

Position Paper

European Electronic Communications Code

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Bitkom represents more than 2,500 companies in the digital sector, including 1,700 direct members. With more than 700,000 employees, our members generate a domestic turnover of 140 billion Euros a year, exporting high-tech goods and services worth another 50 billion Euros. Comprising 1,000 small and medium-sized businesses as well as 300 start-ups and nearly all global players, Bitkom' members offer a wide range of software technologies, IT-services, and telecommunications or internet services. They produce hardware and consumer electronics or operate in the sectors of digital media and the network industry. 78 percent of the companies' head-quarters are located in Germany with an additional amount of 9 percent in other countries of the EU and 9 percent in the USA as well as 4 percent in other regions. Bitkom supports an innovative economic policy by focusing the modernization of the education sector and a future-oriented network policy.

Bitkom comments on the ongoing legislative debate on the Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Recast) – COM (2016)590 as follows:

Summary

- The **European Electronic Communications Code** is no ordinary legislation. This is a once-in-a-decade opportunity to make the Gigabit society a reality, which is at the core of a successful society and economy. However, key parts of the debate so far risk leading to the opposite. Even the status quo could deliver more predictability and certainty than the latest positions from the European Parliament and the Council.
- Bitkom supports policy measures which address the objective of simplification and reduction of administrative burden whilst **connectivity** should be seen as an equal general objective alongside the promotion of competition, of the internal market and of end-user interests. Unfortunately this goal will hardly be reached with the proposal as it introduces new obligations causing respective expenses instead of unlocking further investment.
- **Co-Investment** and cooperation models can enhance the deployment of high capaci-

Federal Association
for Information Technology,
Telecommunications and
New Media

Nick Kriegeskotte

Head of Telecommunications Policy

P +49 30 27576-224

n.kriegeskotte@bitkom.org

Albrechtstraße 10
10117 Berlin
Germany

President
Achim Berg

CEO
Dr. Bernhard Rohleder

ty networks, although the proposed model of co-invest also needs to be questioned and in consequence be developed into an approach comprising different forms of collaboration.

- The proposed role of **BEREC** establishes a further level in the regulation process and therewith rather complicates than simplifies the process.
- Bitkom supports the review of the framework and applicable rules for **communication services** with the goal of creating a legal framework allowing and facilitating fair competition of equivalent services.
- Bitkom questions the general outline of the new **universal service** proposal with regard to the model of financing universal service obligations and the dynamic scope of future universal service obligations.
- **End-User rights** should be addressed with a review of sector-specific end-user and data protection rules with the goal of relying on harmonized cross-sector regulation. New obligations need to be avoided.
- Bitkom supports the measures of the proposal to foster efficient **spectrum** usage in Europe, via better coordination of timing of assignments and increased harmonization of spectrum regulations, especially with stricter common general objectives and principles for licenses and auctions.

Current legislative debate vs. status quo

While Heads of State rightly set digital as a top political priority, the current legislative debate does not reflect the vital role of infrastructures and is detached from the reform's objectives, consumer behavior and market realities. Bitkom is convinced that the EU either needs to get this reform right today, or there will be no other chance for the next ten years. This matters both in terms of global competitiveness of all EU sectors as well as empowerment of citizens.

Regulatory certainty and consistency are both paramount to ensure the market confidence that is necessary to deliver new networks and services to European citizens. The final result of the Electronic Communications Code negotiations should bring concrete and clear improvements to the current Telecoms Regulatory Framework. In light of the current discussion on enhancement of infrastructure investment, oligopolies, spectrum license duration and retail price regulation, even the status quo with the existing EU Directives could deliver more predictability, certainty and economic value than the proposed new Code.

Access regulation and enhancement of infrastructure investment

The objectives of the framework have been expanded to include the deployment and take-up of very high capacity networks. Bitkom supports these policy measures which focus on sustainable competition in particular with regard to infrastructures, decent investment conditions for all network operators and those addressing the objective of simplification and reduction of administrative burden. Unfortunately this goal will hardly be reached with the proposal.

Especially with view to new obligations regarding information on electronic communication networks and associated facilities the proposal establishes new administrative costs. The defined model of co-invest also needs to be questioned and in consequence be developed into an approach comprising different forms of collaboration. Furthermore, the new role of BEREC establishes a further level in the regulation process and therewith rather complicates than simplifies the process.

Connectivity as a new objective

The proposal introduces widespread access to and take-up of very high capacity networks as a new objective alongside the existing objectives of promotion of competition, of the internal market and of end-user interests (Art. 3). Bitkom supports the aim of increased connectivity across Europe and believes that the Communications from the Commission ‘Connectivity for a Competitive Digital Single Market – Towards a European Gigabit Society’ and ‘5G for Europe: An Action Plan’ shall aim for ambitious targets. As the three existing objectives have proven to be effective, the new amendment however shouldn’t be seen as new parent category to the existing objectives, but rather a fourth objective equal and alongside the existing ones.

Definition of VHCN (Art. 2 (2))

EU legislation should focus on future proof high capacity networks, not prescribe technology. The principle of technology neutrality should not be violated. Hence, the definition of very high capacity networks (VHCN) should be adjusted in line with the connectivity objectives and thus include all network deployments that provide superior quality.

Restricting regulation to a minimum necessary

The Electronic Communications Code will send a very important message to investors that Europe is ready to make the 500 Billion EUR investments that are presumably required to achieve its connectivity targets. The current texts from both the European Parliament and the Council would however lead to additional regulation compared to the Commission proposal as well as the status quo. Regulation should not be extended and instead be limited to the extent that is strictly necessary in light of the objectives of the regulatory framework.

New obligations create further administrative burden (Art. 22, 20)

Contrary to the goal of simplification the proposal introduces new obligations, which will increase administrative burden for companies across Europe. For example, the requirement for national regulators to survey the state of broadband networks and investment plans (Art. 22) has an immediate effect on companies which have to provide an intense set of information (Art. 20). Consequently, expenses for regulatory and administrative requirements will increase while this approach of state-directed economy also contradicts the objective of competition. In this aspect the proposal therewith fails to unleash further investment in high capacity networks.

Co-Investment models (Art. 74)

Bitkom generally supports Co-Investment models and cooperation models respectively as they can enhance the deployment of high capacity networks. Commercial agreements can be one of many key drivers for the successful implementation of such models. Bitkom deems the provisions concerning co-investment as a step into the right direction, although some details of the co-investment proposals remain unclear. Further, investment challenges associated with VHC network deployment as well as the market landscape indicate that co-investment will comprise different forms of collaboration. In order to consistently implement the principle objective of Article 74, which is to promote investment in VHC networks, the provisions of Article 74 shall apply also to different forms of VHC deployment partnerships. Bitkom therefore questions if the proposal can sufficiently support such models by linking regulatory measures to only a certain Co-Investment model, which details still remain unclear. Due to different market situations in the member states a broader approach to different cooperation models might prove to be more effective.

Role of BEREC

The proposal aims for a new and stronger role of BEREC developing the Board to a regulatory institution on European level. Thus a new level of regulation is implemented. Bitkom considers this idea to complicate the regulatory process. As a contradiction a more simplified process with clear competences is needed to support a fast roll-out of high capacity networks.

Universal Service

Bitkom is supportive of a reduction of universal service obligations and reducing those to a functional internet access and voice communication services as the existing obligations of a comprehensive telephone directory enquiry service and a public telephone service have become dispensable due to technologic development such as mobile phones. However, Bitkom questions the general outline of the new universal service proposal with regard to the model of financing universal service obligations and the dynamic scope of future universal service obligations.

The proposal states that in the future the contemporary obligation of a comprehensive broadband access service defined by a minimum bandwidth shall be expanded by an obligation to offer a functional internet access service at an affordable price supporting a set of services which can be defined by the member states (Art. 79 and 80 EECC). In addition the financing of universal service obligations shall be moved from a sector contribution to public funding where the obligation creates an unfair burden for the undertaking.

With regard to the model of financing Bitkom supports public funding for universal service obligations. However, it remains unclear if this goal can be reached with the proposal. On the one hand the proposal does not state any details on when the obligation creates an unfair burden for undertakings. The regulation is therewith likely to impose an uncompensated obligation, which might lead to market distortion. On the other hand it is questionable if the idea

of public funding will reach the necessary support of member states in the further legislative process, increasing Bitkom's doubts of a sustainable regulation of public funding for such obligations.

Furthermore, Bitkom is apprehensive of the shift of the universal service regime from a comprehensive basic broadband access service towards a functional internet access service at an affordable price supporting a set of services defined by the member states, will create an environment of bustling definitions of such services by member states. Consequently, this 'race to the top' contradicts the provisioning of essential services at reasonably low prices. Only services indispensable for social and economic participation should be subject to the universal service regime. Therefore, an extension to mobile services is not justified.

Communication Services

Bitkom supports the review of the framework and applicable rules for communication services with the goal of creating a legal framework allowing and facilitating fair competition of equivalent services. The EECC proposal differentiates 'electronic communication services' in 'internet access services', 'services consisting wholly or mainly in the conveyance of signals' and 'interpersonal communication services' with subcategories of 'number-based interpersonal communication services' and 'number-independent interpersonal communication services' (Art. 2 (4)-(7) EECC). The members of Bitkom incorporate different views to whether the proposed differentiation is helpful for achieving this goal.

Intra-Union Calls

There is no necessity to introduce symmetrical price regulation to one of the few markets released from market-based regulation. Consumers have numerous choices available regarding voice connections. There is functioning competition: call-by-call and preselection with cheap quality-based voice connections are available to consumers. There are also call-through providers offering quality-based voice services at each port. In addition, there are even free alternatives with OTT voice services. Price regulation of international intra-EU calls must not be introduced. It would constitute a clear over-regulation that would destroy billions of euros in turnover on the part of European telecommunications companies and would not benefit consumers.

As consumers are able to use these different voice services the average revenue per user for telco-voice services regarding intra-union calls has significantly decreased from appr. 1 € in 2010 to less than 0,5€ in 2015. During the next years it can be expected that this development will go on and therefore there is no need to introduce this new kind of symmetric price regulation.

M2M / IoT-Communication

With regard to services regulation, we advocate for a future-proof Electronic Communications Code, which fosters harmonized consumer protection and trust. The Code should also promote innovation in new services, such as for

instance Internet of Things and M2M (machine-to-machine). M2M services should not fall within the scope of consumer protection rules (and particularly art. 95-100), to avoid hampering innovation and the deployment of Industry 4.0.

End-User Rights

Bitkom is supportive of a full harmonization of end user rights across Europe. Unfortunately the proposal misses the chance of relying on existing cross-sector rules like the GDPR and thus the chance of abandoning overcome sector-specific rules.

Contract duration and termination (Art. 98)

Today's end-user rights regulation is spread across different legislation causing discrepancies and overlaps. The proposal does not resolve this unsatisfying situation and rather imposes new obligations which have already been addressed by market offers. For example, end-users shall be entitled to a contract termination with a one-month notice period in cases of a prolonged fixed duration contract (Art. 98 EECC). As a matter of fact this excludes any implicit prolonging of contracts. Consumers with the need of a high flexibility can already conclude contracts with a short termination period, so no further regulation in this field is needed. Just after market liberalization limits on contract duration were implemented to enable competition between ECS providers. 20 years after liberalization it does not seem reasonable to tighten these rules as this may lead to detriment of the consumers.

Furthermore, in the digital age consumers need reliable telecommunications services. These services are needed permanently, not just for a limited time. Therefore, consumers must have the choice to conclude long-term contracts to ensure their supply of telecommunications services. Short periods of notice can also harm consumers as providers cannot be obliged contractually to provide the service in the long term. Providers could terminate contracts at short notice in order to carry out, for example, technically necessary network changes.

Bundled offers (Art. 100)

Also, the almost indefinite extension of end-user rights in case of bundled offers (Art. 100 EECC) is alarming and seems unjustified, especially with view to those services and goods, which are not necessarily bounded to the communications service, e.g. hired purchase of terminal equipment. The proposed provision would introduce highly discriminatory regulation at the expense of ECS providers. Additionally, the proposal will be most likely be confusing for consumers, because identical products are subject to completely different legal obligations.

Must carry obligations (Art. 106)

Thanks to digitalization and convergence in the audio-visual media landscape, content distribution and consumption today utilize a variety of transmission channels, increasingly including the internet. Therefore the question whether there is still any valid justification for "must-carry" obligations must be thoroughly assessed.

In the past the regulation of infrastructure platforms with regard to certain TV or radio channels to be carried was motivated by scarce transmission capacities (e.g. analogue terrestrial TV networks) with ensuing bottlenecks for media services, and by limited choice for viewers/listeners. However, those technical conditions that conditioned such must-carry regulation no longer exist. Bitkom therefore argues that must-carry obligations (Art. 106 EEC proposal, ex-Article 31 USD) should be removed.

Certainly no additional must-carry obligations should be introduced for 'related complementary services' such as connected TV or electronic program guide services. Such services are not part of the program signal and can be very capacity intensive (data stream with own services / text offerings / on demand services). Extending the regulation to these services would constitute an incalculable and therefore unreasonable burden for network operators. It should be clarified what kind of services and data streams are considered to be 'related'. Bitkom opposes a general must-carry obligation for services through which the network operator would lose control over the size of the broadcaster's data stream. As network operators and broadcasters need to ensure efficient network management and the delivery of a high-quality TV signal to the customer, contractual agreements are necessary in any case. It would furthermore offer an unfair competitive advantage to the respective broadcasters as compared to similar other services which operate in an area separate from linear TV/radio offerings where capacity scarcity is no issue.

Therefore, based on economic and legal considerations, must-carry rules are no longer justifiable, let alone their extension to different kinds of audiovisual media services. This rationale is already and rightfully presented by the EP's addition in Article 106 para. 1 subpara. 2 (accompanying new recital 269a proposed by IMCO Committee).

Bitkom calls on the regulators to withdraw must-carry obligations from the EEC in general. If, nevertheless, such rules should be maintained, a clearer definition of privileged broadcasting services will be necessary: as those providing a specific and significant additional contribution to the individual and general formation of public opinion or an appreciable, distinctively valuable contribution to culture. At any rate, such privileged broadcasting services would have to provide sufficient compensation for the required infrastructure and transport services.

Bitkom therefore recommends adding a stipulation to Article 106 (2), stating that in the absence of national provisions on such compensation, the parties shall agree contractually on a proportionate remuneration. This would reflect on the Council's suggestion in Recital 269 as amended by the respective mandate for the trilogue.

Spectrum Management

Bitkom welcomes the intention of the draft EEC that more harmonization of spectrum regulation will provide increased legal certainty. A more coordinated and harmonized approach to spectrum in Europe will be essential for the timely deployment of mobile devices and services, including for 5G, IoT and M2M, and must also prevent interference with other existing mobile signals. It is also essential that first-mover benefits are preserved. Therefore Bitkom welcomes the idea of increasing harmonized spectrum regulations in Europe via the Peer Review-Mechanism (Art. 35 EEC) requiring NRAs to prior notify national spectrum awarding procedures for review and a non-binding opinion by BEREC and possible inputs from the EC and national regulatory agencies. However, it is of utmost importance that there occur no undue delays of dynamic developments and faster decisions are avoided.

License duration (Art. 49)

Bitkom generally supports the proposal of longer minimum license duration, which within technology neutral licenses will increase planning certainty and incentives to invest. This allows industry to take advantage of latest technologies and economies of scale and have lower costs in product development and deployment. That way there will be no undue delays in bringing new technologies to the market, for example in the field of 5G, and thus unlock economic growth in sectors of transport, media and health services.

Renewal of Rights (Art. 50)

Bitkom supports the harmonization of renewal regulations for mobile networks all over Europe. Renewal leads to an extension of license durations that offer more certainty and confidence for planning and investment. A start of the renewal procedure 3 to 5 years before expiry of licenses would additionally help to overcome the risk of a frozen zone for further investments with the relevant spectrum. If market tests as part of the renewal procedure do not produce any concerns, then the license should be extended for no less than a further ten years from its initial expiry.

Peer review process (Art. 35)

German digital sector has the opinion that - for the success of Europe regarding the 5G goals - it is of utmost importance that Member States get to more harmonized spectrum regulations and a better coordination of spectrum allocation and awarding. Thus, every opportunity of supporting more harmonized rules and conditions for the award and usage of relevant spectrum should be used. Bitkom therefore supports the Commission proposal which was endorsed by the Parliament to have a mandatory review of allowing BEREC, the Commission and national regulatory authorities to review elements of individual Member States' planned national assignment procedures which have more impact on market and business developments. This peer review process that had been proposed as a harmonizing tool for NRAs planning to provide their national markets with spectrum resources should be kept as a transparent and mandatory approach. Turning it to a voluntary coordination as proposed by the council would risk not achieving urgently needed progress regarding more harmonized rules and conditions for future spectrum resources and would not go very much beyond the status quo meaning that Europe will be very much stuck with 28 different ways to manage spectrum.

Small-cell deployment / Deployment and operation of small-area wireless access points (Art. 56)

Bitkom expects that all over Europe the deployment of a huge number small area wireless access points to become one of the prevailing characteristics of the implementation of 5G mobile networks. Thus, it is very important that Member States introduce a uniform implementation of the general authorization regime for the deployment, connection and operation of small area wireless access points. Fragmentation of rules and conditions due to national specifications should be avoided. Instead, a harmonized set of regulations should specify such technical characteristics by reference to the maximum size, power and electromagnetic characteristics. Technical conditions shall be exclusively covered by European standards (ETSI). Administrative procedures - if required at all - need to be fast and at low effort.

Without such simple rulings Europe risks to fall behind other regions in 5G deployments with adverse impact on the larger economy.