

Making the Code fit for tomorrow's digital needs

AmCham EU's key recommendations in the trilogue process

We welcome the review of the rules for electronic communication services towards a more targeted, proportionate, light-touch and harmonised regime. However, more can be done to consistently reflect those objectives in the legislative text.

Towards a Genuine Digital Single Market

General Authorisation Regime

Providers of electronic communication services need to obtain a general authorisation by the regulator in order to offer their services in a given national market. For a pan-European provider this entails duplicating overlapping requirements (e.g. complaint mechanism, statistical reporting, language requirements, etc.) for every single Member State, creating an unnecessary administrative burden (see our [infographic](#)).

This governance regime is based on legacy technology when the provision of services was intrinsically and inseparably linked to control over networks and where markets were national by nature. Irrespective of the kind of electronic communication services a provider offers, technology has fundamentally changed the nature of markets and to a large extent broken down the barriers between national markets which has in turn seen the emergence of a handful of genuinely pan-European providers. This is confounded with the expansion of scope of the regulatory framework to now encompass a significantly broader set of services, demonstrating even more the need for an updated general authorisation regime for pan-European providers. This is notwithstanding the position that number-independent interpersonal communication services (NI-ICS) should be exempted from general authorisation as proposed by the Commission and Member States.

- **Pan-European providers should be able to rely on a single notification ('one-stop-shop') and the principle of main establishment** (one main supervisory authority in the EU). We welcome

the ambition from the European Parliament (EP) to build a truly single market for electronic communication services providers. Maximum harmonisation in this regard is particularly important. However, potential adoption of the **EP's language on how to define a main establishment as included in article 12 paragraph 2a new is problematic** as it would practically exclude all non-EU providers¹.

- **The definition of main establishment should be based on the Directive on security of network and information systems (NIS Directive)** namely: 'A digital service provider shall be deemed to have its main establishment in a Member State when it has its head office in that Member State'². This would be without prejudice to the national or competent regulatory authorities' powers to impose conditions attached to the use of spectrum, numbers and physical network assets and ensure compliance with its applicable laws not harmonised by the Code.
- **The EU should follow the Commission and Council text on Article 12 which excludes NI-ICS from general authorisation requirements.** Number-independent communications apps are born online, globally available, and therefore inherently pan-European in nature. Forcing such services in a national authorisation and governance scheme will lead to significant fragmentation and compliance costs for those apps that are registered, while creating significant compliance challenges for National Regulatory Agencies (NRAs) as they are forced to find apps from across the globe that have not registered.

¹ "the main establishment corresponds to the place where the undertaking [...]: a) performs its substantial activities other than purely administrative such as business development, accounting and personnel departments; b) takes its strategic business decisions as to provide electronic communications services in the Union; and c)

produces a significant part of its turnover" (Art. 12 – par. 2a new, Parliament's report on EECC).

² NIS Directive, Article 18 - Jurisdiction and territoriality

Security requirements

AmCham EU supports a fully harmonised approach to security requirements where implementation is set out at EU level and additional national requirements are limited to those necessary for clearly defined cases of national security.

- **Failing that, we support and urge the co-legislators to adopt the EP additional Art. 40 paragraph 1a new** which would create a notification and cooperation mechanism in case of Member States adopting additional diverging or overlapping security obligations to those implemented at EU level.
- **AmCham EU supports the involvement of ENISA** in the implementation of security obligations and the proposal to have ENISA adopt further guidelines to the EU implementing/delegated acts.

A targeted, proportionate and light-touch regulatory regime

Machine to Machine (M2M)

It is crucial that the Code allows the market to develop in M2M without unnecessary burden. Further clarity is therefore needed around what is meant by M2M/conveyance of signals and the specific obligations that such services should be subject to. For this reason we would like to provide recommendations on how this can be achieved:

- **Explicit reference should be made in the Code that only the transmission of M2M should be considered conveyance of signals in the definition of an ECS and not the service.** Such a clarification will provide necessary legal certainty to M2M providers as to whether or not they are regulated under the EECC. We welcome the proposed amendment to Recital 15³ by the IMCO Committee of the EP, as it makes this distinction. This should be supported and echoed in the relevant articles.
- Also, services consisting of the transmission of signals should **only be covered to the extent that they are provided over a public electronic communications network**, in line with the

³ (15) [...] *Similarly to the case of broadcasting, where the transmitted content does not fall within the definition of an electronic communications service, a distinction between a machine-to-machine service and its underlying transmission should be made. Only the transmission should be considered*

existing framework. This will ensure clarity as to when specific obligations do or do not apply to enterprise network providers, for example.

Enterprise distinction

With regards to consumer protection obligations, considering the specificities of business users – different contractual provisions and business needs – we strongly believe that although certain obligations may make sense to protect consumers, they are irrelevant and potentially disproportionate and burdensome when applied to enterprise services. Although the European Commission, EP and Council attempted to explicitly exclude enterprise services from consumer protection obligations (e.g. elements of contract information requirements), we call to reflect this principle consistently throughout the services section. A clear distinction should be made between consumer, and where relevant micro and small enterprises and high-end enterprise users.

- **We support the provisions by the EP and Council to apply end-user rights to micro and small enterprise, unless they expressly agree to waive those provisions**, as this clearly excludes large enterprises from the scope. However this clarification should be used consistently, particularly for **all paragraphs of Articles 95-98 and 100**, to have full effect and to provide legal certainty for large enterprises who would otherwise fall under consumer-related provisions.
- **We welcome the acknowledgement by the Council of the uniqueness of service level agreements used by enterprises, and both co-legislators' reference to terms and conditions**, thereby acknowledging the differences of enterprise services compared with consumer services. We support these provisions remain in the agreed text.

We trust these points will be considered for the ongoing negotiations, which we hope will lead to a successful and investment boosting telecom framework for Europe.

as conveyance of signals, whereas the application part of a machine-to-machine service (such as e.g. the consumption recording and analysis in smart metering) should not. [...]