as today: a paradigm-shift is necessary. In fact, ex-ante regulation was meant to take place only for a transitional period of time. Instead, regulation has been steadily extended since the beginning of liberalisation. It is necessary to decrease intervention, complexity and bureaucracy, and provide operators with more freedom to invest, innovate, and profit from their investment efforts⁴.

As a general principle, ETNO believes that regulatory intervention should be thoroughly justified. It should not be taken for granted as an ever-existing feature, particularly taking into account that it implies a very intrusive form of intervention. Thresholds for ex-ante regulatory intervention have to be high. The need for regulation must be very rigorously analysed and, if applied, it should be on a transitory basis.

Regulation should aim at fostering the massive infrastructure investments needed and at maximising general economic welfare along with ensuring an efficient and sustainable level of competition at retail level. In case it is necessary to apply some form of access regulation to allow sustainable competition at retail level, it should be reduced to the essential access obligations and substantially simplified to one access layer. Regulators should identify the relevant “Key Network Input (KNI)”. The decision about the access level would have to be taken at national level, as NGA network architectures and other important aspects vary widely at local level.

It is very relevant that this type of access should not hamper the development of full infrastructure competition where it is feasible.

In a nutshell, ETNO advocates for a radical simplification of wholesale access regulation, with the emphasis on infrastructure competition as a key driver of innovation and investment. A regulatory system which can allow adequate return on investment in NGA networks is needed, ensuring a level playing field between competing infrastructures. Ex-ante regulation should be removed as much as possible in favor of a greater reliance on ex-post regulatory oversight.

Focusing on retail markets and dynamic efficiencies

We believe that the new framework should identify the retail market as the focal point for the assessment of potential need for regulatory intervention. The aim should be competition at retail rather than at wholesale level. This approach would help to reduce complexity, increase proportionality and ultimately design regulation to solve well-defined market problems in a much more targeted manner. At the same time, the analysis should always take a prospective stance and focus on dynamic (long-term), rather than static, efficiency.



In areas where infrastructure competition is in place, NRAs should lift wholesale obligations leaving to market forces the negotiation of access agreements under market conditions. In these situations there is no essential input warranting regulation.

Giving priority to commercial agreements

The future regime should take into consideration the current progresses in the field of voluntary access, e.g. joint network investments and network-sharing as well as commercially driven voluntary wholesale access offerings. It should move to a more market-driven approach, where commercial solutions for wholesale access take precedence over regulated outcomes.

Should the access seeker be satisfied with a wholesale offer (which it considers appropriate in terms of economic and technical replicability), no further regulatory analysis should be required. As a safeguard, an unsatisfactory response may lead to a dispute resolution mechanism, bringing the case before an NRA, which performs a “test” (retail-based and with a higher burden of proof) to determine if such access is indispensable.

Taking into account geographic variations

Regulators should be required to thoroughly take into account the heterogeneous geographic market circumstances. In fact, regulators should not start the analysis with a default national market as starting point. To the contrary, the analysis should be made with a bottom-up approach, determining which type of geographic areas in a country show similar competitive characteristics. Areas with sufficiently similar competitive characteristics that are different from other areas should be grouped together and analysed separately.

In certain cases, geographic remedies could be used instead.

Moving away from the “Ladder of Investment” thinking

The upcoming framework should abandon the concept of the “ladder of investment”. The “ladder of investment” approach has failed, as it has increased costs and discouraged infrastructure competition. The future access regulation regime should be much more simple, efficient and proportionate, and should limit access regulation, where it is still required, to one layer of the network.

⁴ See also Plum Consulting, <https://etno.eu/datas/publications/studies/PlumStudy2016.pdf>

Focusing price regulation on an ‘economic replicability test’

As outlined above, the obligation of cost orientation has particularly adverse effects on incentives to undertake risky investments in high-speed connectivity and is no longer proportionate in today’s much more dynamic market environment. A revised framework should limit price regulation to a test of economic replicability of competitive offers by national regulators, taking into account investment risks and any risk sharing arrangements⁵.

Assessing the impacts of regulatory decisions ex-ante

NRAs should make a sound impact assessment when taking regulatory decisions, including assessing the prospective impacts on investments. With such impact assessments, the NRAs should check if the considered intervention is beneficial bearing in mind a triple objective: (i) incentivising network investments and innovation, (ii) promoting sustainable competition, and (iii) maximising long-term consumers’ interests. The most important point in this assessment is if the decision will encourage investments in infrastructure.

Safeguarding technological neutrality

Regulatory intervention should not steer the market into a specific direction. Regulatory policy should aim at the best solutions for investments in NGA networks by providing network operators with a stable, predictable and investment-friendly framework, but should not discriminate against cost-efficient technologies for connecting customers to very high-speed broadband. Network operators should be able to decide their investments according to market developments both on the supply and on the demand-side; to the cost of deployment; to the long-term strategy which in some cases may lead to an upgrade of an existing network and in others to investments in new networks up to, or very close to, the premises of the customer.

An approach that deviates from the well-established principle of technology neutrality would be inefficient and contradict current EU policy goals such as the Digital Agenda broadband targets. Most importantly, the focus shall not be diverted from the consumer, who is not concerned about technologies, but focused purely on the quality of the experience.

Avoid extending regulation

ETNO warns against the extension of the scope of regulatory intervention to situations characterized by the absence of single/joint SMP, as BEREC has proposed with the concept of “tight oligopolies”.

Introducing a lower threshold for regulatory intervention, dependent on when “retail competition is still thought to be at risk” – or the “tight oligopoly concept” as proposed by BEREC, goes in the opposite direction of what is needed for the future framework.



Ex-ante regulation has a deep impact in the market. Introducing a new and loose trigger for ex-ante regulation would go against the principle of regulatory certainty and would send a wrong signal to investors.

Public funding should address market failures, without distorting competition

The role of public funding in broadband deployment should be exclusively limited to address the specific reasons of a market failure, i.e. for example lack of sufficient demand, lack of skills, high costs, elements hampering the investment process, i.e. in-building wires or other elements in low density areas, etc... .

In the area of broadband financing, it is of the utmost importance to ensure that public support takes place in a competitive neutral manner, i.e. avoiding at all cost distorting competition amongst market players and crowding out private investments. Finally, we believe it is crucial not to pick up winners and losers by selecting particular business models or players.



⁵ The report by CRA for ETNO provides useful indications in this respect:
https://www.etno.eu/datas/publications/studies/FinalCRAreport_18032015.pdf

IV. SPECTRUM MANAGEMENT AND WIRELESS CONNECTIVITY

Shortcomings of the current framework

It is widely shared among end-users, industry and policy-makers that the EU should work towards the creation of a more forward-looking and investment-friendly framework for spectrum management. This is vital if the EU wants to realise its ambitions in the field of connectivity, Internet of Things, and 5G.

Spectrum is the “lifeblood” of mobile communications. Spectrum allocation and assignment remain a crucial regulatory factor in determining the market structure and hence the performance of the wireless broadband sector in Europe. Few would argue that the way in which Europe manages spectrum today cannot be improved upon. We are faced with late and sub-scale 4G deployment and with vast differences in allocation policies between Member States with regard to any pre-defined number of networks per country. This means that all interested parties, namely the Commission and National Authorities, should aim for significant changes in spectrum policy, and the forthcoming Framework Review provides a unique opportunity to do that.

ETNO believes that the currently applicable regime has contributed to harmonising the technical usage conditions in particular for e-communications networks (ECN) frequency bands. However, the major problem in the EU is regulatory fragmentation regarding spectrum award procedures and licensing conditions. This situation needs to be changed not to further reduce the importance of European players in the global mobile environment.



KEY TAKE-AWAY

- EU's connected future depends on spectrum harmonisation
- Ensure efficient spectrum use
- Promote harmonisation in assignment conditions
- Coordinate policies beyond ECN



What should the future framework look like?

Much could be done to improve the current framework. We list below some proposals which would have a concrete and beneficial impact. The Commission should:

- Favour and enhance harmonisation in the assignment conditions of spectrum. Various degrees of harmonisation can be foreseen, ranging from the harmonisation of the granting timetables and of the duration of the rights of use only, to a broader harmonisation of spectrum policy across the EU, at the same time taking into account the different environments in each Member State;
- Increase market certainty, such as the definition of a longer or undetermined duration of the rights of use;
- Promote a more liquid and simplified secondary market for spectrum trading; and
- Minimise conditions that can distort market competition among players/operators, such as reserving significant portions of spectrum for new entrants.

A more detailed set of considerations follows.

The need for more harmonisation

The following spectrum assignment conditions should be aligned with particular priority in order to overcome the existing fragmentation of spectrum regulation in the 28 EU Member States:

- An objective, transparent and non-discriminatory treatment of existing as well as potential new mobile operators, especially in spectrum awarding procedures;
- Avoidance of excessive spectrum fees supporting the industry potential to invest in infrastructure and innovation;
- Alignment of awarding time tables for additional spectrum for mobile services (with some flexibility to accommodate specific and justified national circumstances);
- Implementation of a system of increased minimum license durations (e.g. 20+ years) or change to a model of indefinite mobile licenses (perpetual licensing like in the UK);
- Least restrictive spectrum usage conditions including enhanced flexibility regarding trading and sharing of spectrum resources.

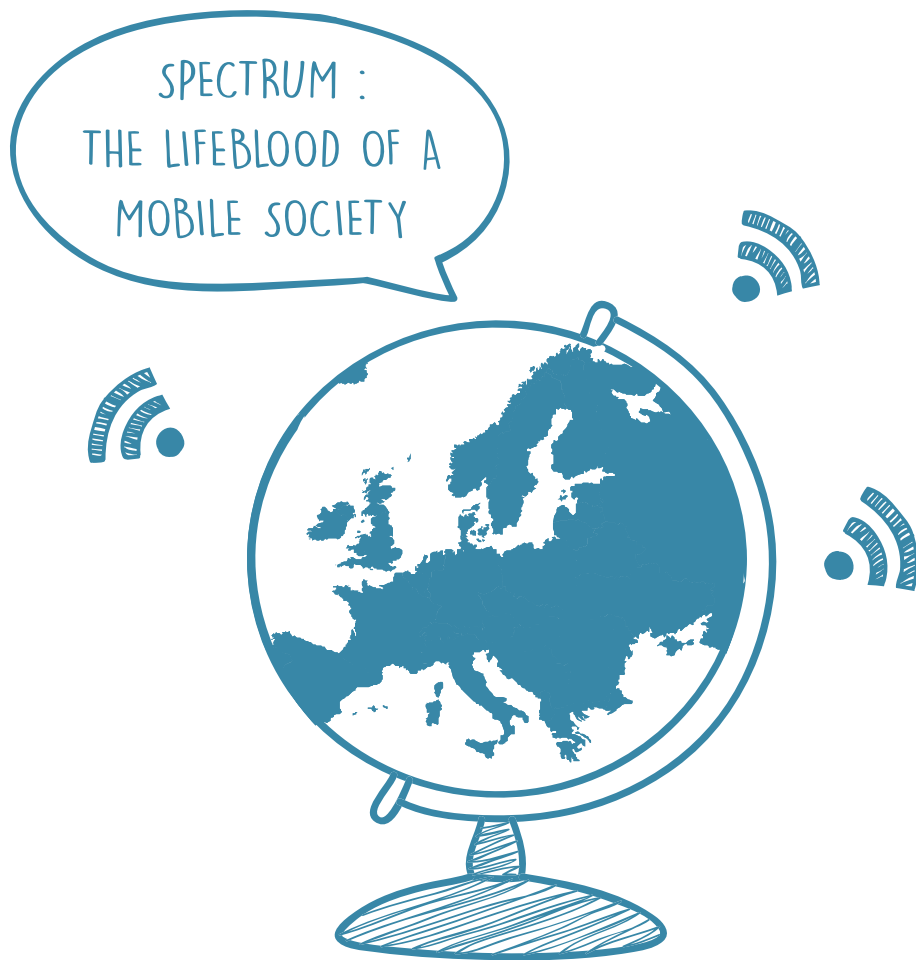
ETNO believes that the recent refarming of the 800 MHz in Europe is an example of the impact/result of the current fragmentation, which should not be replicated. Freeing this spectrum for mobile broadband took place at very different points in time depending on each Member State and with different usage and licensing conditions. Many EU Member States claimed derogations from the timeline set in the RSPD decision and the award conditions deviated considerably.

It should finally be noted that not all assignment conditions need to be harmonised. An example is constituted by specific obligations like coverage conditions, which should be left to Member States to decide.

Coordination of spectrum policies beyond ECN

Many emerging services (e.g. Audiovisual, IoT/M2M, Transport) rely on electronic communications services provided by network operators.

However, if some specific policy areas/services cannot utilise ECN provided by network operators or already harmonised license-exempt spectrum, there should be a common EU spectrum approach for such policy areas/services. This could ensure efficient use and simplify any potential changes of use.





The need for more efficiency

In a competitive scenario – as well as for ensuring effective and efficient use of spectrum – fair and equal provisions should be mandated instead of subsidising (or requiring the existing operators to subsidise) the new entrants. An example of a fair mean, which may be used in spectrum auctions, is to use spectrum caps to prevent one operator to acquire most of the spectrum in the band.

Until now the variation in remedies and competition measures imposed through spectrum policy has resulted in fragmentation across the EU, hampering innovation and investments. Additionally, it should be noted that competition law should not be mixed up with spectrum assignments, as is currently the case. They should have separate objectives: a competitive market and efficient assignments, respectively. Preferring new players in already competitive markets, e.g. by spectrum reservations, is not the right instrument and it is counter-productive since competitive markets have their own dynamics to establish the optimum amount of players. Favoring new players in assignment procedures hampers existing players to efficiently use spectrum and results in artificial scarcity.

ETNO believes that Europe would benefit from better coordination and transparency of national award procedures. In this context, the Commission should play a bigger role in fostering harmonisation of the overall principles of spectrum award procedures and licensing conditions.

In addition, it is very important that service and technology neutrality are respected regardless of the final service provided. In the light of this, we believe that it is more relevant to provide for the efficient use of spectrum resources rather than allocating spectrum separately for each policy area. If this was the case, these policy areas would not need dedicated spectrum in any of the Member States and the approach would be common in the EU. Such approach would allow similar implementation of the service across the whole EU.

Finally, we underline that a single legislative instrument that integrates the objectives and principles related to spectrum management for both electronic communications networks (ECN) and other spectrum uses would increase consistency, regulatory flexibility and would result in better efficiency of spectrum use.

V. REGULATION FOR COMMUNICATIONS SERVICES

Development of services in the telecommunications market is creating a new paradigm. Telecom networks gradually switch to IP, enabling new service offerings, increasing competition between digital services: New network operators have entered the market along with internet players, both providing additional services to end-users.

If we take the viewpoint of digital consumers, services are converging. Together with the bundling and integration of different services in single offerings, this generates new business models, based on multi-sidedness, commercial exploitation of personal data and network effects.

It is urgent to adjust the current regulatory framework to the new market reality and eliminate the existing asymmetries. End-users and businesses need consistent and more efficient regulatory standards across the digital market.

Towards new rules

The sector specific rules applicable to services provided by telecom operators must be subject to a profound review. The high regulatory burden on companies delivers limited benefits and is a source of complexity and lack of legal certainty for both end-users and services providers. In addition, it has created a distortion of competition vis-à-vis the provision of similar services by Internet-based providers that are de jure outside the scope of the framework. Services provided by electronic communication providers should be subject to the same horizontal laws applicable to all other services – based on a horizontal framework.

The consumer protection acquis needs to be principle-based and move from sector-specific to horizontal legislation. Specific legislation should only apply where strictly necessary.

This is the only solution that can effectively address the fast changing markets, ensuring efficient and future oriented protection standards across the digital market.



KEY TAKE-AWAY

- Eliminate outdated legacy ECS category: focus on the service, not on who delivers it
- Ensure regulatory consistency
- Allow more space for innovation
- Proportionality of the rules is key



A horizontal framework needs to be based on high-level principles, and move from currently applied ex-ante regulation of telecom operators' services to proportionate ex post instruments, that effectively ensure consistent protection standards and fair competition across the digital market.

How to improve the current framework

ETNO believes that a broad and thorough assessment is required, based on following high-level principles, which should form the basis for an efficient and future-oriented framework in the digital market, including Electronic Communications Services (ECS), Internet Access Services (IAS), Information Society Services (ISS) and Audio-visual and Media services (AVMS):

- 1. Same service, same rule:** The same end-user protection rule needs to be applied to services that are the substitutable from the end-users' point of view – in a technology-neutral way, irrespective of the provider or of the business model. Consumers, need consistent consumer protection standards across the converging digital market.
- 2. Efficient, consistent and future-oriented protection standards:** Reassess in detail which rules currently applied to services are still required, delete outdated rules, adjust to new risks and, finally, apply updated rules consistently in the digital market. A one-time-regulation principle should be adopted: whenever a situation is already addressed by a horizontal rule, the sector-specific one should be removed. Moreover, efficient consumer protection has to be proportionate, by effectively addressing identified consumer concerns, whilst avoiding unnecessary costs for industry. A simplified and light touch regulation should be the goal to achieve, by deleting rules that are already covered by horizontal laws and transferring selected rules from telecoms regulation to horizontal legal instruments applicable to all players.
- 3. Specific rules only where indispensable:** Some specific service characteristics of the services can still deserve specific rules, to be applied selectively and in a proportionate way, and only where clearly indispensable. This includes to preserve established standards that end-users highly value and rely on. In regard to telecom operators' communication services this refer to e.g. the use of numbering resources, enabling e.g. any-to-any connectivity, or end-to-end quality that ensures inter alia reliable emergency services.
- 4. Proportionate geographic harmonization:** EU-wide harmonisation of efficient consumer protection standards would facilitate cross-border commerce, if implemented in a proportionate manner, avoiding unnecessary costs for the industry. Proportionality is particularly relevant where services are strictly regulated and this regulation is highly fragmented across EU member states.

Considering these high-level principles, an updated legislation requires going beyond the mere modification of only those rules that proof to be a high burden. An updated framework is necessary, in line with the above described high-level principles, entailing the revocation of the rules that do not meet these principles.

V. REGULATION FOR COMMUNICATIONS SERVICES

Inconsistencies in current legislation

Several sector-specific end-user rights provisions in the current framework overlap with horizontal consumer protection requirements whilst others are no longer relevant to consumers; others impose requirements to that are delivered on a voluntary basis in a competitive market. With reference to the Universal Service and ePrivacy Directives, there are a few examples of asymmetric protection rules for consumers, as well as other end-users, which are only applicable to only telecoms. The justification for maintaining them should be assessed:

- **Transparency:** Standardised information to be published to enable consumers' informed choice; prescriptive information requirements before, within contract, and after contract conclusion, e.g. on various specific service characteristics, consumers' rights and on consumption.
- **Technical cost control measures:** Regarding technical tools that support consumers to control expenses, e.g. through spending caps and warning signals.
- **Contract duration and termination:** Providing for each service at least one contract with minimum duration time of no more than 12 months; very restrictive rules for contract modification, even if not for the detriment of consumers, limit telecom operators' flexibility, e.g. to innovate services.
- **Services for disabled:** Where the dynamic and innovative market already delivers more efficient solutions, providing a variety of offerings that may replace the earlier dedicated system, telecom operators are required to provide specific services, ensure choice and specific terminals for disabled end-users. In this context, specific additional obligations can be imposed on dedicated operators.
- **Collecting and processing customer data:** disproportionately prescriptive rules on how and when ECS providers are allowed to collect and use customer-traffic and location data.

A thorough assessment of the implementation of these rules is essential in order to assess whether they are still required, outdated or simply require adjusted to new risks and market conditions. Moreover, any rules which are maintained and updated should apply consistently in the digital market.

Specific rules to be maintained only where truly required

In principle, all digital services should only fall under a horizontally applicable set of rules and service-specific rules should apply only in selected areas, where deemed necessary. For the purposes of preserving specific quality standards, particularly valued and relied upon by consumers, or where certain specific characteristics of the services so require, specific rules can be justified and should be maintained in the framework, albeit subject to simplification and to a proportionality test. This applies to any-to-any connectivity (interoperability) based on phone numbers, number portability and access to reliable emergency services.



- **Services for interpersonal voice communications** at ensured quality, based on numbers are highly valued by customers. Therefore there are specific rights and obligations that should be kept in relation to these services, such as any-to-any-connectivity based on phone numbers closely related to obligations for number portability and ensured end-to-end-quality. The latter is the basis for reliable connections, inter alia, for reliable emergency services. Recognising that end-to-end quality can only be ensured between providers that manage their services, extended interoperability including best-effort services providers dilutes the regime of ensured end-to-end quality. Likewise, obligations and rights linked to any-to-any-connectivity (interoperability) based on phone numbers should only cover services for interpersonal voice communications at ensured quality based on numbers and not best-effort communications services.

In this context, it is important to recall that these rules were set to reduce the potential network and lock-in effects for consumers from large telecoms services providers. The emergence of communication services based on best-effort, which do not need to ensure interoperability with other providers and portability of their identifiers and the consequent creates lock-in effects created by certain Internet based providers. Therefore, to reduce network and lock-in effects, adequate and swiftly applicable ex-post instruments should be in place, to be applied in a proportionate manner. Further tightening of rules applicable to already regulated services would be non-proportionate.

- **Reliable emergency call functionality** is publicly perceived as valuable feature and safeguard of the services provided by telecom operators, linked to high reliability of the connection and provisioning of numbers. Due to the very broad penetration of telecoms' voice services, nearly every European Citizen can rely on this offering. Rules should ensure sufficient flexibility to take into account the different intrinsic characteristics of the new technologies "all IP", identifying solutions that are sustainable and viable through the new technologies. To ensure that consumers are properly informed about availability of these safeguards, best effort voice services lacking end-to-end quality and phone numbers and, therefore unable to provide reliable emergency call functionality, should be required to clearly inform consumers about the limitations of the services.
- Likewise, with regard to IAS, subject to simplification and adjustment to the technological evolution, there are rules that are still relevant for selected characteristics the services, are included in the Open Internet Regulation⁶, such as the obligations of **non-discrimination and neutrality** where IAS has a gate-keeping functionality and transparency on quality of service, transparency and requirements in the Universal Service Directive that ensure a smooth switching process.

⁶ Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015

- **Regarding integrity and security of public communications networks and services**, the current rules are adequate there being no need to amend or add new provisions. The application of Article 13a of the Framework Directive, complemented by the Network and Information Security (NIS) Directive should provide the appropriate levels of security considering services for interpersonal voice communications at ensured quality based on numbers, communications networks and other internet services that are key to deliver a safe IT ecosystem to citizens and companies. Beyond legal obligations, most telecom operators have implemented comprehensive measures and programs to minimise security threats and developed voluntary initiatives. Coordination between public and private players should be reinforced to ensure an affective and agile response

Scope of application – Definitions and categories of services

In light of the above described market developments, the legacy categorisation of services proves to be outdated. The current definition of Electronic Communications Services (ECS) is not fit for purpose and should be deleted.

Due to the convergence of electronic markets there is a strong need to review current terms and definitions of all services provided in the digital world, including ECS, IAS, ISS and AVMS, from a consumer centric perspective.

| | |
|------|-----------------------------------|
| ECS | Electronic Communication Services |
| IAS | Internet Access Services |
| ISS | Information Society Services |
| AVMS | Audio Visual Media Services |

- **Definitions**

As confirmed by a recent survey prepared by ComRes⁷, consumers perceive new communications services as functional substitutes of services traditionally provided by telecommunication operators. These services are competing in the same market and consistent regulation is required to properly guarantee consumers’ rights. In fact, users do not clearly distinguish ECS, as provided by telecom operators, from ISS with communication functionalities, provided by Internet based players. All services which are perceived to be similar from the consumer’s point of view, should be subject to the same horizontal protection rules.

The convergence of communication services perceived by end-users is further illustrated in the recent study produced by The Boston Consulting Group “Five Priorities for Achieving Europe’s Digital Single Market”⁸:

“the volume of Internet-based voice services in Europe is growing at more than 20 percent a year and is expected to lead to a 21 billion revenue loss for European telcos, or 7 percent of their total, by 2018. OTT messaging is growing even faster – more than 30 percent a year – and is projected to result in a 10 billion revenue loss for telcos by 2018 in eight European countries alone (Germany, France, the UK, Italy, Spain, the Netherlands, Belgium and Portugal). Part of the growth in OTT voice and messaging stems from consumers substituting these services for traditional telephone calls and text messages and part of the growth represents additional usage. Services such as Whatsapp voice calling and FaceTime audio are expected to accelerate both substitution and new usage”.



Therefore, any rules applicable to services included in an updated framework, should apply irrespective of the nature of the provider but based on the end-user perceptions.

The technical criteria such as “conveyance of signals” is irrelevant to define whether a specific consumer protection standard should apply. For that purpose, only the perception of the consumer and the need to provide the appropriate safeguards should be considered.

- **What services ?**

Specific rights and obligations should apply to services that require consumers to provide “counter-performance” in one form or another, including remuneration or any form of payment, of a monetary nature or on the basis of personal data for the purpose of monetisation, including on the other market side for the purpose of displaying personalised advertisement.

Rules applied to commercial services - including commercial services for interpersonal voice communications at ensured quality based on numbers - should not discriminate specific business models.

Current sector-specific regulation includes all ECS and IAS provided by telecom operators, irrespective if these services are charging or entirely for free. Horizontal consumer protection rules applied to other providers are mostly limited to commercial services that remunerate monetary payments. Services that are being remunerated e.g. by the submission of personal data do not have to comply with the respective rules. Consumers cannot rely on protection standards applied to other commercial services and, most often, are not even aware that they give up their privacy and are being “charged”. Providers of such services benefit from less compliance costs and benefit from supposedly being “for free”.

Services which are provided entirely for free to consumers (non-commercial and no remuneration by end-users, such as submission of personal data) may be considered as communications services. However, most consumer rules included in the current horizontal and sector-specific legislation are not reasonably applicable. The same rules should apply equally to all non-commercial services, irrespective of the provider. Services that do not require any counter-performance from consumers should be excluded from the obligations applied to commercial services.

Collecting personal data solely for the purpose of service delivery (if service delivery is technically not possible without submission of personal data) or due to legal obligations (e.g. registration) does not have to be considered as remuneration or any form of consideration and, thus, does not prove the commercial purpose of a service.

⁷ ComRes Digital Consumer Survey for ETNO, September 2016

https://etno.eu/datas/publications/studies/ComRes_ETNO_Final%20Report_LATEST%20FOR%20PUBLICATION.pdf

⁸ The Boston Consulting Group, October 2015

A future-proof characterisation of communication functions needs to be technology-agnostic, reflecting consumers' perception and user habits and encompass any services or functionality that allow communication between individuals. It should also acknowledge that more and more interpersonal communication do and will take place within a richer context, such as social networking, online gaming, doing e-commerce or e-administration, etc..., which integrate communications features more and more. The rationale for regulating communications between individual does not apply to the vast majority of services where machines are involved.

Finally, a holistic characterisation of the function of communication must not rule out that some services that show special characteristics, which require specific rules (since they appear as quality standards), need to be preserved. However, this difference in treatment with limited scope must not constitute that such communication services generally fall under a different set of rules.





- **M2M/IoT-services**

Machine-to-Machine (M2M) and related Internet of Things (IoT) services should be considered outside of the scope of the definition of communication services provided to end-users. Communications with and between machines substantially differ from traditional communication between individuals and the regulation in this framework and the regulation applicable to communication services would not be relevant nor fit for purpose for M2M/IoT related services. To avoid distortion of the dynamic development of M2M/ IoT, any regulation to such services needs to be sufficiently flexible and non-prescriptive.

- **Must carry' and Electronic Programme Guide provisions**

ETNO believes that there is no need to expand the scope of existing regulation in view of media convergence. The existing must-carry regime needs to be reassessed in the light of an increasingly global, digitised audio-visual market that has little in common with the analogue world it was once tailored to suit. In this perspective, the national application and particularly the review of imposed obligations should be assessed more stringently to focus on obligations related to content of general interest.

Convergence will lead to a greater offer of services, where traditional broadcasters may start providing linear or non-linear TV services over the Internet and OTTs will also start providing linear or non-linear TV services (“Netflix-type”), and traditional distributors may re-distribute their signals on a broadband circuit in addition to a TV circuit.

Consumers today are generally capable of identifying, retrieving and accessing their content of choice more than ever before. ETNO believes that transparency, non-discrimination and empowerment of users – provided that bearing in mind to preserve their autonomy of choice – are key success factors. Therefore, the EU framework should clarify that there is no need, also at Member State level, to follow an overly-prescriptive – or even paternalistic – approach by adopting additional obligations on findability.

VI. UNIVERSAL SERVICE

Those Member States who put in place universal service obligations recognise that the market increasingly fulfils the relevant needs of the citizens, with no further need for the designation of one or more operators.

As the European Commission underlined in the public consultation for the Framework Review, “the three basic characteristics of the current universal service concept relate to availability, affordability and accessibility, while minimising market distortions”.

ETNO believes that the universal service regime has demonstrated little effectiveness in ensuring these three objectives. In fact, they have been largely and more satisfactorily met by the market. This puts in question the adherence of the regime to the proportionality and necessity principles of EU legislation. Furthermore, the regime appears to be more and more outdated⁹.

Moreover, the quality parameters defined in the annexes of the existing regulation have increasingly lost relevance: firstly because they are limited by nature, as they apply to universal service operators only and not to other providers; and secondly because parameters have meanwhile been re-defined under horizontal consumer protection rules.

In light of these reasons, the universal service regime has lost its effectiveness in ensuring the availability of universal services. It has been implemented in a few countries only, with different characteristics, and the results of such application have been modest. In many cases, obligations were maintained without a timely assessment of their need and effectiveness in the light of market evolution.

Finally, where obligations have been imposed, they have led to numerous litigation cases, including numerous cases brought before the Court of Justice. The majority of such cases were justified by the excessively complex provisions regarding financing and net-cost calculation. The decisions made in this respect when the USO system was designed have cost substantial resources to the operators involved, as well as to the related Member States.

What should the future framework look like?

ETNO shares the main objectives of the universal service regime: to provide a safety net where the market does not deliver services which are indispensable for being part of a modern digitalised society and for preventing social exclusion. We believe that the revised regime should continue having this fundamental focus.

Having said that, we believe that the way in which these objectives are pursued should change.



The universal service regime was shaped in a context of incipient market liberalisation. However, market conditions have drastically evolved since then, with more competition and choice available to consumers and end-users. Market forces have multiplied and are now delivering most of the USO, as also highlighted by the European Commission in its latest Digital Agenda Scoreboard for 2014. In addition, due to the drawbacks of the universal service regime (calculation of “net costs” and assessment of the unfair character of the proven burden, with the related legal uncertainty), the USO financing mechanism should be fundamentally revised.

This review of the telecoms framework should therefore be the opportunity to reconsider obligations, measures and instruments which are no longer relevant.

The scope of the universal service regime

The universal service regime does not call for any undue extensions to new components, but for a change to a more effective and efficient policy composed of a mix of supply-side and demand-side tools. The political objective of universality of access such as availability of services necessary for social inclusion can be better met by other means rather than the current USO mechanism.

Some features of the current regime are outdated. For instance, it seems clear that the designation of universal service providers for telephony services at a fixed location is no longer neither necessary nor adequate for the purpose of preventing social exclusion in societies progressively being transformed by the Internet and the digital economy. Mobile telephony already provides ubiquitous voice services and is considered as an alternative, a complement to telephony services at a fixed location.

Furthermore, the framework provides guarantees for the quality of Internet Access Services, which implies that VoIP will be functional. As far as pure VoIP is concerned, it should be noted that there is no comparable obligation to those applied to voice telephony as those services are currently out of the scope of the framework.

Regarding the extension of the current scope, ETNO believes that a basic/functional Internet Access Service (IAS) will be a key service for an inclusive participation in the society. However, we do believe that this political goal should not be implemented through an extension of the current universal regime. While we agree with the political goal of ensuring broadband connectivity for all, we strongly believe that the universal service mechanism is not the right instrument to achieve it.

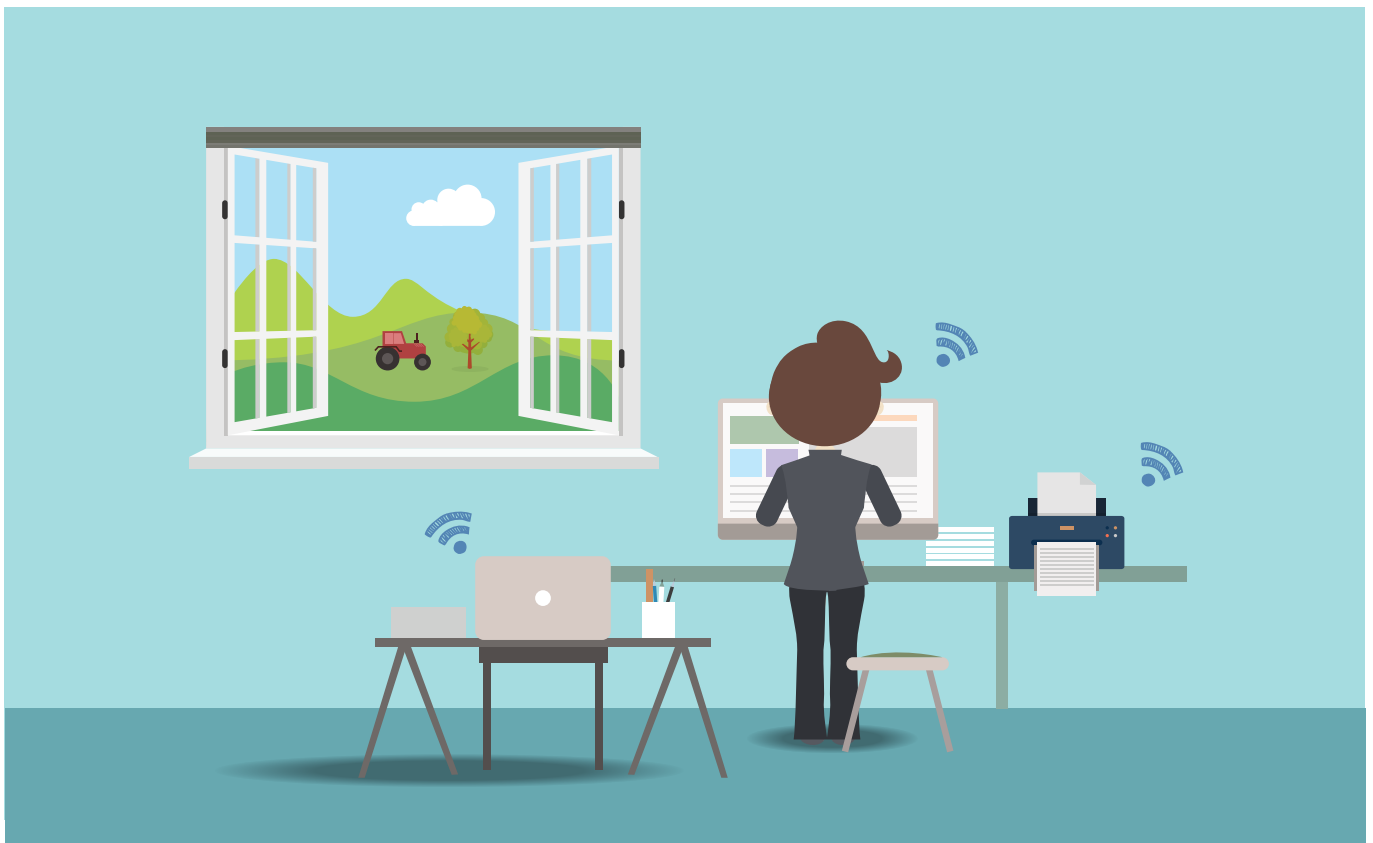
⁹ In fact, the current universal service regime is grounded on an obsolete, PSTN voice-centric, monopolistic world and thus ignores the rapid development of market and services. It focuses on supply-side measures and, as such, it is not effective in addressing problems related to demand gaps. For example, in France a potentially significant number of customers may benefit from subsidised subscriptions. However, albeit offered, only some customers use the mechanism.

End-users with disabilities

It is of the utmost importance that citizens with special needs, notably citizens with disabilities, can communicate at the same level as all citizens. Technological innovations and new services have made this much easier already. It is important that governments support and facilitate their take-up.

In general, the variety of offerings already existing on the market are complementing earlier dedicated systems (e.g. text-telephony being replaced by chat, messenger services, Skype-type of services, video telephony etc.). As for communications services, disabled end-users may even find better solutions offered by other players along the value chain, e.g. by manufacturers, soft- and hardware providers, app developers or internet-based service providers.

Only an approach of shared responsibility across the digital services market delivers efficient and proportionate solutions for users with disabilities. Therefore, a more horizontal approach is required. Only if the market does not deliver, it may be appropriate to impose the obligation on the relevant public authorities or NRAs to safeguard the interests of disabled users. This can be done through tenders for relevant specific measures. Also, self-regulatory tools should be considered.





The funding of the universal service regime

A shift in the funding base of the regime is necessary. In fact, the regime has introduced significant market distortions, imposing a financial burden only on one or some operators.

Grounded on the designation of one or more operator(s), the universal service regime is not aligned with the philosophy of the competition-based model underlying EU electronic communications markets.

Moreover, the fact that the designated operator relies on uncertain contributions from other operators without the assurance of a fair compensation, undermines competition and fairness.

If basic access to the Internet is a determinant condition for an inclusive participation in society and thus a political objective of universal access to Internet Access Services is kept in the regulatory framework, Member states should then comply with this obligation by:

- Creating an investment-friendly regulatory framework incentivising maximum coverage by private undertakings on commercial grounds to minimise the extension and the cost of non-profitable areas;
- Supporting coverage in non-profitable areas via public subsidies;
- Guaranteeing the benefit of a competitive retail market to all customers, including those of non-profitable areas;
- Using demand-side instruments, such as affordability schemes (e.g. vouchers), digital literacy programs and other types of social policies aimed at fostering service penetration and usage amongst relatively disadvantaged groups of citizens.

With USO becoming a political objective for Member States to fulfill, public funding, and not operators' resources, should be used to finance the related costs. The cost of USO should not anymore be supported by the designated operator – in the case where it is concluded that its burden is not unfair – or by only some actors in the electronic communications sector. As the Universal Service is a social goal that benefits the entire society, it is logical that society as a whole finances it through public funding.

If private financing was to be kept, it should directly involve all the players of the Internet value chain (such as providers of online content, applications and services). The uncertainty as to the right to compensation should in any case be eliminated. Any operator that is designated to bear extra costs to comply with the requirements should have an unconditional right for compensation.

VII. INSTITUTIONAL SET-UP AND GOVERNANCE

As a general remark, ETNO believes that the overall institutional set-up should be made consistent with the objectives and reforms suggested in the previous chapters.

With this regard the set-up should be significantly streamlined, to be consistent with the new competitive environment that requires a significant reduction of regulatory intervention, and increased regulatory certainty and predictability.

The set-up, as well as the overall framework review, should also take into account the profound changes occurring in the whole digital ecosystem at large. It should be targeted towards the reaching of the following, crucial, policy goals:

- A radical simplification of wholesale access regulation, with the emphasis on infrastructure competition as a key driver of innovation and investment. A regulatory system which can allow adequate return on investment in NGA networks is needed, ensuring a level playing field between competing infrastructures. Ex-ante regulation should be removed as much as possible in favour of a greater reliance on ex-post regulatory oversight, and in any concern should exclude mobile networks.
- A more efficient spectrum management framework, which meets the spectrum requirements determined by the predicted explosion of mobile data traffic;
- A reduction of sector specific rules to what is really sector specific;
- A consistent and proportionate set of horizontal rules, applied to all services in the digital market, particularly with regard to consumer protection:

- A competition and regulatory perspective which safeguards and promotes innovation and investments;
- A more consistent and predictable regulatory framework within the EU.

Below, a set of concrete and specific remarks in line with this vision:

Network access regulation

As far as network access regulation is concerned, the current framework has provided an excessively complex regulatory setting, with high implementation costs, both in the area of network access and consumer protection. Overregulation has had a negative impact on operators' costs and commercial flexibility and ultimately on citizens. The new framework should promote regulatory simplification and legal predictability, and any institutional set-up should be targeted at ensuring these goals.

A clear example of overregulation is that market definitions have often been designed with the idea to regulate specific wholesale services. Regarding efficiency, we highlight that regulation has led to huge inefficiencies and compliance costs, overburdening operators.

To avoid this, we believe that NRAs should envisage thorough impact assessments of their proposed decisions, focusing in particular on the impact of such decisions on investment incentives.

Moreover, the future regime should take into consideration the current progresses in the field of voluntary access, e.g. joint network investments and network sharing as well as commercially-driven voluntary wholesale access offerings.



It should move to a more market-driven approach, where commercial solutions for wholesale access take precedence over regulated outcomes. If necessary, NRAs should remain competent to arbitrate between undertakings on the subject using dispute resolution powers. Therefore, an adequate institutional set up and procedures should be in place which give priority to voluntary access agreements.

A consistent regulatory environment for digital services

The new institutional set-up should also be targeted at ensuring consistent rules across the whole digital service market, which includes a level playing field between competing services.

The fragmentation of the regulatory framework actually in force in Member States, with the consequent simultaneous application of very different set of rules to digital services (where different authorities may be involved, such as the telecom NRAs, consumer protection agencies and others) does not sufficiently ensure consistent protection standards that consumers can rely on.

Moreover, enhanced competition due to new providers in the market – telecom operators as well as OTTs – has increased consumer choice, further questioning the justification for prescriptive and sector specific ex-ante regulation.

Effective enforcement of the new rules should be ensured. ETNO considers a solution to ineffective enforcement of rules as a priority.

Additionally, we are facing a major problem of enforceability of the European legislation in relation to non-European players, which negatively impacts effectiveness of legislation.

All of these factors need to be considered when assessing the current framework's effectiveness regarding consumer protection and when defining a new future-proof holistic legislation for the digital economy.

Regarding the possibility of conferring new powers to regulators, ETNO agrees with the recent BEREC's proposals to extend the scope of information gathering to grant NRAs the power to request information from "all relevant parties, including OTTs". This corresponds with the European Commission's Recommendation on relevant product and service markets (2014), which explicitly recognises that OTTs may be taken into consideration when analysing markets. But it also recalls that according to Art 15 of the Framework Directive, markets can be identified "within the electronic communications sector". Therefore, the Recommendation does not even seek to identify OTT-specific markets. Still, it is questionable if NRAs would have the ability to enforce such a provision, if OTTs refuse to comply with the requests, being OTTs not covered by the Framework.

Numbering and addressing issues

Regarding numbering and addressing issues, practice has shown that individual Regulatory Authorities in member countries have adequate expertise to deal with issues such numbering or addressing on a national basis. Whilst ETNO welcomes some coordination on numbering and addressing at European level such as the one undertaken by CEPT/ECC (with no autonomous enforcing role, with a role of EC advisor as for the frequencies), ETNO considers that there is no need for the time being to give BEREC more executive tasks or binding powers in the above-mentioned areas due to the particularities of each national numbering or addressing scheme.

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