

ETNO POSITION ON COMPLETING THE TELECOMS SINGLE MARKET

Proposals on how to improve the draft Regulation “laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent – COM (2013) 627” to ensure it contributes to the creation of growth and jobs in Europe

1. Introduction

ETNO welcomes the European Commission’s willingness to accelerate the establishment of a fully-functioning European Telecoms Single Market. **ETNO agrees with Commission Vice-President Kroes’ diagnosis of the situation** of the telecoms sector in Europe: decreasing revenues and profitability, lower investments, and lack of adequate scale and scope for European firms to compete on the global marketplace. In addition, **ETNO shares the overarching objectives of the presented proposals**: (i) to secure simplified, predictable and convergent regulatory conditions; ii) encourage the global competitiveness of the Union and promote sustainable competition within the Single Market; iii) favour investment and innovation in new and enhanced high-capacity infrastructures and facilitate innovative and high-quality service provision; iv) ensure the availability and highly efficient use of spectrum; and v) serve the interests of citizens and end-users by fostering investments conditions. ETNO believes, however, that different and additional measures to the ones proposed would be required to achieve these objectives.

2. What the industry needs to promote the Telecoms Single Market and foster investment and growth

High-speed next generation broadband infrastructures are the backbone of the Digital Economy. The European Council of October 2013 reaffirmed that Europe needs the right regulatory framework to accelerate the investments in broadband networks and tap the full potential of the digital economy. A review of the present EU rules for the sector is necessary to get investment in these networks ‘back on track’ and allow Europe’s telecoms industry to be a partner in doing so.

ETNO has over the past year consistently called for a new regulatory framework to address changes in the marketplace, the shifting positions within the ICT value chain and the need for an investment-friendly policy framework in order to meet the ambitious Digital Agenda goals. In July 2013, the Boston Consulting Group (BCG) produced for ETNO a comprehensive study entitled *Reforming Europe’s Telecoms Regulation to Enable the Digital Single Market*¹. The study details how a **properly reformed regulatory framework can both safeguard competition**

¹ http://www.etno.be/datas/publications/studies/BCG_ETNO_REPORT_2013.pdf

as well as incentivize the investments in advanced next-generation access networks required for the EU to reach its Digital Agenda targets. The report flags that without the right changes, by 2020 the shortfall in investment needed to meet EU Digital Agenda targets for broadband coverage and penetration will amount to between €110 billion and €170 billion, leading to an enormous missed opportunity for the broader EU economy. The report proposes a set of complimentary measures, notably in the field of: i) deregulation of fixed-line wholesale access; ii) levelling the playing field between network operators and "over-the-top" service providers; iii) fostering efficient allocation and use of scarce spectrum resources; and iv) permitting a healthy industry structure in mobile and harmonising rules and procedures to unlock cross-country synergies.

The Commission's Connected Continent proposals address some of the above-identified issues, for example in the field of harmonising spectrum allocation conditions. However, ETNO considers that overall the **proposed package would not achieve the Commission's own objectives and does not provide a clear strategy to enhance operators' scale, investments and innovation.**

The European Parliament and Council should therefore pursue **more ambitious changes** to EU regulation **as well as reconsider or remove** those **proposals of the draft regulation that have a negative impact on the investment capacity** of the sector. ETNO believes that to achieve the stated goals in terms of growth and jobs, the following changes are imperative.

1. A substantial deregulation of fixed-line wholesale access which fosters investments in next generation networks and services

While we welcome the incorporation of some deregulatory principles into the proposal, such as more flexible pricing for wholesale next generation access, the proposals overall do not address the excessive regulatory burden on the main network investors in Europe that results from strict asymmetric ex-ante regulation based on the current framework. Access regulation should focus on one level of the network only and price regulation should end where there are competing NGA infrastructures. Remaining regulation should apply as far as possible symmetrically to all competing platforms in local access markets.

2. Remove or revise proposals that have a negative impact on the investment capacity of the sector

The proposal to regulate intra-EU call prices, which are deregulated across Europe, and the amendments to the existing Roaming Regulation before its effect on consumer and prices do not provide market players with regulatory certainty and do not send the right signal to investors. They undermine current sources of revenue for the sector without opening up opportunities for growth that could compensate for these cuts. In the case of intra-EU calls, protection of end users against any tariff levels that are perceived as overly high is already ensured through the competitive nature of this market which provides consumers with a choice of readily available alternative services.

3. Develop a sound spectrum policy that accelerates the build-out of mobile network

The Commission's proposals in the field of spectrum policy provide a positive starting point for supporting investments in mobile broadband and should be further strengthened.

4. Achieve a level playing field across the Internet value chain and adopt rules on the open Internet that support service differentiation and quality

ETNO calls on EU policy makers to establish an **open European Internet model** which guarantees the maximum level of innovation and choice for European consumers through product differentiation while ensuring best-in-class levels of privacy and security. In the context of the draft regulation, this implies, *inter alia*, a consistent application of regulation to all players offering functionally equivalent services at all levels in the value chain and harmonised rules on the open Internet that do not limit future service and network innovation.

3. Required changes to the draft regulation

ETNO is currently developing more refined positions on all of the components of the draft Regulation. Below we provide our input on several key issues concerning the new Regulation.

3.1 New elements to be incorporated into the regulation – substantial deregulation

The present legislative process presents a unique opportunity to address shortcomings of the current framework that have led the sector to underperform compared to other world regions. Restoring European industry's global competitiveness can only be achieved if the proposed Regulation incorporates more ambitious and dynamic provisions that tackle the root causes of the problems at hand, notably the lack of infrastructure investment.

In their present form, the EU rules on ex-ante regulation favour access seekers *vis a vis* network owners by providing a wide choice of regulated access products which do not incentivise networks investments. This regulatory approach is not fit-for-purpose to deal with the roll-out of next generation access networks. The main success story of alternative infrastructure roll-out in the past decade have been cable networks, which have greatly benefited from not being subject to wholesale access regulation. True to the original spirit of the framework of progressively reducing ex-ante regulation and relying on competition law, the high level of competition achieved in Europe should lead to less and more equitable regulation, in particular:

- i) an increased use of symmetric regulation which applies to all competing fixed access networks and platforms in the place of current SMP-obligations;*
- ii) clear focus of access regulation on one level of the network to ensure that incentives to invest in new infrastructure are safeguarded;*
- iii) more consistent analysis of platform competition at the local, rather than national, level; and*
- iv) ending price regulation where end-users can chose between competing next generation networks and deregulating retail service offers to take into account the availability of competing services and applications.*

3.2 New elements to be incorporated into the regulation – a more level playing field across the Internet value chain

In ETNO's view, the present review has to lead to a consistent application of regulation to all players offering functionally equivalent services at all levels in the value chain. Over-the-top

providers (OTTs) are offering services in competition with traditional communication services but are not subject to the same rules as traditional telcos, creating an uneven playing field.²

Consumers would greatly benefit from an application of the consumer rights and switching rules that would extend to OTT services. Such services today represent an important part of the digital economy, and have become in many cases essential for consumers and businesses. The October European Council conclusions have inter alia highlighted the need to address the bottlenecks in accessing one's "digital life" from different platforms which persist due to a lack of interoperability or lack of portability of content and data.

ETNO believes that to achieve a level playing field, additional measures are required, such as:

- i) revisiting the definition and classification of Electronic Communication Services to achieve an equal treatment of competing services from all platforms; and***
- ii) ensure that consumer protection rules on, among others, transparency and portability that currently apply only to ECS apply in the future to all digital services and platforms.***

On the issue of **net neutrality**, the proposed text requires substantial changes in order not to increase the bias of current regulation against EU telecoms operators vis-à-vis players on other levels of the Internet value chain (s. below).

3.3 The Open Internet / Net Neutrality

ETNO supports the ability of European citizens to access any services, applications and content of their choice on the Internet and notes that the Commission's proposal foresees that all Internet Access services should provide access to all services and applications. Consumers should moreover receive transparent and meaningful information on their access to services, and ETNO members are committed to providing such information. Although the need for further regulatory intervention is not supported by sufficient evidence according to ETNO, it is recognized that **if regulation of net neutrality is nevertheless introduced, a fully harmonized regulation is the appropriate option**, since diverging national provisions would increase fragmentation of the (by nature international, if not worldwide) internet markets, leading to the opposite of what is intended.

When devising EU-wide rules on the Open Internet and network management, it is paramount that the right balance is achieved in order to preserve incentives for investments and innovation and not add another layer of regulation on providers of broadband services in a highly competitive market. Consumers demand differentiated products and services at varying price points also in the field of Internet Access services. **To serve our consumers and meet these demands, it is essential that industry has the flexibility to offer differentiated products and services, including on data volumes, speed, and quality of service.**

Traffic management drives innovation within networks and is a key tool to optimise network performance, allow product differentiation and enhance consumer choice. Implementation of new business and tariff models are key to deliver more choice for consumers, fostering competition and promoting innovation. The **provision of specialized services should not be**

² According to BCG, the lack of a level playing field in digital services has contributed to a value drain of nearly €70B from European telecommunications operators over the last five years, while at the same time OTT and device players from outside Europe have added more than €200B value from just their European operations.

restricted by overly rigid definitions and requirements, allowing for service innovation. There are therefore areas where ETNO thinks the current proposals should be improved by amending the existing text.

Firstly, traffic management principles should be set in such a way that a proportionate implementation, allowing operators to use internationally standardized solutions, is allowed to account for the specific functioning of different networks. Secondly, care should be taken in defining the concept of specialized services so that service innovation is not limited to certain technologies and/or networks. Thirdly, current and future service differentiation that is beneficial to consumers including two sided-business models or free access to services outside of agreed data volumes should not be prevented by rigid traffic management principles. Finally, the setting of minimum levels of QoS should be qualified as a major market intervention, as recognised by BEREC, and hence considered only where there is clear evidence of a significant market failure in providing an acceptable level of performance to consumers.

3.4 International intra-EU calls

ETNO has major concerns over this provision, which it believes to be in contradiction with the basic principles of the regulatory framework. The Commission's proposal introduces price-regulation in a retail market that is effectively competitive. The second Commission recommendation on Relevant Markets adopted in 2007 explicitly confirmed that international communications markets were competitive, and consequently the corresponding markets were withdrawn from the list of relevant markets and deregulated. Protection of end users against potential high tariffs is already ensured by the competitive nature of this market which provides consumers with a choice of readily available alternative services.

ETNO sees no justification for this proposal and believes that such intervention would send a strong negative signal of continued regulatory uncertainty to investors. ETNO asks for this provision to be deleted.

3.5 Roaming

The Roaming III Regulation entered into force less than one year ago, with new price decreases and wholesale obligations. In July 2014, the requirement to decouple roaming services will enter into force. It is therefore clear that more time would be needed to assess how the existing rules are working. ETNO also notes that the market is evolving rapidly in terms of tariff innovation, especially on data roaming offers. The proposed amendments feel therefore untimely, and the need to change again the rules is unproven. More generally, we perceive a lack of coherence in the proposals whereby, on one side, they impose further revenue cuts (e.g. on incoming calls and Roam Like Home) and risk forcing operators to write off any investments that will be made to comply with the decoupling requirement, and, on the other side, the wider context of a push for more network investment in mobile broadband networks and, specifically, the over-arching Commission's objective of increasing investment incentives.

ETNO therefore asks that a proper assessment of how the existing regulation is working for consumers be done and that changes to the current Roaming Regulation be carefully scrutinized for proportionality, also in the light of how the market is evolving rapidly to respond to consumers' demands.

3.6 Ex-ante price and access regulation

While some of the provisions proposed in this field go in the right direction, the draft regulation overall fails to initiate a significant deregulation in fixed access networks. As stated earlier, ETNO believes that asymmetric access regulation that targets the former incumbent operators no longer responds to future regulatory challenges. As next generation networks are rolled out, markets are increasingly characterized by multiple actors at network access level, including municipal networks and cable operators, and increased competition from wireless broadband networks. This calls for a more thorough review of regulation within the current legislative process (s. above). On the proposed rules in the regulation, ETNO comments as follows.

1. Pan-European virtual access products

ETNO believes that the provisions on a European virtual access product in their current form do not perform well against the stated objectives of the draft Regulation: it is unclear how they would support investments or innovation, in particular, as it is not clearly excluded that they would lead to additional regulated access products, which would further limit incentives for investments in new and alternative infrastructures.

ETNO welcomes that Art. 18 of the draft explicitly recognises that NRAs may replace physical unbundling obligations with virtual access products for next generation networks. However, ETNO considers that the Commission has not provided sufficient evidence that the availability of access products such as those specified in Annex I require regulatory intervention over and above the current access obligations. The text should be unequivocal that the new European products should replace existing products, not add further regulatory obligations on a network operator. The level of detail provided in Annex I can moreover lead to disproportionate obligations in view of national market situations where functionalities that may be appropriate in certain European markets are not required in others. NRAs should therefore be given certain flexibility in the implementation of the standardized products.

ETNO would ask that: i) certainty is provided that the European product is an alternative to an existing obligation: the adoption of new access products should not result in additional layers of regulation and therefore it is important that any new obligation only replaces existing ones, including where appropriate physical unbundling, after a proportionality test is applied, and that it takes into account national specificities; ii) the list of requirements in Annex I is limited to the minimum necessary, in particular not requiring functionalities that are specific to certain European markets but would be disproportionate in others, such as multicast; iii) that when applied, they apply to all competing platforms that may have SMP in local access markets, including cable.

2. Assured Quality of Service product (ASQ)

ETNO welcomes the right introduced in the draft to provide a Assured Quality of Service (ASQ) .

We note that for market parties to benefit from its increased capabilities, it is essential that it is symmetrically available, i.e. the provision applies to all networks. Also it should remain a product available only between network operators and in principle be based on commercial negotiations.

3. Price regulation

ETNO welcomes the proposed provision in Art. 18 (7) of the draft which should result in a more binding requirement for NRAs to consider price de-regulation on wholesale next generation access under certain circumstances. The proposal should fully reflect the policy objective of the European Commission to foster investments in new and enhanced high-capacity infrastructures, which also underpinned the Recommendation on non-discrimination and costing methodologies adopted on the 11th of September. However, some aspects of the recommendation are inconsistent, pose problems for its practical implementation and may therefore not result in greater incentives for investments. Therefore the proposals set out in the draft regulation should go further in aligning regulation to the long-term investment of next-generation access networks by resolving the uncertainties that arise from the new Recommendation.

The current balance in the wording should be maintained and the conditions for lifting cost-orientation be clarified to ensure the deregulatory thrust of the proposal is consistently applied, in particular in the presence of competing next generation access networks.

4. Changes to Framework Directive

ETNO welcomes the proposal to amend the Framework Directive (Art. 15) to require the consistent application of the three criteria test when considering markets susceptible to the imposition of ex-ante regulation. If properly implemented, it should ensure a more proportionate approach to ex-ante regulation that takes into account competition from all platforms. We would question however whether the proposal to have regard, among other factors, to the global competitiveness of the Union economy sits well within Art. 15 of the Framework Directive. In addition, both retail and wholesale level constraints should be taken into full account when applying the three criteria test and defining wholesale markets so the current text would need to be clarified in that respect.

ETNO asks that: i) the first part of the proposed amended text for Art. 15 of the Framework Directive is moved into the Recitals of the draft Regulation; ii) the text makes an explicit reference to both direct and indirect competitive constraints in the context of market analysis when assessing the need for ex-ante regulation.

3.7 Spectrum

ETNO welcomes the potential of creating more harmonisation in spectrum markets, including better coordinating the timing and conditions of spectrum assignment. The increased prominence of long term investment incentives in policy decisions on spectrum is also welcome, albeit it has been due for some time. ETNO believes however that other provisions could be made more effective. For example, it would be important to ensure the full implementation of the current framework for spectrum trading and liberalisation, namely full implementation of RSPP and existing measures in all Member States. To this end, a clear and coordinated timetable would be of help³.

³PT, although agreeing that more harmonisation is needed and welcome, believes that such process must not involve the transfer of national competencies to the EC.

Secondly, there is a need to minimise conditions in new and existing licences, which can distort competition among network investors. The draft text should be strengthened to prevent for the future that spectrum is reserved for specific players, such as new entrants, leading to inefficient spectrum allocation and serious distortions of competition in the market. Moreover, there is a need to extend license terms or make licences indefinite, leaving a more liquid secondary market to deal with re-assignment. Uncertainty over the length of existing licences is one of the greatest sources of uncertainty for investments and the current draft proposal rightly recognises this requirement.

Finally, it should be made clear that small cells deployed in licensed spectrum bands should be operated under exclusive license and not under general authorization. Moreover, we have concerns that facilitating the resale of fixed broadband capacity through the use of radio local access networks could be a disincentive to the deployment of competitive mobile and fixed networks. In any event, these local access networks should not be excluded from the scope of the framework.

ETNO asks that: i) the full implementation of the current framework for spectrum trading and liberalisation in all Member States is ensured, introducing a clear and coordinated timetable with adequate incentives to do so; ii) that the current text is strengthened to ensure the minimisation of conditions in new and existing licences which can distort competition; and iii) that the promotion of localised wireless networks does not provide a disincentive for commercial roll-out of competing wireless and fixed networks.

3.8 Single EU Authorisation

The proposals in their present form do not appear relevant for infrastructure-based operators since, under the current text, they would not provide a significant relief from the regulatory burden currently applying to those operators offering services in more than one Member States. ETNO would like to see a close examination in the coming months of how to ensure this new instrument reduces the existing regulatory burden and supports infrastructure-based cross-country communications providers.

There is also some ambiguity around the concept itself, and accordingly a need for clarification of some important aspects. For example, how the decision of the home NRA regarding suspension or withdrawal of rights of the European electronic communications provider is to have any legal effect in the host Member States, and what law would govern judicial review processes.

ETNO suggests reducing the regulatory burden stemming from the current text, as well as a clearer articulation of how important elements within the existing regulatory processes, such as judicial reviews, would work.

3.9 Consumer Protection

Consumer trust in services and products is central to ETNO members' businesses. The 2009 telecoms package (i. e. the Universal Service Directive – USD) strongly improved consumers' rights regarding contracts, information, quality and price transparency as well as switching. These provisions - implemented in the Member States only in late 2011 and 2012 - are only beginning to prove their effectiveness for consumers. Similarly the Consumer Rights Directive strengthens consumers' rights in the field of consumer contracts as of July 2014. The new

proposals build on these still nascent rules by harmonising them further, but also making them far more restrictive and prescriptive for providers with doubtful benefit for consumers.

In this context, ETNO believes that certain consumer-related provisions within the Regulation are ill-founded. Four areas are of key concern to ETNO:

1. Switching: Modifying the number portability procedures currently in place in the different countries would not be proportional. Most Member States have modified the procedures in the last 3-4 years in order to fulfill the requirements of the Universal Service Directive (USD). These have been costly and long procedures for all the operators. Changing them again would be out of proportion. For example, the introduction of a mandatory receiving-led switching process has not been studied properly in terms of costs and benefits. At the moment, the processes in some Member States are not “receiving led”, but there is a high-level of satisfaction with these processes. Introducing a mandatory receiving-led switching process will imply changing the systems again and generate high costs for all operators in the corresponding markets. The one day deadline for switching following the signing of a contract may moreover jeopardize secure and effective switching processes, as under the USD the transferring and receiving providers have to agree when the consumer can be transferred in order to ensure service continuance. Under the USD, consumers' services cannot be disrupted for more than one day.
2. Contract durations: the proposed rules massively and unnecessarily intervene in the freedom to contract, and reduce consumer choice in tariff plans. Since 2009 the USD provides for maximum duration of 24 months and the obligation to provide tariffs for 12 or less months. Such medium-term contracts enable providers to make more attractive offers to consumers than it is possible for contracts with shorter or no contract terms.
3. Broadband transparency: The proposed rules obliging providers to contract on actual data speeds are doomed to fail on their objectives. Fixed providers can provide minimum speeds but not actual ones since, at the time of contracting with the consumer providers, in the majority of cases do not have control of the connection. They have to rely on calculations based on the physical circumstances of the line. Even more complicated is the situation in mobile where there is no such thing as a realistic actual speed since the service is dependent on network coverage and the usage of the respective network cell the consumer is in at a specific time.
4. Spending caps: Today's reality is that there are rarely any postpaid tariff plans offered without flat rates. For prepaid services spending caps are unnecessary from a consumer perspective. Where operators have already voluntarily introduced consumer protection measures, or will do so where there is demand for it, the proposed prescriptive solution is unjustified and would generate complex, costly and disproportionate IT system evolution.

Any regulation needs to be based on a proper proportionality test. ETNO generally proposes to harmonize existing provisions from the Universal Service Directive from 2009 in the single market regulation.