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## **THE EECC – A NEW PHASE IN THE REGULATION OF THE ELECTRONIC COMMUNICATIONS SECTOR**

*With the adoption of the European Electronic Communications Code ("EECC"), the regulation of the electronic communications sector has entered a new phase. A phase of extended and amended regulation aimed at existing and new categories of market parties. This Article gives an overview of the changes that will have to be implemented in the national telecommunications legislation.<sup>2</sup>*

### **I. Introduction**

On 17 December 2018, the Directive of 11 December 2018 on the European Electronic Communications Code was published<sup>3</sup> (the "EECC"). The EECC must be implemented in the national legislation of the European Member States by 21 December 2020.<sup>4</sup> The EECC replaces the Access Directive<sup>5</sup>, the Authorisation Directive<sup>6</sup>, the Framework Directive<sup>7</sup> and the Universal Service Directive<sup>8</sup> which date from 2002, as subsequently amended in particular in the context of the 2009 review.<sup>9</sup> The EECC does not amend the ePrivacy Directive, which is

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<sup>2</sup> An earlier version of this Article was published in Mediaforum, Tijdschrift voor Media en Communicatierecht, 2019-3, pp. 78 – 88.

<sup>3</sup> Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 on the European Electronic Communications Code (*OJEU*, 2018, L 321/36).

<sup>4</sup> Article 124, first paragraph, EECC.

<sup>5</sup> 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 (Access Directive) (*OJ* 2002 L 108/7).

<sup>6</sup> 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 (Authorisation Directive) (*OJ* 2002, L 108/21).

<sup>7</sup> 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 (Framework Directive) (*OJ* 2002 L 108/33).

<sup>8</sup> 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 (Universal Service Directive) (*OJ* 2002 L 108/51).

<sup>9</sup> Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (*OJ* 2009 L 337/37); Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending, inter alia, Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (*OJ* 2009 L 337/11).

also part of the revised European regulatory framework of 2002.<sup>10</sup> The EECC is part of the second pillar of the European Commission's Digital Single Market strategy.<sup>11</sup> This second pillar has been identified by the Commission as creating the right conditions for digital networks and services to flourish and focuses, inter alia, on sector-specific legislation and regulation for the provision of electronic communications networks and services. The first pillar aims to remove obstacles for citizens and businesses to do business online across Europe and the third pillar is described by the Commission as maximising the growth potential of the European digital economy.<sup>12</sup>

The EECC recasts and integrates the provisions of the aforementioned four Directives, adapting their structure and content to the new market situation. In this new market situation, the provision of communications services is no longer necessarily linked to the provision of a network. In addition, important substantive changes are made, which will be discussed in broad outline below.

As in the past, the recitals of the EECC briefly state that the aim is to reduce the sector-specific ex ante rules more and more as competition in the market develops. Ultimately, the electronic communications sector should be governed by competition law.<sup>13</sup> However, looking at the provisions of the EECC this goal seems to be further away than ever. Instead, the regulation of the electronic communications sector has moved on to a new phase, characterised by more sector-specific ex ante regulation, driven by market developments, digitalisation and by further European harmonisation. The very size of the EECC is already a statement. The document, including recitals and annexes, contains approximately 200 pages and refers to further harmonisation through BEREC Guidelines on a range of topics. Moreover, many aspects of regulation do not so much depend on how competition develops but on issues such as market access, including access to land and radio spectrum, obligations to ensure interoperability, management of risks to network and service security and end-user protection. Similarly, the new symmetric access regulation (independent of market power) in the case of high and non-transitory economic or physical barriers to replication of network(s) included in the EECC and discussed in more detail below does not appear to be intended to be phased out over time.

As stated above, the EECC stipulates that the four existing directives will be repealed by 21 December 2020.<sup>14</sup> By that date, the provisions of the EECC must have been implemented in national law.<sup>15</sup> In order to avoid a gap, national obligations to implement the four directives that are repealed will continue to exist, but references to articles in those directives will be construed as references to the EECC. For this reason, Annex XIII of the EECC contains a

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<sup>10</sup> 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 (Directive on privacy and electronic communications) (*OJ* 2002, L 201/37). With regard to this Directive, see the proposal for a Regulation of the European Parliament and of the Council on the respect for private life and the protection of personal data in electronic communications, repealing Directive 2002/58/EC (Regulation on privacy and electronic communications) of 10 January 2017, COM(2017)010 final.

<sup>11</sup> Jorn van Steenis, Roelien van Neck, Marjolein Geus, 'The European Commission's DSM initiatives – negotiating a path between ambition and reality (part I)', *Mediaforum* 2017/1, pp. 13-22 and Marjolein Geus and Jorn van Steenis, 'The European Commission's DSM initiatives – negotiating a path between ambition and reality (part II)', *Mediaforum* 2017/6, pp. 187-195.

<sup>12</sup> For a more detailed description, see the articles referred to in the previous footnote.

<sup>13</sup> Recital 29 EECC, which incorporates the previous recital 5 of Directive 2009/140/EC amending the Framework Directive, the Access Directive and the Authorisation Directive. See footnote 10

<sup>14</sup> Article 125 EECC.

<sup>15</sup> Article 124 EECC.

"correlation table" which determines which articles in the EECC will replace the articles of the existing Directives.<sup>16</sup>

In addition to the EECC, the regulation establishing the Body of European Regulators for Electronic Communications (BEREC) was published on 17 December 2018.<sup>17</sup> BEREC plays an important role in the pursuit of a consistent application of the EECC. The BEREC Regulation requires BEREC to provide guidance on the application of the European regulatory framework for electronic communications on a range of issues covered by the Roaming Regulation<sup>18</sup>, the Net Neutrality Regulation<sup>19</sup> and certain provisions of the EECC.<sup>20</sup>

## **II. Changes resulting from the EECC compared to the existing EU regulatory framework**

As a result of the implementation of the EECC, many aspects of the existing telecoms regulation will have to be adapted. The overview below is far from exhaustive and is only intended to give an impression of the extent of the changes that will also have to be made to national legislation and regulations.

Article 1, third paragraph, EECC stipulates that it does not affect the regulations regarding, among other things, the protection of personal data and privacy and the regulation of the content and audiovisual policy. Other examples of European legislation mentioned concern the Roaming Regulation<sup>21</sup> and the Net Neutrality Regulation.<sup>22</sup> The provisions of those regulations also take precedence over the Telecommunications Code. This is important, for example, for the extensive provisions on end-user protection contained in both the EECC and the aforementioned regulations (see also below).

### ***Objectives***

First of all, the objectives of the Telecommunications Act currently included in article 1.3 of the Telecommunications Act must be supplemented in line with the EECC.<sup>23</sup> At present, these objectives are about promoting competition, the internal market and the interests of the end user. The EECC adds as an important new objective the promotion of connectivity, access and use of very high capacity networks including fixed, mobile and wireless networks for all citizens and businesses of the Union. This additional objective underpins a series of new provisions in the EECC which will have to be translated into national law. The new regulation is important for the roll-out, use and availability of both 5G and fiber networks. In addition, it is no longer sufficient to stipulate that the National Regulatory Authorities ("NRAs") must ensure that their decisions contribute to the achievement of the objectives. Pursuant to the EECC, this

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<sup>16</sup> Article 124, first paragraph, EECC and Article 125 EECC.

<sup>17</sup> Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office for the Support of BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009 (*OJEU* 2018, L 321/1).

<sup>18</sup> Regulation (EU) 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union (*OJEU* 2012, L 172/10).

<sup>19</sup> Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures on open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (*OJEU* 2015, L 310/1).

<sup>20</sup> Article 3, second paragraph, BEREC Regulation. See the enumeration in article 4, paragraph 1, sub d BEREC Regulation.

<sup>21</sup> Regulation (EU) No 531/2012.

<sup>22</sup> Regulation (EU) No 2015/2120.

<sup>23</sup> Article 3 EECC vs. article 8 Framework Directive.

instruction must also apply to other competent authorities, such as local authorities that are charged with the coordination of activities in or on public grounds in connection with rights of way in relation to the installation of electronic communications networks.<sup>24</sup> Moreover, in addition to the earlier directives, the EECC stipulates that the Member States themselves, the Commission, the Radio Spectrum Policy Group and BEREC must also contribute to the achievement of the objectives.

## ***SMP regulation***

While the EECC acknowledges that the ultimate aim is for the electronic communications sector to be governed by competition law, the provisions on market analysis and significant market power in the EECC will not only be adapted but will also be further extended, giving more powers to the Commission and BEREC.<sup>25</sup>

An important change is that the principle that SMP analyses must be carried out every three years is changed. Under the EECC, the national regulatory authorities shall carry out the analyses of the relevant market within five years of the adoption of a previous measure, which may be extended by a maximum of one year in exceptional cases.<sup>26</sup>

The SMP obligations that may be imposed shall be extended to access obligations in respect of civil engineering assets including, but not limited to, buildings or entrances to buildings, building cables, including wiring, antennae, towers and other supporting constructions, poles, masts, ducts, conduits, inspection chambers, manholes and street cabinets.<sup>27</sup> So far, this has been a subject regulated separately from the SMP regime on the basis of Directive 2014/61/EU.<sup>28</sup> Obligations to share use can therefore be imposed as a separate SMP obligation in the future. Another new feature is the possibility for a SMP party to offer agreements, for example to open up the deployment of a new very high-capacity network to co-investment, which can then be made binding by the national regulatory authority.<sup>29</sup> A further refinement is that the scope for imposing SMP obligations is limited in respect of companies operating exclusively in wholesale markets.<sup>30</sup>

The shift of powers to the Commission is illustrated by the provision that fixed and mobile termination rates under the EECC will no longer be set by national regulatory authorities in SMP decisions. The termination rates for both fixed and mobile termination markets will henceforth be set by the Commission on a cost-oriented basis for the whole of the European Union. The Commission will adopt, by means of a delegated act, a single maximum charge for call termination for mobile services and a single maximum charge for call termination for fixed services that will apply throughout the Union.<sup>31</sup> Another example of the shift in powers is that the Commission is given the power to define transnational markets on the basis of an analysis of BEREC, after which the relevant National Regulatory Authorities ("NRAs") are jointly

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<sup>24</sup> Article 43 EECC.

<sup>25</sup> Articles 63 - 82 EECC.

<sup>26</sup> Article 67, fifth paragraph, EECC.

<sup>27</sup> Article 72 EECC.

<sup>28</sup> Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of establishing electronic communications networks at high speed (*OJEU* 2014, L 155/1).

<sup>29</sup> Articles 76 and 79 EECC.

<sup>30</sup> Article 80 EECC.

<sup>31</sup> This means that the long series of appeals against SMP decisions of the ACM (formerly OPTA) in relation to termination rates in the Netherlands will thus come to a definitive end. CBb 8 February 2006 (LJN AV1222); CBb 29 August 2006 (LJN AY7997); CBb 11 May 2007 (LJN BA4880); CBb 3 February 2010 (LJN BL4028); CBb 26 May 2010 (LJN BM5564); Vzr CBb 5 November 2010 (LJN BO3594); CBb 31 August 2011 (LJN BR6195); CBb 8 February 2012 (LJN BV3078); CBb 22 May 2013 (ECLI:NL:CBB:2013:CA1165); Vzr CBb 27 August 2013 (ECLI:NL:CBB:2013:99); CBb 13 January 2015 (ECLI:NL:CBB:2015:4); CBb 10 July 2017 (ECLI:NL:CBB:2017:213); CBb 17 July 2017 (ECLI:NL:CBB:2017:219); CBb 11 September 2018, ECLI:NL:CBB:2018:478.

responsible for carrying out the market analysis.<sup>32</sup> In addition, BEREC will have the power to carry out analyses of trans-national end-user demand for products and services, which may result in guidelines for SMP measures to be imposed by NRAs. These guidelines may even form the basis for the adoption of harmonised technical specifications for wholesale products to meet the demand for cross-border communications, in particular for business users.<sup>33</sup>

It remains to be seen to what extent the new possibilities and powers will actually be put into practice.

## ***Symmetric access obligations***

Apart from the extension and modification of the SMP regime, the EECC introduces the possibility for NRAs to impose so-called symmetric access obligations. Symmetric access regulation is an additional tool introduced in the EECC to promote competition where there are economic and/or physical constraints with respect to the roll-out of networks (or parts thereof) to end-user locations.<sup>34</sup>

The term 'symmetric regulation' is used because it refers to obligations that can, in principle, be imposed on all providers of electronic communications networks and operators of (elements of) such networks if there is a replication issue. It is therefore not necessary to carry out an analysis that results in obligations which are imposed only on parties with SMP.

If the conditions to impose symmetric access obligations are fulfilled such obligations can be similar to those that can be imposed pursuant to an SMP analysis: access obligations, non-discrimination obligations, transparency obligations and tariff regulation could be considered. Symmetric access obligations should be objective, transparent, proportionate and non-discriminatory and should be reviewed within 5 years i.e. a similar timespan as SMP measures.<sup>35</sup>

Symmetric access obligations can be imposed in relation to i) wiring, cables and associated facilities inside buildings or up to the first concentration or distribution point as determined by the NRA where that point is located outside the building<sup>36</sup>, or ii) beyond the first concentration or distribution point, to a point that the NRA determines to be the closest to end-users, capable of hosting a sufficient number of end-user connections to be commercially viable for efficient access seekers.<sup>37</sup>

Symmetric access obligations regarding wiring and cables and associated facilities *inside buildings or up to the first concentration or distribution point* can be imposed upon reasonable request where justified on the grounds that replication of such network elements would be economically inefficient or physically impracticable.

As access obligations to *higher network levels* are more onerous, the criteria for imposing such access obligations are stricter. There must be "high and non-transitory economic or physical barriers to replication which underlie an existing or emerging market situation significantly limiting competitive outcomes for end-users" and other access obligations (including SMP and access obligations to wiring and cables in buildings) should be insufficient. Such access obligations to higher network levels may also be imposed by the NRAs ex officio if the applicable conditions have been met. Moreover where technically or economically justified,

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<sup>32</sup> Article 65 EECC.

<sup>33</sup> Article 66 EECC.

<sup>34</sup> Article 61, third paragraph, EECC.

<sup>35</sup> Article 61, fifth paragraph, EECC.

<sup>36</sup> Article 61, third paragraph, first subparagraph, EECC.

<sup>37</sup> Article 61, third paragraph, second subparagraph, EECC.

active or virtual access obligations may also be imposed. Exceptions apply to wholesale-only operators of very high capacity networks which offer access to their networks on fair, non-discriminatory and reasonable terms and conditions<sup>38</sup> and if the economic or financial viability of the construction of a new network, in particular by small local projects, is jeopardised by the imposition of such obligations.

The EECC leaves very little discretion to Member States in implementing the new regime for symmetric access. Moreover BEREC guidelines have to be adopted by 21 December 2020 to ensure a harmonized implementation.<sup>39</sup> These guidelines will provide important guidance on a number of key concepts and criteria relating to symmetric access, namely:

- a) the first concentration or distribution point;
- b) the point beyond the first concentration or distribution point, capable of hosting a sufficient number of end-user connections to enable an efficient undertaking to overcome the significant replicability barriers identified;
- c) which network deployments can be considered to be new;
- d) which projects can be considered to be small; and
- e) which economic or physical barriers to replication are high and non-transitory.

This new regime of ex ante regulation of symmetric access shows that the European regulatory framework for electronic communications has taken an important further step towards full harmonisation, not only in terms of implementation, but also in terms of interpretation and application through BEREC guidelines.

## ***Radio Spectrum***

The regime governing authorisations, rights of use and assignment procedures for radio spectrum are being revised in the EECC with significant further changes since the October 2016 proposal.<sup>40</sup>

The overall objectives and principles for spectrum management at national level have been specified in the EECC, including the pursuit of the rapid deployment of high quality and high speed wireless broadband networks (5G), predictability and consistency in licensing procedures and the promotion of spectrum sharing. It also specifies the conditions under which temporary alternative use of harmonised spectrum is allowed.<sup>41</sup> In addition, more emphasis is placed on general authorisations and on spectrum sharing, and less on individual licences in order to bring licensing models into line with developments in 5G. In the final text of the EECC, the powers previously envisaged for the Commission to adopt binding measures to promote consistency have been removed.<sup>42</sup> Similarly, the previously envisaged Commission implementing measures aimed at ensuring consistency with regard to certain licence conditions have not survived the negotiations on the text initially proposed by the Commission.<sup>43</sup>

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<sup>38</sup> NRAs may impose obligations to wholesale-only operators where the network concerned is publicly funded (Article 61, third paragraph, subparagraph 4).

<sup>39</sup> On 13 June 2019, BEREC published an initial consultation document in preparation for the BEREC guidelines referred to in article 61, third paragraph, EECC, in which interested parties are invited to give their initial reaction at an early stage (BoR (19) 104). The deadline for the submission of opinions was 15 July 2019.

<sup>40</sup> Articles 45 to 55 EECC. See for comparison the previous proposal of 12 October 2016, COM(2016)590 final.

<sup>41</sup> Article 45, third paragraph, EECC.

<sup>42</sup> Article 46 EECC.

<sup>43</sup> Article 47 EECC.

The provisions relating to the use of spectrum have been substantially extended with a view to improving the consistency of practices across Member States. The proposal of October 2016 provided for a minimum permit period of 25 years. That provision was amended in its final version. The minimum authorisation period in the final text is 15 years, with the possibility of an appropriate extension and the obligation for Member States to ensure predictability of regulation for licence holders for a period of at least 20 years. In addition, the EECC requires Member States to make the general criteria for the renewal of individual licences available in a transparent manner, in principle at the time of the granting of the licence.<sup>44</sup> In addition, decisions on the renewal of harmonised radio spectrum licences should be taken well in advance of their expiry date, but if requested by the licensee, no earlier than five years before their expiry date.<sup>45</sup> In the earlier proposal for the Code, a period of at least three years ahead of the expiry of the licence term was mentioned, but the final EECC provides somewhat more flexibility for the Member States with regard to decisions to renew the licence terms *ex officio*.<sup>46</sup>

Article 52, first paragraph, EECC contains a general reference to the promotion of effective competition and the prevention of distortions of competition in the granting, modification or renewal of frequency licences.<sup>47</sup> However, the second paragraph of article 52, compared to the text initially proposed by the Commission, again leaves a great deal of discretion to Member States to take appropriate measures with regard to, *inter alia*, the limitation of the amount of radio spectrum bands, wholesale access and roaming conditions, spectrum reservation and grounds for refusal in the event of transfer or accumulation of rights of use. In addition, as to whether such measures can be taken, reference is made not only to an assessment of the competitive conditions in the market, but also to the likely effects of such measures on existing and future investments by market participants, in particular for network roll-out. Reference is made to the need for a prospective assessment, as is also applicable to SMP analyses, but without importing the entire SMP regime.<sup>48</sup>

New are also the provisions to achieve improved coordination of the allocation and use of harmonised spectrum.<sup>49</sup> In the final text of the EECC, a new article has been added specifically in view of the roll-out of 5G, requiring Member States to take all appropriate measures by 31 December 2020 to allow the use of sufficient spectrum in the 3.4 to 3.8 GHz band and to allow the use of at least 1 GHz in the 24.25 to 27.5 GHz band. The latter provided that there is clear market demand and that there are no significant constraints for migration of existing users or band clearance.<sup>50</sup> Exceptions are possible, for example in the case of unresolved cross-border coordination issues or the safeguarding of national security and defence.<sup>51</sup> The exceptions have been written with a view to problems such as in the Netherlands, where the 3.5 GHz band above the Amsterdam-Zwolle line is currently used by the satellite earth station in Burum for the interception of satellite communications.<sup>52</sup> The previous proposal for the Code included powers for the Commission to adopt measures to set common deadlines for the authorisation of the use of harmonised spectrum in all Member States and for the coordination of the main elements of the selection procedures and criteria. These powers are no longer included in the final text of the EECC, so that more powers remain with the Member States than was originally intended by the Commission here as well.

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<sup>44</sup> Article 49, second paragraph, in conjunction with article 55, third and sixth paragraph, EECC.

<sup>45</sup> Art. 50, first paragraph, EECC formulates it as follows: "To this end, the authorities shall assess the need for such an extension either on their own initiative or at the request of the right-holder, in the latter case not earlier than five years before the expiry of the rights concerned.

<sup>46</sup> Article 50 EECC.

<sup>47</sup> Article 50, first paragraph, EECC.

<sup>48</sup> Article 52, second paragraph, in conjunction with article 67, second paragraph, EECC.

<sup>49</sup> Article 53 EECC.

<sup>50</sup> See Article 54 EECC.

<sup>51</sup> Article 54, second paragraph, in conjunction with Article 53, third paragraph, EECC.

<sup>52</sup> Letter from the State Secretary for the Interior and Kingdom Relations to the Lower House of Parliament dated 24 December 2018, *Parliamentary Papers II* 2018/19, 24095, 459.

## ***Universal service***

The regulation of the universal service is also undergoing major changes<sup>53</sup> and the regulation in the EECC has been substantially amended compared to the proposal of 12 October 2016.<sup>54</sup>

The most important change from the current regulatory framework is that access at a fixed location to an adequate broadband internet access service is considered to be a universal service. This means that all Member States must ensure that broadband internet access services are available to all consumers at an affordable price. By 21 June 2020, BEREC shall, in close cooperation with the Commission, prepare a report on *best practices regarding* an adequate broadband internet access service. Thereafter, the minimum bandwidth may be determined at national level according to national circumstances and the minimum bandwidth available to the majority of consumers in a Member State, taking into account the BEREC report.<sup>55</sup>

Annex V to the EECC specifies a minimum list of services that can support an adequate broadband Internet access service. These include (1) email, (2) search engines enabling search and finding of all type of information, (3) basic training and education online tools, (4) online newspapers or news, (5) buying or ordering goods or services online, (6) job searching and job searching tools, (7) professional networking, (8) internet banking, (9) use of e-government services, (10) social media and instant messaging and (11) calls and video calls (standard quality).<sup>56</sup>

In addition, of the existing universal services, only the availability of a voice communication service as a mandatory requirement remains. The other traditional universal services (payphones, directories and directory enquiry services) are removed from the compulsory list. Member States may still choose to impose additional universal service obligations in respect of such existing services, provided that they were in force on 20 December 2018. Furthermore, Member States may extend universal service to mobile broadband internet access services and mobile voice communication services to ensure that consumers participate fully in society in social and economic terms.<sup>57</sup> Under the EECC the mandatory availability of universal services will be limited to consumers. However, the universal service obligations may be extended by Member States to microenterprises, small and medium-sized enterprises and non-profit organisations.<sup>58</sup> Finally, Member States may decide to designate additional services as universal services within their territory, but in that case no compensation scheme for specific undertakings can be imposed to support this.<sup>59</sup>

The designation of one or more universal service provider(s) shall only take place if a Member State has determined that the availability of the mandatory universal service cannot be ensured under normal commercial circumstances or through other public policy tools. Designation must be carried out in accordance with the principles of objectivity, transparency, non-discrimination and proportionality.<sup>60</sup>

In order to comply with the requirement of affordability, Member States have the power to take measures in favour of consumers on low incomes or with special social needs. To this end, Member States may provide financial assistance to consumers and/or require service providers

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<sup>53</sup> Article 84 - 92 EECC.

<sup>54</sup> See for comparison the previous proposal of 12 October 2016, COM(2016)590 final.

<sup>55</sup> Article 84 EECC.

<sup>56</sup> Annex V based on Article 84, third paragraph, EECC.

<sup>57</sup> Article 84, second paragraph, EECC.

<sup>58</sup> Article 84, first, second and fifth paragraph, article 85, sixth paragraph.

<sup>59</sup> Article 92 EECC.

<sup>60</sup> Article 86 EECC.



to offer consumers tariff options or packages different from those normally offered. In this context, an obligation to apply uniform tariffs may also be imposed. In principle, such obligations apply to all providers of the universal service concerned, unless this would lead to a proven excessive administrative or financial burden on providers or the Member State. In that case, the obligation can only be imposed on a designated universal service provider.<sup>61</sup>

Initially, the proposal for the EECC provided that the universal service could only be financed from public funds and no longer by means of cost sharing between providers. In the final version of the EECC, this possibility of cost sharing among the providers of electronic communications networks and services is included again.<sup>62</sup>

Member States must review the universal service obligations imposed by 21 December 2021 at the latest and every three years thereafter.<sup>63</sup>

## ***End-user rights***

With the EECC, end-user protection is also entering a new phase with more and more detailed rules<sup>64</sup> based on full harmonisation.<sup>65</sup> For example, information requirements at the time of conclusion of contracts will be increased<sup>66</sup> and providers will have to be more transparent about the quality of their services.<sup>67</sup> The rules on the duration and termination of contracts are considerably extended, including rules on what compensation the provider can claim in the event of a right of termination before the end of the contract term<sup>68</sup>, and detailed rules are introduced to allow for a smooth transition.<sup>69</sup>

It is particularly important to be able to determine which rules apply to which services, to which customers and to which providers. Below are a number of examples, which (again) are not intended to be exhaustive.

For example, the EECC works with a new definition of the term 'electronic communications service'.<sup>70</sup> This definition distinguishes between the following categories of services:

- i) Internet access services within the meaning of the Net Neutrality Regulation;<sup>71</sup>
- ii) Inter-personal communication services which are defined as '*a service normally provided for remuneration that enables direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons, whereby the persons initiating or participating in the communication determine its recipient(s) and does not include services which enable interpersonal and interactive communication merely as a minor ancillary feature that is intrinsically linked to another service*'.<sup>72</sup> Within the interpersonal communication services, a distinction is then made between:<sup>73</sup>
  - a. Number-based interpersonal communication services, and
  - b. Number-independent interpersonal communication services

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<sup>61</sup> Article 85 EECC.

<sup>62</sup> Article 90, first paragraph, EECC.

<sup>63</sup> Article 87 EECC.

<sup>64</sup> Articles 98 et seq. EECC.

<sup>65</sup> Article 101 EECC.

<sup>66</sup> Article 102 EECC.

<sup>67</sup> Articles 96 and 97 EECC.

<sup>68</sup> Article 105 EECC.

<sup>69</sup> Article 106 EECC.

<sup>70</sup> Article 2, fourth paragraph, EECC.

<sup>71</sup> Regulation (EU) No 2015/2120.

<sup>72</sup> Article 2, fifth paragraph, EECC.

<sup>73</sup> Article 2, sixth and seventh paragraph, EECC.

- iii) 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.

This classification does not, however, mean that the various categories of services are strictly separated. There may be some overlap between the different types of services.<sup>74</sup>

According to the initial proposal, most of the provisions relating to end-user protection applied only to internet access services and number-based interpersonal communication services. Under the initial proposal number-independent interpersonal communication services, such as WhatsApp and Skype, could be obliged to become interoperable with other services.<sup>75</sup> In addition, measures should be taken by these services to ensure security.<sup>76</sup> These obligations seemed relatively light.

In the final EECC, however, this approach has been partially abandoned. Certain contractual information requirements and transparency obligations<sup>77</sup> also apply to number-independent interpersonal communication services. In addition, rules have again been added in the final EECC which extend to transmission services used for the provision of machine-to-machine services such as rules relating to the termination of contracts<sup>78</sup>. Regarding internet access services special additional requirements under the EECC and the Net Neutrality Regulation are applicable.<sup>79</sup> As a result of these fragmented provisions, a provision on bundled offers was added. Where bundles containing an internet access service or a publicly available number-based interpersonal communications service are offered to consumers, microenterprises, small enterprises and not-for-profit organisations, the maximum protection shall apply to all elements of the bundle.<sup>80</sup>

Whether ex ante rules are applicable is also determined by the status of the supplier. For example, most end-user provisions do not apply to number-independent interpersonal communication services provided by micro-enterprises unless these enterprises also provide other electronic communication services.<sup>81</sup>

And it matters who the customers are. Some provisions protect only consumers and others protect end-users in general, while there are also provisions which protect consumers and end-users who are micro-enterprises, small businesses or non-profit organisations.<sup>82</sup>

All in all, the EECC provides for a complex and detailed structure of ex ante end-user protection. It is another example showing that ex ante sector regulation will not disappear as competition increases.

## IV. Concluding

The EECC marks the start of an important new phase in the regulation of the electronic communications sector. A new phase characterised by full harmonisation in many areas, with relatively limited scope for national legislators to choose their own interpretation. In addition, the interpretation and application of European rules by the NRAs will be harmonised much

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<sup>74</sup> Recital 15 EECC.

<sup>75</sup> Meanwhile Article 61, second paragraph, under c EECC.

<sup>76</sup> Article 40 EECC.

<sup>77</sup> Article 102 - 104 EECC.

<sup>78</sup> Article 105, seventh paragraph, EECC.

<sup>79</sup> See for example article 106, first paragraph and Regulation 2015/2120.

<sup>80</sup> Article 107, first and third paragraph, EECC.

<sup>81</sup> Article 98 EECC.

<sup>82</sup> See for example article 107, fourth paragraph, EECC.

more strongly than before. To this end, the EECC provides a set of guidelines to be adopted by BEREC in the period up to the end of 2020 aimed at ensuring consistent application in the Member States by the NRAs.

In addition to greater harmonisation in the new phase, the substantive provisions of the existing directives have in many cases been substantially amended, while the scope of European sector-specific regulation has continued to broaden. The number of parties covered by the regulation has increased. Regarding infrastructure, the ex ante obligations already covered owners of land / buildings and governments, including local authorities with a coordinating role.<sup>83</sup> The Cost Reduction Directive added providers of physical infrastructure. In addition the EECC extends the number of categories of providers of electronic communications services addressed in the various provisions of the EECC, each of which will be subject to its own rules. Internet access services, interpersonal communication services (number-based and number-independent) and other electronic communications services, including transmission services used for the provision of machine-to-machine services are regulated to a greater or lesser extent by the EECC, while at the same time differentiating between types of end-users. Electronic communications services may fall into several categories and therefore into several sections of the regulation. Not only is ex ante regulation increasing but the ex ante rules are increasingly differentiated and relevant to an increasing number of market players.

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<sup>83</sup> Articles 11 and 12 of the Framework Directive (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 (Framework Directive) (*OJ* 2002 L 108/33)).