

AmCham EU's Position on the new European Electronic Communications Code

Getting ready for tomorrow's digital needs: fostering investment and innovation in world-class communication networks and services

Executive summary

- AmCham EU welcomes the proposal for a new European Electronic Communications Code which gives Europe an opportunity to adapt to challenges and prepare for the future needs of the digital economy and society.
- The European Commission's proposal rightly focuses on driving investments in world-class communications networks while at the same time maintaining the Significant Market Power (SMP) competition law based approach.
- The proposals on spectrum are a step in the right direction, but should be considered as the minimum requirement, further alignment would be desirable in a world where everything will be increasingly connected wirelessly.
- A more layered approach needs to be applied to services regulation. In order to enable a flourishing digital ecosystem, legislators should seek a horizontal as opposed to a sector-specific regulatory approach, and a harmonised, pan-European approach.
- Finally, legislators should carefully consider to not create any unnecessary regulatory burden on the development of Internet of Things.

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AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €2 trillion in 2015, directly supports more than 4.3 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

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Introduction

AmCham EU welcomes the proposal for a new Electronic Communications Code which gives Europe an opportunity to adapt to challenges and prepare for the future needs of the digital economy and society. Incentivising investment in high speed broadband networks, enhancing coordination of spectrum management to foster 5G deployment and tackling regulatory fragmentation among others, are the backbone of the Digital Single Market and key to building and strengthening the future economy.

World-class communication networks are a prerequisite for Europe to succeed in building a digital economy and society and to reap the benefits hereof. Significant and capital intensive upgrades in Europe's fixed and mobile networks will be required to meet the needs for higher capacity and to provide connections for more diversified types of devices, services and applications. AmCham EU therefore believes it is paramount that the co-legislators retain the focus on incentivising investment in Europe's connectivity infrastructure. This does not mean making concessions on competition but rather finding a more appropriate balance between maintaining competition and incentivising investment.

As mobile broadband traffic continues to grow exponentially, it is equally important to ensure ubiquitous, high-quality connectivity through a more harmonised approach in spectrum management. If Europe is going to lead on 5G, we need a stronger alignment not only on timetables for the identification and release of spectrum but also greater convergence around spectrum conditions. The European Commission's proposal is a step in the right direction but the level of ambition should as a minimum be maintained while further alignment is desirable.

Further, if the co-legislators wish to see a flourishing digital ecosystem in Europe where bright ideas are easily turned into new services and where start-ups can easily scale-up, the Code needs to be more layered in its approach to services regulation. Careful consideration should be given to whether existing obligations on providers are still necessary or whether historic, sector-specific obligations can be removed, given the strong retail level competition and strong legal protections already offered in horizontal legislation. This becomes ever more important as the European Commission proposes to extend the scope to also include online communication services (Over The Top services/OTTs). Extending sector-specific regulation to cover even more services, including new and emerging services, risks having a chilling effect on innovation and could inadvertently increase rather than lower barriers to market entry for new players. The principle should rather be to rely on horizontal consistency of reducing regulation of electronic communication services where appropriate. AmCham EU therefore urges the co-legislators to make sure that any new regulatory obligation is strictly necessary, appropriate, proportionate and technically feasible.

A more layered, balanced and proportionate approach also implies a stronger distinction between business and residential services. The European Commission's proposal is a step in the right direction but further work will be needed to ensure the newly introduced distinction

between business and consumers is applied fully and consistently across the Code. Finally, more work is needed to ensure a fully harmonised approach that enables cross-border service delivery. The Code lacks in its pan-European focus both as regards the substantive provisions and the governance, in contradiction with the principle objective of the Digital Single Market proposal.

Flexible access obligations for more investment and innovation

The current EU regulatory framework has been focused on liberalising and opening up former monopolies' networks to foster and enable competition and choice for consumers and end-users. As a result there is a strong level of retail competition in Europe (for which reason the European Commission explicitly considers that all retail regulation should be abolished) and broad availability of basic broadband.

At the same time Europe risks falling behind when it comes to the availability of very high-speed broadband networks, defined as Very High Capacity Networks (VHCNs) in the European Commission's proposal. The scope of access regulation needs to be reduced to create more incentives for the private sector to make the necessary investments in the widespread availability of VHCNs. Equally, the scope and intensity of access regulation should not undermine competition between networks which has proven key to ongoing investment and innovation – a model which is highly sensitive to the approach taken by regulators on access regulation.

AmCham EU therefore welcomes the focus of the review proposed by the European Commission on driving investments while at the same time maintaining the SMP competition law based approach. The principles behind the current framework remain relevant but the way in which they are applied need updating to take into account the different commercial realities when it comes to building new networks or significantly upgrading existing ones. While the current telecom package has in principle an inbuilt flexibility to adapt regulation to new market trends and to take investment risk and return on investment into account, national regulatory authorities (NRAs) have in practice only used this flexibility to a limited extent and only in a limited number of Member States. The European Commission's proposed changes to market analysis seek to strengthen this by building in some stronger "signals" to the NRAs to enable a more targeted approach to regulation. This notably includes obligations to take into account market dynamics and commercial agreements in place of absent regulation, to assess the cumulative market pressures and, where ex ante obligations are still needed, choose remedies which are more likely to foster self-sustaining competition as a first priority.

It is important to note that while the intention is to create a more targeted regulation, NRAs fully retain their powers to intervene in case this is necessary to safeguard competition and end-user choice. Thus, the intention is to continue to promote competition whilst recreating the ability to get a return on investment in networks, which in turn should spur on development of new and innovative services that will benefit both businesses and residential consumers alike.

The introduction of provisions to facilitate commercial co-investment in new infrastructure as an additional tool are also welcome. However, it should be made sure that this model is not pursued as the only valid business model or as the panacea to fix the network investment gap.

State funding should also remain an important tool where appropriate, in line with the EU state aid rules on broadband investment.

Spectrum alignment a step in the right direction

In a world where everything will increasingly be connected wirelessly, investment in mobile broadband networks is crucial. Europe needs both licensed, license-exempt and licensed shared spectrum. Licensed spectrum will be crucial to generate investment and quality of service for Europe's consumers and businesses. License-exempt spectrum plays an increasing role in enabling wide channel, video-rich experience on devices with larger screens and offloading traffic from congested mobile networks. Spectrum sharing on both an unlicensed (e.g. Wi-Fi, LAA) and licensed (e.g. LSA) basis will be necessary to allow greater access to spectrum to meet the demands of society and business.

AmCham EU fully supports the European Commission's proposals in the Code to further converge and align spectrum policy management at a European level and urges the co-legislators to maintain the level of ambition of the European Commission's proposal as a minimum. Harmonisation should in principle go further in order for Europe's digital sector to become truly competitive at a global level.

The European Commission's proposal in support of harmonisation could be further enhanced by requiring Member States to take into account future demand growth, future changes in technology to the extent known, or possible changes in other relevant policies (e.g., cell siting, pricing, roaming) that would impact the future utilisation of an allocated band. The Code should discourage backward looking, static analysis, particularly if the Member State is looking to depart from an harmonised policy approach.

One of the key positive elements of the European Commission's proposal is the minimum licence duration of 25 years. This is a step in the right direction to increase certainty which is essential for business investing in often very costly licences.

AmCham EU also supports the proposals to facilitate deployment of small cell infrastructures and radio local area networks. The proposals to facilitate sharing of spectrum to promote greater efficiency, both in the case of general authorisations and for individual rights of use, have merit in cases where cleared spectrum is impractical or inefficient. In cases where sharing is warranted, the Code should encourage Member States to harmonise spectrum sharing mechanisms by band to promote consistent access to radio spectrum resources throughout Europe.

Need for a more harmonised and layered approach to services regulation

Digital communication services have fundamentally changed since the inception of the EU regulatory framework for electronic communication services. From covering a relatively narrow set of services provided by a relatively small group of potential providers, the convergence to all IP has brought with it a host of new services going far beyond traditional electronic communication services and what used to be primarily national markets. The goal of regulation should be to enable this development and not to create barriers to it. This requires two things: a horizontal as opposed to sector-specific regulatory approach and a harmonised, pan-European approach.

As regards a horizontal versus a sector-specific approach, the European Commission's proposal unfortunately does little to minimise and limit historic sector-specific regulations to where absolutely necessary. Rather than enabling the entire ecosystem to innovate and compete on the basis of the numerous existing horizontal regulations that protect and promote competition and consumers' interest¹, the European Commission proposes to extend the scope of the historic sector-specific regulation, in some cases even beyond electronic communication services (see Art.100 on bundles in the Code). AmCham EU appreciates that the European Commission has at least attempted to extend the scope in a way that differentiates between different types of electronic communication services and layers obligations accordingly. However, some significant fine-tuning by the co-legislators will be required in order to make sure that the new regulatory obligations are necessary, proportionate, technically feasible and future-proof. In this regard, the broad definition of number-based services raises some concerns as it could capture a wider than intended range of services. As a consequence of this overly broad definition, it might not be technically feasible for all of the captured services to comply with all relevant regulatory obligations. As such, the European Commission's proposal does not sufficiently take into account the technical differences between 'network-integrated' and 'network-independent'.² Finally, it will also be crucial that there can be no further additional requirements at national level, e.g. if a service is not required to notify under the Code it should not be possible for a Member State to impose a notification requirement nationally. This should be made unequivocal in the Code.

An important additional issue to ensure a layered approach to regulation of end-user protections is the lack of distinction between different groups of end-users, i.e. "consumers and micro and small enterprises" versus enterprise users. This is a distinction that has been lacking from the existing framework which has too often led to regulation that aims to protect consumers also apply to business services despite being unnecessary or irrelevant in a business to business (B2B) context. It has acted as a deterrent to investment, innovation and new developments in this specific market and AmCham EU therefore strongly supports the changes in this regard. We welcome that the Code includes some attempts to explicitly exclude enterprise services from consumer protection obligations (e.g. elements of contract

¹ Notably the Information Society Services Directive, the Consumer Rights Directive, General Data Protection Regulation as well as ongoing legislation on digital contracts.

² The concept of network-independent is explained in recital 259 of the Commission's proposal

information requirements). However we regret that this principle is not consistently reflected throughout the services section. Indeed the text jumps inconsistently from “consumer” to “end-user” without clear justification. AmCham EU calls on the co-legislators to make sure that the distinction between different types of “end-users” (consumers, micro enterprises and large enterprises) is applied across the board in the Code.

As regards the second prerequisite, the need for a harmonised, pan-European approach, the Commission's proposal is a welcome starting point. AmCham EU would however like to see more ambitious proposals and believes a Regulation would have been a better tool to ensure maximum harmonisation and direct applicability. As a starting point, AmCham EU supports the proposal to establish the Body of European Regulators for Electronic Communications (BEREC) as a single point of contact for notification in order to obtain a general authorisation. However, as this appears to be limited to the notification itself, and as it applies only in specific circumstances, we believe further work should go into ensuring a streamlined single governance that minimises duplication and overlapping jurisdictional issues. The Code should also aim at promoting the cross-border provisioning of services by facilitating cross-border selling and contracting for example through a one-stop-shop mechanism (main establishment/lead NRA) authorisation. When it comes to the substantive provisions, these too should be fully harmonised. The European Commission's proposal does helpfully establish maximum harmonisation as the basic principle but there are too many and too broad exceptions to that principle where Member States are explicitly allowed to go above and beyond common rules.

Concerns over regulatory effects on the Internet of Things (IoT)

In the next wave of the Internet revolution, we will be connecting anything that can have a sensor attached to it – providing us with a wealth of information and increasing productivity. It's about connecting machines and people in more relevant ways and enabling the right information to reach the right person or machine at the right time. It is also about converting data into usable intelligence and connecting devices to the Internet and each other. The IoT will impact nearly every industry. Education, healthcare, retail, shipping, automotive, utilities and more will be transformed for the benefit of EU citizens.

It is crucial that the Code allows for freedom for the market in Machine to Machine (M2M) communication to develop. We are therefore concerned about the explicit reference to M2M in the third category of the new definition of electronic communications services, i.e., “services consisting wholly or mainly of the conveyance of signals, such as transmission services used for the provision of machine to machine services” (emphasis added). While the intention may not be to create new regulatory burdens care should be taken to ensure that no new barriers are created to the development of M2M. In the absence of any justification for mention of M2M in the definition, AmCham EU strongly urges that it should be deleted.

This being said, AmCham EU supports the changes in the European Commission's proposal to explicitly allow M2M providers to apply for numbering resources and for the extra-

territorial use of numbering resources. That is to say, national regulators should allow the use of their numbering resources outside their national territories, as well as allowing the use of foreign numbering codes within their national territories. This operational model has been successfully put into use for many years and has promoted fair competition and competitive telecommunications markets.

Conclusion and recommendations to co-legislators

AmCham EU welcomes the European Commission's proposal for a new European Electronic Communications Code. With the aim of creating a forward-looking regulation which fosters innovation and investment in world-class communication networks and services, AmCham EU calls co-legislators to consider the key recommendations hereafter.

1. Incentivise investments while maintaining competition:
 - ❖ **Support** the changes to the market analysis for a more targeted approach to access regulation.
 - ❖ **Assess** the provisions on co-investment as an additional tool while making sure that co-investment is not pursued as the only valid business model.
2. Incentivise investments in mobile broadband networks:
 - ❖ **Further enhance** harmonisation by requiring Member States to take into account future demand growth.
 - ❖ **Support**, if not increase, the minimum licence duration of 25 years.
 - ❖ **Support** proposals to facilitate deployment of small cell infrastructure, and notably encourage harmonisation of spectrum sharing mechanisms by band in cases where sharing is warranted.
3. Foster a flourishing digital ecosystem for communication services:
 - ❖ **Maintain and further fine-tune** the layered approach, differentiating between different types of electronic communication services, to ensure new regulatory obligations are necessary, proportionate, technically feasible and future-proof, including revising the definition of number-based.
 - ❖ **Apply** the distinction between different types of "end-users" (consumers, micro enterprises and large enterprises) consistently throughout the services section in the Code.
 - ❖ **Further streamline** notification procedures to establish BEREC as a one-stop-shop and further minimise the exceptions to the maximum harmonisation principle of the substantive provisions.
4. Avoid creating any new unjustified barrier to the development of Internet of Things:
 - ❖ **Delete** the inclusion of M2M services in the new definition of electronic communication services in absence of any valid justification.