

DIGITALEUROPE Position Paper on the Telecoms Framework Review

Brussels, 27 June 2016

1. Introduction: a time for reform

In September 2015, the European Commission launched a public consultation on the regulatory framework for electronic communications networks and services.¹ DIGITALEUROPE responded to the consultation, giving input on aspects related to Next-Generation Access (NGA), spectrum management and Over-The-Top (OTT) services.

The Commission is now preparing the first legislative proposals to address the concerns expressed in the consultation and to update the electronic communications framework. DIGITALEUROPE welcomes the ambition of the Commission and stresses that a coordinated approach is necessary to bring the regulatory system to the 21st century and realize the Digital Single Market.

DIGITALEUROPE calls on the Commission and regulators to build a stronger and more competitive telecommunications infrastructure market, with a balanced regulatory enforcement regime. Harmonized EU spectrum management and ensuring fixed backhaul will further be key in unlocking the resources needed for effective deployment of new technologies and applications such as for 5G. Meanwhile the changing market landscape and growth of digital services must be supported with a proportionate response, with horizontal regulation rather than sector-specific policies.

It is time for a forward-looking framework that promotes innovation and effectively delivers the required large-scale network investments to the benefit of consumers, businesses and public administrations.

2. Filling the gap: an access regime that fosters NGA investment

The current regulatory framework for electronic communications has in many senses served the purpose of liberalizing the telecommunication markets and delivering competition at retail level. It has undoubtedly brought intensive competition to many places in the EU, resulting in improved quality of service, lowered retail prices and affordable basic broadband access to all. It has also enabled the emergence of some cross-border operators, even though the markets themselves remain fragmented along national borders.

However, at the same time, the framework has fallen short of ensuring the build-out of high-capacity and high-speed ubiquitous networks. When assessing the progress made on the objective of infrastructure competition

¹ EU Commission - Public consultation on the evaluation and the review of the regulatory framework for electronic communications networks and services ([link](#))

and investment in high capacity and reliable networks, it is clear the EU as a whole is lagging behind significantly in connectivity and uptake compared to other regions. The challenges facing the industry now in upgrading existing or building new networks for ubiquitous access of end-users to ultrafast broadband are by definition different than the challenges in the 1990s.

According to the Commission's estimates, Europe is facing an investment gap of €90bn to reach the current 2020 targets. A McKinsey study² from 2012 assessing the gap going beyond the 2020 targets to instead delivering a 100% coverage of 100 Mbits estimates an investment of around €200-250bn and €50-70bn to bring LTE to 95% of the EU15 population (see also study on mobile investments by iDate³). And even though coverage has increased more recently, broadband take-up remains disappointing.⁴

It is therefore paramount that the new framework incentivizes all players to invest in state-of-the-art fixed and mobile broadband networks.

Re-assessing the benchmarks for access regulation

Member States have achieved strikingly divergent outcomes in terms of NGA investment despite markets being governed by a common EU regulatory framework. This is illustrated by over 90% NGA coverage in the Netherlands, Belgium and Malta, with numbers below 50% to even 30% in Poland, Italy and Greece.⁵

It is worth analysing these divergent outcomes to understand the drivers and barriers to investment. Partially these discrepancies can be explained or even to an extent justified by relatively static factors such as local geographic and demographic characteristics. A more dynamic factor has been the way National Regulatory Authorities (NRAs) have regulated the rollout of copper and fibre-based networks, i.e. networks that would very often be subject to SMP obligations.

It is for example interesting to note the differences between two groups of former Central and Eastern European countries, all of which had low first-generation broadband. The three Baltic States which rank in the top and above EU average NGA coverage kept fibre free from strict cost-oriented access obligations. Hungary, Poland and Slovakia which introduced stricter fibre-access regulations all rank below the EU average with in particular Poland and Hungary lagging behind.⁶

Another instructive example is the regulatory approach taken in Portugal. In 2009 the regulator effectively relieved the incumbent of wholesale broadband access obligations on new last mile network facilities, including fibre, where it faced broadband competition from a cable operator and an unbundled local loop (LLU). In a large portion of the territory, where competition from both cable and LLU operators is present, there are no effective NGA wholesale access obligations (except for access to ducts and in-building wiring). This approach is based on geographical segmentation in the market analysis, a greater focus on prospective competition and taking the cumulative competitive pressures into account.

² McKinsey study 2012 – A “New Deal”: Driving investment in Europe’s telecoms infrastructure ([link](#))

³ iDate study 2015 – Telco Investment Challenges ([link](#))

⁴ EU Commission – 2016 European Digital Progress Report ([link](#))

⁵ European Commission Digital Economy and Society Index report ([link](#))

⁶ Subsequently some price control unbundling has been mandated in e.g. Estonia. For further details on the Baltic states case studies, consult Bruegel policy paper 2015 – Why is Europe lagging on next generation access networks? ([link](#))

Combined with a strong focus on passive infrastructure sharing that helps reducing investment costs, this approach seems to have incentivized substantial private capital investments in last mile network facilities including fibre, by all operators. As such, the Portuguese approach not only led to a rapid increase in fibre-coverage, but it also enabled more dynamic market structures. Spain and France followed a similar approach which achieved positive results such as in Portugal.

While the *ex ante* regulatory system specifically developed for electronic communications has enabled a rich retail-level competitive market, DIGITALEUROPE believes the review should learn from and try to build on the above cases. Despite the sound principles, the framework has in practice often been applied in a manner which has disincentivised investment in new networks for all operators, resulting in Europe lagging behind compared to other leading regions. As is currently the case, NRAs often assess competition too narrowly and do not sufficiently take competitive pressures in the ‘whole market’ into account, e.g. from cable, LTE, independent or alternative Fibre-To-The-Home (FTTH) and copper. This has in many instances led to new investments being subject to the same level of regulation as legacy copper networks.

This regulatory and enforcement approach consequently can make it difficult to develop a strong business case and seek capital from investors. Equally, this approach can lead to a ‘wait and see’ scenario for all operators rather than a race to invest.

To incentivize more private investment into networks, the framework therefore needs to carefully consider the balance between *ex ante* intervention and *ex post* oversight: where the market can deliver investment and infrastructure-based competition it should be encouraged to do so with the NRAs as a regulatory backstop. This includes a more consistent and forward-looking market analysis, with an evidence-based and counter-factual approach (i.e. would the market be different in a ‘greenfield’ scenario?).

In particular, regulation and enforcement must examine the market dynamics absent of regulation to assess the cumulative market pressures and, where *ex ante* obligations are still needed, choose remedies which are more likely to foster self-sustaining competition. Remedies should, as such, be designed to become ‘obsolete’.

Challenges to rolling out ubiquitous rural broadband

Network coverage in rural and sparsely populated areas presents unique and different challenges compared to coverage in urban areas. Roll-out of NGA in rural areas is key to bridging the digital divide and ensuring that all citizens and businesses will be able to benefit from the opportunities of digitisation.

Access regulation should therefore address network coverage in all geographic areas but it will also need to be applied in accordance with the different market realities of rural versus urban network investments, for instance outside of high-density areas when there is little business case for private investment into more than one network.

DIGITALEUROPE supports exploring various options to incentivize rollout in rural areas. For instance, we agree that co-investment and wholesale models could have a supportive role. Beyond ensuring that regulation does not inadvertently discourage these models, regulation should at the same time not impose them as a panacea to all challenge areas.

In addition, a key element will likely be better use of existing public funds for these purposes, notably structural funds and state aid, including public-private partnerships. State aid outside of high density areas should focus on enabling these single networks to be open at all levels.

3. Towards more harmonized and coordinated spectrum management

Mobile infrastructure is an increasingly important element of digitization. Demand for high-quality, low-latency and wide coverage wireless networks has soared. Content size has gone up substantially with consumption of audio-visual content while dense communication networks are essential for new applications such as Connected Cars and Smart Industry.

Spectrum, the resource underpinning wireless networks, is therefore more relevant than ever in the EU discussions on realizing the full potential of the Digital Single Market and for Europe to have a leading role in the development and deployment of 5G networks.

DIGITALEUROPE consequently supports a further coordinated, harmonised and consistent approach to spectrum management and assignment in Europe. There needs to be a framework for creating a coherent economic region where innovation with global impact is possible, investment is encouraged and administrative burden is minimised. Europe needs future-proof regulation fit for the digital age, in particular in preparation for 5G deployment, Internet of Things (IoT) applications and Machine-To-Machine (M2M) technology.

Scaling up and overcoming market fragmentation

On the one hand, on the technical level, the current cooperation framework between CEPT, European Union institutions, Member States and national regulators is working well, both to identify harmonised technical rules for spectrum usage (CEPT, RSPG, RSCoM) and to deliver harmonised standards enabling access to the EU market (ETSI, TCAM). In this context, more transparency and opportunities for input from the industry would be useful in regards to the workings of the RSPG and RSCoM, in line with the very effective cooperation between administrations and industry at CEPT level. In this context, DIGITALEUROPE welcomes the approach of the RSPG to open up for informal stakeholder meetings with also the expectation of a more formal collaboration in the future.

On the other hand, economies of scale are sometimes unreachable due to delays or fragmentation between Member States and also between applications on the regulatory side of spectrum management, i.e. making available the spectrum to economic actors.

It is critical to unlock these economies of scale in a timely manner, which has not been the case for some frequency bands in some parts of Europe.⁷ As device manufacturers need to consider market sizes, support of bands in devices can be an issue if insufficient numbers of licences are in place for a new band which in return can further delay the uptake of the service. Instead, a lack of harmonization and non-synchronized spectrum band

⁷ In EU, delays in the allocation of certain frequencies had as impact the inclusion of the European bands in mobile devices only few years later (e.g. the 800 MHz, aimed to assure fast and economic national coverage). As such, this impeded the take-up of LTE in Europe, leaving the leadership in 4G to the USA, Japan, Korea and Australia.

assignments has led to the availability of new services and devices to come to European citizens at different speeds.

Therefore DIGITALEUROPE supports measures to encourage driving forward national processes in Member States for awarding new bands in a timely manner that is consistent with market requirements. We would like to stress the importance of early assignments of harmonised spectrum as a prerequisite for the development of new electronic communications, based on common economies of scale, especially in light of 5G development and deployment. Early availability of spectrum bands together with coordinated long-term licence duration shall provide incentives to invest into network infrastructure.

In this context, DIGITALEUROPE is process-agnostic in terms of the tools to use to ensure the timely and harmonised release of spectrum. As such, it is irrelevant to the consumers and industry whether the goal is reached through regional selections or coordinated national procedures.

A more efficient auction and licensing process

Coordinated methods for granting spectrum usage rights could be envisaged assuming that Member States reach some commonalities in their licensing processes. These might span over one or several areas such as similar auction approaches and design, incentive measure to promote efficient use of spectrum, duration and timeline for granting access to new bands, spectrum re-farming conditions, common allocation timeline, etc.

The availability of new spectrum bands is often subject to different timelines in clearance from legacy services. Common calendars for coordinated release could be a successful initiative in this area, on the condition that timing would not take a lowest common denominator approach and be delayed to meet the deadline of the slowest administration.

While recognizing the specific needs and properties of different national markets, administrations should be encouraged to see spectrum allocations as tools to create vibrant telecom markets. Excessive pricing of spectrum, because of ‘waiting’ for larger market potential or to maximise auction income, has a limiting effect on the future investments in networks and can cause delays in the take-up of the newest technologies.

Further, DIGITALEUROPE finds that in order to properly incentivize continuous operator investments into the latest and most efficient spectrum infrastructure, licenses should have a long enough duration and be technology neutral. Near license end-dates, investment would be discouraged due to uncertainty around re-assignment of the spectrum resources and would instead be postponed. Technology and service-neutral licenses, coupled with spectrum re-farming, further allow and incentivize operators to switch-off legacy networks and upgrade to more efficient technology.

Combined with a more simplified secondary market for spectrum trading, we would achieve a more efficient use of non/under-utilised spectrum. All forms of spectrum secondary trading among the spectrum licensees – leasing, trading, and swapping should be allowed – assuming that competition is not distorted. This may lead to more consolidation of spectrum in wider contiguous bands that can be used more efficiently. Sharing of spectrum, for example through Licensed Shared Access (LSA) methods can further complement exclusive licenses when clearing spectrum in the short-term is not needed.

DIGITALEUROPE reiterates that consistent availability of EU harmonized spectrum for all spectrum users, efficient assignment and use are prerequisites for the deployment of a world-class wireless infrastructure throughout

Europe. These aspects will be critical to maximise the socio-economic benefits of all services leveraging spectrum, including converged services and technologies such as 5G, Internet of Things and M2M.

4. Scope

The past several years have been dominated by a substantial change on how people interact with each other, enabled by a wealth of innovative and disruptive online services altering irreversibly the way in which they access information, share ideas and organize their personal and professional lives. The most prominent examples of this development are social networks, photo and video sharing websites, cloud-based documents, ratings websites and others, which are still to come.

It is therefore of paramount importance to carefully assess the need for regulation of traditional Electronic Communications Services (ECS) (telecommunications providers) and other recently established services OTTs (Over-The-Top) in this rapidly changing landscape. Europe needs an innovation friendly framework that simplifies the offer of new services, rather than hampering new offers entering the market by overregulating them.

DIGITALEUROPE recommends the Commission to consider the following points when assessing the evolving ICT value chain, technology innovations and business models.

Sector-specific regulation only where still necessary

The world of ICT has been revolutionized by the advent of the Internet and network technologies, and the changing environment makes a fresh look at the current telecom framework opportune. DIGITALEUROPE believes that the overarching aim of this review should be to focus on the public policy objectives that we want to achieve and how to best achieve them. Where sector specific legislation is no longer needed, it should be abandoned. Instead, the goal should be to rely on horizontal legislation.

For instance, the EU institutions should consider replacing the ECS-specific e-Privacy Directive with the horizontally applicable General Data Protection Regulation (GDPR), and use of other instruments such as the Network Information Security (NIS) Directive to apply to all actors. DIGITALEUROPE also believes that the definition of ECS should not be reviewed. However, if reviewed the focus should be on narrowing the scope, rather than extending it.

Working towards a proportionate response

In the last years, new ways of offering digital services with a wide range of attributes have emerged. We see for instance telecommunications operators offering OTT services and OTT providers relying on operators' networks (e.g. IPTV).

Regulators should therefore take into consideration the diversity and fast evolution of OTT and digital services including their wide scope and capabilities of ICT devices. OTT services may offer different functionalities than ECS which may have their own distinguishing traits.

The question whether traditional ECS and OTT services fulfil the same function(s), i.e. are truly functionally substitutable, can consequently only be answered on a case-by-case basis. Only then could one assess whether a given OTT service qualifies as an ECS.

Digital services are further undoubtedly adding significant value to businesses and consumers, to the benefit of the European economy and society. Expanding the scope of the current ECS framework and the application of existing rules to OTTs would very likely stifle this innovation engine and needs to be carefully assessed, so that users are not deprived of multiple benefits of the digital ecosystem.

DIGITALEUROPE therefore urges the Commission to proceed carefully and believes that an appropriate and proportionate response should focus on reduction of unnecessary obligations on ECS. Trying to establish the same detailed and prescriptive, sector specific legal obligations on OTTs as on ECS may ultimately either prove to be an impossible task or simply constitute a disproportionate burden for a highly dynamic industry sector.

5. Looking forward

The time is right to take a comprehensive and modern approach to electronic communications regulation in Europe. The new framework must be adapted to the current-day situation, while also build it to be future-proof and more flexible for technological developments.

Consumer and business needs in terms of coverage, quality and speed can be met, given a sufficiently strong and competitive market. That is why it is crucial for the framework to incentivize players to invest in state-of-the-art networks, encourage a harmonized approach to spectrum management and adopt a proportionate response to innovative and fast-evolving digital services.

DIGITALEUROPE looks forward to working together with the EU institutions and stakeholders on the Telecoms Framework Review, with contributions and specific recommendations on the upcoming legislative proposals of the Commission once published in late September.

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ABOUT DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies.

DIGITALEUROPE ensures industry participation in the development and implementation of EU policies. DIGITALEUROPE's members include 62 corporate members and 37 national trade associations from across Europe. Our website provides further information on our recent news and activities: <http://www.digitaleurope.org>

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