Opinion of the European Economic and Social Committee on the proposal for a directive of the European Parliament and of the Council establishing the European electronic communications code (Recast)

(COM(2016) 590 final — 2016/0288 (COD))

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1. **Conclusions and recommendations**

1.1 The EESC endorses the general thinking underlying the Commission's proposal on the European electronic communications code, as well as its timing, the way it has approached the subject and the manner in which it has tackled the codification and horizontal recasting of the four existing directives (Framework Directive, Authorisation Directive, Access Directive and Universal Service Directive), bringing them together in a single directive and simplifying the current structure, aimed at making the legislation more consistent and accessible, in line with the aim of regulatory fitness (REFIT).

1.2 The EESC would in particular highlight the difficulty of recasting the various directives concerned, stressing the excellent legal work carried out the first time, but it would draw attention to the need for the various language versions to be carefully reviewed so as to sort out a few minor problems in the wording.

1.3 It agrees with the main objectives of the proposal, aimed at securing better internet connectivity for everyone and all businesses in the bundle of initiatives designed to make it more attractive for firms to invest in new, high-quality infrastructures throughout the EU, both at local level and beyond national frontiers.

1.4 The EESC does, however, express regret at the decision to leave the directive on privacy out of this move, as it should be a shining example for citizens of the positive action taken by the EU for their benefit. The directive is deprived of one of the most important pillars guaranteeing the main interests of network users. This is therefore one of the weak points of the proposal.

1.5 It also deplores the fact that the Commission has opted for a directive with a variety of harmonisation arrangements, leaving many of the important matters to the Member States to decide upon, doing nothing to prevent market fragmentation, rather than opting for a regulation which would be directly applicable and legislating for a higher level of consumer protection, thus contributing to greater integration in the single market.

1.6 The EESC supports the proposal, highlighting the following aspects:

(a) concern about accessibility of services for 'users with disabilities', as well as the need to 'lay down the […] end-user rights' better, with particular emphasis on the application of EU standards on consumer protection, in particular Directives 93/13/EEC, 97/7/EC and 2011/83/EU;

(b) relevance of the wording of new concepts and definitions, important for clarifying and interpreting the legal framework;

(c) the change to the procedures for analysing the market and codifying current best practice, so as to ensure that access requirements are imposed where and when necessary to offset retail market shortcomings and secure results for the end-user, all the while ensuring competitive outcomes;

(d) facilitating the sharing of the 5G network spectrum and promoting access for end-users to basic WiFi connectivity; shared use of the spectrum, based on general authorisation or individual rights of use, can allow intensive, more efficient exploitation of this scarce resource;

(e) greater independence for national regulatory and other authorities responsible for this area stands out amongst the special guarantees granted in the selection, limitation of mandates, independent management and dismissal of members of the respective management bodies.

1.7 On the other hand, the EESC has serious misgivings and strong doubts about the following points:

(a) some innovation introduced into the 'universal service' provisions which, on the pretext of the declared aim of modernising the regime for this service, in practice involves replacing services and even abolishing a series of requirements such as public payphones, comprehensive directories and directory enquiry services, making the desired outcome redundant;

(b) the definition of functional broadband, since this might be likely to create just an arbitrary list of accessible internet services, unlike a neutral minimum quality link, and may thus in the future give rise to discriminatory practices detrimental to end-users;

(c) reference to social assistance and welfare, i.e. to the national budget through taxes: 'support is provided to low-income or special social needs end-users in view of ensuring affordability of functional internet access and voice communications services at least at a fixed location'. This removes such requirements from the sphere of service providers and enables them to only provide coverage for profitable sectors, which protects their interests and reduces both the scope of universal service and consumer rights; in the same vein, it is public funds which are being called upon to cover the costs of public service, since the possibility of pooling costs, which was previously available, has now been removed;

(d) the express choice of the maximum harmonisation method as regards end-users' rights, at a low level of protection, which ends up curtailing users' rights out of a desire for simplification and runs counter to the stance systematically defended by the Committee;

(e) the removal of some regulatory requirements or a reduction in earlier rights and guarantees on the pretext (not demonstrated) that they are no longer necessary or are covered by general consumer rights. One example thereof is the revocation of national regulators' powers to impose retail price regulation directly on operators with significant market power (SMP) or certain provisions on contracts, transparency, equivalence of access for users with disabilities, directory services and the interoperability of digital television equipment;

(f) shortcomings in the regulation of certain practices reported as unfair in contracts with users, such as upper limits on the length of contracts or termination of contracts, contract renewal in the event of bundled offers, the lack of sanctions for ensuring efficiency of the process of changing supplier for end-users, maintenance of the requirement for compensation by the end-user 'for the pro rata *temporis* value of subsidised equipment bundled with the contract at the moment of the contract conclusion and a pro rata *temporis* reimbursement for any other promotional advantages marked as such at the moment of the contract conclusion';

(g) lastly, this proposal does not respond to the Council's express wish that there be a European code of rights for users of electronic communications services, the aim of which would be to 'have at EU level a simple, user-friendly tool bringing together all the rights of users of electronic communications services in the areas of ICT (information and communications technology) and consumer protection'.

2. **Key elements of the Commission proposal**

2.1 ***Proposal for a directive***

2.1.1 As part of the Digital Single Market (DSM) ([1]) strategy, and given the recent rapid and profound structural changes in the electronic communications market and the arrival of formerly unknown types of market players now competing with traditional telecom operators, combined with the rise in the number and popularity of online content services, a review and update of the regulatory framework for electronic communications is required. This framework dates from 2009 and should be reviewed so that individuals and businesses can seamlessly access and conduct online activities under conditions of fair competition. The main objective set by the Commission in its proposal of 14 September 2016 ([2]) is to ensure better connectivity for all individuals and businesses.

2.1.2 The present proposal is part of a package aimed at making investment in new, high-quality infrastructure throughout the EU — both locally and beyond national borders — more attractive to all businesses. The package also contains a proposal for a regulation on the Body of European Regulators for Electronic Communications (BEREC) and a communication from the Commission on *Connectivity for a competitive Digital Single Market — Towards a European gigabit society*. An action plan to introduce 5G services across the EU from 2018 and a proposal for a regulation to promote internet connectivity in local communities and public spaces (WiFi4EU) are likewise part of the package.

2.1.3 All these instruments pursue the three main strategic connectivity objectives for 2025:

(a) all the main socio-economic drivers should have access to extremely high — gigabit — connectivity;

(b) all European households, rural or urban, should have access to connectivity offering a download speed of at least 100 Mbps, which can be upgraded to Gbps speeds;

(c) all urban areas as well as major roads and railways should have uninterrupted 5G coverage. As an interim target, 5G should be commercially available in at least one major city in each EU Member State by 2020.

2.1.4 The proposal is based on Article 114 of the Treaty on the Functioning of the European Union, aiming to 'achieve the internal market for electronic communications and ensure its functioning'. It opts for a horizontal recasting of the four existing directives (Framework Directive, Authorisation Directive, Access Directive and Universal Service Directive), bringing them together in a single directive and simplifying the current structure, aimed at making the legislation more consistent and accessible, in line with the aim of regulatory fitness (REFIT) and taking the form of a fully-fledged European electronic communications code.

2.1.5 Depending on the areas addressed, the proposal adopts different forms of legislative harmonisation, ranging from full targeted or selective harmonisation, for example where end-user protection rules are concerned, to minimum harmonisation of national regulatory authorities' (NRA) competences at a high level, or maximum harmonisation in spectrum matters.

2.1.6 The proposal was based on wide-ranging public consultation with stakeholders over a 12-week period and on external expert advice from the EP and the Council, together with a number of studies that were examined and reviewed in detail in the impact assessment, and by a high-level expert panel set up under the SMART 2015/0005 study.

([1]) COM(2015) 192 final.
([2]) COM(2016) 590 final.

2.1.7 The Commission's intention with this present proposal is to achieve the following objectives:

(a) increased competition and predictability for investments;

(b) better use of radio-frequencies;

(c) stronger consumer protection, in areas where general consumer protection rules do not adequately address sector-specific needs;

(d) a safer online environment for users and fairer rules for all players.

2.1.8 In short, several of the proposed changes, particularly those concerning spectrum, universal service, access, end-users, numbering and governance policy, aim to introduce clear rules, allow parties to easily understand their rights and obligations, and avoid overregulation and administrative burdens.

2.1.9 The proposed changes include specifically: streamlining and geographic targeting of access regulation; the use (wherever possible) of general authorisation in preference to individual licences for spectrum; fostering secondary markets for spectrum; the removal of redundant universal service obligations such as requirements to ensure the provision of payphones and physical directories; narrowing of the scope of universal service; clarifying the scope of the regulatory framework and the removal of redundant consumer protection obligations where these are already addressed through horizontal legislation or met by the market; harmonisation and clarification of rules and governance of numbering in the machine-to-machine (M2M) context.

2.1.10 The Commission also proposes to strengthen the role of national regulators and BEREC to ensure consistent and predictable application of the rules throughout the Digital Single Market, limiting current fragmentation and inconsistencies with the aim of enhancing the efficient governance of new bodies ([3]).

2.2 *The recast method*

2.2.1 The Commission has gone beyond simple codification, bringing together the content of the different previous directives into a harmonious, coherent text without, however, amending their content, as it does in most cases. Instead, it has used the possibility granted to it under the Interinstitutional Agreement signed on 28 November 2001 ([4]) to make deep and substantial changes ('substantive amendments') to the current regime, in tandem with the horizontal merger of several previous acts into a single legislative act.

2.2.2 When carrying out any legislative simplification, codification or substantive amendment of the legal content of a legislative act, 'The Community's normal legislative process shall be complied with in full' (Article 5 of the Agreement). More specifically, it must be referred to the EESC for an opinion, and the recast proposal must comply with a series of criteria and rules clearly set out in Articles 6 and 7 of the Agreement.

3. **General comments**

3.1 *Aspects not covered in the present opinion*

3.1.1 On account of both the limits on the length of its opinions and the nature of the proposal itself, the EESC does not consider that it should comment again on content carried over unchanged from previous legislative acts into the present proposal, except insofar as this is absolutely necessary for understanding one or another of the points addressed.

3.1.2 The EESC has commented in detail in previous opinions on all such content and would simply confirm its positions in this regard.

3.1.3 Neither will it comment in detail in the present opinion on aspects concerning the structure and functioning of BEREC, which are to be analysed in detail in the opinion being drawn up in parallel with the present one.

([3]) COM(2016) 591 final.
([4]) OJ C 77, 28.3.2002 p. 1.

3.2 ***Consideration of the general thrust of the proposal***

3.2.1 Firstly, the Commission would congratulate the Commission on the good timing of its initiative, which is fully warranted on the grounds of market developments, technological progress and the legal protection of users of electronic communications users. The legal framework needs to be recast so as ensure that individuals can seamlessly access and conduct online activities and that businesses can develop these activities under conditions of fair competition. It also welcomes the fact that Commission has opted for the recast method, which is a highly appropriate instrument within the general REFIT framework; its only regret is that the Commission makes little use of it.

3.2.2 The EESC acknowledges in particular how the Commission has correctly conducted this difficult recast exercise, complying strictly with the established rules, and regrets only that the Commission has not simultaneously published a 'clean', more readable version, as the EESC has suggested on a number of occasions.

3.2.3 It also agrees in general terms with the new rules introduced in the proposed new directive and the way in which these legal provisions are made compatible with other Community policies: the specific rules in force in the sector, and more particularly the principles of competition law and horizontal consumer protection legislation.

3.2.4 The EESC considers, however, that legal simplicity and certainty would have been increased if, instead of choosing a directive — a choice which is not entirely justified — that is so all-embracing and wide-ranging and leaves so many aspects up to national rules, the option had been for a framework directive to be applied directly, immediately and uniformly in all the Member States, as in fact proposed by the Commission itself, in the form of specific directives for some of the areas covered, entailing different levels of harmonisation depending on market conditions and the nature of the subject matter. The time required for adoption (a minimum of 18 months), transposition (no less than 2 years) and implementation means that the new system cannot come into effect before 2021/2022.

3.2.5 On the other hand, that fact that the proposed directive on privacy (COM(2017 10 final)) published on 10 January 2017 — one of the most important aspects of the package — has been left out, while understandable on grounds of the legislative timetable, inevitably constitutes a weak point in the proposal. The proposal is thus deprived of one of the most important pillars guaranteeing the main interests of network users. The effect of this is to push back steps for bringing current rules into line with what will be the future privacy instrument into the distant future, making transposition and implementation of all the measures more difficult.

3.2.6 The Regulation of the European Parliament and of the Council on roaming on public mobile communications networks within the Union ([5]) and certain aspects of the Communication from the Commission on promoting the shared use of radio spectrum resources in the internal market ([6]), which were worth including in the Code, have also been left out.

3.2.7 Lastly, it is clear that this proposal does not respond to the Council's express wish that there be a European code of rights for users of electronic communications services, the aim of which would be to 'have at EU level a simple, user-friendly tool bringing together all the rights of users of electronic communications services in the areas of ICT (information and communications technology) and consumer protection' ([7]); nor, by the same token, does it take on board the explicit intention set out in the Digital Agenda to 'issue a code of EU online rights by 2011 that summarises existing digital user rights in the EU in a clear and accessible way' ([8]).

4. **Specific comments**

4.1 ***Subject matter and aim***

The EESC welcomes the Commission's emphasis in Article 1 on the issue of the accessibility of services for 'disabled users' as well as on the need to 'lay down […] end-user rights' in a better way. In this regard, the proviso set out in Article 1(4) is of particular importance: the provisions of this directive are to apply without prejudice to Union rules on consumer protection, in particular Directives 93/13/EEC, 97/7/EC and 2011/83/EU, and national rules in conformity with Union law. The EESC has recently issued information reports on these aspects (information reports INT/795 and 796, adopted 15 December 2016).

([5]) COM(2011) 402 final.
([6]) COM(2012) 478 final.
([7]) 3 017th meeting, 31 May 2010.
([8]) COM(2010) 245 final.

4.2 ***Definitions***

Regarding definitions, the EESC emphasises the accuracy of the definitions of new concepts such as 'very high capacity network', 'interpersonal communications service', 'number-based interpersonal communications service', 'number-independent interpersonal communications service', 'security' of networks and services, 'small-area wireless access point', 'radio local area network (RLAN)', 'shared use of radio spectrum', 'harmonised radio spectrum', 'public safety answering point (PSAP)', 'most appropriate PSAP', 'emergency communication' and 'emergency service', which are of relevance to the legal regime.

4.3 ***Objectives***

4.3.1 Where the objectives are concerned, the EESC would draw attention to the important aspect of cooperation between national regulatory authorities and other competent authorities, as well as between the Member States and BEREC for achieving these objectives, although the Committee's preferred 'model' would adopt a different approach, as set out in its opinion on the new status of BEREC.

4.3.2 It is particularly important in this regard to emphasise the re-definition of the obligations of the national regulatory and other competent authorities, as well as those of BEREC, laid down in Article 3(2).

4.3.3 Of similar importance is cooperation between the Member States through the Radio Spectrum Policy Group, established by Commission Decision 2002/622/EC, with each other and with the Commission, and their call, together with the European Parliament and the Council, in support of strategic planning and coordination of radio spectrum policy approaches in the Union.

4.4 ***Aspects of particular interest***

4.4.1 Since it is impossible, within the bounds of the present opinion, to analyse all the provisions in question, the EESC's intention is to concentrate on those provisions it considers to be of greatest relevance to society.

4.4.2 *Regulation of access*

4.4.2.1 The EESC welcomes the fact that rules on access have not been substantially amended and agrees with the Commission's streamlining of procedures and making ubiquitous connectivity and very high capacity (VHC) the core objective of the regulatory framework for the sector, along with the promotion of competition, completion of the internal market and consumer protection.

4.4.2.2 The EESC supports the specific market regulation amendments requiring regulators to identify investment plans and allowing public authorities to seek investors in areas with insufficient coverage. This should increase transparency surrounding network installation plans, provide investors with increased predictability and allow regulators to take greater account of specific geographical features in their market analyses.

4.4.2.3 It agrees with the Commission on the change to market analysis procedures and on the codification of current best practice so as to ensure that access requirements are imposed when and where necessary to offset retail market shortcomings and secure results for the end-user, all the while ensuring competitive outcomes. However the EESC does not find justification for the extension of the 3-year market review period to 5 years.

4.4.2.4 Lastly, the EESC agrees that infrastructure-based competition is one of the most effective ways of providing new or enhanced internet connectivity in areas where population density is such that it can absorb more than one network.

4.4.3 *Spectrum assignment*

4.4.3.1 Although the EU was the first to develop 4G wireless technologies, it is lagging behind in deployment compared to other regions. Since spectrum assignment and management is, in principle, a Member State responsibility, this has generally to be identified as the reason for market fragmentation, with a direct negative impact on wireless network coverage and penetration across Europe. If this situation persists, it will jeopardise the successful introduction of 5G services in Europe and the deployment of new, innovative services.

4.4.3.2 This is why the proposal sets out to impose a set of common rules such as, for example, a minimum licence duration to guarantee a return on investment, more scope for spectrum trading, consistency and objectivity of regulatory measures (reservations, arrangements for invitations to tender, price caps and spectrum blocks, and exceptional spectrum reservations) and peer review between national regulators to ensure the consistency of assignment practices under BEREC. On the other hand, operators must undertake to use the spectrum assigned to them effectively.

4.4.3.3 The EESC agrees with this new approach in that, in addition to speeding up the spectrum designation procedures for electronic communications, with clear deadlines for when spectrum is to be made available on the market, investors in next-generation wireless broadband enjoy greater predictability and consistency regarding future licensing models and preconditions for the allocation or renewal of national spectrum rights.

4.4.3.4 Lastly, the EESC welcomes the simplification of the steps to share the 5G network spectrum, and the moves to promote end-user access to basic WiFi connectivity. Shared use of the spectrum, based on general authorisation or individual rights of use, can effectively allow intensive, more efficient use of this scarce resource. Under the general authorisation system, users of radio frequency spectrum will enjoy better regulatory protection against harmful interference, so that barriers to the roll-out of wireless access points will be removed and end-user access to shared wireless internet connections made easier.

4.4.4 *Redefining the universal service regime*

4.4.4.1 The 'renewed' universal service regime and the amendments to services and the rules protecting end-users are the aspects about which the EESC has the greatest reservations. Universal service was also one of the aspects most criticised by the EESC in previous opinions.

4.4.4.2 Extension of this service to other services, such as mobile services and broadband internet access, have long been a priority. On the pretext of the declared aim of modernising the framework for this service, in practice the proposal involves replacing services and even removing a series of requirements such as public payphones, comprehensive directories and directory enquiry services from its scope, making the desired outcome redundant. The EESC is not sure that the sector will prove sufficiently mature to ensure that these services will continue to be provided in the absence of universal service requirements. Article 82 allows the Member States to 'continue to ensure the availability or affordability of other services', however this not only depends on 'the need for such services [to be] duly demonstrated in the light of national circumstances', but also opens the door for such services to be quickly abandoned due to the burdens they involve.

4.4.4.3 The EESC would question the definition of functional broadband, since this might be likely to create just an arbitrary list of accessible internet services, as opposed to a neutral minimum quality link, and may thus in future give rise to discriminatory practices detrimental to end-users.

4.4.4.4 Article 79 does indeed require Member States to ensure that 'all end-users in their territory have access at an affordable price, in the light of specific national conditions, to available functional internet access and voice communications services at the quality specified in their territory, including the underlying connection, at least at a fixed location', and they may even 'require undertakings which provide such services' to 'offer … tariff options or packages different from those provided under normal commercial conditions' to 'low-income or special social needs end-users', applying 'common tariffs, including geographic averaging, throughout the territory'.

Article 80(4) and (5), however, leaves it to social services — in other words, national budgets funded by taxes — to ensure that 'support is provided to low-income or special social needs end-users' or to 'end-users with disabilities' 'in view of ensuring affordability of functional internet access and voice communications at least at a fixed location', effectively relieving service suppliers of these obligations.

4.4.4.5 Moreover, the entire system for financing the public service where the regulatory authorities find that an undertaking is subject to an unfair burden has been limited to the introduction of 'a mechanism to compensate that undertaking for the determined net costs under transparent conditions from public funds'. Yet again, the national budget, through taxation, is required to cover public service costs, particularly in the absence of providers in the non-profitable areas of the public service, since the option of sharing the costs, previously set out in Article 13(b) of the relevant revoked directive, (which reads '(b) to share the net cost of universal service obligations between providers of electronic communications networks and services'), has been removed.

4.4.5 *End-user rights*

4.4.5.1 Where the EESC has greater difficulty, however, is with the new title on end-user rights, since the general thrust of its opinions on this subject is not reflected in the solutions adopted, starting with the choice of maximum harmonisation under Article 94. The EESC has always argued that where consumer rights are concerned, minimum harmonisation directives or regulations establishing the highest level of protection for consumers should be adopted.

4.4.5.2 It deems the removal of some of the regulatory requirements or a reduction in earlier rights and guarantees, on the pretext (not demonstrated) that they are no longer necessary or are covered by general consumer rights, to be unacceptable. One example thereof is the revocation of national regulators' powers to impose retail price regulation directly on operators with SMP or certain provisions on contracts, transparency, directory services and the interoperability of analogue television equipment (Articles 95 to 98 and 103 to 105).

4.4.5.3 Neither has the Commission given any acknowledgement that certain situations that have been reported as unfair in contracts with users need better regulation, such as upper limits on the length of contracts or termination of contracts, contract renewal in the event of bundled offers, the lack of sanctions for ensuring efficiency of the process of changing supplier for end-users, and maintenance of the requirement for compensation by the end-user 'for the pro rata *temporis* value of subsidised equipment bundled with the contract at the moment of the contract conclusion and a pro rata *temporis* reimbursement for any other promotional advantages marked as such at the moment of the contract conclusion'.

4.4.5.4 The EESC however welcomes a number of new provisions such as better readability of contracts through a contract summarising essential simplified information, the provision of consumption control tools, price and quality tools and a ban on discrimination based on nationality or country of residence.

4.5 ***Regulatory and other competent authorities***

4.5.1 The rewording of Article 5(1) is particularly significant with regard to the tasks of regulatory and other competent authorities.

4.5.2 The provisions of Articles 7 to 9 concerning the independence of national regulatory and other competent authorities stand out on account of the special guarantees granted in the selection of the members of the respective management bodies, the limit on the duration of their mandates, and the independent management and dismissal of these members.

4.6 ***Out-of-court dispute resolution***

4.6.1 Particular attention is drawn to the proposal's concern to establish transparent, non-discriminatory, fast, fair, simple and inexpensive out-of-court procedures for disputes that may arise between consumers and undertakings providing electronic communications networks and/or services, or publicly available electronic communications services other than number-independent interpersonal communications services, relating to the contractual conditions and/or performance of contracts for the supply of those networks and/or services.

4.6.2 The option given to the Member States to extend access to such procedures to other end-users, in particular micro and small enterprises, is even more important.

4.6.3 However, in the event of cross-border disputes, the proposal provides a solution which is undermined by the lack of EU-level mechanisms for disputes of this type, enmeshing itself in a complex procedural web offering doubtful outcomes in terms of both effectiveness and a real guarantee of a fair balancing of interests in good time, eventually terminating in court procedures.

Brussels, 26 January 2017.

The President
of the European Economic and Social Committee
Georges DASSIS