

EN



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 18.9.2001
SEC(2001) 1411 final

2000/0188 (COD)

**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT**

pursuant to the second subparagraph of Article 251 (2) of the EC Treaty

concerning the

**common position of the Council on the adoption of a Directive of the European
Parliament and of the Council on the authorisation of electronic communications
networks and services**

**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT**

pursuant to the second subparagraph of Article 251 (2) of the EC Treaty

concerning the

common position of the Council on the adoption of a Directive of the European Parliament and of the Council on the authorisation of electronic communications networks and services

1. BACKGROUND

In July 2000 the Commission submitted the proposal for a Directive of the European Parliament and the Council on the authorisation of electronic communications networks and services (COM(2000)386 – C5-0440/2000 – 2000/0188 (COD)) for adoption by the co-decision procedure laid down in Article 251 of the Treaty establishing the European Community¹.

The Economic and Social Committee delivered its opinion on 24 January 2001².

The Committee of the Regions informed the Council and the European Parliament, by letter dated 16 February 2001 that it would not deliver an opinion on the subject.

On 1 March 2001, the European Parliament adopted a series of amendments at its first reading³.

On 4 July 2001, the Commission adopted its amended proposal incorporating in whole, in part or in principle many of the amendments voted by the European Parliament in its first reading, in accordance with Article 250 of the EC Treaty⁴.

The Council, in accordance with Article 251 of the EC Treaty, adopted its common position on this proposal for a directive on 17 September 2001⁵.

This Communication sets out the Commission's opinion on the common position of the Council, pursuant to the third indent of Article 251(2) of the EC Treaty.

¹ OJ C 365, 19.12.2000, p. 198.

² OJ C 123, 25.4.2001, p. 55.

³ OJ C ..., ..., p. ...

⁴ OJ C ..., ..., p. ...

⁵ OJ C ..., ..., p. ...

2. AIM OF THE COMMISSION PROPOSAL

This proposed Directive aims to simplify and harmonise existing national systems for the authorisation of electronic communications services and networks. The proposed general authorisation system would apply to all such services and networks regardless of their technological characteristics and would limit administrative barriers to entry in the market to a minimum.

3. COMMENTARY ON THE COMMON POSITION OF THE COUNCIL

3.1. Summary of the position of the Commission

The Commission can support the Council's common position. Several of the Parliament's amendments have been taken on board in part or in principle, and many of the changes introduced strengthen or clarify the Commission's original proposal. The Council's common position also includes parts of certain amendments from the European Parliament that the Commission was not able to accept in its amended proposal.

3.2. Amendments adopted by the European Parliament at its first reading

3.2.1. Amendments of the European Parliament

The European Parliament adopted at first reading 23 amendments to the Commission's original proposal.

As a result of the European Parliament's opinion, the Commission introduced several substantive amendments in its amended proposal.

In its amended proposal, the Commission incorporated 17 of the European Parliament's amendments, either in full, in part or in principle: amendments 1, 2, 3, 5, 8, 11, 12, 13, 14, 18, 21, 23, 24, 25, 26, 27, 28.

3.2.2. Amendments of the European Parliament accepted by the Commission and included in the common position

The following amendments, accepted in full, in part or in principle by the Commission in its amended proposal, have been retained by the Council in its common position: amendments 1, 2, 3, 5, 12, 13, first and second part of 14, 18, 25, 26 and second part of 27.

Of the amendments retained, there have been minimal or partial adjustments to some, while others have been significantly modified, although the underlying objective of the European Parliament's revisions has nevertheless been maintained.

3.2.3. Amendments of the European Parliament accepted by the Commission but not included in the common position

The following amendments were accepted in full, in part or in principle by the Commission in its amended proposal but not included by the Council in its common position: amendments 8 (second part), 11 (second part), 21 (third and fourth part), 23, 24 and 28.

Amendment 8 (standstill for fees)

The Council could not agree to include a statement to the effect that where no fees exist now, none shall be introduced in the future. Although the Commission has supported the amendment by the Parliament, it can also understand the reluctance of the Member States to make such a commitment in an area where competencies have been decentralised to regional and local levels of government.

Amendment 11 (clarification on territorial coverage of authorisation)

The Council did not consider necessary the Parliament's proposal to clarify that general authorisations should be valid throughout a Member States' territory. The Commission considered the Parliament's text a useful clarification, but does not think it is essential.

Amendment 21 (harmonised approach regarding usage fees)

The Council could not accept the Parliament's proposal to submit envisaged decisions regarding usage fees to the transparency procedure of the Framework Directive and also rejected the request to allow for alternative payment modalities in case of (high) one-off fees. The Commission regrets that the Council has been unable to accept the important improvements proposed by the Parliament.

Amendment 23 (Information regarding rights of way)

The Council could not accept the Parliament's proposed obligation for national regulatory authorities to maintain a register of the authorities responsible for granting rights of way, but did agree to a recital calling upon national regulatory authorities to endeavour to ensure that there is user friendly access to such information. Given that information on rights of way could be provided by bodies other than the national regulatory authority, the Commission can accept the Council position.

Amendment 24 (deduction of administrative charges already paid beyond entry into force of new authorisation regime)

The Council rejected the proposed provision to deduct administrative charges paid before the entry into force of the new authorisation regime for a period extending until after the entry into force. The Commission still agrees with the substance of the amendment by the Parliament, but also considers that there may be sufficient legal instruments available in national law that allow companies to claim back unduly paid administrative charges.

Amendment 28 (restriction or withdrawal of rights)

The Council also rejected the proposal to limit restriction or withdrawal of rights of way or rights of use to exceptional circumstances only and to grant compensation in such cases. Although the Commission agrees with the Parliament's amendment with regard to rights of way (but not rights of use), there is no evidence that in reality withdrawal of rights of way takes place arbitrarily or on any significant scale.

3.2.4. *Differences between the Commission's amended proposal and the Council's common position*

Recitals

The Council has added new recitals and amended many of the existing recitals in order to increase the clarity of the text, to be consistent with amendments to the Articles of the directive, or to emphasise certain key provisions. In particular the Council has introduced recitals clarifying the scope of the Directive, explaining how the assignment of frequencies to broadcast content providers fits within the new framework and explaining that the application of non-discriminatory pro-competitive selection criteria could in practice lead to the exclusion of particular companies from participation in comparative or competitive selection procedures for scarce resources.

Article 2 - Definitions

The Council has added definitions of a 'general authorisation' and of 'harmful interference'. The Commission agrees that these additions are useful.

Article 3 – General authorisation of electronic communications services and networks

The text of this Article has been redrafted without changing the substance. The information that may be requested as part of a notification has been further specified.

Article 4 – Minimum list of rights derived from the general authorisation

The common position has changed the presentation of the rights for undertakings into one category of rights available for all undertakings and a second category for undertakings providing publicly available electronic communications services only. Other drafting changes have been made to align the text with relevant provisions in the Framework Directive and the Access and interconnection Directive.

Article 5 – Rights of use for radio frequencies and numbers

The common position clarifies that where radio frequencies are assigned to broadcasting content providers, general interest objectives as recognized by Community law may in certain cases prevail over the need to apply open, non-discriminatory and transparent procedures. The Commission can accept this clarification together with the new recital.

The time limit for decisions to be taken regarding the assignment of numbers has been extended from two to three weeks with a possible extension of three weeks in case of comparative selection procedures.

Article 6 – Conditions attached to the general authorisation and to rights of use for radio frequencies and for numbers and specific obligations

The common position includes various drafting changes to this article, but none of substance.

Article 7 – Procedure for limiting the number of rights of use to be granted for radio frequencies

The minimal period of 30 days for public consultation on an envisaged limitation of the number of rights to use radio frequencies has been deleted. The objectives that need to be taken into account when deciding on such limitations have been broadened to include the policy objectives set out in Article 7 of the Framework Directive.

The additional time allowed beyond the initial six weeks to assign radio frequencies in case of comparative or competitive selection procedures has been extended from six to eight months.

Article 8 – Harmonised assignment of radio frequencies

The article has been redrafted to clarify its scope but this has not changed the substance.

Article 9 – Declarations to facilitate the exercise of rights to install facilities and rights of interconnection

The article has been redrafted to clarify what national regulatory authorities are required to do, but there are no changes of substance.

Article 10 – Compliance with conditions of the general authorisation or for rights of use and with specific obligations

Further flexibility has been created with regard to the time limits imposed on undertakings to remedy any breaches of conditions attached to general authorisations or usage rights. An enabling clause was added for Member States to allow NRAs to impose financial penalties where appropriate. An additional provision was inserted to deal with serious and repeated breaches of conditions.

Article 11 – Information required under the general authorisation, for rights of use and for specific obligations

Various drafting changes have been made in this Article and a clarification that it also covers usage rights and specific obligations was added. No changes of substance have been made.

Article 12 - Administrative charges

This Article has been changed substantially. The scope of administrative costs that may be recovered through administrative charges was widened. The turn-over related distribution key was deleted, as the European Parliament had requested, and the minimal threshold excluding SMEs from administrative charges has disappeared too. The Commission is not entirely satisfied with the new provisions on administrative charges. There is considerable risk of further variation in levels of charges between the Member States. There is less certainty that systems for charges will be simple, pro-competitive and in line with the basic principles of a general authorisation system. The absence of a minimal threshold may furthermore lead to administrative charges acting as a disincentive for entry in the market.

Article 13 – Fees for rights of use and to install facilities

The Council has not taken over the amendments proposed by the European Parliament and accepted by the Commission, namely the requirement to submit all measures regarding usage fees to the transparency procedure of the Framework Directive and to allow alternative payment facilities in case of (very high) one-off fees for instance as a result of auctions. The only change included in the common position is a broadening of the scope of objectives to be taken into account in order to include all the objectives set out in Article 7 of the Framework directive.

Article 14 - Amendment of rights and obligations

The Council has not accepted the changes proposed by the European Parliament and supported by the Commission, which sought to ensure that consultation periods were proportionate to the economic or operational impact of changes in rights and obligations. The proposal to allow serious restrictions or withdrawal of rights of way only in exceptional circumstances and to entitle operators to appropriate compensation was also rejected.

Article 15 – Publication of information

The requirement for NRAs to publish a user friendly overview including all procedures and conditions regarding rights to install facilities was changed into a best endeavours clause only.

Article 16 – Review procedures

The common position does not include the possibility to harmonise charges, fees, procedures or conditions that create a barrier within the internal market through a comitology procedure.

Article 17 – Existing authorisation

The provision proposed by the European Parliament and supported by the Commission to require that administrative charges paid for periods beyond the entry into force of the new authorisation regime would be deducted from new charges to be paid was rejected by the Council.

The time between the bringing into line of existing licences and the additional period granted for licences where alignment would lead to a reduction of rights or an extension of obligations, was increased from the proposed 6 months to 12 months. The Commission considers that given the relatively long period of 15 months already available between entry into force and transposition, there is no reason to grant an additional 12 months for these special cases. Such a long period would mean that effective implementation of the new framework could not be guaranteed until 27 months after its entry into force.

A new temporary prolongation clause was added to provide some further flexibility in case where undertakings would suffer excessive difficulties due to the disappearance of mandated access to other networks. The Commission will decide whether requests for temporary prolongation can be granted.

Article 18 - Transposition

The transposition period was changed from 6 to 15 months after entry into force of the Directive, in line with the transition period for other measures in the new framework.

Annex - Part A

Five conditions were added to the list of requirements that may be attached to a general authorisation, namely access obligations other than those imposed on undertakings with significant market power; requirements regarding maintenance of the integrity of networks, security of networks against unauthorised access, conditions regarding the use of radio frequencies where such right is covered by the general authorisation, and measures regarding compliance with standards and specifications. All these conditions refer to provisions found in other Directives in the new framework and the Commission therefore considers their addition is justified and consistent.

Furthermore, some of the conditions have been redrafted to improve consistency with other existing Community law and with redrafting of provisions in the other Directives in the new Framework.

Annex – Part B

The common position has amended some of the conditions in the list and added one condition, namely a reference to obligations under relevant international agreements regarding the use of radio frequencies.

Annex – Part C

Three conditions were added, namely the obligation to make available any public directory information as required under the Universal Service Directive, any commitments undertaken in the course of a competitive or comparative selection procedure and a reference to obligations under relevant international agreements regarding the use of numbers. The addition of these conditions is justified to align the list with part B of the Annex and with the Universal Service and Users' Rights Directive.

4. CONCLUSION

The Council common position takes on board most of the concerns expressed by the European Parliament in its first reading, and remains close to the Commission's original proposal. However, with regard to Article 12 on administrative charges, Article 13 on usage fees and Article 17(2) on an additional transition period the Commission finds the common position disappointing and lacking sufficient guarantees for a harmonised and timely implementation. Nevertheless, the Commission considers the overall balance of the common position acceptable.