



**Computer & Communications
Industry Association**
Tech Advocacy Since 1972

▶ The Computer and Communications Industry Association (CCIA) is pleased to put forward its position on the proposal of the European Commission for an Electronic Communications Code (The "Code").

CCIA welcomes the scrutiny of the European Parliament and Council as this presents an opportunity to improve upon elements of the European Commission's (EC) proposal that would fragment the (digital) single market, that are too focussed on particular technologies or that threaten to limit innovation.

INTRODUCTION

CCIA does not believe that the EC has shown a sufficiently robust regulatory basis for extending the scope of regulation to online services. In the absence of a clearly identified regulatory gap, or economic or social problems faced by consumers, it would have been preferable to retain a distinction between sector specific telecommunications rules for traditional telecoms providers regarding access to the Internet, and for information society services rules for services running over the Internet. Online services should ideally be removed from the scope of this proposal. Failure to do so would bring unnecessary and disproportionate regulatory burdens.

At the very least, the graduated approach to the regulation of services set out by EC, with fewer rules for services that run over the Internet, should be retained. This approach recognises that online services should not be subject to the volume and type of obligations imposed on traditional telecoms providers and should be limited to what is strictly necessary at this point in time.

Achieving the political objectives of a digital single market and a vibrant digital economy require that policy recognises the relationship between next generation networks and next generation services: consumers and business buy high speed broadband because they wish to use bandwidth intensive applications. Without such applications there is no investment case, or need for high speed networks.

Regulators should not name specific services (eg email) as requiring regulation, nor should they favour particular network technologies (fibre) over others. Companies and consumers should choose the services they wish to use, and the technologies they wish to deploy, at the price they are willing to pay.

Below CCIA sets out its specific suggestions for amending the proposal:

DEFINITION OF 'ELECTRONIC COMMUNICATIONS SERVICES' (ECS)

Explanation: EC has provided no reasoning as to why machine-to-machine and IoT should be regulated by sector specific telecommunications rules. These technologies and this market are nascent and it is premature to regulate them without a clear rationale and proven case. Such inclusion risks hindering, not helping, Europe's 5G ambitions.

Amendment: Article 2.4 - Delete "...for the provision of machine-to-machine services and..."

DEFINITION OF 'INTERPERSONAL COMMUNICATIONS SERVICE' (ICS)

Explanation: Article 2 (5) establishes the core definition of "interpersonal communications service" (ICS) as: a service normally provided for remuneration that enables direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons, whereby the persons initiating or participating in the communication determine its recipient(s).



Recital 17 interprets Article 2 (5) both unwisely and too broadly by suggesting that this definition covers “all types of emails, messaging services, or group chats.” The Directive should be forward looking and technology neutral, not backward looking or focused on specific services as they may exist today.

Recital 17 thus should not attempt permanent classification of particular services that surely will evolve in the future. Furthermore, the Internet is inherently interactive, and the proposed framework rightly does not seek to sweep in all Internet interaction as an ICS.

The concept of an “interactive exchange of information” with selected recipients must be applied in that light.

Email and web mail, for example, are not services properly within the scope of Article 2 (5). Electronic mail has never been primarily a network based service. Today, major electronic mail providers across Europe include 1&1, AOL, DMX, Google (Gmail), La Poste, Microsoft (Outlook/Hotmail), Runbox, Virgilio, Yahoo!, Yandex, and Zoho, among many others. These providers often provide their services at no charge, and they compete vigorously with respect to the features of their offerings, including privacy and data security. Furthermore, many electronic mail providers have little control over the network processing that supports their service. The communication may not pass through the provider’s servers, and the provider may have limited control over whether and when the message is delivered. As a result these services can be cumbersome to use and, like many messaging services, are wholly unsuitable for emergency communications, for example.

Recommendations

Recital 16, 17 and 18’s interpretation of the ICS definition should be generic rather than service specific. Otherwise, a variety of interactive features of the internet that are not specifically excluded by name like chat boards and collaborative editing of documents stored in the cloud would become subject to legal doubt. Like number independent ICS, other diverse forms of internet interaction such as social networks, email, and cloud collaboration are not appropriate for emergency service functionality.

Communication as a primary or ancillary feature

The EC proposal is not sufficiently clear about when communication is a primary or ancillary feature. Article 2 (5) states that ICS “does not include services which enable interpersonal and interactive communication merely as a minor ancillary feature that is intrinsically linked to another service.” This is an important exception that should be given full effect and, accordingly, the inconsistent “exceptional circumstances” language in Recital 18 should be removed. Likewise, Recital 16 and Article 2 (4) regarding the definition of ECS provide that “services consisting wholly or mainly in the conveyance of signals” will qualify; clarifying language should be added to make completely clear the converse principle that if a service does not wholly or mainly provide simple transmission, then it is not an ECS.

Regulation of standalone services

Article 2 (5) should provide that to the extent a multifeature service contains a communications feature or element that (on its particular facts) can properly be considered to be a separable ICS, it is only that separable feature or element that may be considered for regulation. This addition will avoid harmful spillover regulation of non ICS features. Recital 17 and Article 100 should clarify this.

Amendment: Article 2.5 as follows: “...it does not include services which enable interpersonal and interactive communication merely as a minor ancillary feature that is intrinsically linked to another service **which is marketed to end users for another purpose**”

Amendment: Recital 18 to remove phrase “exceptional circumstances” ie “...~~Under exceptional circumstances~~, a service should not be considered as an interpersonal communications service if the interpersonal and interactive facility is a purely ancillary feature to another service...”

Amendment: Recital 18 remove phrase “...but also all types of emails, messaging services, or group chats.”



EXCESSIVE REQUIREMENTS FOR NUMBER-BASED INTERPERSONAL COMMUNICATIONS SERVICE (NB ICS)

Explanation: The proposed Directive largely takes its requirements for number-based ICS from the current framework's obligations for publicly available telephone services (PATS), which are two way services that interconnect to the public switched network. Many of these obligations were developed specifically for services that are provided over a particular network rather than apps that can be used with any internet connection. Additionally, some PATS obligations address consumer issues that do not exist for PSTN calling apps that are one-way, low cost, and not subject to long-term contracts, particularly where consumers typically have multiple such apps on their mobile devices and readily switch from one app to another as desired.

Amendment: The information and service requirements discussed in Article 95 (1), 95 (6), 96-100, and 107 are designed to protect consumers who cannot easily exercise choice by switching their service once they have entered into a contract, and should be limited to PATS and/or internet access and removed for ICS. Similarly, service outage reporting and security audit requirements (Articles 40 and 41) are needlessly redundant and burdensome if applied to both a network and apps that ride over that same network, and should be removed for ICS.

EMERGENCY CALLING

Explanation: Consumers know that when they dial an emergency service on a phone line they can get through. They cannot have the same certainty when using Internet apps and services, because these offerings operate at the content layer and may be wholly dependent on the underlying network operator's transport layer, over which the apps and services have no control. Ignoring that uncertainty in the proposed Directive would carry great risk.

Some voice apps do not have outbound calling capability. Indeed, Gary Machado, executive director of the European Emergency Number Association, has pointed out that "the number of calls coming from OTTs is extremely low." It also is not clear that emergency services call centres will be willing to incur the substantial costs of upgrading their systems to respond to requests from users of, for example, messaging services.

Further, as recognized in Recital 253 for number-based ICS, apps cannot provide geolocation information that they do not have; even if an app is capable of considering location, users may choose not to share location information with the app. And although internet apps like Android Emergency Location Services can help to pinpoint a device, there is not yet a widespread infrastructure for sending and receiving precise geolocation information in connection with apps, much less correlating such information to individual attempts to reach emergency service.

Recommendation: National authorities should not be permitted to impose emergency service requirements on messaging or other ICS unless and until the member state has established for the particular communications service in question a national solution for reliable delivery of emergency traffic with precise geolocation information, and then only when technically feasible and economically viable.

Amendment - Article 102.2

*"Member States, in consultation with national regulatory authorities and, emergency services and providers of electronic communications services, shall ensure that undertakings providing end-users with an electronic number-based interpersonal communications service for originating national calls to a number or numbers in a national telephone numbering plan provide access to emergency services through emergency communications to the most appropriate PSAP, **but only where the PSAP has put in place measures to receive and process such calls in a technically feasible and proportionate manner.** In case of an appreciable threat to effective access to emergency services the obligation for undertakings may be extended to all communications services in accordance with the conditions and procedure set out in Article 59 (1) c **provided this is technically feasible and proportionate.**"*

Recitals 20, 137, 253, 255, and 256, and Articles 95 should also be revised to reflect the above.



INCLUSION OF 'NUMBER-INDEPENDENT INTERPERSONAL COMMUNICATIONS SERVICE' (NI ICS) IN THE CODE

Explanation: There is no consumer expectation that online services will be covered by telecommunications rules. The Commission has not shown any problems that need to be addressed through regulation, or can only be addressed through regulation. **Number Independent Services should be removed from the scope of the Electronic Communications Code.**

Equally, EC proposed to include specific services such as email within telecommunications rules; there is clearly no expectation that an emergency call could be made using email. The reference to email and other specific services (especially messaging services that are categorised as number-independent under the draft Code) should be deleted to ensure that the Code is technologically neutral.

Delete Article 2.7 on 'Number-Independent Interpersonal Communications Service'.

Amend Recital 18: The reference to email and other named services in recital 18 should be removed eg *"Interpersonal communications services are services that enable interpersonal and interactive exchange of information, covering services like traditional voice calls between two individuals but also all types of emails, messaging services, or group chats."*

TECHNICAL FEASIBILITY AND ECONOMIC PROPORTIONALITY OF REQUIREMENTS FOR NUMBER-INDEPENDENT INTERPERSONAL COMMUNICATIONS SERVICES

A number of measures proposed for NI ICS are proposed without adequate regard for their technical feasibility or proportionality for service providers or public authorities. A number of recitals and articles should be amended to make clear that they could only apply upon proper feasibility and proportionality studies being carried out. Many providers of these services are very small companies and a proportionality test is vital to preserve open, competitive and innovative markets.

To implement the proportionality principle and to avoid eliminating desired innovative services from the European market, requirements imposed under the Directive should be technically and economically feasible to implement. This rule is reflected in many aspects of the proposal.

For instance, Recitals 157 and 176 and Articles 59 (3) and 71 (2) require consideration of technical feasibility before imposing access and other requirements on ECS network operators;

Recital 228 and Articles 87 (6) and 91 (1) make access to numbering resources subject to technical and economic feasibility;

Recitals 253 and 256 and Article 95 (2) recognise the possibility of "a lack of technical feasibility" for number based ICS and oblige such services to inform users about "any constraints on access to emergency services and/or caller location information due to a lack of technical feasibility";

Article 99 (5) requires consideration of technical feasibility in establishing number porting requirements; and

Article 107 (1) requires consideration of technical feasibility and economic viability before requiring additional facilities with respect to internet access services and number based ICS.

Yet this common sense limitation is not uniformly applied to number independent ICS, which have different capabilities and architecture from other covered services.

Recommendation: Consistent with the proposal's approach to other communications services, national authorities considering whether to impose requirements on number-independent ICS, including interoperability under Article 59 (1) (c), should be required to consider the technical feasibility and economic viability of any obligations, as well as whether the obligations would address a clear, identifiable harm. This would include consideration whether a requirement, even if otherwise feasible and justified, would be unreasonably burdensome if



applied to small providers (as defined by number of users or revenue). To promote administrative efficiency as well as consistency across member states, BEREC should publish guidelines to assist national administrations in assessing the particular technical questions that are likely to come before them under these provisions. There should be sufficient consultation with industry, particularly in evaluating questions of technical feasibility from a practical and financial perspective. Recital 18 should reflect these conditions.

INTEROPERABILITY REQUIREMENTS

Interoperability is one possible tool for promoting consumers' convenience and competition. However, mandatory interoperability can result in a slowing of innovation if all services must adopt the same technologies at the same time. In a rapidly evolving market, such as that for online services, requiring interoperability could slow innovation for example in introducing features such as payments: a key feature of the 'WeChat' platform. It could also stifle competition by picking winners and losers. The European Commission has shown no market problem which might require the introduction of interoperability. It is also important to recognise that interoperability already exists at a device level. The Commission has not put forward any cogent evidence as to why interoperability at a service level might be required and if so, how this could be achieved in a way that recognises the historical benefits of policies that minimize internet regulation; the fundamental principle of regulatory forbearance; and the potentially heavy economic and social costs of overregulation.

Recommendation: Article 59 1(c) should be deleted. If it is not deleted, it should only be used following i) extensive objective analysis and identification of a clearly defined problem that can only be solved by regulation and ii) attempts to work with market actors to resolve any demonstrated problems. Any solution should be technically feasible and proportionate.

Amendment suggestion 1 "~~(c) in justified cases, obligations on providers of number independent interpersonal communications services to make their services interoperable, namely where access to emergency services or end-to-end connectivity between end-users is endangered due to a lack of interoperability between interpersonal communications services~~", or

REPORTING OBLIGATIONS

Where regulatory reporting obligations exist they should be same for each regulator, in a commonly understood format and proportionate. For online services that operate across the EU having 28 sets of data to provide would be costly, disproportionate and unnecessary.

Any data that is collected should be treated as strictly confidential and must not be shared between regulators. Requests for data should only be made when strictly necessary and should be proportionate.

ENCRYPTION AND CONVEYANCE OF SIGNALS

The Code should be clear that the use of encryption or VPNs does not mean that a company is engaged in the conveyance of signals. This should be made explicit in the recitals.

GIGABIT AMBITIONS

The European Commission is right to aim for high speed networks to be available to as many people as possible as soon as possible. To achieve this the Code should:



**Computer & Communications
Industry Association**
Tech Advocacy Since 1972

- Be strictly technology neutral - currently the proposal describes fibre networks in practice. Space needs to be left to companies to build networks using fibre, copper, cable, and wireless technologies depending on geography, population density and passive infrastructure.
- Be demand driven - demand for and use of high bandwidth applications and services is what makes the investment case for next generation networks. Without demand we do not need high capacity networks. Some consumers will prefer the convenience of wireless services; some may have specialist needs requiring a high capacity fixed network.

REGULATION OF NETWORKS

Competing provision will benefit consumers and stimulate innovation by providers. The significant market power framework should be maintained as it has been successful in stimulating competition. Weakening this would be detrimental, as would moving to a system of oligopoly regulation would grant considerably more flexibility to NRAs thus fragmenting the single market.

UNIVERSAL SERVICE OBLIGATION

The European Commission is right to see this as a safety net for underserved regions or consumers. The benefits of Broadband USO will ultimately help the whole economy/society so any funding should be tax-based.

CROSS-BORDER BUSINESS SERVICE PROVISION

The provision of cross border telecoms and IT service to large companies is important for making sure Europe's enterprises have access to the best services at the lowest cost. Achieving this requires more effective and consistent implementation of existing rules to ensure non discrimination. The Code is positive in requiring BEREC to look further into this.

About CCIA Europe

CCIA is an international not-for-profit membership organization dedicated to innovation and enhancing society's access to information and communications. CCIA promotes open markets, open systems, open networks and full, fair and open competition in the computer, telecommunications and Internet industries.