

DIGITAL SINGLE MARKET UPDATE:

The European Commission review of telecommunications regulation

The European Commission is undertaking the first fundamental review of the telecommunications regulatory framework since 2009. This initiative is driven by a range of significant structural changes identified by the Commission, including the continuing migration from copper to fibre access networks, fixed/mobile convergence, retail bundling and the emergence of over-the-top (OTT) services that are rapidly transforming the traditional telecommunications markets.

Scott Morrison and Neil Clements review the European Commission's telecommunications regulatory framework consultation and highlight the importance of engagement on key issues

Since the liberalisation of EU telecommunications markets across the 1980-90s, economic regulation of the sector has focused on using regulation to open up markets, promote competition, free up economic bottlenecks and enable access to key inputs. More recently, there has been a trend towards less retail regulation with a focus on targeted wholesale regulation. However, whilst the sector and its investors are making the argument for the relaxation of regulation, it is not inconceivable that the Commission's review will lead to increases in the scope and depth of regulation of the European telecoms sector.

Critically, the review contemplates redefining communications services to include elements of social media and instant messaging, and considers the merit of imposing ex-ante regulation on these services. The Commission also suggests that increased regulation of retail markets might be appropriate, there is a real risk of both increased regulatory intervention, and a greater degree of uncertainty as to outcomes arising from lengthy interaction between the EC and member state regulators.

Network operators and their OTT counterparts, would be well advised to engage early and effectively in the consultation process before it concludes in December.

Digital Single Market initiative

As we highlighted in our recent paper 'Europe goes for telecom reform', in May 2015 the European Commission set out a roadmap towards a Digital Single Market (DSM). According to the EC, the DSM will deliver an environment in which "individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence."

The Commission has diverse and ambitious objectives; amongst the 16 broad elements of the DSM roadmap is a review of the entire telecommunications regulatory framework. The current regulatory framework consists of the five Directives of the Telecoms Package, three Decisions relating to the regulation of spectrum, and four 'soft law EU recommendations'. Add the member state governments and the independent national sector regulatory authorities, and a complex web of regulation emerges. A comprehensive review and reform exercise is a significant undertaking.

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Review of the Telecommunications Regulatory Framework

The Commission's review of regulation is lengthy and complex; the questionnaire that has been issued on the current regulatory framework includes over 200 individual questions, covering a broad range of issues.

Network access: The review covers five different areas. The first of these is the regulation of network access – in particular the market reviews that regulators are required to undertake every three years. The review of network access has the scope to make fundamental changes, the Commission considers whether investment should be a primary policy objective of the regulatory framework, how to promote the migration from copper to fibre, and even whether copper should be decommissioned after 2020. On one hand, the review questions whether the current approach of ex-ante market reviews is needed at all and on the other hand questions whether EC guidance on market reviews should be made binding.

The review also considers that retail regulation might need to be strengthened in order to address market failures, and the Commission suggests that retail regulation might be incremental to existing wholesale regulation.

Spectrum management: The second area of the review covers Europe's approach to spectrum management, which is currently governed by a range of frameworks, decisions, and policy programmes. The Radio Spectrum Policy Programme dates from 2012 and was intended to harmonise strategic planning across Europe. The review questions suggest that the Commission is looking for even more harmonisation across Europe. This has fundamental implications for any network operator or investor considering cross-border consolidation.

Redefining communications services for a new age:

Thirdly, the review considers existing sector-specific regulations. The existing regulatory framework only covers what the EU calls Electronic Communication Services (ECS) such as traditional voice and data services but excludes OTT services such as those provided by WhatsApp and Viber and by social media platforms such as Twitter and Facebook. This speaks to the debate about creating a 'level playing field' between the OTTs and traditional operators. Implicit in this section, however, is the possibility of a 'levelling up' whereby the OTTs could be subject to EU ex-ante regulation, rather than a 'levelling down' of the regulation of the traditional operators towards that faced by the OTTs.

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The review also considers the possibility of including machine to machine (M2M) communications in the definition of communication services, which could have fundamental implications for the burgeoning 'Internet of things'. The second half of the section dives further into the detail and asks questions on number portability, switching regimes, three-digit harmonised numbers and 'must-carry' obligations.

Universal Service Obligation (USO): Sensibly given the transformation of consumer access to telecommunications services over the last ten years, the review then considers the scope of the USO in Europe. The review questions both the need for an ongoing USO regime, and whether the scope of the existing regime requires amendment.

The Commission considers whether a voice service is still required in light of developments in mobile telephony, suggesting that both VoIP and mobile might act as substitutes, but seeks reassurance that they can provide 'reliability, quality and security' on a par with fixed services. The Commission even considers whether coverage targets should move away from household coverage to individual coverage and implies that mobile services with coverage obligations might play a role in the USO. As well as redefining how the USO could be defined and delivered, the review contemplates extending the scope of the USO to include broadband access and then debates whether a broadband USO would be defined by speed, services, or by both. Finally, the Commission debates how USO services should be funded, suggesting a greater role for Europe in funding the USO.

Institutional Framework: The final part of the review considers the institutional set-up in Europe. In this section, the Commission considers whether a 'common EU approach' would be beneficial, and whether BEREC's role should be strengthened. The Commission notes that the design of access remedies is not consistent across Europe, suggesting possible harmonisation.

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FTI's view

The EC's review of the telecommunications framework is timely. The last fundamental review was undertaken back in 2009 before transformative developments such as digital switch over and the release of 4G spectrum. Coupled with the rollout of FTTx technologies, the rise of the smart phone and the advent of 'OTT' services, it is clear that the technical and commercial landscape has been transformed since 2009, and even more fundamentally since the regime was set up in the early 2000s.

Since liberalisation, economic regulation has focused on mitigating the impact on consumers of enduring economic bottlenecks such as access to the local loop. In this regard some major challenges remain; the implications for consumers of inadequate access to the internet-based society have never been greater, and the investment required to provide high quality access to 100% of the population is almost prohibitive.

However, the diversity of network access options, consumers' perceptions of the value of services provided, and the different business models that firms have developed to gain reward for the value they create have all fundamentally altered the commercial and technical landscape.

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Indeed, the value chain that has developed around the broader internet ecosystem is radically different to the traditional linear telecommunications value chain of network owners, wholesalers, retailers and consumers. The new internet value chain, of which the telecommunications sector is now part, is far broader and more complex. Multi-sided markets have proliferated; the drivers of value and drivers of revenue have atomized and are now coalescing around a very different structure to that which existed when the telecoms regulatory regime was first envisaged.

The European Commission's review of the framework will have far reaching impacts for all participants in the internet value chain, not just the owners of the network infrastructure and those who seek access to it. This review could result in far greater pan-EU harmonisation, giving more decision-making power to BEREC and consequently less discretion for national regulators. The effects of the European Commission's review may also be felt in countries outside the EU as other European countries and states in the rest of EMEA take heed from the EU. The merits of centralised regulatory certainty versus member state-specific discretion will be a central debate as the new regulatory framework is developed. Now is the time for firms throughout the internet ecosystem to engage with the EU's consultation process, to assess the potential impact on their business models and to provide theoretically rigorous and evidenced-based submissions that will influence the agenda effectively.

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