

## Introduction

The EU Electronic Communications Code (EECC) is a new directive consolidating and reforming the framework for the regulation of electronic communications services and networks across the EEA<sup>1</sup>. Member states must adapt their existing telecommunications regulations in accordance with the EECC by 2020. In the meantime, certain provisions of the EECC may have direct effect, even before its transposition into national laws. The EECC is complemented by various directives and regulations, including, among others, the e-Privacy Directive, the Telecoms Single Market Regulation, the Roaming Regulation, and the Radio Spectrum Decision.

## Definitions

- **“Electronic communications service”** means a service normally provided for remuneration via electronic communications networks, which consists of (a) internet access services, (b) interpersonal communications services, or (c) services consisting wholly or mainly in the conveyance of signals. This definition includes traditional telephony, SMS, MMS, transmission services, machine-to-machine communications, broadcasting, voice over internet protocol (VOIP) and over-the-top services. It excludes e-commerce, information society services and exercising editorial control over online content or broadcasts. It also excludes interpersonal communications services that are minor and purely ancillary to a non-communications service, such as a communication channel in online games.
- **“Electronic communications network”** means a network consisting of servers, switches and routers, used wholly or mainly for the provision of electronic communications services available to the public, which support the transfer of information between network termination points. This definition includes the Public Switch Telephone Network (PSTN), mobile networks, data centres and any other transmission system. It excludes passive elements of the networks, such as towers and dark fibres.
- **“Associated facilities”** means those associated services, physical infrastructures and other facilities or elements associated with an electronic communications network or service that enable or support the provision of services via that network or service, or have the potential to do so. This definition includes buildings, entries to buildings, wiring, antennae and other passive elements of the networks, such as towers and dark fibres.

## Objectives

The new objectives of the EECC include:

- The promotion of investment in very high capacity networks, such as optical fibre and 5G
- The promotion of competition, including an “efficient infrastructure-based competition”
- The development of the internal market across the EEA
- The protection of consumers

Therefore, before requiring access to an incumbent’s network, national regulatory authorities will need to ensure that any such access obligation takes appropriate account of the risk incurred by the investing companies in new generation networks. This new provision translates into hard law existing recommendations by the European Commission against the imposition of cost-oriented prices for access to new generation networks.

## Promotion of Co-investment and Wholesale-only Networks

The EECC promotes co-investment in very high capacity networks and the separation of incumbent operators in separate wholesale and retail arms, by rolling back network access regulation in those circumstances, subject to certain conditions. Co-investment in this context includes co-ownership, long-term risk sharing, co-financing and purchase agreements giving rise to specific rights of a “structural character”. Separation of incumbent operators includes both functional and structural separation. The conditions for the rolling back of network access regulation for co-investment are that the co-investment offer is fair, reasonable and non-discriminatory; it is open to any co-investor for the lifetime of the network; and provides for access for non-co-investors to legacy capacity and, over time, to more advanced capabilities of the network. The condition for the rolling back of network access regulation for wholesale-only networks is that the “netco” must not have activities in the retail markets. Finally, both co-investment and wholesale-only networks must comply with EU competition law.

## Network Access Regulation

Network access regulation continues to be limited to operators designated with significant market power (SMP) in defined relevant markets. Prior to their adoption, proposals for network access regulation are subject to the review of the European Commission and BEREC (the Body of European Regulators for Electronic Communications), where the proposed measures are capable of affecting trade between member states.

<sup>1</sup> EEA member states include all EU member states, plus Iceland, Liechtenstein and Norway.

Moreover, the EECC and new European Commission's Guidelines on Significant Market Power (SMP Guidelines) now limit cost-oriented network access pricing regulation (which is the most intrusive form of network access regulation) to wholesale markets, where EU competition law enforcement is deemed insufficient to solve a perceived market failure.

The SMP Guidelines require national regulatory authorities, when imposing access regulation, to take account of convergence and the rise of OTT services, which could challenge traditional, copper-based single dominance in telecoms, as well as "joint SMP" to regulate oligopolistic markets, in line with EU competition law case law.

The EECC has also introduced the ability for competent authorities to impose symmetric regulation on the sharing of facilities or property in certain limited circumstances, regardless of a finding of SMP.

## Internet-based Services

The scope of the EECC has expanded to cover internet-based services that did not previously fall within the definition of electronic communications services under EU law. In particular, the definition of electronic communications service now includes internet-based services that do not connect with publicly assigned numbering resources (i.e. number or numbers in national or international numbering plans). The EECC calls these services "number-independent interpersonal communications services" (NI-ICS) to distinguish them from "number-based interpersonal communications services" (NB-ICS). The definition of NI-ICS also includes services using numbers as a mere identifier, such as instant messaging. The EECC provides for lighter regulation of NI-ICS, compared to NB-ICS. For example, only NB-ICS providers are currently subject to requirements to register with the competent authorities of the member states, guarantee the ability to dial in emergency services numbers (i.e. 112), and ensure interoperability of their services. However, the EECC also sets out various procedures to allow for the expansion of some of the regulatory provisions applicable to NI-ICS over time, based on demonstrated changes in use of NI-ICS, compared to NB-ICS.

The EECC maintains a general authorisation regime, whereby any operator can provide its services across the EU without the need for an individual licence. The general authorisation regime requires each operator to self-assess and comply with the applicable regulatory conditions under the national telecoms laws where the services are provided. However, competent authorities may require the registration of certain operators (e.g. NB-ICS) as a condition to benefit from the general authorisation to provide services in their territories.

The use of certain radio spectrum (e.g. 4G spectrum bands) continues to be subject to the need for individual rights of use.

## Spectrum Management

The EECC creates a more co-ordinated approach to spectrum management, with a view to promoting the rollout of 5G and protecting incentives in network investment. As part of this co-ordinated approach, the EECC makes the following changes:

- Duration of radio spectrum licences for wireless broadband up to a minimum of 20 years, to provide legal certainty and stimulate long-term investments
- Clear rules on spectrum assignment and the renewal of licences
- A regular review of radio spectrum fees

## End-user Protection

The EECC is also designed to enhance protection for end-users across the whole EEA by:

- Aligning protections, including security requirements, for end-users of OTTs with those of traditional telecoms providers
- Requiring maximum harmonisation in relation to consumer protection provisions, which means that member states may not impose more, or less, stringent provisions than those set out in the EECC
- Specifying that bundles of services that include an internet access service or publicly available NB-ICS must apply certain consumer protection provisions to the whole bundle
- Enhancing user rights during the switching of internet access services and the porting of phone numbers
- Establishing a universal service ensuring availability and affordability of both broadband and voice communications
- Strengthening protection of citizens in emergency situations
- Enhancing security of networks and services
- Capping the price for intra-EU calls



## Next Steps

EEA member states have two years to transpose the EECC into national law, by 2020.

In the meantime, certain provisions of the EECC may have direct effect, even prior to national transposition. For example, the provisions on the intra-EU calls apply from 1 May 2019.

Traditional services, as well as new internet-based services, will need to understand and comply with these new rules, and may wish to participate in the public consultations for the transposition of the EECC at national level.

## Brexit

At the time of writing, the UK has adopted a decision to withdraw its membership from the EU, which is currently expected to take effect on 29 March 2019, possibly subject to a transition period.

The UK government has pledged that, post Brexit, the UK will continue to transpose the EECC into national law.

## Contact

For more information, please contact your principal firm representative or the lawyer listed below.

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