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Chairman of the European
Affairs Committee of the Sénat
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*cc. Mr Gérard Larcher
President of the Sénat
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Dear Chair,

The Commission would like to thank the Sénat for its Opinion on the initiatives and legislative proposals adopted on 14 September 2016 with the aim of placing the European Union at the forefront of Internet connectivity¹.

This ambitious Connectivity Package of measures, which is designed to meet the growing connectivity needs of European citizens and businesses and boost Europe's competitiveness, aims to encourage investment in very high capacity networks and accelerate public access to Wi-Fi for Europeans. In proposing these measures, the Commission is delivering on the promise in its Communication "A Digital Single Market Strategy for Europe"² of May 2015 to present an ambitious overhaul of the regulatory framework for electronic communications with the objective of making the telecom rules fit for purpose as part of the creation of the right conditions for the Digital Single Market.

¹ Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Connectivity for Competitive Digital Single Market – Towards a European Gigabit Society {COM(2016) 587 final}; Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 5G for Europe: An Action Plan {COM(2016) 588 final}; Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) No 1316/2013 and (EU) No 283/2014 as regards the promotion of Internet connectivity in local communities {COM(2015) 589 final}; Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code {COM(2016) 590 final/2}; Proposal for a Regulation of the European Parliament and of the Council establishing the Body of European Regulators for Electronic Communications (BEREC) {COM(2016) 591 final}.

² COM(2015) 192 final.

The Commission welcomes the generally positive opinion of the Sénat on the different components of the Connectivity Package, while noting its doubts relating to some of its specific provisions. The Commission is pleased to have this opportunity to provide a number of clarifications regarding its proposals and trusts that these will allay the concerns expressed by the Sénat.

The Commission shares the view that significant investment is needed to deploy very high capacity networks. This is why it has proposed a wide range of policy, regulatory and funding measures that aim at incentivising this type of investment while remaining pro-competitive and is in discussions with stakeholders in all Member States to ensure that the European Union can meet the strategic objectives set for 2020 and 2025.

The Opinion of the Sénat has been made available to the Commission's representatives in the ongoing negotiations with the co-legislators and will inform these discussions.

The points made in this reply are based on the initial proposals presented by the Commission. The Commission will bear in mind the Opinion of the Sénat in the context of the ongoing legislative process involving both the European Parliament and the Council, in which your government is represented.

In response to the more technical comments in the Opinion, the Commission would like to refer the Sénat to the attached annex. The Commission hopes that the clarifications provided in this reply address the issues raised by the Sénat and looks forward to continuing our political dialogue in the future.

Yours sincerely,

*Frans Timmermans
First Vice-President*

*Andrus Ansip
Vice-President*

Annex

The Commission has carefully considered each of the issues raised by the Sénat in its Opinion and is pleased to offer the following clarifications.

On the European Electronic Communications Code

The Commission welcomes the positive opinion of the Sénat on the extension of the scope of the Regulatory Framework to all interpersonal communications services, including those provided on-line and not linked to the use of a number. It takes note of its request that the latter be subject to the same obligations as traditional telecommunication services as regards number-independent interpersonal communications services. The Commission tried to find the right balance on the treatment of interpersonal communications services. Indeed, it is proposed that number-independent interpersonal communications services be subject only to obligations of security and accessibility for disabled end-users. Additionally, in the event of an actual threat to end-to-end connectivity or to effective access to emergency services, interoperability obligations could be imposed by the national regulatory authorities (NRAs), where necessary. The Commission would like to point out that the more favourable treatment of number-independent interpersonal communications services is justified as they do not participate in or benefit from a publicly assured interoperable ecosystem. Furthermore, from an end-user point of view, only number-based interpersonal communications services allow a connection with the traditional telephone network and are therefore functionally substitutable. Moreover, certain obligations such as number portability are simply not relevant for number independent services. Lastly, the Commission considers that imposing all rules on all services could hamper innovation and negatively affect competition, whereas conversely applying to all interpersonal communications services only a minimum set of obligations would not provide sufficient end-user protection.

With regard to the proposed full harmonisation of certain end-user rights, the Commission would like to point out that it would apply only to the subject-matters governed by Title III on end-user rights. Member States would therefore be able to react to any new challenge potentially raised in the future to the extent the issue is not addressed in Title III. Furthermore, the proposal includes certain exceptions from the maximum harmonisation approach, such as for the maximum duration of contracts for which Member States can maintain or introduce shorter periods. The aim of the Commission was not to lower the level of consumer protection in Member States.

With regard to the scope of the universal service, the proposal focuses on the affordability of functional internet access and voice communications services "at least at a fixed location", which gives Member States the flexibility to extend affordability measures to mobile services. Universal service obligations can also address the lack of availability of functional internet access or voice communications services if a Member State has demonstrated that this cannot be ensured by other means. This is limited to "at a fixed location", as there are more proportionate tools to ensure wireless coverage. The provision of the connection at a fixed location is technology neutral; the proposal does not prejudge the technology used to deliver service at a fixed location. With regard to the financing of the universal service, the proposed

rules focus on affordable basic broadband access and voice communications services (rather than on the availability of services and underlying networks) and is likely to generate limited costs. The beneficiaries of widespread take-up of connectivity are much wider than the telecoms sector and it is difficult to justify that only one sector would finance it, also in view of achieving a level playing field amongst all beneficiaries of broadband connectivity, including society as a whole. The cost of addressing the shortcomings of connectivity in terms of affordability for certain users or availability (if there are still coverage gaps in 2020) should, in the view of the Commission, be supported by all the sectors of the economy benefiting from it, hence by public funds.

With regard to spectrum, the new rules aim inter alia at increasing investment predictability by setting a sufficiently long minimum duration of licenses for the use of harmonised spectrum. The Commission takes note of the Sénat's concerns regarding the 25-year license duration and would like to highlight that this long duration is meant to provide the necessary certainty that will incentivise network roll-out and is counter-balanced by the possibility for Member States to take measures as and when needed to ensure the efficient use of spectrum.

The Commission agrees with the Sénat that spectrum management should remain a prerogative of the Member States. Without contesting this principle, the proposed rules aim at facilitating the acceleration of the assignment of newly harmonised spectrum bands. This is proposed to be done through the definition of certain common modalities and principles for the application of authorisation procedures and conditions as well as through the coordination of maximum assignment deadlines at Union level. They also aim at increasing the consistency of the selection procedures and of the conditions attached to spectrum usage rights through the establishment of a peer review focused on the regulatory and economic elements of spectrum assignments. The Commission welcomes the Sénat's positive opinion on the peer review.

With regard to the access rules, the Commission would like to highlight that the proposed rules reinforce, rather than limit, the national regulatory authorities' toolbox. In particular for areas with low population density, the proposal confirms and expands the power for national regulatory authorities to impose access obligations with regard to non-replicable network elements, which have successfully been used in France. With regard to the proposed changes to the procedure for the consistent application of remedies which vest the Commission with a veto right, the Commission takes note of the Sénat's opposition. In this respect, the Commission would like to underline that its veto, which can only be exercised if the Body of European Regulators for Electronic Communications shares its serious doubts as to the compatibility of a draft measure with the internal market, is necessary to ensure the consistent application of the remedies across the Union, including with regard to symmetric measures that may be imposed without a prior market analysis.

The proposed rules on co-investment offers and on wholesale-only networks have been inspired to a certain extent by the French experience, to which the Opinion refers. The aim of the Commission is to scale up best practices at the European Union level and to foster the deployment of very high capacity network through risk sharing models that may help bring these networks to areas where it would not otherwise have been economically viable.

Lastly, with regard to the geographic surveys of network elements and investment intentions, the aim is to focus regulation on the areas where it is needed and to provide authorities with a good understanding of where additional efforts are needed to provide end-users with high-quality connectivity. Knowledge of where networks are and where they are expected to be deployed in the near future is necessary in order for the analysis of the relevant market for physical network infrastructure access to be conducted correctly. It is already performed by most of the national regulatory authorities when performing market analysis, while the three year forecast period is consistent with usual practice in the context of state aid procedures. Furthermore, the proposed rules do not impose transparency of information between competitors and do not mandate that the collected information is made publicly available.

On the Body of European Regulators for Electronic Communications (BEREC) Regulation and other institutional provisions

The Commission welcomes the Sénat's support for its proposal to reinforce the independence of the national regulatory authorities and takes note of its suggestion to clarify the division of competences between governments and regulators.

With regard to Body of European Regulators for Electronic Communications (BEREC), while maintaining BEREC's rootedness in the national regulatory authorities' expertise, the Commission proposes to establish BEREC as a European Union Agency for two reasons: firstly to ensure that it can take decisions to the benefit of the internal market; secondly, to streamline the current complex and bureaucratic structure and align it with the model for modern European Union agencies with reinforced tasks and accountability. The Commission shares the Sénat's opinion on the need to ensure BEREC's independence and will take it into consideration during the negotiation process. This issue is explained more in detail in the Commission's reply to the Reasoned Opinion issued by the Sénat in December 2016.

On the 5G Action Plan

The Commission welcomes the support of the Sénat for the deployment of 5G in Europe and especially to a coordinated launch in the Member States in 2020, respecting the principle of subsidiarity. It takes note of the request for collaboration between France and Germany, while putting it in the context of collaboration between all Member States. Finally, the Commission underlines the need for a common approach for 5G in order to avoid the problems mentioned in the Opinion related to the deployment of 4G.

On the European Gigabit Society Objective

The Commission welcomes the support expressed by the Sénat and is pleased that it shares the objective to develop a true European Gigabit society. In this respect, the Commission would like to underline that the identification of appropriate financing instruments should be one of the key concerns for national policy-making – notably in the form of an update of national broadband plans – as well as for a reorientation of European financing mechanisms.

The Commission also welcomes the backing that the Sénat lends to its initiative targeting the promotion of Internet connectivity in local communities (the 'WiFi4EU' initiative). It confirms that it is interested in an as wide as possible participation and in achieving the greatest possible benefits from this initiative. Details will be defined in the implementation work programme.