

Committed to Europe

The Telecom Framework Review

Towards a future-proof digital services regulation

The review of the telecom regulatory framework is an opportunity to design modern rules applicable to digital services. It should be driven by an all-inclusive plan in mind aiming at re-organizing consumers' rights, to make them easier to understand and consistent, and at simplifying rules for providers.

In a convergent market, where traditional regulatory categories are increasingly blurred, the telecom framework should be reviewed: more rules on services should be moved to horizontal rules that are the most suited to the demands of a fast-changing digital single market.

Why services regulation should be changed

While telecommunications services developed long ago, the internet revolution has supported the development of a wide range of new substitutive services. The increasing use of those services provided on the Internet is tremendous; for instance, WhatsApp now handles 30 billion messages each day sent by its 700 million users, compared to the 20 billion SMS sent daily - source: www.telegraph.co.uk, Jan. 2015.

This market evolution is definitely good for users' choice; however, it also requires a fresh look at the regulation of digital services in order to ensure that similar services are governed in a similar way. This is key to ensure a consistent consumer protection as well as a fair competition between players.

Currently, similar services are ruled differently depending on who the provider is or on which technology is used. This is because the current scope of Electronic Communication Services (ECS) regulation is based on the outdated definition that the ability to convey communication signals is required to provide communication services. As only telecom operators convey signals, only their services are regulated.

Today, conveying signal is not necessary anymore to provide services. Thanks to broadband access, internet-based providers operate platforms on which they provide services competing with telecom services. This has led to many regulatory differences as recalled within Box 1.

Box 1 – Different rules for similar services jeopardize consumer protection

Telecom consumers' policies and other public interest measures include access to emergency calls, number portability, privacy and confidentiality, interoperability, universal service, provisions on legal interceptions and many specific financial contributions. Recent updates have introduced additional provisions to facilitate switching between providers, reduce bill-shocks and guarantee transparency. Those rules only apply to services provided by telecommunication providers.

On the other hand, consumers are not protected the same way when they use services provided by pure internet players, such as VoIP or messaging services. These services usually do not grant access to emergency services; they do not facilitate switching providers; grant individuals' location a lower level of protection and do not apply confidentiality of communications nor notifications of security breaches, etc. Law enforcers and regulators have no legal basis for intervention as legal provisions currently only apply to telecoms operators.

As highlighted by a recent survey - see Box 2- boundaries between the traditional regulatory categories are increasingly blurred and the different sets of consumers' rights are today difficult to identify. This situation calls for clarification to dissipate consumer protection confusion and redress competition distortion.

Box 2 – Digital survey on consumers' assessment of consumer protection – 2015

A survey, commissioned by ETNO, showed that the majority of consumers were not aware of the differences in protection levels granted by telecom operators compared to internet players' services. Accordingly, many of the stricter rules such as those on data protection or transparency applied to telecom operators' services are hardly valued by consumers and, thus, are not a positive differentiator. Survey: https://etno.eu/datas/publications/studies/ComRes_ETNO_Final%20Report_LATEST%20FOR%20PUBLICATION.pdf

How the review of the telecom regulatory framework should modernize services regulation to ensure consistent consumer protection

Sector specific rules should be limited to networks, Internet Access Service and the use of numbers

The sketch on page 4 shows how sector specific and horizontal law should be articulated in the digital single market. Sector specific law should continue to apply to Electronic Communication Networks, Internet Access Services (IAS) and services using numbering resources while consumer protection rules should be horizontal to ensure consistency in the digital single market.

The telecom framework review constitutes a timely occasion to start re-modelling rules applying to the European digital single market. As shown in the sketch, networks and internet access services – fixed and mobile – will still require some specific technical rules because of their needs of scarce resources, namely spectrum and numbering plans, and also because they have to guarantee interconnection. Specific consumer protection rules, as those recently established by the Regulation on Open Internet and Roaming (hereafter the TSM), should also continue to apply to IAS.

Rules such as number portability or transparency on the capability of routing emergency calls should apply to any services using the numbering plan irrespective of their provider. This is particularly important since mobile apps are increasingly making usage of mobile phone numbers bypassing current regulatory obligations and creating confusion with customers – see Box 3.

With the introduction of the IAS definition in the TSM, the telecom framework would focus on internet access and the ECS definition currently enshrined in the Framework Directive, now obsolete as described above, should be deleted.

Besides regulation related to the use of numbers and the rules imposed on IAS providers (non-discrimination, quality of service requirements, etc.), sector specific regulation is not needed anymore for services beyond IAS. Indeed, consumers benefit today from the competition between services available over the internet. In addition, with Orange's proposal, Electronic Communication Networks regulation guarantees competition between providers of IAS and of "optimized" services for specific usages as provided in the TSM Regulation.

Box 3 – Inconsistent use of numbering resources

Numbering resources are increasingly used by pure internet service providers, which can allow innovation and increase consumer choice. But it also raises new challenges for regulators, who are unable to ensure compliance with the current rules, as several ongoing litigations on the notification obligation for VoIP service providers show. Similar issues may develop with new apps already available that propose the re-sale of mobile numbering resources, bypassing associated current regulatory obligations.

Consumer protection rules should be moved to horizontal law as much as possible

The review of the telecom framework should take into account the improvements achieved by horizontal legal instruments that are today more detailed – see Box 4. It should remove accordingly redundant and obsolete sectorial provisions. Those sectorial rules should be re-assessed in light of a proportionality test and against their relevance in the digital era.

Concerning consumer protection, a single set of rules should apply consistently as much as possible to all digital services. So individuals will get what they expect and understand what their consumers' rights are, no matter whether a service is provided by a telecoms company or a pure internet player, and no matter whether the purchase concerns a communication service, a content service or a bundle of both. The future set of rules should not distinguish between services that are charged to the end-user or paid against access to consumers' personal data.

Box 4 – Current horizontal instruments are robust tools

The Consumer Rights Directive, 2011/83/EC contains numerous obligations on traders entering into a distance contract with consumers - information requirements for contracts, duration and the right of withdrawal conditions - and also adequately addresses price transparency and information on the main characteristics of a service.

The General Data Protection Regulation is also significantly reinforcing individuals' rights thanks to a horizontal instrument.

Extending the scope of the current telecom framework would not be future-proof

Some argue that an alternative option would be to keep the existing definition of ECS while extending regulation to internet-based substitutes of those ECS; a wider set of “communication services” would then be regulated by sector specific rules.

This approach is backward looking. The proposed definition would be self-referencing and logically inconsistent, even more confusing and prone to litigations than the current one. For instance it may imply that an internet-based video call service may switch from non-regulated to regulated service, depending on whether telecom operators launch their own version of video calls. Ambiguities or uncertainties concerning the qualification of services such as Cloud, Content Delivery Networks or Internet of Things services would stay unresolved.

In addition, more and more messaging, voice or video exchanges will occur within a richer interaction, such as a social network, an e-commerce website, a CRM, or on-line gaming, without which there would not be any exchanges. Richer services will provide the context within which people will communicate. Therefore, basing regulatory architecture on the assumption that communications will remain as a standalone category of services, separated from other richer or wider digital services, would not be a forward looking approach.

Beyond the review: consistent rules for consumer privacy are required

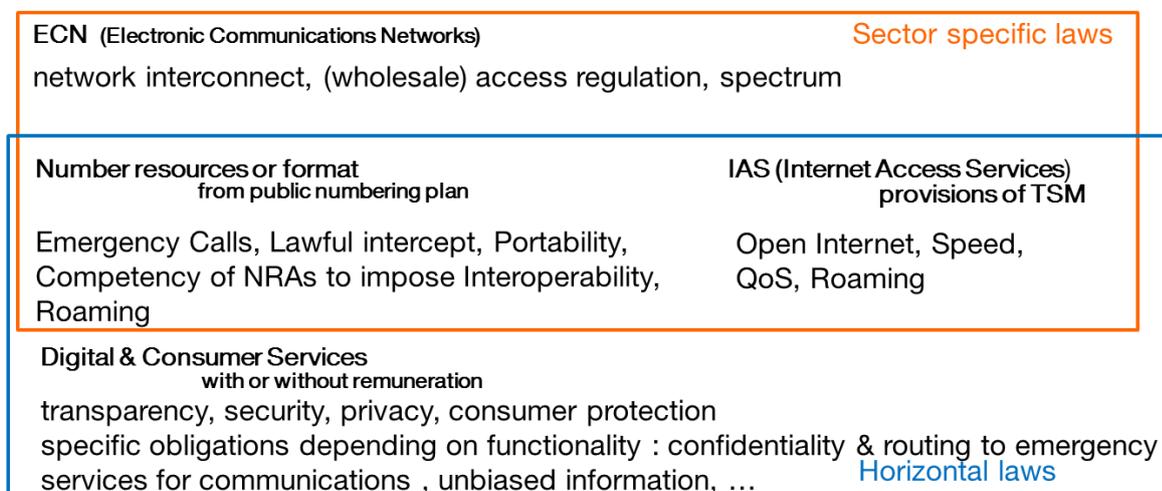
The e-Privacy directive, which is today part of the telecom framework, is also under review although with a slightly different roadmap. Delayed because of the debate on the General Data Protection Regulation, the e-Privacy directive should be reviewed in the light of that new Regulation, by removing redundant or inconsistent rules such as the personal data security breaches notification obligation or the specific consent for processing location data and traffic data. For instance, at a time where apps can inform on how long individuals stay in a shop and even how long they look at merchandise before buying it, telecom operators still need a reinforced consent to exploit less precise geographical information than what apps get through GPS. The review of the e-privacy Directive should be driven by the objective to provide identical privacy protection to consumers, whatever the service provider they choose, and identical opportunities to all providers of digital services to develop data based innovations.

As a conclusion

The below sketch summarises Orange views on how services regulation should be changed in the context of the Telecom Framework Review.

More generally Orange considers that for digital services regulation, a holistic and horizontal approach should be taken while avoiding any case-by-case approach by silos, which would lead to the uncontrolled creation of multiple regulatory categories and the sketch-up of inconsistent rules in different legal instruments which would have different purposes and reaches.

new organisation of rules for digital services



Further readings: Orange detailed proposal on the way to design a modern and consistent framework on digital services; www.orange.com/en/news/2015/avril/Proposal-for-the-reform-of-the-regulation-of-digital-services