



The International Communications Market 2017

**International regulatory
context**

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2.1 Introduction

This section provides an overview of recent and ongoing regulatory developments at EU¹⁵ and international levels in the communications sector. It does not aim to be a comprehensive examination of regulatory frameworks across the comparator countries, but highlights significant developments to provide some context to the analysis of the international communications market elsewhere in the report.

The section covers the telecommunications and postal sectors as well as the area of content regulation and the protection of audiences. It concludes with an overview of international and European radio spectrum policy developments.

2.2 Significant developments in the telecommunications sector

2.2.1 The EU regulatory framework for electronic communications

In May 2016, the European Commission (EC) published its Digital Single Market (DSM) strategy,¹⁶ setting out a vision for achieving an internal market in Europe, in which anyone can access and purchase digital goods and services, regardless of their country of origin.

Comprising 16 actions, the DSM is now well under way, and the EC has published a number of legislative initiatives that are expected to be adopted by the European Parliament and Council (28 Member States) in the coming year. A review of the regulatory framework for electronic communications (commonly referred to as the 'Framework', soon to be renamed *the European Electronic Communications Code*) is one of these legislative initiatives.

The Framework, originally adopted in 2002,¹⁷ sets the regulatory principles for electronic communications network and service regulation, including the suite of remedies that regulators can impose on operators with significant market power, as well as principles for spectrum authorisation and use. It defines the permitted scope of universal service obligations (USO) and includes sector-specific measures on consumer protection.

The Framework currently comprises four Directives and two Regulations, and applies to all electronic communications networks and services, retail and wholesale, as well as associated facilities and services. It aims to ensure effective competition and consumer protection, and constitutes the basis for a consistent regulatory environment across the communications markets of all 28 Member States.

The Framework was last revised in 2009 to ensure that it continued to serve the best interests of consumers and industry, and to reflect some of the major developments of the sector, such as growth in VoIP and take-up of television services via broadband.

¹⁵ The consequences of the UK's EU referendum vote will be unclear for some time. The UK currently remains a member of the EU and the EU regulatory frameworks continue to apply.

¹⁶ <http://ec.europa.eu/priorities/digital-single-market/>

¹⁷ http://europa.eu/legislation_summaries/information_society/legislative_framework/l24216a_en.htm

Since then, the EC has continued to monitor the implementation of EU rules and Member States' progress towards achieving the targets set out in the Digital Agenda, which will be described in more detail below. It has done so via its annual Digital Agenda Scoreboard¹⁸ (DAS), the Digital Economy and Society Index¹⁹ (DESI), and Implementation Reports²⁰.

In September 2015 the EC launched its second review of the Framework with a public consultation,²¹ and in September 2016 it published legislative proposals (*the European Electronic Communications Code*).²² At the time of writing, the European Parliament and the Council are well into their consideration of the EC's proposals, and trilogue discussions (the reconciliation of the European Parliament's and Council's positions, mediated by the Commission) commenced in late October 2017. The EC is aiming for a final agreement to be adopted by mid-2018.

The overriding policy focus of the Code is the deployment and take-up of very high speed networks. While retaining the core tenets of the economic regulation framework that has been in place since 2002, the EC's proposals sought to increase investment incentives (including, in some cases, through lighter-touch regulation). It also proposed to broaden the scope of the Code compared to the current Framework, by bringing into scope some 'over-the-top' services, and subjecting them to a limited number of new regulatory obligations. The EC proposals sought to simplify and increase the level of harmonisation of consumer protection provisions across the EU, while explicitly enabling regulators to apply rules on switching and contract termination to all elements of a retail bundle. The EC also proposed to remove certain services (such as payphones and directory enquiries) from the scope of the mandatory USO, and to recast the objectives of the USO from one of service availability to one of affordability. While it also proposed that industry funding of USO should no longer be permitted, this has been met with resistance. Finally, the EC proposed greater EU-level oversight over national spectrum auctions, and greater coordination in the timing and terms of spectrum awards.

Last but not least, the EC proposed a strengthening of the independence of national regulators, and the transformation of the Body of European Regulators for Electronic Communications (BEREC – the network of EU national regulators) into a European agency. BEREC is a forum for cooperation, knowledge-exchange and sharing best practices between independent National Regulatory Authorities (NRAs). The European Council, The European Parliament and the EC regularly seek the advice of BEREC on a range of policy issues, while NRAs and the EC are required to take the utmost account of any opinion, recommendation, guidelines, advice or regulatory best practice adopted by BEREC.

National regulators including Ofcom are members of BEREC, which was established by the EU as an independent advisory body in 2009 (it is not an EU agency). BEREC contributes to the better functioning of the internal market by ensuring a more consistent application of the EU regulatory framework. It provides advice to the European institutions, both on its own initiative and on request, and complements at European level the work performed at national level by NRAs through developing regulatory best

¹⁸ <http://ec.europa.eu/digital-agenda/en/digital-agenda-scoreboard>

¹⁹ <http://ec.europa.eu/digital-agenda/en/desi>

²⁰ <https://ec.europa.eu/digital-agenda/en/news/implementation-eu-regulatory-framework-electronic-communications-2015>

²¹ <https://ec.europa.eu/digital-agenda/en/news/public-consultation-evaluation-and-review-regulatory-framework-electronic-communications>

²² http://europa.eu/rapid/press-release_IP-16-3008_en.htm

practices and by issuing reports on pertinent regulatory issues. In 2017, among other things, BEREC assessed the regulatory implications of frequency unbundling on new forms of passive optical networks (PONs) and of the convergence of fixed and mobile network networks. It also produced reports on current symmetric regulation and universal service practices as well as on the implementation of the Broadband Cost Reduction Directive (BRCD) and the net neutrality guidelines. BEREC undertakes about thirty such reports every year as well as issuing opinions of draft decisions, recommendations and guidelines of the Commission regarding the regulatory framework. Next year, as well as continuing to provide inputs to the legislative proposals of the Code as it moves through the legislative process, BEREC will, among other things, prepare best practice reports on monitoring mobile coverage, ensuring equivalence of access for disabled users and infrastructure sharing. It will also continue its work on the development of a net neutrality measurement tool and prepare a report on IoT (internet of things) indicators and how to measure them.

2.2.2 International mobile roaming

The European regulatory framework for international mobile roaming was originally set out in the first *EU Roaming Regulation* (EC 717/2007), which was subsequently updated in 2009 and 2012.²³ This was then superseded by measures agreed as part of the *Connected Continent Regulation* (also known as the Telecoms Single Market (TSM) Regulation), which entered into force in April 2016 and set out a timeline, conditions and a transitional period, for the abolition of retail roaming surcharges by 15 June 2017. The Regulation also introduced new net neutrality rules, covered separately below.

The new international roaming rules abolished retail roaming surcharges with effect from 15 June 2017 (known as ‘roam like at home’). This followed agreement on a Commission implementing act on fair use and sustainability (in December 2016) and a new regulation regarding wholesale roaming charges (in April 2017) both of which were envisaged by the TSM Regulation. As a preliminary step, a substantial reduction in retail roaming surcharges had already become applicable from 30 April 2016, until the mandatory introduction of ‘roam like at home’ pricing.

Since June 2017, operators have been allowed to implement fair-use policies (essentially, limits to ‘roam like at home’) to prevent the abuse of regulated roaming services, subject to the conditions in the Implementing Act. Operators are also able, exceptionally, to apply annually to their NRAs for permission to retain surcharges up to the retail caps if they can demonstrate that they cannot cover the costs of providing roaming.

2.2.3 Traffic management and net neutrality

The net neutrality debate – about the extent to which a principle of non-discrimination should apply to internet traffic across networks – has continued to preoccupy national regulators and governments across the world, and particularly in Europe and the US, where new rules have been the subject of extensive discussion during 2017.

There is broad global support for the principle that ISPs²⁴ should not become gatekeepers to online content, applications and services rather than neutral providers of access to them, to avoid the risk of compromising the continued operation of the internet as an open platform for innovation. However,

²³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:172:0010:0035:EN:PDF>

²⁴ Internet service provider (ISP): a company that provides access to the internet.

there is significant disagreement about what exactly this means for ISPs, with strongly held and divided views about practices such as ‘zero-rating’. An online content service is ‘zero-rated’ on an internet access service when use of the content service does not count against the data cap applying to the internet access service.

By late 2016 there was net neutrality legislation or regulation in place in at least six countries outside the EU and US:

- A 2010 Chilean net neutrality law forbids ISPs from discriminating between content providers or from blocking users from accessing lawful content.
- Singapore’s telecoms regulator maintains a ban on blocking access to lawful content (following a 2011 consultation).²⁵
- In 2012 provisions in a Peruvian law enabling and promoting broadband investment require ISPs to respect network neutrality.
- Israel introduced a net neutrality requirement for mobile broadband services in 2011, and extended these to fixed-line services in 2014.
- in Brazil, the 2014 *Civil Rights Framework for the Internet*²⁶ included net neutrality rules.

In general, the trend has been for regulation and legislation to strengthen the protection of net neutrality. However, in May 2017, the FCC (the telecoms regulator in the US), under its new Chairman, Ajit Pai, issued a consultation on proposals to reverse the fundamentals of the FCC’s February 2015 ‘Open Internet’ Order²⁷. The ‘Open Internet’ Order had reclassified broadband internet access services from largely unregulated ‘information services’ to more regulated ‘telecommunications services’ (so-called Title II), and adopted net neutrality rules similar to those subsequently adopted in Europe’s Telecoms Single Market (TSM) Regulation. The FCC consultation does ask whether the ‘bright line rules’ in the 2015 Order, which ban blocking, throttling and paid prioritisation, should be retained, so some degree of net neutrality protection might remain when the consultation process is completed.

In Europe, the *Telecoms Single Market (TSM) Regulation*²⁸ introduced rules on net neutrality that came into force on 30 April 2016. The Regulation requires ISPs (fixed and mobile) to treat all traffic equally and establishes a right for all end-users to access and distribute lawful content, applications and services of their choice. It also introduces new transparency requirements for ISPs. Under the Regulation ISPs may use reasonable traffic management measures, but blocking and throttling are allowed only in a limited number of circumstances, such as preserving network security and managing network congestion. In August 2016 BEREC issued guidelines on the implementation of the rules by NRAs.

The EU framework bans certain ISP practices which would clearly conflict with the purposes of net neutrality – such as charging content providers for access to consumers – but also provide for case-by-case analysis of practices which might pose a risk to internet innovation, but which are not banned

²⁵

https://www.imda.gov.sg/~media/imda/files/inner/pcdg/consultations/20101111_netneutrality/netneutralityexplanatorymemo.pdf

²⁶ <https://www.publicknowledge.org/documents/marco-civil-english-version>

²⁷ <https://www.fcc.gov/restoring-internet-freedom>

²⁸ <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015R2120>

outright. ISP services which include zero-rated content are the most widespread examples of such potentially 'risky' services. During 2017, EU regulators investigated several cases of zero-rating; some of them were determined to be in breach of the TSM Regulation, but others were approved. This illustrates the complex position of zero-rating in the net neutrality debate. It is also relevant that in 2016 India's telecoms regulator ruled all zero-rating practices to be impermissible.

In late 2017, BEREC will publish an analysis of the implementation of the net neutrality rules in the TSM Regulation. This should help clarify or resolve ambiguities around the specific rules ISPs must obey in order to protect the open internet, something which would be welcomed by industry, regulators and open internet activists. Following this, the BEREC 2018 work programme will include a review of the operation of the Regulation, intended to inform the Commission's own review and potential revision of the Regulation scheduled for 2019.

2.2.4 Next-generation access (NGA)²⁹ and broadband roll-out

The *Digital Agenda* presented by the EC forms one of the seven pillars of the *Europe 2020 Strategy*, which sets objectives for the growth of the European Union by 2020. The *Digital Agenda* sets out targets for NGA coverage by 2020: Europe needs download rates of 30 Mbit/s for all of its citizens and at least 50% of European households should be subscribing to internet connections above 100 Mbit/s by 2020.

The EU conducted a mid-term review of its Digital Single Market programme this year; it found that, to date, there are 35 proposals and initiatives that have been published such as the WiFi4EU scheme which will support the installation of wifi coverage in places that are the centre of community life (local municipalities, libraries, health centres).

The EC has extended its thinking beyond 2020 to address longer term broadband needs and has talked of a 'Gigabit society' by 2025: all schools, transport hubs and main providers of public services as well as digitally intensive enterprises should have access to internet connections with download/upload speeds of 1 Gigabit of data per second. In addition, all European households, rural or urban, should have access to networks offering a download speed of at least 100 Mbit/s, which can be upgraded to 1 Gigabit, and all urban areas as well as major roads and railways should have uninterrupted 5G wireless broadband coverage.

The EC aims to turn this ambition into reality by introducing initiatives that will incentivise investments and reduce the costs of NGA deployment (e.g. by encouraging co-investments and the sharing of civil infrastructure). Member States have now transposed the Cost Reduction Directive³⁰ into national law; this aims to reduce costs by making it easier to share and re-use any infrastructure that can deliver broadband services. As well as facilitating and incentivising access to physical infrastructure, it also seeks to more efficiently co-ordinate civil works, and simplify permit-granting procedures.

²⁹ Next-generation access (NGA) networks are new, or upgraded, access networks that can allow substantial improvements in broadband speeds, typically being able to provide actual speeds in excess of 24Mbit/s. NGA networks can be based on a number of technologies such as fibre-to-the-cabinet, DOCSIS 3.0 cable and fibre-to-the-premises/home/building.

³⁰ <https://ec.europa.eu/digital-single-market/en/news/directive-201461eu-european-parliament-and-council>

More recently, as noted above, the EC's proposals for the European Electronic Communications Code have as one of their key aims to incentivise investments in high capacity networks, including by facilitating co-investment projects and increasing regulatory predictability.

In various European countries, regulators have defined their own roll-out strategies and begun to implement them. Despite their common goals, the type and speed of NGA roll-out varies considerably across European countries. In 2016, BEREC's report: *Challenges and drivers of NGA roll-out and infrastructure competition*³¹ highlighted a number of factors that impact on a country's NGA deployment (e.g. the model of competition, based to a large degree on the technologies deployed). The report also shows that factors that are largely exogenous to NRAs' sector specific regulation have a significant impact on NGA deployment - for example, the type of NGA roll-out is largely shaped by the legacy infrastructure and existing civil infrastructure, hence revealing strong elements of path-dependency. However, the regulatory approach does have a strong bearing on the degree/type of competition that emerges, and on prices – currently, several NRAs are considering how best to balance increased infrastructure competition based on passive infrastructure access while retaining service-based competition using the active wholesale products of the incumbent.

Governments and regulatory agencies have also examined policies of imposing structural remedies to enhance the deployment of high speed broadband networks. In the UK, Ofcom has made progress toward realising the vision it set out in its Digital Communications Review (DCR) which explicitly supported investment and innovation in ultrafast broadband networks such as fibre to the home (FTTH) through pricing and access remedies. In March 2017, BT agreed to Ofcom's requirements for the legal separation of its network division, Openreach. Openreach will become a distinct company within BT with its own Articles of Association such that it will be obliged to make decisions in the interests of all its downstream clients. Ofcom hopes that this will enable more competition between communication providers that will lead to an accelerated roll-out of fibre closer to end-user premises. In a related proposal, BT's competitors will gain improved access to BT's duct and pole infrastructure to lay their own fibre cables (passive infrastructure access). This will complement existing remedies based on wholesale active products (e.g. VULA).

In Australia, Brazil, Luxembourg, New Zealand, Singapore and South Africa, governments have created new state-owned operators in order to participate directly in the construction of broadband networks. In 2010, the Australian Parliament took fixed infrastructure into state control in the form of a wholesale national broadband network (NBNCo). The original strategy of the government was to favour FTTP³² (fibre-to-the-premises) deployment. However, in December 2013, NBNCo submitted a strategic review to the government, recommending an alternative multi-technology approach whereby the NBN would be delivered using a range of technologies including FTTC³³ (fibre-to-the-cabinet), FTTdp (fibre-to-the-distribution point) and hybrid coaxial cable, alongside FTTP.

³¹ http://www.berec.europa.eu/eng/document_register/subject_matter/berec/reports/6488-berec-report-challenges-and-drivers-of-nga-roll-out/rollout-and-infrastructure-competition

³² Fibre-to-the-premises (FTTP): A form of fibre-optic communication delivery in which an optical fibre is run directly onto the customer's premises.

³³ Fibre-to-the-cabinet (FTTC): Access network consisting of optical fibre extending from the access node to the street cabinet. The street cabinet is usually located only a few hundred metres from the subscriber premises. The

In other European countries, approaches vary to the relative application of passive or active remedies. In France, for example, very few active FTTH remedies have been imposed as the French regulator pursues a policy of incentivising infrastructure competition and the deployment of FTTH. This has required geographic variations in remedies, to take account of the different points in the access network at which NGA investment becomes commercially viable for communication providers who are not first movers.

Geographic variations have also been implemented in Spain and Portugal based on the designation of competitive and non-competitive areas. Both Iberian countries have also been leaders in the EU in using passive infrastructure remedies through symmetric access regulation to facilitate the deployment of NGA infrastructure. In Spain, according to the EU's *Digital Progress Report*³⁴, 79% of the population has access to ultrafast broadband services of 100Mbit/s or more. FTTP networks cover 63% of the population, although this drops to 10% in rural areas. Similarly, in Portugal, networks capable of providing at least 30Mbit/s are available to 95% of households. Symmetric measures in both countries have facilitated co-investment and co-deployment agreements that deploy FTTH. In Spain, the four main fixed fibre network operators have all entered into agreements - the incumbent operator (Telefonica) with the smallest player (Jaztel) and Vodafone with Orange. In Portugal, there is a similar situation – Optimus entered into a FTTH sharing agreement with Vodafone in 2010 to cover 400K households and in 2017, Vodafone has entered into an agreement with the cable operator NOS to cover 2.6 million households. Vodafone's reciprocal rights of way agreement with Portugal Telecom enables each operator to provide commercial services using each other's GPON network, giving each operator FTTP coverage to 900K households. These agreements have resulted in increasing coverage as well as competition – 57% of households in Portugal can choose from more than one NGN operator and 43% can choose from three NGN operators.

The range and mix of policy approaches reflects the trade-off that governments and regulatory agencies are having to contend with – the desire to 'future-proof' investments and accelerate the transition to a 'gigabit society' by adopting a FTTP policy with the need to spread the large investment that is required over a longer period by adopting a multi-technology approach.

The policy approaches and outcomes described above have mostly focused on supply-side areas. Supply side approaches have been preferred in the past because policy makers have been guided by a 'build it and they will come' mindset and because supply-side targets tend to be measurable and specific. Policy frameworks are increasingly including demand-side policies to drive digital progress, and the EU's digital progress report uses dimensions such as human capital and use of online services, as well as connectivity measures, to rank and measure progress by countries.

A report by Ericsson³⁵ shows that countries which have taken a holistic approach that encompasses supply-side and demand-side policies that have elements of hard and soft targets within national broadband plans (NBBPs) may deliver more optimal levels of social and economic transformation. Supply-side parameters typically measure coverage, often specifying certain aspects (rural coverage, coverage of ultrafast versus superfast broadband, fixed versus other technologies)

remaining segment of the access network from the cabinet to the customer is usually a copper pair but could use another technology, such as wireless.

³⁴ <https://ec.europa.eu/digital-single-market/en/european-digital-progress-report#Article>

³⁵ <https://www.ericsson.com/en/news/2014/12/15-nations-15-ways-the-many-roads-to-the-networked-society>

Demand-side parameters tend to focus more on parameters such as e-government, and providing ICT tools to educational and health sectors. NBBPs tend to start with a greater focus on hard supply-side targets, particularly in developing countries or to facilitate coverage in rural areas which have less attractive economic fundamentals for commercial deployment. In South Africa, for example, the priority is to increase its broadband coverage whereas in France, the plans contain targets to increase coverage to rural areas. By contrast, in Finland which has already made significant progress in terms of broadband coverage and use, the focus is on demand-side initiatives that embed technology more deeply into society.

2.3 Significant developments and activities in the postal sector

During 2017, substantial discussions took place in the European Parliament and Council on the EC's 2016 legislative proposals aimed at ensuring greater transparency in and regulatory oversight over cross-border parcels tariffs, especially for SMEs and users in remote areas.

The original proposals include a requirement for NRAs to annually assess the affordability of a range of universal service provider (USP) cross-border postal tariffs and the publication by the EC of public listed prices of USPs in order to increase peer competition and transparency. The proposals also would require third-party access to multilateral cross-border agreements of USPs, with an associated role for regulators in approving an access reference offer and adjudicating on any disputes.

In July 2017, the Council reached agreement on amendments to the Commission's proposals. Key changes which the Council proposed included extending the information requirements on tariffs to all parcel service providers with at least 50 employees, replacing the proposed affordability assessment by an assessment of 'unreasonably high' prices and deleting the proposed third-party access requirements.

In October 2017, the European Parliament's Transport Committee reached agreement on its own amendments to the Commission's proposal which also would extend the tariff provision requirements to all parcels delivery providers, but with further qualifications relating to the number of employees and reporting on subcontractors. However, while the Committee voted to make the NRA affordability assessment wider than USPs, it also voted to make such assessments optional i.e. at the NRA's discretion.

The next stage in the process is for trilogue meetings to take place between the European Council, the European Parliament and the EC with agreement on a final text expected in the first half of 2018.

Meanwhile, the European Regulators' Group for Postal Services (ERGP)³⁶, the network of European postal regulators tasked with sharing best practice and advising its members and the EC³⁷, has been working on the implementing measures which will accompany any new cross-border parcels regulation as well as on other aspects of postal regulation. During 2017, the Group has been working to produce reports on the following topics:

- A common set of criteria to ensure the comparability of different postal user needs studies.

³⁶ http://ec.europa.eu/growth/sectors/postal-services/ergp_en

³⁷ As well as the ERGP, a number of international bodies are active in the postal sector. The Universal Postal Union (UPU), a UN body, is the primary forum for cooperation between UN Member States concerning postal services. See <http://www.upu.int>

- An assessment of possible changes to the scope of USO in the light of market developments and their impact on USO sustainability.
- A report on costs of the postal network incurred by the designated USPs in providing access to other postal providers.
- A report on recommendations and best practices in regulation for access to the postal network of the incumbent USPs.
- Defining the boundaries between items falling within the postal and transport sectors to ensure clarity for NRAs on the performance of their tasks.
- An analysis of service quality, complaint handling and consumer protection in 2016, including an analysis of trends.

With a wider membership than the ERGP, the Committee of European Postal Regulation (CERP)³⁸ brings together representatives of the regulatory authorities in 64 states, including EU Member States, EU candidate countries, the EEA and other Eastern European countries. It has two working groups, one dealing with postal policy and the other working on Universal Postal Union (UPU)³⁹ issues. In 2017, the work of CERP was focused on follow-up actions from the 2016 UPU Congress in Istanbul, in particular proposals to reform the structure of the UPU to be considered further at an extraordinary UPU Congress to be held in Addis Ababa, Ethiopia, in September 2018.

2.4 Significant developments in the area of content regulation and the protection of audiences

2.4.1 The EU content regulatory framework

In Europe, the *Audiovisual Media Services Directive* (AVMSD)⁴⁰ is the common framework for the regulation of television and video-on-demand (VoD) content. Last reviewed in 2007, the AVMSD sets out common minimum rules for television content, focusing on the protection of minors, incitement to hatred, advertising, and the promotion of European works. It also ensures that pan-European broadcasters have to comply only with a single set of rules: those of the country in which they are established (the country-of-origin principle).

Following a public consultation in 2015⁴¹ on the fitness of the rules, the EC published a legislative proposal to update the AVMSD in May 2016, including: extending the scope of the Directive to cover certain internet-delivered services (via the regulation of ‘video-sharing platforms’ (VSPs) such as YouTube, in relation to harmful content and hate speech); relaxing the rules on commercial communications; harmonising rules on protecting minors; extending the right of Member States to charge levies on on-demand revenues to fund content investment; and introducing detailed requirements for ensuring the

³⁸ <http://www.cept.org/cerp/>

³⁹ <http://www.upu.int>

⁴⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF>

⁴¹ <https://ec.europa.eu/digital-agenda/en/news/public-consultation-directive-201013eu-audiovisual-media-services-avmsd-media-framework-21st>

independence of NRAs. Negotiations on the proposal continued throughout 2017 and a final text is expected to be adopted in the first half of 2018.

In the meantime, and in part feeding into the AVMSD review process, national regulators in Europe continue to work on implementation at the national level, and to cooperate in a number of regulatory bodies. One of them is the European Regulators Group for Audio-visual Media Services (ERGA)⁴², a group of EU audio-visual regulators, set up to advise the EC on the application of the AVMSD. In 2015 it conducted work on regulatory independence, the scope of the AVMSD, territorial jurisdiction and the protection of minors⁴³. In 2016, ERGA continued its work notably on the protection of minors, and on 5 October 2016 adopted an opinion on the proposal to amend the AVMSD⁴⁴. It also conducted an analysis of co and self-regulatory schemes across Europe.

National regulators in Europe also cooperate on a wider basis through the European Platform of Regulatory Authorities (EPRA)⁴⁵, an independent group of regulators from 46 countries, that meets twice a year to share best practice.

2.4.2 Content protection and controls in an online environment

Child online protection⁴⁶ (and the wider protection of audiences online) has in recent years moved up the international political agenda. As the existing EU content framework, the AVMSD, applies content regulation to only a limited number of online services, new models of cooperation and participation are emerging, featuring combinations of co- and self-regulation and media literacy initiatives.⁴⁷ While self-regulatory models remain a primary feature of the landscape, there is an increasing trend towards the introduction of statutory frameworks to complement industry-led measures.

In 2017, the UK introduced legislation⁴⁸ for a new statutory scheme which aims to ensure that providers of sexually explicit material online restrict minors' access to their services through age-verification. The new scheme, which allows a regulator (likely to be the BBFC) to require ISPs to block access to providers who do not comply with the rules, is expected to start operating during 2018.

Statutory and co-regulatory arrangements are typical across the EU in relation to those online services which are covered by the AVMSD – in other words, video-on-demand services which are established in a Member State of the EU. These include obligations on regulated providers to restrict minors' access to 'stronger' material, such as sexually explicit programmes, through access control mechanisms. The UK rules in particular set out in some detail the obligations on providers of stronger material to verify the

⁴² <http://ec.europa.eu/digital-agenda/en/audiovisual-regulators>

⁴³ <http://erga-online.eu/wp-content/uploads/2016/10/ERGA-PoM-Report-2017-wordpress.pdf>

⁴⁴ <https://ec.europa.eu/digital-single-market/en/news/erga-opinion-avmsd-proposal>

⁴⁵ <http://www.epra.org/>

⁴⁶ The term 'child online protection' in this case relates to the protection of minors (traditionally meaning, in regulatory terms, broadcast content-related rules for the protection of young viewers) in the online space. In many countries, the broadcast related rules for minors are only applicable to tv-like services online and not all video and content services online.

⁴⁷ Ofcom defines media literacy as: 'the ability to access, understand and create communications in a variety of contexts'.

⁴⁸ <http://www.legislation.gov.uk/ukpga/2017/30/contents/enacted>

ages of viewers before allowing access. France operates a statutory age classification system for VoD content, with associated scheduling restrictions and information requirements.

In some cases, the statutory framework is complemented by self-regulatory bodies: in Italy, the Committee for Media and Minors oversees the provision of access control mechanisms under a code, with AGCOM, the NRA, as a statutory back-stop.

However, the most significant development towards more formal regulation of online content was in the proposals noted above for the expansion of scope of the AVMSD to cover video-sharing platforms (VSPs), of which YouTube is the most prominent example. The scope of services covered by the new rules remained subject to negotiation by late 2017, but looks likely to cover other social media platforms, such as Facebook.

The proposed VSP obligations are not the same as the rules which apply to broadcasters and video-on-demand providers, who must make *ex ante* decisions about content before offering it to viewers. In contrast, the VSPs are required to operate *ex post* flagging and review procedures, under which they must:

- have a standards framework covering the concept of content harmful to minors;
- allow users to flag content which may not be consistent with the framework; and
- review content flagged to them and act accordingly to remove or restrict access to content which is potentially harmful.

These obligations are similar to the current, voluntary practices of the major social media players, but under the Directive will be subject to statutory regulatory oversight, and must be operated in a way which is transparent to users. The details of this new VSP regulation have been the subject of further discussion and negotiation during 2017, with the adoption of new rules expected to take place in the first half of 2018.

Self-regulatory initiatives remain a central aspect of online audience protection. Notably, in the UK, all of the country's mobile operators and the four largest fixed-line ISPs offer network-level content filtering services on a voluntary basis. Since the announcement of the provision of filtering by fixed providers, Ofcom has published a series of reports on the protection of children online. The first⁴⁹, published in January 2014, looked at how parents protect their children online. The second⁵⁰, published in July 2014, set out the measures adopted by the UK's four largest fixed line ISPs to introduce family-friendly network-level filtering for new customers. Two further reports in January 2015⁵¹ and December 2015⁵², provided an update on the ISPs' filtering and more recent media literacy research.

Ofcom continues to publish regular media literacy and viewer research data, to aid understanding and identify areas of concern, including annual reports on audience understanding and expectations of

⁴⁹ https://www.ofcom.org.uk/__data/assets/pdf_file/0019/27190/Internet-safety-measures-first-report.pdf

⁵⁰ https://www.ofcom.org.uk/__data/assets/pdf_file/0019/27172/Internet-safety-measures-second-report.pdf

⁵¹ https://www.ofcom.org.uk/__data/assets/pdf_file/0016/31732/third_internet_safety_report.pdf

⁵² https://www.ofcom.org.uk/__data/assets/pdf_file/0020/31754/Fourth-internet-safety-report.pdf

protection measures and standards across different media.⁵³ Ofcom research in 2017 found that 37% of households with children had adopted the network parental filters discussed above⁵⁴.

Other important self-regulatory initiatives established during the 2016 included the online platforms Facebook, Twitter, YouTube and Microsoft agreeing a voluntary code of conduct with the EC covering a commitment to act to combat the spread of illegal hate speech online in Europe.⁵⁵ The code commits signatories to act quickly in removing illegal content when they are notified of its existence. The Commission's *2017 Communication Tackling Illegal Content Online*⁵⁶ challenged online platforms like to go further, and voluntarily "*adopt effective proactive measures to detect and remove illegal content online*", rather than simply respond to reports of illegality.

A collaborative programme run since 2014 between the British Board of Film Classification (BBFC), the Netherlands' regulator NICAM and others, on *You Rate It*, a tool to enable members of the public to age-rate user-generated video content online across different territories and platforms. It covers areas such as violence, language and discrimination, and applies different national ratings according to the location of the user. It is intended for non-commercial content, and can be used both by creators and consumers of content. Approaches like this model, which involve content creators and audience members in securing audience protection, are likely to be a significant part of future content protection.

2.4.3 Media pluralism, trust in the media, and ownership rules

In 2017 media pluralism remained high on the European agenda, brought into sharp focus by the worldwide concerns over 'fake news' after a debate and an EC consultation on media pluralism and freedom, including the role of NRAs, sparked by an earlier report from a High Level Group (HLG)⁵⁷ of Experts for the EC. Most recently, EC Vice-President Frans Timmermans hosted the Second Colloquium on Fundamental Rights in November 2016, on the subject of *Media Pluralism and Democracy*. The Colloquium's output noted the risks posed to democracy from disinformation, falling trust in traditional media, and threats to journalists. It called for action in a number of areas, including ensuring the independence of media regulation, for implementation of European Parliament and Council of Europe recommendations on media pluralism, and encouraged more support for public service media and organisations who monitor risks in this area⁵⁸. The new European Commissioner for Digital Economy and Society, Mariya Gabriel, intends to tackle fake news a priority. In November 2017, the Commission launched its public consultation on fake news and called for applications for a new high-level expert group on the subject⁵⁹.

In March 2017, the UN's Special Rapporteur on Freedom of Opinion and Expression, and the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, issued a joint

⁵³ <https://www.ofcom.org.uk/research-and-data/tv-radio-and-on-demand/tv-research/protecting-audiences-online-world>

⁵⁴ <https://www.ofcom.org.uk/research-and-data/media-literacy-research/childrens>

⁵⁵ http://europa.eu/rapid/press-release_IP-16-1937_en.htm

⁵⁶ <https://ec.europa.eu/transparen1cy/regdoc/rep/1/2017/EN/COM-2017-555-F1-EN-MAIN-PART-1.PDF>

⁵⁷ <http://ec.europa.eu/digital-agenda/en/high-level-group-media-freedom-and-pluralism>

⁵⁸ http://ec.europa.eu/information_society/newsroom/image/document/2016-50/2016-fundamental-colloquium-conclusions_40602.pdf

⁵⁹ http://europa.eu/rapid/press-release_IP-17-4481_en.htm

declaration on *Freedom of Expression, 'Fake News', Disinformation and Propaganda*⁶⁰. The declaration stressed the importance of respecting freedom of expression when tackling such issues, and called for an emphasis on support for public service media, editorial independence, transparency of information, and critical understanding.

The debate has focused on whether there is a greater need for harmonisation of rules on media pluralism at the European level. On the basis of one of the HLG's recommendations, and as an attempt to gather further data, a number of EU countries conducted pilot studies in 2014 (9 countries) and 2015 (19 countries), using the Media Pluralism Monitor Tool developed in 2009, which is a set of indicators to measure 'threats' to pluralism. The study was extended to all Member States and the full results published in November 2016⁶¹. Risks were identified in the area of media ownership concentration.

In parallel, the Council of Europe (CoE) created a Committee of Experts on Media Pluralism and Transparency of Media Ownership (MSI-MED), whose task was to analyse best practices in the CoE's Member States and prepare standard-setting proposals around ensuring a pluralist media landscape, diversity of media content and transparency of media ownership⁶². The group's work was completed in October 2017 and the recommendations it made will now be considered for approval by the Committee of Ministers.

In September 2017, Australia passed new legislation amending its media ownership laws. Changes include the repeal of the 75% reach rule (which prevents the creation of national television networks by banning networks from broadcasting to more than 75% of the population) and the '2/3' cross-media ownership rule (which restricts media companies from controlling more than two out of three platforms in any market across newspapers, television and radio).

In the US, the FCC's 2016 review of broadcast ownership rules retained existing rules, including the prohibition on cross-ownership of newspapers and television stations, and introduced new rules for reporting shared services agreements (i.e. a broadcaster will be counted as having an ownership interest in any station where that owner sells 15% or more of its advertising time – a common arrangement in the US, known as the 'sidecar'; this change will have the effect of tightening rules that limit companies to owning just one TV station in small and medium local markets). However, following the change in administration and appointment of new Chairman Ajit Pai, the FCC has announced a package of measures to lift restrictions on media ownership, including changing how station owners count certain television stations toward their national ownership caps, and removing restrictions that limit ownership of multiple media outlets in the same market. The changes can be (and in some cases already are) appealed but if passed create the potential for significant consolidation in the US broadcasting market.

2.5 Significant developments in the area of radio spectrum

Radio spectrum, a key public asset required for communications services, continues to be used increasingly intensively. As transmissions do not stop at international borders, there exists a formal framework of cooperation between countries to minimise cross-border interference within and between

⁶⁰ <http://www.osce.org/fom/302796?download=true>

⁶¹ <http://cmpf.eui.eu/media-pluralism-monitor/mpm-2016-results/>

⁶² <http://www.coe.int/en/web/freedom-expression/committee-of-experts-on-media-pluralism-and-transparency-of-media-ownership-msi-med->

services; to achieve the mobile use of wireless services at global and European levels; and to help create economies of scale which drive the availability of services and desirable outcomes such as lower prices for consumers.

Three key international structures coordinate spectrum at the international and European levels:

- the International Telecommunications Union (ITU)⁶³ which defines the global framework for spectrum use in the Radio Regulations. The Radio Regulations are a UN treaty, revised approximately every four years at World Radiocommunication Conferences⁶⁴ (WRC).
- the European Conference of Postal and Telecommunications Administrations (CEPT, Electronic Communications Committee (ECC)⁶⁵ which has a broader membership than the EU, with 48 Member States; and
- in the European Union, the Radio Spectrum Committee (RSC)⁶⁶ (comprising EU national governments) and the Radio Spectrum Policy Group (RSPG)⁶⁷ (comprising EU national spectrum authorities).

Ofcom acts for the UK in the above fora by virtue of a Government Direction⁶⁸ and contributes to the workings of CEPT/ECC where spectrum harmonisations measures are developed and published.

2.5.1 ITU and World Radiocommunication Conference (WRC) 2019

The preparatory process for the next WRC, WRC-19, is well under way, with less than two years before the conference starts. For the UK the main process involves engagement with Government, regulators and stakeholders to inform the UK position on individual agenda items which Ofcom manages and on which it leads. In parallel we engage with our European colleagues in CEPT which, through negotiation, leads to the establishment of European common positions (ECPs) on many of the agenda items considered at a WRC. We will also be engaging in the preparations of other regional groups outside Europe, and will participate in discussions with other administrations around the world, including with colleagues within the Commonwealth.

Ofcom confirms positions taken on WRC agenda items with the UK Government, to ensure consistency with Government policy, and publicly consults on them. Ofcom has already reached preliminary views on a number of WRC-19 agenda items:

- supporting additional allocations for mobile broadband, including 5G, in bands above 24 GHz; The UK, along with CEPT, has identified the 26 GHz band as its pioneer band for 5G and that it should be harmonised at WRC-19. We also view the bands around 40 GHz and 66-71 GHz as additional bands of interest.
- supporting the consideration of earth stations in motion use, in the frequency bands 27.5-29.5 GHz and 17.7-19.7 GHz;

⁶³ <http://www.itu.int/ITU-R/>

⁶⁴ <http://www.itu.int/ITU-R/index.asp?category=conferences&rlink=wrc&lang=en>

⁶⁵ <http://www.cept.org/ecc>

⁶⁶ <https://ec.europa.eu/digital-single-market/en/radio-spectrum-committee-rsc>

⁶⁷ <http://rspg-spectrum.eu/>

⁶⁸ <https://www.ofcom.org.uk/about-ofcom/international/spectrum/mou>

- supporting the assessment of the frequency bands between 5 150 MHz and 5 925 MHz for additional capacity for wifi and compatible wireless broadband technologies.

Other items which WRC-19 will be considering include studies related to wireless power transfer (WPT), the regulatory conditions applied to non-geostationary satellite systems in bands around 37.5 and 51.4 GHz, the allocation status applied to earth exploration satellites in the 450 – 470 MHz band and spectrum needs and regulatory provisions for the introduction and use of the global aeronautical distress and safety system (GADSS).⁶⁹

As work around WRC-19 progresses, Ofcom will continue to assess the full suite of agenda items to be considered, and will consult on all WRC-19 agenda items and the UK positions on them, towards the end of 2017. In parallel Ofcom continues to engage with all interested UK parties and will engage in the European and international processes, which will allow us to further develop views and the UK positions accordingly.

2.5.2 European Conference of Postal and Telecommunications Administrations (CEPT)

The European Conference of Postal and Telecommunications Administrations (Conférence Européenne des Postes et Télécommunications – CEPT), is a collective of 48 countries across Europe which also includes non-EU countries such as Russia, Turkey, Norway and Switzerland. CEPT's activities include cooperation on commercial, operational, regulatory and technical standardisation issues related to postal, telecommunications and radio spectrum harmonisation.

Within CEPT the Electronics Communications Committee (ECC) considers and develops policies on electronic communications activities in a European context, taking account of European and international legislation and regulation. The ECC produces spectrum harmonisation measures (concerning spectrum use by all sectors), which are then adopted by CEPT member countries. CEPT is also the recognised regional organisation for the European preparations going into World Radiocommunication Conferences.

The EC takes due account of the work of international organisations, such as CEPT and ITU, where they are seeking the development of technical implementing measures. This normally takes the form of an RSC mandate to CEPT to undertake this technical work and then report to the EC.

2.5.3 Radio Spectrum Committee (RSC)

The RSC⁷⁰ is responsible for developing legislative technical decisions to ensure harmonised conditions of use across Europe for the availability and efficient use of radio spectrum. It comprises Member States' representatives and is chaired by the EC. Once legislative harmonisation decisions are passed, they are binding upon the 28 EU Member States.

As reflected above, part of Member States remit within the RSC is to draft and approve mandates to the CEPT. These mandates, on which Member States provide both technical and policy input and direction normally specify the tasks to be undertaken, including the technical analysis required to establish

⁶⁹ A list of all the issues to be considered and decided upon at WRC-19 can be found here: <http://www.itu.int/en/ITU-R/study-groups/rcpm/Pages/wrc-19-studies.aspx>

⁷⁰ <https://ec.europa.eu/digital-single-market/en/radio-spectrum-committee-rsc>

minimum technical requirements to ensure harmonised conditions for the viable and efficient use of radio spectrum. The results of these mandates form the technical basis of RSC harmonisation decisions.

2.5.4 Radio Spectrum Policy Group (RSPG)

The RSPG⁷¹ is a high-level advisory group assisting the EC and the European Parliament (at its request) in the development of radio spectrum policy. It comprises representatives of the spectrum management authorities for each Member State (which in some cases are independent regulators, in some the relevant government ministry, and in many cases both) and the EC. The RSPG is chaired by a senior member from a Member State administration, and Ofcom's Group Director of Spectrum, Philip Marnick, has been Chair for the two-year period 2016-17.

The RSPG's work programme is delivered by a number of working groups. The RSPG's work programme currently covers:

- the spectrum needs of the *Digital Single Market* (including the Framework review);
- intelligent transport systems (ITS);
- The internet of things (IoT);
- 5G;
- WRC-19;
- PMSE; and
- EU assistance in bilateral coordination ('Good Offices').

The RSPG has already adopted Opinions under this work programme on the Framework Review consultation; on a European spectrum strategy for 5G; and on ITS and IoT. It is anticipated that a second Opinion on 5G will be published for public consultation, and a final Opinion on PMSE will be published in late 2017.

⁷¹ <http://rspg-spectrum.eu/>