

Committed to Europe



The European Electronic Communications Code

A gigabit society deserves a future-proof network access regulation

Executive summary

Since the current telecom regulatory framework was designed in 2002, telecommunications markets have substantially evolved. The demand for speed and volume has grown exponentially. In order to support Europe going digital, state-of-the-art technologies in mobile and fixed networks are needed. The European Commission (EC) estimates that this transition will require an overall investment of €500 Billion over the coming decade, €155 Billion above current operators' investment trends. Meanwhile, infrastructure-based competition has become a reality for fixed networks.

Orange is fully aligned with the EC's vision and believes that the draft European Electronic Communications Code (Code) constitutes a robust basis to deliver a new, modernised, simplified and investment-focused set of rules for networks, safeguarding sustainable competition across the EU and the long-term interest of European citizens.

Several new provisions proposed by the EC are essential in sending a positive signal to investors, creating the foundation to ensure the ability of operators, including Orange, to invest and innovate to the benefit of consumers and businesses. These include the following:

- Current competitive market conditions justify the simplification of the current framework by relying more on clear and consistent rules applicable to all types of operators owning fixed networks.
- For the same reasons, Orange welcomes the more proportionate and targeted approach to regulatory measures and the increased role of long-term commercial or co-investment agreements in the assessment of competition. These agreements are conducive to more sustainable competition, benefitting businesses and end-users.
- Orange also believes the right balance is struck between measures encouraging investment and co-investment in Very High Capacity (VHC) network and safeguarding competition amongst all actors. Co-investment models already deliver in some Member States; Orange has a positive experience of co-investment in Fibre-To-The-Home networks in two of its key European markets, France and Spain.

However, Orange also believes the Code requires some improvements as some of the current wording may deviate from the overall objective of incentivising investment, and looks forward to working closely with the co-legislators to achieve it:

- The sharing obligation for mobile networks neither reflects the dynamism of the mobile market, nor is aligned with the commitments required of mobile operators in the context of their mobile license obligations. Mobile network sharing should remain voluntary.
- The lack of consistency when it comes to allowing exceptions to rules that should apply to all fixed network owners or when considering that dominant fixed operators may be regulated differently depending on their business model will introduce bias at the expense of competition.
- Sanctioning operators deviating from their investment plans; corporate investment strategy requires flexibility and these sanctions can deter investment altogether.

The draft Code is right to set new rules on fixed networks, as markets have dramatically evolved

The reason for regulating the electronic communications fixed networks was to support challengers of historical monopolies, open-up the legacy networks to competition and improve consumer welfare. The European regulatory framework put in place in 2002 was therefore mainly based on asymmetric measures; operators having significant market power, usually the former monopolies have been required to make their fixed networks available under regulatory terms to their new competitors entering the market.

Since then the broadband landscape has radically changed and has become much more diversified. For the benefit of end-users, the number of competing network infrastructures has increased, and not only in dense areas; new actors successfully entered telecom markets, with some of them rolling-out their own new networks; cable operators have upgraded their networks; local authorities have increasingly contributed to new publicly owned wireline access infrastructure.

In parallel, telecommunications markets are evolving towards fixed-mobile convergence, transforming the competitive landscape. With the spread of smart-phones and tablets, customers use fixed and mobile internet access as complementary services. To answer these needs, fixed and mobile network operators are consolidating, allowing them to sell 'quadruple play' offers combining fixed, mobile, internet and TV services. Conversely, as there is no business case for building as many fixed networks as there are mobile operators, the latter, with no fixed assets of their own, will still need some form of access to fixed network(s) to compete. This market evolution must drive regulatory approaches to network access in the future.

Orange calls policy makers to support the draft Code's provisions that incentivise investment in Very High Capacity networks (VHC) while preserving sustainable competition

More symmetric rules for the rollout of fixed networks better match new market realities

Orange believes the draft Code is sound in relying more on a symmetric approach for fixed network regulation, i.e. imposing a common set of rules on fixed network operators independently of their market power (articles 44 and 59.2), for the following reasons:

- As the EC acknowledges in article 59, the parallel rollout of VHC fixed infrastructures is likely to be impractical, in the terminating segment of the fibre network. A symmetric obligation will facilitate deployment by minimising the delay to provide services, facilitate network rollout in private properties, and reduce the risk of creating monopolies at end user level. In the end, customers will benefit from the choice of several operators relying on symmetric arrangements.
- Adopting a more symmetric approach will also simplify the market analysis process of regulators. This process will otherwise become complex with the development of various local competitors, calling for very granular market definitions. Regulators will also be better equipped to manage the situations of fixed duopoly warranting regulation, especially where none of the two players grants wholesale access or has a clear dominant position.

The regular review of regulatory measures, in order to account for market development, is also sound policy-making, including the need to notify the EC to ensure better harmonisation.

A more stringent and proportionate market analysis procedure creates more certainty

While keeping the current system of market analyses and designation of operators having significant market power, the draft Code improves the existing rules, which have been applied without fully considering retail market changes or the impact of resulting regulatory measures on investment incentives, and consequently on the deployment of VHC networks. Orange calls co-legislators to endorse these welcome changes:

- Before imposing wholesale regulation, regulators will have to provide evidence of end-user harm; if any, they will have to focus on the remaining bottlenecks of physical infrastructures.

- Regulators will have to abstain from regulating when commercial agreements and co-investment offers are conducive to sustainable competition.
- Before imposing any asymmetric obligations, regulators will have to consider existing symmetric rules, if any, and follow a proportionality and cost/benefit evaluation with a gradation of remedies. Then regulators will have to firstly consider access to civil work and, if not sufficient, other access products could be imposed.
- Price control won't be imposed on wholesale access to new infrastructure if a retail price constraint exists.
- The draft Code also rightly acknowledges that when two operators provide wholesale access on fair and reasonable terms, no operator can wield significant market power, and even less when three operators compete on the same retail and wholesale markets.

Supporting co-investment in VHC networks is a positive signal for investors

In France where proposing co-investment is imposed by law and regulatory decisions, the proportion of FTTH lines among those deployed by Orange for which the co-financing mechanism has actually taken place has been growing overtime. By September 2016 it reaches 96% in very dense areas and 83% in less dense areas. In Spain, Orange is rolling-out FTTH based on co-investment agreements with competitors. Based on this experience, Orange strongly believes that co-investment models provide a good solution to incentivise VHC or Fibre-to-the-Home (FTTH) rollout while securing competition. Orange therefore welcomes the provisions of the draft Code that encourage commercial agreements between network operators and co-financing mechanisms for VHC and in particular FTTH networks, while requesting regulators to take them more into account.

Co-investment schemes have several advantages:

- They can both reduce deployment costs and stimulate sustainable competition. When meeting the criteria set-up in the draft Code (article 74), VHC networks rolled out under a co-investment scheme would not be subject to additional regulation, sending a positive signal for operators taking the risks to invest or co-invest, especially in new FTTH networks. A fall back scenario is foreseen for access-seekers that would not co-invest. They will remain entitled to benefit from the access features equivalent to those available before the deployment of new VHC elements.
- They have less distortive effects than an asymmetric access obligation, as co-investors will share the investment risk and pursue the same objective of making the investment profitable. Sharing fixed costs upstream gives more space for competition downstream as their variable costs are lower; operators will have more flexibility to compete on price and offers, and therefore will offer more choice for the consumers and attract higher take-up.

However, some provisions of the draft Code require adjustments to make them more efficient

Regulating mobile operators beyond license-related obligations deviates from the objective of incentivising investment

The mobile sector is highly dynamic, with mobile operators competing through investment in more coverage and new technology. Their obligations are set in their licence which, on the basis of substantial fees, gives them legitimate confidence in their conditions of operations. Despite this situation, the draft Code introduces in article 59.3 a provision allowing regulators to impose mobile networks sharing and joint roll out. This inclusion must be reconsidered; ex-post sharing obligations would reduce investment incentives, limit operators' competition on coverage, and contradict agreed commitments. Sharing arrangements should only be voluntary, possibly under the monitoring of the regulator.

The regulation of fixed networks should be further simplified and made more consistent

- While welcoming the Commission's support for symmetric measures, Orange argues that exempting some cases from their scope, as currently foreseen in article 59.2, weakens the efficiency of the method and its

foundation. These exceptions notably rely on the existence on the novelty of the network deployment; they would imply high complexity, discretion and uncertainty in the entire regulatory process, and they must therefore be deleted.

- Giving a more favourable treatment to wholesale-only providers (article 77), with no regards to their market power would introduce discrimination between operators and bias in the competitive landscape.
- Mandating more than one access level per fixed network and geography will increase regulatory costs and undermine pricing flexibility and innovation. It is also unlikely to be compliant with the cost/benefit requirement imposed by the draft Code. In order to further simplify the framework and ensure greater predictability, the draft Code must be clarified, for instance in article 66, to prevent new and additional layers of access rules once a given symmetric access obligation is imposed. The existing access obligation can of course be improved following a market analysis.
- To remain proportionate, the non-discrimination obligation (article 68) must clarify that the benefit of equivalence of input does not always balance its costs, as also foreseen in the Recommendation on consistent non-discrimination obligations and costing methodologies.
- The Code should confirm the existing principle according to which new or emerging markets should not be subjected to inappropriate regulation. For example, extending regulation to new functionalities under development thanks to network virtualisation (e.g. “software emulated networks”, “self-provision, automated provision“ in articles 2 or 71), is not justified without any robust impact assessment to support it.
- As far as terminal equipment is concerned, the aim of the Code must remain focused on specific features related to disabled users only (article 1), as other features are covered by Directive 2014/53/EU on radio equipment.

The network mapping exercise is relevant, but the sanction mechanism can deter investments

The mapping exercise required from regulators in article 22 gives the latter the possibility to launch a call for gathering the operators’ intention to invest in so-called “digital exclusion areas”. While providing coverage in those areas is an important objective, the positive impact of this provision on investment is more than uncertain. Moreover, the sanction procedure (article 20) linked to this exercise risks being counterproductive and excessive. Operators’ investment plans need flexibility to adapt to market evolutions, competition on coverage, or specific engineering challenges. The risk of seeing this flexibility removed or misinterpreted will hamper investment in these areas altogether. The level of details required by the regulators may not be possible for the operators to provide at a given time, as network investment strategies can be planned short term (less than three years in advance). This article should acknowledge that incomplete answers or mistakes can occur and should not be sanctioned as such.

The harmonisation of termination rates calls for a clearer provision

The willingness to fix a cap for fixed and mobile termination rates at the European level is welcomed (article 73) as it will ensure more harmonisation and more balanced financial flows between European operators. It is very important to keep the figures proposed in the draft Code, based on the recommended methodology, in order not to create financial disruption in the market.

However, the proposed process is very complex. It would be simpler and more efficient to fix a cap at European level without requesting regulators to perform a market analysis, using a proportional form of symmetric obligation instead. In order to limit unbalanced financial flows between regulated EEA and unregulated non EEA operators, the Code should also make it explicit that calls originated from outside the EEA are not covered by its provisions, as these relationships should be based on commercial negotiations and at least on the principle of reciprocity.

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