

The Consumer Voice in Europe

EUROPEAN ELECTRONIC COMMUNICATIONS CODE

BEUC key demands for trilogue negotiations on market design



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EC register for interest representatives: identification number 9505781573-45



Co-funded by the European Union

Ref: BEUC-X-2018-029 - 11/04/2018

Why it matters to consumers

In an ever more interconnected world, consumers spend increasing amounts of time and money online, connecting with others and leading digital lives. Access to affordable, high-quality internet connections and communication technologies have become a prerequisite for all consumers to be able to participate in the digital society.

Key demands for trilogue negotiations on the European Electronic Communications Code – market design

Negotiations between the European Parliament and the Council on the European Commission's proposal on a European Electronic Communications Code (EECC) are ongoing. BEUC would like to provide the European legislator with a set of recommendations on the key provisions related to how telecom markets are designed and should function to ensure a positive outcome for consumers¹.

1. Article 74 (co-investment) can become the Trojan Horse of efficient market regulation

EU regulation cannot be directly aimed at reducing the risks that investors run when deciding on long-term investments into new infrastructure. On the contrary, EU market regulation in the field of telecoms has proven essential to equip National Regulatory Authorities (NRAs) with the right tools to ensure some competition emerges in what are otherwise markets with a tendency towards oligopolistic and concentrated structures.

We therefore do not believe that the proposed idea to give telecom operators "regulatory holidays" in certain investments scenarios (article 74) where they might or might work with other companies is sufficiently justified. On the contrary, we are deeply concerned that this deregulatory mechanism will worsen the negative effects of what are already too concentrated markets and will strengthen the position of the dominant operator/s. We have therefore consistently requested that **Article 74 should be entirely deleted**.

If the EU co-legislators decide to maintain deregulatory provisions on co-investments in the new European Electronic Communications Code, then the European Parliament's version should be preferred, and based on that, ensure that the **following key principles are respected**:

- This article must **apply strictly only to new technologies**, where the need for investment is higher. Therefore, the definition of Very High Capacity Network (VHCN) must be ambitious. Article 74 should not apply to only some elements of a network.
- NRAs should always maintain the discretion to decide whether to apply this deregulatory mechanism or not. It **shall never be an obligation on NRAs**.

¹ For more information on BEUC's positions on this proposal, please see:

- BEUC key demands for trilogue related to consumer protection: http://www.beuc.eu/publications/beuc-x-2017-028_consumer_protection_in_the_communications_sector.pdf
- BEUC position paper on telecom market design: http://www.beuc.eu/publications/beuc-x-2017-025_qbe_telecom_market_design_-_beuc_position_paper.pdf

- Only concluded agreements shall constitute grounds for the application of this deregulatory mechanism. A mere co-investment offer shall never be sufficient for NRAs to apply this mechanism.
- This deregulatory mechanism should not serve as a means to provide regulatory cover for commercial access agreements outside of the regulatory framework. **Only genuine joint investment projects** (where two or more investors finance and/or build infrastructure together) shall be considered for the scope of this article.
- Any network operator that does not participate in the co-investment shall still be able to access the network deployed as a result of the co-investment in **fair, reasonable and non-discriminatory terms**.
- **NRAs should always uphold competition**. To do that, they shall review the proposed co-investment projects and demand further commitments if there is a risk to the competitive landscape or to consumer welfare.

2. Significant Market Power is not the only problem, rules to address oligopolies are also necessary– Article 59.2 and Article 61

Monopolies and anticompetitive oligopolies are bad for the market and bad for consumers. EU regulation has and must continue playing a pivotal role in preventing the appearance of monopolies or oligopolies at any level in telecom markets, be it at local, regional or national level.

The tools that NRAs are given by telecom regulation are mainly focused on situations where Significant Market Power (SMP) is demonstrable. This is an important barrier for regulatory intervention that is not easy for NRAs to overcome. Importantly, as BEREC rightly points out, situations of Significant Market Power are not the only threats to competition. Oligopolistic structures where the market is dominated not by one but by a reduced number of players are also problematic and increasingly commonplace as a result of market consolidation.

In some countries, such as Belgium, the Netherlands and Denmark, this is already the case, and consumers suffer from the lack of sufficient competition. The lack of competitive dynamics in these markets allows operators to increase their prices at the same time and often even by the same percentage. These same worrying dynamics can be observed in other markets such as in Portugal.

In order to prevent and address problems linked to oligopolies, **NRAs must be equipped with the right regulatory tools**. Whether through the extension of the Significant Market Power (SMP) regime to include **joint dominance** (article 61) or through **symmetric remedies** (Article 59.2), it is essential that the co-legislators empower NRAs with effective regulatory tools which can be used swiftly and without undesirable side-effects on the competitive landscape of the market they oversee.

Whichever type of regulatory tool is chosen, the **following principles shall be embedded into the legislative measure**:

- **NRAs must not be directly obliged to apply the regulatory measure**. It should always be the NRA who decides on a case-by-case basis whether the market situation calls for intervention through this specific regulatory tool.

- NRAs shall always ensure that competing players have **access at reasonable terms** to the dominant players' networks **at the level that allows them to compete effectively**.
- NRAs shall be required to **consider the overall competitive dynamics of the regional and/or national market at stake** to ensure that competition is always safeguarded in the long term. Especially with symmetric remedies (article 59.2), NRAs must ensure that their use of it does not in turn worsen situations of dominance of SMP operators.
- The regulatory tool must be **easy to put in practice and efficient** in how it impacts the market. The Dutch and Belgian examples show the necessity for NRAs to be able to act fast.

In addition, dealing with oligopolies requires a **significant modification or complete deletion of Recital 175 as proposed by the European Commission**.

3. Security of Communications is paramount – Article 40

The security of communications is an essential pillar of consumer protection and must be guaranteed for all types of electronic communication services. Security of communications is necessary to guarantee consumers' fundamental rights to privacy, integrity and personal security.

Already in today's markets where consumers use communication services constantly, the security of their private communications needs to be safeguarded. As goods and individuals get increasingly interconnected with the Internet of Things, the security of communications is becoming an ever increasingly fundamental principle for consumers. To best achieve this, where possible communications should be encrypted end-to-end by default.

In addition, when there is a breach of security, providers of ECS should not only notify authorities but also notify consumers affected by the breach as soon as possible once they become aware of the breach.

We therefore call on co-legislators to adopt the European Parliament's Article 40, paragraphs 1, 1a and 3.

4. Europe needs strong, independent, well-resourced NRAs with the right competences

The EU's updated telecom framework will not be successful in achieving its public policy objectives if it is not accompanied and supported by the right institutional governance model.

The EECC Directive will contain provisions on National Regulatory Authorities that are important for the market and for consumers, such as for example harmonising a minimum set of powers that all NRAs should have (Article 5).

The EECC Directive also includes rules to secure the financial and political independence of NRAs, two important aspects of the institutional design of NRAs that must be strongly protected. In this sense, **it is important that the obligations and powers stemming from this legal framework are always assigned to a regulatory authority that is independent both from market actors and from the national government.**

Furthermore, telecom NRAs will have a crucial role to play in the markets of the future where new technologies are already being designed and deployed. A case in point is the Internet of Things, where all new products and services that will be interconnected will include an electronic communication service. We therefore **call on the co-legislators to adopt the European Parliament's version of Article 5**, in virtue of NRAs will have a set of competences that are more adequately fit for the challenges of the future.

END



This publication is part of an activity which has received funding under an operating grant from the European Union's Consumer Programme (2014-2020).

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