

Questions and answers on the EECC

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Article 1

Article 1(2)(b)

“The aims of this Directive are to: [...]

(b) ensure the provision throughout the Union of good quality, affordable, publicly available services through effective competition and choice, to deal with circumstances in which the needs of end-users, including those with disabilities in order to access the services on an equal basis with others, are not satisfactorily met by the market and to lay down the necessary end-user rights.”

We would like to know your views and position on the interpretation and application of this provision taking into account:

- (a) the fact that there could be a different authority applying consumer protection and consumer rights’ legislation in a Member State, and
- (b) the application of sector specific rules.

Reply

Article 1 par.2 (b) of EEC Directive provides one of the aims of the Directive concerning end-users’ rights. Its wording draws on Article 1(1) of Directive 2002/22/EC (Universal Service Directive).

Article 3 of the EEC Directive provides a set of objectives and principles and sets the binding obligation of the NRAs and of other competent authorities to pursue each of these general objectives.

The specificities of the electronic communications sector require a limited number of additional end-user protection rules. The EEC Directive rules, which sometimes target all end-users and not only the consumers, are sector specific rules. Duplication with general European consumer protection rules has been avoided. In case of conflict, the EEC Directive would be considered *lex specialis*.

The institutional changes introduced by the EEC Directive include a minimum set of competences for the NRAs (Article 5 EEC Directive). The EEC Directive allows nevertheless other competent authorities to be assigned tasks in areas not directly entrusted to NRAs and promotes the cooperation between the NRAs and other competent authorities. Specifically, as far as the consumer and end-user protection in the electronic communication sector is concerned, the EEC Directive does not mandate that NRAs are responsible for end-user protection. However, where Member States assign this task to a different competent authority, the EEC Directive provides that NRAs should contribute to this task in coordination with other competent authorities (Article 5 par.1 (d)). The Article also addresses the need for cooperation between the competent authorities and for publishing in a clear way the tasks assigned to each of them. Recital 35 explains that “where tasks are assigned to other competent authorities, those other competent authorities should seek to consult the national regulatory authorities before taking a decision”.

In light of the above the response to your questions is:

The EEC Directive does not exclude that the responsibility for applying some or all the sector specific end-user protection rules is entrusted to a competent authority other than the NRA, such as for instance the authority which applies the general consumer protection rules. However, in such a case, the Member State should ensure that the competent authority coordinates with the NRA and that the latter may contribute to this work. Such contribution may take different forms, one of which is indicated in recital 35, which explains that NRAs should be consulted before competent authorities take a decision.

Article 2

Article 2(2)

The EECC defines the term “*very high capacity network*” as either an electronic communications network which consists wholly of optical fibre elements at least up to the distribution point at the serving location, or an electronic communications network which is capable of delivering, under usual peak-time conditions, similar network performance in terms of available downlink and uplink bandwidth, resilience, error-related parameters, and latency and its variation; network performance can be considered similar regardless of whether the end-user experience varies due to the inherently different characteristics of the medium by which the network ultimately connects with the network termination point.

Directive 2014/61/EU, on the other hand, defines the term “*high-speed electronic communication network*” as an electronic communication network which is capable of delivering broadband access services at speeds of at least 30 Mbps.

According to the above, is it necessary to retain the definition from Directive 2014/61/EU in the new Electronic Communications Act or is it sufficient to use the EECC definition? In what way could this definition incompatibility be resolved?

Reply

The two terms (“*high-speed electronic communications network*” and “*very high capacity network*”) describe two types of networks, with the latter being a subset of the former (very high capacity networks are also high-speed networks, while the opposite is not always the case). They are not meant to be used interchangeably, nor is one meant to supersede the other.

Given that Directive 2014/61/EU (the BBCRD) remains in force in parallel with Directive (EU) 1972/2018 (the EECC), both terms remain valid and relevant in their respective regulatory context. Therefore, the definition of both terms should be maintained in national law.

Article 2(4)

Does M2M-service („*transmission services used for the provision of machine-to-machine services*) only include the transmission services used for the communication, or does it also include the M2M service itself?

Reply

M2M-service as such is not a category of electronic communications services. However, electronic communications services include services that consist wholly or mainly in the conveyance of signals. These include transmission services used for the provision of machine-to-machine services. The M2M service itself (application) is not included.

Article 2(5)

The definition of an ‘interpersonal communications service’ in Art.2(5) refers to a direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons. On this basis, we assume that at least two natural persons must be involved. Recital 17 says that communications involving legal persons should fall within the scope of the definition where natural persons act on behalf of those legal persons or are involved at least on one side of the communication. Does this mean that an interpersonal communications service requires only one natural person on one side of the communication? Could you clarify how exactly legal persons should participate in the communication? Do you consider services like Siri or Alexa, where a natural person speaks to a machine, to be regarded as interpersonal communications services?

Reply

In light of Recital 17 the scope of the definition of interpersonal communications service covers situations where one natural person is participating on one side of the communication whereas on the other side is a legal person (possibly represented by a natural person acting on behalf of such legal person). A legal person could also directly participate in the communication (e.g. via a functional mailbox whereby no natural person would be identified or known to the natural person participating in the communication). P2M (natural person to machine) communication would not be covered under said definition, in cases where the communication is possible exclusively with a machine, as the as a machine is not a person.

Article 2(8)

Can the category '*publicly available electronic communications services*' (mentioned in Art 2(8)) continue to be used, to maintain the reference to telecommunication services?

Reply

The term '*publicly available electronic communications service*' is used throughout the EEC to refer to the general category of an electronic communications service (that covers three categories: IAS, ICS and conveyance of signals) that is publicly available. For example, in Articles 102, 104 and 105. Article 2 (8) refers to '*public electronic communications network*' that is also used in the EEC, for example, Article 40.

Article 2(40)

Do you agree that the definition of "caller location information", as provided by paragraph 40 of Article 2, must be interpreted taking into account a broad interpretation of the term "caller", in order to include the location information in respect of emergency communications through a means other than a call, bearing in mind that, according to Recital 285, "emergency communications are a means of communication that includes not only voice communications services, but also SMS, messaging, video or other types of communications, for example real time text, total conversation and relay services"?

Reply

Indeed, caller location should be interpreted as the location information of the user of emergency communication. Hence, in case other emergency communication than a "call" is mandated in a Member State, "caller location" should be accordingly provided. In any case, the definition of "emergency communication" encompasses any type of communication with the goal to request and receive emergency relief from emergency services. Please note that in case of users of means of access designed for end-users with disabilities, the location information of the end-users should be also provided by virtue of the obligation to ensure equivalence of access.

Article 2(42)

In the definition of security incident, what does the '*actual*' in '*actual adverse effect*' means?

Reply

The definition is inspired by the similar one in the NIS directive. The term "*actual*" indicates that the adverse effect has already materialised.

Article 12

Article 12(2)

In Article 12(2), providers other than providers of NIICS "*may [...] only be subject to a general authorisation*". As for NIICS and the obligations applicable to these services throughout the Code,

does this mean there can be no (general or other) authorisation mechanism for these players, or would this wording allow that NIICS are subject to general authorisation and something else, or to separate 'specific' authorisation?

Reply

The scope of the EECC, as provided in Article 1, covers all electronic communications services, i.e. including NIICS. The EECC harmonises the authorisation regime for all ECS, as explained in Article 12(1) "*Member States shall ensure the freedom to provide electronic communications networks and services, subject to the conditions set out in this Directive*".

More specifically, in 12(2), the EECC provides that "*the provision of electronic communications networks or services, other than number-independent interpersonal communications services, may, without prejudice to the specific obligations referred to in Article 13(2) or rights of use referred to in Articles 46 and 94, be subject only to a general authorisation*". The relevant recital 44 explains the reason why NIICS are not subject to the general authorisation regime: "*Contrary to the other categories of electronic communications networks and services as defined in this Directive, number-independent interpersonal communications services do not benefit from the use of public numbering resources and do not participate in a publicly assured interoperable ecosystem. It is therefore not appropriate to subject those types of services to the general authorisation regime*".

Lastly, Article 12(3) provides that "*[w]here a Member State considers that a notification requirement is justified for undertakings subject to a general authorisation, that Member State may require such undertakings only to submit a notification to the national regulatory or other competent authority*". The Article then includes a maximum list of information to be provided in this context.

The implications of the general authorisation regime for the ECS which are subject to it is clear: they have the right to provide these services, negotiate access and interconnection, apply for rights of way. They may also be subject to the conditions provided in Annex I and if they do not comply with one of them, they may be prevented from providing the service. The general authorisation is however a facultative regime in the sense that Member States may allow the provision of the service unconditionally. The conditions of the general authorisation are the maximum they can require for the provision of the services. They are not obliged to impose however any of them. Not imposing conditions does not mean that the providers of those services do not have the rights linked to the general authorisation or that other obligations included in the Code do not apply to them.

NIICS are ECS which by law may not be subject to a general authorisation. The qualification of ECS is not exclusive of other qualifications under EU law, in particular that of information society services. As provided in recital (10) EECC, "Certain electronic communications services under this Directive could also fall within the scope of the definition of 'information society service' set out in Article 1 of Directive (EU) 2015/1535 of the European Parliament and of the Council. The provisions of that Directive that govern information society services apply to those electronic communications services to the extent that this Directive or other Union legal acts do not contain more specific provisions applicable to electronic communications services." Therefore, when an ECS could also fall in the definition of information society services, for the aspects not covered by the Code, Directive (EU) 2015/1535 shall apply, for the aspects not specifically covered by other Union law.

The latter are defined in Directive (EU) 2015/1535 as "*any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. For the purposes of this definition: (i) 'at a distance' means that the service is provided without the parties being simultaneously present; (ii) 'by electronic means' means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received*

by wire, by radio, by optical means or by other electromagnetic means; (iii) 'at the individual request of a recipient of services' means that the service is provided through the transmission of data on individual request".

Voice telephony services or telex services do not fall in the definition of ISC, according to Annex I to this Directive. However, NIICS fall within the definition of information society services. Therefore, for the aspects not covered by the Code, the provisions applicable to information society services shall apply.

Article 2(h) of Directive 2000/31/EC e-commerce Directive defines the coordinated field as *"requirements laid down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them. (i) The coordinated field concerns requirements with which the service provider has to comply in respect of:*

- the taking up of the activity of an information society service, such as requirements concerning qualifications, authorisation or notification,

- the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider;"

Article 4 of that Directive provides that *"1. Member States shall ensure that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect.*

2. Paragraph 1 shall be without prejudice to authorisation schemes which are not specifically and exclusively targeted at information society services, or which are covered by Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services(28)"

Lastly, under Article 12(4) last sub-§, *"In order to approximate notification requirements, BEREC shall publish guidelines for the notification template and maintain a Union database of the notifications transmitted to the competent authorities".* This of course concerns only notifications under the general authorisation.

As a consequence:

It derives from the above provisions that Member States may not subject NIICS to general authorisation or any other prior authorisation or any other requirement having equivalent effect. As a consequence, they may not require the providers of these services to submit a notification under the General authorisation regime. BEREC shall maintain a data-base of notifications received in the context of the general authorisation only.

Article 12(3)

Can NI-ICS not be obliged to notify themselves to a Member States under the rules of the Code? Can Member States therefore not impose notification requirement on NI-ICS even for the purpose of monitoring compliance of those providers with the national obligations (stemming from the EEC or regarding legal interception in the broad sense)? Could such notification be justified on another legal basis than Article 12(3) (General Authorisation) and included in national legislation on ICS?

Reply

Member States cannot subject NI-ICS to general authorisation or to any other prior authorisation or any other requirement having equivalent effect. As a consequence, they may not require the providers of these services to submit a notification under the General authorisation regime.

Drawing on these notifications, the data-base maintained by BEREC will hence not include providers of NIICS.

The provision of NIICS is not subject to general authorisation, and by consequence to notification obligations.

In addition, Article 4 of the e-Commerce Directive 2000/31/EC prohibits Member States to subject the taking up and pursuit of the activity of an information society service provider to prior authorisation or any other requirement having equivalent effect. Paragraph 2 of the same provision states that this is without prejudice to authorisation schemes covered by the framework for general authorisations and individual licences in the field of electronic communications services.

As NI-ICS are also a type of Information Society Service, the information obligations of the eCommerce Directive apply. In particular, following Article 5 of the same directive, information society services providers have an obligation to render certain information easily, directly and permanently accessible to the recipients of the service and to competent authorities.

Article 19

Article 19

Pursuant to Article 19, “Restriction or withdrawal rights”, Member States may anticipate a possibility of the compensation to the holder of the rights in the case of the restriction or withdrawal. Is it necessary to transpose such option, in light of the specificity of the market and national conditions?

Reply

Member States are not required to transpose a compensation mechanism in their national law. Article 345 TFEU generally provides that the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.

Article 19 reads ‘(...) MS shall not restrict or withdraw rights to install facilities or rights of use for radio spectrum or for numbering resource before the expiry of the period for which they were granted, except where justified pursuant to (...) relevant national provisions regarding compensations for the withdrawal of rights’, and ‘[i]n such cases, the holders of the rights may, where appropriate and in accordance with Union law and relevant national provisions, be compensated appropriately’. The terminology used (where justified, where appropriate, in accordance with relevant national provisions) leaves the choice to MS whether to adopt national provisions on compensation or not.

However, this being said, when restricting or withdrawing rights, even in the absence of a specific compensation mechanism, Member States need, in any case, to respect the principles of the Code, the general principles of EU law, in particular the principle of non-discrimination and more generally the fundamental rights, freedoms and principles protected by the Treaties and the Charter as interpreted by the CJEU.

Article 20

Article 20

Article 20 para 1 second subparagraph of the Code provides: “Where the information collected in accordance with the first subparagraph is insufficient for national regulatory authorities, other competent authorities and BEREC to carry out their regulatory tasks under Union law, such information may be inquired from other relevant undertakings active in the electronic communications or closely related sectors”.

We would welcome your view and concrete examples, whom to consider as fulfilling the criterion of being undertakings active in the electronic communications or closely related sectors that are

not undertakings providing electronic communications networks and services, associated facilities, or associated services to whom the reference is made in the first subparagraph.

Reply

Firstly, it should be clarified that any request for information from the NRAs, other competent authorities and BEREC to undertakings should be proportionate, strictly limited to the performance of their tasks and objectively justified. The objective of the information request to undertakings is to ensure that national regulatory authorities are able to carry out their tasks effectively and assess the implementation of the relevant telecoms regulatory framework and not to impose burdensome obligations on the undertakings. As mentioned in Article 20, in case of insufficient information (i.e. not sufficient for the NRA to perform its tasks), it may be necessary for NRAs, other competent authorities and BEREC to gather information exceptionally from other relevant undertakings active in the electronic communications or closely related sectors. A concrete example of such undertakings are content providers (Recital 57 of the EECC), which create, acquire and distribute content and data usually with the help of a software platform such as online movie platforms, e-commerce platforms etc. Another example of undertakings could be developers of operating systems and/or manufacturers of hardware providers used in electronic communications networks and/or services.

Article 22

Article 22

Article 22(2) and (3) provides for a designation process to clarify plans to build in areas where there is no planned deployment of very high capacity networks.

1. When drafting this article how did the Commission envision that the designation and accompanying clarification process could work in practice, and how will it address problems with deployment in these areas?
2. What is the scope under this article? Is it to focus on specific kinds of VHCNs - ie, full fibre or gigabit-capable networks?
3. Article 22(4) states that the designation process should treat all providers equally. Is this symmetrical treatment intended to apply equally to all parts of the Article, or is there scope for differential treatment in other parts of the Article – e.g., the process for forecasting and making the information directly accessible. Which aspects of the process are symmetric or otherwise?

Reply

Regarding the first question, the relevance of the procedure originally envisaged by the Commission might be limited, given that the final version of this Article contains significant changes with respect to the Commission's original proposal. It is clear however that one of the aims of the process is to create transparency for undertakings and public authorities that have an interest in deploying in specific areas, but face significant uncertainty not only in demand but also in supply conditions (i.e. regarding the competition they are likely to face, which may be decisive for the return on investment in an area where infrastructure competition would not be efficient). Irrespective of the provision on sanctions, it is expected that operators will reply in good faith to such surveys.

Regarding the second question, given the complexity of the tasks deriving from different policy and regulatory environments both at national and EU level, geographical surveys will need to account for all types of network deployments including, but not limited to, existing infrastructure and future investments in: VHCN, NGA, significant upgrades, extension to a performance of at least 100 Mbps download speeds. In the same spirit, recital (62) states that surveys should include "*both deployment of very high capacity networks, as well as significant upgrades or extensions of existing*

copper or other networks". Ultimately, geographical surveys should reveal the details of all significant upgrades in quality of service with a view to supporting a wide range of policy and regulatory functions of relevant EU and national/regional authorities.

Regarding the third question, there is no much room for different interpretations as the paragraph states clearly that it refers to measures pursuant to paragraph 3, meaning to the whole process of designation of designated areas. In any case, there is a general obligation of non-discrimination enshrined in Article 3 of the Code which does not leave much scope for a differential treatment of operators under this and any other Article of the Code. On the specific examples, the following remarks are made: although forecasts are not a mandatory component of geographical surveys, they are a necessary condition for the process of designation of areas as per paragraph 3. Moreover, they are also required under EU state aid rules, if/when a public authority wishes to identify an area affected by a market failure and intervene with public funds. It is also an important tool for market analysis in a forward-looking perspective. Therefore, when forecasts are part of the survey, they *"shall include all relevant information, including information on planned deployments by any undertaking or public authority [...]"*. This suggests that a differential treatment is not possible. Similarly, regarding the accessibility of (non-confidential) information that has been collected in the context of geographical surveys, the text states that authorities *"shall make data from the geographical surveys which are not subject to commercial confidentiality directly accessible [...]"* and does not provide any exemption for specific types of undertakings. Therefore, also in this case, a differential treatment of undertakings does not appear to be possible.

Article 22

In the EECC, there are several references (such as recital 24 and 63) regarding desirable download speeds in the networks, such as *"a next-generation access network offering download speeds below 100 Mbps"*, *"performance of at least 100 Mbps download speeds in this area"* etc. Also in Article 22 par. 1, 2 and 3 there are similar references to next-generation access network offering download speeds at 100 Mbps.

Regarding mobile networks, does the download speed of 100 Mbps correspond to availability per user or per macro base station cell?

Reply

Regarding mobile networks, the reference to 100 Mbps download speeds in article 22 of the Code corresponds to availability per user. The following references in the Code support this view:

1) Article 22 of the EECC contains a reference to forecasts on the reach of broadband networks. Such forecast shall include all relevant information, including information on planned deployments of very high capacity networks and significant upgrades or extensions of networks to at least 100 Mbps download speeds. Since the final connection to the end-user in a network may be ensured both by wired and wireless technologies with different configurations and characteristics, the only point at which it is possible to objectively compare the speeds delivered by both types of networks is at user level.

2) Moreover, leaving aside that the concept of "macro-cell" (or even "cell") is not defined in the Code, there are wireless networks that are not cellular. If we would accept a cell-based approach for cellular wireless networks, this would leave a void for non-cellular ones.

3) Lastly, the wording of recital 24 argues in favour of a per user target *"the availability to all households in each Member State of electronic communications networks which are capable of providing at least 100 Mbps and which are promptly upgradeable to gigabit speeds"*. The download speed is not linked to the macro base station cell and there is no specific target for mobile networks.

Article 23

Article 23

Art. 23(2), Art. 35, Art 55(2) (peer review process) - the moment when the procedure involving the RSPG should start raises doubts. Should the procedure start at the moment of beginning consultations or during consultations?

Reply

Under Article 23 EECC, competent authorities have to inform the RSPG at the moment of its publication about any draft measure covered by Article 23(2). There are two types of peer review procedure: the voluntary and the exceptional procedure. The rules of procedure of the RSPG request the competent authority to indicate, when it informs the Group about a draft measure, whether and when it requests the convening of a peer review. In case no voluntary peer review is requested, the Group may decide to organise an exceptional peer review; this decision has to be made at the latest during the public consultation conducted pursuant to article 23. The details of the procedure for the RSPG are set forth in the RSPG rules of procedure (document RSPG19-028 final).

Article 47

Article 47

Art 47 / Art 13(1), Annex I(D): is it possible to have band-related obligations (in contrast to company/operator-specific conditions) and, if yes, which conditions are/can be operator specific and/or band-specific?

Reply

It seems that, apart from Article 52 where conditions may be operator-specific, the question should be also as to whether conditions can be band- or spectrum-specific or right-specific. This question should be distinguished from operator (in singular or plural)- specific conditions, which could happen

- under the rules of the Code on access, interconnection and significant market power,
- in relation to the application of article 52 of the Code on competition, or
- where the right to use spectrum has been granted pursuant to Article 48(2) of the Code based on specific national criteria and procedures to providers of radio or television broadcast content services with a view to pursuing general interest objectives.

The general question must be put in context and is linked to the difference between individual rights and general authorisations.

The Radio Spectrum Decision, Recital 11, distinguishes spectrum management that involves harmonisation and allocation of spectrum, from assignment and licensing. Under allocation measures and the Radio Spectrum Decision, the use of spectrum may be subject to technical conditions for the availability and efficient use of radio spectrum. In case of harmonisation under the Radio Spectrum Decision, these are generally defined in relation to a specific frequency band through Commission implementing acts to be implemented in the national frequency table and in the technical conditions for the use of spectrum.

Where general technical rules have been defined, in certain cases through harmonised conditions under the Radio Spectrum decision, for the use of one or several spectrum bands, the right to use such spectrum can be envisaged under three regulatory regimes:

- Unlicensed spectrum: the conditions could be considered as spectrum-specific in the case of so-called 'unlicensed' spectrum, where no authorisation is necessary to use the spectrum in addition to the compliance with the essential requirements of the Radio Equipment Directive 2014/53/EU (RED) (which include efficient use of spectrum and protection of health and safety of persons). This can also refer to technical conditions which have been harmonised under the 2002 Radio Spectrum Decision. In other words, as provided by Article 7 RED, where the equipment complies with the Radio Equipment Directive and is properly installed, maintained and used for its intended purpose, Member States shall in principle 'allow the putting into service and use of radio equipment'. Hence the use of the spectrum occurs on an 'unlicensed basis', without additional general authorisation or individual right requirement.

- However, under Article 7 RED, MS may also apply additional requirements for reasons related to the effective and efficient use of the radio spectrum, avoidance of harmful interference or of electromagnetic disturbances or for public health, in the limits allowed by the principles of technological and service neutrality of articles 9(3) and 9(4) of the Framework Directive (articles 45(4) and (5) of the Code); this could be done in the form of general authorisations or individual rights to use spectrum.

The use of spectrum can be subject to a general authorisation; general authorisation is defined in Article 2(22) of the Code, as a legal framework ensuring rights for the provision of ecn/ecs and laying down sector specific obligations that may apply to all or to specific types of ecn/ecs, and in article 46(1) par.2; these conditions go beyond the applicable conditions set by the Radio Equipment Directive and do not apply to the equipment but may apply to the use of the spectrum as such. These can apply in relation to a specific band or to a mix of bands. (see annex I B(3) and (6) of the Code). They are generally applicable and no operator is identified in particular.

- Individual rights to use spectrum include specific conditions and are applicable to all operators using spectrum in the same band pursuant to the principle of non-discrimination; such conditions can apply to a specific band or a mix of bands. The conditions should be considered specific to the spectrum usage right, and not to the right holder even if the right holder can be identified. As an evidence thereof, these rights or licenses are normally tradable, with all the rights and obligations that attach thereto. Therefore, any specific obligation, for example those linked to the financial status of the right holder, should be set in general terms in such a way that they would not be attached 'intuitu personae' to a specific right holder (application of non-discriminatory and objective criteria), even in case of commitments made under Annex I D(7). This includes also the possibility to apply in an objective and non-discriminatory way the eligibility criteria that would be set in advance under Article 48(4).

The only exception seems to be where the right has been granted pursuant to Article 48(2) to providers of radio or television broadcast content services with a view to pursuing general interest objectives; the same logic is at the basis of the possibility under Article 51(1) 2nd sup-par. to exclude from trading spectrum which has been assigned for broadcasting; and finally, also under article 52 ex post – to remedy distortions of competition, to exclude certain providers from procedures, or to promote new entry.

Article 47

Paragraph (2) provides:

"2. When attaching conditions to individual rights of use for radio spectrum, competent authorities may, in particular with a view to ensuring effective and efficient use of radio spectrum or promoting coverage, provide for the following possibilities:

- (a) sharing passive or active infrastructure which relies on radio spectrum or radio spectrum;
- (b) commercial roaming access agreements;
- (c) joint roll-out of infrastructures for the provision of networks or services which rely on the use of radio spectrum.

Competent authorities shall not prevent the sharing of radio spectrum in the conditions attached to the rights of use for radio spectrum. Implementation by undertakings of conditions attached pursuant to this paragraph shall remain subject to competition law."

1. What's the meaning of "provide for the following possibilities"? Does this mean that the NRAs may "allow" providers to do (a), (b) and (c), or NRAs may "impose" these obligations? If these needs to be "allowed", does it mean that if it's not allowed (a), (b) and (c) are forbidden? If it needs to be "allowed" why is the last subparagraph of article 47 stating that "sharing of radio spectrum" (included in subparagraph (a)) cannot be prevented?

2. Is it possible to "impose" these conditions (any or all of (a), (b) and (c)) after the granting of rights of use? Under which provisions can that happen? Is article 61(4) one of those cases? Article 61(4) only refers to "local roaming". Under what circumstance "national roaming" may be imposed?

3. Article 52(2)-a allows for "national or regional roaming" as a condition of the rights of use. This condition may only be imposed when granting the right of use under article 47(1) or can also be imposed later? If it can be imposed later, it has to be limited to the basis of article 61(4) (insurmountable economic or physical obstacles) and restricted to local roaming?

Reply

The purpose of Article 47(2) of the Code is to ensure that each Competent Authority has indeed the possibility to allow spectrum usage right holders to take such actions if such authority sees the need, and without prejudice to the assessment of the legality under competition law of specific agreements. In other words, MS may not forbid nor oblige Competent Authorities to do so. If provided, such possibility requires an assessment by the competent authority and has to be clearly exercised and formulated, for reasons of legal certainty, and cannot be provided directly for all cases in national law. Moreover, the same provision also provides that Competent Authorities cannot prevent the sharing of radio spectrum.

On the other hand, Article 61(4) is meant to empower Competent Authorities to impose passive or active infrastructure sharing or obligations to conclude roaming access agreements with a view to bring or significantly improve wireless connectivity in a specific localised area subject to a number of conditions; however, the exact terms of such agreements remain to be negotiated by the parties. Under 61(4), the possibility to impose certain obligations of sharing or local roaming must be clearly provided for when rights are granted, while the imposition itself could take place after the granting of the rights. This would fit into the logic that it only takes place where market-driven deployment of infrastructure is proven to be facing insurmountable obstacles.

Article 61(4) allows Competent Authorities to impose not only local roaming but also passive and active sharing agreements. Only local roaming is covered by this provision which relates to the need for local provision of services.

Imposition of national roaming obligations may take place only under Article 52 (2)(a). This obligation can be imposed when granting, amending or renewing rights of use, subject where applicable to the requirements of Articles 18 and 19 of the Code. If it is done under Article 52, it does not have to be limited to local roaming obligation. The purpose of Article 52 is to promote competition or avoid distortion of competition, while article 61(4) is to ensure access to networks and services to end-users despite insurmountable economic or physical obstacles.

Article 48

Article 48(1)

Two provisions of the Authorisation Directive (2002/20/EC) appear not to be mentioned in the EECC.

That is:

(i) Article 5(2), 5th subparagraph.

“Where individual rights to use radio frequencies are granted for 10 years or more and such rights may not be transferred or leased between undertakings pursuant to Article 9b of Directive 2002/21/EC (Framework Directive) the competent national authority shall ensure that the criteria to grant individual rights of use apply and are complied with for the duration of the licence, in particular upon a justified request of the holder of the right. If those

criteria are no longer applicable, the individual right of use shall be changed into a general authorisation for the use of radio frequencies, subject to prior notice and after a reasonable period, or shall be made transferable or leaseable between undertakings in accordance with Article 9b of Directive 2002/21/EC (Framework Directive).”

(ii) Article 7(1), and specifically the reference to extension of the right of use (not the reference to the limit of the number of rights)).

“1. Where a Member State is considering whether to limit the number of rights of use to be granted for radio frequencies or whether to extend the duration of existing rights other than in accordance with the terms specified in such rights, it shall inter alia:

- a) give due weight to the need to maximise benefits for users and to facilitate the development of competition;
- b) give all interested parties, including users and consumers, the opportunity to express their views on any limitation in accordance with Article 6 of Directive 2002/21/EC (Framework Directive);
- c) publish any decision to limit the granting of rights of use or the renewal of rights of use, stating the reasons therefor;
- d) after having determined the procedure, invite applications for rights of use; and
- e) review the limitation at reasonable intervals or at the reasonable request of affected undertakings.”

National Legislation includes specific paragraphs that adopt these two provisions. One paragraph refers to individual rights of use of radio frequencies that are granted for 10 years or more and such rights may not be transferred or leased between undertakings and also a paragraph for the extension of the duration of the existing rights.

Can you please confirm that these two provisions are not included in the EEECC?

And if so, since these two provisions are not included in the EEECC, is it possible to delete them from our national legislation?

Reply

Indeed Article 5(2) and the reference in Article 7(1) AUD that you mention in your question do not exist anymore as such and the transposing national measures should hence be withdrawn. However, the Code contains provisions regulating matters falling in the scope of these two Articles and these provisions must be transposed:

- as regards Article 5(2) 5th par., the transfer and lease of individual rights is governed by Article 51 that provides that “Member States shall ensure that undertakings may transfer or lease to other undertakings individual rights of use for radio spectrum”.
- as regards Article 7(1), on the extension of the duration of existing rights, - Article 50 regulates the renewal of individual rights of use for harmonised radio spectrum. For renewal of rights to use other non-harmonised spectrum, the general competition rules as provided under Article 52 shall apply, as well as the principles set in Article 45(1) of objective, transparent, pro-competitive, non-discriminatory and proportionate criteria, and of Article 45(2)(g) that requires MS

to apply rules for the renewal of rights of use that are clearly and transparently laid down in order to guarantee regulatory certainty, consistency and predictability.

Article 49

Article 49

- a) Can a Member State predict in advance a fixed duration for granting rights, e.g. exactly 20 years?
- b) Is it possible not to introduce in the national regulations the possibility of extending the rights at all, if the time limit for granting rights is set to a minimum of 20 years, due to the fact that regulatory certainty is guaranteed for 20 years?

Reply

1. A distinction should be drawn between individual rights covered by Article 49(2) and any other right under Article 49(1). Under Article 49(1), any law governing the duration of rights should allow the competent authorities to adapt the duration so that the period is appropriate in light of the objectives pursued in accordance with Article 55(2), taking into account the need to ensure competition and effective and efficient use of spectrum, and to promote innovation and efficient investments, including by allowing for an appropriate period for investment amortisation”.

2. Article 49 requires regulatory predictability of at least 20 years. National law could provide for competent authorities to fix a non-extendable period of 20 years where they consider that this is sufficient to fulfil the conditions of par.2, which itself refers to the requirements of par.1. A duration of more than 20 years might indeed be necessary, for example for satellite wireless broadband electronic communications services; this could be achieved either by allowing the competent authorities to set longer the duration from the start, or by allowing them to extend the initial duration beyond 20 years.

Article 50

We would like to exclude any renewal of rights of use harmonized for the provision of wireless broadband electronic communications services (that are always assigned via an auction) by the Electronic Communication Act. If this is possible, is it possible not to transpose Article 50 at all, as all other harmonized frequencies are used under general authorization.

Member States have to transpose Article 50; MS cannot automatically exclude any renewal of rights of use of spectrum harmonized for the provision of wireless broadband electronic communications services, since the legislator made renewal one of the instruments to increase stability, consistency and predictability of investments (see article 45(2)(c) of the Code). Recital 129 clearly includes renewal as a possibility which should be available to investors. So exclusion of renewal of rights is allowed only where it was explicitly done at the time of assignment of a specific band as provided by 50(1).

Article 52

Article 52

1. Does the provision apply only in the case of granting, renewal and amending of rights or can the fact of distortions of competition constitute a separate basis and initiate an amendment of individual right of use? (paragraphs 1 and 2)
2. What "*change of rights*" (to what extent) is referred to in para. 2 (paragraphs 1 and 2)?
3. Does paragraph 2(a) concern general limitation of the number of spectrum bands, imposition of conditions (e.g. in the documentation of the selection procedure), or intervention and a change in the scope of individual rights for a specific entity?

4. Does the imposition of conditions apply only to the right of use and spectrum currently being awarded, or can obligations be imposed on another band with similar characteristics previously owned by an entity which e.g. has just received a new spectrum resource (paragraph 2(a))?
5. What conditions are referred to in paragraph 2(c)? Are these the same or different conditions than in paragraph a (wholesale access, national or regional roaming)?
6. To what extent the current rights can be changed in the scope of paragraph 2(e)? What does the indication "*in accordance with this Directive*" mean?
7. g) Does the last subparagraph of paragraph 2 mean that de facto the same procedure as the market analysis should be carried out?

Reply

1. In Article 52(1) the scope is defined as "when deciding to grant, amend or renew rights". Again, paragraph (2) refers to the same hypothesis. Member States may decide to amend a right of use of radio-frequency in case of distortions of competition (e.g. acquisition of a dominant position). In any event, such amendment of existing individual rights of use would be subject to the requirements of Articles 18 and 19 of the Code.

2. An amendment of a right of use for whatever reason in compliance with the Code could have an impact on competition such as where it would lead to a relaxation of the conditions, or more flexibility allowed to the holder to provide certain services or use different technologies, e.g. when allowing the use of a band for a new technology generation while other holders might not. Moreover, to restore competition which has been distorted for any reason, Member States may amend a right of use through one of the measures enumerated in (a) to (e).

3. This relates to a measure addressing specific bands or certain groups of similar bands, no matter the holder of the rights; spectrum caps for example. This provision also refers to limiting the amount of radio spectrum bands to "any undertaking".

4. Considering the need for stability and predictability of existing rights, the imposition of conditions should apply to the new rights of use being awarded. Member States may amend already assigned rights of use of radio spectrum following the procedures of Articles 18 and 19. In such a case, Article 52 applies. This should be distinguished from the case where competent authorities allow assignees to fulfil their obligations (e.g. for coverage) not only with the acquired spectrum, but will all spectrum they hold. This does not require an amendment of RoU.

5. The conditions referred to in Article 52(2)(c) may be similar with the ones referred in (a). As the measures referred to in paragraph (2) are not limitatively defined, additional conditions could be considered by the competent authorities. This could also include conditions currently covered by Article 5(6) of the Authorisation Directive in case of transfer or accumulation of rights, such as mandating the sale or the lease of rights of use.

6. There is no specific restriction to the content of the amendment, as long as it is necessary and proportionate to remedy ex post a distortion of competition by any transfer or accumulation of rights of use for radio spectrum. However, the amendment should be in line with the requirements of Articles 18 and 19 of the Code.

7. Indeed, Article 67(2) applies from a substance point of view. The procedure foreseen in Article 52 (2) would be similar with the one followed in market analyses.

Article 52

Article 52(2) establishes that "When Member States grant, amend or renew rights of use for radio spectrum, their national regulatory or other competent authorities upon the advice provided by national regulatory authority may take appropriate measures". One of those measures - bullet (e) - is the possibility of "amending the existing rights in accordance with this Directive where this is

necessary to remedy ex post a distortion of competition by any transfer or accumulation of rights of use for radio spectrum.” (emphasis added).

Is this bullet (e) only applicable when there is a case of granting, amending or renewing rights of use (which seems odd since we are talking about ex post remedy)? In any case, whatever the interpretation given to question 1, may we set bullet (e) as an independent NRA power, that is to say, can we use ex ante measures in any circumstance and not only when the NRA is granting, amending or renewing rights, under article 52?

Reply

While Article 52(2) is non-exhaustive and NRAs may adopt other measures, to fulfil the objectives identified in Article 52(1), the latter limits the scope of the Article to granting, amending or renewing rights of use of radio spectrum.

The solution provided in this provision is not only an ex post remedy, but also an ex ante remedy where the conditions thereof are set by the competent authority in advance of granting rights of use, as part of the procedure to grant those rights, which become conditions attached to the rights of use.

The answer to the question raised is provided in Article 52 (2) d) which speaks about “conditions prohibiting or imposing conditions on transfers” which are set as part of the procedure to grant those rights, therefore ex ante.

Article 52 (2) e) serves cases where such conditions were not imposed as part of the initial procedure and they are required by the changes in the market, therefore as ex post remedies

Article 53

Article 53

Article 53(2), (3) and (4) requires actions from Member States, in case conditions have been set by technical implementing measures in accordance with Decision no. 676/2002/CE in order to enable the spectrum use for wireless broadband networks and services. As provided in Article 124(2), these provisions are already in force since 20 December 2018.

Taking into account that 53(2), (3) and (4) are already applicable, what exactly is to be achieved by the transposition of this article?

Reply

Under Article 288 TFEU, Member States have the competence to decide on the form and means for the implementation of the Directive. Member States may consider that certain general rules and procedures have to be set in national law in order to make sure that where harmonised conditions have been set by a technical implementing measure, the result of the article 53 paragraphs (2) to (4) is achieved i.e. allowing the use of the relevant radio spectrum within 30 months. However, similarly to Article 54, it could be sufficient for Member States to implement those paragraphs through the adoption of specific national measures necessary to achieve the result each time a spectrum band has been subject to a new specific technical implementing measure.

Article 54

Article 54

Article 54 refers to measures that Member States will have to accomplish in a scheduled timeframe. Furthermore, this article has already entered into force as provided in Article 124(2).

Does this Article need to be transposed into the national law or does it only require the adoption of the adequate measures in order to accomplish its provisions?

Reply

Article 54 requires specific action in relation to specific spectrum bands within a specific deadline. It therefore can be implemented by Member States only adopting the specific appropriate national measures necessary to achieve the obligations defined by Article 54 in relation to those spectrum bands.

Article 57

Should Article 57(1) sub.§ 2 be interpreted as not allowing the owner of a property to condition the deployment of a small cell to an authorisation for the use of public land in the form of a decree or contract?

Should Article 57(5) be interpreted as not allowing to condition the deployment of a small cell to the payment of a public domain occupancy fee resulting from the granting of an authorisation to occupy the public domain ?

Reply

In the case of an implementing act of the Commission defining those small area wireless access points which should not be subject to any individual permit, this regulatory regime should not be considered as a tacit authorisation, but as an authorisation granted by law.

On the second question, it was the clear intention of the EU legislator to only subject the deployment of such access points to administrative charges at the exclusion of fees or charges.

Article 16 EEC restrictively defines administrative charges as administrative costs incurred in the management, control and enforcement of the general authorisation system and of the rights of use and of specific obligations as referred to in Article 13(2). A contrario, ensuring the optimal use of resources is a characteristic of fees as defined in article 42 for a.o. rights to install facilities on public property (fees should reflect the economic and technical situation of the market concerned as well as any other significant factor determining their value as stated in recital 100).

Therefore, a reference to advantages of all nature drawn from the authorisation to use the public domain would not be valid under Articles 16 and 57 EEC as clearly excluded from the scope of administrative charges in these articles; a reference to advantages of all nature would rather fall under the definition of fees under Article 42 EEC, which are prohibited, as explained, by Article 57 (1) second sub-paragraph. Recital 139 confirms that any administrative charge involved should be limited to the administrative costs relating to the processing of the application.

Moreover, as small area access points covered by an implementing act under Article 57(2) would not require any application for an individual town planning permit or other individual prior permit, unless the third sub-paragraph of Article 57(1) applies, there would be no right of use or prior individual town planning permit or other individual prior permit which could justify the imposition of an administrative charge. Such administrative charge could only be imposed if it can be demonstrated that the management, control or enforcement of the regulatory regime created by the Commission implementing act adopted pursuant to Article 57(2) would justify such an imposition, for example in view to the monitoring of the fulfilment of the conditions set by the Commission implementing act.

It should be noted that the imposition of charges and fees relating to the use of the spectrum is not covered by Article 57 and is subject to the provisions of Articles 16 and 42.

Article 57

- a) Paragraph 5 states that the deployment of small-area wireless access points "shall not be subject to any fees or charges going beyond the administrative charges" - does this

paragraph apply only to fees charged by public authorities (eg. whether it relates to fees for planning permits), or to charges by private landowners as well (eg. it relates to rental charges for occupation of the land).

- b)** Does paragraph 5 prohibit landowners from charging rent to telecoms operators for the use of their land?
- c)** What is the intention of the European Commission is stating that paragraph 5 is "without prejudice to any commercial agreements"? What sort of commercial agreements does the European Commission consider exempt from paragraph 5?
- d)** Is paragraph 5 of Article 57 intended to apply only to public sector land, or is it intended to apply to both public and private land? (It follows after paragraph 4, which applies only to public sector land - but unlike paragraph 4 it contains no reference to public sector land.)

Reply

- a)** It was the clear intention of the EU legislator to only subject the deployment of small-area wireless access points to administrative charges imposed by public authorities at the exclusion of fees or other charges imposed by public authorities. Article 16 EECR restrictively defines administrative charges as administrative costs incurred in the management, control and enforcement of the general authorisation system and of the rights of use and of specific obligations as referred to in Article 13(2). This does not exclude rental charges as article 57 provides that it is 'without prejudice to any commercial agreements'.
- b)** There is no such prohibition in the Code. Recital 139 provides that this is without prejudice to private property rights set out in Union or national law.
- c)** This may include rental agreements, for example with owners of physical infrastructure.
- d)** This provision does not distinguish between public and private property.

Article 61

Article 61(1) second paragraph states that *"to ensure that small and medium-sized enterprises and operators... can benefit from the obligations imposed"*, but we are at wholesale level and the beneficiaries of these obligations are always operators of electronic communication networks and services. Thus, SMEs cannot benefit from wholesale access if they are not, at the same time, undertakings providing publicly available electronic communications services, covered by Articles 59 and 60. Can you confirm this interpretation?

Reply

Beneficiaries may be also providers of services, which are not 'operators'. We agree with the interpretation as expressed in the second sentence.

Article 61(2)(b)

Article 61(2)(b) sets out powers to impose obligations on undertakings subject to General Authorisation that control access to end-users to make their services interoperable. 61(2)(c) provides powers to impose interoperability on number-independent interpersonal communications providers (when certain conditions are met). Both these powers can be exercised by NRAs or by other competent authorities, in contrast to the powers in Article 61(2)(a) and (d) which are exercisable by NRAs only.

Were these powers designed to potentially be used together – i.e., for services subject to general authorisation to be interoperable with NIICS, and for NIICS to be required to be interoperable with services subject to general authorisation?

Article 61(2) ii) states the conditions under which interoperability can be imposed on NIICS. Are these meant to be read as cumulative - ie, an “and” statement?

Reply

The idea of the second paragraph was to ensure, if certain conditions are met, that number-independent interpersonal communication services (NIICS), which fulfil certain conditions, are also interoperable with number based interpersonal communications services (NBICS). If more than one NIICS fulfil the conditions then all those would need to be interoperable with NBICS and with each other. In any event, interoperability should ensure two way communication.

The conditions of Article 61(2) (i) and (ii) are cumulative.

Article 61(2)

Obligations on relevant providers of number-independent interpersonal communications services which reach a significant level of coverage and user uptake, to make their services interoperable.

This would mean securing the interoperability of OTT-services. What sort of logic is behind this Article, is it at this point in time mostly meant as a future safeguard? (as hinted in i(i)): *“where the Commission, after consulting BEREC and taking utmost account of its opinion, has found an appreciable threat to end-to-end connectivity between end-users throughout the Union or in at least three Member States and has adopted implementing measures specifying the nature and scope of any obligations that may be imposed.”*

Reply

This paragraph was indeed intended to be a future safeguard. It is intended to kick-in in case one or several number independent interpersonal communication services become *de facto* the primary or only means of interpersonal communications for a significant number of end-users. Such end-users would rely for interpersonal communications only on services running on top of their internet access service without subscribing to a number-based electronic communications service. In such a case, interoperability of services could be endangered, in the absence of solutions developed by the market on its own motion.

There are two steps before such a symmetric (independent from significant market power) obligation may be imposed by competent authorities: 1) The Commission, following an opinion of BEREC, should first find an appreciable threat to end-to-end connectivity between end-users throughout the Union or at least in three Member States; 2) The Commission should first adopt implementing measures specifying the nature and scope of any obligations which may be imposed by the competent authorities.

This provision should be read in parallel with Article 123 which requires BEREC to issue by 21 December 2021 and every 3 years thereafter or on reasoned request by at least 2 Member States an opinion inter alia on the extent to which effective access to emergency services is appreciably threatened due to an increased use of NIICS by lack of interoperability or technological developments

Article 61(4)

In certain cases, competent authorities may impose obligation to share spectrum with the infrastructure host. What sort of exceptional situation or case were thought of when drafting the article? When could it be necessary to impose that kind of duties?

Reply

The exact wording of the last subparagraph of Art. 61(4) is: *“In the event of dispute resolution, competent authorities may, inter alia, impose on the beneficiary of the sharing or access obligation, the obligation to share radio spectrum with the infrastructure host in the relevant area”*

The market situations described in Article 61(4) are more likely to be found in less densely populated areas. In such areas, the Code acknowledges (Rec. 124) that network infrastructure sharing, and in some instances radio spectrum sharing, can allow for a more effective and efficient use of radio spectrum and ensure the rapid deployment of networks.

Recital 191 explains that *“[n]ational regulatory authorities should be able to impose technical and operational conditions on the provider or beneficiaries of mandated access in accordance with Union law.”* Article 26(1) allows NRAs to impose a counter-obligation of access to the beneficiary of an obligation of access to spectrum.

Therefore, where an operator is subject to an access (localized roaming) or sharing obligation under this Article, the addition of spectrum held by beneficiaries to the access or sharing scheme may contribute to the proportionality of the obligation and bring benefits to all end-users. As an example, while a local access or sharing obligation may be imposed because other mobile network operators face severe economic obstacles to deploying necessary passive and active equipment to serve a more remote area, the MNOs benefiting from such an obligation may hold spectrum in a band that has favourable radio propagation characteristics. This spectrum may help achieving better coverage for both hosting and hosted operators without negative effects for competition. In other cases, the spectrum contributed by beneficiaries may help meeting the increased capacity requirements due to hosting and may help avoiding a degradation of the services that the hosting operator provides to its own end-users.

Article 61(5)

Relationship between the CRD and Art 61(5) requirements for procedures preparing decision under art 61(3) and (4), is there a requirement for an EU co-ordination procedure for (each and every) individual decision

Reply

Article 61(5) concerns exclusively measures imposing obligations and conditions under Art. 61(1) to 61(4). There is no requirement for notifying dispute settlement decisions adopted by the respective bodies established under the Broadband Cost Reduction Directive.

Article 67

According to Article 67 (5a) National regulatory authorities shall carry out an analysis of the relevant market and notify the corresponding draft measure in accordance with Article 32:

(a) within five years from the adoption of a previous measure where the national regulatory authority has defined the relevant market and determined which undertakings have significant market power;

The EECC defines the market analysis review period in five years.

Therefore we would like to ask the following questions:

1. How this period is applicable in case of market analysis reviews that have been notified before the entry into force of the Code (in the „three-years-period era“)?
2. Do these reviews have to be re-analysed and notified also within 5 years?

Reply

The intervals for the notification of market reviews are governed by Article 67 (5) of the Code.

The general rule according to Article 67 (5) (a) is that a market needs to be reviewed “within five years from the adoption of a previous measure where the national regulatory authority has defined the relevant market and determined which undertakings have significant market power;”
Or

According to Article 67 (5) (b) “within three years from the adoption of a revised Recommendation on relevant markets, for markets not previously notified to the Commission”

This means that for market reviews that were adopted under the old framework (3 year period era) will – after the code enters into force – fall under the 5 year rule of Article 67 (5)(a).

Since the recommendation on relevant markets is set to be reviewed by 21 December 2020, the code enters into force, potential new markets not previously notified to the Commission would have to be notified within 3 years from the adoption of the revised recommendation according to Article 67 (5)(b).

Article 68

Article 68(6)

Art 67 and 68 on market analysis and remedies: flexibility regarding new markets developments (and obligation for NRAs to take them into account under Art. 68 (6)): Where exactly can these be taken into account – at the level of market definitions / market analysis or rather at the level of the remedies?

Reply

New market developments can affect the competitive situation in different ways and degrees. For instance, a new product launch or a new network deployment may affect product and/or geographical market definition and market power. Commercial agreements, including co-investment agreements, as well as certain regulatory developments may also have the same effect. If the NRA considers that a market development does not give rise to a (full) market review (e.g. the development does not affect the finding of SMP), it should nevertheless consider if an adaptation of current remedies is appropriate.

Article 68(6)

Article 68(6) requires the NRA to consider the impact of new market developments influencing market dynamics. If they are not sufficiently important to require a new market review, the NRA must assess without delay whether it should review and amend SMP obligations. The NRA would have to consult on these amendments.

We would like to understand how the Commission intended for this clause to work in practice.

- What does the Commission consider to be a trigger for considering a new market development influencing competitive dynamics? For example, would the NRA be required to do this every time a stakeholder brings a new development to its attention?
- Can the Commission comment on, or provide examples as to, when market developments will be "sufficiently important" to require a new market analysis"?

Reply

In the experience of the Commission, it is not uncommon for NRAs to notify amendments to previously notified measures or implementation of remedies already imposed without changing the underlying market definition or SMP finding.

In line with this experience, the provision of Article 68(6) clarifies NRA's ability - and obligation - to react, when necessary, to important market developments. This is also in line with the extension of the default time frame between market reviews from 3 years (Article 16(6)a FD) to 5. Article 68(6)

reflects the need to ensure on the one hand predictability of the regulatory framework and on the other hand the need to adapt the regulation to the changes occurred in the market during the longer market review period without necessarily carrying out a market analysis provided that the modifications of the remedies would be consistent with the result of the market analysis.

Article 68(6) was therefore designed to capture changes in market dynamics not foreseen at the stage of the last market analysis.

Regarding the first question, the answer may depend on different national administrative law principles. The national administrative law may require NRAs to take a formal decision (either positive or negative), whenever a stakeholder formally requests a change of SMP obligations due to changed market circumstances.

This is however not required by the Code. In that sense, this is not a change vis-à-vis the old framework. The Code however requires the NRA to monitor the market and to act when there is an objective need. This may be either upon request by stakeholders, or indeed as a result of continuous market monitoring undertaken by the NRA.

The answer to the second question cannot be exhaustive, as different types of market developments may justify a new market analysis, depending also on national circumstances. The assessment of such cases would be undertaken case by case, by the NRA, exercising its margin of discretion, in light of this provision and the objectives included in Article 3. Already in the past, the Commission has, in the context of Article 7/7a decisions, called on regulators to conduct the market review before the end of the 3-year period in light of important changes of the competitive situation in the market. An example of a market development triggering the need to review the market analysis would be the voluntary separation of a vertically integrated undertaking that holds SMP. Other examples can be found in the recently assessed cases AT/2018/2092¹, IT/2016/1880² and HR/2018/2132³ where the Commission suggested a review before the end of the standard regulatory period, in view of expected technological and significant changes to market structure or to the state of competition.

Article 70

Article 70

Article 70(2) refers to the equivalence of access, which includes EoI and EoO, in accordance with Recommendation 2013/466/EU. However, Recital 185 only refers to equivalence of input and the wording of Article 70(2) mentions “same systems and processes”. Could you confirm that NRAs, when applying Article 70(2) may impose obligations to ensure either EoI or EoO.

Reply

We can confirm that Article 70 (2) in principle allows NRAs to impose either EoI or EoO and is not limited to EoI. However, NRA’s have to take their decision in compliance with Article 68 (4) and should take account of recital 185, making a proportionality assessment and weighing the benefits of EoI vs the additional implementation costs. In particular, for new systems, implementation costs are expected to be relatively low and thus would likely not outweigh the benefits. By contrast, the imposition of EoI might be disproportionate in cases of small scale SMP undertakings.

¹ https://circabc.europa.eu/webdav/CircaBC/CONNECT/e-cctf/Library/01%20-%20Commission%20Decisions/Commission%20Decisions%202018/AT-2018-2092%20Adopted_EN.pdf;

² https://circabc.europa.eu/sd/a/e322bcd6-673f-4261-bb58-e744c432d503/IT-2016-1879-1880-1881%20ADOPTED_EN.pdf;

³ https://circabc.europa.eu/webdav/CircaBC/CONNECT/e-cctf/Library/01%20-%20Commission%20Decisions/Commission%20Decisions%202018/HR-2018-2132%20Adopted_EN.pdf

Article 72

Article 72

Art. 72 on civil engineering: when checking the proportionality of access obligations Art. 72 prevails over Art. 73?

Reply

Indeed, pursuant to the last subparagraph of Art. 73(2), the imposition of obligations under Art. 73 requires NRAs to establish that obligations under Art. 72 alone would not be a proportionate means to solve the identified competition problem.

Article 74

Article 74

Art. 74 would there a possibility to forego strict pricing obligations and to apply an economic replicability test instead, as a default for VHC networks?

Reply

The Code provides this possibility to regulators. The choice of obligations to be imposed has to follow the market analysis process and has to be duly justified. But this is an assessment to be made not by the legislator, but by the regulator (also taking into account the guidance provided in the Commission Recommendation on consistent non-discrimination obligations and costing methodologies).

Article 74(1)

Does the procedure described in Article 74 (1) subparagraph 3 (citation below) concern the market analysis stage or the stage of imposing regulatory obligations regarding the price control? Could you please confirm at what stage the test should be carried out?

„National regulatory authorities shall consider not imposing or maintaining obligations pursuant to this Article, where they establish that a demonstrable retail price constraint is present and that any obligations imposed in accordance with Articles 69 to 73, including, in particular, any economic replicability test imposed in accordance with Article 70, ensures effective and non-discriminatory access”.

Reply

The procedure described in the quoted text of Art. 74(1) subparagraph 3 concerns the stage where remedies are considered for imposition on undertakings designated as SMP. They do not concern the market analysis stage.

Article 75

Article 75

According to that article, the Commission is only empowered to take a decision on what the EU termination rate should be, but it cannot in that decision impose an obligation to actually terminate traffic or other terms and conditions on EU operators.

At the same time, NRAs cannot perform a market analysis and base a specific interconnection obligation (or other related obligations) on an SMP operator in the market for termination when the Commission has taken a decision to set the EU termination price according to Article 75.

Consequently, there is the risk of a gap where there is no specific obligation to terminate traffic, while at the same time a specific termination price has been set. A potential solution could be the

use by NRAs of Article 61 (general interconnection obligation) as/where necessary but in any case we thought this issue merits some clarification.

Given the issue outlined above, what is the Commission Services' view, if any, on the division of competences as regards termination between the Commission and the NRAs, and consequently what should be required of the NRA in ensuring that termination takes place at the regulated EU price?

UPDATED Reply

The Commission's view is that the imposition of the single maximum Union-wide voice termination rates will not prohibit NRAs from defining and analysing termination markets. The relevant steps for such analysis will depend on the next revision of the Commission's Recommendation on Relevant Markets (RRM), planned for adoption by 21 Dec 2020. If termination markets are excluded from the RRM (a point on which the Commission is still finalising its position), NRAs will have to justify the necessity for ex-ante regulation by means of the three-criteria test. Where imposition of ex-ante regulation is justified, NRAs will be able to designate SMP and impose relevant obligations (e.g. non-discrimination), excluding obligations related to pricing that are set by the Delegated Act.

NRAs can also impose ex ante obligations under Article 61(2) of the Code on access, interconnection and interoperability of services in order to ensure the policy objectives of Article 3, including the promotion of competition in the provision of electronic communications networks and associated facilities, the development of the internal market by favouring the provision, availability and interoperability of pan-European services, and end-to-end connectivity, and the promotion of the interests of the citizens of the Union by enabling maximum benefits in terms of choice, price and quality on the basis of competition.

Transparency and non-discrimination obligations could also be imposed under this provision when necessary to achieve end-to-end connectivity. In this regard, the Commission acknowledged in its Article 7 practice that Article 5 of the Access Directive (corresponding to Article 61 of the Code) could be the legal basis to impose obligations of transparency and non-discrimination. It should also be noted that Article 61 could also be the legal basis for imposing obligations in the context of the settlement of a dispute arising between terminating operators.

Furthermore, in case of anticompetitive conducts, general competition provisions apply.

Article 75

Art. 75 and Annex III [termination rates] - if the European Commission adopt a delegated act setting a single maximum Union-wide voice termination rates, can NRA impose other regulatory obligations (regulate the market in other respects)?

Reply

Yes, NRAs may regulate market 1 and market 2 in aspects other than pricing, if the relevant conditions are met (i.e. if termination markets are part of the Recommendation on Relevant Markets or alternatively, in case the termination markets are not longer included in the Recommendation, if the three-criteria test is passed). The Delegated Act will set a single maximum mobile termination rate and a single maximum fixed termination.

Article 76

Article 76

Is this Article only applied to fibre construction/deployment or also to building base stations (to which fibre is connected)?

Could you explain the meaning of the first paragraph: “very high capacity network that consists of optical fibre elements up to the end-user premises or base station”.

Does the Article apply only to SMP-undertakings?

Reply

In principle, the Article is applicable also to mobile or other wireless networks, provided that the respective operator holds SMP (not a common situation in European markets, but which may be relevant, e.g. in the event that fixed-line SMP operators deploy 5G fixed wireless solutions at the edge of their fixed networks in lieu of a fibre drop line).

Article 3 defines very high capacity networks as networks which either:

- consist wholly of optical fibre elements at least up to the distribution point at the serving location
OR - are capable of delivering similar network performance.

Article 76 provides for a specific regulatory treatment of a subset of very high capacity networks, namely with a scope that covers only the first part of the definition under Article 3. This means that only networks that consist of optical fibre elements up to the serving location near or at the end-user premises or base stations are included. By contrast, very high capacity networks that use other technologies, even when providing similar performance, are not eligible for the regulatory treatment under Article 76.

The article applies only to SMP undertakings, which will be relieved from regulatory obligations in exchange for commitments which meet the necessary conditions in Article 76. Other undertakings will indirectly benefit from the application of this article, in the form of opportunities for co-investment or access agreements.

Article 76

- Do the first and second subparagraphs of Article 76(2) of the EECC mean that the NRA may impose remedies if the conditions laid out in Article 76(1), which affect competition and are likely to serve the objectives set out in Articles 67 and 68 of the EECC, are not fulfilled?

We understand that for an offer that to some extent does not meet the conditions of Article 76(1), it is still possible to accept such obligations that meet the conditions, and for the remainder it is possible for the NRAs to impose appropriate remedies, taking into account the results of the market test under Article 79(2) of the EECC.

- Is a separate basis under national law necessary to oblige an undertaking designated as having significant market power to provide an annual statement of compliance under Article 76 (3) of the EECC where the NRA has broader powers to request the necessary statements and reports [also in relation to monitoring of the compliance with the obligations approved under Article 79(3) EECC]?

- Should Article 76(1)(d) of the EECC be understood as meaning that:

- an access seeker not participating in the co-investment is to be granted access under the existing terms and conditions to the old network or, if dismantled, to comparable access products, and

- an access seeker not participating in the co-investment is to be provided with access to the new very high speed network (VHCN) under transparent and non-discriminatory conditions, which are complemented by a mechanism of adaptation, i.e. incentives to enter into co-investment. This mechanism does not apply to access to the old network.

The mechanism of adaptation (co-investment incentives) should be understood as more favourable price conditions for access for co-investors than for those not participating in co-investment.

If above presented interpretation is not correct, we kindly ask to clarify what is meant by the mechanism of adaptation and by the concept of incentives under Article 76(1)(d)?

Reply

On the two sub-questions:

- Article 76(1) sets out conditions under which an undertaking with SMP can benefit from deregulation. If these conditions are not fulfilled, then as provided in Art. 68 the NRA shall (rather than may) impose appropriate obligations. In the case of co-investments, it should have regard in particular to Art. 68(6) and assess the impact of these co-investments on competitive dynamics.
- Yes, note however that this case would fall under Article 79(1)(a), i.e. “cooperative arrangements relevant to the assessment of appropriate and proportionate obligations pursuant to Article 68;”
- Yes, we consider that a separate legal basis would be necessary. NRA will have powers to request information from undertakings under Article 20. However, Article 76(3) refers to statements of compliance, which may entail more than just information.
- The mechanism of adaptation refers to the evolution of conditions for access seekers. These conditions may include qualitative aspects, pricing aspects and timing aspects (e.g. time of access to the very high capacity elements). The incentives refer to all factors that would favour a decision to co-invest, rather than to pursue other courses of action, such as relying on the conditions provided for access seekers under Art. 76(1)(d), rolling out an independent network, not offering services in the specific area etc. Please also note the following:
 - The mechanism of adaptation can apply also to the legacy network (see Recital 200: “This should be achieved through the maintenance of existing access products or, where legacy network elements are dismantled in due course, through the imposition of access products with at least comparable functionality and quality to those previously available on the legacy infrastructure, in both cases subject to an appropriate adaptable mechanism validated by the national regulatory authority that does not undermine the incentives for co-investors.”
 - The purpose of the mechanism of adaptation is to maintain the competitiveness of the market. It is reasonable to expect that the mechanism of adaptation is going to be one of the factors influencing the incentives to co-invest, but it is unlikely to be the only factor. In any event, it has to be devised in a way that does not undermine these incentives. Depending on the model of co-investment, maintaining incentives may necessitate more favourable access conditions (in terms of price, quality etc.) for co-investors compared to those provided to access seekers. Finally, please note that BEREC is planning to publish its guidelines on the consistent application of the conditions set out in Art. 76(1) by the end of 2020, which are likely to cover these aspects in more detail.

Article 79

Article 79

Q1: Art 79 procedure for commitments: Is there a catalogue of basic/minimal requirements, with which the commitments under Art 79(1a) have to comply (FRAND, openness)?

Q2: What is the relationship between the terms „commercial agreements“ under Art 68(6), „cooperative arrangements“ under Art. 79 (1a) and „co-investment“ under Arts 76 and 79(1b)?

Q3: Are there criteria that cooperative arrangements need to meet at a minimum to be assessed and made binding? While for Art 79 para 1 b) and c), (minimum) conditions are defined, this is not so clear for Art. 79 para 1 a) settings. In this regard, one could understand Art. 79 para 2 subpara 2

as a set of minimum conditions, yet the wording refers to the evaluation of the commitments in the assessment of obligations (at a possibly different stage) and does not suggest a strict test (“the NRA shall, when assessing obligations to Art 68 (4), have particular regard to”).

Q4: Could you clarify the relationship between the terms commercial agreements (Art 68 para 6), cooperative arrangements (Art 3 para 4 lit d, Art 79 para 1 lit a), co-investment (Art 76, Art 79 para 1 lit. b). Our current understanding is that commercial agreements is the “widest” term, encompassing the other two (possibly also including commercial access agreements that are limited to the rental of capacity referred to in recital 198); yet, since there is no reference in Art 79 to it, this raised the question for us whether there might be agreements with the SMP operator involved falling out of the procedure described by Art 79?

Reply

Q1: There is no such catalogue, other than what is provided in Art. 79(2).

Q2: Co-investment agreements could be considered as a sub-category of commercial agreements (see wording in Art. 68(6)). In turn, commercial agreements could be considered as a sub-category of cooperative arrangements (the latter may be also less formal types of cooperation). Art. 79 provides for a procedure for any kind of commitment that undertakings might offer and for the NRA to assess such offers.

Q3: Indeed the list (a)-(d) provided in the second subparagraph of Art. 79 (2) is not a minimum set of conditions to assess commitments, but rather a list of considerations that are relevant for the assessment of obligations pursuant to Art. 68 (4). On the other hand, the first subparagraph of the same provision provides a procedure for assessing such commitments, in particular their compliance with Articles 68, 76 or 78, including through a public consultation. On this basis, regulators should be able to assess any commitments submitted by SMP operators which concern conditions for access, co-investments, or both, in the light of the particular market conditions.

Q4: Co-investment agreements could be considered as a sub-category of commercial agreements (see wording in Art. 68(6)). In turn, commercial agreements could be considered as a sub-category of cooperative arrangements (the latter may be also less formal types of cooperation).

As mentioned above, under Art. 79 SMP operators may submit commitments on conditions for access, co-investments, or both. The use of the wording ‘inter alia’ in the first subparagraph of Art. 79 (1) suggests that the list (a) - (c) is not exhaustive.

Article 79

Should Articles 79(3) and 76(2) be interpreted as meaning that a NRA, in a decision which makes commitments binding, refers directly to existing regulatory obligations and accordingly revokes, amends or maintains them?

Given the wording of Article 79(3) subparagraph 4 of the EECC, should the NRA's decision to make commitments binding be made subject to a consolidation procedure?

Reply

This may indeed be required, if the new very high capacity elements would, in absence of such decision, be subject to existing regulatory obligations. In addition, the NRA would have to take a decision that, during the period of commitments, no obligations will be imposed on the elements of the very high capacity network that are subject to these commitments.

Yes, the decision should be notified under Art. 32, along with the decision not to impose obligations during the period of commitments on the elements of the very high capacity network that are

subject to these commitments and, if appropriate, the decision to withdraw, amend or maintain existing regulatory obligations.

Article 80

Article 80

Para 1 (b) - the provision applies to the features of a wholesale-only undertakings. In accordance with Art. 80 para 1 (b): "the undertaking is not bound to deal with a single and separate undertaking operating downstream that is active in any retail market for electronic communications services provided to end-users, because of an exclusive agreement, or an agreement which de facto amounts to an exclusive agreement." The concept of an "exclusive contract" raises doubts. Is the wholesale-only undertaking "exclusive" to the retail, or is the retail undertaking "exclusive" to the wholesale-only undertaking?

Para 2 - the provision concerns the possibility for the NRA to impose on the wholesale-only undertaking obligations related to reasonable and fair pricing. Are these obligations referred to obligations under Art. 74 (cost calculation, setting fees) or is Art. 80 para 2 referred to other, new obligations?

Reply

Article 80(1)(b) considers situations where exclusivity in the vertical relationship is binding for the wholesale-only operator, i.e. the wholesale-only operator cannot supply its services to more undertakings active in the retail market because of an exclusive agreement. In such a case, the conditions of Article 80(1) would not be met. Whether the agreement between the wholesale-only operator and an undertaking active on the retail market allows this undertaking to be supplied also by other wholesale operators is not relevant for the purposes of this provision.

Article 74 provides for a range of price control and cost accounting obligations. Fair and reasonable pricing is a specific case within this range

Article 84

Article 84 According to Annex XIII to Directive 2018/1972/EU Article 11 of Directive 2002/22/EC (quality of service of designated undertakings) has no corresponding Article in Directive 2018/1972/EU. Could you please provide us with information if this prevents Member States from maintaining provision in national legislation regarding determining quality of universal service?

Reply

Article 84(1) of the EECC provides that Member States shall ensure access at an affordable price, in light of specific national conditions, to an available adequate broadband internet access service and to voice communication services at the quality specified in their territories. Member States are thus required to specify the quality and can maintain rules on the quality of universal service regarding these two services.

Article 104 refers to technical QoS requirements and entitles NRAs to require providers to publish comprehensive, comparable, reliable, user-friendly and up-to-date information on QoS, which is to be specified by NRAs. Pursuant to Article 104(1) providers may be required to publish information on the quality of their services, to the extent that they control at least some elements of the network either directly or by virtue of a service level agreement to that effect. Crucially, Article 104 is a transparency provision and the EECC does not indicate minimum QoS levels to be ensured by ECS providers.

Article 84

Would it be possible to define USO by referring to the services listed in Annex V, without defining a minimum speed/ bandwidth for the USO service?

Reply

The EECC Article 84(3) requires that each Member State define the adequate broadband internet access service. The service shall be capable of delivering the bandwidth necessary for supporting at least the services set out in Annex V.

The EECC does not oblige the Member States to define specifically the adequate broadband access service in terms of speed/bandwidth as such. However, as Article 84(3) requires that the definition of the service to take into account national conditions, minimum bandwidth enjoyed by the majority of consumers, taking into account the BEREC report and with a view to ensuring the bandwidth necessary for social and economic participation in society, using (only) a reference to supporting the services listed in Annex V would not meet the requirements in this provision and would not provide sufficient clarity as regards the conditions for the provision of such a service

Article 84

Where would be the limit for a publicly financed universal service / above which quality parameters the service would have to be considered an additional service under Art 92 for which no compensation mechanisms involving specific undertakings can be used? The universal service obligations are included in Articles 84 to 87. Recital 245 also explains that Member States are not permitted to impose on market participants financial contributions which relate to measures which are not part of the universal service obligations.

Reply

Member States define the adequate broadband internet access (at a quality specified in their territories) with a view to ensuring the bandwidth necessary for social and economic participation. Member States are to take into account also national conditions, the minimum bandwidth enjoyed by the majority of consumers within that Member State and the BEREC best practice report. Furthermore, the service is to have the necessary bandwidth for supporting at least the minimum set of services set out in Annex V. In this context, additional services (and not a universal service) would be those that ensure an internet service that exceeds this (bandwidth of) adequate broadband internet access or other services not included in articles 84 - 87.

BEREC report on best practices is available at https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/8920-berec-report-on-member-states8217-best-practices-to-support-the-defining-of-adequate-broadband-internet-access-service The report includes details from Member States that have already included broadband connection in the universal service obligation under the current rules

Article 84(1)

Article 84(1) of EECC states that „Member States shall ensure that all consumers in their territories have access at an affordable price, in light of specific national conditions, to an available adequate broadband internet access service and to voice communications services at the quality specified in their territories, including the underlying connection, at a fixed location“.

1. Can the requirement to have access of electronic communications services at a fixed location be ensured to be provided not only via fixed networks (but also mobile networks), especially taken into account the technological neutrality?
2. In case we concentrate on fixed networks, can the services provided via mobile networks be evaluated as substitutes, if parameters of the services are met?

3. Could you provide your insight about the affordability requirement. Can this requirement be imposed, even if there is no problem with availability of the service and no undertaking is designated as universal service provider. If yes, can it also be imposed on all the providers, including mobile operators?

Reply

1. Article 84(1) refers to consumers having access to an available adequate broadband internet access and voice communications services at a fixed location. The article does not limit the technical means by which the connection at a fixed location is provided. Recital 230 includes that there should be no constraints on the technical means by which the adequate broadband internet access and voice communications services at a fixed location are provided, allowing for wired or wireless technologies.

2. The above also means that services provided via mobile networks can be used for the access at a fixed location.

3. Affordability of adequate broadband internet access service and voice communications to all consumers is the focus of the EECC's universal service obligations. The affordability obligation can be, and in many cases indeed will be, imposed even if there is no problem with availability of the service and without designation. Where Member States establish that retail prices for services referred to in Article 84(1) (adequate broadband internet access and voice communications services at a fixed location) are not affordable because consumers with a low income or special social needs are prevented from accessing them, they shall take measures to ensure affordability. To that end, Member States may ensure support to such consumers or may require providers of broadband internet access and voice communications to offer tariff options or packages and apply common tariffs to those consumers.

According to Article 84(2) Member States may also ensure the affordability of the services that are not provided at a fixed location where they consider this to be necessary to ensure consumers' full social and economic participation in society

Article 84(2)

When Article 84(2) refers to the possibility of adequate broadband Internet access service and voice communications services being provided through connections other than at a fixed location, must it be understood that such connections are provided through mobile access or, rather, through any wireless system?

Reply

Article 84(2) refers to providing affordability of adequate broadband internet access and voice communications services not at a fixed location. This gives Member States a new possibility of ensuring affordability of these services to citizens on the move as clarified in recital 204, where Member States consider that this is necessary to ensure consumers' full social and economic participation in society. The article does not limit the technical means by which the connection not at a fixed location is provided.

Article 84(3)

Is there a difference between the words used/enjoyed: "prevailing technologies used by the majority of subscribers" [current USD Article 4(2)] - "minimum bandwidth enjoyed by the majority of consumers" [EECC Art 84(3)]?

Reply

No important difference is to be understood in practice between the terms “used” and “enjoyed”. The EECC refers to minimum bandwidth enjoyed by the majority of consumers, which can be understood as the speed that consumers actually subscribe to. The subscribed speed can present a slight difference to the bandwidth that consumers actually use. Note that Art 122(2) EECC on the universal service review refers to “prevailing technologies used by the majority of end-users”.

A difference in the provisions is that “consumers” are individuals, whereas subscribers/end-users include also legal persons. Therefore, the result in these terms may be different.

The minimum bandwidth enjoyed by the majority of consumers within the territory of the Member States is one of the aspects to be taken into consideration when Member States define the adequate broadband internet access according to Art 84(3) of the EECC. Other aspects include national conditions, BEREC report on best practices, ensuring bandwidth necessary for social and economic participation in society and supporting the services set out in Annex V. The list of services in Annex V ensures a common European minimum level of universal service internet access.

Article 85

Article 85

Is the availability of numbers mentioned in the fourth paragraph of Article 85 (2) only justified in the context of number portability? If not, what other situations should be considered in this context?

Reply

Member States are to ensure the availability of the number for an adequate period to consumers entitled to tariff options or packages under universal service. Member States are to ensure the availability of a number for a reasonable period also during periods of non-use of voice communications services, so this availability is not only justified in the context of number portability.

Article 85(2)

In Article 85(2), the EECC sets out a four options for providing an affordable universal service to consumers with special social needs: 1. The state provides social allowances or vouchers for those consumers; 2. All operators must provide special tariff options or packages for those consumers; 3. Combination of the first and the second option; and 4. Only one predetermined universal service provider is obliged to offer specific tariff options or packages for those consumers). Is it necessary to transpose and define all four options mentioned above or is it sufficient to define only the selected option?

Reply

According to Article 85(2), Member States must take measures to ensure affordability. To do so, they may transpose one or several of the options provided in sub-§ 2, i.e. support to consumers or tariff options or packages from all providers, or both, or any other solution which ensures the fulfilment of the obligation of paragraph 1. Member States may designate undertakings only in exceptional circumstances, which have to be proven at the time when imposing the obligation and cannot be *ex lege* and cannot be the default obligation forever, but only as long as those exceptional circumstances remain valid. The analysis has to be undertaken each time before they rely on this exception (which normally has to be interpreted narrowly, and cannot become the default option).

Article 87

Article 87

Article 87 refers that MS may continue to ensure the availability or affordability of the so-called "legacy" services that were in place on 20.12.2018. Should be considered as covered by this provision (i) the services that are being provided under contracts entered into with the designated providers and still in execution and/or (ii) the services that, under the current law, fall within the scope of the universal service, even if the validity of those contracts has expired on 20.12.2018?

Reply

Article 87 provides that Member States may continue to ensure the availability or affordability of other services than adequate broadband internet access service and voice communications services that were in force on 20 December 2018 if the need for such services is established in light of national circumstances. (These services concern, for example, public payphones or directory enquiry services). As clarified by recital (235), this Article does not refer to the validity of designation contracts but to services that were included in the scope of Member States' universal service obligations 20 December 2018 on the basis of Directive 2002/22/EC, if the need is demonstrated, provided those services or comparable services are not available under normal commercial circumstances.

Article 88

Article 88

How can we ensure cost control and cost transparency for prepaid customers?

Would a list of individual connections specifying also the costs be sufficient as a means for prepaid-customers to control their expenditure, or is a settlement bill (itemised bill) required? At what point in time or how often does this information need to be given to the consumer with a view to the fact that user behaviour can fluctuate greatly and that there may be no use / no consumption for weeks or months.

We would like to know the Commission's view on how to ensure that users receive sufficient information regarding usage expenses especially with regard to the ETSI requirements on prepaid account credit correctness complaints (ETSI EG 202 057-1, No. 5.12) and recital 236 of the code that mentions the possibility for customers to control expenditure via pre-payment means. Are there best practice examples from other MS?

Reply

The provisions on control of expenditure in Article 88 are applicable on providers of universal service affordable adequate broadband and voice communications (pursuant to Article 85 on affordable universal service). As motivated in recital 236, affordability is also related to the information which users receive regarding usage expenses. Providers of affordable universal service are required to offer the specific facilities and services of part A of Annex VI to the customers benefiting from universal service. This is regardless whether the service is on pre-paid terms or not. These facilities include itemised billing.

Beyond universal service, Article 115 mandates that Member States are able to require providers to make available all or part of the additional facilities in Annex VI Part A (and Part B), subject to technical feasibility. This means that it is for the Member States whether to require itemised billing for other customers than those benefiting from the universal service affordability obligation.

If the list of individual connections would allow verification and control of the charges incurred and include explicit mention of identity of the supplier and of the duration of the services charged by premium numbers this would fulfil the requirements in Annex VI part A (a) for universal service customers. Article 115 and Annex VI do not rule on the frequency of providing this, but state that the aim is to allow end-users to "exercise a reasonable degree of control over their bills". As long

as this goal is ensured, for example, by coinciding with the billing periods, Member States can decide on the frequency or this can be left at the providers' discretion.

We do not have best practice examples from other Member States.

Article 90

Article 90

Would a provision stating that “[t]he recovery of net costs may not be requested by the universal service operator with more than 70% share in the total revenue earned on the market of these services” be compatible with the EECC?

Reply

If NRAs consider that the provision of universal service may be an unfair burden on provider(s) that request universal services may represent an unfair burden to a provider, and the NRA may well conclude that there is no unfair compensation, NRAs calculate the net costs (Art 89). It is for the NRAs to assess whether provision of the burden to an operator with more than 70% share in the total revenue earned on the market of these services. However, it would not be possible to exclude the assessment of the existence of the unfair burden by the independent NRA by an absolute presumption in national law. The unfair burden assessment is to take into account factors beyond the market share (see also recital 238 and Annex VII on net cost calculation).

Moreover, Article 5(1)(f) EECC provides that the competence of assessing the unfair burden and the net cost of the provision of the US is a task to be carried out exclusively by NRAs. Recital 13 of the Better Regulation Directive and 37 of the EECC clarify however that “a national legislative body [is] unsuited to act as a national regulatory authority under the regulatory framework”.

Article 90

Can a Member State exclude a category or group of providers, such as for instance providers of number independent interpersonal communications services, from sharing the net cost of the provision of the universal service, or limit their contribution?

Reply

According to Article 90 EECC Member States can decide to “share the net cost of universal service obligations between providers of electronic communications networks and services”. Art 90(2) gives conditions for the sharing mechanism. The mechanism shall respect the principles of transparency, least market distortion, non-discrimination and proportionality, in accordance with the principles set out in Part B of Annex VII. Part B of Annex VII includes the principle that sharing mechanism based on a fund shall use a transparent and neutral means for collecting contributions. Article 90(2) also rules that Member States may choose not to require contributions from undertakings the national turnover of which is less than a set limit.

Recital 243 confirms that the method of allocation amongst providers is to be based on objective and non-discriminatory criteria and in accordance with the principle of proportionality. Linked to the possibility in Article 90(2) of not requiring contributions from undertakings with turnover below a set limit the recital includes that the criteria does not prevent Member States from exempting new entrants, which have not achieved any significant market presence.

Should a Member State choose to finance the universal service obligations with funding from the sector, Article 90(1)(b) requires sharing the net cost between providers of electronic communications networks and services. Groups of providers are a priori not excluded from the sharing. Any exclusion of a group of providers, if not done based on a set turnover limit, can only

be done if based on principles of transparency, least market distortion, non-discrimination and proportionality.

Article 93

Article 93(2) and 93(4)

Article 93(2) allows Member States to assign numbering to undertakings other than providers of electronic communications networks and services. Article 93(4) concerns the allocation of numbers for the purpose of providing electronic communications services other than interpersonal communications services throughout the EU. In the light of the above articles:

- a) Does the provision of Article 93 (4) also apply to entities referred to in Article 93(2)?
- b) Should separate numbering be established for the purposes of Article 93(2), and if so, should ECS / ECN suppliers also be entitled to such numbering (and numbering for the purposes of Article 93 (4))?
- c) Can separate procedures and conditions be established for the purposes of granting rights of use for numbering resources depending on whether it is ECS / ECN or non-ECS / ECN?

Reply

a) Article 93 (4) lays an obligation on the Member States, i.e. a numbering range referred thereto has to be made available. Article 93(2) gives Member States a right, i.e. it is Member State's right to allow that numbers are assigned to undertakings other than providers of electronic communications networks and services (non-ECN/ECS undertakings). Consequently, Member States should also decide which numbers could be assigned to those undertakings. Article 93(4) foresees that numbers for the provision of electronic communications services other than interpersonal communications services throughout the EU referred therein may be granted to non-ECN/ECS undertakings in accordance with para 2 of that Article.

b) Pursuant to Article 93 (2) numbering resources for specific services may be granted to undertakings other than providers of electronic communications networks and services (non-ECN/ECS undertakings). This paragraph does not require establishing a separate numbering range for that objective, but rather requires that the right of non-ECN/ECS undertakings should relate to a specific service and consequently numbering range(s) dedicated to specific services. It is for Member States to determine services for which numbers could be granted to non-ECN/ECS undertakings.

Article 93(4) requires that a specific numbering range is allocated for the provision of electronic communications services other than interpersonal communications services, with a right of extraterritorial use. It is for Member States to decide if numbers from that numbering range could be granted to non-ECN/ECS undertakings.

c) The procedure for granting of rights of use for numbering resources is described in Article 94 of the EEC. Paragraph 7 of this article states that the article shall apply where national regulatory or other competent authorities grant rights of use for numbering resources to non-ECN/ECS undertakings in accordance with Article 93(2). At the same time, pursuant to Article 93(2) non-ECN/ECS undertakings shall demonstrate their ability to manage the numbering resources and comply with any relevant requirements set out pursuant to Article 94. This condition does not apply to ECN/ECS providers, which are subject to general authorisation. The paragraph further states that granting of numbering resources to non-ECN/ECS undertakings may be suspended in case of risk of exhaustion of numbering resources. Consequently, the procedure for granting rights of use for numbering resources as set in Article 94 should apply to both ECN/ECS providers and non-ECN/ECS undertakings, but in the case of non-ECN/ECS undertakings, also their ability to manage numbering

resources and risk of exhaustion of numbering resources should be assessed. In March 2020 BEREC adopted [guidelines on common criteria for this assessment](#).

Article 93(4)

Article 93(4) concerns the provision of numbering resources for the purposes of using throughout the territory of the Union. In the light of this article:

- a) Can extraterritorial numbering be used for services provided in both mobile and fixed networks?
- b) Should extraterritorial numbering based on Article 93(4) be subject to obligations such as subscriber numbering, e.g. to be subject to number portability?

Reply

a) Article 93(4) provides that the numbers referred thereto shall be non-geographic. There is no indication as to the type of network over which the services may be provided and consequently no type of network is excluded.

b) Pursuant to Article 93(4) conditions listed in Part E of Annex I may be attached to the right of use for numbering resources. At the same time, the conditions attached to the rights of use of numbers used for the provision of service extraterritorially shall be “as stringent as the conditions and enforcement applicable to service provided within the Member State of the country code”. In other words, conditions listed in points 1 to 9, Part E of Annex I related to a numbering range used for the provision of a given service imposed in a given Member State should be the same, regardless of whether the numbers are used within the Member State of the country code or outside of it. In addition, National Regulatory Authorities or other competent authorities shall ensure that when numbers are used extraterritorially, providers using them comply with consumer protection and other national rules related to the use of numbering resources applicable in the Member State where the numbers are used. Pursuant to Article 94(6), specific conditions in order to ensure this compliance should be attached to the rights of use of the numbering ranges with the right of extraterritorial use. Accordingly, National Regulatory Authorities or other competent authorities shall attach the condition provided in point 10, Part E of Annex I to the rights of use of numbers with the right of extraterritorial use.

Article 93(6)

Art. 93(6) EECC provides that ‘*Member States shall promote over-the-air provisioning, where technically feasible, to facilitate switching of providers of electronic communications networks or services by end-users, in particular providers and end-users of machine-to-machine services*’.

What is meant by ‘promote’? Recital (249) does not really elaborate on the Commission’s expectations for promoting OTA, save that MS ‘should strive to ensure technology neutrality in promoting over-the-air provisioning’. What is the Commission’s expectations of best practice promotion of OTA? Are there any e.g. consultants’ reports or other material in the public domain that you could point me to.

Reply

The obligation in Article 93 (6) (“promote”) leaves a wide margin of flexibility to Member States when transposing and implementing Art. 93(6). As such, this provision does not require transposition in their national legislation or via secondary technical provisions. However, Member States are required to take measures to promote “over-the-air provisioning”. This may imply the adoption of measures encouraging such use, either through binding measure or through soft law (e.g. publishing best practice, policy orientations) with the stated aim to “promote” OTA. At the

same time, maintaining or introducing national legislation that impedes the deployment of OTA would be contrary to Article 93 (6) of the Code.

We are not aware of any consultants' reports or other material in the public domain on that issue.

Article 93(6)

EECC Article 93(6) states that "without prejudice to Article 106, Member States shall promote over-the-air provisioning, where technically feasible, to facilitate switching of providers of electronic communications networks or services by end-users, in particular providers and end-users of machine-to-machine services."

The Commission on an earlier occasion has pronounced regarding the interpretation of Article 93(6) that "the obligation in Article 93(6) ("promote") leaves a wide margin of flexibility to Member States when transposing and implementing Art. 93(6). As such, this provision does not require transposition in their national legislation or via secondary technical provisions. However, Member States are required to take measures to promote "over-the-air provisioning". This may imply the adoption of measures encouraging such use, either through binding measure or through soft law (e.g. publishing best practice, policy orientations) with the stated aim to "promote" OTA. At the same time, maintaining or introducing national legislation that impedes the deployment of OTA would be contrary to Article 93 (6) of the Code."

To promote over-the-air (OTA) provisioning, we are considering introducing binding measures for providers of machine-to-machine (M2M) services where they will be obliged to inform end-users whether they offer OTA switching of providers of M2M services before formation of contract. The intention is that end-users should be able to make decisions based on an informed choice.

Does the intention of EECC Article 101(1) prevent Member States from making national rules imposing binding measures for providers of M2M services to inform end-users whether they offer OTA switching of providers of M2M-services as a mean to implement EECC Article 93(6)?

Reply

1. Article 93(6) mandates Member States to promote over-the-air provisioning to facilitate switching of providers of electronic communications network or services, in particular providers and end-users of M2M services, without prejudice to Article 106. It would therefore be helpful that the end-users and providers of machine-to-machine (M2M) services are informed whether OTA provisioning of numbers is available.

The electronic communications services do not include machine-to-machine services (applications) as such, but services consisting wholly or mainly in the conveyance of signals, these include *transmission services* used for the provision of M2M services.

Article 101(1) prevents Member States from maintaining or introducing in their national law end-user protection measures diverging from Articles 102 to 115. If the aim is to introduce binding measures on informing end-users on the transmission services used for the provision of M2M services it should be noted that these are excluded from the scope of Article 102 (Information requirements for contracts) or 103 (Transparency, comparison of offers and publication of information). Therefore, Member States may not introduce in their national law provisions, which would expand the scope of the said Articles to this category of ECS.

Article 96

Article 96

1. Member States shall ensure that end-users have access free of charge to a service operating a hotline to report cases of missing children. The hotline shall be available on the number '116000'.

‘Harmonised service of social value’ is a service meeting a common description to be accessed by individuals via a freephone number, which is potentially of value to visitors from other countries and which answers a specific social need, in particular which contributes to the well-being or safety of citizens, particular groups of citizens or helps citizens in difficulty.

Given the definition of harmonized service stated in Decision 2007/116/EC, should we keep understanding that all 116 numbers are free to the caller or that is now restricted to the number 116000?

Note: According to Article 96, the number 116111 is not referred as free to the caller (national level) along with the other numbers included in Decision 2007/116/EC.

Reply

Decision 2007/116/EC remains in force after the EECC becomes applicable in the Member States, i.e. after 21 December 2020. Therefore, the definition of harmonised service of social value provided therein remains valid, and numbers specified in the annex to the decision shall be provided as freephone numbers.

Article 96 EECC refers specifically to two numbers from the ‘116’ range, i.e. missing children hotline (116000) and child helpline hotline (116111) and further details obligations of the Member States in reference to services provided with the use of the said numbers.

As regards 116111 number, Article 96 specifies that the Member States and the Commission shall ensure that end-users are adequately informed of the existence and use of services provided under this number, where appropriate.

End-user rights

Title III affords protections to end-users. In certain cases, these protections are specifically limited to microenterprises, small enterprises and not-for-profit organisations. Where protections apply generally to “end-users” without this limitation, we do not interpret such provisions as allowing any discretion for a Member State to limit the application of the protections to smaller enterprises and on this basis, we believe the protections will apply to larger enterprises [for example a medium-sized enterprise as referred to in Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36) and enterprises that are larger in size than this]. Examples of protections afforded to end-users that would extend to larger enterprises include Article 103 (comparison tool, public interest information), Article 104 (publication of information on quality of service), Article 105(3), (4) and (6) (regarding contract duration and termination) and Article 106(1) (switching).

Is it intended that larger enterprises will benefit from these and other protections afforded to ‘end-users’?

Reply

Some provisions in the EECC Title III apply to all end-users, i.e. consumers and other users. Some are limited to consumers or consumers and end-users that are microenterprises, small enterprises or not-for-profit organisations (unless they have explicitly agreed to waive).

On the Articles that are referred to:

Article [103\(2\)](#) rules that end-users have access to the comparison tool. While all end-users are to have access to the tool, the comparison of prices possibility in the comparison tool between offers in Article 103(3)h is specified to cover only comparison of offers available to consumers (unless Member States require to cover offers also available to other end-users). Of course, all end-users have access also to this facility.

Article 104(1) differentiates between end-users and consumers. Pursuant to the Article, information on QoS is to be addressed to end-users, whereas providers may also be required to inform consumers if the quality of their service depends on any external factors.

Article 105(4) and 105(6) provisions on rights regarding contract termination apply to all end-users, i.e. consumers and other users. However, for transmission services used for M2M, Article 105(7) limits the scope by excluding other end-users than consumers, microenterprises, small enterprises or not-for-profit organisation from benefiting from these rights.

Article 106(1) covers end-users.

According to Article 101 on the level of harmonisation Member States shall not maintain or introduce in their national law end-user protection provisions diverging from Article 102 to 115, including more, or less, stringent provisions to ensure a different level of protection, unless otherwise provided for in this Title (Title III). This applies also to the provisions on scoping to end-users or its limitations.

Which accessibility provisions are applicable before transposition of Directive 2019/882/EU (transposition deadline 28 June 2022, and, - respectively before the end of the transposition period in art 32 (28 July 2025)?

Reply

The general obligation on ensuring equivalent access and choice for end-users with disabilities, as in the current framework (Directive 2002/22), is maintained and strengthened in the EECC. The requirements are to be specified by competent authorities. According to recital 297 such requirements can include that providers ensure that end-users with disabilities take advantage of their services on equivalent terms and conditions. In addition, recital 298 explains the requirements that the EECC imposes in addition to the European Accessibility Act (“Union law harmonizing accessibility requirements for products and services”). The EAA is in force but before its application deadline it is up to the Member States whether they would already use or benefit from the EAA requirements in the context of the EECC end-user rights provisions.

Article 98 (recital 259)

What type of organisations does the concept of not-for-profit organisation include?

Reply

EECC does not define not-for-profit organisations, which are defined in the national law. (Recital 259 EECC refers to “not-for-profit organisations as defined in national law”).

Article 98

Should the articles of the Directive which apply to micro and small enterprises apply to micro and small enterprises as defined in the 2003 Recommendation, or are the Member States free to determine the type of undertaking to which these Articles apply?

Reply

In accordance with the principle of proportionality, a number of provisions on end-users rights (Title III of the European Electronic Communications Code, EECC) should not apply to microenterprises, which provide only number-independent interpersonal communications services (Article 98). On the other hand, the rationale of the Code is to provide, to a certain extent, micro, small and not-for-profit organisations with the same level of protection ensured to consumers, because they are in the same position of inferiority in the negotiation, due to their limited bargaining power.

The definition of micro and small enterprises is included in the Commission recommendation 2003/361 and this is also the one referred to in the EECC recital 68. This is the generally applied definition and its application is mandatory in a number of EU schemes or programmes. Directive 2013/34 is applied for accounting and is specific in its scope.

The thresholds for the micro or small enterprises category (to benefit from the EECC exemption or additional protection as applicable) are lower in Directive 2013/34 than in the Commission recommendation of 2003. Choosing to apply the Directive 2013/34 definition, instead of the Commission recommendation from 2003, would exempt more micro and small enterprises from the EECC's planned micro and small enterprises scope.

However, the EECC does not harmonise the definition of micro and small enterprises, and Member States can only be invited to apply the SME Definition therein, also in the case of applying the EECC provisions.

Article 99

Article 99

Article 99 is silent on how non-discrimination is to be monitored/enforced. How does the Commission envisage this Article to work in practice, and how should it be enforced?

Reply

The Article prohibits discrimination based on nationality or the country of residence. In case a particular measure is found to infringe Article 99, the legal consequences are falling under national law. A NRA can take the matter up and enforcement can also be private, e.g. a consumer takes legal action. As with other EU law, there are different ways for redress⁴. The Services Directive 2006/123/EC has a similar Article on non-discrimination.

Article 101

Article 101

Article 101 EECC reads: "*Member States shall not maintain or introduce in their national law end-user protection provisions diverging from Articles 102 to 115 EECC*". Articles 102 to 115 do not contain rules on premium rate services. In the light of recital 257 which reads: "*Member States should be able to maintain or introduce national provisions on issues not specifically addressed in this Directive*" could national provisions that regulate this specific issue be kept, such as detailed transparency requirements (i.e. information on price that must be given before charging), provisions on charging mechanism and provisions on ways of termination of services, provisions on marketing, provisions on interim measures (blocking access to premium rate service)?

Reply

It is not possible to give a positive or negative answer without additional details on the specific issues related to premium rate services.

In general, detailed pre-contractual information requirements are given in Annex VIII (Article 102) and related to transparency in Annex IX (Article 103) of EECC. Furthermore, Annex VI includes provisions of additional facilities, also related to control of expenditure. Art 115(2) notes that Member States may go beyond the list of Annex VI when applying Article 115(1) to ensure a higher

⁴ https://ec.europa.eu/info/about-european-commission/contact/problems-and-complaints/complaints-about-breaches-eu-law/how-make-complaint-national-level-0_en

level of consumer protection. As regards fraud or misuse please also see Article 97(2) on access to numbers and services that addresses this.

Furthermore, Art. 102(7) extends the possibility for MS to legislate on (novel) issues not covered by Art. 102. Moreover, Rec. 266 foresees that “[...] Member States should be able to maintain or introduce provisions on consumption limits protecting end-users against ‘bill-shocks’, including in relation to premium rate services and other services subject to particular pricing conditions. This allows competent authorities to require information about such prices to be provided prior to providing the service and does not prejudice the possibility of Member States to maintain or introduce general obligations for premium rate services to ensure the effective protection of end-users.”

Article 101

There have been many proposals for prohibiting pricing of administrative costs for change of the package of services at the same service provider. The Directive 2018/1972/EU does not cover this issue. Therefore, we would like to know if member states can prohibit such practices of service providers in national legislation in light of maximum harmonization in chapter End-user rights?

Reply

The pricing of administrative costs when an end-user requests a change of the package of services with their provider is not covered in the EECC thus is not subject to the full harmonisation principle.

Article 101

May Member States’ legislation prohibit practices of service providers charging administrative costs for change of the package of services at the same service provider?

Reply

The pricing of administrative costs when an end-user requests a change of the package of services with their provider is not covered in the EECC thus is not subject to the full harmonisation principle.

Article 102

Article 102

While detailing the information regarding prices that must be provided to consumers before they are bound by a contract, as well as included in the contract summary template, both annex VIII, part A, point (2) and Article 102(3) refer to ‘prices for activating the electronic communications service’. However, no reference is made to the prices for the installation of the service, which are typically higher than the activation prices. Assuming that the EECC did not mean to exempt service providers from disclosing information on the prices for the installation of the service, and also considering that Article 102(7) only allows Member States to maintain or introduce in their national law provisions relating to aspects not regulated by said article, are the installation prices to be considered as being included in a broader concept of ‘prices for activating the electronic communications service’, in which case Member-States can clarify, in their national law, that the prices for the installation of the service are also to be disclosed to consumers before the contract and included in the contract summary template?

Reply

The “respective prices for activating the electronic communications service” is understood to include also the price of the installation, if the installation is necessary for activating the service. The rationale of Art. 102(3)(c) is to clarify that there are one-off prices (such as “activation” charges) and recurring or consumption based prices. It would be artificial to further semantically distinguish

between various (sub-)charges for various hypothetical steps of the one-off “activation” process. Moreover, the Regulation 2019/2243 (establishing a template for the contract summary) specifies in its annex that the section “Price” shall indicate “Any additional fixed prices such as for activating the service, - - -” .

Article 102(1)

1. Article 102(1) is to be applicable «Before a consumer is bound by a contract or any corresponding offer». What should be considered a corresponding offer that could bound a consumer but does not constitute a contract?
2. Considering the difficulty consumers have proving service providers did not comply with their information obligations and in order to make EECC rules on this matter actually enforceable by consumers, are Member-States at liberty to establish (i) a procedural rule determining that the burden of proof of these obligations lies with the service providers and (ii) a consequence in case they are not able to do so (for example, to not be able to demand compliance with the disputed contract clauses) without violating the maximum harmonization principle?

Reply

1. The term “contract or corresponding offer” is used also in the Directive on consumer rights 2011/83/EU in Articles 5 and 6 on information requirements. A “corresponding offer” is referred in order to address situations of binding offers under national contract law.
2. Procedural rules and consequences are not regulated in Article 102 and do not concern additional information requirements for contracts on which Article 102(7) provision on Member States’ freedom to introduce provisions relating to aspects not regulated by Article 102 could apply. In accordance with the case-law, in the absence of European Union rules governing the matter, it is for the domestic legal system of each Member State, in accordance with the principle of the procedural autonomy of the Member States, to set these rules.

Article 102(1)

Are EECC Article 102(1) and 102(7) only directed to consumers or would it be possible to interpret these two articles to include end-users such as large companies who use M2M services?

Reply

Pursuant to Article 102(2), information referred to in paragraphs 1, 3, 5 shall also be provided to end-users that are microenterprises or small enterprises or not-for-profit organisations. Article 102(7) gives Member States freedom to maintain or introduce provisions relating to aspects not regulated by Article 102. As Article 102 regulates the scope of end-users that benefit from the information requirements for contracts and it explicitly excludes transmission services used for the provision of machine-to-machine services, it cannot be interpreted in a way that would allow introduction of other categories of end-users or the transmission services used for the provision of machine-to-machine services into the Article.

However, as mentioned above, electronic communications services do not include machine-to-machine services (applications) as such, but services consisting wholly or mainly in the conveyance of signals, these include transmission services used for the provision of M2M services.

Article 102

Q.1 Is the sequence as follows (i) the contract summary template is provided in accordance with Article 102(3) prior to the conclusion of the contract; (ii) the contract is concluded / becomes effective only when the consumer has confirmed his/her agreement after receipt of the contract summary; (iii) the consumer is not bound by the contract “or any corresponding offer” until contractual information is provided (as applicable) in accordance with Article 102(1)?

Q2. If provision of the contractual information on a durable medium is not feasible, and the consumer’s attention is expressly drawn to the availability of an easily downloadable document with the relevant information in accordance with Article 102(1), is the consumer bound from the point in time that he / she is made aware of the easily downloadable document? If not, when is the consumer bound?

Q3. Do the consumer’s cooling-off rights under the Consumer Rights Directive run (a) from the time the contractual information required by Article 102(1) is provided or some other time? In the case where provision of the information on a durable medium is not feasible and the consumer’s attention is expressly drawn to the availability of an easily downloadable document, do the consumer’s cooling-off rights run from the time he / she is so made aware or from some other point in time?

Q4. In respect of Article 102(2), what is meant by the term “a contract or any corresponding offer”?

Q5. Article 102(4) states that “The information referred to in paragraphs 1 and 3 shall become an integral part of the contract and shall not be altered unless the contracting parties expressly agree otherwise.”

How should this be interpreted in light of Article 105(4) which states that “End-users shall have the right to terminate their contract without incurring any further costs upon notice of changes in the contractual conditions proposed by the provider of publicly available electronic communications services other than number-independent interpersonal communications services, unless the proposed changes are exclusively to the benefit of the end-user, are of a purely administrative nature and have no negative effect on the end-user, or are directly imposed by Union or national law” ?

Q6. If the information contained in Article 102 paragraphs 1 – 3 is changed for any of the reasons stipulated in Article 105(4) should the end-user be entitled to terminate? What are the implications of information being an “integral part” of the contract in the context of a contract change notification issued to a consumer pursuant to Article 105(4) that results in a change / changes to that information?

Reply

Q1: Article 102(1) foresees that certain information should be provided to the consumer “before [the latter] is bound by a contract”. The wording in Art. 102(3) is provide the contract summary “prior to the conclusion of the contract”. The EEC does not set a “sequence” for the provision of these items. Art. 102 does not preclude the transfer of the abovementioned information and summary simultaneously.

Q2: Pursuant to Art. 102 (Information requirements for contracts) providers of publicly available ECS are obliged to provide information referred to in Articles 5 and 6 of Directive 2011/83 (Consumer rights Directive) and the information listed in Annex VIII before a consumer is bound by a contract. Alternatively, if the provision on a durable medium is not feasible, and a provider has expressly drawn the consumer’s attention to the availability of an easily downloadable document, the aforementioned condition is deemed to be fulfilled. Prior to the conclusion of the contract, the providers shall also provide the contract summary. If all of these conditions are met, the contract

may be concluded. When the contract is considered concluded and when the consumer is bound is a matter of civil law.

Q3: The start of the right of withdrawal period for distance or off-premises contracts is specified in Article 9 of Directive 2011/83. In the case of service contracts the withdrawal period starts after the day of the conclusion of the contract. Directive 2011/83 and the EECC do not specify the moment of conclusion of the contract, which is for the national law to define, but details the information to be provided to the consumer “before [the latter] is bound by a contract” and “prior to the conclusion of the contract”.

Q4: The term “contract or corresponding offer” is used also in the Directive on consumer rights 2011/83/EU (Consumer rights Directive) in Articles 5 and 6 on information requirements. A “corresponding offer” is referred to in order to address situations of binding offers under national contract law.

Q5: The change of the contract and the right to terminate have to be considered separately.

Article 102(4) confirms the general principle of agreed contracts, “pacta sunt servanda”. Any change to the terms and conditions agreed may take place if both parties agree.

In this respect, Article 105(4) rules specifically on the right to terminate the contract upon notice of changes in the contractual conditions. Providers shall notify end-users at least one month in advance of any change in the contractual conditions. Unless the proposed changes are exclusively to the benefit of the end-user, are of purely administrative nature and have no negative effect on the end-user, or are directly imposed by Union or national law, the end-user has the right to terminate the contract.

Q6: Please also see the reply to the question above.

Information referred to in paragraphs 1 and 3 of Article 102 become an integral part of the contract. According to Article 105(4), providers shall notify end-users at least one month in advance of any change in the contractual conditions. This applies irrespective of whether the amendment gives rise to a right to terminate the contract. Unless the proposed changes are exclusively to the benefit of the end-user, are of purely administrative nature and have no negative effect on the end-user, or are directly imposed by Union or national law, the end-user has the right to terminate the contract. Hence, some of changes to information referred to in Article 102 paragraphs 1 and 3 will not give end-users the right to terminate their contract on basis of the EECC.

Article 102

If a consumer cannot conclude a contract until they have received a contract summary template (CST) and a consumer only receives the Article 102(1) information after concluding the contract (but before it becomes binding on the consumer), how can a provider be compliant with his obligations to provide a contract summary template prior to a contract being concluded if both documents are sent simultaneously? How could a consumer be in receipt of a CST and the contractual information simultaneously?

Reply

Article 102(4) rules that information referred to in paragraphs 1 and 3 of Article 102 shall become part of the contract. For the contract summary there is an exception: the summary *may be provided* after the contract is concluded, but before the contract becomes effective. This is only because the summary summarises what is already provided in the contract. The contract may not be concluded without the information in Article 102(1), because that contract, if concluded, becomes binding in most cases on the parties.

The contract summary does not determine the actual conclusion of a contract. It can be provided without contract conclusion for information purposes. The aim of the summary is to help end-users to compare between service offers. The wide availability of the summaries, before conclusion of a contract, fulfils this purpose. The EEC Art 102(3) also allows providing the summary “thereafter” (of the conclusion) for objective technical reasons and rules that “the contract shall become effective when the consumer has confirmed his or her agreement after reception of the contract summary”.

Article 102(3)

Does anything speak against an obligation for providers to make their contract summary templates for all of their products available on their websites and in their points of sale as information prior to the conclusion of a contract?

Reply

Indeed, the aim of the summary is to help end-users to compare between service offers. The wide availability of the summaries, before conclusion of a contract, fulfils this purpose. Please note that Art 102(3) or the implementing regulation 2019/2243 do not require consumer’s details to be filled in.

NOTE: Questions and answers on the contract summary template are at <https://ec.europa.eu/digital-single-market/en/faq/question-and-answers-contract-summary-template>

Article 102(7)

Article 102 (7) reads: “Member States shall remain free to maintain or introduce in their national law provisions relating to aspects not regulated by this Article, in particular in order to address newly emerging issues.” As regards distance contracts, paragraph 3 of Article 102 regulates only the moment when the contract shall become effective. Could we provide in national law some additional requirements for distance contracts that emerge in practice?

Reply

Distance contracts are covered by the consumer rights directive 2011/83 (see Chapter III), which provides that Member States shall not maintain or introduce, provisions diverging from those in that Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided in that Directive.

Article 102

Should the contract summary be given to the consumer on a durable medium?

Reply

The contract summary as foreseen in Article 102(3) needs to be provided “in accordance with paragraph 1” of Article 102, which requires the use of a durable medium or an easily downloadable document, where provision on a durable medium is not feasible.

Article 102 and Annex VIII

Does the EEC allow a level of detail to be imposed for information on the terminal equipment price in the case of the application of (v) (2) (B) of Annex VIII? Does the EEC allow (or allow the imposition of) such information at the advertising stage?

Reply

The EECC Annex VIII requires that before a consumer is bound by a contract the information listed in Annex VIII is given. Annex VIII B(2)(v) requires (for any recurring charges) that for bundles the price of the individual elements of the bundle is given to the extent they are also marketed separately. Furthermore, Article 105(6) refers to the *pro rata temporis* value of the terminal equipment as agreed *at the moment of the conclusion of the contract*.

The EECC rules on information to be given before a consumer is bound by a contract (Art 102 and Annex VIII) and on transparency of terms and conditions of services (Art 103 and Annex IX). The EECC does not rule on information that is given in marketing.

Article 103

Article 103(3)

Do you consider that a comparison tool managed by the NRA with tariff information on-line uploaded by the providers, the comparison tool is considered to be compliant with the obligation, set in Article 103(3.a), of being “operationally independent from the providers of such services, thereby ensuring that those providers are given equal treatment in search results”?

Reply

Article 103(3) provides for the requirements that the comparison tools should meet. Letter (b) requires that the tool clearly discloses the owners and operators of the comparison tool. Recitals 267 and 268 provide for additional clarifications. In light of these criteria, it would appear that a tool is not independent if it is not operationally independent from providers or if contractual relations with providers have an impact on the list of the results delivered to the end-users. In our view, if requiring providers to upload their tariff information in a tool managed by the NRA is done in a way that ensures equal treatment, the tool can be considered as being independent.

Article 103(3)

Is there an obligation under Article 103(3) that at least one market comparison tool be certified by a national regulatory authority?

Reply

Art. 103(3) foresees that a comparison tool fulfilling the requirements in points (a) to (h) of Art. 103(3) shall, upon request by the provider of the tool, be certified by competent authorities in coordination, where relevant, with national regulatory authorities. Hence, it is an option (i.e. a right to request) but not an obligation that a comparison tool is certified. Absent a request from a provider of the tool, Member States cannot make certification mandatory. On the other hand, under Article 103 (2), at least one independent comparison tool has to be made available, which meets the requirements a) to h) in Article 103 (3).

Article 103

1. Article 103(1) establishes that competent authorities in coordination, where relevant, with national regulatory authorities may specify additional requirements regarding the form in which information referred to in Annex IX is to be published. On this matter, recital (265) states as follows: «In order to allow them to make price and service comparisons easily, competent authorities in coordination, where relevant, with national regulatory authorities should be able to require from providers of internet access services or publicly available interpersonal communication services greater transparency as regards information, including tariffs, quality of service, conditions on terminal equipment supplied, and other

relevant statistics.» In this context, can competent authorities (in coordination, where relevant, with national regulatory authorities) be allowed to, for example, detail the type of elements to be included by service providers under each category indicated in annex IX (for example, establishing that information regarding customer assistance services must include, along with the contact details, the prices of the calls to the telephone numbers provided)?

2. Where a comparison tool is made available and managed by an NRA, are Member-States at liberty to obligate service providers to upload the relevant information into that tool free of charge and within a certain time limit without violating the maximum harmonization principle?
3. Article 103(2) establishes that «Competent authorities shall, in coordination, where relevant, with national regulatory authorities, ensure that end-users have access free of charge to at least one independent comparison tool which enables them to compare and evaluate different internet access services and publicly available number-based interpersonal communications services, and, where applicable, publicly available number-independent interpersonal communications services, with regard to: (a) prices and tariffs of services provided against recurring or consumption-based direct monetary payments; and (b) the quality of service performance, where minimum quality of service is offered or the undertaking is required to publish such information pursuant to Article 104». On the other hand, article 103(3)(h) establishes that this comparison tool shall «include the possibility to compare prices, tariffs and quality of service performance between offers available to consumers» and, only if required by Member States «between those offers and the standard offers publicly available to other end-users». Should the comparison tool in question apply to all offers available to end-users or only to those available to consumers?
4. Article 103(2)(b) defines that the tool shall include the quality of service performance, where minimum quality of service is offered or the undertaking is required to publish such information pursuant to Article 104. According to this article 103(2): does “such information pursuant Article 104” refer only to the information on “minimum quality of service” published pursuant that article or does it refer to any information on quality of service which is published pursuant the same article. To note that according to article 104 “Where appropriate, the parameters, definitions and measurement methods set out in Annex X shall be used.”. However, pursuant the Annex X of the Code, at least for the parameters to be measured according to the ETSI Guide, the providers will not publish information on minimum quality of service. For example, according to the ETSI Guide mentioned in Annex X (https://www.etsi.org › etsi_eg › eg_20205701v010301p), the quality of service parameters are never defined as minimum quality of service parameters. They are, instead, mostly average quality of service parameters or percentiles other than 100 (e.g. percentiles 80, 95, etc). For example, the measurements for the parameter “Fault repair time for fixed access lines” are, according to the ETSI Guide, the following: a) the time by which the fastest 80 % and 95 % of valid faults on access lines are repaired (expressed in clock hours); b) the percentage of faults cleared any time stated as an objective by the service provider; c) provision of information on the hours during which faults may be reported. Annex X of the Code also establishes that for example this parameter (fault repair time) shall allow for performance to be analyzed at a regional level (namely, no less than level 2 in the Nomenclature of Territorial Units for Statistics (NUTS) established by Eurostat).

Reply

1. Article 103(1) establishes that additional requirements may be specified regarding the form in which such information is to be published, namely the modalities in which such information is to be made available. In line with Article 101 on the level of harmonisation, additional, more stringent obligations regarding the categories of information in Annex IX

cannot be introduced. However, please note that the examples provided on requiring including the contract details and the prices of the calls to the telephone numbers provided seem to be covered under Annex IX points 2.3 and 2.2 respectively.

2. Directives leave to the Member States the choice of form and methods to achieve the objectives foreseen in that act. From this perspective the aspects on uploading information into a tool and within a certain time limit concern the methods to achieve the obligations in Article 103(2) of ensuring that end-users have access to at least one independent comparison tool.
3. Article 103(2) rules that end-users have access to the comparison tool. While all end-users are to have access to the tool, the comparison of prices possibility in the comparison tool between offers in Article 103(3)h is specified to cover only comparison of offers available to consumers (unless Member States require to cover offers also available to other end-users). Of course, all end-users have access also to this facility.
4. Article 103(2)(b) covers both situation in which the minimum QoS is offered and when the undertaking is required to publish information on QoS parameters pursuant to Article 104 (which does not need to be on minimum QoS but depending on the parameter may be measured e.g. by percentage or provided as a mean value). In both those cases relevant information on the quality of service performance should be included in a comparison tool and available for end-users to compare.

Article 104

1. Article 104(1) determines that the NRA, in coordination with other competent authorities, may require providers of internet access services and of publicly available interpersonal communications services to publish information for end-users on the quality of their services. Recital 271 clarifies that NRA or other competent authorities should be able to require the publication of such information 'where it is demonstrated that such information is not effectively available to the public'. Would it be considered to violate the full harmonization obligation a solution where the MS, through its legislative body, directly establishes the obligation to publish the information to which article 104(1) refers by service providers, instead of leaving that option to the NRA?

2. Article 104(1) refers to end-users on the first sentence of §1 [«(...) may require providers of internet access services and of publicly available interpersonal communications services to publish comprehensive, comparable, reliable, user-friendly and up-to-date information for end-users (...)»] but to consumers on the next [«(...) may also require providers of publicly available interpersonal communication services to inform consumers (...)»]. Should this paragraph be applicable to all end-users in what comes to the information to be published, but only to consumers in what regards the potential reliance of QoS on external factors?

3. Considering that Article 104 is merely a transparency provision, can we assume that the EECC does not extend to the subject matter of minimum material QoS levels, in which case MS are at liberty to establish their own material rules on this matter, where appropriate, or enable the NRA to do so, without violating the full harmonization principle? Are MS at liberty to require providers to compensate end-users in case of non-compliance with contracted QoS levels?

4. Considering that Article 104 refers only to technical QoS requirements, as previously clarified by the Commission, can we assume from the fact that the EECC does not extend to other types of QoS levels – namely regarding complaints handling procedures, fulfilment of set up or repair appointments, etc. – that MS are at liberty to require service providers to commit to other non-technical QoS requirements?

5. In Annex X, note 2 mentions two parameters. However, this note seems to only be associated with one specific parameter («unsuccessful call ration»), as well as with the title of the first column

of the second table of the annex («Parameter»). Would the other parameter to which note 2 refers be «call set up time», in line with the current USD?

Reply

1. The addressee of Article 104(1) is a national regulatory authority, which pursuant to the disposition of the said provision may require providers of IAS and publicly available ICS to publish information for end-users on the quality of their services. Therefore, while transposing Article 104(1) to its national laws, Member States should ensure that NRAs are empowered to implement the disposition of the said article. At the same time, recital 271 clarifies that NRA or other competent authorities should be able to require the publication of such information in certain circumstances, i.e. where it is demonstrated that such information is not effectively available to the public. Should a MS, however, through its legislative body, directly establish the obligation to publish the information, instead of leaving that option to the NRA, this would exclude the prior assessment of the factual situation by the NRA (“where it is demonstrated that such information is not effectively available to the public) and hence a priori exclude the NRA’s prerogative. Such “reduction to zero” of a prerogative is not covered by Art. 104(1) as the legal base. Moreover, in such a case, the legislator would pre-empt the powers of the regulator and would act as one and therefore has to meet the criteria to be considered a national regulatory authority. However, as explained in recital 37 EEC “Such outside influence makes a national legislative body unsuited to act as a national regulatory authority under the regulatory framework”.

2. Yes, Article 104(1) differentiates between end-users and consumers. Pursuant to the Article, information on QoS is to be addressed to end-users, whereas providers may also be required to inform consumers if the quality of their service depends on any external factors.

3. Article 104 is a transparency provision and the EEC does not indicate minimum QoS levels to be ensured by ECS providers. Providers of publicly available ECS other than transmission services used for the provision of M2M services are required to provide information on the main characteristics of each services provided, including any minimum QoS levels where offered (pursuant to Article 103(1) and Annex IX(2.1)) as well as on any compensation and refund arrangements, including, where applicable, explicit reference to rights of consumers, which apply if contracted levels of quality of service are not met (Article 102(1) and Annex VIII(a)(4)).

Article 101 does not limit the liberty of MS to establish rules under national law on matters not covered by Articles 102-115, where appropriate, or enable the NRA to do so. Therefore, MS are at liberty to require providers to compensate end-users in case of non-compliance with contracted QoS levels, which is further confirmed in Article 105(5) and, on IAS, in Article 4(4) of Regulation 2015/2120.

4. As previously explained, the addressee of Article 104(1) is a national regulatory authority, which pursuant to the disposition of the said provision may require providers of IAS and publicly available ICS to publish information for end-users on the quality of their services. In accordance with Article 104(2) the QoS parameters to be measured shall be specified by the NRA in coordination with other competent authorities. As Art. 104(2) does not distinguish between technical and non-technical QoS parameters. NRAs are at liberty to specify the type of QoS parameters to be measured themselves, although, where appropriate, they shall follow Annex X and the BEREC guidelines. On the other hand, as explained earlier, MS in turn are not at liberty to require service providers to commit to other non-technical QoS requirements, as otherwise this would exclude the mentioned NRAs’ prerogative. Such “reduction to zero” of a prerogative is not covered by Art. 104(1) as the legal base.

5. Note 2 states that “Member States may decide not to require up-to-date information concerning the performance for those two parameters to be kept if evidence is available to show that performance in those two areas is satisfactory”. Logically, the note should refer to two

parameters only, one of which is indicated explicitly («unsuccessful call ration»), whereas the latter shall be among the parameters indicated in table 2 as note 2 is associated the title of the first column of the second table of the annex. Given the fact that Annex X corresponds with Annex III of the USD which identifies the «call set up time» as the second parameter associated with note 2, it can be assumed that indeed note 2 should refer to this parameter.

Article 104(1)

Are the quality of service measures that we may require providers to publish under Article 104(1) limited to technical measures that providers are able to collate on their own performance (such as those in Annex X), or could it include broader measures of quality of service such as customer complaints figures or the results of customer surveys, e.g. for overall customer satisfaction, satisfaction with complaint handling, net promoter scores etc.?

Reply

These measures relate to technical measures, the same as its predecessor, Article 22 USD, which requires undertakings to publish information on the quality of their services and on measures taken to ensure equivalence in access for end-users with disabilities. BEREC adopted [guidelines](#) detailing the relevant parameters in March 2020.

Article 104(1)

Article 104(1) EECC reads: *“National regulatory authorities (...) may require providers of internet access services and of publicly available interpersonal communications services to publish comprehensive, comparable, reliable, user-friendly and up-to-date information for end-users on the quality of their services, to the extent that they control at least some elements of the network either directly or by virtue of a service level agreement to that effect, and on measures taken to ensure equivalence in access for end-users with disabilities. National regulatory authorities in coordination with other competent authorities may also require providers of publicly available interpersonal communication services to inform consumers if the quality of the services they provide depends on any external factors, such as control of signal transmission or network connectivity”*. We understand this provision as information requirement as regards the quality of service. Could national law provide requirements for repairs of faults and for possible compensation to end-users?

Reply

Firstly, it needs to be observed that Article 101 provides for full harmonisation of consumer rights and prevents Member States from maintaining or introducing in their national law end-user protection provisions diverging from Art. 102-115. More stringent national consumer protection provisions may be applied until 21 December 2021 only if they were in force on 20 December 2018 and any restrictions to the functioning of the internal market resulting therefrom are proportionate. Secondly, publication of QoS info is not related to breach of contract, Art. 104 is a transparency provision. To that end and concerning the requirement to provide information on repairs of faults and possible compensation to end-users, the information requirement is set in Article 102. Pursuant to Article 102 (Information requirements for contracts) providers of publicly available ECS are obliged to provide information listed in Annex VIII before a consumer (and end-users that are micro and small enterprises and not-for-profit organisations) is bound by a contract. The information shall become integral part of the contract (Art. 102(4)). Annex VIII in part A indicates that information on *“(4) any compensation and refund arrangements, including, where applicable, explicit reference to rights of consumers, which apply if contracted levels of quality of service are not met or if the provider responds inadequately to a security incident, threat or vulnerability”* shall be provided. In

addition, pursuant to Art. 102(7) Member States are free to maintain or introduce in their national law provisions relating to aspects not regulated in the said Article.

Article 104 and Annex X

Provisions relating to fault repair under Art 104(2) and Annex X. We intend to treat all fault reports equally, regardless of whether the fault occurs e.g. in an ongoing contractual relationship or during the switching process. Since the Code does not expressly regulate the fault report/fault repair procedure, we think that we are free to make specifications. That would for example mean that we introduce a fault repair procedure and sanctions for (any) missed service and installation appointments those covered in Article 106 para 8 EECC with regard to the switching process but also any other missed service appointments that occur outside the switching process. Otherwise, we find it difficult to explain to a customer why he is treated differently depending on the reason why he scheduled the service appointment. Is the procedure we envisage in your view in line with the Code?

NEW UPDATED REPLY

Reply

UPDATED: Article 106(8) rules that Member States shall lay down rules on the compensation of end-users in the case of failure of a provider to comply with the obligations laid down in Article 106, as well as in the case of delays in, or abuses of, porting and switching process, and missed service and installation appointments.

UPDATED: Following a further analysis of the discussions which took place during the legislative process, and taking into account the overall scope of Article 106 and the explanations provided in recital (282), it should be read that this provision relates to compensation to missed service and installation appointments in the porting and switching context, and it does not cover missed appointments outside the porting and switching process.

UPDATED Member States would be free but not obliged to legislate on the consequences of other missed appointments, taking into account and as long as this would be in compliance with other Union law, when relevant.

Article 104 is a transparency provision enabling NRAs in coordination with other CAs to require providers to publish information for end-users on the quality of their services. When specifying the QoS parameters to be measured, NRAs in coordination with other CAs shall take utmost account of BEREC guidelines. Furthermore, parameters, definitions and measurement methods set out in Annex X shall be used where appropriate. Annex X contains a “fault repair time” parameter, together with the definition and measurement method (as defined in ETSI EG 202057). The relevant BEREC guidelines adopted in March 2020 confirm that the ETSI standard should be used. However, the standard does not specify the fault repair procedure.

UPDATED: The EECC does not cover fault repair procedures, apart from requiring Member States to lay down rules on the compensation of end-users on missed service and installation appointments ***in the porting and switching context.***

Article 104

1) Do the QoS parameters and measurement methods indicated in this Article have to be followed or is it possible to deviate from them.

2) Which providers will be covered by the requirement (i.e. how to interpret “control at least some elements of the network either directly or by virtue of a SLA to that effect” - does Art. 104 apply to OTTs or not?);

Reply

1) Art. 104 entitles NRAs (‘NRAs may...’) to require providers to publish certain pieces of information, which are to be specified by NRAs (‘NRAs shall...’) taking utmost account of the BEREC guidelines. Art 104(2) states that Annex X shall be used where appropriate, which – in comparison to the current practice based on the wording of Art. 22(2) last phrase USD (“could be used”) – allows for a limited variability. It does not completely exclude possibility of deviation if the said parameters/definitions/measurement methods are deemed inappropriate (e.g. if the standard was updated and newer version is available, if a new standard was developed; if no standard for a particular issue is provided in Annex X). Furthermore, paras. 1 and 2 of Art. 104 should be read together, i.e. NRAs have discretion (“may”) to require operators to publish under 104(1), but if they decide to do so then NRAs have to (“shall”) decide the parameters, and use Annex X and BEREC Guidelines. The fact that provided information is to be comparable (as stated in para 1) and that the Code aims at reaching full harmonisation of consumer rights support this understanding.

2) Art. 104 refers to “*providers of IAS and publicly available ICS (...) to the extent that they control at least some elements of the networks either directly or by virtue of a SLA to that effect*”. The question of application of this provision to particular providers is of a practical nature – if a particular ICS provider neither controls any network element nor has a SLA to that effect, it is not required to publish information on QoS parameters. Hence, in case of a dispute on the scope of application to a particular ICS provider, the practical enforcement of that obligation might entail NRAs having to assess service level agreements. At the same time, all ICS providers may be required to inform consumers if the QoS they provide depends on external factors.

Article 105

Article 105(1)

Article 105(1) establishes that «contracts concluded between consumers and providers of publicly available electronic communications services other than number-independent interpersonal communications services and other than transmission services used for the provision of machine-to-machine services, do not mandate a commitment period longer than 24 months», adding that «Member States may adopt or maintain provisions which mandate shorter maximum contractual commitment periods». Given that this rule applies only to the maximum duration of the commitment period, are Member States at liberty to obligate service providers to also make available other offers of shorter commitment periods (for example, service providers cannot establish commitment periods longer than 24 months and must also make available alternative offers of 12 months, 6 months and no commitment period for consumers to choose from)?

Reply

Article 105(1) establishes that Member States may adopt or maintain shorter maximum contractual commitment periods. Recital 273 explains that Member States should have the possibility to maintain or introduce provisions for a shorter maximum duration. Art 105 does not introduce a possibility to mandate an obligation to offer various maximum contractual commitment periods and in line with Article 101, Member States shall not maintain or introduce more, or less, stringent provisions to ensure a different level of protection.

Article 105(3)

1. Article 105(3) refers to automatic prolongation of fixed duration contracts and establishes, among other things, that service providers shall give end-users best tariff advice relating to their services before the contract is automatically prolonged. This provision also establishes that service providers shall provide end-users with best tariff information at least annually. Does this obligation to provide end-users with annual best tariff information apply only to fixed duration contracts that can be automatically prolonged, adding to the obligation to provide this information before the contract is prolonged?

2. Article 105(6) establishes that where an end-user has the right to terminate a contract before the end of the agreed contract period pursuant to the EECC or to other provisions of Union or national law, no compensation shall be due by the end-user other than for retained subsidised terminal equipment, adding that where the end-user chooses to retain subsidised terminal equipment bundled at the moment of the contract conclusion, any compensation due shall not exceed its pro rata temporis value as agreed at the moment of the conclusion of the contract or the remaining part of the service fee until the end of the contract, whichever is the smaller.

a. Does this provision apply to equipment that was already bought by the end-user – either paid in full or in instalments – or to leased equipment property of the service provider? If for leased equipment, is it to be applied only where the provider gives the end-user the option to buy it or should that option always be available?

b. Assuming «the remaining part of the service fee until the end of the contract» means the monthly price for the provision of the service associated with the equipment multiplied by the number of months until the end of the agreed upon contract duration, does this monthly price encompass every service in a bundle, where the equipment was bought in that context? Please note that currently providers don't always specify a price for each of the elements in a bundle.

Reply

Article 105(3) is on automatically prolonged fixed duration contracts and the requirement on giving best tariff information at least annually is also related (only) to these contracts. This adds to the obligation on giving best tariff advice before the contract is automatically prolonged.

a. Article 105(6) refers to terminal equipment that was “bundled at the moment of the contract conclusion”, hence equipment bought prior to that moment would normally not be considered to be “provided or sold by the same provider under the same or a closely related or linked contract” (see recital 283). If, however, the “equipment that was already bought by the end-user – either paid in full or in instalments” would fulfil this mentioned criteria of recital 283 (provided or sold by the same provider under the same or a closely related or linked contract), it would fall within the scope of Article 105(6).

Article 105(6) does not oblige providers to give an option to end-users to buy the leased equipment. The provision applies only when equipment is bought by the end-user or where a provider gives an option to buy the equipment.

b. The service fee means the (typically monthly) fee set together with the terminal equipment. Given that Art. 107(1) extends the rights under Art. 105(6) to all elements of the bundle, Article 105(6) does not require the referred service fee to be linked to a specific element in a bundle. It is to be noted, however, that the comparison (“whichever is smaller”) is to be made with the pro rata temporis value of the bundled terminal equipment.

Article 105(3)

What is the correct interpretation of “auto prolonged” contract for the purpose of Article 105? Is it the case that the final sentence of Article 105(3) “*Providers shall provide end-users with best tariff*”

information at least annually” is confined to situations of auto-prolonged contracts (rather than being a general obligation to provide best tariff information at least annually to ALL end-users)?

Reply

Article 105(3) refers to “automatic prolongation of a fixed duration contract” without specifying the length of the prolongation or the relation to the duration of the initial contract. However, Article 105(3) is clear in providing that “[...] *end-users are entitled to terminate the contract at any time* [...]” after a fixed duration contract was “auto prolonged”. While the EECC acknowledges the possibility of automatic prolongation of contracts (recital 274) it excludes the assumption that such contracts upon their expiry would automatically become a subsequent contract of the same duration without the right to terminate. A prolongation of the contract to 24 months without the right to terminate at any time is an establishment of a new contract that the end-user would have to explicitly agree to.

Article 105(3) is on automatically prolonged fixed duration contracts and the requirement on giving best tariff information at least annually is also related (only) to these contracts. This adds to the obligation on giving best tariff advice before the contract is automatically prolonged.

Article 105(3)

- (1) The obligation to inform end-users of the end of the contractual commitment and of the means to terminate the contract applies only where national law or a contract provides for automatic prolongation of a fixed duration contract for the specific electronic communications services (ECS) referred to in Article 105(3)?
- (2) The obligation to provide best tariff advice under Article 105(3) applies only where national law or a contract provides for automatic prolongation of a fixed duration contract for the specific ECS referred to in Article 105(3)?
- (3) The obligation to provide best tariff information at least annually applies only where national law or a contract provides for automatic prolongation of a fixed duration contract for the specific ECS referred to in Article 105(3)?
- (4) National law may provide for ‘automatic prolongation of a fixed duration contract’ and may specify when this occurs in a national context?
- (5) The concept of ‘automatic prolongation’ in Article 105(3) does not require that the period for which the contract is automatically prolonged is the same duration as the initial fixed duration?
- (6) A fixed duration contract, of 24 months’ duration for example, may be automatically prolonged on a month-to-month basis following the expiry of the initial 24-month period, if this is provided for in either national law or the contract?

Reply

- (1) Article 105(3) is on automatically prolonged fixed duration contracts and its provisions (including the specific rules on the entitlement to terminate, best tariff advice and best tariff information) are related (only) to these contracts. It could be noted that if the contract is not of fixed duration, the provisions in other paragraphs of Art 105 of course still apply.
- (2) Correct.
- (3) Correct. During the prolongation period of a fixed duration contract, providers shall provide best tariff information at least annually.
- (4) Correct.
- (5) Correct. Article 105(3) refers to “automatic prolongation of a fixed duration contract” without specifying the length of the prolongation or the relation to the duration of the initial contract.

(6) Correct. As stated above, Article 105(3) refers to “automatic prolongation of a fixed duration contract” without specifying the length of the prolongation or the relation to the duration of the initial contract. Article 105(3) is clear in providing that “[...] *end-users are entitled to terminate the contract at any time* [...]” after a fixed duration contract was “auto prolonged”.

Article 105(3)

A consumer is in a 24-month contract for electronic communications service to which Article 105(3) EECC applies. There is no express provision in national law regarding automatic prolongation of fixed duration contracts. The consumer’s contract does not expressly use the term “automatic prolongation” of the fixed duration upon expiry, but rather provides that on expiry of the 24 months, the contract will continue on the same terms and conditions as before but can be terminated on one month’s notice. If not terminated, the contract will continue indefinitely.

Based on this worked example, please confirm whether the following statements are correct:

(A) While the consumer’s contract does continue after the initial 24 month period, because there is no provision in national law providing for “automatic prolongation” and no reference to same in the consumer’s contract, this contract **should not be considered** as “autoprolonged”.

(B) The consumer is therefore **not** entitled to the following:

(i) details of the end of the contractual commitment or the means to terminate the contract near the end of the initial 24 month period,

(ii) best tariff advice at the end of the initial 24 month period,

(iii) best tariff information at least annually after receiving the best tariff advice referred to in (ii).

Reply

(A) In our view the contract has a fixed duration (24 months) and it is automatically prolonged (continues on the same terms and conditions), even if the term “automatic prolongation” is not used. The aim of Art 105(3) is to ensure protection of end-users when contracts of fixed duration are automatically prolonged. The entitlement to terminate the contract at any time with a maximum one-month notice period together with the requirement to provide best tariff information at least annually thus applies after the end of the 24 months.

(B) (i) In our view, as explained above, the contract has a fixed duration, it is automatically prolonged and Art 105(3) applies. The end-user is thus entitled to receive, before the end of the initial 24-month period, information of the means to terminate and best tariff advice.

(ii) As above, the contract has an initial 24-month fixed duration and it is automatically prolonged. Art 105(3) requirement on best tariff advice applies before the end of the initial 24-month period.

(iii) As above, the provider shall provide best tariff information at least annually during the duration of the prolongation.

Article 105(3)

Art 105(3): giving „advice“ regarding best tariffs or „information“ about the best tariff – how should providers do this?

Reply

Art. 105(3) stipulates that providers should “in addition, and at the same time” inform end-users on best tariff advice relating to their services. That means that such best tariff information should be provided in a prominent manner and on a durable medium.

Article 105(3)

Does Article 105(3) on end-of-contract notifications and best-tariff advice, which is subject to full harmonisation, prohibit Member States from setting rules on how bundled mobile services are treated at the end of the initial contract period, i.e. requiring communication providers to move consumers to sim-only deals once handset costs are paid off at the end of the contract period?

Reply

Art 105 applies also to bundles (Art 107(1)) and applies to contracts that provide automatic prolongation of a fixed duration. Art 105(3) requires that before the contract is automatically prolonged, providers shall inform end-users of the end of the contractual commitment and of the means by which to terminate the contract and give end-users best tariff advice. Full harmonisation applies to matters covered in the EECC. In such a case, Member States shall not introduce more or less stringent rules concerning requirements related to automatic prolongation of a fixed duration contract.

Article 105(3)

Article 105(3) establishes that ‘Before the contract is automatically prolonged, providers shall inform end-users, in a prominent and timely manner and on a durable medium, of the end of the contractual commitment and of the means by which to terminate the contract’. In order to ensure legal certainty, as well as the future enforceability of this rule, are Member-States at liberty to substantiate the vague concepts used in this article, namely what should be considered ‘timely’ (e.g. two months before the automatic prolongation of the contract)?

Reply

The question of what is considered “timely” is not a question about the level of end-user protection in relation to the substance of Article 105 and it does not fall into the Article 101 provisions on level of harmonisation. Member States can thus lay down in their national legislation measures to ensure that providers inform consumers in a prominent and timely manner. In practice this would require that the “timely” manner ensures that end-user has sufficient time to change their provider if they so wish.

Article 105(4)

Article 105(4) §2 establishes that ‘Providers shall notify end-users at least one month in advance of any change in the contractual conditions, and shall simultaneously inform them of their right to terminate the contract without incurring any further costs if they do not accept the new conditions’. Considering that this notification shall be sent before any change in the contractual conditions – including those that do not involve a right to terminate the contract, can Member-States assume that the obligation to simultaneously inform end-users of said right is only to be considered where applicable and not always?

In the Commission’s interpretation, are providers obliged to notify end-users of any change in the contractual conditions or should such notification be sent only when there is a right to terminate the contract without incurring in any further costs? Can Member-States assume that changes that are directly imposed by a decision of a competent authorities or NRA fall under the third exception (Union or National Law)?

Reply

Article 105(4) rules that providers shall notify end-users at least one month in advance of any change in the contractual conditions. This applies irrespective of whether the amendment gives rise to a right to terminate the contract. Unless the proposed changes are exclusively to the benefit of the end-user, are of purely administrative nature and have no negative effect on the end-user, or are directly imposed by Union or national law, the provider has to inform at the same time the end-user about the right to terminate the contract. Recital 276 also notes that the provisions on contract termination are without prejudice to other provisions of Union or national law on which contractual terms and conditions can be changed by the provider or by the end-user.

Article 105(4)

a) Is it in line with the EECC if the national legislation grants consumers the right to reject proposed changes of contract terms during the commitment period and demand that the initially agreed upon contract terms be respected until the end of the commitment period? An example of such change: the telecoms provider proposes to raise the monthly subscription price during the commitment period.

b) Does the answer change if the proposed changes fall under one of the exceptions including Article 105(4) of the EECC?

Reply

a) Art. 105(4) EECC provides for a termination right for end-users. It does not exclude a provider's right to propose changes to the contract terms during the commitment period or give end-users the right to the initially agreed contract terms. The end-user, however, has the right to terminate the contract in case the proposed changes do not fulfil the exceptions (for example that the proposed changes are exclusively to the benefit of the end-user) mentioned in Art. 105(4). As to the example, in case the provider proposes to raise the monthly price, the end-user has the right to terminate the contract upon notice of the change, but the end-user does not have a right to demand the original subscription price. Full harmonisation applies as set in Art 101(1), in this case, Member States cannot impose a restriction on the provider and demand that the initially agreed upon contract terms be respected until the end of the commitment period.

b) This applies equally, if the proposed changes fall under one of the exceptions under Article 105(4), except that the end-user does not have the right to terminate the contract in such circumstances.

Article 105(4)

In the event of the disappearance of a SVOD (*subscription video on demand*) channel or service, or in similar cases, are consumers entitled to terminate their subscription on the basis of Article 105(4)?

Reply

Electronic communications services do not cover services that provide content transmitted using electronic communications networks. However, according to Article 107 EECC, if a bundle of services (or a bundle of services and terminal equipment) comprises at least an internet access service or a publicly available number-based interpersonal communications service, Article 105 shall apply to all elements of the bundle.

Article 105(4) EECC provides for a termination right for end-users. It does not exclude a provider's right to propose changes to the contract terms during the commitment period or give end-users the right to the initially agreed contract terms. The end-user, however, has the right to terminate

the contract in case the proposed changes do not fulfil the exceptions (for example that the proposed changes are exclusively to the benefit of the end-user) mentioned in Article 105(4).

As to the example, Article 105 applies in case the SVOD service is part of a bundle of services (Recital 283: provided or sold by the same provider under the same or a closely related or linked contract) that includes an internet access service or a publicly available number-based interpersonal communications service. If the provider modifies the selection of the SVODs (by reducing the selection, which can be considered not to be in the benefit of the end-user), the end-user has the right to terminate the contract upon notice of the change

Article 105(4)

(i) Will the roaming traffic in the UK count for the whole RLAH tariff/FUP caps, applicable within the EU (without the operators' prerogative to have a specific "RLAH/FUP" to UK traffic, similar to the one applied within the EU)?

(ii) Will clients have the possibility for an early termination of the contract if, from 1st January 2021, the operators change their tariff plans due to the cease of the EU RLAH tariff application to the UK? If not, will the operators be obliged to previously inform their clients of the said changes, within the applicable deadline?

Reply

After the end of the transition period (*i.e.* after 31 December 2020), the United Kingdom becomes a third country for the purposes of EU rules on roaming on public mobile communications networks within the European Union (Regulation (EU) 531/2012). This means that outbound roaming traffic to the UK should be treated like any other roaming traffic to countries outside the EEA. It should not count as retail roaming RLAH traffic nor should it be taken into account for FUP limits. The RLAH rules apply for periodic travelling within the Union. The FUP is applicable on EU roaming traffic. Operators are free to handle third country roaming traffic under RLAH conditions, if they chose. However, it should not count against fair use limits for EU roaming. In addition to the RLAH tariffs, operators are free to offer alternative tariffs. In this case, the operator can offer tariffs that include both EU and third country traffic under the same conditions. The above are relevant for the traffic that operators report in the framework of the international roaming BEREC data benchmark reports.

Article 105(4) paragraph 2 of the European Electronic Communications Code (EECC) rules that providers shall notify end-users at least one month in advance of any change in the contractual conditions. Hence, there's an obligation to inform the end-users of the change of tariff plans. Article 105(4) paragraph 1 of the EECC provides that end-users shall have the right to terminate their contract without further costs upon notice of changes in the contractual conditions, unless the proposed changes are exclusively to the benefit of the end-user, are of purely administrative nature and have no negative effect on the end-user, or are directly imposed by Union or national law. After the end of the transition period (*i.e.* after 31 December 2020), the United Kingdom becomes a third country for the purposes of EU rules on roaming on public mobile communications networks within the European Union (Regulation (EU) 531/2012). This means that after that date roaming providers operating in the European Union will no longer benefit, when requesting wholesale roaming access, from the obligation of mobile network operators operating in the United Kingdom to meet all reasonable requests for providing wholesale roaming access (Article 3 of Regulation (EU) 531/2012). They will neither benefit from the EU rules on maximum wholesale roaming charges that visited network operators operating in the United Kingdom may charge for the provision of wholesale roaming services within the European Union (Articles 7, 9, 12 of Regulation (EU) 531/2012). Consequently, they will not have an obligation on the retail market not to levy any

surcharge in addition to the domestic retail price on the roaming customer for the use of roaming services in the United Kingdom (calls made or received, SMS messages sent and data services), subject to fair use (Articles 6a and 6b of Regulation (EU) 531/2012, as well as the Commission Implementing Regulation (EU) 2016/2286). However, they will still be obliged to provide information to their roaming customers travelling to the United Kingdom under the transparency obligations (Article 14 of Regulation (EU) 531/2012 (voice and SMS) and Article 15 of Regulation (EU) 531/2012 (data services)). The end of the "Roam Like at Home" (RLAH) for the UK is not directly imposed by Union or national law because although after the end of the transition period the roaming providers will no longer be obliged to apply this rule, they will not be obliged to stop applying it. The change of tariff plans due to the cease of the EU RLAH tariff application to the UK does thus not fall in the exceptions above and would give end-users the right to terminate their contract under Article 105(4). However, it should be noted that operators may still continue to offer RLAH on a voluntary basis and if the change is exclusively to the benefit of the end-user there is no right to terminate the contract on this basis.

Article 105 (4-6)

a) Besides instances contemplated in Articles 105(4), 105(5), and 105(6) does an end-user have a right to terminate a contract at any time within the contract period (when in his best interest to do so), and what, if any, fees/costs/compensation/charges is a provider allowed to apply?

b) Could early termination charges currently applied in the national context (as described in 1.0), be allowed under the new provisions emanating from the Code?

c) Taking into consideration Recital 273, can Member States abolish the applicability of any termination charges (with the exception of termination charges related to compensate for any retained subsidised terminal equipment, as per 105(6)), including termination charges intended to recover any discounts benefitted by the end-user when opting for a subscription with a minimum contractual period?

Reply

Article 105(6) of the EEC provides that "[w]here an end-user has the right to terminate a contract for publicly available electronic communications service, other than a number-independent interpersonal communications service, before the end of the agreed contract period pursuant to this Directive or to other provisions of Union or national law, no compensation shall be due other than the subsidised terminal equipment".

The scope of Article 105(6) of EEC thus covers the cases where a specific right to terminate an electronic communications service contract exists in the EEC or in other Union or national law. In the EEC, the rights to terminate a contract are set out in Article 105(3) (related to automatic prolongation), Article 105(4) (related to change in the contractual conditions), and Article 105(5) (related to significant discrepancies between the actual performance of an electronic communications service other than internet access service or a number-independent interpersonal communications service and the performance indicated in the contract). In addition, specific provisions on the right to terminate in case of bundled offers are addressed in Article 107(2).

Where the conditions set in these rules are fulfilled, the legal consequence of the exercise of the right to terminate the contract has to be the one prescribed in the EEC, i.e. no compensation, except for terminal equipment.

Furthermore, other cases when an end-user has the right to terminate the contract may be provided (now or in the future) in national legislation or in other Union legislation, for which the

consequence is hence fully harmonised. Such rights may be linked to different circumstances, taking into account national particularities, but, as it will be explained below, may not be linked to the sole will of the subscriber.

Indeed, in our view, the EECC does not provide full harmonisation for cases where the contract is terminated unilaterally by an end-user without such a right (“ad nutum” or by choice). These cases would need to be assessed not against paragraph 6, but against the other paragraphs of Article 105 and more in general in the light of the general objectives of the EECC (Article 3).

In particular, in order to address the first and last question, we observe the following:

On the one hand, when adopting legislation on termination, a Member State has to ensure that the conditions and procedures for contract termination do not act as a disincentive to changing service provider in line with Article 105(1). On the other hand, the national provisions set in this regard should not undermine the purpose of other provisions of the EECC, which already set rules in order to facilitate consumers' change of provider and have to be compliant with the general principles of proportionality, transparency and objectivity as enshrined in Article 3 of the EECC. The above would in most of the cases translate in an assessment of the proportionality of the provisions to be carried out with a case-by-case approach (where all the characteristics of the tariffs at stake are duly taken into consideration). Only on the basis of such case-by-case assessment it would be possible to conclude whether a provision establishing early termination fees or abolishing any early termination fees, is compliant with the EECC.

In respect to the second question, we understand that in accordance with national Law, end-users have the right to terminate their contract (even if they are within a contractual period, thus before the expiry of the contract) for any reason (i.e. not only if there is a discrepancy between the actual service and the contracted service), subject to certain specific conditions such as the applicability of reasonable termination charges.

While the general principle enshrined above should apply, i.e. the necessity of a case-by-case assessment of whether national legislation respects the principle of proportionality, as a general remark it can be noted that a reasonable approach could be that the more the end-user approaches the end of the contract period, the less he/she should be required to pay for loyalty discounts or equipment to be able to switch. This would also be in line with the pro rata temporis principle enshrined in Article 105(6) on compensation for terminal equipment. Conversely, the provider should also have a minimum period of time to amortise its investments.

The national legislator, in taking (or maintaining) any measures regarding the termination charges in case of termination of the contract before its term, should therefore make sure that the above guiding principles are respected. Nevertheless, as previously mentioned, a case-by-case assessment of whether national legislation adopted in this area respects the principle of proportionality would be necessary. In such case-by-case assessment, national specificities should also be taken into consideration.

Article 105(5)

Article 105(5) establishes that «Any significant continued or frequently recurring discrepancy between the actual performance of an electronic communications service, other than an internet access service or a number-independent interpersonal communications service, and the performance indicated in the contract shall be considered to be a basis for triggering the remedies available to the consumer in accordance with national law, including the right to terminate the contract free of cost.» Given that the actual remedies are to be established by national law, are we right to assume that those remedies can apply to end-users other than consumers without violating the level of harmonization rule established in article 101, in which case the transposition rule of article 105(5) would apply, at a national level, to those end-users?

Reply

Article 105(5) refers to remedies available to the consumer in accordance with national law in case of discrepancies. The remedies are to be available to the consumer and the referred discrepancies do not trigger remedies for other end-users. Article 105(5) does not provide a basis to extend the remedies available to the consumer to other end-users.

Article 105(5)

Can Article 105(5) and Article 105(6) be applied at the same time?

Reply

Article 105(5) indicates that discrepancy between the actual performance of electronic communications service (ECS) other than internet access service (IAS) or number-independent interpersonal communications service (NI ICS), and the performance indicated in the contract shall be considered as a basis for triggering remedies available to the consumer in accordance with the national law, including right to terminate the contract free of cost. This paragraph describes a consumer right and refers to ECS with the exception of IAS (covered by the net neutrality rules) and NI ICS. This provision is not limited to the termination of the contract, but other remedies (including compensation) may be available under national law.

Article 105(6) relates to a situation when an end-user has right to terminate contract for publicly available ECS other than NI ICS, before the agreed contract period pursuant to EECC or other provisions of Union or national law. According to this paragraph, in such a situation no compensation shall be due by end-user other than for retained subsidised terminal equipment.

The previously mentioned paragraphs have different subject (consumer vs end-user) and object scope (discrepancy in the provision on ECS, other than IAS and NI ICS vs right to terminate contract for publicly available ECS, other than NI ICS).

Having said that, paragraph 6 applies when an end-user has the right to terminate the contract before the end of the agreed contract period. As stated in this paragraph, such right may arise pursuant to the EECC (e.g. in a situation described in Art. 105(5)) or to other provisions of Union or national law. Consequently, in certain situations both Art. 105 (5) and (6) may apply.

Article 105(6)

Article 105(6) of the EECC states: 'Where an end-user has the right to terminate a contract for a publicly available electronic communications service, other than a number-independent interpersonal communications service, before the end of the agreed contract period pursuant to this Directive or to other provisions of Union or national law, no compensation shall be due by the end-user other than for retained subsidised terminal equipment.'

Would the following be in line with the EECC:

Consumer has the right to terminate the contract in case of unilaterally proposed changes of contract terms by the provider, unless proposed changes are necessary to comply with changes in national or EU legislation, without paying any costs or penalties.

If the contract included subsidized terminal equipment, the consumer can choose to either keep such equipment or return it to the provider. If he opts to keep the terminal equipment, he may continue to pay-off the equipment according to the initially agreed upon contract terms (monthly instalments, subsidized prize). If he opts to return the terminal equipment, the provider must return the purchase price (or parts of the purchase price the consumer already payed) to the consumer

and is not allowed to demand any compensation or other costs related to the termination of the contract.

Reply

The first part on the consumer's right to terminate a contract would not be fully in line with the EECC as it limits the exceptions to the termination rights contained in Art. 105(4) EECC, to merely "unless proposed changes are necessary to comply with changes in national or EU legislation", without mentioning the other exceptions contained in Art. 105(4). Having regard to Art. 101(1), this change of scope of Art. 105(4) would not be in line with the EECC.

In case of an end-user retaining the terminal equipment Art. 105(6) provides for two options for compensation: the pro-rata temporis value pay back or the payment of the remaining part of the service fee, which both need to be provided, in order to compute the more beneficial option for the end-user. Member States may also determine other methods to calculate the compensation rate, following the limits set in Art 105(6). The proposed national provision in the example, however, would appear to limit the choice and computation to merely "paying-off the equipment according to the initially agreed upon contract terms" and would hence not be in line with the EECC.

Art. 105(6) does not provide for a specific compensation by the provider to the end-user in case the end-user opts to return the terminal equipment.

Article 105(7)

What is the scope of Art 105(7) EECC (right for M2M contract termination and related compensations due for end users)?

Reply

Article 105(4) and 105(6) provisions on rights regarding contract termination apply to all end-users, i.e. consumers and other users. However, for transmission services used for M2M, Article 105(7) limits the scope by excluding other end-users than consumers, microenterprises, small enterprises or not-for-profit organisation from benefiting from these rights.

Article 106

Article 106(1)

The second sentence of Article 106(1) prohibits the receiving and transferring providers from delaying or abusing the switching and porting processes. This recognises both the need for, and intention to have, prompt and efficient processes. However, the second half of the same sentence says "*nor shall they port numbers or switch end-users without the end-users' explicit consent*".

We interpret this provision to mean no more than that there is a prohibition on switching or porting without the end-user's consent. We do not interpret this provision as requiring that two separate consents are obtained, one by the receiving provider and one by the transferring provider, as this would delay the switching and porting processes (i.e. we interpret the provision as allowing one consent, which in practice will be obtained by the receiving provider, to satisfy this requirement).

Is the correct interpretation of the requirement of Article 106 with respect to consents for switching or porting?

Reply

Article 106(6) refers to the receiving provider and has the wording "nor shall they port numbers or switch end-users without the end-users' explicit consent" and the interpretation on one consent is in line with our view.

Article 106(2)

Number portability is a key driver to ensure subscriber choice and competition in the case of number-based interpersonal communications services. However, it could also be relevant, as consumer right, for non-interpersonal communications services, such as M2M/IoT connectivity services.

Given the consistent application of numbering criteria among MS, what are the EC views on the interpretation of article 106(2) in the sense that number portability should be attached as a general condition to the rights of use of numbering resources for the provision of transmission services M2M?

Reply

Pursuant to the general rule set in Article 106(2) all end-users with numbers from the national numbering plan have right to retain their number, upon request, independently of provider of the service. Pursuant to Part C of Annex VI, referred to in Article 106(2), this requirement shall apply at any location in the case of non-geographic numbers. Art. 106 does not provide for any differentiation of the requirements due to the type of electronic communications service provided with the use of the numbers. As explained in recital 278, number portability is a key facilitator of consumer choice and effective competition in competitive electronic communications markets, which applies to any type of electronic communications service that uses numbers.

Pursuant to Article 13(1), rights of use for numbering resources shall be in accordance with Art. 94 and may be subject only to the conditions listed in Annex, part E, which in point 3 covers number portability requirements in accordance with the EECC. Consequently, number portability requirements may be attached as a general condition to the rights of use of numbering resources for the provision of transmission services for M2M.

Article 106

Article 106(3) establishes that where an end-user terminates a contract, MS shall ensure that they can retain the right to port a number from the national numbering plan to another provider for a minimum of one month after the date of termination, unless that right is renounced by the end-user. Although this is not expressly mentioned in this provision, does the fact that it refers to a minimum period allow MS to establish a longer one? Or is that to be left to the providers discretion?

Reply

Article 106(3) requires Member States to ensure a minimum of one month right to port a number. Article 101 on the level of harmonisation provides that Member States shall not maintain or introduce in national law more or less stringent provisions to ensure a different level of protection, unless otherwise provided for in this Title. The minimum period is thus to be ensured by Member States, granting a longer period is left to providers discretion.

Article 106(6)

EECC Article 106(6) states that: “[...] They shall not delay or abuse the switching and porting processes, nor shall they port numbers or switch end-users without the end-users’ explicit consent.”

We are discussing the term “abuse” in the above-mentioned Article. The discussing concerns whether the term abuse refers to the switching and porting process or if abuse refers the situation where end-users has numbers port or switch without the end-users’ explicit consent.

In the sentence quoted from the EECC Article 106(6) abuse seems to be connected to the switching and porting process. In our understanding abuse is more or less connected to porting or switching

end users numbers without the end-users' explicit consent. In this context we have the following questions:

- Is abuse connected to the switching and porting process or is abuse connected to porting or switching end-users numbers without the end-users' explicit consent?
- If the term abuse is referring to the switching and porting process, does the Commission have any examples of such abuses of the switching and porting process?
- If abuse in the Article is not addressed to the switching and porting process what kind of abuses are the Article addressing?

Reply

"Abuse" as such is not defined in the EECC. In Article 106(6) it is used to refer to the switching and porting processes. "Abuse" can be understood as a wrong use of the said processes, i.e. an action by the receiving or transferring providers that would obstruct or impede the processes. Recital 281 refers to experience in certain Member States that has shown that there is a risk of end-users being switched without having given their consent. The aim is to ensure that end-users are protected throughout the switching process without making the process less attractive for them. The right to port numbers should not be restricted by contractual conditions.

Related to switching (though not explicitly on possible abuse) BEREC has published a report in 2019 on the terminating of contracts and switching provider.

Article 106(6)

The receiving provider shall lead the switching and porting processes set out in paragraphs 1 and 5 and both the receiving and transferring providers shall cooperate in good faith. They shall not delay or abuse the switching and porting processes, nor shall they port numbers or switch end-users without the end-user's explicit consent.(...) Transferring providers shall refund, upon request, any remaining credit to the consumers using pre-paid services. Refund may be subject to a fee only if provided for in the contract. Any such fee shall be proportionate and commensurate with the actual costs incurred by the transferring provider in offering the refund.

What should be understood by "abuse" in the switching and porting processes? Should we understand that the refunding regime stated at paragraph 3 applies to the switching process as well as to number portability? And should the NRA take measures to establish the quantum of that refund or the way it is calculated?

Reply

"Abuse" as such is not defined in the EECC. In Article 106(6) it is used to refer to the switching and porting processes. "Abuse" can be understood as a wrong use of the said processes, i.e. an action by the receiving or transferring providers that would obstruct or impede the processes.

Article 106(6) refers to the switching and porting processes set out in paragraphs 1 and 5 of the article. Subparagraph 3 of Article 106(6) refers specifically to the refund to which consumers using pre-paid services are entitled in the case of switching and porting processes. Pursuant to the said provision, any remaining credit should be refunded to the consumer. Refund may be subject to a fee only if provided for in the contract. In such a case, the fee shall be proportionate and commensurate with the actual costs incurred by transferring provider in offering the refund.

NRAs' tasks are described in paragraphs 1, 4 and 6 of Article 106, which provide that NRAs are to ensure the efficiency and simplicity of the switching process for the end-user and to ensure that pricing related to number portability is cost oriented and no direct charges are applied to end-users. NRAs may also establish the details of the switching and porting processes. The Code does not

require NRA to take measures to establish the quantum of the fee, which may be deducted from the refund, or the way it is calculated, however such requirements may be prescribed as part of the overall porting process.

Article 106(6)

Article 106(6), third sub-paragraph, provides that “Transferring providers shall refund, upon request, any remaining credit to the consumers using pre-paid services...”. Are Member States to interpret this provision applying to credit accumulated prior to the transposition of the Code, i.e. if a customer has €20 in credit on their account on 20 December 2020 and seeks to move operator on 1 January 2021, is that customer entitled to receive a refund of the €20 on their account, minus any contractually mandated fee?

Reply

The national measures transposing the EECC will apply from 21 December 2020⁵. The EECC does not include a provision that would limit the applicability of Article 106 only to contracts concluded after this date. Hence, the new rules on provider switching and number portability (Article 106), including provisions on refund on pre-paid services, will apply immediately to all existing electronic communication services contracts which fall in the scope of the Title III.

Article 106(8)

May a Member State require that information on compensation arrangements be provided prior to the conclusion of a contract?

May a Member State add this information obligation to the ‘other relevant information’ section of the contractual summary provided for in Article 102 (3)?

Is it possible to set a formula for calculating the compensation on the basis of the price of the subscription taken out by the consumer?

Should compensation be automatic or only at the request of the consumer?

Reply

The EECC Art 102 requires that before a consumer is bound by a contract, providers shall provide the information in Annex VIII. Annex VIII A (3) (ii) requires information on refund arrangements for delay or abuse of switching. Furthermore, Annex VIII A (4) includes any compensation and refund arrangements.

The items to be included in the contract summary are laid down in Article 102(3) and specified in the Commission Implementing Regulation 2019/2243. Providers can choose to include additional information (required by Union on national law) under the section “Other relevant information”, but Member States cannot set obligations on items to be included in this section.

The EECC Art 106(8) requires Member States to lay down rules on the compensation of end-users by their providers in an easy and timely manner. The EECC does not detail on the method of calculation of the compensation, and does not specify if the compensation is to be automatic or on demand; these aspects are at Member States discretion.

Article 106(8)

⁵ Art. 124(1), Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast); OJ L 321.

What is meant by a “service” appointment as distinct from an “installation” appointment, in the context of switching and porting (Article 106(8))?

Reply

Recital 282 explains that Member States should provide for the compensation of end-users where an agreement between a provider and an end-user is not respected. An agreement can also consist of the fixing of an appointment. Hence, where a provider does not show up at an agreed service or installation appointment, which is necessary for or which was agreed to ensure the switching and porting process, he could be liable for compensation.

Article 106(8)

How should Article 106 and the compensation rules be interpreted in the event of delay or abuse in porting procedures and change of supplier and in the event of no-show for a service and installation appointment? Our understanding is that compensation only occurs in case of change of supplier and is not applicable for any other case of other after sales service. We would appreciate if you please confirm that this interpretation is correct.

Reply

This provision relates to compensation to missed service and installation appointments in the porting and switching context, and it does not cover missed appointments outside the porting and switching process. **NEW UPDATED TEXT:** Member States are free but not obliged to legislate on the consequences of other missed appointments, taking into account and as long as this would be in compliance with other Union law, when relevant.

Article 107

Article 107

Do the provisions of Article 107 on bundles apply where the service bundle includes SVOD (*subscription video on demand*) content services?

Reply

According to Article 107 EEC, if a bundle of services (or a bundle of services and terminal equipment) comprises at least an internet access service or a publicly available number-based interpersonal communications service the provisions concerning bundles apply. Article 107 provisions apply if the digital content service is part of a contract provided or sold by the same provider under the same or a closely related or linked contract as an internet access service or a publicly available number-based interpersonal communications service.

Article 107

What types of products and services were intended to be included under Article 107? Was the intention to capture services such as energy if sold as part of a bundle with an internet access service or a publicly available number-based interpersonal communication service from the same provider?

Reply

The wording seems to be clear. If an IAS provider bundles various 'services' or bundles of 'services and terminal equipment' then the quoted rules apply *mutatis mutandis* to all such services and terminal equipment (“provided or sold by the same provider” see Rec. 283). Energy (i.e. 'electricity') as provided by EU case-law falls under 'goods' and hence was not intended to be captured.

Article 107

Article 107(1) establishes that ‘If a bundle of services or a bundle of services and terminal equipment offered to a consumer comprises at least an internet access service or a publicly available number-based interpersonal communications service, Article 102(3), Article 103(1), Article 105 and Article 106(1) shall apply to all elements of the bundle including, mutatis mutandis, those not otherwise covered by those provisions’. On this matter, recital (283) states that ‘Bundles comprising at least either an internet access service or a publicly available number-based interpersonal communications service, as well as other services, such as publicly available number-independent interpersonal communications services, linear broadcasting and machine-to-machine services, or terminal equipment, have become increasingly widespread and are an important element of competition. For the purposes of this Directive, a bundle should be considered to exist in situations where the elements of the bundle are provided or sold by the same provider under the same or a closely related or linked contract’. In this context, should Article 107 apply to bundles comprising an internet access service or a publicly available number-based interpersonal communications service and other electronic communication services or, more comprehensively, to bundles comprising an internet access service or a publicly available number-based interpersonal communications service and any other kind of service sold by the same provider under the same or a closely related or linked contract (e.g. energy services)?

Reply

Following Recital 283 and Article 107 EEC, when a provider bundles various 'services' or 'services and terminal equipment', several essential provisions regarding contract summary information, transparency, contract duration and termination and switching will apply to all the services and terminal equipment included in the bundle (“provided or sold by the same provider”), provided that the bundle includes at least an internet access service or a publicly available number-based interpersonal communication service.

This means that applicability is to all services provided or sold by the same provider under the same or a closely related or linked contract. Recital 283 describes current widespread examples and does not create a limitation to the Article’s wording on its scope. As to the example on energy, please note that electricity and gas are classified as goods, therefore for bundles that include such services Article 107(1) does not apply. (Directive 2011/83 on consumer rights classifies electricity and gas, as well as water, as goods).

Article 107 and Annex VIII

Are the terms ‘bundled offers’ and ‘bundled services’ to be regarded as referring to identical concepts? If not, what is their respective scope?

Reply

Article 107 is titled “Bundled offers” and Annex IX 2.4 refers to “bundled offers”. Article 107 refers to a “bundle of services” and a “bundle of services and terminal equipment”; likewise, Annex VIII refers separately to “bundled services” and “bundles including both services and terminal equipment”. All terms refer to the same concept of a bundle, “Bundled offers” can be understood to cover both a “bundle of services” and a “bundle of services and terminal equipment” as referred to in paragraph 1 of Article 107.

Article 109

Article 109

1. Does EEC article 109(6) prevent Member States from making national rules imposing the costs of running and/or maintaining the AML set-up on the PSAP, so that the MNO’s won’t be forced to endure costs, i.e. interconnect fees, when the end user makes emergency calls?

a. Or could this be considered as an indirect imposition of costs related to the transmission of caller location information making it illegal according to article 109(6)?

2. What level of freedom do the member states have on easing the costs on the undertakings, e.g. with national rules zero-rating the AML-number in all instances? In this example the we would have to pay more for the service of the company running the AML-platform as the company can no longer gain revenue from the MNO's.

3. How did the Commission initially imagine the set-up of AML? Was the intention that the PSAPs should receive the AML-SMS individually and directly from the undertakings or via one or more "designated" undertakings responsible for a coordinated transmission to the PSAPs?

4. Does "transmission of caller location information free of charge" also entail that the MNO's must endure interconnect fees from a third party if the PSAP is not able to receive the AML-SMS themselves?

5. Is it against article 109(6), if regulation is put in place to ensure that the AML-SMS is zero rated from origination to termination with the consequence that the PSAP must be able to receive AML-SMS without charging interconnect fees from the MNO's?

Reply

Q1 a: The Code does not provide rules regarding the allotment of costs of running and maintaining of the AML system. The legal text mentions that only "the establishment and transmission "of the caller location should be for free for the end-user and the PSAP. In view of the fact that in emergency communications the end-user is the originator of the call and the PSAP is the recipient of the call, the gratuitous transmission of caller location should be assessed accordingly: it should be for free for the originator end-user and the recipient PSAP. The management of the AML/SMS platform at the PSAP side, to the extent that it involves other processes, mechanism or infrastructures than the process of transmission of caller location information to the recipient PSAP, is not in the scope of the right to receive the caller location obligation free of charge. Apart from the transmission of caller location, free of charge for the recipient PSAP, other costs of the AML/SMS platform should be borne by the PSAP/Member State. In case of AML, free transmission of caller location would mean that the receipt of the caller location information through SMS or data connection is free for the PSAP.

Q2: As explained above, the Code provides only for the obligation to ensure that the establishment and transmission of the caller location is free of charge for the originator end-user and for the recipient PSAP. As far as the MNO, MVNO, fixed network providers or other entities involved in the transmission of the caller location information do not charge the PSAP for the transmission/receipt of the caller location information, the requirement of the Code is met.

Q3: The transmission architecture of the handset derived caller location is not regulated in the Code. It is for the Member State to choose the appropriate transmission architecture that ensures the caller location that is regulated in Article 109 of the Code.

Q4: As explained above, Member States have the obligation of result to ensure that the transmission and the establishment of the caller location should be free of charge for the end-user and the PSAP. The level of interconnection fees charged between third parties (third parties in relation to the end-user and the PSAP) is outside the scope of Article 109 of the Code, as long as the transmission of caller location is free of charge for the end-user and the PSAP.

Q5: As long as such regulation does not prevent that the transmission and the establishment of the caller location should be free of charge for the end-user and the PSAP, it meets the requirements of article 109(6).

Article 109

Does the transposition deadline of 21 December 2020 also apply for the entire technical setup of the service chosen as emergency communication, e.g. SMS?

2. If yes, does the setup have to be fully functional by that time, e.g. be able to deliver network- and handset based caller location, and be able to route SMS to the most appropriate PSAP?

3. If no, would it suffice that the national legal framework has implemented article 109, thus ensuring that the technical solution currently being worked on will comply with the requirements in article 109?

Reply

Article 124 of the EECC requires that Member States not only to transpose but also to apply the measures transposing the Directive by 21 December 2020. In case SMS communication is mandated as emergency communication by the Member State the technical implementation should comply with the requirements laid down in Article 109, including routing to the most appropriate PSAP and caller location. Please note the definition of “most appropriate PSAP” in Article 2, point 37.

The provision of equivalent means of access for end-users with disabilities is an obligation since 25 May 2011. This presupposes that location information is provided to the PSAP.

2. Under Article 109 (5) Member States are obliged to provide a means of emergency communication for end-users with disabilities that is equivalent to that enjoyed by other end-users. While the means for communications for end-users with disabilities do not have to provide identical functionalities as those of other end-users, the effectiveness of the access to the emergency communications should be equivalent, including with regard to the effectiveness of provision of location information to the most appropriate PSAP. It is for the Member State to ensure such equivalence.

The Commission services are not in the position to provide derogations from the provision of Article 109 nor may grant the possibility of staged implementation of the legal requirements. Meanwhile, Member States are best placed to identify the means of access to emergency services that best serve the safety and health of end-users. It is for the Member State to decide when to deploy such emergency communications. When it comes to ensuring equivalent access to emergency services, Member States are under the obligation to deploy a solution that allows 2-way interactive communication and near instant caller location already under the current regulatory framework (Article 26(5) USD).

3. Member States may adopt the relevant legal framework implementing Article 109 by implementing at least one means of emergency communication to the Single European emergency number 112 which complies with all requirements in this provision. While access to 112 through calls would be still in place SMS to 112 could be mandated at a later stage than 21 December 2020 and be used as a complementary means to access emergency communications.

Article 109(6)

Is the integration of AML mandatory according to the Code and if yes, is there deadline?

Reply

Article 109(6) of the European Electronic Communications Code (the Code) mandates the deployment of handset derived caller location that should be provided without delay after the emergency communication is set up. AML is a cost-effective technology that complies with this requirement. To our knowledge no other technology was yet deployed in the EU that would comply with the requirements of Article 109(6) of the Code.

Article 124 of the Code sets the deadline for transposition for 21 December 2020. The transposition measures will have to be applied in Member States from the same date, meaning

that handset based caller location will have to be made available to the most appropriate PSAP as of 21 December 2020.

Article 110

Article 110

Does Article 110 require the creation of a public warning system?

It states that "when public warning systems regarding imminent or developing major emergencies and disasters are in place", Member States must ensure that those warnings are transmitted by mobile networks. We interpret this to mean that only if you have a public warning system in place it must meet the requirements of the article. If you have no public warning system, then no obligations.

Reply

Indeed, Article 110 does not provide for an obligation for Member States to put in place a public warning system. In this regard, the conditional obligation provided in Article 110 first paragraph refers to the transmission by mobile operators of the public warning. The condition is the pre-existence of a national public warning system that transmit public warnings in case of major emergencies and disasters. Such pre-existing public warning systems are for instance sirens warning or broadcasted warnings (e.g. radio and/or TV) that are issued on the basis of a pre-existing protocol. A public warning system is in place when competent national authorities have a pre-established protocol to address specific messages to the population on their territory with the goal of providing implicit or explicit information that may potentially contribute to the saving the addressees' health, property or safeguarding public interest. In the latest COCOM 112 implementation report, all Member States reported a public warning system in place, except Malta and Greece. <https://ec.europa.eu/digital-single-market/en/news/2018-report-implementation-european-emergency-number-112>

Article 110

Article 110(1) requires Member States who have public warning systems (PWS) in place to ensure that by 21 June 2022 the public warnings are transmitted by providers of mobile number-based ICS.

A Member State has a PWS in place that functions via any ICS, which provides a mechanism to urgently warn the public via a television and radio broadcasts of an immediate public safety risk and/or to provide advice to the public on urgent public safety or health issues. The relevant legislation empowers the authority to require broadcasting contractors and network providers to co-operate with the relevant public bodies in the dissemination of relevant information to the public in the event of a major emergency. Does such a broadcasting public warning system trigger the requirement of Article 110(1), i.e. is the Member State now required to ensure that a PWS transmitted by providers of mobile number-based ICS is in place by 21 June 2022?

Reply

Article 110 does not provide for an obligation for Member States to put in place a public warning system. In this regard, the conditional obligation provided in Article 110 first paragraph refers to the transmission by mobile operators of the public warning. The condition is the pre-existence of a national public warning system that transmit public warnings in case of major emergencies and disasters. Such pre-existing public warning systems are for instance sirens warning or broadcasted warnings (e.g. radio and/or TV) that are issued on the basis of a pre-existing protocol. A public warning system is in place when competent national authorities have a pre-established protocol to address specific messages to the population on their territory with the goal of providing implicit or explicit information that may potentially contribute to the saving the addressees' health, property

or safeguarding public interest. The EECC does not specify the technology on which the PWS in place may be based, but the existence of such system – be it sirens, broadcast based PWS, etc. - triggers the requirement of Article 110.

Article 110

1: To what extent is Article 110 subject to the maximum harmonization rule provided by Article 101, considering that we are dealing with matters under national sovereignty, namely emergency and civil protection, related to public and national safety?

In particular:

1.1. May a MS determine that public warnings, when technically feasible, are to be transmitted with priority against other traffic?

1.2. May a MS determine that the gratuity mentioned in the 6th sentence of recital 294 (“The transmission of public warnings should be free of charge for end-users”) also applies to the competent authorities?

1.3. May a MS determine that the automatic SMS mentioned in the 2nd sentence of recital 294 is also to be sent regarding public warning systems provided by number 1 of Article 110, bearing in mind that some of those systems (in particular, cell-broadcast systems) also justify such informative notices to roamers-in?

2: Should mobile number-based interpersonal communications services mentioned in number 1 of Article 110 be limited to publicly available services, considering that number 2 of the same article mentions “(...) publicly available electronic communications services other than those referred to in paragraph (...)”? If so and bearing in mind the answer to question 1, may a MS impose an obligation to transmit public warnings to mobile number-based interpersonal communications services that are not available to the public?

Reply

Article 101 provides for a rule of maximum harmonisation of end-user protection. Article 110 is aimed at regulating certain aspects of transmission of public warnings. In particular, the conditional obligation provided in Article 110 first paragraph refers to the transmission by mobile operators of the public warning. The condition is the pre-existence of a national public warning system that transmits public warnings in case of major emergencies and disasters. Such pre-existing public warning systems, governed by national legislation, are for instance sirens warning or broadcasted warnings that are issued on the basis of a pre-existing protocol. A public warning system is in place when competent national authorities have a pre-established protocol to address specific messages to the population on their territory with the goal of providing implicit or explicit information that may potentially contribute to the saving the addressees’ health, property or safeguarding public interest. Matters of public safety and public security fall outside the maximum harmonisation rule provided under Article 101.

1.1. Article 110 specifies that when a public warning system is already in place, end-users should receive the warning through mobile operators (Art 110.1) or through internet access services (Art. 110.2). Art. 110 does not specify the technical parameters of the transmission, such as priority of PWS traffic. However, the obligation to ensure the availability of services under Art.108 might warrant the prioritisation of the public warnings in order to be transmitted by providers of “voice communication services”. In addition, in case prioritisation of public warnings traffic is imposed by means of national law, it would be covered by the traffic management exception listed in Regulation 2015/2120 Art. 3(3)(a) as explained in recital 13.

1.2. Recital 294 supports Article 110(2), in particular, the requirement on the ease for the end-users to receive the public warning including roaming end-users. Article 110(2) mentions “end-users” only

as recipients of the public warnings. Hence, the explanation provided in Recital 294 would apply to competent authorities only to the extent they are recipients of the public warnings and not originators of public warnings. Please note that the recital has only an explanatory value for the interpretation of the obligations provided in Article 110(2) and the obligation to transmit public warnings free of charge does not correspond to an obligation in the enacting terms of the Code. Member States should however take account of this recital when deciding to lay down measures to implement public warning systems, in compliance with Article 110 of the Code

1.3. As indicated before, recital 294 supports Article 110(2), in particular the requirement on the ease for the end-users to receive the public warning including roaming end-users. The second sentence of the recital 294 is aimed to establish the role of awareness raising (on the way public warnings implemented under Article 110(2)) in ensuring the ease for the end-users to receive the public warning including end-users entering the Member State. The objective of the SMS mentioned in this sentence is to inform end-users of the existence and use of the public warning system. However, notwithstanding this recital, Member states are free to regulate how to raise awareness of their public warning systems complying with Article 110(1), including through the provision of free of charge SMS to end-users entering the Member State.

2. Pursuant to Article 110(1), Member States shall ensure that public warnings are transmitted by providers of mobile number-based interpersonal communication services. The reference in Article 110(2) to publicly available services “other than those referred to in paragraph 1” is made to delineate the scope of this provision from Article 110 (1).

Article 111

Article 111 refers to end-users with disabilities. However, recital (296) states that «In line with the objectives of the Charter and the obligations enshrined in the United Nations Convention on the Rights of Persons with Disabilities, the regulatory framework should ensure that all end-users, including end-users with disabilities, older people, and users with special social needs, have easy and equivalent access to affordable high quality services regardless of their place of residence within the Union». Can Member-States assume that article 111 is to be applicable to all end users with special needs (either those related to disabilities, age or social context) or only to end-users with disabilities?

Reply

Article 111 on equivalent access and choice applies to end-users with disabilities. Consumers with special social needs are addressed in the universal service obligations (see Article 85) of the EECC.

Article 112

Article 112(2)

The provision seeks to allow MS to impose conditions on undertakings that for some reason wouldn't make available directory enquiry services, i.e. the undertaking would be obliged to give access to/make available telephone directory services not actually provide them. How to interpret this paragraph? What type of undertakings other than providers could possibly come in question in case it means the formerly mentioned of the options above?

Reply

The current USD Art 25(3) on telephone directory enquiry services ensures that all end-users provided with publicly available telephone service can access directory services. Art 5 USD ensures that at least one comprehensive directory is available. NRAs are able to impose obligations and conditions on undertakings that control access of end-users for the provision of directory enquiry services.

The Code removed the obligation to ensure the availability of at least one directory enquiry service from the scope of universal service. Given the functioning market for such services, it is no longer necessary to put in place obligations to ensure the right of end-users to access directory enquiry services. However, NRAs should still be able to impose obligations and conditions on undertakings that control access to end-users (Article 112(2)) in order to maintain access and competition in that market (see recital 302).

Article 112(2) is not about an obligation to provide directory service as such. Article 112(2) applies to undertakings that control access to end-users and ensures that such providers ensure access to directory enquiry services, in accordance with Article 61. Undertakings which control access to end-users are currently providers of electronic communications networks and services (ECNS), other than number-independent interpersonal communications services (NIICS). A specific procedure is provided in Article 61 to extend the obligations for access and interconnection to NIICS in specified cases.

This means the scope covers any undertaking that controls access to end-users for the provision of directory enquiry services, however, the requirement to be "*in accordance with Article 61*" limits this for the moment to ECNS other than NIICS.

Article 113

Article 113 and Annex XI

Annex XI requires Member States to ensure that cars "made available on the market for sale or rent in the Union from 21 December 2020 shall comprise a receiver capable of receiving and reproducing at least radio services provided via digital terrestrial radio broadcasting". The Code does not provide a definition of "made available on the market".

The 'Blue Guide', a publication by the European Commission that offers CE Marking information and advice on the implementation of EU product Directives (2016/C 272/01) provides a definition of "placed on the market". In the Blue Guide, a vehicle is "placed on the market" when it is made available for the first time on the Union market. The operation is reserved either for a manufacturer or an importer, i.e. the manufacturer and the importer are the only economic operators who place products on the market. A product is placed on the market when a manufacturer or an importer supplies a product to a distributor or an end-user for the first time. Placing a product on the market requires an offer or an agreement (written or verbal) between two or more legal or natural persons for the transfer of ownership, possession or any other property right concerning the product in question after the stage of manufacture has taken place.

Any subsequent operation, for instance, from a distributor to distributor or from a distributor to an end-user is defined as "making available". Those are the moments that products are first made available for sale to the next owner in the vehicle supply chain (distributor, dealership, customer or rental company).

Would it be correct to define a vehicle as having been "made available on the market" for the purpose of Article 113 and Annex XI as when the vehicle is been "placed on the market" in accordance with the "Blue Book", i.e. having been passed from a manufacturer / importer to a distributor for the first time

Reply

Directive (EU) 2018/1972 establishing the European Electronic Communications Code ("Code") provides that radios in new cars must have a digital radio receiver. Commission services discovered a potential legal-linguistic error in the car radio provisions in the Code described hereafter. The wording as adjusted by the lawyer-linguists relates to cars 'made available on the market'. This

wording differs from what the co-legislators agreed in the political agreement, which read ‘put on the market’.

The term ‘made available on the market’ (employed by the legal revisers in point 3 of Annex XI) has a specific meaning in the type-approval Union legislation. In our view, an interpretation of the wording ‘made available’ would entail that non-compliant vehicles which have been placed on the market before the application date of the Code could not be sold, leased or rented or registered as “new vehicles” (i.e. they could be sold as used vehicles) or would have to be retrofitted with a digital radio. It does not appear that this was the intention of the co-legislators.

The Commission contacted the General Secretariat of the Council (Legal Service, Directorate for Quality of Legislation) to consider whether to initiate the procedure for a corrigendum of a legal-linguistic error.

Article 113(1) and (2)

In terms of the new provisions about interoperability for car radio receivers, paragraph 1 refers to Annex XI (no.3) which states that *‘Any car radio receiver integrated in a new vehicle of category M which is made available on the market for sale or rent in the Union from 21 December 2020 shall comprise a receiver capable of receiving and reproducing at least radio services provided via digital terrestrial radio broadcasting. Receivers which are in accordance with harmonised standards the references of which have been published in the Official Journal of the European Union or with parts thereof shall be considered to comply with that requirement covered by those standards or parts thereof.’* Paragraph 2 leaves it up to Member States to adopt measures that would ensure the interoperability of other consumer radio receivers.

Apart from the actual transposition into national law, this Article requires relevant entities to take appropriate action (e.g. informing car importers) well before the coming into force of the new law. Amongst others, informing stakeholders about the standards that they should abide to is very important.

We need to explore whether any related harmonised standards have already been published in the Official Journal of the European Union. Would you be able to guide us in relation to this?

Reply

As this is a new requirement, harmonised standards for such receivers do not yet exist. At the same time, if such standards become available by 21 December 2020 (or after), national law has to ensure that receivers compliant with such standards are also considered compliant with the requirement to receive and reproduce at least radio services provided via digital terrestrial radio broadcasting .

Harmonised standards for transmitting equipment for digital terrestrial audio broadcasting are included in the Commission communication in the framework of the implementation of Directive 1999/5/EC of the European Parliament and of the Council on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity and Directive 2014/53/EU of the European Parliament and of the Council on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC, (2018/C 326/04), OJ C 326 of 14.9.2018, p. 132 and p. 134. However, these standards relate to the requirement of efficient use and supporting the efficient use of radio spectrum in order to avoid harmful interference established by Article 3(2) of Directive 2014/53/EU, not to the requirement established in Annex XI(3) EEC, namely the capability of receiving and reproducing radio services provided via digital terrestrial radio broadcasting. One example for receiver specifications established at national level is available [here](#).

In the absence of harmonised standards, compliance of the receivers with a non-harmonised standard/specification for digital terrestrial radio broadcasting, such as DAB+, should be

encouraged in order to ensure compliance with the requirement in Annex XI (no.3). The DAB standard is included in the non-compulsory list of standards referred to in Art. 39 of the EEC Directive and Art. 17 of the Framework Directive as the only standard for digital audio broadcasting included in that list. The DAB family of standards includes also DAB+ which is integrated in DAB chipsets. The use of DAB+ is widespread across and by far the dominant technology used in Member States for digital terrestrial radio broadcasting.

Article 113(2)

Is it, according to this Article, explicitly forbidden to apply these requirements to mobile phones? Can a member state require that all mobile phones that are put on the market have DAB support? Is this consistent with the Directive?

Reply

Under this provision, Member States may adopt measures to ensure the interoperability of consumer radio receivers which are not car radio receivers.

This “*de minimis rule*” has been introduced to ensure that Member States are obliged to limit the impact on the market for low-value radio broadcast receivers and to ensure that such measures are not applied to products where a radio receiver is purely ancillary, such as smartphones, and to equipment used by radio amateurs. In accordance with Recital 304 to the EEC Directive, Member States may, in such a case provide that radio broadcast receivers should be capable of receiving and reproducing radio services provided via digital terrestrial radio broadcasting or via IP networks, in order to ensure that interoperability is maintained.

Member States are neither imposed an obligation to adopt measures to ensure the interoperability of other consumer radio receivers, as paragraph 2 merely states this possibility (“may”), nor prohibited to do so. However, whenever they decide to adopt such measures, the Directive states clearly that such measures cannot apply to smartphones or any other product where a radio receiver is purely ancillary.

Art 124(1) of the EEC Directive provides that Member States shall apply measures transposing the EEC Directive from 21 December 2020. Accordingly, any transposition of this provision into national law would have to ensure that the impact on the market for low-value receivers would be limited and that smartphones and equipment used by radio amateurs are excluded.

Article 113(3)

Exactly what type of digital tv equipment is meant in the Article? Annex XI speaks of digital tv sets, which we then assume is part of what is considered digital TV equipment. But is it the box that should be interoperable or what equipment more specifically?

Reply

Art 113(3) addresses digital television equipment that providers of digital television services provide to their end-users. In practice, these can be in particular set-top boxes in case the end-user owns a TV set or integrated TV sets with a receiver. In the trilogues there was a clear intention by the EP to include in particular set-top boxes. Annex XI relates to Art 113(1), not to Art 113(3).

Article 113(3)

Article 113(3) states that Member States shall encourage providers of digital television services to ensure, where appropriate, interoperability of digital television equipment. However, in Directive 2018/1972/EU there is no definition of providers of digital television services (IPTV providers?)

Multiplex providers?). Could you please provide us with more information what is meant by “providers of digital television services”?

Reply

The provision applies to providers of digital television services that provide digital television content transmitted using electronic communication networks and services to their end- users. Accordingly, one practical way for Member States to proceed would be to analyse which entities, in their Member State, provide such equipment to end users, and then to analyse which of these entities can be considered as providing digital television content to end users. One possible category could be pay TV platforms. While there is no definition in the EECC, Article 18 of the Framework Directive 2002/21/EC includes the established notions of “provider of digital interactive television services” and “providers of digital TV services” which could be relied on, taking into account recent technological and market developments as appropriate. Digital television services can be transmitted via a variety of networks and services, including via IPTV or via an internet access service. In addition, article 113(3) requires a contractual relationship with an end user (‘their end-users’ in the first sentence, ‘their contract’ in the second sentence). At the end user level, the conveyance of the signals has to be combined with ensuring that the digital TV content is made accessible to the end- users. In case the end-user contracts with a content provider, this content provider is responsible for ensuring transmission and accessibility of any third party content. In case the end-user contracts with an electronic network or service provider such as an IPTV provider or a multiplex operator, it is this entity which is responsible for making the content accessible to end-users. In both cases it is the party which concludes the contract with the end-user, combining transmission and access to digital TV content which is covered by the provision on interoperability of equipment under article 113(3) EECC

Article 113

Article 113 (Annex XI): Obligations on the interoperability of car radio receivers. According to the article any car radio receiver in a new vehicle of category M which is made available on the market for sale or rent, shall comprise a receiver capable of receiving and reproducing at least radio services provided via digital terrestrial radio broadcasting.

We have planned to implement the Article 113 of the ECC directive by an obligation to receive and reproduce digital radio broadcasts, which would not require the installation of DAB radio in cars sold or rented, but for example unicast radio reception would fulfil the requirement. The advantage would be that it would not limit some of the developments concerning the future radio distribution channels and would not necessarily require the installation of a radio receiver that could not be used by consumers (DAB/DAB +). It is possible that in the future, radio distribution will be switched to IP-based distribution, and LTE/5G broadcasting will not be widely used by consumers, whereby this approach would be more technology neutral and be in consumer's interest.

Possible formatting could be: "If a car radio receiver is integrated in a new vehicle of category M, the receiver shall have the preparedness to receive and reproduce radio services provided via digital radio broadcasting".

We kindly ask for the Commission’s view on our implementation plan and whether this way forward would be possible.

Reply

Annex XI (3) EECC requires that receivers are “capable of receiving and reproducing at least radio services provided via digital terrestrial radio broadcasting” (our emphasis).

Please note that Recital (302) EEC refers to “equipment [...] for the reception of radio”. For a future proof implementation of the provision, it has to be taken into account that recital (304) covers the possibility that radio receivers are constructed in a way that they are capable of receiving and reproducing radio services provided via [...] IP networks. It would therefore appear that in a situation where a car radio relies on a cellular receiver for mobile data to receive and reproduce radio services provided via IP networks, the requirement for fitting also a digital terrestrial radio receiver as set out in art 113(1) and Annex XI(3) would apply.

To this it should be added that the obligation to integrate digital terrestrial radio receivers applies regardless whether or not radio services provided via digital terrestrial radio broadcasting are available in a particular Member State.

Furthermore, Annex XI(3) EEC refers to the capability “of receiving and reproducing [...] radio services”. Accordingly, it would seem to be in line with the intentions of the legislator that the reception is available easily and by default rather than upon a potentially burdensome and complicated procedure to enable the reception later.

As to your suggested formatting/wording we would have concerns that the issues mentioned above would still need to be addressed and would not be covered by your draft. Furthermore, to the extent that your draft legislation regarding radio receivers integrated in a new vehicle of category M extends beyond obligations covered by art 113(1) and Annex XI(3) and covers technologies other than digital terrestrial radio broadcasting this is not covered by the EEC and may constitute a technical regulation. Under Directive (EU) 2015/1535¹, Member States are obliged to notify to the Commission any draft technical regulations relating to products, prior to their adoption, in order to allow their assessment in the light of Union law and avoid any technical barriers to trade. Technical regulations are technical specifications or other requirements the observance of which is compulsory, de jure or de facto, in the case of marketing of a product (e.g. national provisions laying down the characteristics of a product such as the dimension, labelling, packaging, level of quality, production methods and processes). The Court of Justice of the European Union (CJEU) held that the adoption of technical regulations in breach of the obligation to notify would constitute a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals. Consequently, individuals can resort to national courts which must decline to apply a national technical regulation which has not been notified in accordance with the directive (Case C-194/94 CIA Security International, paragraphs 54-55¹, Case C-443/98 Unilever Italia SpA v Central Food SpA., paragraphs 40-50).

Article 113(3)

Article 113(3) of Directive 2018/1972/EU states that member states shall encourage providers of digital television services to ensure, where appropriate, interoperability of digital television equipment. However, in Directive 2018/1972/EU there is no definition of providers of digital television services (IPTV providers? Multiplex providers?). Could you please provide us with more information what is meant by “providers of digital television services”?

Reply

The provision applies to providers of digital television services that provide digital television content transmitted using electronic communication networks and services to their end- users. Accordingly, one practical way for Member States to proceed would be to analyse which entities, in their Member State, provide such equipment to end users, and then to analyse which of these entities can be considered as providing digital television content to end users. One possible category could be pay TV platforms. While there is no definition in the EEC, Article 18 of the Framework Directive 2002/21/EC includes the established notions of “provider of digital interactive television services” and “providers of digital TV services” which could be relied on, taking into account recent

technological and market developments as appropriate. Digital television services can be transmitted via a variety of networks and services, including via IPTV or via an internet access service. In addition, article 113(3) requires a contractual relationship with an end user ('their end-users' in the first sentence, 'their contract' in the second sentence). At the end user level, the conveyance of the signals has to be combined with ensuring that the digital TV content is made accessible to the end- users. In case the end-user contracts with a content provider, this content provider is responsible for ensuring transmission and accessibility of any third party content. In case the end-user contracts with an electronic network or service provider such as an IPTV provider or a multiplex operator, it is this entity which is responsible for making the content

Article 114

Article 114

The must carry obligation was extended to ECS too. Could you say, what the purpose of the extension was?

Reply

In the past such problems could not arise as networks operators provided the service to the end users themselves. But with cable operators providing access or resale agreements (often imposed by regulation) and IPTV provided over third party telecoms infrastructure this has changed and it was felt a safeguard should be available.

This is not a provision where transposition is mandatory, I would recommend to analyse the national situation in this respect carefully as obligations would have to be reasonable, necessary to meet general interest objectives as clearly defined, proportionate and transparent.

Article 115

Must the mechanism established by the Directive for the deactivation of billing by third parties make it possible to distinguish between billing practices and leave the possibility for the end user to disable billing by use by use, or should it make it possible to deactivate all invoices by third parties at once?

Reply

Article 115 rules that competent authorities (with national regulatory authorities) are able to require providers to make available all or part of the additional facilities in Part A of Annex VI. Furthermore, Member States may go beyond the list in Annex VI to ensure a higher level of consumer protection.

In line with Annex VI, A (h), the facility is to enable end-users to deactivate the ability for third party service providers to use the bill of a provider of IAS or publicly available ICS to charge for their products or services.

The EECC does not specify whether the deactivation should be done per type of service or in one go.

Annex VI

Part A (a) of annex VI details that «National regulatory authorities may require operators to provide calling-line identification free of charge» in the context of itemised billing. Shouldn't this reference be associated with part B (a) of the same annex instead, in the context of the calling-line identification facility?

Reply

Providers of universal service (ref. Article 88) are to offer the facilities of Part A, as applicable, so that consumers can monitor and control expenditure. These facilities include itemised billing,

under which NRAs may require calling-line identification free of charge. Article 115 mandates that Member States are able to require providers to make available all or part of the additional facilities in Part A and Part B. Part B specifies calling-line identification in the context of establishing a call.

Annex XI

Annex XI.3

Does car radio receiver include a vehicle without a typical car radio, i.e. without any FM or AM receiver, but with a cellular receiver for mobile data. Mobile data can be used to receive web radio. Would IP streaming receivers fall under the new obligation?

Is it sufficient to equip the vehicle only with the hardware (DAB+ compatible receiver) whereby the reception can be enabled later on by the customer via software features (“function on demand”)?

Can Member States apply the obligation for terrestrial digital broadcasting sooner than 21 Dec 2020?

Reply

- Recital (302) EEC refers to “equipment [...] for the reception of radio”. For a future proof implementation of the provision, it has to be taken into account that recital (304) covers the possibility that radio receivers are constructed in a way that they are capable of receiving and reproducing radio services provided via [...] IP networks. It would therefore appear that in a situation where a car radio relies on a cellular receiver for mobile data to receive and reproduce radio services provided via IP networks, the requirement for a digital terrestrial radio receiver as set out in art 113(1) and Annex XI(3) would apply.
- Annex XI(3) EEC refers to the capability “of receiving and reproducing [...] radio services”. Accordingly, it would seem to be in line with the intentions of the legislator that the reception is available easily and by default rather than upon a potentially burdensome and complicated procedure to enable the reception later.
- Furthermore, Annex XI(3) specifies that “Any car radio receiver [...] shall comprise a receiver capable of receiving and reproducing at least radio services provided via digital terrestrial radio broadcasting.” This does not seem to cover configurations with a separate receiver for DAB+ next to the conventional AM/FM car radio.

National legislation transposing Article 113 EEC should apply from 21 December 2020. For the time up to 21 December 2020 Member States may apply national legislation in compliance with Union law which does not transpose Article 113 EEC, as the latter becomes applicable only at that date.

The obligation to integrate digital terrestrial radio receivers applies regardless whether or not radio services provided via digital terrestrial radio broadcasting are available in a particular Member State.

EU law provides that this obligation shall apply already from 21 December 2020.

Annex XIII

According to Annex XIII to Directive 2018/1972/EU Article 11 of Directive 2002/22/ES (quality of service of designated undertakings) has no corresponding Article in Directive 2018/1972/EU. Could you please provide us with information if this prevents member states from maintaining provision in national legislation regarding determining quality of universal service?

Reply

Article 84(1) of the EEC provides that Member States shall ensure access at an affordable price, in light of specific national conditions, to an available adequate broadband internet access service and

to voice communication services at the quality specified in their territories. Member States are thus required to specify the quality and can maintain rules on the quality of universal service regarding these two services.

Article 104 refers to technical QoS requirements and entitles NRAs , to require providers to publish comprehensive, comparable, reliable, user-friendly and up-to-date information on QoS, which is to be specified by NRAs. Pursuant to Article 104(1) providers may be required to publish information on the quality of their services, to the extent that they control at least some elements of the network either directly or by virtue of a service level agreement to that effect. Crucially, Article 104 is a transparency provision and the EECC does not indicate minimum QoS levels to be ensured by ECS providers.