

# Hot Topics

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## EU intends to regulate Over-the-Top ("OTT") services

### New BEREC Report advocates "Convergent Rules" for OTTs and Telecoms Services

Over-the-top (OTT) services - including Voice over IP, instant messaging services, streaming video and music services - are using telecommunications infrastructures, often competing with traditional telecommunications services, and are perceived as affecting and sometimes "disrupting" traditional industries.

Both, national regulators and the European Commission are currently considering if and to which extent OTT services should be subject to a regulatory regime that is identical with or broadly similar to the existing telecommunications regulatory regime.

A recent report (**BoR (16) 35, the "OTT Report"**) published by the Body of European Regulators for Electronic Communications (BEREC) assesses the growing importance of OTT services and their impact on electronic communication services (ECS), analyses the current regulatory regime and its applicability to OTT services and identifies points to be addressed in the forthcoming review of the EU regulatory framework for electronic communications. BEREC advocates the adoption of "more convergent rules" that would empower national regulators to protect end-users' rights while fostering future technological developments in the electronic communications markets.

#### What is an OTT?

BEREC defines OTT service - very broadly - as "content, a service or an application that is provided to the end-user over the open Internet." According to the OTT Report, this means "that anything provided over the open Internet is an OTT service". Not expressly included in the BEREC's definition is the criterion that OTT services are provided "without operating a network".

In order to categorize the services in relation to their impact on the ECS sector, BEREC proposes a taxonomy of OTT services which is based on a combination of technical and economic categories. BEREC differentiates between three types of OTT services:

- **OTT-0:** an OTT service that qualifies as an ECS, i.e. a service that consists wholly or mainly in the conveyance of signals.
- **OTT-1:** an OTT service that is not an ECS but potentially competes with an ECS, such as an instant messaging service.
- **OTT-2:** other OTT services, such as e-commerce, video and music streaming.

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## **Are OTT services currently regulated under the EU framework for electronic communications?**

Certain types of OTT services are qualified, by national regulators, as (publicly available) ECS and, as such, are subject to regulation under current EU telecommunications laws.

For example, in most (if not all) EU member states, Voice over IP (VoIP) services providing for a break-out to the public telephony network (PSTN) are considered regulated telecommunication services. BEREC qualifies these services as OTT-0.

The OTT Report notes, however, that the scope of the ECS definition provided for in the Framework Directive (2002/21/EC) is not sufficiently clear. BEREC therefore suggests to clarify the definition of ECS to ensure that "it keeps pace with the current developments". BEREC also notes that the lack of clarity allowing for different interpretations of the ECS definition leads to a lack of harmonization between member states in assessing which OTT services constitute ECS.

The classification as an ECS triggers the applicability of obligations such as emergency calling, safeguarding telecommunications secrecy, and telecommunications-specific consumer protection rules.

## **German Court broadens ECS definition**

A recent ruling of the Administrative Court of Cologne illustrates the lack of clarity of the current definition of the term ECS in EU legislation: The German Court took a broad view of what constitutes the "conveyance of signals" that characterizes an ECS. The court confirmed the German regulator's view that certain OTT webmail services are subject to telecommunications regulation. According to the ruling, even those OTT services where the actual transmission of signals is performed by third party ISPs over the public Internet may constitute ECS. In its reasons for the ruling, the Court stated that the classification of the relevant OTT service could not be based merely on a technical assessment but also needed to take into account the customers' as well as providers' points of view and the intention of the legislator. In its ruling, the Court did not follow the (legally non-binding) view of the EU Commission that the OTT webmail service in question was not to be considered an ECS.

As a consequence, Germany is now one of few EU member states where OTT email services and instant messaging services may be considered ECS and therefore subject to telecoms regulation.

## **Creating a "level playing" field for OTTs and ECS?**

Both, at member state and at EU level, the regulatory treatment of OTTs is currently being discussed and reevaluated. Many established telecommunications providers strongly lobby for the creation of a "level playing" field between OTT providers and telecommunications service providers. They demand that either their telecommunications services be deregulated or that those OTT services that substitute classic telecommunication services are subjected to sector-specific telecommunications regulation as well.

## **BEREC: "Proportionate" Regulation**

The OTT Report emphasizes that the creation of a "level playing field" should neither be the only nor the main consideration for regulatory reform. Rather, the range of services to which any specific regulatory obligation should apply, must be considered in light of its proportionality in relation to the public interest objectives pursued. According to BEREC, in a review that assesses the future scope of rules, the proportionality of rules regarding currently regulated services and currently not

regulated services (like OTT-1) should be considered in the same way. This means that an assessment of the proportionality of regulatory obligations may lead to an extension of their scope but also to its reduction, i.e. to deregulation. The OTT Report encourages the adoption of more convergent rules and of legal definitions that would empower national regulators to address consumer protection and competition issues arising from interactions between ECS and OTT services.

## Toward a new EU Telecoms Framework

BEREC's OTT Report will play an important role in the ongoing review of the EU telecoms framework, which the European Commission has launched in September 2015.

It is expected that the Commission will propose changes of the EU legal framework to allow national regulators to regulate at least those OTT services and platforms that provide functional substitutes for electronic communication services.

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