

PUBLIC CONSULTATION
on the review of the
EU regulatory framework for electronic communications

(courtesy translation)



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I. Introduction

Regulation of electronic communications in the European Union has a long history. Since the most recent regulatory review of 2009 markets have changed significantly, calling for a reform of the currently effective regulations in order for the European Union — and thus also Hungary — to retain its competitive edge over other parts of the world.

The upcoming review is expected to begin in 2016, with EU approval of the new regulatory framework likely in 2018 and its implementation in Hungary taking place in 2020.

The National Media and Infocommunications Authority (hereinafter: NMHH) intends to play an active role in the preparations for the regulatory framework review. To ensure a coordinated and informed representation of Hungary's interests at EU level, NMHH works closely with the Ministry for National Development. It also maintains excellent working relationships with BEREC¹, which assists in the Union's legislative process as a technical advisory body.

In this process, it is essential to familiarise with the preliminary standpoints of stakeholders and incorporate them into decision making processes at both national and international level.

This Consultation Paper provides a brief overview of the history of regulation in electronic communications, also touching upon its fundamental principles and future challenges. At the end of the Paper a number of questions are raised, in connection to which opinions and comments by industry players and other stakeholders are welcome through 10 September 2015 via e-mail at eukeretszab_konzultacio@nmhh.hu².

We trust that an industry-wide collaboration in Hungary can contribute to the creation of a new and advanced European regulatory framework.

¹ BEREC - Body of European Regulators for Electronic Communications

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II. The history of regulation in electronic communications

The history of regulation in the electronic communications sector can be divided into the following four stages:

Stage One – road to market liberalisation (up to 1998)

In the earliest phase of liberalisation (up to the late 1980s), telecommunications services were considered a public utility across Europe causing the state to play a significant role in the sector, as relevant infrastructures were owned by national or state-run corporations with widespread monopolistic powers. By the mid-1980s the pace of advancements in telecommunications technology increased, coinciding with the privatisation of many state-owned entities and soon followed by the deployment of alternate electronic communications infrastructures. In light of these processes, the need for market liberalisation became all the more pressing.

The so-called Green Paper of 1987 detailed the European Commission's approaches to liberalising the continent's telecommunications market, which was intended to be implemented through sector-specific regulation based on ex-ante market regulation and competition law, and using legal harmonisation.

Under the 'Services' Directive (1990) the licencing of telecommunications services, as well as spectrum allocation and monitoring was brought within the jurisdiction of independent authorities. As a result, Member States began setting up their respective sectoral regulatory bodies.

Stage Two – liberalisation takes hold (1998-2003)

The legislative process was aimed at implementing market liberalisation. To that end, 1998 saw a number of Directives being put into effect (such as the new 'Services' Directive or the Directive on Full Competition).

Stage Three – market regulation with consolidation (2003-2009)

The primary objectives of electronic communications regulation in Europe are to promote internal competition in regulated sectors, facilitate market entry by new providers, and ensure a regulatory environment that can advocate sectoral developments and investments in a predictable manner, using regulatory tools adjusted to market processes.

Elements of the Regulatory Framework (2002) are:

- **Framework Directive**³: contains objectives and general provisions, as well as rules applicable to national regulatory authorities. It stipulates that national regulatory authorities must be independent from all communications service and network providers, and its executives and their deputies may not be under political influence. Under this Directive national regulatory bodies are tasked with ensuring access to electronic communications services and promoting growth in competition and investments, overseeing spectrum assignment and allocation, carrying out market analyses and identifying providers with significant market power.
- **Authorisation Directive**⁴: provides a summary of regulations pertaining to the authorisation of electronic communications services, and presents the key rules of spectrum and identifier management.

³ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services

⁴ Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services

- **Access Directive⁵**: contains the rules of access to, and interconnection of, electronic communications networks.
- **Universal Services Directive⁶**: provides a definition of what constitutes universal service and contains provisions on quality and consumer protection pertaining to all providers of public electronic communications services.
- **e-Privacy Directive⁷**: contains provisions on the handling and utilisation of user information accessible by a service provider.

Stage Four – a review of the 2002 regulatory framework (since 2009)

Given a rapidly changing market environment the Regulatory Framework was subjected to a comprehensive review during 2009. While the core principles and tools of regulation for EU markets remained unchanged, the resulting framework did contain some new elements. Although **promoting sustainable competition** continues to be one of the primary objectives, additional issues such as **incentivising sectoral investments**, **boosting demand** (as a means to address the digital divide) and **protecting consumer rights** were also brought into the spotlight, as was the question of **security**.

As a result of the Regulatory Framework, between regulatory authorities and the European Commission a unique collaboration was formed, in which Commission “rulings” may be disregarded only under exceptional circumstances.

Furthermore the **BEREC⁸** was established, which is a permanent European advisory body chiefly tasked with the development and dissemination of best practices, in certain cases drafting preliminary opinions, carrying out consultations and summarising applicable results, as well as providing professional advice concerning the EU's legislation and application of law.

In addition to the five amended Directives, the currently effective regulatory framework contains an additional two Regulations⁹:

- **Framework Directive** (Directive 2002/21/EC as amended by Directive 2009/140/EC)
- **Access Directive** (Directive 2002/19/EC as amended by Directive 2009/140/EC)
- **Authorisation Directive** (Directive 2002/20/EC as amended by Directive 2009/140/EC)
- **Universal Service Directive** (Directive 2002/22/EC as amended by Directive 2009/136/EC)
- **e-Privacy Directive** (Directive 2002/58/EC as amended by Directives 2006/24/EC and 2009/136/EC)
- **Regulation 1211/2009/EC** establishing the Body of European Regulators for Electronic Communications
- **Regulation 531/2012/EU** on roaming on public mobile communications networks within the Union

⁵ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities

⁶ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services

⁷ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector

⁸ <http://berec.europa.eu/>

⁹ <https://ec.europa.eu/digital-agenda/en/telecoms-rules>

III. The need for a review of the Regulatory Framework

Since the most recent review of the Regulatory Framework, the most popular communication channels have changed remarkably, as have the ways in which content is consumed. People are increasingly turning to online channels to communicate, **interactivity and mobility** are gaining momentum, and users take it for granted that the content they are searching is available anytime, anywhere. At the same time, however, we must not overlook the fact that the **digital divide** is not disappearing at the desired rate: a significant share of today's adult population is still considered digital illiterate, and coming generations are not necessarily literate, either. As a new phenomenon, machines are starting to take on “consumer” functions and the volume of data traffic they generate is expected to rise at a dramatic rate (e.g., M2M, NFC, RFID and other intelligent networks)¹⁰. Consequently, certain groups of users can be characterised by their **growing use of bandwidth-intensive applications, both in mobile and fixed-access services**. Furthermore, more and more concerns are being voiced about service and **network security**, which may exert a negative influence on consumption. Outside the rigid context of the digital economy we can see that digitalisation does not end at the boundaries of the infocommunications sector¹¹, as its effects are disrupting society's existing mechanisms and the access to fundamental services such as education or health care. The rapid growth of **e-commerce** stretches across geographical and economic boundaries, impacting logistics, transportation and postal services alike. Besides physical goods, cross-border retail commerce also encompasses the exchange of content, which will have a disruptive effect on the market of copyrighted content (i.e., the continuing practice of geo-blocking¹² within the EU already looks doubtful).

The proliferation of IP-based data traffic and the **growth of online services** have had a profound impact on the electronic communications market. Convergence has brought along the interoperability of infrastructures and services, and made possible the connection of hitherto separate links in the value chain, which in turn also results in the increasing interdependence of actors in the digital market. Previously isolated technologies and services are now directly competing with one another, hence the constantly changing nature of business opportunities and models. New services, solutions and market participants have emerged, such as over-the-top content (OTT) services operating above the level of Internet service providers. These data intensive online services compete with “conventional” services, generate heavy traffic loads on networks, add to the pressure on ISPs to engage in network development, and disrupt previous business models. At the same time, their advancement results in more diversity, a wider variety of choices, the penetration of innovative services and thus an overall increase in competition. **With the entry of new actors new types of regulatory concerns have been raised**, such as the issues of guaranteed bandwidth, interoperability, as well as matters relating to taxation and jurisdiction. Since a number of cases involve corporations located overseas, the challenges associated with their endeavours typically need to be overcome at pan-European level.

With sectoral players subjected to revenue pressure, **their vertical and horizontal integration is becoming all the more prevalent**. Those able to gain a foothold in more elements of the value chain and in more value chains will prevail. Current market conditions therefore strengthen role of economies of scale and choice, further adding to the pressure on businesses to consolidate.

In this digital world, **scarce resources are appreciated** and the provision of sufficient capacities becomes more important than ever, whether in terms of fixed-access or mobile throughput, data storage or the available limited spectrum or number fields. It is increasingly difficult for digital networks and systems to keep up with **growing**

¹⁰ Machine to Machine Communication, Near Field Communication, Radio Frequency Identification, Smart Grid

¹¹ In the Digital Single Market (DSM) strategy, infocommunication is a horizontal discipline: while the regulation of electronic communication remains a core element, areas such as audiovisual media, e-commerce, copyrights, privacy and certain taxation issues are also touched upon.

¹² Discrimination based on place of residence

and changing user needs. Accordingly, a more pronounced emphasis is placed on the effective utilisation of resources.

Moreover, in today's convergent digital world advancements in physical networks, technologies and consumer-side tools and services fuelling each other have resulted in changes that, **by increasing the number of ways to access content**, significantly altered the technical and economic conditions of content distribution, also impacting the media services market and the collaborations of service providers and device manufacturers. This **change that has taken place and is still ongoing in the value chain** is highly relevant to regulation, on the one hand because new "bottlenecks" are coming into play, and also because actors (e.g., search engines or certain smart devices) outside the scope of current regulations are taking on a central role. Therefore, the emergence of new technologies, services and business models also means the obsolescence of certain regulatory tools of yesterday. **The 2016 review provides an opportunity to gear up for new market challenges and elaborate new regulatory approaches.**

The European Committee released its [Digital Single Market strategy](#) on 6 May 2015, which unlike previous documents represents a comprehensive approach by focusing not only on electronic communications but also on reforms in copyright, audiovisual media and e-commerce, all with the intention to implement a digitally unified European Union.

The three key tools that must be used in optimal balance are sectoral regulation, ex-post competition regulation, as well as co- and self-regulation.

When reviewing the regulatory framework the European Union will focus on the following main areas:

- Establishing adequate regulatory environment to ensure the success of digital networks and services;
- Ensuring increased access to Europe's digital goods and services for both consumers and businesses;
- Creating the "digital economy and society" in Europe;
- Reinforcing the independence of national regulatory authorities and guaranteeing the conditions of effective institutions for the long term;

...and may consider using the following tools:

- Overhauling the state aid system;
- Promoting pan-European mergers;
- Shifting towards balanced competition (of "traditional" and online service providers);
- Strengthening regulation based on competition law;
- Reviewing the rules of consumer protection (and the possible extension to online providers);
- Identifying minimum standards of service quality (if and when special services come to light, the definition of minimum quality levels and guarantees of traditional best-effort-based Internet access will be of fundamental importance);
- Taxes (re-evaluation of tax rules, possible reform of taxation according to permanent residence);
- Media regulation (review of the [AVMS Directive](#)¹³ and the "country of origin" principle);
- Reviewing [copyright legislation](#) at EU level.

¹³ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services

IV. Questions

Stakeholders are welcome to submit comments and suggestions to the following questions, which have been formulated according to the key regulatory areas. As OTT services are becoming increasingly important factors on electronic communications markets, some of these questions are focused on this subject¹⁴. After collecting and evaluating the comments submitted, the NMHH will use relevant findings in drafting Hungary's position paper concerning the review of the regulatory framework. The responses will contribute greatly to enabling sectoral players voice their opinions during the 2016 review.

Suggestions and comments to the following questions may be submitted via e-mail at eukeretszab_konzultacio@nmhh.hu¹⁵ through 10 September 2015:

Principles and definitions

- 1 Is there a need for updating the definitions¹⁶ currently used in electronic communications? What are the ones that need to be changed the most? Is it necessary and possible to extend these definitions so that regulation also applies to communications-related online services? Do we need specific definitions for internet and Internet access services, particularly when it comes to identifying service providers' scope of responsibilities? In view of the proliferation of OTT services and the market presence of CDN providers, how should the definitions framework be changed?

Access

- 2 In light of rapidly changing technological and market demands, is there a need for objectives defined in the 2010 Digital Agenda for NGA coverage and penetration rates (30/100 Mbit/s) to be reviewed? What bandwidth rates would be necessary for Hungary's development (both urban and rural areas)? Is there a need for EU objectives to be updated?
- 3 Are there any physical features of Internet connection that may be more relevant or is similarly important to consumers as bandwidth?
- 4 What elements of the current regulatory framework need to be reviewed in order to further promote high-speed network deployment (primarily market-based tools for boosting competition)?

Market Regulation

- 5 What are the key market processes that, over a horizon of 5-10 years, can have a fundamental impact on how markets work and regulatory tools are used? Within said timespan, where in the value chain containing communications services would bottlenecks appear?
- 6 According to EU recommendations, the number of relevant markets is on a permanent decrease. What are the markets where ex-ante regulation is no longer required and what are those where regulation must be maintained? Do you think we can define a market that should be subject to ex-ante regulation?
- 7 Do you think that online communications services (Skype, Viber, WhatsApp etc.) can be true substitutes of "conventional" electronic voice/text communications services?

¹⁴ Our standpoint regarding OTT service providers is also based on the results of the previous OTT consultation.

¹⁵ eukeretszab_konzultacio@nmhh.hu

¹⁶ Article 2 of the Framework Directive, and particularly item c) thereof

- 8 Can certain obligations, applicable to traditional electronic communications service providers, be extended to market participants offering "information society services" (e.g., access to the 112 emergency hotline, switching between providers, interoperability, deployment of monitoring systems)? What obligations in particular could these be?
- 9 Is there a need for agreements between service providers concerning guaranteed quality of service? Are there any actual examples to this practice in Hungary? How do such agreements influence the principles of network neutrality and the functioning of a "best-effort" based Internet? Can the introduction of guaranteed-quality services cause a deterioration in the quality of "best-effort" based services?
- 10 With the number of regulated markets on a steady decrease, do you consider whether there is a need for broadening the competences of regulatory authorities – concerning the wholesale level relations between providers (e.g., extending the scope of authority in legal disputes, or applying more efficient ad-hoc wholesale requirements?)

Spectrum

- 11 By way of a more harmonised spectrum tender effort by Member States, how can we ensure maximum utility of this scarce resource? Can we facilitate the market's development by stepping up the sharing of information (whether at national or international level)?
- 12 Can a more efficient frequency utilisation be achieved by harmonising spectrum use?
- 13 Is there a need for higher-level international or EU coordination in order to better utilise the available frequencies?

Users

- 14 Is there a need for reviewing regulation concerning the protection of users? If yes, why and what specific provisions should be updated? How can the protection of rights of those using online services be ensured?
- 15 How should regulations on universal services be changed? Should broadband access be included as a part of universal service?
- 16 Is there a need for additional standards to be put in place in order to prevent users from encountering technical difficulties when attempting to use a service?
- 17 Do you think that national legislation concerning the blocking of online content that is illegal or harmful to minors should be harmonised? If yes, how?
- 18 How do you think issues pertaining to net neutrality could be resolved? How do you suggest the often conflicting interests of electronic communications providers and users be aligned?

Privacy and data security

- 19 What are the latest challenges in network and information security that the new framework on electronic communications should address? How can regulatory and law enforcement authorities take a proactive stance against cybercrime spreading any further?
- 20 How can users be ensured a higher level of privacy at EU level?
- 21 What are the conditions of, as well as the checks and balances applicable to, limiting the confidentiality of data transmitted by communications providers if these are intended to uphold public order or serve

purposes of national security? Can electronic communications service providers be mandated to collect and retain data on a general basis, and if yes, for what duration?

- 22 Is there a need to regulate matters involving data ownership? (For instance, in connection with the business use of data stored on servers outside Europe?)
- 23 What special regulation would you welcome for ensuring a higher level of data protection for cloud-based applications?

Other regulatory matters

- 24 With regards to the review of the EU framework, what other regulatory matters not referred to above should be given priority focus?