



EUROPEAN COMMISSION

*Brussels, 25.3.2014  
C(2014) 1966 final*

*Dear President,*

*The Commission would like to thank the Bundesrat for its Opinion concerning the Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent {COM(2013) 627 final}.*

*The global economy is evolving towards an Internet economy, and Information and Communication Technology (ICT) should be fully recognised as a source of smart, sustainable and inclusive growth. A single market for electronic communications, where the freedom to provide electronic communications networks and services to every customer in the Union and the right of each end-user to choose the best offer available on the market is ensured and is not hindered by the fragmentation of markets along national borders, should promote competition, investment and innovation in new and enhanced networks and services. The benefits arising from a single market for electronic communications should extend to the wider digital ecosystem.*

*The Commission appreciates that the Bundesrat welcomes the strengthening of the telecoms sector in Europe by creating a fully functioning digital single market to the benefit of European companies and consumers. Europe, once a leader in ICT, now lags behind, and we have to act quickly to reverse this trend.*

*The Commission takes good note also of the concerns expressed by the Bundesrat.*

*As to specific concerns raised in the Bundesrat's Opinion regarding the possible transfer of national powers to EU level, the Commission would like to stress that the proposal seeks to achieve the right balance between the need to ensure regulatory consistency and the respect of national competences in accordance with the subsidiarity principle. Member States will remain fully responsible for regulating operators' networks and service provision within their territory. While some targeted measures concern the way national competences are exercised, they only aim at ensuring coordinated regulatory approaches in accordance with*

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*EU law, but they do not shift the final authority of the Member States to regulate the provision of electronic communications services and networks. The principle of subsidiarity is respected as EU intervention is limited to cases where coordinated regulatory approaches in accordance with EU law are needed to ensure the freedom to provide electronic communications services across the EU as well as the possibility of end-users to access electronic communications services of their choice wherever they are provided in the Union, without cross-border restrictions or unjustified additional costs, on the basis of a high level of protection. At the same time, the EU measures foreseen will not limit the national margin of policy assessment more than is necessary to achieve Single Market goals.*

*Furthermore, on the chosen instrument in the form of a Regulation, the Commission would like to underline that the proposal builds on the 2009 regulatory framework for electronic communications since its fundamental principles remain valid. The Commission proposed a Regulation as it ensures the removal of single market barriers by complementing the existing regulatory framework. This includes specific, directly-applicable rights and obligations for providers and end users; it also includes coordinating mechanisms regarding certain inputs at European level to facilitate the provision of electronic communications services across borders. A Regulation is important, for example, in a field such as open Internet and traffic management, where a truly common approach is necessary to avoid from the outset the current tendency towards divergent national solutions and to enable both integrated network management and the development of online content, applications and services which can be made available in a common way throughout the Union.*

*As regards the Bundesrat's concerns about shifting the policy objective towards consolidation of the European telecom market for the benefit of major national and transnational companies, the Commission would like to stress that this is not its policy objective in itself. The aim of the proposal is to enable operators to provide their services on a cross-European basis and to create business opportunities. In light of this, the Commission's role is not to predetermine what the future EU market will look like, to define the industry structure or to favour any technological choice. It is rather to allow innovation to thrive and to enable industry to seize the most promising business opportunities, while driving investment in networks, enhancing competition and ensuring maximum benefits for the consumers.*

*With regard to the Bundesrat's concern about Recital 38 of the proposal and in particular its last sentence, the Commission would like to clarify that this does not state that the presence of two fixed NGA networks would be enough to lift access regulation, but rather recognises the role of infrastructure competition in driving investment decisions and in improving competition at the retail level, in particular as regards network quality. This must be an element in the competition analysis of the market, but the presence of an alternative fixed Next Generation Access (NGA) infrastructure does not in itself exclude the presence of a duopoly and of insufficient retail competition across all relevant dimensions (price, choice as well as quality). Access regulation may well still be necessary, taking into due account the intensity of the constraints in determining the appropriate remedy.*

*Moreover, the Commission takes good note of the Bundesrat's concerns regarding the European virtual access products. In this regard, the Commission would like to point out that harmonised products should be flexible enough to be applicable in all Member States. The set of products that have been chosen for harmonisation includes a range of options that reflects the different investment decisions that operators may make when entering a new market, and is neutral as to the business model that they choose. In light of this, the virtual unbundled local access product cannot be left out of the harmonisation effort, given its increasing*

*importance for access seekers, particularly in Member States where the deployment of gigabit passive optical networks or vectoring solutions create challenges for other types of unbundling. For those specific circumstances where the harmonised remedy can demonstrably not be implemented, the national regulatory authority will continue to have the responsibility to determine that it is not the most cost-effective or appropriate remedy in accordance with the rules of the framework. In these cases, the imposition of other non-harmonised remedies will continue to be possible if justified under the Framework.*

*Concerning the assignment of frequencies, the Commission would like to stress that the proposal is not seeking a transfer of spectrum responsibilities from the national to the European level. Nevertheless, delays in granting spectrum licenses have already led to an important fragmentation of the European mobile market. This situation has a negative impact on mobile equipment manufacturers operating in the EU market and has reduced the offer of new generation terminals for European consumers. It acted also as a barrier to enter the European market at an efficient scale, thus hindering the emergence of pan-European operators. A new approach on the coordination of licenses across Europe is therefore absolutely necessary. Under this approach, the Commission would be able to adopt implementing acts with a view to ensure harmonisation of availability, timing of assignments and duration of rights of use for spectrum used for wireless broadband communications. This would be done together with the national competent authorities and taking into account any opinion issued by the Radio Spectrum Policy Group, to ensure that no barrier is created to the internal market, but does not limit the responsibilities of Member States for authorisations of rights of use of spectrum.*

*Furthermore, the Commission fully agrees that spectrum is not only an economic asset. As stressed by the 2012 Radio Spectrum Policy Programme and the 2002 Radio Spectrum Decision, in particular, spectrum contributes to freedom of expression, plurality of the media and is a key public resource for television and radio broadcasting. The proposed Regulation would not derogate to these principles as it would only apply to wireless broadband communications, would not pre-empt any future decision on the use of specific bands such as 700 MHz and would be without prejudice to national competence under the EU Treaties.*

*As far as the provisions on sector-specific end-users rules are concerned, the Commission would like to emphasise that the tabled proposal would harmonise them at a very high standard. This excludes in principle that Member States keep more detailed national sector-specific consumer protection rules as the aim is to ensure consistency in the single market. Nevertheless, it should be noted that the envisaged full harmonisation is in line with a broader tendency in EU consumer protection in recent years; it is pitched at a high level of protection in order to respect as much as possible the choices of Member States which have up to now chosen to go beyond the minimum or facultative provisions of the existing Directive. The Commission is of the firm belief that overall gains in both end-user protection and alignment of business conditions for operators justify such a harmonising step.*

*With regard to the Bundesrat's concerns about the single EU authorisation, the Commission would like to recall that despite the introduction of the general authorisation system by the Regulatory Framework since 2002, individual notification of activities is nevertheless required in almost all Member States, with corresponding national notification, each differing in terms of modalities and content of the information required. In addition to that, several Member States link direct and indirect additional national establishment and/or proxy requirements to each national notification regime.*

*The system envisaged by the Authorisation Directive, therefore, does not take sufficiently into account the specificities of pan-European electronic communications service providers (for example those addressing business-to-business needs) nor the group dimension (and therefore individual notification is typically requested for each company of the group). As a result, a company wishing to offer services in the whole territory of the EU (while it may have only one business customer in each Member State) has to be authorised under each national regime. In conclusion this results in administrative burden and increases the costs of providing a service across borders<sup>[1]</sup>. As a matter of fact, heterogeneity of notification requirements as well as the additional requirement linked to the notification was raised by stakeholders in the context of a public consultation carried out by the Body of European Regulators for Electronic Communications (BEREC) on the impact of administrative requirements on the provision of cross-border services<sup>[2]</sup>.*

*On the other hand, the single EU authorisation would not change the nature of the general authorisation available to all electronic communications providers in the Member States where they operate (and therefore would not require an individual authorisation by the Member States concerned), but it only aims at providing a one-stop-shop system for EU operators while ensuring transparency of their activities across-borders.*

*The Commission is confident that the single EU authorisation, while facilitating cross-border market entry, does not affect the competences of any host Member State to define the conditions of operation applicable to every operator (being purely national or European) within its territory in accordance with EU law. The EU-authorized provider, therefore, would be subject to the same jurisdiction as other purely "national" providers as regards the regulation and supervision of its activities and conditions of operation in each concerned Member State, except for the extreme sanctioning measure of the withdrawal/suspension of the general authorisation (and also in this case appropriate safeguards for interim measures are ensured for the host Member State).*

*However, also in this latter case, the possibility of decisions of a NRA having effects in other Member States is normal also in other EU regulatory systems (for example decisions of the home Member State withdrawing the authorisation of financial intermediaries/banks, having effects in all Member States; or decisions disqualifying certain regulated professionals who provide services in other Member States, that would prevent from enjoying the freedom to provide services pursuant to Directive 2005/86/EC).*

*Moreover, the Commission takes good note on the concerns of the Bundesrat regarding the net neutrality provisions. These aim at guaranteeing open access to the Internet by prohibiting blocking, throttling, degradation and discrimination within the limits of any contracted data volumes or speeds. In this regard the Bundesrat claims that the distinction*

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<sup>[1]</sup> The advantages of a single authorisation regime are difficult to quantify as the scale of operations varies with company size. Nonetheless, on the basis of impacts assessed for the Services Directive, it has been estimated that professional advice to ascertain legal and regulatory requirement for advertising the provision of services could amount to at least EUR 100.000. Other estimates suggest that up to EUR 3.600.000 p.a. is needed to ensure on-going compliance with administrative requirements, see See Extended Impact Assessment of a proposal for a Directive on Services in the internal market, SEC(2004)21, see in particular Section 4, available at [http://ec.europa.eu/internal\\_market/services/docs/services-dir/impact/2004-impact-assessment\\_en.pdf](http://ec.europa.eu/internal_market/services/docs/services-dir/impact/2004-impact-assessment_en.pdf).

<sup>[2]</sup> BEREC report on the public call for contributions on possible existing legal and administrative barriers with reference to the provision of electronic communications services for the business segment [http://berec.europa.eu/files/doc/berec/bor/bor11\\_55\\_input\\_businessservices.pdf](http://berec.europa.eu/files/doc/berec/bor/bor11_55_input_businessservices.pdf).

*made in Article 23 of the proposal between providers' "specialised services" and other "internet access services" will lead in the short to medium term to a two-class internet in the provider and end-user sides. In contrast, the Commission believes that the proposal would help start-ups to innovate as they would not risk to see their applications and services blocked or degraded, as is currently the case. In the Commission's view agreements between content providers and Internet service providers are necessary to satisfy the demand of some end-users for high-quality services such as videoconferences or certain e-Health applications. In this sense, the possibility for content providers to avail of access with guaranteed levels of quality so as to satisfy end-users demand is also a pre-condition for innovation and both, general internet services and guaranteed Quality of Services can co-exist. As a safeguard, National regulators shall monitor that the quality of the internet reflects advances in technology, so that a high quality Internet is available and that specialised services do not impair the general quality of the Internet. They are also empowered to set minimum quality of service requirements on electronic communications providers. Furthermore, the Commission understands the Bundesrat's particular concerns with regard to Article 24 of the proposal. The Bundesrat states that this does not contain clear criteria for many terms used in the wording such as the "non-discriminatory internet access services" or "general impairment" of quality of specialised services. In this context, the Commission would like to refer to paragraph 5 of Article 24. According to this article, the Commission would be empowered to develop such criteria through implementing acts which could be subject to revision so as to adapt conditions to market developments. Consequently, such criteria cannot be included in the Regulation.*

*Finally, the Commission appreciates that the Bundesrat welcomes in general the envisaged abolishment of roaming charges. The Commission takes note of the Bundesrat's concerns regarding possible negative effects on consumers through so-called "water bed" effects leading to the raising of prices on other products. In this regard, it should be noted that the roaming market has been regulated since 2007, lowering roaming prices from exorbitant level to the current level. During this period the prices of domestic mobile calls have also decreased, because of competition. In the Commission's view the increase of other products' prices assume both that other segments are not very competitive, and that providers are not already engaging in profit-maximising behaviour within the margin for manoeuvre allowed by competitive forces. However, such a contention is not supported by evidence.*

*The Commission hopes that these clarifications address the concerns raised by the Bundesrat and looks forward to continuing our political dialogue in the future.*

*Yours faithfully,*

*Maroš Šefčovič  
Vice-President*