Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) (Text with EEA relevance)

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(Recast)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[(1)],

Having regard to the opinion of the Committee of the Regions[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) Directives 2002/19/EC[(4)], 2002/20/EC[(5)], 2002/21/EC[(6)] and 2002/22/EC[(7)] of the European Parliament and of the Council have been substantially amended. Since further amendments are to be made, those Directives should be recast in the interests of clarity.

(2) The functioning of the five Directives which are part of the existing regulatory framework for electronic communications networks and services, namely Directives 2002/19/EC, 2002/20/EC, 2002/21/EC and 2002/22/EC, and Directive 2002/58/EC of the European Parliament and of the Council[(8)], is subject to periodic review by the Commission, with a view, in particular, to determining the need for modification in light of technological and market developments.

(3) In its communication or 6 May 2015 setting out a Digital Single Market Strategy for Europe, the Commission stated that its review of the telecommunications framework would focus on measures that aim to provide incentives for investment in high-speed broadband networks, bring a more consistent internal market approach to radio spectrum policy and management, deliver conditions for a true internal market by tackling regulatory fragmentation, ensure effective protection of consumers, a level playing field for all market players and consistent application of the rules, as well as provide a more effective regulatory institutional framework.

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(4) This Directive is part of a 'Regulatory Fitness' (REFIT) exercise, the scope of which includes four Directives, namely 2002/19/EC, 2002/20/EC, 2002/21/EC and 2002/22/EC, and Regulation (EC) No 1211/2009 of the European Parliament and of the Council[(9)]. Each of those Directives contains measures applicable to providers of electronic communications networks and of electronic communications services, consistently with the regulatory history of the sector under which undertakings were vertically integrated, namely, active in both the provision of networks and of services. The review offers an occasion to recast the four Directives in order to simplify the current structure with a view to reinforcing its consistency and accessibility in relation to the REFIT objective. It also offers the possibility to adapt the structure to the new market reality, where the provision of communications services is no longer necessarily bundled to the provision of a network. As provided in the Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts[(10)], recasting consists in the adoption of a new legal act which incorporates in a single text both the substantive amendments which it makes to an earlier act and the unchanged provisions of that act. The proposal for recasting deals with the substantive amendments which it makes to an earlier act, and on a secondary level, includes the codification of the unchanged provisions of the earlier act with those substantive amendments.

(5) This Directive creates a legal framework to ensure freedom to provide electronic communications networks and services, subject only to the conditions laid down in this Directive and to any restrictions in accordance with Article 52(1) of the Treaty on the Functioning of the European Union (TFEU), in particular measures regarding public policy, public security and public health, and consistent with Article 52(1) of the Charter of Fundamental Rights of the European Union (the 'Charter').

(6) This Directive is without prejudice to the possibility for each Member State to take the necessary measures to ensure the protection of its essential security interests, to safeguard public policy and public security, and to permit the investigation, detection and prosecution of criminal offences, taking into account that any limitation to the exercise of the rights and freedoms recognised by the Charter, in particular in Articles 7, 8 and 11 thereof, such as limitations regarding the processing of data, are to be provided for by law, respect the essence of those rights and freedoms and be subject to the principle of proportionality, in accordance with Article 52(1) of the Charter.

(7) The convergence of the telecommunications, media and information technology sectors means that all electronic communications networks and services should be covered to the extent possible by a single European electronic communications code established by means of a single Directive, with the exception of matters better dealt with through directly applicable rules established by means of regulations. It is necessary to separate the regulation of electronic communications networks and services from the regulation of content. Therefore, this Directive does not cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain information society services, and is without prejudice to measures taken at Union or national level

in respect of such services, in accordance with Union law, in order to promote cultural and linguistic diversity and to ensure the defence of media pluralism. The content of television programmes is covered by Directive 2010/13/EU of the European Parliament and of the Council[(11)]. The regulation of audiovisual policy and content aims at achieving general interest objectives, such as freedom of expression, media pluralism, impartiality, cultural and linguistic diversity, social inclusion, consumer protection and the protection of minors. The separation between the regulation of electronic communications and the regulation of content does not affect the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection. Within the limits of their competences, competent authorities should contribute to ensuring the implementation of policies aiming to promote those objectives.

(8) This Directive does not affect the application to radio equipment of Directive 2014/53/EU of the European Parliament and of the Council[(12)], but does cover car radio and consumer radio receivers, and consumer digital television equipment.

(9) In order to allow national regulatory and other competent authorities to meet the objectives set out in this Directive, in particular concerning end-to-end interoperability, the scope of the Directive should cover certain aspects of radio equipment as defined in Directive 2014/53/EU and consumer equipment used for digital television, in order to facilitate access for end-users with disabilities. It is important for national regulatory and other competent authorities to encourage network operators and equipment manufacturers to cooperate in order to facilitate access by end-users with disabilities to electronic communications services. The non-exclusive use of radio spectrum for the self-use of radio terminal equipment, although not related to an economic activity, should also be the subject of this Directive in order to ensure a coordinated approach with regard to their authorisation regime.

(10) Certain electronic communications services under this Directive could also fall within the scope of the definition of 'information society service' set out in Article 1 of Directive (EU) 2015/1535 of the European Parliament and of the Council[(13)]. The provisions of that Directive that govern information society services apply to those electronic communications services to the extent that this Directive or other Union legal acts do not contain more specific provisions applicable to electronic communications services. However, electronic communications services such as voice telephony, messaging services and electronic mail services are covered by this Directive. The same undertaking, for example an internet service provider, can offer both an electronic communications service, such as access to the internet, and services not covered by this Directive, such as the provision of web-based and not communications-related content.

(11) The same undertaking, for example a cable operator, can offer both an electronic communications service, such as the conveyance of television signals, and services not covered under this Directive, such as the commercialisation of an offer of sound or television broadcasting content services, and therefore additional obligations can be imposed on such an undertaking in relation to its activity as a content provider or

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distributor, in accordance with provisions other than those of this Directive, without prejudice to the conditions laid in an annex to this Directive.

(12) The regulatory framework should cover the use of radio spectrum by all electronic communications networks, including the emerging self-use of radio spectrum by new types of networks consisting exclusively of autonomous systems of mobile radio equipment that is connected via wireless links without a central management or centralised network operator, and not necessarily within the exercise of any specific economic activity. In the developing 5G wireless communications environment, such networks are likely to develop in particular outside buildings and on the roads, for transport, energy, research and development, eHealth, public protection and disaster relief, the Internet of Things, machine-to-machine and connected cars. As a result, the application by Member States, based on Article 7 of Directive 2014/53/EU, of additional national requirements regarding the putting into service or use of such radio equipment, or both, in relation to the effective and efficient use of radio spectrum and avoidance of harmful interference should reflect the principles of the internal market.

(13) The requirements concerning the capabilities of electronic communications networks are constantly increasing. While in the past the focus was mainly on growing bandwidth available overall and to each individual user, other parameters such as latency, availability and reliability are becoming increasingly important. The current response towards that demand is to bring optical fibre closer and closer to the user, and future 'very high capacity networks' require performance parameters which are equivalent to those that a network based on optical fibre elements at least up to the distribution point at the serving location can deliver. In the case of fixed-line connection, this corresponds to network performance equivalent to that achievable by an optical fibre installation up to a multi-dwelling building, considered to be the serving location. In the case of wireless connection, this corresponds to network performance similar to that achievable based on an optical fibre installation up to the base station, considered to be the serving location. Variations in end-users' experience which are due to the different characteristics of the medium by which the network ultimately connects with the network termination point should not be taken into account for the purposes of establishing whether a wireless network could be considered as providing similar network performance. In accordance with the principle of technology neutrality, other technologies and transmission media should not be excluded, where they compare with that baseline scenario in terms of their capabilities. The roll-out of such 'very high capacity networks' is likely to further increase the capabilities of networks and pave the way for the roll-out of future wireless network generations based on enhanced air interfaces and a more densified network architecture.

(14) Definitions need to be adjusted to ensure that they are in line with the principle of technology neutrality and to keep pace with technological development, including new forms of network management such as through software emulation or software-defined networks. Technological and market evolution has brought networks to move to internet protocol (IP) technology, and enabled end-users to choose between a range of competing voice service providers. Therefore, the term 'publicly available telephone service', which is exclusively used in Directive 2002/22/EC and widely

perceived as referring to traditional analogue telephone services, should be replaced by the more current and technological neutral term 'voice communications service'. Conditions for the provision of a service should be separated from the actual definitional elements of a voice communications service, namely, a publicly available electronic communications service for originating and receiving, directly or indirectly, national or national and international calls through a number or numbers in a national or international numbering plan, whether such a service is based on circuit switching or packet switching technology. It is the nature of such a service that it is bidirectional, enabling both parties to communicate. A service which does not fulfil all those conditions, such as for example a 'click-through' application on a customer service website, is not such a service. Voice communications services also include means of communication specifically intended for end-users with disabilities using text relay or total conversation services.

(15) The services used for communications purposes, and the technical means of their delivery, have evolved considerably. End-users increasingly substitute traditional voice telephony, text messages (SMS) and electronic mail conveyance services by functionally equivalent online services such as Voice over IP, messaging services and web-based e-mail services. In order to ensure that end-users and their rights are effectively and equally protected when using functionally equivalent services, a future-oriented definition of electronic communications services should not be purely based on technical parameters but rather build on a functional approach. The scope of necessary regulation should be appropriate to achieve its public interest objectives. While 'conveyance of signals' remains an important parameter for determining the services falling into the scope of this Directive, the definition should cover also other services that enable communication. From an end-user's perspective it is not relevant whether a provider conveys signals itself or whether the communication is delivered via an internet access service. The definition of electronic communications services should therefore contain three types of services which may partly overlap, that is to say internet access services as defined in point (2) of Article 2 of Regulation (EU) 2015/2120 of the European Parliament and of the Council[(14)], interpersonal communications services as defined in this Directive, and services consisting wholly or mainly in the conveyance of signals. The definition of electronic communications service should eliminate ambiguities observed in the implementation of the definition as it existed prior to the adoption of this Directive and allow a calibrated provision-by-provision application of the specific rights and obligations contained in the framework to the different types of services. The processing of personal data by electronic communications services, whether as remuneration or otherwise, should comply with Regulation (EU) 2016/679 of the European Parliament and of the Council[(15)].

(16) In order to fall within the scope of the definition of electronic communications service, a service needs to be provided normally in exchange for remuneration. In the digital economy, market participants increasingly consider information about users as having a monetary value. Electronic communications services are often supplied to the end-user not only for money, but increasingly and in particular for the provision of personal data or other data. The concept of remuneration should therefore encompass situations