GSMA position on the European Electronic Communications Code (COM (2016) 590 final)

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About the GSMA

The GSMA represents the interests of mobile operators worldwide, uniting nearly 800 operators with almost 300 companies in the broader mobile ecosystem, including handset and device makers, software companies, equipment providers and internet companies, as well as organisations in adjacent industry sectors. The GSMA also produces industry-leading events such as Mobile World Congress, Mobile World Congress Shanghai, Mobile World Congress Americas and the Mobile 360 Series conferences.

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EXECUTIVE SUMMARY

Introduction

The GSMA welcomes the launch of the telecommunications framework review[1] and supports the European Commission's objectives of modernising regulation in the sector and creating an environment conducive to investments and the development of next-generation digital networks and services, while ensuring European citizens benefit from consistent protection.

Telecommunications markets have changed beyond recognition since the current set of rules was passed into law. The convergence of digital technologies and services has broadened the scope of today's markets. To satisfy their communications needs, consumers can now select from a wide range of service propositions, technologies and providers, many from adjacent industries. The proposed European Electronic Communications Code (the Code) should reflect the profound socio-economic changes brought about by the rapid spread of mobile connectivity and associated digital services.

Now is the time to establish a new set of rules that addresses the new paradigm through clear, long-term thinking. The region needs a forward-looking and holistic policy and regulatory framework that reinforces Europe's position as a preferred location for investment and innovation, while ensuring European citizens benefit from consistent protection across similar services. Moreover, greater policy harmonisation, particularly with respect to spectrum, should improve the quality, reach and adoption of mobile broadband services and support the EU's Digital Single Market objectives.[2]

With the right policy and regulatory framework, Europe could, once again, be at the forefront of technological innovation worldwide. The development of such a framework is a big task, to be undertaken through dialogue between policymakers, industry and stakeholders. From GSMA's perspective there are several areas that need further discussions guided by the overall idea of deregulation and creating a level playing field. A new regulatory framework should incorporate three main principles[3]:

- First, it should be functionality-based, rather than structure-based.
- Second, it should recognise that the dynamism of the digital ecosystem demands that regulation also be dynamic and flexible.
- Third, it should recognise that many of today's legacy regulatory structures are outdated, and take a bottom-up or 'clean-slate' approach by assessing both current and potential new regulations, and regulating only when it can be demonstrated that the benefits will exceed the costs.

The co-legislators need to continue pressing ahead with the modernisation of regulation in the sector.

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[1] Proposed Directive establishing the European Electronic Communications Code

[2] For more information, please see research conducted by the management consultancy Arthur D Little and the GSMA: Socio-economic benefits of greater spectrum policy harmonisation in the EU

[3] For more information, please see the study conducted by NERA Consulting and the GSMA: "A New Regulatory Framework for the Digital Ecosystem" (February, 2016)

This paper outlines the GSMA's position on the proposed Code. As the GSMA specifically represents the mobile industry, the following comments focus on issues concerning mobile networks.

Spectrum Management

Longer spectrum licence durations, a stronger presumption of renewal and greater consistency in licencing approaches, as proposed in the draft Code, increase operators' incentives to invest. Together with technology and service neutrality and reduced barriers to spectrum trading, these measures will encourage investment in mobile networks and will result in more advanced mobile services and more efficient use of spectrum.

In return for greater investment certainty, the Code understandably places greater emphasis on coverage obligations. These obligations need to be realistic from an investment perspective, clearly defined prior to licensing and must not be subject to unilateral change by NRAs post-licensing, as envisioned in the current draft. Similarly, the introduction of use-it-or-lose-it criteria after a licence has been awarded, could also undermine the investment case.

When assessing competition issues in the context of spectrum licenses, Member States should apply the same standards as they do in the SMP (significant market power) framework. However, the Code foresees the inclusion of access obligations in licences and proposes the imposition of remedies through spectrum auctions, which is at odds with the standard SMP market analysis.

The Code sets out proposals that prioritise licence-exempt use and spectrum sharing, at the expense of individual licence authorisations to dedicated spectrum. The text needs to be more balanced to reflect the importance of internationally-harmonised, dedicated mobile spectrum to meeting demanding quality of service targets, and the concept of spectrum sharing needs to applied to specifically relevant situations, such as where a band is inefficiently used (and where the user cannot be relocated and the band cleared for full reassignment) or where there is scope for licensed shared access to allow several mobile operators to share future millimetre wave bands for 5G.

Across Europe, there is a wide variance in the approaches and timetables for spectrum licensing and renewal, deterring investment by the mobile industry in some Member States and jeopardising the ambitions of the digital single market. High spectrum prices, artificial scarcity and ineffective auction rules have resulted in delays, higher costs and under-investment in some Member States. The GSMA welcomes proposals for increased consistency and best practice in licensing across the EU, and the need for clear objectives that guard against governments using spectrum licensing explicitly to raise revenues. Whilst further coordination and cooperation is required for certain key aspects of spectrum management, Member States do need a degree of national flexibility to adjust for local conditions.

Services

The proposed Code aims to re-establish the European Union as a digital leader, and bring further benefits for end users. While the current regulatory framework has created a highly competitive environment for the telecommunications sector bringing increased choice and lower prices for its customers, it is time to truly empower end users by implementing a framework that will provide a sound platform for the ongoing digital revolution.

Consumer protection

The European Commission is already taking steps to create more coherent consumer protection legislation by launching the REFIT exercise that aims to ensure horizontal consumer protection regulation is smarter, simpler and more consistent. The Code should build on this measure by further harmonising consumer protection rules across digital sectors.

The Commission needs to follow through on its high level objectives to put end-users first, based on a functional perspective on services. Communications services have become global. End-users have a wide choice of modes, platforms and providers for communication and, therefore, consumers' rights to information, terms and conditions should not vary according to the type of service they choose, and should not be dependent on the Member State from which the service is provided.

Today, very different consumer protection rules are applied depending on minor differences between types of Interpersonal Communication Services (ICS). Providers of number-based ICS, Internet Access Services (IAS) and services that convey signals, such as Machine-to-Machine (M2M) services, are overly burdened. Such requirements should be proportionate and indispensable. For consumers, it is irrelevant how the communication service is provided, and whether or not the provider "conveys the signal" – they expect to receive a good service from all providers.

The Internet of Things will employ M2M services at a scale the industry has not seen before. To enable European companies to pursue this opportunity, the regulatory environment needs to recognise the specificities of M2M services, and not subject them to end-user protection rules only because they are based on the conveyance of signals. End-user protection rules are only appropriate and reasonable, in a modified way, in the context of interpersonal communications. Furthermore, the regulation of services consisting of the conveyance of signals risks discriminating M2M services according to the type of provider, which is highly inappropriate and burdensome.

Numbering

As numbers constitute a scarce resource, used to route traffic and to answer legal and emergency requirements, numbers should not be granted to undertakings that are not providers of electronic communications networks or number-based services. Similarly, there is no justification to allocate a mobile network code, another scarce resource, to undertakings that are not an operator. This would jeopardise operators' ability to compete in the innovative and flourishing M2M market. On the other hand, the proposal to allow extraterritorial use of numbers for electronic communication services, with the exception of interpersonal communication services, is a welcome step. However, this should be done without adding a

sector-specific consumer protection rule; such a requirement would be irrelevant in the context of M2M services. There is also no need to have BEREC coordination or a central registry for numbering resources that are used extraterritorially.

Universal service

The draft Code rightly modernises the scope of universal service by focusing on voice telephony and access to the internet, while acknowledging that universal service is not an appropriate tool to support networks deployment. The draft Code also rightly sets up a public budget for financing, as universal service benefits society as a whole. Policymakers need to safeguard the specific safety net role of universal service, ensuring its scope remains focused and limited to voice telephony and a functional Internet access, allowing all citizens to be part of the digital society, while ensuring financing is from the public budget.

Mobile network access

The development of a "Gigabit Society", with ultrafast connectivity coverage and sustainable competition in the medium and long term, depends on a regulatory framework that favours investment. A true Digital Single Market will bring broad economic benefits by boosting private investment in new networks and expanding connectivity.

The draft Code recognises these principles by setting objectives that focus on the take up of very high capacity networks, while promoting competition, including infrastructure-based competition, as well as the interests of citizens in both the near term and long term. The pursuit of these objectives is key to supporting on-going and future heavy network investments, and meet the challenges of the Gigabit Society. Not only the national regulatory authorities and BEREC, but also the Commission, should comply with those objectives.

To that end, the EU needs a forward-looking and holistic policy and regulatory framework that further strengthens Europe as a preferred location for investment and innovation. This framework should be established through a functionality-based, dynamic and bottom-up approach. There needs to be a stronger focus on performance-based regulation with ex-post enforcement preferred to overly-prescriptive, ex-ante rules for mobile networks. There is also a need for better evaluation of regulation – including the need for regulation – in light of current market realities.

In general, the proposed Code needs to ensure regulatory measures are proportionate and solve specific problems in a much more targeted manner, with simplification being a key goal. This is especially important in the case of network regulation. The Code should avoid introducing further uncertainties for operators and investors in mobile markets, and better take into account existing obligations, such as those contained in spectrum licenses.

The principles enshrined in the Code could be complemented with a reference to the contribution of the telecom sector to the economic development of the EU for the benefits of its citizens.

Evaluation of the institutional set up and governance structure

The implementation of the Code should lead to a substantial reduction in the complexity of the institutional and governance structure, reflecting the simultaneous streamlining and simplification of the regulatory framework.

As a general principle, an analysis of how the institutional framework is configured should be undertaken once the measures and reforms of the framework review have been clarified. Only at this point will be possible to assess which institutional architecture is the most appropriate. Strengthened harmonised rules would also help improve sector conditions.

GSMA POSITION ON DIFFERENT ELEMENTS OF THE EUROPEAN ELECTRONIC COMMUNICATIONS CODE

The GSMA hopes the following detailed comments can serve as a constructive contribution to the co-legislators' deliberations on the Commission's draft Directive.

1. Review of the Objectives of the Regulatory Framework

Subject matter and aim (Article 1)

The aim of the new Code is to lay down tasks for national regulators and ensure a harmonised implementation in the EU, as foreseen in Articles 1 and 5 of the draft Code. It is for the Member States to decide how to organise the regulatory body(-ies) at national level. However, the introduction in the draft Code of the concept of "other competent" authorities creates additional uncertainties. It would be good practice to avoid a plethora of "competent" authorities dealing with the Code at national level. This creates uncertainties for market players and also inefficient procedures at a national level, as well as competitive or overlapping competencies between various local institutions, in some cases. One given authority per country should be in charge of implementing the regulatory tasks associated with any provision of the Code. This remark applies to Article 5 in particular.

Furthermore, in Article 1, the European Commission underscores the need for ensuring end-user benefits, effective competition and choice. Competition in the market is already strong and brings a wide variety of products and services to end-users, and will continue to do so. However, to ensure a thriving market for electronic communication networks (ECN) and electronic communication services (ECS), further work is needed to make the proposed Code future proof and reflect the increasing disconnection between the provision of ECN and ECS. The Commission should aim to ensure that end-user protection regulation is viewed from a service-perspective, and the protection of the consumer is the focus of the regulation: consumers are generally more vulnerable than other end-users. This approach would also increase consistency with horizontal regulation, which first of all addresses consumers and not business customers.

General objectives (Article 3)

The GSMA welcomes the proposed general objectives set out in Article 3 of the draft Code, as they promote long-term interests of citizens and pro-investment measures, while safeguarding competition. Specifically, the new references to "infrastructure based competition" and "promotion of the interest of the citizens of the Union, including in the long term" are relevant for the mobile industry, which is making huge investments in new networks. This article could, however, further emphasize the need to support investment to achieve the objective of take-up of very high capacity networks for EU citizens.

Furthermore, the ultimate objective of the regulatory framework should be to maximize the contribution of the telecoms sector to the economic development of the EU and its competitiveness for the benefits of its citizens. Hence, the notion of support for European economic development should be inserted as an additional objective in Article 3 of the Code.

Moreover, to maximise the impact of the general objectives proposed in the Code, the Commission should be made accountable in the context of provisions outlined in paragraphs 2 and 3 of this Article.

The GSMA strongly supports the objective of ensuring a high and common level of protection for consumers. However, modifications to the detailed end-user rules of the Code are necessary to achieve this goal. Ideally, consumer protection rules should be horizontally applicable to all consumer services to the greatest extent possible, to ensure a high and common level of protection. As an example, the proposed contracts summary in Article 95(5) disregards the core issue: the level of contractual details is a general problem across all services. The consumer protection elements should be guided by the following principles: duplication between various consumer protection directives should be avoided; the presentation of information should be simplified; and less technical and more easy-to-understand information should be provided. Requiring different services to deliver different sets of information does not meet the needs of consumers, and accordingly, providers of number-independent ICS should not be exempted from the obligation under Article 95(5). Consumers should be assured, rather than confused, by the level of information provided. As such, the proposed contracts summary should be addressed through a self- or co-regulatory approach across the digital market, or at least, included within horizontal consumer protection law. To be consistent with general law, the rules should focus on consumers, who are more vulnerable than business customers and, thus, require stricter protection standards.

2. Spectrum Management

Regulatory safeguards to ensure ongoing efficient use

It is understandable that regulators may seek safeguards to ensure ongoing efficient use of spectrum. However, attaching open "use-it-or-lose-it" obligations to licences (Recitals 72 and 116 /Articles 19(2) and 47(1)), and the imposition of joint roll out and sharing obligations post-award to improve coverage (Recital 144 and Article 59(3))[4] are unacceptable. Such provisions would undermine investment certainty for licensees.

Article 19(2) may conflict with existing authorisations and creates uncertainty in relation to new authorisations. Moreover, use-it-or-lose-it provisions in licences are unnecessary when secondary trading is available, giving licensees an opportunity and incentive to sell spectrum that they do not need. Use-it-or-lose-it conditions may in fact hinder the further development of a secondary market because they create additional uncertainty and the risk of licences being revoked.

These factors could also impact other electronic communications networks that rely on spectrum, such as broadcasting and satellite, with a potentially huge detrimental impact on achieving the Commission's objectives. Articles 59(3), 19(2) and 19(3) should be deleted.

[4] Please also refer to the detailed comments made on Article 59(3) on pages 23-24 of this paper in the 'Mobile Network Access' section. As stated there, sharing of mobile networks should remain voluntary and not be imposed beyond licenses terms; Article 59(3) should be deleted.

Competition remedies introduced in licences and spectrum auctions

The GSMA is concerned about the inclusion of provisions, such as spectrum sharing, network sharing, wholesale access and national roaming, in spectrum licences. Such provisions are set out in Articles 47 and 52, for example, and are envisaged by the proposed access conditions in Article 59(3) for services that rely on spectrum. These matters should not be dealt with in spectrum licences, but under competition law or as ex-ante regulatory conditions using the standard market assessment framework where remedies can be imposed if SMP has been established.

In practice, the draft Code proposes a double standard for the imposition of competition remedies. Whilst the imposition of remedies for fixed services requires Member States to follow strict guidelines to define the relevant market and determine the existence of SMP, Member States would not need to follow the guidelines when imposing remedies through spectrum awards. Any competition measures taken when granting, amending or renewing rights, following Article 52, should only be imposed as a result of following the guidelines on market analysis and assessment of market power.

Licence-exempt and shared spectrum

Investment in the development and deployment of new wireless technologies depends on exclusive licensing for key mobile bands, together with clarification on the specific bands where spectrum sharing and licence-exempt access are appropriate.

The GSMA shares the Commission's view that technological progress, greater use of spectrum and the expansion of mobile services into much higher frequency bands increases the potential benefits of spectrum sharing between different users/uses. The existing licensing framework is inconsistent in this respect, hindering economies of scale and, in many EU countries, acting as a barrier to efficient use of spectrum. The GSMA, therefore, shares the Commission's objective of harmonising principles and greater coordination in the way licensing is used by Member states to foster sharing.

However, the draft Code's emphasis on shared and licence-exempt use, as the default approach, jeopardises the economic benefits obtained when exclusive licensing has been used to provide investment certainty and freedom from harmful interference. Whilst there is scope for some innovative licensing in bands above 24GHz, the Commission needs to be cautious about broader radical changes, particularly in lower bands. Exclusive licensing at frequencies below 4GHz has driven the growth of mobile investment and services in the past 25 years. Reducing property rights for spectrum users in the low and mid spectrum bands - that support the large majority of the traffic today - would risk disruptions for existing users, and should be evaluated with care, including in cases of licence renewals or re-auctions of spectrum in use.

It is not appropriate to push one licensing approach over another a priori. Instead, the licensing approach should be adapted to the needs of the services that are likely to be the most efficient users of a given spectrum band. Legislation should be high level and principles-based. There should be scope for development of the most appropriate licensing models for given bands as technologies and business models evolve. Those principles should take into account that some services are more sensitive to interference arising from reduced

exclusivity. Mobile services that require ubiquitous connectivity and assured quality of service are, by definition, less suited to sharing spectrum, especially low frequency bands, than, for example, multi-frequency broadcasting networks or fixed services. As incumbent users, mobile licensees would face a relatively high reduction in the value of their rights, if they were forced to share. From the perspective of potential new licensees in bands currently used by others, the value of the spectrum is significantly reduced in cases where the need to co-exist imposes significant constraints.

The provisions in Article 46 should be amended in the following way:

- All licencing schemes should start from an equal footing, without any preference for General Authorisation / licence-exemption.
- Due regard should be given to the need to assure quality of service and the relevant technical parameters, such as required power levels, which may favour specific, rather than general, authorisations in order to avoid interference;

Small cells and RLANs

The GSMA welcomes the proposals to assist in small cell deployment in Article 56. But Article 55 on RLANs, in particular, requiring third-party access to Wi-Fi, could put at risk investments made by operators and represent an unacceptable intrusion into contractual arrangements. Wi-Fi is the wireless edge of the fixed broadband network: it should only be regulated, if SMP in retail broadband had been found.

Spectrum fees

The GSMA welcomes the measures to control excessive fees in Article 42, but these need to go further to be effective in avoiding excessive fees that crowd out investment. Clear conditions should be added (for example in Article 42(4)) to clarify that spectrum fees may not impose an undue financial burden; and may not be imposed unless it can be demonstrated that such fees meet the objective of promoting efficient spectrum use.

3. End-User Rights (Articles 92 to 108)

General remarks on end-user rights provisions

To bring the true benefits of the EU to citizens, the end-user provisions should apply to all interpersonal communication services (ICS) equally. Additional requirements should only be necessary because of the nature of the service, e.g. number portability requirements. The conditions for supplying electronic communication services (ECS) should empower consumers to make informed choices and protect vulnerable groups, such as disabled users. The conditions for supplying ECS should focus on consumers. Other end-users are less vulnerable and – to be consistent with horizontal law – protection rules should not per se encompass businesses. If some business customers still remain in the scope of the information and transparency obligations, they may be considered to have the right to choose to receive additional information. However, it would be overly onerous and unnecessary to

continuously require providers of ECS to automatically provide all information to businesses.

The GSMA fully supports Article 94 and agrees that obligations within the draft Code should be based on full harmonisation, which has a great potential in facilitating provision and usage of cross-border services for consumers. However, this potential will only be realised if decision makers refrain from disproportionately increasing the burdens on service providers. This point also applies to the provisions that leave considerable flexibility for Member States, included in Articles 95 to 98. Full harmonisation of protection standards in the Code would also ensure consistency with the horizontal consumer acquis, which is already mostly based on that principle (e.g. in the Consumer Rights Directive). Further harmonisation of horizontal rules is envisaged in the ongoing discussions in the scope of the REFIT exercise.

Electronic Communication Services (ECS) definition (Article 2(4))

Article 2 of the draft Code redefines the notion of electronic communication services (ECS). It includes internet access services (IAS), interpersonal communication services (ICS), plus a third sub-category characterised as "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". Presumably, this sub-category refers to the technical criteria "conveyance of signals" as established in the current legacy definition of ECS. However, this very technical criteria is not suitable to define an own service category, and it does not reflect the functional view of end-users. Neither the Code, nor the Impact Assessment nor the Explanatory Memorandum provides a clear justification for sector-specific regulation of this third sub-category. However, the draft Code imposes almost the same level of sector-specific end-user protection obligations on this sub-category as it does on IAS and on number-based ICS.

At the same time, the scope of this category is largely unclear, as the draft Code mentions transmission of signals in the scope of M2M and broadcasting only as examples. As this service category is focused on the technology, rather than focused on the outcome for end-users, it lacks the functional perspective on services. A function perspective is crucial since in IP-based networks all services will be transmitted in the same way via IP. The only technical difference between services will be whether they are provided via an IAS (best effort services) or not (managed services).

Even if there was legal clarity of the scope of this service category, it remains unclear how the proposed end-user protection rules would apply to the technical service element that reflects the conveyance of signals. It is also unclear whether the set of rules would apply to the whole service, if it somehow includes an element of conveying signals.

A function perspective is particularly important in the context of the Internet of Things and M2M services. Imposing unjustified and inappropriate sector-specific obligations on this subcategory is likely to hamper the ability of M2M service providers to innovate and compete globally. There is also a high risk that only network providers' M2M services are considered as conveying signals. This would severely impair European industrial development and the opportunity for EU players to participate in such a promising new market. Consequently, the aforementioned third sub-category of ECS needs a priori to be deleted or at least to be revised and the rules removed. The provisions in the first two categories cover all of the necessary

safeguards for consumers.

The definition of ICS correctly distinguishes between services using numbers and number-independent services. The very specific, limited and inter-linked rules which ensure end-to-end-quality or interoperability obligations, number portability and reliable emergency services based on phone numbers are the only obligations and they cannot easily be applied to services not using numbers or services which do not ensure end-to-end-quality. It is, therefore, reasonable that these rules should only apply to number-based services. However, the definition of "number-based ICS" lacks clarity, as qualification appears to depend on PSTN interconnection rather than actual use of numbers. Apart from these limited obligations on number-based services, no further regulatory distinction should be made between the two categories of services: These services are increasingly perceived as full substitutes by consumers and therefore merit the same treatment (e.g. messaging or international voice calls) in terms of safeguards with respect to transparency and other characteristics.

Excluding "ancillary services" from the ECS definition would create a grey area for service providers. In the draft Code, the definition of ICS excludes services that "enable interpersonal and interactive communication merely as a minor ancillary feature that is intrinsically linked to another service", such as the use of a communications channel for chat/messaging within a gaming service. This may cause considerable uncertainty as to whether a specific service has to comply with the rules. Past experience has shown that consumer behaviour can be very different from that anticipated by the service designers. Clarification is therefore required.

Information requirements for contracts (Article 95)

Horizontal consumer law, as well as sector-specific regulation, such as that included in the Open Internet Regulation, already ensures effective consumer protection standards in most areas. This provides the opportunity to simplify and improve the current contractual information requirements included in Article 20 of the Universal Services Directive (USD). Unfortunately, the European Commission has mostly missed this opportunity in the draft Code. Most of the provisions have been kept or even extended. Other end-users than consumers, are continuously covered by nearly all specific protection standards, contrary to horizontal protection law that focuses on consumers, as a more vulnerable group.

The Code's requirements should not include information, which is in principle already covered under the horizontal legislation, such as the Consumer Rights Directive (CRD). For example, the provisions on price indication are already included in Article 6 of the CRD. Similarly, the Code touches upon information that already has to be provided according to the Open Internet Regulation and the related BEREC Guidelines on Net Neutrality (BoR (16) 127). The existing legislation covers quality parameters, data and traffic management and they should not be repeated in the Code. Overlapping provisions will lead to legal uncertainty and further increase complexity. Any additional information requirements should be applicable to all ICS, and should be simple, and easy-to-understand so consumers can make an informed choice instead of being presented with overly technical information, and any such information requirements, which are applicable to all ICS, should be based on general service performance measurements.

Care should be taken to ensure consumers receive relevant information, both in relation to

number-based and number-independent ICS. Information requirements should apply to all ICS equally, covering details of products and services designed for disabled end-users, how updates on this information can be obtained, the type of action that might be taken by the undertaking in response to security or integrity incidents or threats and vulnerabilities. The requirements relating to these areas apply to all communications services. In the same way, all ICS should be required to notify the end user if reliable emergency calling services are not available.

The draft Code provides that micro and small enterprises are required to opt-out to receive information prior to contract conclusion, according to Article 95(3), whereas at present, they have a right to request this information under the current framework. Given that this right extends to business customers with a turnover of 10 million euros and up to 50 employees, an opt-in right would be more proportionate. Today, the customer already has an option to obtain this information. In this respect, the draft Code runs counter to the objective to simplify requirements on providers, as it would require current business practices to change.

Although the proposal to develop a template for a contract summary, as outlined in Article 95(5), could, in principle, represent an improvement for consumers, it is only imposed on ECS. Telecoms operators, as providers of number-based ICS, already provide more information than other digital market players, including detailed publication requirements. At the same time, the lack of consumer awareness on contractual information is clearly not a sector-specific issue, but equally relevant for any service. Therefore, the proposal to provide a contract summary needs to be linked with the discussion held on the REFIT of horizontal consumer laws. To ensure consistency and establish a truly consumer-friendly approach for all digital services, the development of better information should instead be addressed firstly through co- or self-regulatory initiatives. Only if this fails, should horizontal legislation, which applies to all consumer services, be introduced. Such an approach would enable service providers who have daily contact with end-users to identify and quickly adapt the template over time in line with the changing needs of users and rapid development of technology. This approach would also be consistent with Annex VIII which provides that NRAs may promote self- or co-regulatory measures prior to imposing any obligation. Moreover, self-regulation can be implemented quicker than regulation. Conversely, regulation in this area can produce a negative result; for example, a contract summary introduced in Portugal by the regulator is in a format that exceeds five pages even before operators have started to add information[5]. Any contract summary should be short and easy-to-understand – defined by industry and not by BEREC.

In any case, the Code needs to clarify that this requirement should only be applicable to contracts concluded after the new regulation has come into force.

The facility to monitor and control consumption in Article 95(6) should be restricted to data services, rather than voice services, and be limited to information about consumption rather than the ability to set a cap. Many new and innovative charging models are emerging for data, as well as voice, and it would not be future-proof to base new rules on charging models that could be superseded by others. Most service contracts include free gigabytes for data usage or unlimited voice calls. In any case, many operators already offer tools that allow detailed monitoring of usage. These established good practices should not be harmed. Therefore, any

[5] For more information, please see contract summary introduced in Portugal

monitoring obligation should provide flexibility for operators and focus on possible gaps such as the need for monitoring usage beyond inclusive volumes. Co- or self-regulation should be considered.

Transparency, comparison of offers and publication of information (Article 96)

The principles described in the sections of Article 95 equally apply to the transparency obligations. If the obligation to publish information is still necessary (on top of extended contractual information, the newly introduced pre-contractual summary, publication requirements under the Open Internet Regulation, and horizontal provisions such as presenting main characteristics on service before contract conclusion), then these provisions should have to apply to all services equally, particularly to all ICS. This specific regulation, if considered to be indispensable, should be limited to a clear set of information requirements (possibly aligned with the information categories provided in the contract summary), and should not invite NRAs to individually extend the list, which would lead to national legal fragmentation and undermine the objective of full harmonisation.

Quality of service (Article 97)

The GSMA does not support Article 97's proposal for BEREC to adopt guidelines to monitor quality of service (QoS). NRAs are already required to monitor compliance with the QoS requirements under Article 5 of the Open Internet Regulation and the respective BEREC Guidelines. Any additional monitoring by BEREC would lead to a duplication of processes, based on additional quality parameters for IAS beyond those only recently adopted in the aforementioned Regulation.

If monitoring mechanisms remain for ICS, monitoring should encompass all voice services – number-based and number-independent services. In this scope, NRAs' competencies to define quality certification mechanisms should help consumers identify and choose voice services that ensure stable end-to-end-quality. In any case, NRAs should refrain from imposing additional burdens on providers of number-based ICS, particularly if these providers offer services with reliable end-to-end-quality, which incur higher costs.

The provision to provide transparency on access for disabled users cannot be reasonably limited to a sub-set of ECS. The scope needs to be broadened to include IAS and all ICS. Considering that Article 103 obliges all ICS providers to ensure disabled end-users can access their services, all ICS providers should also inform consumers about this. As the Code stands, only ICS services that use numbers have to inform consumers, even though all services need to be accessible to disabled end-users. Besides this, the obligation to provide services for the disabled should not be reasonably limited to ECS, but should apply horizontally to any service. Accordingly, information requirements on access for disabled people need to be introduced in horizontal consumer protection law.

Contract duration and termination (Article 98)

Overall, the current rules have proven to be effective in enabling consumers to switch providers and ensuring competition between providers. Article 20 of the USD stipulates that telecoms' operators cannot introduce contracts with a minimum duration of more than 24

months. Moreover, telecoms operators have to offer at least one contract of no more than 12 months. This applies to contracts for IAS, as well as communications services. The reality is that consumers have a growing choice of offers with even shorter or no contract durations, for mobile services as well as for fixed. They also have options to use operators' prepaid contracts or – with regard to ICS – communication services provided over the internet, generally without any minimum duration times. Despite this broad choice, consumers frequently choose contracts with longer minimum durations, due to their associated benefits. When the minimum contract duration time has ended, consumers can either switch to another offering or extend the same contract.

When consumers contractually commit for a longer period of time, service providers benefit from greater planning security, e.g. in terms of estimated revenues per customer. That enables them to offer lower prices and subsidised devices to consumers on longer contracts. This is particularly crucial if providers have to shoulder massive and long-term investments in ECN. In markets where Member States have imposed a short maximum contract duration, neither consumers nor providers have these benefits.

Therefore, the proposed rule in the Code allowing providers to offer contracts with a minimum duration of up to 24 months, should be maintained. In principle, where there is enough choice, Member States should refrain from imposing shorter maximum contractual duration times at a national level, to avoid detrimental effects on consumers' choice and network investments.

The new obligation in Art. 98(2) significantly impairs the current contractual freedom of consumers and providers. Providers possibility to offer services, including, a variety of different contract durations would be narrowed down. This overly burdens ECS providers, compared to other service areas that only have to comply with more flexible horizontal laws. This obligation would drastically reduce planning security for operators and would be an unwarranted intervention in current business models that have been applied in some markets. Considering that consumers have a broad choice between very different kind of contracts that include ECS, such a regulatory intervention appears to be not justified. The choice for consumers will be reduced, and specific benefits that are only offered in connection with more long-term contract durations cannot be offered any more. Also, consumers benefit from automatic new minimum contract durations in that they can keep attractive contractual conditions, since the provider cannot end the contract at any time. This has strong appeal for many customers, as they can often profit from specific benefits or prices that are not offered any more (e.g. promotions). Also, many consumers will not like being contacted by their provider to agree a new minimum contract duration. If consumers want to change provider, they have the freedom to end the contract at any time and move to another provider once the agreed contract duration has ended. The Code should refrain from regulating this area. Instead, consumers and service providers should have the option to explicitly agree to a new minimum contract duration time in case of automatic contract prolongation, when concluding the initial contract. This could be combined with the provisioning of better information to the consumer, to ensure that consumers are fully aware of the contract duration times when they initially conclude contracts.

Consumers' rights to information, terms and conditions should not vary according to the service they choose, or be dependent on the Member State or network from which the service is provided. The proposal for a Directive regulating certain aspects of contracts for the

supply of digital content (DCD) is a good example of how regulation has to be better aligned to avoid detrimental and unintended effects: this proposed directive would limit the minimum contract duration on digital content to 12 months, which would apply to an IPTV service included in a bundle with ECS, for example. Although ECS are explicitly excluded from the scope of the DCD, this rule would de facto prohibit providers from offering bundles that include ECS and digital content (such as IPTV) with a minimum duration of 24 months. To diminish this unintended effect, all elements of a bundle that includes at least one ECS should entirely fall under the specific rules provided for in Article 98 with regard to contract duration.

Change of provider and number portability (Article 99)

The draft Code introduces a new portability requirement related to IAS. The current portability system for numbers in the national numbering plan has been developed over a number of years, and this process is often intertwined with the switching of the IAS. However, in many cases, there is no stand-alone system for switching of IAS. Typically, the choice of a particular IAS plan is made by the consumer when they sign the contract of the new provider, and this service is activated as agreed between the consumer and the new provider. As such, potential switching barriers with regard to the IAS are different from those related to the porting of numbers, where it is essential for the consumer to keep his/her number to avoid having to inform everybody of the new number. As this is not the case with IAS, the draft provision rightly distinguishes between porting of numbers and switching of the IAS. However, the requirement to port the number within one working day will be meaningless if the consumer has no available access (IAS or voice only) when the number is ported. Therefore, it is essential to have the service activated as soon as the mobile or fixed number has been ported.

The draft Code also introduces stricter rules for switching only the IAS (from the previous to the new provider, based on a new contract agreement), which is not linked to the use of phone numbers. In some Member States, this will require the establishment of new processes. To enable service providers to set up reliable switching processes, reasonable timeframes for implementation should be granted. Operators have not yet established portability systems that include ICS from providers that aren't also operators. Therefore, the implementation of the requirement to ensure that the loss of service does not extend beyond one working day will likely become complicated and time consuming. To ensure that service providers have the chance to properly implement this requirement and consumers can fully rely on this provision, a sufficiently long transposition period is required.

Bundled offers (Article 100)

Whether they have signed up to a bundle or a single service, end-users should be able to switch easily between service providers. This applies to any bundle – irrespective of whether it includes an ECS, ISS, AVMSD, etc. In principle, switching barriers and bundles are not limited to number-based ICS. In the digital market, many large ecosystems provide bundles, some of which have a strong lock-in effect on consumers. Considering this, the draft Code's narrow focus on ECS, other than number-independent ICS, is misleading. It is not clear why bundles that include IAS, number-based ICS and services based on the conveyance of signals (including M2M communication) require burdensome specific rules, while other bundles do not face comparable restrictions.

The European Commission's own study, which provides evidence on the required regulation of ECS, indicates the new requirements are unnecessary. The study, "*Support for the preparation of the impact assessment accompanying the review of the regulatory framework for e-communications",* clearly indicates on page 272 that among households that claimed switching barriers, only 0.55% identified "some services of the bundle could not be cancelled at the same time" as a barrier. Accordingly, only a very minor share of households (0.055%) identified this factor as a switching barrier, making it the barrier that was experienced the least by a wide margin. Besides this, none of the households indicated that a lack of information, such as that provided for in Article 95 or 96, was a reason for the identified switching barriers. This suggests the provisions in Article 100 won't be effective in addressing the switching barriers identified. Considering the responses from households, it is not clear that any further measures are required and proportionate to further facilitate switching. Some of the top "switching barriers" identified in the study cannot reasonably be considered as barriers: Households consider their current bundle as good value for money or the agreed period of a minimum contract duration time is not finished yet. Other switching barriers are already addressed by the rules on IAS switching. Further measures, such as better information for consumers, could only facilitate switching for a very small amount of households, probably without any further positive effect on the overall market dynamics.

Besides this general statement, the provisions would also prove to be highly impractical. Article 100 in conjunction with Article 99(1) stipulates that in the case of switching of the IAS-element, all elements should be switched to another provider. While the term "switching" is sufficiently clear with regards to phone numbers and IAS, it is entirely unclear how this applies to any other services that are bundled with an ECS. ECS bundles can include an increasing variety of different ECS, digital content, information society services, audio visual media services or hardware. For the ECS provider, it would be extremely challenging to align with the receiving party on each element of a bundle, especially in relation to parts of the bundle, such as audio visual content, where the ECS provider has less control. This is particularly of concern with respect to the provision that the loss of service shall not exceed one working day. While the necessary alignment between transferring and receiving providers can be ensured with regard to the IAS and other main elements of the bundle, it would be difficult to also ensure this for minor elements of the bundle, e.g. a video streaming service provided by a third party. A new switching process, including new interfaces, would need to be established. In any case, the transferring and receiving providers can only deliver the contractually agreed bundle to the consumer – the bundled offerings of the transferring and receiving parties will often differ, e.g. if the receiving provider has a smaller service-portfolio. Clearly, in a highly competitive market, this provision must not lead to an obligation that providers are forced to offer identical bundles. Considering this, the application of the switching obligations to parts of the bundle, other than the IAS, is highly burdensome and impractical.

Already today, ECS providers conclude contracts with consumers for bundled services. These contracts include all relevant information relating both to telco-specific regulation and horizontal law. Telecoms operators also publish information on bundles and consumers have the additional possibility to choose from a wide range of third party comparison tools. Therefore, the new provisions in Article 100(1), referring to Articles 95 and 96(1), do not address an existing gap. If more information on services, which are not ECS, is considered to be necessary, such new information requirements should apply generally, and be included in

horizontal law. Conversely, it is unclear how the requirements included in Article 95 and 98 should apply to any other service included in a bundle, as the provisions have been drafted with regard to ECS and mostly do not translate well for other services. For example, the information about quality parameters, emergency services, porting requirements or monitoring of consumption are usually not relevant for non-ICS services, such as music streaming or TV services, bundled with an ECS.

The strong detrimental effect of Article 100 is also apparent with regard to M2M services, which are proposed to fall within the ECS category "conveyance of signals". As a huge variety of services contracts will ultimately encompass M2M elements, all of these contracts would entirely fall under Article 100. This would mean that detailed information and transparency requirements would have to be met for each single element of such service contracts. The resulting increase in complexity would have detrimental effects.

If new information and transparency obligations are deemed indispensable for bundles, they should apply horizontally and equally to all ICS. Additionally, the obligations should only apply to the main elements of the bundle.

There is also a need for more clarity about how this article would be implemented, and in this regard, it is necessary to define a "bundle": it makes an important difference as to whether the bundle, for example, comprises services offered by one provider under the same contract or comprises services under different contracts that are inter-linked and cannot be provided independently from one another.

Availability of services (Article 101)

Since Article 101 aims to ensure uninterrupted access to emergency services, it should be amended in conjunction with Article 102, ensuring that providers of ECS providing end-users with number-based ICS take all necessary measures to ensure uninterrupted access to emergency services. Moreover, it should be specified that providers can only ensure uninterrupted access to emergency services in the own core network, not end-to-end.

Emergency communications and the single European emergency call number (Article 102)

End-users need to be clear on how they can reliably get in touch with a Public Safety Answering Point (PSAP). As such, it is of concern that Article 102(7) extends the notion of "emergency services" to all forms of number-based ICS (e.g. voice, video, messaging, text messages). This would cause significant additional effort for respective providers, including PSAPs who would need to be in a position to respond. Emergency communications should be restricted to calls until such time as a general review of emergency services in the context of number-independent ICS is completed. At least, the obligation should be optional for other services than voice calls. As the current level of knowledge among citizens about the "112" number is limited in all Member States, it would undermine citizens' confidence in the emergency services, should a Member State not be able to respond to a citizen because that Member State does not support the 112 number.

Further clarifications are required, such as in Recital 260, which may be misunderstood in such a way that all ICS with numbers need to ensure accessibility for disabled persons to

emergency services. Article 102 needs to reflect the notion from Recital 259, to clarify that service providers can only offer emergency services if the respective Member State has established the required structures.

Equivalent access and choice for disabled end-users (Article 103)

Article 103 should eliminate any overlaps with the proposed European Accessibility Act (EAA) by specifying that ECS should be subject only to the requirements of the EECC Article 103 (and hence removed from the scope of the EAA). However, devices – either provided in the scope of ECS or in other service areas – may be subject to the requirements of the EAA. Beyond the Code, legislation needs to ensure that all services contribute equally to accessibility for disabled persons, to secure a truly horizontal approach. It is important to ensure that there is proportionate responsibility applied across the value chain and for like-for-like services, to ensure that disabled end-users have access to services that are available to the majority of users.

Telephone directory enquiry services (Article 104)

It should be clear within Article 104 that the requirement to provide information is only applicable to end users who have agreed to include their personal data in a directory in Article 95.

'Must carry' obligations (Article 106)

The scope of the "must-carry" provision under Article 106, as well as national implementation and application of respective obligations, should be strictly limited to content of general interest that is really essential, both in terms of amount and value, and to realise the policy objective of the regulation namely to ensure a basic level of access to information, which is highly relevant to individual and public formation of opinion.

In many Member States, platforms are legally obliged to pay copyright and/or similar fees for must-carry channels they are obliged to distribute, and no legislative decision has been taken regarding the payment towards platforms for distributing these channels. While the decision as to what exactly amounts to a fair balance of payments among different must-carry channels may vary from market to market, and remains at the discretion of Member States, the absence of a mandatory legal decision on the balance of payments could have a far-reaching and particularly harmful impact on the entire TV distribution market. As operators are obliged to offer broadcasters access to their TV platforms at fair and non-discriminatory terms, it is essential to ensure that capacities reserved for must-carry channels remain a separate category that does not impact or set any precedence regarding the commercial terms at which channels are distributed in the remaining network capacities.

The GSMA does not support the proposal to extend must-carry requirements to data supporting connected TV services and electronic programme guides. In order to provide competitive and differentiated functionalities, it is essential that the distributor of a channel can create its own programme guides and associated features. The proposed requirement would also result in additional cost for the operator with respect to the additional bandwidth and technological developments required to enable this.

Moreover, there is a growing trend for essential public interest content to be provided exclusively by a single distributor (particularly where the content provider also owns the distribution platform), thus making content less available and forcing the consumer to subscribe to multiple services. The introduction of a "must-offer" system would make it easier for operators to offer such essential public interest content.

Provision of additional facilities (Article 107 and Annex VI)

Based on the principle of full harmonisation of end-user protection rules, the requirements under Part A and B of Annex VI should not be determined at national level.

Adaptation of annexes (Article 108)

The Commission should ensure that stakeholders are consulted prior to the adoption of delegated acts.

4. Numbers (Articles 87 to 91)

Granting of numbers to undertakings other than providers of ENC and ECS (Article 87(2))

The provision to grant numbers to undertakings other than providers of ECN and ECS should be removed as this would hamper innovation and bring a lot of complexities into mobile networks.

Multiplying the number of actors would lead to a waste of scarce resources and make it more difficult for national regulators to manage numbering plans, ensure the stability of calls to emergency services and respond to legal requirements from authorities.

The case for extending numbering ranges is to remove lock-in effects and enable competition to flourish – predominantly in an M2M context. However, these assumptions are out-dated and have already been addressed. Lock-in effects have been assumed on the grounds that users acquiring SIM-cards for M2M purposes would be locked in with a particular provider once the physical SIM-cards were installed, and therefore potentially be difficult to replace. The GSMA has developed standards for the provisioning of embedded SIM-cards over-the-air (OTA), and a user is, therefore, able to switch provider without having to physically replace the SIM-cards. This option was demanded by those users that require it, and has, therefore, been addressed by the industry itself. It is important, however, to recognise that there is no 'one size fits all' approach to M2M switching. Regulatory policy should differentiate between the requirements of different types of M2M users in this respect (e.g. consumer or enterprise).

The potential allocation of Mobile Network Codes (MNC) to undertakings other than providers of ECN and ECS is also a cause for concern. The draft Code does not specify exactly which type of numbers are being considered, but an opening up of MNC-codes to any undertaking would put at risk the ability of European providers to participate in the M2M market. MNC-codes are a scarce resource as only 100 codes are available per country today. Moreover, the proposal goes against the principles for the assignment of MNC codes as

provided by ITU's Recommendation E.212 (Annex B), which stipulates that MNC-codes are only to be assigned to, and used by, public networks offering public telecommunication services. Furthermore, M2M services will, in the medium term, move to IPv6, for which there is no danger of an exhaustion of numbers. The draft Code should focus on ensuring regulatory stability, and therefore Articles 87, 88(1) and Recital 227 need to be amended accordingly.

Extraterritorial use of national numbers (Article 87(4))

The GSMA welcomes the new provisions in Article 87(4), as far as they intend to create planning reliability concerning the use of national numbering resources in an extraterritorial manner. It also provides transparency, and potentially, regulatory stability for the provision of Internet of Things (IoT) services.

However, the GSMA is concerned about some details of the suggested approach. As it is clearly stated that such extraterritorial use should be possible for electronic communication services, with the exception of interpersonal communication services, there is no need to ensure compliance with consumer protection rules. Moreover, the relevant recitals do not include information on the rationales. Therefore, this requirement should be removed. Moreover, the new provision in Article 87(4), which proposes that BEREC should assist NRAs in coordinating their activities relating to the management of numbering resources, and establish a central registry on numbering resources used extraterritorially, is also unnecessary. The proposal does not define a purpose for either the BEREC-coordination or a central registry and as such this paragraph should be amended or deleted.

Finally, this approach does not explicitly mention the use of ITU Supranational numbering resources, which both BEREC and CEPT have recognised as being appropriate for the deployment of M2M devices across borders. It is important that the approach envisaged in Article 87(4) does not preclude use of ITU Supranational numbering resources, which are already in place in the market today.

Granting rights of use for numbers (Article 88)

As stated in the earlier comments on Article 87(4), the clarifications on the allowance of extraterritorial use of national numbers are welcome. However, the proposal to attach an obligation to adhere to consumer protection rules in the context of extraterritorial use of numbering resources (Article 88(6)) is a major cause for concern. The industry has requested clarification of the extraterritorial use of numbering resources specifically in a M2M context. This is also evident in Recital 225, in which the extraterritorial use of numbering resources is limited to ECS, with the exception of interpersonal communications services in order to prevent a considerable risk of fraud. For M2M services, the predominant feature(-s) are not the connectivity, which is provided through the extraterritorial use of numbers, but the features of the device, whether this be a fridge, a wearable, or an electricity metering system. As the connectivity feature is ancillary to the M2M solution provided, applying the consumer protection elements of sector-specific regulation is not appropriate. Instead, the solution should be subject to general consumer law associated with the relevant device, such as the fridge, wearable or electricity metering system. Furthermore, in many cases, it is unclear at the time of sale in which country the number will finally be used, making the provision in

Article 88(6) impractical and difficult to comply with. The consumer protection elements should therefore be removed from Article 88(6).

5. Universal Service Obligations (Articles 79 to 86)

The role of Universal Service obligations should continue to be the provision of a social safety net and ensuring inclusion in the digital society. The revised provisions on the Universal Service Obligations (USO) in the draft Code, which focus on voice telephony and internet access services, rightly reflect that role. They shift the focus from availability to the affordability of the available connectivity and not on deployment of new networks. The draft Code confirms that USO is not the right tool to deliver very high capacity network coverage, which can be supported by other means. A misleading interpretation of universal service would create competitive distortions, inefficiencies and would result in high and disproportionate costs for the sector.

The acknowledgement that universal service obligations answer a public interest goal, thereby justifying public budget financing, is also welcome. Relying on the general budget is the most equitable and least distortive way of funding the provision of universal service. The current system of specific-sector funding has been inefficient. Moreover, it has been a source of complexity and litigation, at national and EU level, wherever it has been implemented.

Regarding the new scope proposed in the draft Code, any obligation should remain at a fixed location. As far as defining affordable functional internet access is concerned, the draft Code correctly references a list of minimum basic services (used by the majority of end-users), as providing a social safety net, without stipulating a given speed. However, too much flexibility is granted to Member States, which should define the scope of such services, including all those listed in Annex V. This provision is excessively broad, open to interpretation and could lead to requirements for very high speeds – beyond safety net requirements. The Code should, therefore, further clarify that when defining such a list, Member States should refer to basic universal needs and not to the speed used by the majority of users. Moreover, the divergence of national lists would increase fragmentation of universal service obligations across Member States.

Most of the current universal service obligations have become obsolete (public payphones, comprehensive directories and directory enquiry services) and, therefore, should, as the draft Code suggests, be removed at a EU level. Nevertheless, Member States would remain free at national level to maintain or add services, funded from the public budget. Such flexibility would create legal uncertainty and could lead to a disproportionate burden for the industry to maintain inefficient or irrelevant compulsory services. Similarly, the possibility for Member States to impose an availability obligation raises concerns in terms of its impacts and European harmonisation.

Clarification on the proposed universal service mechanism is also required; it is unclear how special tariffs options/packages will be imposed and how operators will recover the costs they may incur due to that obligation. Moreover, according to the draft Code, the provider will be compensated for universal services if the provider demonstrates the “unfair burden”. As a consequence, compensation will remain problematic: the designated provider has no a priori

certainty that it will be compensated. The net-cost calculation provisions in the draft Code are not being revised, despite the confusion they cause, as evidenced by court cases in the European Court of Justice.

Providers of universal services are obliged to provide affordable services, according to Art. 79. This also means that prices are reasonably low, with less risk of any e.g. bill shocks. Besides this, prices for electronic communication services have sharply decreased in the last two decades and new ECS contracts are increasingly based on so called "flat rates" for end-users. Additionally, end-users have the choice to use new ICS offered on the internet that do not charge any money at all. Considering this, it appears not proportionate to keep all the provisions in Annex VI[6] section A, according to Art. 83(2). In addition, the provisions must avoid a continuously asymmetric regulation of "cost controls" depending on the kind of undertaking – considering that operators are in the focus of providing universal services.

6. Mobile Network Access

Powers and responsibilities of the national regulatory authorities with regard to access and interconnection (Article 59)

The new provisions in Article 59(1) to potentially impose obligations for interoperability, to ensure end-to-end-connectivity and reliable emergency services, are, in principle, reasonable safeguards. However, some of the concepts remain largely unclear, particularly with regard to the definition of end-to-end connectivity and the thresholds for regulatory intervention.

Therefore, the provisions in Article 59(1) should define a balanced approach, based on reasonably high thresholds, to efficiently address identified problems, such as market foreclosure, while avoiding overly disruptive effects on the digital service market. Moreover, for all ICS, wherever access to emergency calls cannot be granted for technical reasons, consumers should receive adequate notice of this gap in the service.

The draft Code also proposes a new provision in Article 59(3) that would allow NRAs to impose obligations for joint roll-out of infrastructures to enhance coverage. Such obligations would be on top, and independent of, licence obligations. In general, Article 59(3) is highly questionable; it is unclear in its scope and justification; and the basis on which a regulator could impose such an intrusive and distortive remedy is undefined. Recital 144 mentions that it could only be used "exceptionally", but that notion is not reflected in Article 59(3), which is rather unclear. This article, therefore, introduces serious legal uncertainties and undermines the predictability the Code otherwise attempts to create within the spectrum provisions. This uncertainty is counterproductive at a time of heavy mobile network investments. For instance, it could distort the award outcomes; if an obligation is imposed after the award, it would undermine the equilibrium reached in terms of obligations versus fees paid for the licence. Increases in obligations could also direct the future investment programmes of some operators to remote areas, distorting the competitive process.

The mobile sector is highly dynamic across the EU. In the Member States, there is fierce competition at both network and retail levels, relying on infrastructure-based competition

[6] Also see proposal on p. 20 of this paper for Art. 107: Based on the principle of full harmonization of end-user protection rules, the requirements under Part A and B of Annex VI should not be determined at national level.

and network sharing in some circumstances, with various modalities. Network sharing on a voluntary, commercial basis, subject to negotiated conditions, can deliver positive outcomes. To improve the case for investment, joint roll out, access and sharing in remote areas should be the result of a voluntary agreement, rather than being imposed.

If Member States wish to expand coverage beyond what is commercially achievable, there are other options that would not diminish the investment incentives. The existing framework already allows conditions in licence agreements to be amended during the life of the licence by mutual agreement. For example, a license holder may accept new coverage obligations in exchange for a reduction in annual fees or an extension of the licence term. Member States could also run tenders for government funding to extend mobile coverage.

While the mobile industry shares the Commission's objective of maximising high-speed network capacity throughout the EU, this provision can contradict licence obligations and deter investment in mobile networks and competition between players, seeking to differentiate themselves through better mobile coverage. Article 59(3) should be deleted.

Procedure for the identification and definition of markets (Article 62) and market analysis procedure (Article 65)

The Code should deliver a framework that gives certainty, stability and predictability to investors in networks. The draft Code retains the current market analysis process, which relies on market definition and significant market power assessments based on competition law principles.

It also introduces several welcome procedural steps, such as the requirements for regulators to start from retail market assessment and to focus on remaining bottlenecks at the wholesale level. The stipulation in Recital 159 that NRAs must follow a cost-benefit analysis is also sound and should be included in an Article. The introduction in the Code of the three criteria test for market definition is also welcome, but regulators should be asked to perform the test when defining relevant markets at a national level. However, the texts of Recitals 150 and 160, referring to the imposition of remedies only on a wholesale market and the repealing of the power of imposition of ex-ante remedies in retail markets, should also be reflected in the Articles. To remain in line with the market analysis approach, it is essential that any undefined or weak concept, which is not reliant on robust competition law principles and case law, is not introduced into the legislative debate.

Procedure for the identification of transnational markets (Article 63) and Procedure for the identification of transnational demand (Article 64)

The provisions in Articles 63 and 64, relating to the identification of transnational markets and transnational demand by BEREC, are questionable. As those provisions seem to define a process independently of the market analysis process conducted at national level by regulators, they raise questions in terms of consistency, complexity and concrete outcomes. For instance, could this new process mean a given market considered competitive at national level is subject to an additional and burdensome analysis? Could this process lead to diverging conclusions? How would the relevant authorities ensure consistency between the two levels?

Moreover, the whole task of defining the cross-border access products will prove complicated

and impractical: network architectures and products vary considerably, and would require costly and burdensome projects to harmonize.

7. Security provisions

Security of networks and services, implementation and enforcement (Articles 40 and 41)

Security is a cornerstone of the development of the European Digital economy; it is an essential feature to ensure a proper functioning of the Internal Market and for ensuring that European citizens have a secure and trustworthy digital environment throughout the entire value chain.

The draft Code rightly requires network operators and providers of electronic communication services to take appropriate security measures proportionate to risk and report to the competent authority, without undue delay, security breaches that have a significant impact on the operation of networks or services. Extending the scope of the existing obligations to all providers of electronic communications services is a positive and necessary step towards a more secure value chain and a level playing field.

However, while the relevant Articles do not distinguish between providers of services, Recital 93 introduces lighter security requirements for number-independent interpersonal communication services, and number-dependent communication services that do not exercise control over signal transmission: such players would be entitled to decide the level of measures they consider appropriate to manage risks. This inconsistency, and in particular one-sided obligations, creates complexity and uncertainties on the scope of Articles 40 and 41. The same rules, including those on risk management, should apply to all service providers be they number-based, number-independent interpersonal communication services or conveyance of services. Finally, it is not clear in Articles 40 and 41 which competent authority should be notified by those providers that are currently not covered by these rules.

8. Evaluation of the Institutional Set Up and Governance Structure, general authorization and settlement of dispute provisions

NRA and other competent authorities (Article 5)

See comments made on Article 1 on page 7 of this paper.

General authorisation of electronic communications networks and services (Article 12)

In general, the existing system of general authorisation of electronic communications networks and services is functioning efficiently. The requirement to provide a mere notification to regulators has been positive for the sector. The proposal to have a single format of notification with a maximum list of information to be provided, as foreseen in Article 12(4), would be a positive change.

However, any new process should remain simple and not create additional complexity. In that sense, it should be made clearer in the Code, that for those operators who are already notified

to their respective regulators, and thus authorised to provide networks and services, there won't be any requirement to repeat the process vis à vis BEREC. In other words, the Code should state that a notification made to a relevant national regulator, before the entry into force of the Code, is considered as a notification made to BEREC.

When looking at the details of this provision, the GSMA has certain reservations:

The draft Code maintains the currently regulated rights and obligations in the scope of authorisation and notification and limits them to electronic communication services (ECS) other than number-independent interpersonal communication services. While this appears reasonable with regard to number-related provisions, it is questionable whether other related rights and obligations can reasonably be limited to a subset of ECS. In particular, the draft has missed the opportunity to empower NRAs to impose notification requirements equally on all ECS. Notification is one crucial element to establish market intelligence, which needs to encompass all competing services and cannot reasonably exclude an increasingly important group of services and providers. A general requirement would also help to create a level playing field. Accordingly, the Code should be amended to impose notification requirements equally on all ECS. In any event, the notification process should be consistent with the final definition of electronic communication services.

Article 12(3) of the Code provisions for notification to BEREC, which shall forward each notification to respective NRA. Extending the requirement of notification to BEREC may have significant negative consequences, notably in terms of additional red tape and complicating the process.

Therefore, the proposed deletion of the last sub-paragraph of Article 12(3) under which a cross-border ECS provider has privilege to submit no more than one notification, should be amended in the following way: The provision of electronic communication networks and related services should remain with respective NRAs, as it would be more appropriate if NRAs themselves forward notifications to BEREC to update the publicly available European registry of authorized providers, that is very useful for undertakings. Undertakings should submit notification to their NRA and subsequently require the NRA, where appropriate, to notify BEREC. Direct notification to BEREC could be an option for undertakings wishing to provide services in more than one Member State.

Declarations to facilitate the exercise of rights to install facilities and rights of interconnection (Article 14)

Again, the costs/benefits of any new procedure should be assessed in light of the existing procedure. The current system works efficiently with the NRA delivering that document under request following a notification. Operators may need a quick answer so they can start network roll outs, for example. In this regard, it is not clear whether giving such competency to BEREC would really add any value. Therefore, the NRAs should remain entitled to deliver the standardised declarations.

Minimum list of rights derived from the general authorization (Article 15)

With respect to the proposed link of rights of use of radio spectrum and numbering to the general authorization, this should not imply a new revision of the existing specific authorizations of providers and their authorization conditions and included rights of uses, as that would adversely impact continuity in provision of networks and services with instability for operators. It could, however, be applicable for new authorizations in the future. That should be clearly stated in the Code.

Out-of-court dispute resolution (Article 25)

The need for out-of-court dispute resolution systems, as referenced in Article 25, is questionable as provisions from out-of-court dispute resolutions are already available in horizontal law. Again, if these types of procedures are to be extended to SMEs, this should be addressed within horizontal legislation, rather than on a sector-by-sector basis. To maintain consistency, out-of-court-dispute resolution procedures – if sector-specific and horizontal procedures are kept in parallel – should not overlap.