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Strelia Competition Newsletter

February 2022 : The impact of the implementation of the European Electronic Communications Code in Belgium

1. *Introduction*

At the end of 2021, the Belgian Chamber of Representatives approved the law transposing the European Electronic Communications Code.

Belgium took its time transposing EU Directive 2018/1972, better known as the European Electronic Communications Code ("**the Code**"). The deadline to transpose this Directive passed 21 December 2020. As a result, the European Commission was forced to start an infringement procedure against Belgium for failure to transpose a directive on time. On 12 November 2021, the Commission sent a reasoned opinion, giving Belgium two final months to adopt the transposing measures, before the case would be referred the European Court of Justice.

This seems to have given Belgium the incentive it needed. The law was approved on 16 December 2021, published in the Belgian Official Gazette on 31 December 2021 and it entered into force on 10 January 2022.

In this newsflash we highlight the most important changes to the Belgian framework for electronic communications, with a particular focus on certain Belgian peculiarities arising from this transposition. This overview is not exhaustive, as the transposing law includes 263 articles and modifies not less than nine different federal laws, although the majority of modifications concerns the law of 13 June 2005 concerning electronic communication ("**the ECA**").

2. *Most important changes*

Clarification and enlargement of the scope

Since the last overhaul of the regulation of electronic communications, significant technological developments have taken place. Therefore, the definition of the services caught by telecoms regulation needed an update. Two preliminary references before the European Court of Justice to clarify and interpret whether the definition of an electronic communications service ("**ECS**") under the old package of telecom directives included certain so-called over-the-top services ("**OTTs**"), such as Skype Out and Gmail[1], brought this issue back to the fore amid the negotiations on the Code.

The Code includes a new broader definition of ECS, which distinguishes between different categories of services, namely: (i) internet access services; (ii) number-based and number-independent interpersonal communication services; and (iii) services consisting wholly or mainly in the conveyance of signals, such as transmission services used for the provision of machine-to-machine services.
These definitions have been copied by the Belgian legislature without significant modifications, the only exception being that the Code includes networks used for radio and television broadcasting, while in Belgium this falls outside federal competences and resides with the communities. A number of the new responsibilities introduced for each of these different service providers are detailed below.

[1] Judgment of 5 June 2019, *Skype v IBPT*, C-142/18, ECLI:EU:C:2019:460; and Judgment of 13 June 2019, *Google v Germany*, C-193/18, ECLI:EU:C:2019:498.

Spectrum and the introduction of 5G

A substantial part of modifications to the electronic communications framework relate to spectrum regulation. These updates are largely due to the new "connectivity" goal as introduced by the Code, and more specifically the European Commission's initial objective of a rapid roll-out of 5G to foster innovation, although the rules are not limited to 5G spectrum bands.

In the ECA, spectrum is dealt with in Articles 12 to 24, and in numerous Royal Decrees. Here as well, spectrum used for audio-visual media services has been largely excluded from the scope of the regulations.

In relation to spectrum, the regulatory competences of the Belgian Institute for Postal Services and Telecommunications ("**BIPT**") have been extended. The matter is considered to be of such a technical nature that the BIPT is better suited than the government via Royal Decrees. Moreover, the BIPT's competences are delineated by detailed implementing decisions of the European Commission in this domain.

The overall objectives and principles for spectrum management have been specified in the Code (Art. 45(2) of the Code), leaving little room for national deviations. These principles were therefore adopted in full, except for the provision regarding the protection of public health due to the regional divergences and sensitivities concerning radiation standards. The main principles include the pursuit of the rapid deployment of high quality and high-speed wireless broadband networks, predictability and consistency in licensing procedures and the promotion of spectrum sharing, instead of individual licenses to bring licensing models in line with 5G-developments.

The Code also includes detailed provisions concerning spectrum licenses and attribution mechanisms. The minimum authorisation period of 15 years has been implemented in Belgian law, including the rules regarding predictability and transparency and the procedures for extending this duration. The final version of the Code, however, did leave a certain margin of discretion to Member States to take appropriate measures regarding, *inter alia*, the limitation of the amount of radio spectrum bands, wholesale access and roaming conditions, spectrum reservation and grounds for refusal in the event of transfer or accumulation of rights of use.

This margin of discretion has been used by Belgium specifically in view of the roll-out of 5G and the extension of 2G and 3G licenses. Belgium has been lagging behind in the EU regarding spectrum allocation, mainly due to a disagreement between the federal and defederated entities concerning the distribution of the proceeds of a spectrum auction and the uncertainty of whether a fourth telecom player should be admitted to the auction. At the end of November 2021, the government reached an agreement regarding the latter issue, *i.e.*, reserving spectrum for a new player (as allowed by Art. 24/2, §2, 2°of the ECA in case of a specific situation in the national market), while it opted not to decide on the first issue yet. This however, allowed, the BIPT, to start preparing an auction, which is set to take place in June 2022.

Shared use provisions

The development of new technologies and improvements of capacity and coverage require significant investments of undertakings. In order to alleviate these financial burdens, incentivise private investors and foster innovation, the Code and subsequently Belgian telecoms law, puts the emphasis on shared use. This shared use is reflected in different parts of the legislation, *i.e.*, shared use of spectrum, of passive infrastructure, of antenna sites and of other equipment. However, this shared use also requires an increased vigilance with respect to competition law, particularly concerning the exchange of sensitive information and anti-competitive agreements.

Radio spectrum is a valuable but finite resource. Traditionally spectrum management separates services into different frequency bands to avoid interference and guarantee quality of service. However, technological

developments now allow the shared use of spectrum and an increased demand requires new solutions. Therefore, the BIPT can include shared use conditions in the general authorisation concerning license-exempt spectrum (Art. 13/2, §3 ECA), and the government, via Royal Decree, can set rules for individual non-exclusive licenses, allowing shared use (Art. 18, §1, 5° ECA). These conditions should foster an efficient use of spectrum, innovation and competition.

The shared use of antenna sites, infrastructure and other network elements is dealt with in Articles 25 to 28 of the ECA. The shared use of antenna sites was already partially included in the ECA since 2014, but 5G requires significantly more antennas to ensure coverage. Therefore, operators now need to notify the BIPT when starting a procedure to obtain a permit to extend existing antenna sites, after which the BIPT informs other operators, so they can negotiate shared use. The shared use of other infrastructure and network elements is new. The Code introduced certain so-called "*symmetrical access obligations*", whereby the regulatory authority can impose access on operators that do not have significant market power ("**SMP**") based on a market analysis. Article 28 ECA grants the BIPT extensive new powers to impose access obligations to wiring and cables and associated facilities within buildings or to the first point of aggregation or distribution, where replication of those network elements would be economically inefficient or physically impracticable. It can even go further than the first point of aggregation or distribution, if it is considered necessary. The BIPT needs to reassess the necessity of these conditions every five years. Additionally, owners of passive infrastructure need to provide on request certain minimum information in order to encourage the shared use of passive infrastructure.

End-user protection improvements

Finally, with regards to end-user protection, it is important to note that Article 101 of the Code is based on the premise of maximum harmonisation, meaning that Member States are not allowed to maintain or introduce more or less stringent provisions, unless explicitly permitted. Though, this only relates to topics covered by the Code, because for instance Article 4(3) of the EU's Open Internet Regulation explicitly allows Member States to impose additional monitoring, information and transparency requirements on operators.

In Belgium, the previous version of the ECA contained several stricter rules than the end-user provisions of articles 102 to 107 of the Code. Consequently, in order to respect the principle of maximum harmonisation, it was decided to completely rewrite the end-user protection rules in Articles 108 to 136 of the ECA, introducing both stricter and less strict measures, of which the most important ones are described below:

- Articles 108, §1 and 111, §1 ECA include a detailed list of (pre-)contractual information that operators must provide to consumers and certain small professional end-users, with a differentiation made between the offered electronic communication services;
- Article 108, §4 ECA determines that in case of modifications of the contractual conditions, end-users have to be informed at least one month before the entry into force of the changes and should be allowed to terminate the contract free of charge, with certain limited exceptions;
- Article 108, §5 ECA limits the initial contract term to 24 months, also for certain professional end-users;
- Articles 109 and 110/1 ECA make it mandatory for operators to inform their subscribers at least once a year and on simple request of the subscriber as to whether there is a more beneficial tariffs based on the individual consumption pattern of the subscriber;
- Article 110 ECA requires operators to provide end-users with a standard basic invoice, of which a template will be included in a Royal Decree, and on simple request end-users should receive a more detailed version;
- Article 111/2 ECA sets out certain high-level principles meant to improve the Easy Switch program, allowing end-users under certain conditions to switch from one operator to another - the program will be regulated in more detail by Royal Decree;
- Articles 111/3 and 111/4 ECA specifiy the rights and obligations of end-users when terminating or

modifying contracts;
- Article 113 ECA makes it mandatory for operators to publish complete, comparable, reliable, user-friendly and up-to-date information about their quality of service based on parameters defined by the BIPT;
- Article 116 ECA limits the waiting time for end-users to be connected to customer services of operators to 2.5 minutes - if this time is exceeded the operator needs to contact the end-user before the end of the next working day;
- Articles 120 and 120/1 ECA require operators to block incoming and outgoing calls and messages to certain numbers or paid products or services, if requested by an end-user;
- Article 121/1 ECA determines that end-users after terminating its agreement with an internet access provider should retain access to the email-address they created with this provider for at least 18 months and that end-user's webspace remains available for at least 6 months. In addition, end-users should be allowed to prolong this access and availability in return for remuneration, the maximum amount of which shall be determined by Royal Decree.

Overall, the end-user protection rules have become more detailed, but not necessarily significantly more extensive for operators. For example, the pre-contractual information, the comparability of tariffs and quality of service information, the maximum duration of 24 months for consumer contracts, etc. as included in the Code were already provided in the previous version of the ECA.

Conclusion

The transposition of the European Electronic Communications Code in Belgian law brings about a comprehensive overhaul of the principles of telecoms regulation. The latest modification on this scale dates back to 2012, when the 2009 EU Telecoms Package was transposed in Belgium.

The framework has now been modernised, which is most significantly shown by the enlarged scope of application, now also including number-independent electronic communications services and very high-capacity networks. Moreover, the application of rights and obligations has become more complex, with different rules applying depending on the type of service and the type of end-user. Consequently, all undertakings active in the wider sector of telecom, electronic communications, cloud services, machine-to-machine services etc. are recommended to verify whether they fall within the scope of this act and if so, whether they should respect new obligations.

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