

Committed to Europe



The European Electronic Communications Code

Towards a future-proof digital services regulation

Executive summary

With the draft European Electronic Communications Code (EECC), policy-makers have a tremendous challenge to meet, in adapting the provisions on end-user protection to the digital era and ensuring they will stay fit for purpose for at least one or two decades.

Orange believes the EECC includes comprehensive efforts in this regard, notably by pushing for full harmonisation of consumer rights rules, and by highlighting the need to rely more on horizontal instruments, such as Consumer Rights, Unfair Commercial Practices or E-commerce Directives. The EECC attempt in avoiding overlap with other sector-specific instruments, in particular the Telecommunications Single Market (TSM) Regulation, is also laudable.

Orange also strongly appreciates the Commission's announcements to ensure similar levels of consumer protection for substitutable services provided by telecom operators and by other suppliers of digital services. For this reason, Orange supports the orientation stated by the Commission in the Impact Assessment and the Explanatory Note of the Code, to focus end-users protection provisions on Internet Access Service (IAS) and on services using numbering resources.

Nonetheless, these objectives and orientations are not yet consistently translated in the definition of Electronic Communication Services (ECS) proposed in the EECC, therefore requiring significant changes. Orange believes that sector-specific consumer protection should be further focussed on sector-specific resources (IAS, use of numbers) combined with a stronger move towards generic consumer protection. Orange therefore calls policy-makers to review the current draft in order to simplify it and make it fit for the next decade. This requires notably to:

- Limit the scope of the definition of ECS to IASs and services using numbering resources. Relying on what has become an irrelevant "Conveyance of Signal" criterion is no longer justified and could, on the contrary, hamper the development of innovative services, for instance Machine-to-Machine (M2M) services. It would moreover maintain an unjustified regulatory asymmetry by design between market players.
- Review the rules applicable to bundles, that can have unintended consequences notably on innovative services.
- Confirm the full harmonisation principle for the remaining EECC provisions (following the limitation of the scope of the definition afore mentioned), relating to consumer protection.
- Ensure the continuity and consistency of end-users protection of traditional telephony and SMS by attaching obligations (e.g. number portability) to the use of numbering.

Orange is confident that those concerns can be addressed during the legislative process. The EECC is an opportunity that should not be missed to provide clear, consistent and effective consumer protection rules, providing freedom, security and confidence to end-users, whilst supporting competition and innovation for all market players.

Orange believes the ECS definition is not fit for the digital era; it requires an in-depth review by policy-makers

A new complex definition of ECS composed of 3 types of service categories

Electronic Communication Services (ECS)	
Internet access services (IAS)	as defined in the TSM
Interpersonal Communication services (ISC)	<ul style="list-style-type: none"> ▪ “Number-based ICS”: “services that interconnect to the Public Switched Telephone Network (PSTN)”, both packet and circuit switched. This category includes telecommunications voice services, SMS, and Skype services interconnected to the PSTN. ▪ “Number-independent ICS”, it includes services like: <div style="text-align: center;">  </div>
Conveyance of signal	Services consisting wholly or mainly of the conveyance of signals, such as transmission services used for machine-to-machine (M2M) communications and for broadcasting

The new definition of ECS (Art. 2) will not cover interpersonal communication facilities provided as “purely ancillary” to another service “which, for objective technical reasons, cannot be used without the principal service”, such as communication channels for online games or apps, not dedicated, but including communications.

The impact assessment and the definition of the draft EECC do not match, the latter still relying on the criteria of “Conveyance of signal”

Orange supports the Impact Assessment and the Explanatory Note accompanying the EECC which recommend that end-users protection provisions should concern IAS and services using numbering resources. As a consequence, Orange questions the ECS definition enshrined in the EECC as it refers to another “conveyance of signal” criterion, whose relevance is nowhere justified, and which will negatively impact innovation by operators.

The “conveyance of signal” criterion refers to the core activity of telecommunications providers, which is to transport signals on their networks, and does not relate to specific service characteristics or end-users’ needs. As a consequence, most of the services provided by operators will also fall in this category. While it was a relevant technical criterion in the 2002 Telecom regulatory framework, at a time where networks were service-specific (e.g. telephony), this is no longer the case since services are now provided on platforms independently of the underlying connectivity. From an end-user perspective, whether a service provider conveys or not the signal is irrelevant, as long as the end-user is protected for his connectivity, which is the case, as achieved by the provisions on IAS.

Furthermore, the Impact Assessment of the EECC does not deliver a justification for this category carrying an extensive set of regulatory obligations. In fact, most sector-specific end-user protection measures apply to all ECS including this category, with only marginal references to horizontal laws. This criterion is thus nowhere justified.

The “conveyance of signal” criterion is irrelevant and creates regulatory imbalance by design

Orange believes that this criterion and the obligations attached to it create by design, an unacceptable regulatory imbalance. This goes against a clear and simple harmonised end-user protection and negatively impacts the launch of innovative services by telecom operators. For instance, an on-line game provided ‘over’ an IAS will be subject to different consumer protection rules than the same on-line game provided with a specific quality of service by a vertically integrated telecommunications operator:

- While the former will not be subject to any interoperability obligation, as mentioned in the previous section, the latter will be subject to the general interoperability obligation imposed on ECS, again without any justification.

- The former will not be subject to any provisions of the EECR related to end users provisions, while the latter will be subject to the provisions concerning contractual information, transparency, comparison of prices, quality of service, contract duration and renewal, and rules on switching of providers.

Concretely, applying the “conveyance of signal” criterion to innovative Machine-to-Machine (M2M) services also risks discriminating M2M services provided by telecommunications operators against similar services provided by other players. This would heavily penalise telecommunications operators’ opportunities. For instance, M2M services may be used to manage fleets of business cars: thanks to the connectivity provided by the sim card installed in the car, the fleet manager can notably be informed of maintenance issues. In the future, telecommunication operators, like Orange, would compete to deliver 5G based business solutions and high performance Internet Access. Under the proposed rules, these business solutions would fall in the category of conveyance of signal, and would therefore be subject to traditional telecommunications regulation and notably to interoperability obligations. This would make the commercialisation of such services slow and cumbersome whereas similar competing services, based on Internet Access would be free of such obligations and could pre-empt the market.

By contrast, the competitors of telecommunications operators will be free to integrate their own core competencies with their M2M capabilities i.e. automotive, energy, on-line platforms, software development or e-commerce. The fact that any undertaking conveying signals may be subject to current telecom rules, as established by the European Court of Justice ruling (UPC vs. NMHH, 2014), does not solve this issue.

By maintaining the conveyance of signal criterion, the EECR does not take into account existing sector-specific rules for networks, numbers or Open Internet

The conveyance part of digital services is already subject to electronic network regulation, which guarantees competition, interconnection and access for service providers at “conveyance level”. In addition, regulation attached to the usage of numbers ensures the continuity of rules for telephone services. Moreover, Open Internet rules prevent any foreclosure or discrimination of digital on-line services by vertically integrated operators. To ensure watertight and consistent end-user protection, all other digital services, conveyed or not, should be subject to the same horizontal rules under Consumer Rights, Unfair Commercial Practices or E-commerce Directives.

For all those reasons, the definition of ECS should be reviewed and the “conveyance of signal” criterion should not be considered as relevant for an EECR that will apply for the next 10 years. Specific obligations concerning broadcasting and security, currently attached to it, could be instead imposed on Electronic Communication Network providers.

Orange questions the new rules on bundles, which can have unintended consequences on innovative services

The new provision on bundles (Art.100) extends the EECR rules relating to transparency, contract duration, termination and change of provider to all products of a bundle that includes at least one ECS. The impact of this new obligation has not yet been properly assessed.

Communications services offered as triple or quadruple play are popular; it is expected that such bundles will further expand in the coming years thanks to M2M. Orange questions the feasibility of applying this new rule to these types of bundles. Similarly, pure internet players also increasingly integrate ECSs which would trigger for example the application of “change of provider” rules (Art. 99) to all their internet platform functionalities.

As a matter of principle, Orange believes that horizontal law should rule how different end-user protection regimes associated with different services bundled in a single offer should play together. Again, any issue related to specific forms of bundles should rather be addressed on a case-by-case basis.

Orange supports the full harmonisation of end-user protection rules

The EECC introduces a major novelty compared to the current minimum harmonisation regime. The full harmonization approach (Art. 94) is expected to limit the proliferation of national legislative initiatives that have created the current patchwork of very different situations in the Digital Single Market. Such an approach – applied to streamlined definitions and obligations - would better support the spread of digital services across the EU.

Orange calls for further adjustments on the end-user protection rules

First of all, as numbering resources are increasingly used by pure internet service providers, Orange believes consumer protection rules should be attached to the usage of numbering resources, without reference to interconnection. Rules such as number portability or transparency on the capability of routing emergency calls should apply to any service using the numbering plan, irrespective of their provider.

Secondly, on portability (Art. 99), Orange considers that the new provision on continuity is disproportionate. Serving an end-user after the termination of the contract may not be feasible and introduces new legal issues.

Annex: EECC categories of services and obligations attached to them

The proposed categories of services and obligations attached to them are complex, the following table aims at summarising Orange’s understanding of the EECC.

Consumer: C / Business: B
 Y: the obligation applies

Obligations \ Categories	Internet Access Services (IAS)	Number-based Interpersonal Communication Services (ICS)	Number-independent Interpersonal Communication Services (ICS)	Conveyance based services
Security Art. 40	Y	Y	Y	Y
General interoperability (B & C) Art. 59.1	Y	Y		Y
Contract information & format (C) Art. 59.1	Y	Y		Y
Quality of Services (B & C) Art. 97	Y	Y		Y
Contract duration & renewal (C) Art. 98	Y	Y		Y
Provider Switch & portability (B & C) Art. 98	Y	Y		Y
Emergency Services Art. 102		Telcos only		

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