

The Consumer Voice in Europe

CONSUMER PROTECTION IN THE COMMUNICATIONS SECTOR

BEUC position paper



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EC register for interest representatives: identification number 9505781573-45



Co-funded by the European Union

Ref: BEUC-X-2017-028 - 21/03/2017

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.

Summary¹

Telecom markets remain an important sector of concern for all European consumers, as general satisfaction with telecom services remains very low. We welcome the Commission's proposal to establish a European Electronic Communications Code (EECC)² with an overall strategic objective of getting Europe to the forefront of connectivity, deploying the latest technologies and making sure nobody gets left behind.

In a time when consumers are supposed to embrace the digital revolution and communicate with each other using different types of digital services, and considering the complex nature of modern digital communications markets and services, it is essential to maintain a specific set of rules that guarantee a high-level of protection for all consumers and respond to their concrete needs. To advance consumers' interests in the sector, EU co-legislators must take the opportunity posed by this proposed reform to:

1. Maintain sector-specific rules that guarantee a high-level of protection for all consumers.
2. Keep over-the-top players (OTTs) such as Skype and WhatsApp in the scope of the Directive so that they are bound by:
 - a. The principle of security of communications (Article 40).
 - b. The principle of confidentiality of communications in the proposed e-Privacy Regulation³.
 - c. Important consumer protection provisions, particularly on contractual remedies in the Digital Content Directive⁴.
3. Make Title III of the proposed Directive on consumer rights minimum harmonisation to ensure that:
 - a. No consumers lose acquired rights and protections that Member States have adopted to resolve national specificities.
 - b. Member States and national authorities have the necessary flexibility to respond to problems that arise in the future.
4. Strengthen rules that facilitate switching, in particular on early contract termination, easy switching and on bundled contracts.
5. Drawing inspiration from general single market principles of non-discrimination for cross-border services, ensure the price of telecom services are not different depending on whether the service is delivered domestically or whether it crosses a border.

¹ Our UK member Which? is not a signatory to this paper.

² Proposal for a Directive establishing the European Electronic Communications Code -COM/2016/0590 final 2 - http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=comnat:COM_2016_0590_FIN

³ Proposal for a Regulation concerning the respect for private life and the protection of personal data in electronic communications, COM(2017) 10 final (e-Privacy Regulation)

⁴ Proposal for a Directive on Contracts for the supply of digital content, COM(2015) 634 final

1. Introduction

Telecom markets remain an important sector of concern for all European consumers, as general satisfaction with telecom services remains very low. For example, the European Commission's latest Consumer Market Scoreboard⁵ found that from all 29 surveyed markets, telecom markets (fix and mobile telephony, internet access and digital TV) are the worst performing markets in Europe with the highest share of consumers that have experienced problems and have suffered detriment.

The European Commission's proposed reform of Europe's telecom rules is a good opportunity to ensure consumers' interests in the sector are protected and promoted. We welcome the Commission's overall strategic objective of getting Europe to the forefront of connectivity, deploying the latest technologies and making sure nobody gets left behind.

In a time when consumers are supposed to embrace the digital revolution and communicate with each other using different types of digital services, and considering the complex nature of modern digital communications markets and services, it is essential to maintain a specific set of rules that guarantee a high-level of protection for all consumers and respond to their concrete needs. Horizontal consumer protection laws play an important role but will not be in itself sufficient to address those needs.

We welcome that the European Commission's proposal to establish a European Electronic Communications Code (EECC)⁶ **aims to strengthen sector-specific consumer protection regulation.** This paper goes into the detail of different provisions and proposes improvements to maximise consumer protection for all consumers.

2. An upgraded consumer rights framework for the digital communications sector

The EU's updated rules for digital communications should regulate any type of service that enables real-time communications over digital networks, whether they are transmitted over the internet or not. Not all types of communication services require the same regulatory measures because the problems that need to be addressed are not always the same. The new legislative framework should be sufficiently detailed to address different types of communication services differently, whether they are provided as a managed service (Voice over IP) or over the internet (so called Over-The-Top or OTT services).

Importantly, the proposed European Electronic Communications Code is not the only necessary instrument to ensure a comprehensive, balanced and future-proof framework to protect consumers of digital communications services. As we highlight below, certain changes need to be made to the proposed Digital Content Directive (DCD)⁷ and to the proposed Regulation on e-Privacy⁸.

2.1. Getting the definition of electronic communications services right

The proposed definition of *electronic communications services* (ECS) is important because it will determine the type of communication service that is covered and which provisions

⁵ 12th edition of Consumer Markets Scoreboard, European Commission 2016

⁶ Proposal for a Directive establishing the European Electronic Communications Code -COM/2016/0590 final 2 - http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=comnat:COM_2016_0590_FIN

⁷ Proposal for a Directive on Contracts for the supply of digital content, COM(2015) 634 final

⁸ Proposal for a Regulation concerning the respect for private life and the protection of personal data in electronic communications, COM(2017) 10 final (e-Privacy Regulation)

in the EECC apply to each type of communication service. Importantly, other instruments such as the proposed DCD and the proposed e-Privacy Regulation make their scope dependant on the definition of ECS that the EECC establishes.

The proposed definition of ECS says it is a service “normally provided via remuneration via electronic communications networks” and breaks down the types of electronic communications services into three:

1. Internet access service (IAS) as defined in Article 2(2) of Regulation 2015/2120.
2. Interpersonal communications services (ICS).
3. Services “consisting wholly or mainly in the conveyance of signals such as transmission services used for the provision of machine-to-machine services and for broadcasting (...)”.

The distinction between these three types of services is a reasonable approach to provide the necessary granularity needed for the legal framework. It is important to maintain the third category of services (conveyance of signals) within the scope of the EECC Directive to make sure all the necessary protective provisions can apply to them too. These services are essential in the context of machine-to-machine communications as the Internet of Things develops and important consumer protection provisions must apply to them too.

Interpersonal communications services are defined as “a service normally provided for remuneration that enables direct interpersonal and interactive exchange of information (...) between a finite number of persons (...); it does not include services which enable interpersonal and interactive communication merely as a minor ancillary feature that is intrinsically linked to another service”.

Interpersonal communications services are then further broken down into two sub-categories:

1. Number-based interpersonal communications services are ICS that “connect to the public switched telephone network, either by means of assigned numbering resources (...) or by enabling communication with a number or numbers in national or international telephone numbering plans”. In other words, all traditional voice and SMS services provided by telecom companies and online services that connect to the numbering system such as SkypeOut and ViberOut are considered equivalent services by this definition and therefore covered under it.
2. Number-independent interpersonal communications services are ICS that do “not connect with the public switched telephone network (...)”. In other words, all OTT services that do not connect to the public numbering system such as WhatsApp, Google Hangout, Telegram, Signal, Skype-to-Skype, etc would be covered under this definition. Nevertheless, only few provisions of the proposed Directive apply to these services.

Services of the same nature from a functional, technical and legal perspective should comply with the same rules and share the same protective measures. We are however concerned that while making a distinction based on whether they connect to the numbering system may be a reasonable dividing line today, this technique might not be the most future-proof solution.

Regarding the proposed exception for communication services that are merely a “minor ancillary feature that is intrinsically linked to another service”, the proposed Directive includes a Recital (Recital 17) that aims to clarify what should be considered and what shouldn't. Inserting such an exception can pave the way to numerous interpretation

problems. For example, as BEREC recognizes⁹, it is unclear why social networks would be entirely excluded from the scope of communication services when they can often be used as an interpersonal means of communication between a limited set of persons, just as other digital communications applications.

All communication services, whether they are the main service or ancillary in the context of a broader service, should be bound by the principles of confidentiality (in the e-Privacy Regulation) and security of communications (in the EECC Directive).

The proposed EECC Directive excludes number-independent ICS such as WhatsApp and Skype from most of its provisions, and importantly from the consumer-rights chapter where important provisions on contract termination, switching and transparency are regulated.

In light of this approach, it is crucial that number-independent ICS fall within the scope of the proposed Digital Content Directive currently under negotiation, as it is the adequate instrument to address many of the consumer protection issues linked to this type of service. In existing EU law, there are no European-wide contractual rights for consumers in cases where online communication services are of poor quality or malfunction. By including OTTs in the scope of the proposed DCD, consumers will enjoy the necessary specific conformity rights.

This demand is also consistent with the fact that it would be very difficult for consumers to distinguish between OTTs and other digital content and services when it comes to consumer protection: why would consumers have rights when it comes to over-the-top video-on-demand services like Netflix but not for over-the-top communication services such as Skype or WhatsApp? In both cases consumers provide a counter-performance, be it data or money. A different treatment would not be justified and therefore the DCD needs to be amended by expressly including communication OTTs into its scope.

BEUC demands:

1. Maintain services based on the conveyance of signals such as machine-to-machine communications in the definition of ECS and therefore in the scope of the EECC Directive.
2. Ensure that number-independent ICS such as WhatsApp fall within the scope of the proposed DCD¹⁰.
3. Make sure that the proposed e-Privacy Regulation covers all types of ECS¹¹, including social networks as well as services where the communication service is merely an ancillary feature.

2.2. Not all digital communications services are the same

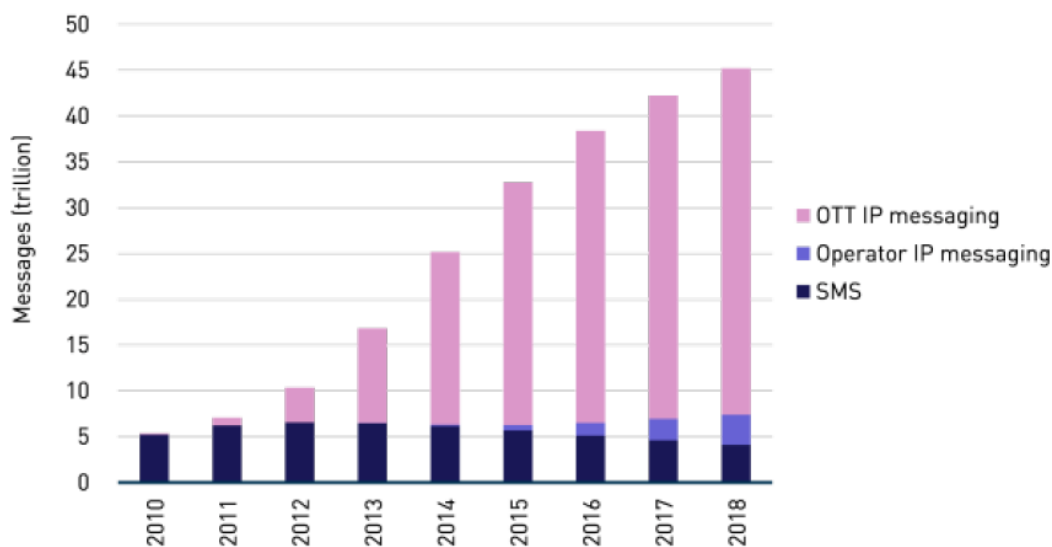
Some of the newest digital communication services provided over the internet such as WhatsApp, FaceTime, Hangout or Skype can be seen and sometimes work as a

⁹ BEREC high-level Opinion on the European Commission's proposals for a review of the electronic communications Framework, BoR (16) 213

¹⁰ This could be done by clarifying in article 3(5) point b of the proposed Digital Content Directive that number-independent interpersonal communication services are covered by the rules of the Directive, despite the general exclusion of electronic communication services.

¹¹ The scope of the e-Privacy Regulation should cover all electronic communication services namely for the applicability of the principle of confidentiality of communications. Certain provisions should also apply to other types of services. For further details on BEUC's positions on the proposed e-Privacy Regulation, please see our separate position paper on e-Privacy.

replacement of traditional telecommunications services from a usage perspective. Yet data shows that the bigger change these new OTT services have brought about is a great increase in absolute levels of consumption. Consumers simply call, text, and share information and content with each other more often than they did before as the below graphs shows¹².



2.3. Traditional telecom and OTT services are significantly different

While traditional telecom and OTT services are comparable in that they allow users or groups of users to communicate with each other, they remain substantially different from a consumer perspective from at least 5 different perspectives. These are some of the most important differences:

- **Connectivity** – OTT services require a connection to the internet, while traditional voice and SMS do not. A large part of EU consumers still do not have access to the internet, and since internet access is technically necessary to be able to use OTT services, many consumers would have an additional financial and technical burden (contracting internet access) to be able to use an OTT service.
- **Devices** – OTT services require newer, more expensive and technically demanding equipment such as smartphones and tablets, which in turn require more advanced skills and knowledge as compared to traditional voice and SMS services which only require a compatible mobile phone.
- **Functionalities** – OTT services often provide numerous additional functionalities such as video calls, recorded video or audio messages, file sharing, or group calls and chats, while traditional telecom services normally do not offer such additional possibilities to consumers. Regarding SMS, it is also important to consider that except for cases where SMS are unlimited, they usually have a unitary price, a factor that acts as a disincentive to use as an instant messaging chat room. On the other hand, the remuneration mechanism for OTT instant messaging services does not normally depend on the number of messages sent. SMS also have a character limit, while OTT services generally do not. Many OTT services also allow the easy

¹² Over-the-Top players, Study for the IMCO Committee, December 2015, page 11 - [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/569979/IPOL_STU\(2015\)569979_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/569979/IPOL_STU(2015)569979_EN.pdf)

creation of chat groups enabling groups of users to exchange messages with each other.

- **Interoperability** – OTT services are often limited in their service interoperability, as consumers can only reach the users of that same service, while with traditional voice and SMS services, interoperability is ensured regardless of the telecom provider. On the other hand, OTT services often offer device interoperability (communication services that work over mobile broadband and over Wi-Fi, through smartphones, tablets or desktop computers), while traditional telecom services do not offer the same degree of device interoperability.
- **Price and payment** – Traditional telecom services are usually provided against a monetary payment, whether on a pre-paid or a post-paid contract. On the other hand, even if OTT services are often said to be “free”, that is very rarely the case. OTT services normally operate over a contract where the counter-performance is based on the monetisation of the consumers’ data. In these cases, a contractual relationship exists where the OTT service is delivered against types of counter-performance which need to be recognized in horizontal EU consumer law as well as in sector-specific provisions. Recital 18 of the proposed Directive collects the most widely used business models:
 - a. The service provider requires the consumer to actively provide personal data such as name, email address, or phone number.
 - b. The service provider collects personal data such as the IP address or the location without consumers having to actively provide the data.
 - c. The service provider serves advertisements to the consumer and is then paid by a third party (the advertiser or advertising network).

BEUC demands:

1. Ensure that the definition of electronic communication service categorises the different types of digital communication services adequately in order to tailor regulation to what is necessary for each type of service.
2. Recital 18 of the proposed EEC Directive is important and must be maintained.

3. Guaranteeing a high level of protection for all consumers of ECS

The last legislative review of consumer rights in the telecommunications sector was finalised in 2008. Since then, digital communications services have greatly evolved, and so have consumer habits, needs and preferences. Today’s EU rules are therefore in need of a substantial review to make sure they reflect the reality in the market and provide a protective framework that will stand the test of time.

The European Commission has done a welcome job in putting forward a new proposal that includes some of the necessary updates and reinforcement that consumers need. Yet important improvements to the proposal are necessary. This section of our paper highlights the key articles that need to be improved.

3.1. Articles 79 – 86: The Universal Service Obligation regime is still necessary

The Universal Service Obligations (USO) regime is necessary to make sure all consumers, especially those in vulnerable situations, are not left behind and can reap the benefits of the digital economy. We welcome that the USO regime has been kept and special

importance has been given to consumers' right to access the internet at affordable prices. The USO regime should ensure that access to basic broadband is available for the entire population, and at affordable levels for the most economically disadvantaged part of the population.

The definition of "functional internet access service" based on a list of online services it should be able to deliver (Annex V) is likely to be problematic. Firstly, it is unclear what "functional" means in this context as it is not defined elsewhere in the Directive. Secondly, categorising online services with generic wording will not provide consumers the necessary legal certainty as to the minimum set of services they should be able to access with their internet connection. Thirdly, it must be clear for providers of internet access services that the services provided through the USO regime must comply with all related net neutrality obligations under Regulation 2120/2015.

A different way to define "functional internet access service" could be to use a minimum set of Quality of Service characteristics, including minimum bandwidth, that the service must deliver. This minimum set of QoS characteristics could be defined at national level and determined by what is the average use of the majority of the population. The QoS threshold in the definition should then be updated year on year as the average use of the population evolves too. This method of defining "functional internet access service" would ensure that Member States can define the adequate level of QoS and bandwidth that is consistent with the average use of its population, thus ensuring that all consumers have access to what is standard basic broadband in that Member State. In addition, having that QoS and bandwidth requirement evolve ensures that consumers on USO service will not be left behind as the average use of the Member State evolves.

We regret that the only financing option for the USO regime proposed by the Directive is charging the cost of the USO on public funds. This could be problematic because all citizens would pay for the USO regime, while the most economically disadvantaged consumers would possibly not even profit for the services. In order to allow flexibility for Member States, they should be allowed to pick which financing mechanism they would prefer using from several options, including a sector fund.

BEUC demands:

1. The USO regime should provide available and affordable "internet access services". It shall then be for Member States to decide how to define the minimum levels of quality and bandwidth that such services must deliver. Such minimum levels shall be adapted to the national average use at least on a yearly basis.
2. Article 79 must specify explicitly that internet access services under the USO regime shall always comply with the net neutrality obligations under Regulation 2120/2015.
3. Member States must continue having flexibility about the financing of the USO regime. Article 85 must be amended to allow Member States to decide whether to finance their USO regimes through the public budget or through a sector fund.

3.2. Article 94: Harmonisation of consumer protection rules can be problematic

The proposed Directive aims to fully harmonise important consumer rights related to transparency of information, contract termination, switching, and so on. This approach is problematic for consumers in telecom markets for several reasons.

Firstly, telecommunications markets remain highly national in nature and therefore characterised by country-specific structural market problems that cannot be solved by one-size-fits-all solutions.

Secondly, full harmonisation has a negative impact on consumers' rights in those Member States where national legislation provides for more protective measures than those guaranteed by EU law. These additional protective measures would have to be removed if the proposed Directive is not adapted adequately.

Thirdly, full harmonisation of consumer protection rules would hinder the ability of national governments and regulators to react quickly to problematic developments in their markets. Full harmonisation prevents the design of tailored consumer rights within each Member State when necessary.

Fourthly, full harmonisation of consumer protection leads to the *fossilisation* of rights as it takes years if not decades before the legal framework can be modified again. In a highly dynamic sector such as the digital communications sector, such inflexibility could be very detrimental for consumers.

The main argument in favour of full harmonisation, i.e: help build a Single Market for telecommunications by reducing fragmentation for businesses, fails to observe consumers' most important needs. In addition, there is a presumption that the existing fragmentation due to additional protections in some Member States generates significant additional compliance costs for service providers. This presumption has not been adequately substantiated to justify the need to fully harmonise consumer rights in the sector.

The existent minimum harmonisation approach has benefited consumers

Specific protective measures in national legislation exist precisely because the current EU legal framework follows a minimum harmonisation approach and has therefore allowed Member States to respond to national specificities as markets and consumer needs have evolved.

In response to market failures and unfair practices towards consumers, Member States have established numerous different protective measures which have proven to effectively address consumer problems and have a beneficial impact on the market, making it more transparent and fair.

Such highly successful national specific measures include:

- In France, Belgium and Austria, consumer-friendly regimes to allow early contract termination without penalties.
- In Austria, default consumption limits to protect consumers from bill shocks.
- In Austria, in justified cases such as when operators unilaterally change terms and conditions, the right to terminate the contract without penalties or compensations for subsidised equipment.
- In Austria, the power to NRAs to review the terms and conditions proposed by telecom providers before they can be put to the market.
- In Germany, specific transparency measures like obliging service providers to always inform consumers about the termination date on the monthly bill.
- In Germany, information sheets that providers are obliged to provide to consumers.
- In Germany, if the switch fails, the transferring provider has the obligation to take up the service and consumers shall only pay 50% of the price for the service

The proposed EEC Directive would preclude many of these specific rights and measures which means that **Member States would have to abolish such essential consumer**

rights, which have delivered clear benefits to consumers and are necessary for a well-functioning market. **This cannot be an option for the EU legislator.**

Minimum harmonisation still most future proof solution

Against this background and taking into account this fast changing and technically complex sector, the best approach for consumers would be to allow Member States to continue building on top of the common EU rules to cater national specificities and react to developments in the future. This is also echoed by BEREC, which believes that minimum harmonisation is the right approach to allow Member States and NRAs to “respond to technological change and changing consumer needs and priorities”.¹³

If no default minimum rule, then ensure “mixed” targeted harmonisation at highest level

If the EECC Directive’s Title III on consumer rights is to remain full harmonisation by default, then it is imperative to adopt a mixed targeted harmonisation approach where the necessary opening clauses are inserted to ensure that additional protective measures enacted by Member States are not affected. This is the only way for consumers not to risk losing existing rights and allow Member States to react to developments in the market on key rights.

In addition, such additional protective measures should be inserted into the EECC proposal where possible. We welcome that some national protective measures have been inserted into the proposed EECC. For example, Article 99, paragraph 5, subparagraph 2 which creates the obligation for transferring provider to reactivate the service if the switching process fails. This is a mechanism already existent in Germany whereby consumers know that if the switch to a new provider fails, the provider they are moving away from will immediately reactive the service, so they are never disconnected.

We welcome BEREC’s intention to closely examine the practical impact of the full harmonisation approach proposed by the European Commission “so as to ensure that they do not entail any reduction in the protection currently afforded to end users”. Yet we underline that this should have already been part of the European Commission’s impact assessment: when proposing a fully harmonising instrument, knowing about its precluding effect on national consumer rights and evaluating its potential important impact should be a key priority for the institution which holds the right of initiative.

BEREC’s analysis should include a list of all those existing protective measures that would have to be withdrawn or amended due to the fully harmonizing nature of the proposal. The co-legislators should then on this basis establish the best solutions for consumers in the EECC Directive and allow for regulatory options to make sure Member States can keep those additional protective measures without conflict with EU law.

BEUC demands:

1. Delete or modify paragraph 94 to make the EECC Directive minimum harmonisation.
2. If the Directive is not switched to minimum harmonization by default, based on the mapping of national consumer rights prepared by BEREC, limit fully harmonising provisions to additional protective measures and where necessary insert opening clauses to allow that well-established national rights and measures can be maintained.

¹³ BEREC high-level Opinion on the European Commission’s proposals for a review of the electronic communications Framework, BoR (16) 213

3.3. Article 95: Strong information duties and transparency requirements

Article 95 of the proposed EECC streamlines information requirements for contracts, but it is unclear whether the requirements constitute only pre-contractual or also contractual information.

We welcome the idea to have a contract summary template developed by BEREC that all providers of ECS must fill in, share with their consumers, and then integrate into the contracts for their services. These contract summaries should help consumers compare services more easily, and be designed with consumers' needs in mind by running consumers tests while shaping the summaries.

Consumers of services under the USO regime have access to a set of additional facilities that are specified in Part A of Annex VI. Some of these such as *best tariff advice* should be available to all consumers, not just those which are users of USO. Such an additional facility should be a standard service whereby providers give their consumers advice at least once a year for free about what is the most suitable tariff for them.

In the telecoms sector tariffs continuously evolve and new customers often get better deals than existing clients. For example, it is a common practice to reduce the price of an existing tariff for new customers but not have the reduction apply to existing customers of that same tariff. This creates a very frustrating and unfair situation for consumers. Worse, the existing customer would have to terminate the contract and apply again for the same tariff to be able to benefit from the reduction in price. It would therefore be appropriate to give consumers advice on what's the best tariff for them and let them switch for free if they wish to.

BEUC demands:

1. Specify that the transparency requirements outlined in Article 95 paragraphs 1, 2 and 4 represent information to be disclosed to the consumer not only before the contract is concluded (pre-contractual information) but also considered incorporated as part of the contract itself.
2. Modify Article 95 to make sure providers of ECS give consumers *best-tariff advice* for free at least once a year.

3.4. Article 96: In a complex and dynamic sector, easy comparison is key

In an evolving and complex sector such as that of digital communications services, consumers must be able to easily compare between providers, services and tariffs. This is particularly necessary considering that bundling of different services is a common practice in many markets today. As highlighted further below, bundling of services can make the comparability of services and tariffs harder for consumers.

It is of utmost importance that **comparison tools** are available and accessible in every market. These tools should allow consumers to compare all type of communications services, including those delivered over the internet in an easy way. The tools must comply with general principles of independence, accuracy, transparency, being up to date, clarity, user-friendliness and so on. Providers of telecom services must be obliged to provide the information necessary for these tools to run comparisons for consumers¹⁴.

¹⁴ For more details on BEUC's views about comparison tools, please see X/2012/065 – <http://www.beuc.eu/publications/2012-00536-01-e.pdf>

Comparison tools should clearly disclose information regarding their business model (e.g. advertising, pay-per-clicks, referrals, sale of data, etc) so consumers can evaluate the character of the guidance they are getting. The comparison algorithm of the tools should be impartial. This means that service providers whose services are being compared should not be allowed to pay the comparison tool to be placed artificially higher on the comparison ranking.

Accreditation schemes should be in place to ensure comparison tools fulfil the necessary requirements. Such schemes can be run by National Regulatory Authorities or consumer organisations.

The obligation for operators to provide **Public Interest Information** as mandated by public authorities, already included in the Universal Service Directive (USD) and copied into the proposed EECC Directive, includes a list of example categories of supposedly unlawful activities. While it is legitimate for public authorities to mandate operators to inform citizens about common unlawful practices and prevent the dissemination of harmful content, a specific list of examples shall not be included in this sector specific legislation as it creates a bias towards which kind of uses are to be considered unlawful.

BEUC demands:

1. Article 96 should apply to all types of ECS, including number-independent interpersonal communications services.
2. Member States should ensure there is at least one available comparison tool for electronic communications services that functions according to the above principles.

3.5. Article 98: Fair and easy conditions for contract termination

For consumers to reap the benefits of competition in digital communications markets, it is essential that contracts can be easily terminated without burdensome procedures nor unjustified costs.

Article 98, paragraph 1 – duration of contracts

Regarding the **duration of contracts**, the proposed EECC Directive removes the existing obligation for providers to offer at least one 12-months contract. In some countries, there is no minimum duration period and consumers can switch after one day. In countries such as Denmark, 6-month contracts are already the norm today, and a 2015 study¹⁵ shows that 68% of Danish consumers that switched got a better deal than they had before.

Member States with shorter contract duration periods and/or more flexible contract termination regimes tend to have more fluid markets with higher switching rates and decreasing prices. This legislative reform needs to ensure the situation is improved, not worsened, in every single Member State. It is therefore essential to keep the opening clause at the end of Article 98, paragraph 1, subparagraph 1.

The proposed EECC Directive puts the limit of 24-months only on the “initial commitment” period which is worrying because it could mean service providers bound consumers for longer contracts in subsequent renewals of contracts. The word “initial” should therefore be deleted.

¹⁵ The Danish Competition Authority (KFST), 2015 - <http://www.kfst.dk/~media/KFST/Publikationer/Dansk/2015/20150704%20Forbrugeraedfaerd%20paa%2013%20markeder.pdf>

Limits on the duration of contracts have been a successful way to enable consumers to switch providers when they are dissatisfied, a trend which itself has helped reinforce competition in the market as providers try to win consumers away from their competitors. It would be a significant step backwards if service providers started to lock in their customers into contracts to deploy physical infrastructure that go beyond the maximum 24 months' period.

Article 98, paragraph 2 – renewal of contracts

Tacit renewal of contracts is often used to lock in consumers and impede them from opting for the service of a competitor. We therefore welcome the strengthened provision on renewal of contracts in Article 98, paragraph 2. This is particularly important in the context of bundled offers, as we highlight below. Importantly, when a contract has been renewed, the same easy termination regime must continue to apply.

Article 98, paragraph 3 – unilateral changes to the terms and conditions

When service providers unilaterally change the terms and conditions of a contract, consumers should always automatically get the right to terminate the contract free of charge. The inclusion of the exception "unless the proposed changes are exclusively to the benefit of the end-user" in Article 98, paragraph 3 is problematic because it should not be the service provider nor any other party who should decide what is to consumers' benefit. This exception should therefore be deleted.

In addition, Recital 246 is inconsistent with Article 98, paragraph 3 because it refers to changes in terms of conditions "imposed" by service providers as opposed to "proposed", which could lead to the interpretation that service providers are always entitled to unilaterally change the terms and conditions.

Some countries such as Austria have adopted additional protective measures whereby in cases like unilateral changes of terms and conditions, service providers cannot demand any additional payments, including the service fee until the end of the contractual period and as well compensation for subsidised equipment.

Article 98, paragraph 4 – early termination of the contract

To discourage consumers from switching providers before the contract ends, providers often insert **clauses that penalise the termination of a contract**. This practice acts as an important barrier to switching and must be eliminated from the market.

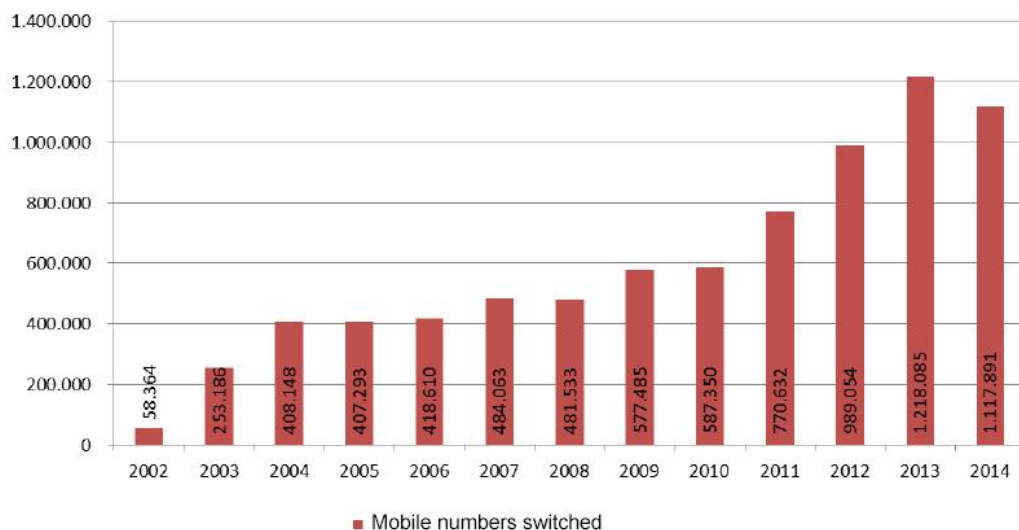
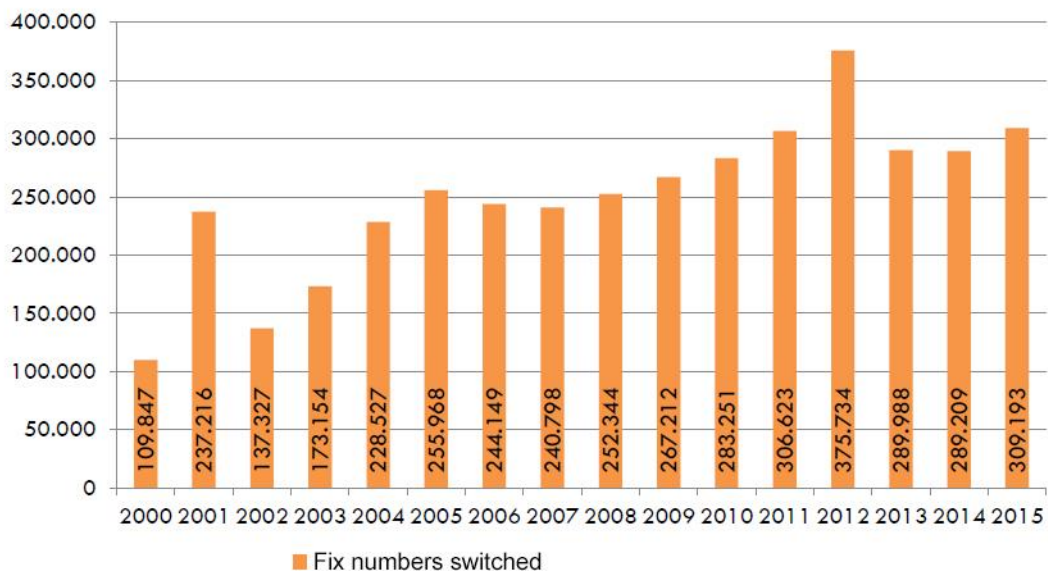
Only if the service provider includes subsidised smartphones or other equipment as part of the offer, it could be justifiable for the provider to give consumers a disincentive to switch in the form of a termination penalty. If the contract only includes the provision of the ECS and no subsidised equipment is attached, no termination penalties should be allowed.

Numerous countries have already mechanisms whereby consumers can terminate their contracts early without facing any particular penalties, following different types of termination regimes aimed at making it easy for consumers to switch if they are dissatisfied or have found a better offer.

Some of those mechanisms could have to be removed due to the fully harmonising nature of the proposed Directive. Such would be the case for the early termination mechanism in Austria, where consumers can leave the contract at any time and are only bound to pay the service fee until the end of the contract, but no termination penalties nor compensations for subsidised equipment.

In Belgium, a law adopted in 2011 mandates that termination penalties are only allowed during the first 6 months of the contract, regardless of the total duration of the contract.

After the first 6 months, the consumer is always free to leave the contract, with the only justified costs being those associated to any compensation due for a discounted smartphone or other equipment. As depicted in the below graphs, the available data from the Belgian regulator BIPT shows that this measure greatly increased switching after it was introduced, helping to boost competition in the mobile market where switching rates have remained high.



In France, a law passed in 2007 establishes that in a 24-months' contract, the consumer can leave the contract after the first year has elapsed and shall only pay one quarter of the remaining monthly service fees to the provider as compensation. Contracts do not distinguish between the service fee and any other fee that might be devoted to reimbursing a smartphone. This simple and clear rule has worked well for consumers.

Drawing inspiration from successful cases, the proposed Directive must also include a rule that limits the use of termination penalties to the first 6 months of the contract, and only if a subsidised smartphone or similar benefit is present.

For tariffs that do include a subsidised smartphone or similar benefit, the Directive should additionally establish that beyond the first 6 months of the contract, the most consumer-friendly regime available to terminate the contract early should apply.

In order to fully protect consumers' need to switch easily, boost competition in markets and respect all European consumers' acquired rights today, the proposed Directive should reform Article 98, paragraph 4 to establish the following rules on contract termination:

1. In service contracts without any additional subsidised equipment, no termination penalty shall be allowed.
2. If the service contract is bundled with subsidised equipment:
 - a. Termination penalties can only be applied during the first 6 months of the contract.
 - b. Termination penalties must always correlate to the concrete benefit that justifies them, and therefore never be an additional expense on top of the reimbursement of the benefit.
 - c. Beyond the initial 6 months, the obligation to compensate for subsidised equipment should have consumers pay whichever amount is less: either the *pro rata temporis* compensation plan for the subsidised equipment or the proportional part of the ECS service fee until the end of the contract, but never both. If the prices of the equipment and service are not separate, drawing inspiration from the French system, any system economically more beneficial to consumers should be privileged.

Countries which already have such type of easy termination regimes shall be allowed to maintain them if deemed appropriate for consumers.

In cases where there are compensation plans for subsidised equipment, they need to be based on customary depreciation methods and proportionate to the duration of the contract and the elapsed time, while reflecting the real market value of the equipment. National Regulatory Authorities shall clarify and standardise the methodologies used to calculate these compensations.

Additional paragraph missing: non-conformity of performance

In cases where there are discrepancies between the actual performance of an ECS and the performance to which the operator is bound by the contract, this should amount to non-conformity of performance and entitle consumers to exercise their legal remedies. This protective measure has already been implemented into EU law for internet access services¹⁶ but it should apply to all ECS¹⁷. As part of such remedies, it should always be possible to terminate the contract free of charge, including any due compensations for subsidised equipment.

BEUC demands:

1. Maintain the opening clause at the end of Article 98, paragraph 1, subparagraph 1. Delete the word "initial" in the 24-month limit for contracts

¹⁶ See Article 4, paragraph 4 of Regulation 2120/2015 on open internet access.

¹⁷ During the work on the Regulation to establish a Telecom Single Market, both the European Commission proposed (Article 28, subparagraph 5 of original TSM proposal - <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013PC0627&rid=2>) and the European Parliament accepted (article 36, paragraph 11 of EP report - <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0281>) a provision to ensure consumers are protected in cases of non-conformity of performance. There is no reason why these protective measures are no longer necessary for ECS other than internet access services and must therefore be inserted into the EECC Directive.

2. Delete paragraph 1, subparagraph 1 regarding deployment of physical infrastructure.
3. Strengthen protections regarding tacit renewals in Article 98, paragraph 2.
4. Delete “unless proposed changes are exclusively to the benefit of the end-user” in paragraph 3. Change “imposed” to “proposed” in Recital 246.
5. Modify Article 98, paragraph 4 to reflect the principles and conditions outlined above regarding the use of termination penalties and compensations in cases of early termination of contract.
6. Insert an additional paragraph in Article 98 to make sure consumers can terminate the contract free of charge in cases of non-conformity of performance of the contract.

3.6. Article 99: Easy switching procedures

The procedure to switch between different providers must be as simple and straight forward as possible. An important principle to ensure this is the winning-provider led switch principle. In many EU countries, it is already the case that when a consumer decides to change provider, he or she will only have to deal with the new provider, and does not have to deal with the provider he or she is leaving behind. This principle should become the norm in all EU countries.

The rights of consumers during the switching process must also be guaranteed at all times. Article 99 of the proposed EEC contains important safeguard mechanisms to ensure that. For example, a new mechanism that is important to maintain is the obligation for the transferring provider (the one the consumer is switching away from) to reactivate the service if the switch fails. In some countries such as Germany, the reactivated service has to be sold at a 50% discount. Rules that go further than the EU proposal such as this one must continue to be possible.

As it stands in the Commission proposed Directive, paragraph 1 of Article 99 would only apply to internet access service and not to other ECS. This should therefore be amended to make sure such paragraph applies to all ECS except for number-independent ICS as the provisions therein contained are important for other services too.

BEUC demands:

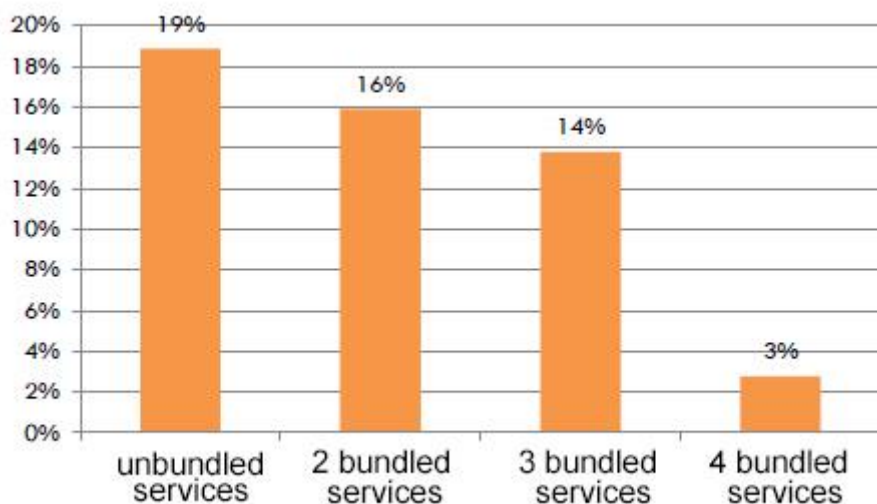
1. Ensure switching provisions apply to all ECS except to number-independent ICS.
2. Maintain the principle of “winning provider-led switch” in Article 99, paragraph 5, sub paragraph 2.
3. Maintain the obligation on transferring providers to reactivate the service in case the switch fails in Article 99, paragraph 5, sub paragraph 2.

3.7. Article 100: Rules on bundled contracts are of crucial importance

The practice of bundled contracts is commonplace in many EU markets. Providers of ECS bundle 3 or even more services (for example: mobile, fix and Digital TV) together into a single contract. This practice has brought benefits to consumers mainly in terms of overall

price because the price of bundle is usually cheaper than the sum of the price of the services bought individually.

Yet bundles often be used by providers of ECS to erect unjustified barriers to switching or even to lock-in consumers into their contracts. The graph below from the Belgian regulator BIPT shows how the more services are bundled together, the lower the switching rate.



Consumers should be able to cancel part of a bundled contract without any penalties. Similarly, consumers should be able to modify or renew part of a bundled contract without impacting the rest of the services that are being bundled, unless they provide their explicit consent for the provider to do so.

Consumers should be able to cancel part of a bundled contract without any penalties. Similarly, consumers should be able to modify or renew part of a bundled contract without impacting the rest of the services that are being bundled, unless they provide their explicit consent for the provider to do so.

BEUC demands:

1. Maintain and strengthen Article 100 by making sure consumers can cancel parts of a bundled contract without penalty and that renewals of bundled contracts are always done with consumers' explicit consent.
2. The entire article 99 – and not just paragraph 1 – should apply in case of bundled contracts.

3.8. Article 25: Alternative Dispute Resolution

It is important that sector-specific rules on Alternative Dispute Resolution (ADR) are in line and interpreted according to Directive 2013/11/EU. It is therefore important to maintain a reference to such Directive in Article 25 of the proposed EEC Directive.

The proposed Article 25 of the EEC Directive falls short on two important elements. First, it must be applicable to all ECS, and therefore not exclude number-independent interpersonal communications services. Second, it must make it mandatory for providers of ECS to participate in the ADR scheme.

Importantly, out-of-court procedures should also apply to cross-border disputes for parties from different Member States, as mandated by Article 25 paragraph 3.

BEUC demands:

1. Maintain reference to ADR Directive 2013/11/EU.
2. Expand the scope of Article 25 to include all ECS.
3. Make the participation of providers of ECS in ADR schemes mandatory.

3.9. Article 40: Security of communications

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 can be 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 advent of the Internet of Things, the security of communications is becoming an ever increasingly fundamental principle for consumers.

When there is a breach of security, providers of ECS need to notify consumers as soon as possible once aware of the breach.

BEUC demands:

1. Maintain Article 40 of the proposed EEC Directive and make sure it applies to all ECS.
2. Article 40, paragraph 4 should refer to the e-Privacy Regulation that is being currently negotiated.

3.10. Article 55: Sharing of consumers' private Wi-Fi networks

It is becoming a commonplace practice for providers of fixed internet access services to install additional Wi-Fi networks on consumers' home equipment to offer all their customer base additional internet access points.

While this practice may bring benefits to consumers as they can use numerous additional access points, it is essential to get the rules of this practice right to make sure consumers are always strongly protected.

First, it is imperative that such additional Wi-Fi networks are only installed on consumers' private equipment if they have provided their explicit consent.

Second, the consumer should not experience any change in the bandwidth available to the service they are paying for.

Third, it must be clarified that the consumer who owns or rents the equipment on which the additional Wi-Fi network is installed and who pays for the internet access service that is being shared is under no circumstance whatsoever responsible nor liable for any use that another person might do while connected to their Wi-Fi network.

In this regard, the European Commission should clarify the interplay of Article 55 with the recent ECJ *McFadden* ruling regarding infringements of Intellectual Property Rights committed by users of Wi-Fi connections.

BEUC demand: Reform Article 55, paragraph 2 to make sure consumers benefit from the above key protections.

3.11. The missing consumer rights

The proposed EECC Directive provides a comprehensive set of consumer rights for the co-legislators to work with, but unfortunately falls short of some important rights that are necessary in the sector.

1. **Control of consumption**¹⁸ – Consumers should be entitled to have a consumption control mechanism at a level of their choice turned on by default. This in turn means that information on accumulated consumption should be mandatory and free of charge, unless consumers decide not to receive it. If the consumer does not establish a financial limit there could be a general rule, like for roaming services. In cases of bundles with a certain number of minutes, SMS and data included, the limit could be established by a certain consumption percentage with respect to the monthly fee¹⁹. Article 95 paragraph 6 should be amended accordingly. 1 Countries such as Austria have concrete protective measures on control of consumption where consumers have a default consumption limit to avoid bill shocks. These additional protective measures cannot be lost due to the EECC Directive.
2. **Unused credit to be accumulated** - The leftover minutes, SMS or data that consumers do not use as part of their bundle must be transferred to the next billing period, and this should happen for at least 3 months in a row if the consumer does not use up the allotted credit. Consumers lose significant amounts of money by buying bundles they do not need. On certain occasions, for example when on holiday abroad, they may not use any credit at all yet still pay for it.

4. Building a Single Market for consumers

The telecoms regulatory framework remains based on distinct national markets, a fact which creates tangible obstacles to the cross-border provision and consumption of services. These obstacles represent barriers to a real single market for EU consumers.

A single market for consumers

Although markets remain fragmented, steps towards the establishment of a single market for consumers can be taken today. First, services such as phone calls, SMS and access to the internet should be usable seamlessly across the EU, without any geographical discrimination. Consumers should be able to travel freely within the EU without having to pay additional costs if they cross a border. This should be the reality for most consumers

¹⁸ During the work on the Regulation to establish a Telecom Single Market, both the European Commission proposed (Article 27 of original TSM proposal - <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013PC0627&rid=2>) and the European Parliament accepted (article 36, paragraph 1k of EP report - <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0281>) an enhanced provision for consumers to be able to control their consumption of electronic communications services. There is no reason why these protective measures are no longer necessary and must therefore be inserted into the EECC Directive.

¹⁹ For additional BEUC views on the issue of control of consumption, please see page 10 of X/2013/081 - http://www.beuc.eu/publications/x2013_081_gbe_telecoms_single_market.pdf

as of June 2017 when rules on Roam Like at Home become the default practice, but it remains to be seen if it will effectively deliver the end of roaming fees for all consumers.

Second, a single market in the digital communications sector also means that consumers can use telephony and messaging services from their home country to call and text any other EU country without discriminatory pricing just because the service crosses a geographical border.

International calls and messaging inside the EU – a rampant market failure

Unfortunately, this is not the case today. A market scan of 13 EU Member States done by BEUC members in July 2016 showed that when consumers pick up their phone and call or text to a different EU country, they are often charged unjustified, abusive prices²⁰.

Our research showed that the average retail price for an international call inside the EU is almost 60 eurocents/minute, and they can be as expensive as 1.99 euros/minute. In contrast, as explained by BEREC²¹, the average cost for mobile providers to deliver that same minute of voice communication in July 2016 was 1.14 eurocents/minute. In practice, this means that mobile providers are making an average of over 5000% profit margin for each international call.

The market for international SMS is not better. BEUC's members' research found that on average international SMS are priced over 24 cents/SMS, while mobile providers face an average cost of 2.2cents/SMS for delivering each message. That's an average profit margin of approximately 1000%.

Unlike roaming which only affects those consumers with the capacity to travel across the EU, abusive pricing of international calling and texting affects potentially every single EU consumer who wants to reach a person, organization or company in a different Member State. Without these abusive prices, not having to fear a bill shock, consumers would not hesitate to use their mobile phones across borders. Mobile providers would therefore also benefit from such an increased demand for their services.

Some argue that internet-based calling apps such as Skype, WhatsApp or Viber are valid alternatives. They are not. First, they require having an internet connection, which is not always the case for all consumers and not always available if the signal is not good enough. Second, online communication services do not guarantee the quality of communications, so consumers know they will never work as well as a traditional call. Thirdly, these services are not interoperable with each other so consumers need to ensure the other person is in the same app as they are before they can communicate.

The necessary political support already exists

In July 2016, BEUC and 31 Members of the European Parliament wrote to the European Commission to highlight the existence of these discriminatory and abusive practices and called on the Commission to put forward a solution in the proposed EEC Directive. In addition, a cross-party group of 156 MEPs (including the current President of the European Parliament and most key digital political leaders) co-signed another strong call²² on the Commission to find a solution to this problem.

²⁰ for more information, see our factsheet here - http://www.beuc.eu/publications/beuc-x-2017-007_international_calls.pdf

²¹ BEREC's latest termination rates data - http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/6603-termination-rates-at-european-level-july-2016

²² See parliamentary question here: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bOQ%2bO-2016-000109%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>

Unfortunately, despite the fact that a similar proposal was part of the European Commission's proposed Telecom Single Market Regulation in September 2013, the European Commission has not proposed adequate rules to address this problem in the EECC Directive. It is important to remember that the 2013 proposal was deleted during co-decision because of time constraints ahead of the European Parliament elections of June 2014.

If the European Commission considered this problem important enough to propose legislation to address it, and analysed the impact of its proposals in the corresponding Impact Assessment, there is no reason why the co-legislator should not take the opportunity offered by the EECC Directive to legislate on the issue.

The solution is not price regulation

To solve these market failures in a simple and fair manner, the EECC Directive should draw inspiration from general single market principles of non-discrimination for cross-border services. The rule should be very simple: the price of an ECS cannot be different depending on whether the service is delivered domestically or whether it crosses a border, thus originating and terminating in a different EU country. If justifiable and objective additional costs exist for ECS providers, they shall be entitled to recover them.

BEUC demand: Insert an additional Article (or additional paragraph in Article 92) of the proposed EECC Directive to establish the rule explained above.

END