



# Electronic Communication Networks and Services



Per Vestergaard Pedersen  
Partner

## Introduction

The member states of the European Union (EU) have recently adapted their regulations of electronic communications, including telecommunications, in accordance with the new European Electronic Communications Code Directive (the "EECC Directive") of the European Union (EU). Its full title is Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code. The directive aims to keep pace with the rapid technological developments and the convergence of product and service innovations and developments of the telecommunication sector. In doing so, the directive both applies to conventional telephony services as well as modern "over the top" services, including, for example, Skype, Zoom and WhatsApp. Such "over the top" services are becoming increasingly more important. This has in particular become apparent in the wake of COVID-19, where a record number of people have been moving online and shifted to remote working.

Furthermore, an updated and appropriate regulation of the telecommunication area is an important element in the climate action and the aim to reduce emissions of carbon dioxide (CO<sub>2</sub>) and other greenhouse gases. New data-driven solutions and services can contribute to reduced emissions of CO<sub>2</sub>, including services which create the basis for intelligent energy management and accelerate improved processes in agriculture, industry and transport sectors. Such systems require a robust digital infrastructure.

The technological developments and the convergence of product and service innovations and developments of the telecommunications, media and information technology sectors have occurred in a rapid pace in more than 30 years now. Such developments of the communication sector and the continuation thereof have called for an ongoing regulation of the area under both national law and EU law.

Until the mid-1980s, telecommunications were almost completely a national matter. However, concurrently with the developments of the telecommunication sector and its services, the legislation and policies have to a large extent shifted from being a matter of the national member states to be a matter of the EU. Thus, today legislation and policies are generally prepared and adopted by the EU legislative bodies and implemented into national law by the EU member states.

The development of EU policy and legislation in the telecommunication sector can be broadly distinguished into three phases. The first and second phases – phase 1 in 1987-1993 and phase 2 in 1993-2002 – generally concern the liberalization of the sector within the EU and the transition from monopoly to competition. The EU regulation comprised by these phases has ensured, among others, that throughout the 1990s and the early 2000s, the telecommunications industry in many European countries were liberalized, including in Denmark where Tele Danmark's exclusive rights in Denmark in several areas were liberalized in 2000.

The third phase commenced on 25 July 2003 when the EU Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (the "Framework Directive") and four more additional specific directives entered into force. These EU directives were comprised by the so-called 2002 telecoms package. The third phase also comprised several amendments to the 2002 telecoms package directives in 2009, the so-called 2009 reform.

In the following, we present some of the main regulatory objectives and provisions of the 2002 telecoms package and the 2009 reform in the EU and the Danish implementation thereof. We also present some of the objectives and provisions of the new European Electronic Communications Code Directive (the "EECC Directive") and the new Danish act which has recently been passed by the Danish Parliament and which, among other legislation, implements the EECC Directive.

## The 2002 telecoms package

As stated above, the third phase of the EU regulation of the telecommunication sector commenced on 25 July 2003 when Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (the "Framework Directive") came into force.

The Framework Directive is supplemented by the following four specific directives which set more detailed provisions on specific matters in relation to the Framework Directive and aspects of the telecommunications sector:

- Directive 2002/20/EC on the authorisation of electronic communications networks and services (the "Authorisation Directive"). This directive sets rules to enable networks and services provision EU-wide.
- Directive 2002/19/EC on access to and interconnection of electronic communications networks and associated facilities (the "Access Directive"). This directive provides the framework for relationships between suppliers of networks and services.
- Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (the "Universal Service Directive"). This directive ensures a minimum set of high-quality services are available to all at an affordable price.
- Directive 97/66/EC concerning the processing of personal data and the protection of privacy in the telecommunications sector (the "Communication Privacy Directive").

Together, the Framework Directive and the stated four specific directives constitute the 2002 telecoms package.

The Framework Directive generally sets the objectives and the principles for the EU regulation of the electronic communication area. The regulation includes provision to strengthen the liberalization and harmonization of the EU communications market, stimulate investments and foster freedom of choice for consumers and enable them to benefit from innovative services, quality and lower rates.

The Framework Directive establishes a harmonised framework for the regulation of electronic communications networks which is broader than that of telecommunications alone. To this effect, the Framework Directive comprises transmission systems which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed and mobile terrestrial networks, electricity cable systems, networks used for radio and television broadcasting and cable television networks, irrespective of the type of information conveyed. This includes, for example, fixed and mobile telecommunications networks, cable or satellite television networks and electricity networks, where they are used for electronic communications services.

It also comprises electronic communications services consisting of the transmission of signals through the stated networks, and associated facilities and services of the networks or of the electronic communications services, which enable or support the provision of services by that network or service. However, the content of services delivered through electronic communications networks, such as broadcasting content or financial services, are excluded from the scope of the Framework Directive.

The Framework Directive thus has a comprehensive scope of application and comprises a broad range of communications networks and communications services, including traditional telephony services and broadcasting services.

Furthermore, the provisions in the Framework Directive and the four specific directives impose on the member states an obligation to take the necessary measures to ensure the protection of its essential security interests, to safeguard public policy and public security, and to permit the investigation, detection and prosecution of criminal offences. The Framework Directive also sets specific and proportional obligations for the national regulatory authorities (NRAs) which are applicable to providers of electronic communications networks and services.

The main obligations of the NRAs generally are to ensure transparency, impartiality and independence in the telecommunication area, including in relation to formerly state-owned monopolies. To this effect, any decision made by an NRA shall be subject to appeal. The NRAs shall also promote competition in the provision of electronic communications networks and services and contribute to the development of the internal market for electronic communications. Furthermore, the NRAs shall promote the interests of European citizens in the following manners:

- Ensuring that all citizens have access to a universal service.
- Ensuring a high level of protection for consumers in their dealings with suppliers, particularly by ensuring the availability of simple and inexpensive dispute resolution procedures.
- Helping to ensure a high level of protection of personal data and privacy.

- Encouraging the provision of clear information, particularly by requiring transparency of tariffs and of the conditions of using publicly available electronic communications services.
- Addressing the needs of specific social groups, in particular disabled users.
- Ensuring the security of communications networks.

The Framework Directive also comprises other aspects in relation to both the substance of the regulation of electronic communications networks and services, such as the granting of certain limited resources, including radio frequencies and numbering resources, strategic planning, coordination and harmonisation of radio spectrum in the EU, sharing of networks and security and integrity of networks and services etc.

#### *Authorisation Directive*

The Authorisation Directive creates a legal framework to ensure the freedom to provide electronic communications networks and services throughout the European Union.

The directive applies to the granting of rights to use radio frequencies where such use involves the provision of an electronic communications network or service. The directive comprises authorisations for all electronic communications networks and services, whether they are provided to the public or are limited.

It follows from the directive that the provision of electronic communications networks or services shall be subject only to a general authorisation. A provider entity may be required to submit a notification but may not be required to obtain an explicit decision or any other administrative act by the national regulatory authority (NRA) before exercising the rights under the authorisation.

#### *Access Directive*

The Access Directive harmonises the manner in which EU member states regulate access to, and interconnection of, electronic communications networks and associated facilities. It establishes a regulatory framework for the relationships between suppliers of networks and services which shall result in sustainable competition and interoperability of electronic communications services.

The directive applies to all forms of public communication networks carrying publicly available electronic communications services. These include fixed and mobile telecommunications networks, networks used for terrestrial broadcasting, cable TV networks, and satellite and Internet networks used for voice, fax, data and image transmission.

EU member states must ensure that there are no restrictions which prevent parties performing activities in the same EU member state or different EU member states from negotiating agreements on access to, and/or interconnection of, electronic communications networks and associated facilities in accordance with relevant competition rules in the treaty.

The directive sets a fundamental rule whereby providers of public communications networks or services have an obligation to negotiate agreements with each other on interconnection, for the purpose of providing interoperability of such services throughout the EU.

#### *Universal Service Directive*

The Universal Service Directive aims to ensure the availability of a minimum set of good-quality electronic communications services accessible to all users at an affordable price, while minimising market distortion.

The directive sets specific rules for the provision of electronic communications services within the EU. The directive sets obligations for the supply of certain mandatory services (universal services) and sets provisions in relation to the rights of end-users and the corresponding obligations on the companies providing electronic communications networks and services available to the public.

#### *Communication Privacy Directive*

Information is exchanged through public electronic communication services, such as the internet, mobile telephony and landline telephony and by their accompanying networks. These services and networks require specific rules and safeguards to ensure the users' right to privacy and confidentiality.

The Communication Privacy Directive sets provisions to ensure security in the processing of personal data, the notification of personal data breaches, and confidentiality of communications. It also bans unsolicited communications where the user has not given their consent.

## The 2009 reform

The directives comprised by the 2002 telecoms package are subject to periodic review by the EU Commission in order to determine the need for modification in the light of technological and market developments.

On the basis of such review, the EU Commission identified certain shortcomings and a continued lack of an internal market for electronic communications. The EU Commission found that regulatory fragmentation and inconsistencies between the activities of the national regulatory authorities (the NRAs) jeopardised not only the competitiveness of the telecommunications sector, but also the substantial consumer benefits from cross-border competition.

Based on this finding and other matters, the Framework Directive was amended by Directive 2009/140/EC, including the above stated four specific directives<sup>[1]</sup>. These amendments constitute the reform in 2009 of the 2002 telecoms package, the so called 2009 reform.

The reform was made to remedy the shortcomings of the 2002 telecoms package and thereby to strengthen competition and consumer rights in the internal market and to facilitate high-speed Internet broadband connections.

Furthermore, the EU regulation no. 1211/2009 on establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office came into force.

The new European Telecoms Body (BEREC) was created to ensure fair competition within the EU with respect to the telecommunications market. BEREC is comprised of the heads of the 27 national regulatory authorities (NRAs). This has further helped to strengthen the independence of these NRAs.

# The Danish legislation in relation to electronic communications networks and services

The EU legislation is, among others, implemented in Danish law by the consolidated act no. 128 of 7 February 2014 on electronic communications networks and services (the "Tele Act"), the consolidated act no. 1100 of 10 August 2016 on radio frequencies (the "Radio Frequency Act") and several executive orders, including among others Executive Order No. 1887 of 8 December 2020 on end-user rights in the telecommunications area. The Danish telecommunications regulation is also supplemented by the general consumer regulation, including the Danish Marketing Practices Act<sup>[2]</sup>, the Danish Consumer Agreement Act<sup>[3]</sup>, the Danish E-Commerce Act<sup>[4]</sup>, the Danish Data Protection Act<sup>[5]</sup> and the Danish Payment Services Act<sup>[6]</sup>. The Danish telecommunications regulation is to a great extent based on EU law.

The Tele Act is the main legal act in the Danish regulatory framework in relation to electronic communications networks and services. The act comprises the overall regulation in relation to end-user aspects, universal services obligations, numbering aspects and interconnection.

The Danish legislation pursues the same aim as the EU legislation. It follows from section 1 of the Tele Act that the aim of the act is to promote a well-functioning and innovative market for electronic communications networks and services to the benefit of the end-user. To this effect, the Tele Act sets certain rules in relation to providers of electronic communications networks and electronic communications services to users (customers).

## *Activities and persons which are subject to the legislation*

The Tele Act generally applies to the following persons and activities, among others, defined in section 2 of the Tele Act (unofficial translation):

1. Provider: Any person who makes products, electronic communications networks or services governed by this Act available to other parties on a commercial basis.
2. Commercial provider: A provider who, for commercial purposes, offers products or electronic communications networks or services governed by this Act as its main service or as a non-accessory part of its business.
3. End-user: User of electronic communications networks or services who does not make such electronic communications networks or services available to other parties on a commercial basis.
4. Electronic communications networks: Transmission systems, whether or not based on a permanent infrastructure or centralised administration capacity, and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including internet) and mobile networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed.
5. Electronic communications service: Service consisting wholly or mainly in electronic conveyance of communications in the form of sound, images, text or combinations thereof, by means of radio or telecommunications techniques, between network termination points, including two-way and one-way communications.

Electronic communications networks, as defined in section 2, no. (4), in the Tele Act generally must be interpreted and applied in accordance with the corresponding definitions of "electronic communications networks" in the EU Directives mentioned above.

#### *Domicile restrictions*

A provider of electronic communications networks and/or electronic communications services under the Tele Act may be a Danish entity. A provider may also be an entity from another member state of the EU or the associated European Free Trade Association (EFTA) (Iceland, Liechtenstein and Norway) or an entity from the United Kingdom. Apart from the United Kingdom, all these states are member states of the European Economic Area (EEA).

#### *Licence and authorisation and frequencies*

Under the Tele Act, a private entity may provide electronic communications networks and electronic communications services to users (customers) without the granting of a licence, approval or similar authorisation to do so. Accordingly, a provider does not need a licence, an approval or any similar authorisation under the act to provide electronic communication networks and electronic communication services, including satellite networks and satellite network services.

However, a provider must register as a provider and register general information on its activities as a provider with the Danish Telecommunications Centre of the Danish National Police. This follows from section 12 of the Tele Act. This registration shall, among others, make it possible for the Danish police authorities to obtain access to information and perform their investigations and other activities in relation to electronic communications networks and electronic communications services provided by the provider.

The use of frequencies generally requires a licence from the Danish Energy Agency. However, there are frequencies for unlicensed use for maritime radio services, aeronautical radio services, ground based aeronautical radio services, amateur and amateur-satellite services and other services. See section 6(1) and (2) of the Radio Frequency Act. The frequencies for unlicensed use are regulated in the Danish Executive order on the use of radio frequencies without a licence.[7]

A licensee under a frequency licence may be a Danish entity. A licensee may also be an entity from another member state of the EU or the associated European Free Trade Association (EFTA) (Iceland, Liechtenstein and Norway) or an entity from the United Kingdom. Apart from the United Kingdom, all these states are member states of the European Economic Area (EEA).

#### *Security*

Furthermore, owners of electronic communications networks or services and providers of electronic communications networks or services shall generally ensure secrecy regarding communication. Such owners and providers shall take the measures necessary to ensure that information about other persons' use of the network or service or the content thereof will not be available to unauthorised persons. This follows from

section 7 of the Tele Act. Moreover, protection of personal data and compliance with the data protection rules must be ensured.

### *Interconnection regulation*

Providers of public electronic communications networks or services have an obligation to negotiate agreements with each other on interconnection, for the purpose of providing publicly available electronic communications services, in order to ensure provision and interoperability of such services throughout the EU and the European Economic Area (EEA). This follows from sections 33-35 of the Tele Act.

The authorities may also impose obligations on such providers, to the extent it is necessary to ensure connection between end-users in the individual networks or to create interoperability with providers of electronic communications networks or services which control access to one or more end-users, including the obligation to interconnecting their networks.

### *Cookies*

The requirements regarding use of cookies are set in Executive Order on Requirements to Information and Consent in relation to Storage of or Access to Information in End-User's Terminal Equipment[8]. Requirements regarding logging of activities are set in Executive Order on Providers' of Electronic Communications Networks and Electronic Communications Services Registration and Storage of Information on Telecommunications Traffic[9].

### *Key sanctions and penalties in the case of contravention of telecommunications laws and regulations*

A violation of the Danish telecommunications legislation will generally entail periodic penalty payments and/or fines. A fine is generally fixed in accordance with the general rules of part 10 of the Danish Criminal Code.[10] However, with respect to some more specific violations of the telecommunications legislation, a fine shall also be calculated based on the legal person's turnover during the last year before a judgment is obtained or a fine is imposed.

### *Regulatory authorities*

The Ministry of Climate, Energy and Utilities and the Danish Energy Agency is responsible for the administration of the Tele Act and policy formulation in the communications sector.

## **The new European Electronic Communications Code (EECC)**

In September 2016, the Commission proposed the establishment of a European Electronic Communications Code and a proposal for a Regulation on the Body of European Regulators for Electronic Communications (BEREC). The proposals were meant to prepare Europe for its digital future.

On the basis of the proposals, the EU Directive 2018/1972 of 11 December 2018 establishing the European Electronic Communications Code (the "EECC Directive") was adopted and entered into force on 20 December



2018. By December 2020, the EU member states must have ensured that their telecommunications regulation is in accordance with the EEC Directive.

The EEC Directive generally aims to consolidate the directives comprised by the 2002 telecoms package and the 2009 reform, except for the Communication Privacy Directive, which is reviewed and updated separately.

The EEC Directive generally maintains the objectives of the 2002 telecoms package. Therefore, the aim of the EEC Directive is, among other matters, to stimulate competition and increase investments in new and very high capacity networks, including especially the fifth generation of mobile telecommunications (5G)[11] and new fibre networks. The aim of the EEC Directive is also to create an updated and symmetric regulation of all network providers and to provide a level playing field between providers of lesser and greater importance. To that effect, the EEC Directive comprises both traditional telecommunications companies and over-the-top providers (OTT's), including for example Facebook messenger, WhatsApp, Zoom and Skype etc.

The inclusion of OTT's entails, among others, any listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users requires the consent of the users concerned. Additionally, the OTT's are subject to limitations on the use of traffic and location data, including, for example, that traffic data must be erased or made anonymous unless it is needed for billing purposes (and only for the period during which the bill may be challenged).

Furthermore, the EEC Directive strengthens consumer rules and protection and aims to make it easier for users (consumers) to switch between service providers and offers better protection, for example in relation to users subscribing to bundled services. The EEC Directive also aims to ensure that affordable and adequate broadband internet access is available to all users (consumers), irrespective of their location or income.

## The Danish implementation of the EEC Directive

Denmark has implemented the EEC Directive into Danish law by Act no. 1833 of 8 December 2020. The title of the act is act on amendment of the electronic communications networks and services act, the radio frequency act and various other acts (Act on Act on Amendment of the Electronic Communications Networks and Services Act etc.). The Act on Act on Amendment of the Electronic Communications Networks and Services Act etc. entered into force on 21 December 2020.

The Danish implementation of the EEC Directive is made as an amendment of the Danish Tele Act, that is the consolidated act no. 128 of 7 February 2014 on electronic communications networks and services, and other acts. Therefore, the Act on Amendment of the Electronic Communications Networks and Services Act etc. does not entail a repeal of the Tele Act. The Danish implementation of the EEC Directive has instead entailed an amendment of the Tele Act to the relevant extent.

The Act on Amendment of the Electronic Communications Networks and Services Act etc. contains provisions on the following general matters, among others:

*Stimulating investment incentives for companies in digital infrastructure through increased competition and greater predictability of the regulation*

The Act on Amendment of the Electronic Communications Networks and Services Act etc. imposes a number of changes to the existing regulation to increase the predictability for the telecommunications industry. The predictability is increased, in particular, through codification of principles and transparent procedures designed to enable industry operators, including telecommunications network owners and service providers, to make long-term investment decisions.

*More harmonized radio frequency management and greater predictability in relation to the allocation of frequency licences*

The Act on Amendment of the Electronic Communications Networks and Services Act etc. introduces, among others, a minimum duration of 20 years for licences to use radio frequencies. This licence period is harmonized at EU level for wireless broadband, that is typically the radio frequencies for mobile communication services which are allocated on the basis of frequency auctions.

*Stronger consumer protection ensuring transparency and support for consumer choice*

Under the Act on Amendment of the Electronic Communications Networks and Services Act etc., the regulation of consumer protection is strengthened, including, among others, the protection of consumer information. In relation to future agreements between consumers and providers, it follows from the Act on Amendment of the Electronic Communications Networks and Services Act etc. that the authorities may require that a summary of any such agreement shall be made by the provider and provided to the consumers prior to entering into an agreement. The summary of the agreement shall enable the consumer to easily review the agreement and compare across providers and services.

*Promoting the roll-out of digital infrastructure, including easier access to establish wireless access points with limited range for use of, among other, 5G networks*

Under the Act on Amendment of the Electronic Communications Networks and Services Act etc., public authorities and private entities controlling physical infrastructure shall meet reasonable requests for access thereto from a provider of electronic communications networks or services wishing to set up limited range wireless access points. The purpose is to utilize existing physical infrastructure more effectively by removing regulatory barriers to setting up wireless access points as much as possible.

*Number-independent interpersonal communications services*

In accordance with the EECC Directive, the Act on Amendment of the Electronic Communications Networks and Services Act etc. regulates number-independent interpersonal communications services. Such services generally comprise services which does not connect with publicly assigned numbering resources, including for example traditional telephone numbers. As most over-the-top (OTT) services does not connect with numbering resources, most OTT services will fall within this category, including for example WhatsApp and Facebook's Messenger.

Under the directive number-independent services are comprised by the general and main term "electronic communications services". This is different under the Act on Amendment of the Electronic Communications Networks and Services Act etc. Under the Act on Amendment of the Electronic Communications Networks and

Services Act etc., number-independent services are separated from term "electronic communications services". This is because number-independent services under the Act on Amendment of the Electronic Communications Networks and Services Act etc. only are subject to a lesser part of the provisions and obligations under the Act on Amendment of the Electronic Communications Networks and Services Act etc. compared to electronic communications services generally. For example, the provision on number-independent services does not require any individual or general authorisation by the Danish authorities. Furthermore, users of number-independent services will generally not have to be provided with the ability to reach emergency services through the respective service.

## Further information and assistance

DLA Piper's team of lawyers with expertise in the telecommunication sector are available to assist with all legal matters in relation to the sector.

For further information on telecommunications laws of other jurisdictions, please see the following [page](#).

[1] The Authorisation Directive and the Access Directive was also amended by Directive 2009/140/EC as the Framework Directive. The Universal Service Directive and the Communication Privacy Directive was amended by Directive 2009/136/EC.

[2] Act no. 426 of 4 May 2017 on marketing practices with subsequent amendments.

[3] Act no. 1457 of 17 December 2013 on consumer agreements with subsequent amendments.

[4] Act no. 227 of 22 April 2002 on services in information society, including some aspects of electronic commerce.

[5] Act no. 502 of 23 May 2018 on supplementary provisions to the regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

[6] Act no. 652 of 8 June 2017 on payment services with subsequent amendments.

[7] Executive Order No. 1701 of 26 November 2020 on the use of radio frequencies without a licence and amateur radio rehearsals and call signals etc.

[8] Executive Order no. 1148 of 9 December 2011 on Requirements to Information and Consent in relation to Storage of or Access to Information in End-user's Terminal Equipment.

[9] Executive Order no. 988 of 28 September 2006 on Providers' of Electronic Communications Networks and Electronic Communications Services Registration and Storage of Information on Telecommunications Traffic.

[10] Consolidated Act no. 976 of 17 September 2019.

[11] 5G is the latest generation of cellular mobile communication, characterised by a high data rate, reduced latency, energy saving, cost reduction, higher system capacity and greater device connectivity.

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