



EUROPEAN COMMISSION

*Brussels, 15.05.2017
C(2017) 3086 final*

*Ms Malu DREYER
President of the Bundesrat
Leipziger Straße 3 - 4
D – 10117 BERLIN*

Dear President,

The Commission would like to thank the Bundesrat for its five Opinions 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 at encouraging investment in very high capacity networks and accelerating public access to Wi-Fi for Europeans. In proposing these measures, the Commission is delivering on the promise in its Communication of May 2015, A Digital Single Market Strategy for Europe², to present an ambitious overhaul of the regulatory framework for electronic communications with the view to make the telecom rules fit for purpose as part of the creation of the right conditions for the Digital Single Market.

The Commission welcomes the generally positive opinion of the Bundesrat on the different components of the Connectivity Package, while noting its specific doubts relating to some of its provisions.

The Commission will bear in mind the views of the Bundesrat in its contribution to the ongoing legislative process involving both the European Parliament and the Council, where your government is represented. The Commission is pleased to have this opportunity to provide a number of clarifications regarding its proposals.

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 (Recast) {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 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 retaining a pro-competitive regulatory framework. In parallel, the Commission is in discussions with stakeholders in all Member States to ensure the achievement of the strategic objectives set for 2020 and 2025. The Commission's legislative proposals in the European Electronic Communications Code were subject to extensive impact assessment, studies and public consultations, where all stakeholders concerned were duly consulted.

The points made in this reply are based on the initial proposal presented by the Commission which is currently in the legislative process involving both the European Parliament and the Council.

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

Yours faithfully,

*Frans Timmermans
First Vice-President*

*Andrus Ansip
Vice-President*

ANNEX

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

The Commission would like to clarify that the connectivity objective stands side by side with the current objectives, including that of competition, and therefore does not take precedence over competition, end-user interest or internal market objectives. While competition remains the cornerstone of the European Union regulatory framework, this review highlights that not only short term, but also long term consumer benefits should be taken into account when regulating access to network elements, in particular if newly deployed. Commercial and co-investment agreements or competitive pressures from outside the specific market that is analysed also contribute to ensuring sustainable competition and should therefore be taken into consideration by regulators, where appropriate.

The proposed European Electronic Communications Code includes a number of safeguards to ensure that co-investment offers are pro-competitive and give the right to all market participants of different scale to participate in them at any moment in time. It is the role of the national regulatory authority to assess whether a specific co-investment offer complies with the requirements set in the Code before the operator with significant market power can benefit from a lighter regulatory approach. The Commission would also like to point out that any obligations of access to civil engineering elements such as ducts can only be imposed on operators with significant market power and based on national circumstances as identified in a market analysis, unless there are specific grounds to apply symmetric obligations. National regulatory authorities retain the discretion to decide when to impose on operators designated with significant market power appropriate remedies including price control and related obligations, but the rules clarify the conditions according to which pricing flexibility should be ensured.

With regard to symmetric regulation, the Commission agrees with the opinion that in order to avoid the risk of overregulation, symmetric access is a measure to be employed by the national regulatory authorities only if it is economically inefficient and physically impracticable to replicate the necessary network elements. It is a form of access regulation which is already part of the current regulatory framework and should remain part of the toolbox of the national regulatory authorities as it has already been applied successfully by several of them alongside the significant market power regulation. The Code reinforces their powers in this respect.

The geographic survey of networks and investment intentions is important for focusing regulation on the areas where it is needed and for providing authorities with a good understanding of where additional efforts are needed to provide end-users with high-quality connectivity. While the identification of a digital exclusion area does not entail any type of public funding award, it is expected to reduce the risk of strategic overbuilding faced by potential new entrants. The Commission acknowledges that private undertakings may change their deployment plans because of different internal or even external parameters outside their control. The Commission would also like to underline that monitoring transnational markets

is already necessary in the current regulatory framework, and does not result in devaluing national regulation, which continues to prevail. As regards the so called "double lock" mechanism on remedies, this would arise only if the Body of European Regulators for Electronic Communications (BEREC) shares the serious doubts raised by the Commission.

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, counter-balanced by the possibility for Member States to take measures to ensure the efficient use of spectrum. They also aim at increasing the consistency of selection procedures and conditions attached to spectrum usage rights through a peer review focused only on the regulatory and economic elements of spectrum assignments to be carried out in a very short timeframe by BEREC – drawing on its members' economic expertise and market knowledge – to promote best practice and predictability for all investors. The proposed rules leave the choice to the Member States whether to make the national regulatory authorities responsible for actually granting the spectrum usage rights. The case-by-case consistency check mechanism by peers would be complemented by the possibility, pursuant to Article 47, to adopt an implementing decision, for harmonised spectrum, setting common general criteria and modalities for the choice and determination of selection procedures and conditions to be attached to spectrum usage rights, which Member States should take into account and adapt to their specific national circumstances when assigning a specific band in their territory. Such common guidance would in no case consist in setting specific coverage obligations but only in determining a set of criteria to be used by Member States to define national coverage obligations attached to spectrum rights and to measure them thereafter.

The proposed rules aim at facilitating the acceleration of the assignment of newly harmonised spectrum bands through the coordination of maximum assignment deadlines at Union level. This is a proportionate approach since individual Member States will continue to be able to decide to assign their spectrum ahead of such a coordinated maximum deadline and the Code allows for further flexibility to reflect national circumstances (see Article 45(3)).

The above overview of the measures proposed in the area of spectrum illustrate that the Commission is far from proposing a centralised system of cross-border planning. Moreover, with regard to the implementation of the rules, most of the limited number of implementing acts to be adopted by the Commission should be confined to spectrum the harmonisation of which would already have been agreed among Member States under the Radio Spectrum Decision, as well as to assignment deadlines and minimum quality requirements for which the Bundesrat has recognised the need for harmonisation. Furthermore, the possibility for the Commission to adopt such acts would be limited to setting out a common framework of action rather than actual individual decision making on spectrum assignments and be confined both by the need to seek the prior opinion of the Radio Spectrum Policy Group (RSPG) as well as the assistance of Member States through comitology in the Communications Committee

The Commission also acknowledges the reference made by the Bundesrat to the need to focus on the implementation of appropriate enforcement rules and powers for the Commission. In this regard, the Commission proposal seeks to improve enforcement by clarifying and being

more precise on some of the obligations related to spectrum as established by the framework. The proposed peer review process would also contribute to a more coherent implementation of the principles agreed at Union level.

With regard to institutional aspects, as was signalled during the public consultation of 2015 by a number of stakeholders, the current institutional set-up of BEREC often results in opting for "greater flexibility" or "the lowest common denominator" instead of focusing on a more harmonised approach for the single market. Moreover, in its Resolution 'Towards a Digital Single Market Act' of 19 January 2016, the European Parliament called on the Commission to ensure a more efficient institutional framework strengthening the role, capacity and decision-making process of BEREC, as well as improving its financial and human resources and further enhancing its governance structure.

The evaluation of the current institutional set-up brought to light the challenges faced by the BEREC Office as the agency providing support to BEREC and raised with acuity the need to progress towards an integration of BEREC and the BEREC Office within the structures and functions of modern European Union agencies with reinforced tasks and accountability, similar to the ones existing in other sectors (for example in energy and financial services).

The objective of the Commission's proposal is to establish a governance set-up fit for purpose for BEREC's increasingly important contributions to the efforts to develop a true single market for the electronic communications sector, delivering valuable technical expertise. This set-up addresses current structural challenges and offers efficiency, coherence, accountability and transparency in the governance of the new regulatory framework for electronic communications, in need of timely implementation across the EU. The new institutional structure of BEREC would be in line with the Common Approach on Decentralised Agencies, as agreed by the European Parliament, the Council and the Commission in 2012, while ensuring the continuity and the consistency of BEREC's action.

The future tasks of BEREC would not centralise powers or be at the expense of those of the national regulatory authorities but, on the contrary, mirror them in the areas where a European Union perspective is necessary (cross-border dimension, need for internal market procedure such as the 'double-lock' mechanism for market remedies, etc.) and where BEREC can assist the national regulatory authorities in carrying out their tasks consistently. The role of the Commission within the structures of the new agency is to ensure a European Union perspective.

The Commission welcomes the Bundesrat's very positive support for its approach to the definition of electronic communications services, including on the aspects of functional substitutability of interpersonal communications services and non-monetary remuneration. The Commission considers that a distinction between number-based and number-independent interpersonal communications services is appropriate for two reasons: firstly, the former make use of numbers as a public resource, and secondly, certain provisions, such as number portability, apply exclusively to numbers. The Commission takes note of the Bundesrat's interesting idea to "offer scope for development" of the definition which, however, would need to be carefully assessed. Regarding the suggested far-reaching BEREC competences in

that respect, the Commission notes it would be at odds with the Bundesrat's position not to assign any new responsibilities to BEREC. With respect to end-user rights, the Commission proposal aims, as supported by the Bundesrat, at a very high level of Union-wide consumer protection based on best practices in Member States.

The basic electronic communications services are already nearly universally available and used by a majority of citizens across the Union. The focus of the universal service, as proposed in the Code, will not be on the availability but rather on the affordability of available basic broadband access and voice communications services. The basic broadband access is defined on the basis of a dynamic basic list of online services that are to be usable over the broadband connection, and which are regularly used by the majority of end-users. Other tools can be used to promote enhanced broadband deployment. The new rules do not therefore affect the ambitious market driven projects for very-high speed network deployment. On the contrary, the Code aims exactly at incentivising such deployment.

With regard to the Opinion on the proposal for a Regulation as regards the promotion of Internet connectivity in local communities, it should be noted that the proposal does not touch upon questions of liability of access providers. The principles regarding such liability have been clarified, in particular, in a recent ruling of the Court of Justice.³ It follows that, where the conditions specified in the e-Commerce Directive⁴ are satisfied, a provider of access to a communication network may not be held liable for copyright violations by third parties (Article 12 of the Directive). However, under that Directive the copyright holder may seek before a national authority or court an injunction to end, or prevent, any infringement of copyright committed by the provider's customers through its network. Such an injunction may in certain cases take the form of ordering the internet connection to be secured by means of a password.

Limiting the funding to investments in purchasing equipment and installation (capital costs) aligns this initiative with the rules applicable to European Structural and Investment Funds (ESIF) which are well understood by local authorities. Besides, the cost of connectivity varies greatly from one municipality to another, and across Member States – which would make this alternative solution less practicable.

The proposal includes provisions which prevent the crowding out of private investments, including the prohibition of the duplication of already existing networks of similar characteristics. In this context, indeed, the term "area" should be understood as the actual physical space where a network is available (e.g. a public square or a part thereof).

Regarding minimum speeds, the Commission's intention is to strike a balance between the flexibility necessary to address local conditions and the overall quality of service provided by the initiative. Hence a municipality may wish to limit the number of simultaneous connections to make sure that the speeds do not go below certain minimum levels. At the same time, to

³ See Judgment in [Case C-484/14, Tobias Mc Fadden v Sony Music Entertainment Germany GmbH](#).

⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ L 178, 17.7.2000, p. 1).

prevent sub-standard technological solutions, municipalities will be required to purchase state-of-the-art equipment, the parameters of which will be further described in the calls.

Regarding the role of the Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks ("Broadband Guidelines"), the Commission would like to highlight that the condition of a step change does not define a ceiling for State aid at 30 Mbps as it is apparently assumed. This condition requires a certain increase in the capabilities of the new State-funded infrastructure and thereby aims at avoiding that an existing infrastructure is simply duplicated or only marginally upgraded. This requirement therefore does not exclude State aid being granted for a new infrastructure allowing, for example, for an upgrade from 30 Mbps more than 100 Mbps.

Moreover, the provisions of the Broadband Guidelines aim at ensuring a procedure which gives a maximum of transparency both to the State authorities and the market. In this procedure, public consultation is essential and it should also be used by the aid-granting authorities to require from market participants evidence for their declarations. However, State aid rules like the Broadband guidelines cannot provide full protection against fraudulent behaviour. On the other hand, they do not prevent Member States from taking appropriate measures in this regard, if deemed necessary.