The Code: last chance to support the network investments leading to a Gigabit Society

After one year of debates in the Council and in the Parliament, the two institutions have adopted their own positions on the draft Code on electronic communications. In a few days, they will start their negotiations with an objective to reach a political deal at the beginning of 2018.

This piece of legislation is essential to modernise and adapt the current legislation to the digital era and to support the political goal of a European Gigabit Society. Orange has been a strong supporter of the Commission's initial draft; it was rightly balanced to support investment in new fixed networks, like Fiber-To-The-Home (FTTH), and mobile networks.

From the negotiation mandates adopted in both institutions, it seems that some important provisions may gather consensus and may therefore be confirmed in the final text. Even if some can still be improved, such an agreement on the principles would be welcome. This relates notably to the:

- Objective to support investments in Very High Capacity Networks; and the acknowledgment that such networks, if regulated, deserve a more granular approach in terms of tariff controls;
- Simplification suggested for the regulation of termination rates;
- Better framing of conditions attached to any regulation of mobile network sharing;
- Spectrum provisions where some principles on criteria and objectives for its allocation are harmonised;
- Support given to the principle of full harmonisation for consumer protection rules - but any exceptions attached to it should be strictly limited to make it efficient - and to the need to concentrate those rules on internet access services and interpersonal communications services.

However, some essential topics seem more contentious and the priorities of the co-legislators may diverge. Depending on the results of the negotiation on those issues, the Code may be either a real and positive step change or not. There is even a risk it could worsen the existing framework, whose incentives to invest are already low.

- On fixed network regulation, the draft Code included several positive provisions supporting investment, like co-investment, which is a very relevant tool for FTTH roll-out. They have however been diluted, by withdrawing the legal certainty attached to that scheme, and, even risk to become negative if the Code imposes access provisions in addition to co-investment proposals. There is also a debate on how to deal with duopolies, with diverging solutions put on the table. One of them would introduce a sector-specific concept of joint dominance, distinct from competition law, which would undermine the economics of investment and create complete legal uncertainty for market players.
- On spectrum, there is a disagreement on the level of predictability and stability to be granted to investors. Longer license duration and clear renewal of rights are essential in this respect.
- Finally there is now a proposal to regulate the prices of intra EU communications, although those markets have been acknowledged to be competitive for a decade. It would mean taking a step back, in contradiction with national regulators and the Commission's past decisions.

The Code is at a crossroad. Either co-legislators re-assess the entire file in light of the shared political objective, to support and reward investments in new networks and allow innovation in services to flourish from all across the EU. Or, they jointly agree to trade-off on the lowest common denominator, for instance by approving a far less ambitious reform on spectrum policy, together with a dilution of the investment incentives on access regulation. This would definitively work against the objectives of the review and the European Union's competitiveness.

Orange strongly hopes that the trilogues will acknowledge the European markets evolutions in terms of infrastructure-based competition and deliver a robust, future proof and pro-investment Code.

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