ETNO POSITION PAPER ON THE EUROPEAN ELECTRONIC COMMUNICATIONS CODE

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European Telecommunications Network Operators' Association

Regulation for the Gigabit Society

The European Commission has set a broad and ambitious vision for the EU Digital Single Market and its electronic communications sector. The vision is aimed at creating a **European Gigabit Society,** and at turning the EU into a global leader in the development of **5G**. This is expected to create a new wave of smart jobs, fresh opportunities for all citizens and innovation-driven growth.

ETNO and its members fully embrace this ambition. We commend the leadership of President Juncker, Vice-President Ansip and Commissioner Oettinger for having put this vision high at the top of the EU agenda.

At ETNO, we do not only support this vision. We want to be practical on how to make it happen.

Innovation in fields such as 5G, connected and automated driving, Internet of Things and many more will be crucial to enhance Europe's competitiveness, job creation and growth. This step forward will not be possible without **strong, reliable, powerful broadband networks** and the development of innovative digital services.

To get there, and deliver even better outcomes for consumers and businesses, Europe needs to accelerate its efforts and put in place more investment-friendly and pro-innovation policies. **At current investment levels, we will not reach the current Digital Agenda targets and the new Gigabit Society objectives in time. We need to step up, embracing all possible technologies and investment models that can lead us there,** as shown in two recent reports by the Boston Consulting Group, commissioned by ETNO[1].

We need to make sure that all EU citizens, in all areas, can benefit from the Gigabit Society in the shortest timeframe possible.

The new European Electronic Communications Code (EECC) proposed by the European Commission is a key piece of legislation. It will contribute to determine whether Europe will be able to achieve its vision and empower its digital economy and society. **For this reason, it is crucial that Europe gets it right.**

In this paper, **we provide our views on the main provisions of the Code** and we make practical suggestions on how the Code can be strengthened to best achieve its underlying goals and the Gigabit Society vision.

We believe that the Code offers a good starting point for the debate, but it still needs substantial improvement in the legislative process.

As primary investors in the Gigabit Society, ETNO and its members are naturally engaged in its achievement. For this, we will be taking active part in the legislative process and look forward to discussing with policymakers and all stakeholders on the best way ahead.

> **"We need to make sure that all EU citizens, in all areas, can benefit from the Gigabit Society in the shortest timeframe possible."**

[1] *"Five Priorities for Achieving Europe's Digital Single Market"* (October 2015), available here; and *"Building the Gigabit Society: An Inclusive Path Toward Its Realization"* (November 2016), available here.

I. NETWORK ACCESS

EUROPE NEEDS POSITIVE REFORM TO:

- Provide better incentives for private investments in very high-speed connectivity across Europe. Regulation should be tailored to incentivise all possible technologies aimed at achieving this goal, as well as all types of investment models, including individual investments;
- Make the benefits of enhanced connectivity available to as many EU citizens as possible, in the shortest possible timeframe;
- Encourage infrastructure competition for the market, incentivising players to invest and innovate to outperform competitors and provide the best quality services to their consumers;
- Avoid regulatory decisions that distort competition and hamper the business case for private investments, notably cost-based price regulation;
- Simplify the current market analysis process, providing increased regulatory certainty and fostering infrastructure competition;
- Reduce the regulatory burden by modernising regulation, adapting it to highly dynamic and increasingly competitive markets;
- Take account of local circumstances, avoiding one-size-fits-all models which risk not being applicable in different geographic markets;
- Avoid further increasing the regulatory burden, which is already very onerous for operators.

Introduction

Modernising the current framework for fixed access is key to foster very high-speed connectivity and improve the competitiveness of the EU digital economy.

In promoting very high-speed connectivity, which is a very desirable objective, the Code should not create any bias towards specific technologies or investment models. All possible investment models, including investment of individual operators (and not only co-investment), and all technologies capable of providing very high-speed connectivity should be incentivized. We believe that there is substantial room for improvement in this respect, as the Code seems not to be adequately technology neutral as it stands.

The promotion of different technologies, such as 5G, G.Fast, Hybrid Fiber Coax (HFC) and FTTx, will make sure that operators have all the tools to best serve their customers and cater the differences in demands, willingness to pay, and local conditions. The promotion of different investment models will make sure that as many citizens as possible, in the fastest possible timeframe, will benefit from the Gigabit Society.

The new Code rightly recognizes that infrastructure competition, rather than service-based competition, is the best driver of network investments and innovation. This should be strengthened in the regulatory provisions of the Code, simplifying the market analysis procedure, avoiding burdensome regulation, particularly when effective retail competition is in place, and incentivizing operators to invest and innovate rather than adopting “wait and see” strategies.

The Code could be substantially strengthened to achieve the above-mentioned goals. Furthermore, provisions which could create uncertainty, distort competition and hamper market incentives should be corrected.

Market and technological realities require an overhaul of the EU framework for fixed access

Since the current framework was devised, around 20 years ago – a very long time in the fast-moving digital sector – many market and technological trends have substantially reshaped the sector. As a consequence, there is urgent need to deeply modernize the framework for network access.

The main trends are as follows:

1) Need for more investment: the growing demand for bandwidth-hungry services, together with the continued migration from PSTN to all-IP technology, requires significant investment in high-speed electronic communications networks across Europe. The Commission has identified an investment gap of around 90 billion euros to reach the old Digital Agenda targets at the current investment levels, and a gap of 155 billion to reach the Gigabit Society targets. If we consider the ultimate goal of connecting every EU citizen to 5G-ready networks, the investment challenge is even bigger[2].

2) Networks are evolving: the emergence of new industry trends such as the Internet of Things and the digitization of the industry also requires substantial changes in both the performance and the characteristics of NGA networks, which in turn requires massive investments;

3) Infrastructure competition: infrastructure competition has gained increasing relevance across several markets. Infrastructure competition, rather than service-based competition, is clearly the main driver of investments and innovation in networks, in addition to consumer demand;

4) Fibre rollout: the existing fixed electronic communications networks will increasingly require significant additional investments in fibre to partly or fully replace copper, in order to remain competitive;

5) New forms of competition: in several Member States, local/regional fibre deployment by players such as utility companies and municipalities is leading to increasingly competitive and heterogeneous market structures in high-speed broadband access, also with the potential to significantly distort competition in competitive areas;

6) The role of cable operators: in many countries, cable operators have been rising as strong, largely unregulated competitors in both fixed broadband and, increasingly, wireless broadband markets;

7) Convergence: a further tendency towards the convergence of networks and services is under way, with increasing complementarity between fixed and mobile, and also increasing substitutability between services (such as voice over mobile and fixed);

8) New players: a key trend of the past years has been the emergence of new market players (such as OTTs) offering a wide variety of applications and services over the internet in competition with traditional telecom operators.

The EECC is geared towards the right objectives; however, actual provisions should be improved to foster better competition, more investment and more innovation

ETNO welcomes the intention of the Commission to reform the access framework in order to promote very high-speed connectivity and infrastructure competition. **Nevertheless, we believe that many actual provisions of the Code are not well-suited for this goal.** Several provisions constitute a positive first step and should be strengthened. However, it is vital that the framework remains technology-neutral and that all investment models are incentivised, including individual investments, which account for the bulk of network investment in the EU.

In this respect, we see substantial scope for improvement. Also, provisions which could distort competition and investment incentives, adding to the regulatory burden, should be revised.

Positive elements, to be strengthened:

The addition of the **"connectivity objective"** to the list of the objectives of the regulatory framework is clearly welcome **(art. 3.2)**. If Europe wants to reap the benefits of the Gigabit Society, the Code should create an environment where investments in very high-speed connectivity are incentivised. We believe that the objective could be further strengthened. Another positive addition is the reference to **infrastructure competition** as a key driver of investment in high-speed connectivity.

Some positive signals can also be found in the articles related to the **market analysis procedure (art. 65)**. A first one is the emphasis on a more granular analysis of markets (through **geographic segmentation**) to be performed by NRAs. A second one is the stronger focus **on retail competition,** and lack thereof as the principle to determine when ex-ante regulatory intervention should be triggered. A third one is the need for regulators to look at **commercial agreements** between operators at wholesale level when assessing the competitiveness of markets. However, the Code does not yet provide the degree of regulatory certainty that is needed. In order to be effective, **these measures should all be strengthened** during the legislative process.

Regarding the provision of **more lengthy market analysis cycles,** our view is mixed. This proposal could on the one hand prove to be a factor of stability, provided that, if and when market conditions change and markets become competitive, ex-ante regulation can be lifted even before the end of the cycle. Otherwise, it might risk "locking-in" markets susceptible of becoming competitive. Therefore, a mechanism providing long-term guarantees on investments and adequate flexibility in case of market changes should be foreseen.

[2] As shown in the Boston Consulting Group Report "Building the Gigabit Society: An Inclusive Path Toward Its Realization" (November 2016), available here.

Provisions that need revision:

One of the main novelties of the Code is the introduction of a definition of Very High-Capacity (VHC) networks **(art. 2 and recital 13)**. Such networks, due to the high risk profiles associated with their deployment, benefit of regulatory incentives within certain provisions of the Code (e.g. co-investment). We believe that, as it stands, **the definition of VHC networks is not fully future-oriented and technology-neutral,** as it could exclude important developments associated to such technologies as for example G.Fast, high-speed wireless access networks and HFC. A definition which is not enough technology-inclusive could risk delaying the roll out of promising technologies which could bring the Gigabit Society to more citizens in the most efficient way. An improved definition should clearly encompass, next to FTTH, cable, G.Fast, other FTTC and FTTdp solutions, and any other high-performing technology; a future-oriented technology mix that would provide a step change in connectivity to end-users and help achieve the 2025 connectivity goals. ETNO firmly believes that technology choices do not pertain to regulators, but to market players who, in a competitive environment, choose what is best to cater consumers' demand.

Another new provision is the one about **mapping of prospective network investments and a related sanctioning mechanism (art. 20.1, 22 and 29).** As mentioned above, we believe that the mapping of existing networks could be a very welcome exercise if it aims at improving the granularity and precision of the market analysis (geo-segmentation). On the other hand, we have serious concerns with the feasibility and the possible detrimental effects of the mapping of "prospective" network investments. We call for the attention of the co-legislators to the fact that the publication and provision of confidential information on forward-looking network deployment could provide signals to competitors in the market, and therefore distort competition and investment incentives. This should be avoided. To this end, the new notion of "Digital Exclusion Areas" should be removed from the Code, as well as the related sanctioning mechanism, as they could risk hampering competition, distorting the market by pre-determining investment choices, and be extremely burdensome for operators.

Our view on **symmetric obligations (art. 59.2)** depends on the actual interpretation of the rules. Symmetric obligations have had a positive impact in some countries where competition is infrastructure-based (e.g.: France, Portugal and Spain). However, symmetric obligations should not be considered a "one-size-fits-all" for all situations. And, when applicable, they should apply to all operators, irrespective of their business model (wholesale-only or not), and irrespective of the size of their investment projects. Finally, symmetric obligations could be useful in addressing competition issues in relation to non-replicable assets related to small local monopolies, when SMP does not apply. Their use should correspond to specific local circumstances.

The same article introduces **new symmetric obligations on mobile (art. 59.3)** in the form of network-sharing. We believe that these should be removed. Mobile markets have functioned well and have become growingly competitive in the absence of regulation and we see no need to revert this situation and create more uncertainty with the Code.

Another key aspect of the Code is **constituted by the continued reliance on the SMP-based framework for market analysis.** We believe that this system has shown significant shortcomings in the past years and has perpetuated burdensome regulation in the application of the theory of the "ladder of investment", which did not lead to the expected results. ETNO would have rather been in favour of a system which would tailor regulation to solve well-identified competition bottlenecks in the market. A positive addition in the Code is the acknowledgement of the importance of commercial voluntary wholesale offers as a means to scale back the need for regulatory intervention.

Regarding the definition and possible regulation of **"transnational markets" (art. 63 and 64)**, we do not see the need to add further provisions to what is already possible today. The identification of transnational demand and transnational markets should happen within the normal framework for market analysis. The new process set up in the Code could ultimately prove to be extremely complex and lead to additional layers of regulation to what is already provided at national/local level.

Mixed view on remedies (art. 66-78):

Finally, regarding remedies, we see **both positive and negative elements,** which should be carefully assessed.

On the positive side, the Code strengthens the reference to the **proportionality** principle and mentions that remedies should be clearly tailored to address the specific competition problem identified at the retail level. This is key to ensure targeted and non-excessive regulatory intervention.

Moreover, the text introduces the need for NRAs to perform a **cost-benefit analysis** before imposing a specific remedy.

Furthermore, we find positive the fact that the Code mentions that the existence of **wholesale commercial agreements** and/or co-investment should be taken into account by NRAs before deciding on the need for regulatory intervention and whether to impose remedies.

With regard to **co-investment models,** we clearly see them as a positive evolution and as a model to be used in areas where the business case for individual investments is more uncertain. However, as already mentioned, the same incentives should apply to all investment models, regardless of their form, and including risky investments by individual operators. All investment models (individual investments and co-investments) can help achieve the very high-speed connectivity objectives of the Gigabit Society. Therefore, they should all be treated in a similar manner.

Finally, a positive element is represented by the recognition of the **pricing flexibility principle** as key to better reward operators investing in networks. However, the Code should be strengthened in this respect. Pricing flexibility should apply **by default,** and cost-oriented approaches should become an exception. As **cost-orientation is at odds with the need to promote very high-speed connectivity,** VHC networks shall no longer be subject to cost-orientation and, where needed, only subject to non-discrimination and economic replicability standards insofar as they are subject to SMP regulation.

On the negative side, we believe that the Code provides an **expansion of NRAs powers** which could lead

to uncertainty as to which remedies will be applied to specific circumstances. We also see higher risk of application of multiple remedies, leading to **additional regulatory burden.**

To this end, the Code should be revised by clearly indicating that **one access layer is sufficient,** and there should not be multiplication of remedies. Otherwise, the welcomed objective of simplification that the Commission has set would be neutralised and more regulation would be created in return.

A provision perceived as negative is constituted by the additional measures regarding the **transparency of reference offers.** Operators have developed established practices and questioning them now could lead to undue costs and uncertainties.

The obligations on **accounting separation** constitute a legacy of the current framework, whose use and effectiveness are questionable. The new Code provides an opportunity to remove them.

When it comes to **non-discrimination,** the Code appears biased towards "Equivalence of Input" as the way to implement it. This is not in line with the existing Recommendation on Costing Methodologies and Non Discrimination. This refers to a broader definition of "Equivalence of access", which should be maintained along with the strict application of the proportionality test.

As far as **non-discrimination** is concerned, ETNO considers that there is no reason to introduce a specific lighter regime for certain kinds of operators acting on the market, notably for wholesale-only operators, as it would pave the way for distortions of competition.

Finally, regarding the approach followed by the EU Commission on **termination rates,** ETNO is concerned with the proposal to rely on a costing methodology (so-called "pure LRIC") that does not allow for recovery of common and joint costs **(art. 73.1). The Code should ensure proper cost recovery in all Member States.** Imbalances in current payment flows could be addressed by applying reciprocal rates. ETNO also has concerns with the proposal to define from the outset specific maximum termination rates in a legislative text.

The way forward: strengthen positive changes and remove provisions which hamper investments and distort competition

With regard to network access, the Code has the potential to be significantly improved in order to better serve its intended objectives of very high-speed connectivity, stronger infrastructure competition, inclusive and ubiquitous coverage, and more targeted regulation – all objectives to which ETNO members fully subscribe.

All technologies capable of very high-speed connectivity and all investment models leading to its deployment should be incentivised in an equal manner.

Outdated rules which do not correspond to market reality any longer should be removed, and proliferation of remedies to be imposed on SMP operators should be avoided to decrease the regulatory burden and increase certainty.

New provisions which create complexity and uncertainty, rather than provide improvements, should be deeply revised or removed.

Finally, provisions which are in line with the welcomed objectives of simplification, competition for investment and more investment certainty should be further strengthened.

> **"All technologies capable of every very-high speed connectivity and all investment models leading to its deployment should be incentivised in an equal manner."**

II. SPECTRUM

EUROPE NEEDS POSITIVE REFORM TO:

- Ensure more timely, more efficient and better coordinated spectrum allocation across Europe, thereby fostering innovation, competition for investment and market certainty;
- Guarantee more certainty regarding licensing duration and conditions;
- Avoid burdening licenses with overly onerous conditions, which could discourage investment and distort competition;
- Ultimately put Europe back to the driving seat in the development of mobile broadband and 5G.

Introduction

Spectrum is a scarce resource that is essential for many vital communications services. It has rightly been dubbed as the "lifeblood of the digital economy".

It is widely shared among end-users, industry and policymakers that the EU should work towards the creation of a more forward-looking and investment-friendly framework for spectrum management. This is crucial if the EU wants to achieve its ambition in the field of connectivity, Internet of Things, and 5G.

Spectrum allocation and assignment remain a crucial regulatory factor in determining the market structure and hence the performance of the wireless broadband sector in Europe. Few would argue that the way in which Europe manages spectrum today cannot be improved upon. We are faced with late and subscale 4G deployment and with vast differences in allocation policies between Member States with regard to any pre-defined number of networks per country. Significant changes in EU spectrum management are necessary and the Code provides a unique opportunity to do that.

ETNO generally welcomes the proposals in the Code regarding spectrum policy. As detailed in the sections below, several provisions could lead the market to the right direction, such as for instance the provision on longer minimum duration of licenses and the scope for better coordination and harmonisation of spectrum regulation. However, **on several other aspects of the draft proposals, there is still room for further improvement** in the legislative process. Some of them could pave the way for distortion of competition and more uncertainty for the investment case.

Market and technological realities require an overhaul of EU spectrum management

When looking at the European framework for spectrum management, the following should be taken into consideration:

1) Skyrocketing mobile data traffic: the volume of mobile data traffic in Europe will increase tenfold between 2014 and 2019, from some 600 petabytes to more than 6.000 petabytes per month. Every European country faces a big gap between current spectrum allocations for mobile use and the amount of spectrum required in 2020 to handle this traffic, according to estimates by the International Telecommunication Union[3]. Spectrum management in Europe should be substantially improved to cope with this trend.

2) Regulatory fragmentation across Europe: the currently applicable regime has contributed to harmonise the technical usage conditions in particular for e-communications networks (ECN) frequency bands. However, the major problem in the EU is regulatory fragmentation regarding spectrum award procedures and licensing conditions. This situation needs to be changed not to further reduce the importance of European players in the global mobile environment.

3) Need for more coordination: there is a clear need to favour and enhance coordination in the assignment conditions of spectrum.

4) Need for more pro-investment and pro-competitive spectrum policy: Europe needs to foster market certainty, such as through the definition of a longer or undetermined duration of the rights of use; the promotion of a more liquid and simplified secondary market for spectrum trading; and minimising conditions that can distort market competition among players/operators.

[3] Source: The Boston Consulting Group, Five Priorities for Achieving Europe's Digital Single Market, October 2015, available here.

The EECC provisions overall go in a positive direction. However, significant room for improvement exists

ETNO overall welcomes the direction of the EECC provisions on spectrum policy. They generally go in the direction of improving the investment climate and fostering a more forward-looking and innovation-friendly framework for spectrum management. Several provisions of the Code in particular could lead the market to the right direction. However, on several others, there is still room for further improvement in the legislative process.

Positive provisions:

A clear positive aspect is constituted by the provisions on **the minimum duration for the rights granted in the harmonised bands (art. 49).** Defining a minimum duration of 25 years is a clear step in the direction of better legal certainty, although ETNO believes that the duration should be further extended to 30 years or even allow for indefinite license terms.

Another positive element is the **extension of the duration of rights for a shorter period of time to achieve in-band harmonisation of expiry dates (art. 50).** The provisions on renewal of rights, up to 5 years prior to expiry based on the holder's request, with parallel review of the fees of spectrum rights, is a step towards the creation of a more investment-friendly environment. It is however to be noted that the conditions defined upon renewal should enhance legal certainty for business planning and investment by offering license holders a right to renew their spectrum usage rights.

ETNO also welcomes the provisions aiming at **easing the spectrum trading and leasing (art. 51),** both making spectrum usage more flexible and supporting self-regulatory measures.

Furthermore, **the provisions on spectrum fees and reserve prices for awarding procedures** introduce a **control mechanism** that could help avoiding excessive spectrum fees which would support the industry potential to invest in infrastructure and innovation. These policy changes, however, could significantly be strengthened in the legislative process **(art. 35 and 42).**

Also, there are positive provisions related to **deployment of radio local area networks and small-area wireless access points** aiming at giving greater emphasis to the investment environment for hyper-dense 5G networks. However, ETNO believes that under the current definition "small area wireless access points" might be interpreted as either RLAN operating under license-exempt conditions or small cells operating under exclusive usage rights regime or a combination of both regimes. ETNO is of view that the definition should be stricter as to keep the distinction between RLAN and small cells (under "small areas wireless access points"), and avoid creating confusion between the two categories and the related provisions in the Code **(art. 2 and related recitals).** Moreover, on the RLAN regulation ETNO has some concerns in relation to opening up RLAN at the edge of the fixed network to third parties and notes that such regulation would normally be considered in the case where SMP in retail broadband were to be found.

Finally, ETNO welcomes a **consistent and predictable approach to electromagnetic field strength** to avoid onerous obligations imposed by local authorities in some Member States **(art. 45).** This is of even higher relevance in view of fast rollout of 5G networks and the take-up of its services.

Regarding the review of EU spectrum governance, without commenting on the exact institutional setup to be envisaged, ETNO nonetheless believes that the introduction of a **non-binding 'peer review' mechanism,** if sufficiently light-touch, could improve the coordination among EU Member states; this is an important positive step to address the growing need for increased connectivity in the Digital Single Market **(art. 35).**

Provisions that need revision:

The possibility to reserve spectrum for new entrants, as transferred to the Code from the Radio Spectrum Policy Programme (RSPP), would lead to **inefficient spectrum allocation and serious distortion of competition** in the market **(art. 52)**. Conditions in new and existing licenses should be minimised rather than increased, as they could distort competition between network investors.

Individually licensed spectrum for exclusive usage remains the basis for network operators, as the only way to ensure the quality of service needed for voice and data services in a world with ever increasing needs and complex systems. This holds true especially when it comes to the implementation of 5G technologies with ubiquitous connectivity. **Therefore, ETNO is greatly concerned that the Code increasingly favours a general authorization regime (art. 46 and 47).** In this way it limits the scope for individual rights of use that have been providing and will continue to provide the best guarantee for investments in high quality and affordable nationwide networks.

Moreover, several provisions in the proposal appear to introduce measures which mandate **access or shared use of passive and active network elements,** including spectrum, circumventing the well-established existing procedures **(art. 47 and 59.3).** This risks having a competition-distortive effect, de-incentivising network operators from bearing the risks of the upcoming huge investments needed to implement 5G technologies and develop innovative services for an increasingly convergent digital world.

The way forward: strengthen positive changes and remove provisions which hamper investments and distort competition

In conclusion, ETNO asks that the current text is strengthened to ensure the minimisation of conditions in new and existing licences which can distort competition; ensure that mobile network operators will still be able to use individually licensed spectrum for exclusive usage; ensure that access or shared use of passive and active network elements remains optional.

III. UNIVERSAL SERVICE OBLIGATIONS

EUROPE NEEDS POSITIVE REFORM TO:

- Provide a social safety net where the market does not deliver services which are indispensable to all citizens, preventing social exclusion;
- Establish a right to a basic and functional Internet Access Service (IAS);
- Create the right incentives for a proportionate implementation of USO, through public funding where necessary.

Introduction

Electronic communications markets have reached a level of evolution that makes the notion of Universal Service, as we know it today, obsolete and counterproductive, due to the market distortions it introduces.

From this perspective, **ETNO considers the set up proposed by the Commission for the Universal Service Regime as a step in the right direction.** Universal Service should remain an instrument to provide a social safety net and ensure that all citizens are included in a fully developed digital society.

Consequently, the costs of this general societal goal should be borne by the society as a whole through public funding, and not by the electronic communications sector exclusively.

The aim of the Universal Service will be the provision of affordable voice services and basic broadband, as well as the existence of special tariffs for consumers. In fact, the Universal service obligations should not be used as extra-market tools to promote high-speed broadband coverage.

The Commission rightly avoids going in this direction, pointing out to the right tools for that purpose, such as the incentives to private investment and spectrum policy. Considering the USO as a tool for the deployment of networks would create competitive distortions and inefficiencies and would result in high and disproportionate costs for the market and Member States.

Market and technological realities require a reformed concept of Universal Service

It is widely recognised that the market increasingly fulfils the relevant needs of the citizens. As a general rule, designating one or more operators to provide specific services is no longer necessary.

As the European Commission underlined in the public consultation for the Telecoms Framework Review, "the three basic characteristics of the current universal service concept relate to availability, affordability and accessibility, while minimising market distortions".

Evidence shows that the market was far more efficient in achieving these objectives than the universal service regime. Moreover, the parameters on quality defined in the annexes of the existing regulation have increasingly lost relevance. The USO has been implemented in a few countries only, with modest results. In many cases, obligations were maintained without a timely assessment of their need and effectiveness in the light of market evolution.

Finally, where obligations have been imposed, they have led to significant litigation, including numerous cases brought before the Court of Justice, in particular regarding the highly complex provisions on financing and net-cost calculation. All these legal procedures required substantial and disproportionate resources to the operators and Member States involved.

Overall, evidence shows the need for substantial reform.

The EECC provisions overall go in a positive direction

In addition to the shift of focus to the provision of affordable voice services and basic broadband, as well as the existence of special tariffs for consumers, **ETNO particularly welcomes the removal of legacy services** (public payphones, comprehensive directories and directory enquiry services) from the USO scope at EU level. Nevertheless, we believe that the Code can be further strengthened to avoid the imposition of unnecessary obligations on operators. The Code still allows for a large degree of flexibility for Member States to maintain outdated Universal Service Obligations **(art. 82).**

Another positive note relates to the proposal for the **financing of the USO** to take place through the general budget of the Member States and not through sectorial funding. This will also be a key element to guarantee that those obligations will be reasonable, discouraging Member States from using USO to promote high-speed broadband coverage at the expense of the industry. In short, this approach creates the **right incentives to establish proportionate obligations, where appropriate, without generating market distortions.**

The way forward: strengthen the refocused approach and clarify provisions to ensure that implementation is in line with the objectives

In order to further improve the approach proposed by the Commission, ETNO proposes the following:

1) Scope: the Commission proposes the affordable functional internet access service to be defined based on a minimum set of basic services (reflecting the services used by the majority of end users – **Art. 79).** The acknowledgment that such services can be provided through various technologies is positive. **It is extremely important that such list of services is aimed at providing a social safety net and not an instrument to unfairly subsidize broadband access services.**

However, the proposal foresees a far too high level of discretion left to Member States in the definition of the scope of such services, including all those listed in **Annex V.** This flexibility risks paving the way to disproportionate implementation, contradicting the high level objective of ensuring the provision of basic and functional internet access. It could also lead to unbalanced requirements in terms of capacity.

This risk is further enhanced by the proposal for Member states to adequately reflect the services used by the majority of end-users in their territory, which do not necessarily correspond to the basic universal needs.

Moreover, the text should be clarified as to ensure that **any definition of voice-only requirements is done in a way which enables new ways to provide such a service going forward** (considering that this covers the 2020-2030 period) and not linked (even implicitly) to PSTN.

When services cannot be ensured under normal commercial circumstances, other public policy tools, such as incentives to private investment, state-aid or spectrum-related coverage obligations are the adequate instruments. The fact that designation remains possible may distort the incentives to use those instruments and maintain the current practice, in contradiction with the objectives set out by the Commission.

Finally, the revised concept of USO should be focused on consumers and not on businesses. The USO requirements and regime, especially regarding aspects of affordability and contractual terms, do not seem relevant for businesses in general.

2) Periodic review of the USO: there is a provision allowing NRAs to review the obligations after three years and every year thereafter **(Art. 82). This seems potentially onerous and could lead to USO requirements changing unnecessarily.**

3) Funding mechanism: for the USO regime to work well, **co-legislators should maintain the choice of the funding mechanism. As USO benefits the whole society, it should be financed through public funding.** Otherwise, the inclusion of broadband affordability in the scope could result in higher and disproportionate costs to be borne by the sector. This would also be detrimental to any substantial harmonisation progress.

Furthermore, the proposal could be further improved to clarify how the proposed mechanism will work; in particular, how special tariffs options/packages can be imposed and how operators will recover the costs they may incur due to that. The same applies to the compensation for costs, where the Commission holds on to the requirement of demonstration of an unfair burden, and compensation can only relate to the net-cost of the provision, which, in practice, maintains all the difficulties of the current framework.

> **“As USO benefits the whole society, it should be financed through public funding.”**

IV. END-USER RIGHTS

EUROPE NEEDS POSITIVE REFORM TO:

- Support the development of innovative services, irrespectively of the kind of service provider;
- Ensure fair competition between functionally equivalent services;
- Improve consumer protection in view of the increasing digitisation of services.

ETNO supports the European Commission's high-level objectives with regard to services as described in the Impact Assessment and the EECC, such as establishment of a level playing field, more legal consistency and simplification of rules. In this context, **Recital 16,** which refers to the refined definition of Electronic Communication Services, rightly states that: *"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 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."*

While we agree on the need of a future-oriented policy approach, we believe that the overall proposals do not match the announced targets and would result in imposing additional harmful rules on electronic communications operators, which risk to also impact emerging services such as M2M-based services.

Market realities call for a renewed and future-proof service regulation

- **Convergence:** in a few years, all communication network providers will have completely switched any traffic on their networks to IP. This means that, irrespective of the type of provider or service, the kind of data submitted over the network will be the same: IP-based. Besides this, from an end-user perspective, the various communication services offered are increasingly perceived as substitutes – irrespective of whether they are number-based or not (e.g. new messaging services are widely used as full substitute to SMS and web-based applications are increasingly used for international calls).
  Requirement: a future-proof and consumer-friendly service regulation needs to strictly reflect consumers' view and overcome legacy service categories.

- **Offering of integrated bundles:** technological developments allow bundling of nearly any services into one integrated offering. End-users' demand for these bundles is high, due to particular benefits linked to bundles. Bundled services are e.g., social media platforms which often combine communication services, media distribution channels, platforms for user-generated content and other functionalities. This equally refers to bundles offered by telecoms, including integrated offerings of e.g. communication services, TV streaming (IP-TV), platforms for 3rd party offerings (e.g. Video on Demand) and internet access service (IAS). All of these mentioned services fall under a different set of consumer protection rules.
  Requirement: reduce the degree of sector-specific service regulation, in order to decrease complexity for consumers and release burdens for providers who offer bundles, which should be primarily subject to horizontal rules.

- **High dynamism and innovation:** the digital market is characterised by extremely rapid innovation cycles. Not only legacy services are further developed but also completely new kinds of services are constantly entering the market. Providing any view on future possible developments would be extremely challenging. Accordingly, future challenges with regard to consumer protection are very difficult to predict and anticipate.
  Requirement: highly prescriptive regulation, focussing on a very specific kind of services risks quickly becoming outdated and ineffective. Future-proof rules need to be more principle-based and broadly applicable. Provisions for co- and self-regulation prove to be more flexible and swiftly applicable and would be instrumental in accomplishing a principle-based approach.

- **Further increase of competition:** services markets are today driven by a fierce competition between a broad variety of players. Telecoms providers compete with each other in several services markets, such as: interpersonal communication services, internet access services that solely provide connectivity, (e.g. leased lines) and specialised services. Additionally, new players have entered the market and propose attractive and innovative communication services over the internet. Consumers benefit directly from this increased competition and can make a choice between a wide-range of services.
  Requirement: the increase of choice in conjunction with an increase of competition between providers should go hand in hand with a relaxation of regulation. More reliance on horizontal provisions is necessary as, today, they cover most of the areas also addressed by sector-specific regulation for electronic communication services. Only whenever sector-specific obligations are still strictly needed, then they should apply to all functionally equivalent services.

- **New challenges:** besides the obviously huge benefits for consumers resulting from a dynamic market for digital services, newly emerging risks must not be neglected. A future-proof framework for electronic communication services needs to address these specific downsides, in order to further consumers' trust. This includes, for example, new kind of remuneration based on the processing of personal data, a lack of transparency within specific areas, and broader responsibility of market players regarding particular vulnerable consumers. Several of these challenges are not only relevant for electronic communication services and should be equally addressed by horizontal new legislation.
  Requirement: define very selectively new and proportionate rules and safeguard provisions, preferably in horizontal law, that tackle identified or potential new risks. These rules and safeguards need to avoid disruptive effects for dynamic markets.

Current wording in the EECC does not entirely meet the European Commission's objectives and requirements for a future-proof service regulation

While the EECC's **objectives rightly aim at simplification, the actual scope for simplification stemming from these provisions is very limited.** Indeed, the bulk of legacy EU-regulation remains in place and applies to any ECS, excluding number-independent interpersonal communication services. Instead, **new regulation for ECS is added, excluding again a number-independent interpersonal ECS.** This refers e.g. to more transparent contract information (e.g. **art.95.1a, (5)**), new harmful rules for bundles **(art. 100)** and tightening of rules for contract prolongation **(art. 98.2)**. Taking into account the increasing competition on the services market (both between operators and from OTTs), the need and proportionality of these asymmetric new rules for ECS and the de facto exclusion of number-independent ICS are highly questionable.

The **end-user protection rules defined for interpersonal communication services are supposed to be applied irrespective of the kind of provider.** Instead, the European Commission has chosen to focus on the kind of services delivered[4]. However, the importance attributed to **"numbers"** is highly questionable and does not reflect at all consumers' perspective and usage habits. Consumers increasingly substitute services irrespective of whether they are number-based or not (e.g. SMS and messaging services). In the same vein, the very general exclusion of "ancillary" communication features of online services should be further analysed, considering the concerns of the end-users at stake, as there is the risk that it becomes a major loophole to circumvent regulation. Moreover, due to the impact of the ECS definition on the ePrivacy Directive, also under review, the exclusion of "ancillary" communication features of online services would be highly confusing for end-users, also concerning confidentiality of communications.

In such context it appears not to be reasonable that the criterion of "number" justifies a completely different treatment, regarding, for example, contractual information **(art. 95)** or transparency obligations **(art. 96, 97)**. Likewise, the potential issues around bundles should be looked at from a much broader, evidence-based, perspective and including all ECS and any other digital services. Linking any service specific regulation to the criterion of "number-based" leads to an unjustified imbalance of burdens, keeps an unlevelled playing field for electronic communication operators and does not provide the appropriate consistent level of protection that consumers should be entitled to have in this new digital era.

Besides this imbalance, **ETNO has identified an increasingly high risk with regard to "services consisting wholly or mainly in the conveyance of signals".** First of all, we question the fact that this legacy category has any relevance from an end-user perspective, since it is more related to networks. Secondly, the concept of "conveyance of signals" in conjunction with applicable end-user rights remains highly unclear, looking at e.g. signal transmission in the scope of machine-to-machine communication, and risks keeping a differentiated regulatory treatment based on the kind of provider concerned: any obligation linked to a "conveyance of signals" could apply prevalently when a service that is not ECS but requires "conveyance of signals" is provided by a network operator. This would discriminate operators and introduce new regulatory constraints to their provisioning of machine-to-machine communication services and vertically integrated services in the scope of 5G.

Such a misinterpretation of obligations through relevant authorities would confuse end-users and conflict with European Commission's objectives of focusing on end-users perception and ensuring a level playing field for functional equivalent services. This severe issue has not been considered in European Commission's impact assessment and the draft EECC does not eliminate this risk. A clarification is urgently required, considering the recent ruling of the European Court of Justice that refers to conveyance of signals (UPC vs. NMHH). The **application of each end-user protection rule to ECS that are exclusively used for M2M/ IoT services** could be disproportionate, as these rules do not necessarily translate well to those kind of services. In many M2M/ IoT services, the most relevant functionality is not connectivity but the features of the connected devices and the final service provided with them (e.g. power supply metering). In those cases, end-user protection needs to be primarily secured through rules associated to that final M2M/IoT service[5].

A **full harmonisation of rules** as foreseen in **art. 94,** which still leaves flexibility to Member States in some crucial areas, has the potential to significantly reduce fragmentation and ensuring a more consistent service regulation. This approach corresponds to a horizontal consumer protection, which is mostly based on full harmonisation as well, e.g. based on the Consumer Rights Directive. To realise a digital single market, full harmonisation appears absolutely necessary – to ensure consistent cross-border rules for consumers and service providers. However, the full harmonisation of rules needs to be proportionate, ensuring efficient protection standards for consumers and avoiding detrimental effects and high burdens for service provisioning.

[4] The criterion "usage of numbering resources" has a specific role to play e.g. for number portability, but considering end-users' usage habits numbers are clearly not such a strong differentiator as assumed by the EECC draft.

[5] In addition, we would like to point out that the extra territorial use of non-geographic numbers should be considered only in certain specific cases, such as M2M/IoT services, and only if public interests like security, national sovereignty etc. are not compromised.

The **included references to horizontal law** streamline the EECC provisions with horizontal law at least to some degree (e.g. **art. 95.1, 25.2**). However, general overlaps remain and in several areas it is questionable why diverging and additional rules are still and only required with regard to Electronic Communications Services. For example, this refers to specific rules on contractual information **(art. 95, 96, 97)**. Considering the recently adopted provisions in the Telecom Single Market Regulation, it is highly questionable if additional and overlapping information requirements on e.g. quality and monitoring in **art. 95.1a** and **97** are proportionate. Overall, the draft has missed the opportunity to not only streamline but also simplify legacy regulation and rely more on horizontal consumer protection rules.

The **stronger focus on consumers,** who indeed require higher protection standards than other end-users, appears as one step further towards more efficient rules. However, focus on consumers only refers to a few selected provisions and the inclusion of small and micro undertakings, partly as opt-out, risks to reduce the intended positive effects due to complexity **(art. 95.3)**. Sales and services that address mass markets can hardly make granular distinctions. Opt-out provisions for small and micro undertakings constitute no significant simplification since electronic communications operators will need to adjust their process and IT systems, anyway. A more consistent and exclusive focus on consumers is required. If small and micro enterprises require protection standards, this should be first of all included in horizontal law, which applies, in principle, also to providers of ECS.

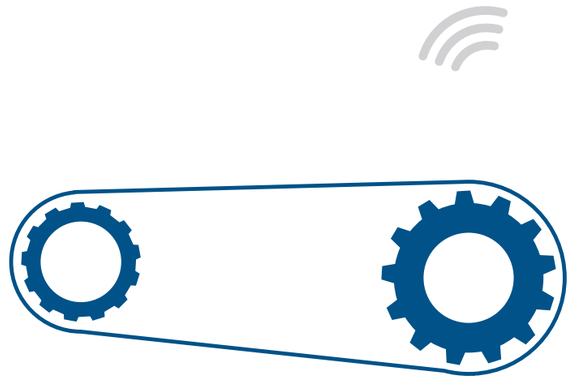
Although the provisions consider a few newly emerged risks, it suffers from a lack of concrete measures to fight against those identified risks. For example, the role of personal data as alternative remuneration is identified in the **recital 17,** but no consumer protection provisions are proposed to apply in case of personal data as remuneration. Likewise, some new transparency obligations are introduced, but providers of services that don't use numbers are exempted from such obligations. The latter includes a lack of e.g. transparency obligations with regard to reliable emergency services **(art. 95.2)** or end-to-end-quality voice calls **(art. 95.1a).** The rules on interoperability remain very vague **(art. 59.1c)** instead of describing clear criteria how this safeguard instrument shall be applied in cases of market failures such as foreclosure through dominant players. While these new identified risks – which will become even more crucial in the future (e.g. due to the further increasing importance of online platforms) – are hardly addressed, **already existing rules are further tightened and new burdens are imposed on already very strictly regulated services.**

The way forward: foster consumer trust and innovation for a future-proof framework

Based on a thorough assessment, ETNO recommends to adjust the end-user provisions along three main principles:

Ensure better consumer protection and fair competition

- Lift and simplify rules in areas which are already covered by other laws (e.g. several contractual information **(art. 95)**, transparency on quality **(art. 95, 97)**); consider co- and self-regulation.
- Reduce rules linked to number-based interpersonal ECS to what is absolutely indispensable (number portability in **art. 99**, access to emergency services in **art. 102**, service interoperability in **art. 59**).
- Simplify rules applied to IAS, particularly if in parallel covered by TSM (e.g. transparency and QoS in **art. 95 and 97**).
- Apply remaining rules relevant for communication services equally to all interpersonal ECS being number-based or not (e.g. transparency and information, notification requirements), and define solution for selected issues within horizontal consumer law (e.g. contract summary as foreseen in **art. 95.5**).
- Limit most end-user rights consequently to consumers, in alignment with horizontal law; small and micro enterprises are to be protected through horizontal provisions, if necessary.
- Ensure that full harmonisation leads to a proportionate level of consumer protection.
- Apply transparency rules on quality (e.g. **art. 95.1a**), access for disabled **(art. 95.1e)** and emergency services **(art. 95.2)** to all interpersonal ECS, irrespective of the use of phone numbers, to enable consumers' informed choice.



Avoid heavy burdens for innovation

- Revise the services category referring to “conveyance of signals” focussing on services which solely provide connectivity, and exempt innovative services from obligations that are unjustified, to avoid negative and unintended impact on newly emerging markets.

- This should include the clarification that network providers who convey signals according to **art. 2.4** will not fall in a discriminatory way under ECS-provisions when providing services and products to end-users which include M2M communication.

- Assess potential for simplification with regard to end-user protection rules applied to ECS that are solely used for M2M services.

- Modify new rules, particularly the additional and asymmetric obligations concerning bundles **(art. 100)** and contract duration and prolongation **(art. 98.2, 98.4)**, to ensure that consumers can continuously choose and benefit from these offerings (offering variety of bundles that include also ECS other than number-independent interpersonal ECS; subsidised devices; lower monthly charges due to longer minimum contract duration times); possible gaps should be closed by adjustments in horizontal consumer law covering all bundles equally.

Address new risks

- Selected new transparency and information requirements should apply to all services, at least to all interpersonal ECS (e.g. transparency on quality, **art. 95.1a**); access for disabled **(art. 95.1e**); reliable emergency services, **art. 95.2**), to close current gaps and ensure that consumers can make an informed choice.

- Any provider of ECS should be required to formally notify in each national market where the services are provided, in order to ensure that authorities can equally monitor any providers of ECS and enforce compliance if required.

- Concept on “data as counter-performance“ as described in **recital 17** should be fully aligned with other legislative processes and the concrete consequences for the service rules have to be clarified.

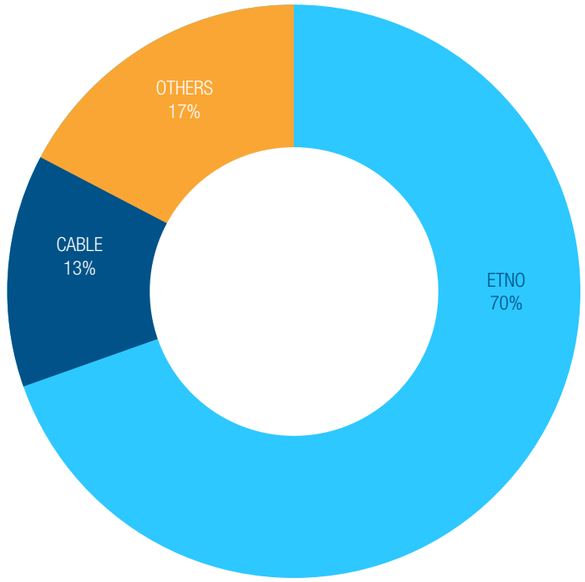
- The concept on interoperability and end-to-end-connectivity **(art. 59.1)** should be clarified, ensuring a balanced and swiftly applicable approach to address identified problems, such as market foreclosure, avoiding disruptive effects on the market.

“ The way forward: foster consumer trust and innovation for a future-proof framework. ”

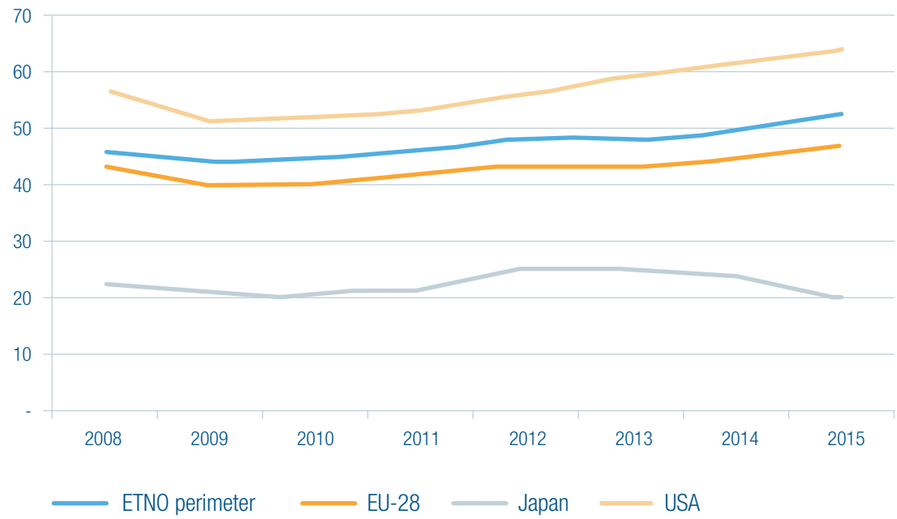
Investment in networks

- In 2015, European telecom operators invested €47bn in EU28
- Most of the investment comes from ETNO members, who deploy 70% of the fixed investment, or 60% of the total sector investment
- There is a persistent investment gap with the US, where telecom operators invested €63.8bn in 2015 as opposed to EU's €47bn

Tangible CapEx in EU5, Fixed
(% Fixed CapEx, EU5 : DE, IT, FR, UK, ES) *



Tangible CapEx
(EUR bn)



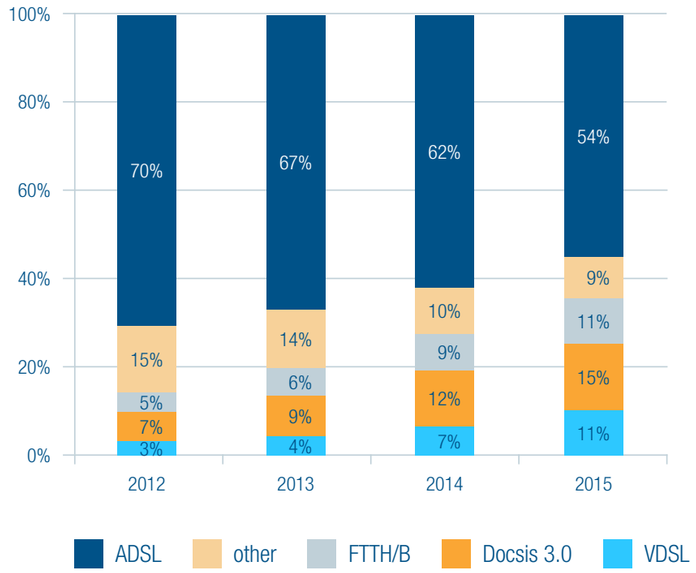
Tangible CapEx (EUR bn)	2008	2009	2010	2011	2012	2013	2014	2015
ETNO perimeter	46.1	43.9	44.2	46.2	48.1	47.8	49.4	52.5
EU-28	43.0	40.1	43.9	42.7	43.3	43.5	45.1	47.0
Japan	22.4	20.5	20.6	21.6	24.8	24.9	23.5	20.1
USA	57.0	51.3	52.1	53.5	56.3	59.4	62.0	63.8

Source: IDATE

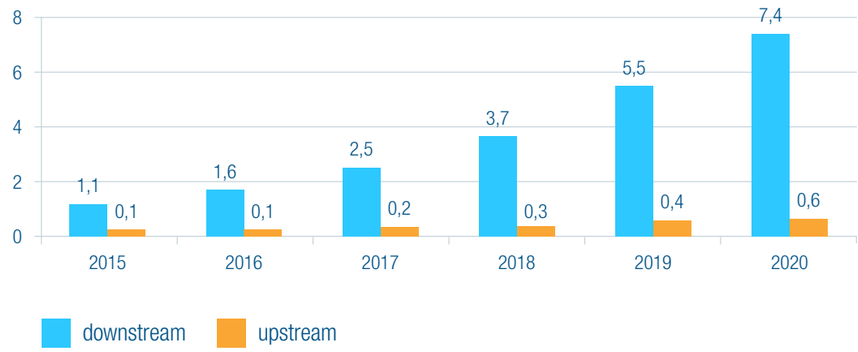
Mobile & fixed technologies

- Mobile data traffic is expected to continue growing in the coming years: today, the average downstream traffic is 1.6 GB/user/month. In 2020 it is expected to grow to 7.4 GB/user/month
- On the fixed side, superfast broadband is taking up, with both VDSL and fibre connections growing
- Fixed data traffic is also expected to grow. Today, the average traffic is 60 GB/line/month. In 2020 it is expected to grow to 142 GB/user/month

Fixed broadband lines by technology
(ETNO perimeter, % of subscriptions)



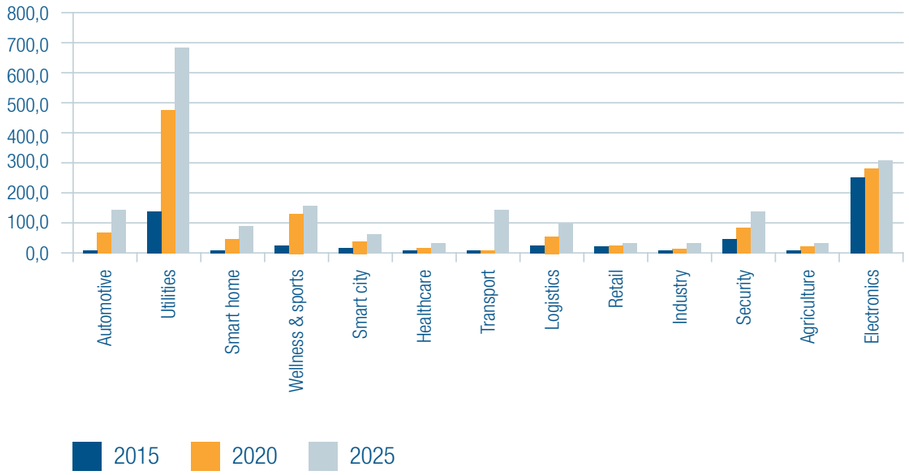
Mobile data traffic
(EU28, GB/user/month)



IoT, Consumer habits

- The Internet of Things is expected to connect more and more units to the network: by 2025, we expect 1.8bn units to be connected overall, with utilities, electronics and automotive to be the main drivers
- Consumers more and more enjoy OTT services, which will be reflected in a boost to their revenues: OTT revenues amount today to almost €80bn and will grow to €124bn by 2020
- Across Europe 5 key markets (FR, DE, IT, ES, UK), consumers are expected to continue taking up social networks usage, online search & e-commerce

IoT units by vertical
(EU28, million)



ETNO (European Telecommunications Network Operators' Association) represents Europe's telecommunications network operators and is the principal policy group for European e-communications network operators. ETNO's primary purpose is to promote a positive policy environment allowing the EU telecommunications sector to deliver best quality services to consumers and businesses.

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