



EUROPEAN COMMISSION

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Dear President,

The Commission would like to thank the Camera Deputaților for its Opinion on 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 welcomes the Camera Deputaților's support for a unified and efficient legislative framework for undertakings providing electronic communications networks and services that will enable undertakings and European citizens to enjoy the advantages of the single European market.

The Commission takes good note also of the concerns expressed by the Camera Deputaților which certainly would be clarified in the ongoing co-legislative process.

Without pre-empting the result of the negotiations the Commission would like to alleviate the concerns raised by this Opinion by presenting the reasoning behind its proposal:

Authorisation issues

The current European authorisation regime falls under the provisions of the Authorisation Directive and follows the principle of national jurisdictions. As a result, a company wishing to offer services, either directly or through subsidiaries, in the whole territory of the EU (while it may have only one business customer in each Member State) has to be authorised

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under each national regime. Complexity therefore is embedded in the current fragmented system of national parallel jurisdictions. Heterogeneity of notification requirements as well as the additional and implicit requirements linked to the national notification (such as establishment) 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.

With specific regard to de minimis thresholds for administrative charges and Universal Service contributions, it should first of all be noted that according to the proposal they would apply only in the host Member State (in the home Member State the EU provider is subject to the domestic rules like all other purely domestic operators) and only to the extent that the EU provider carries on limited activities in such a host Member State, i.e. in the start-up phase, or if its business model is confined to very small niche opportunities. In other words, the concerned provisions envisage a limited exception applicable to small cross-border operators in the phase of market entry or niche markets.

Therefore, and more generally, from the perspective of the EU non-discrimination principle, such an EU provider is in a different position as of that of purely domestic operators, while when it expands its activities in the host Member State beyond the threshold its position is comparable with a purely national established operator. On the other hand, from a national non-discrimination principle (i.e. reverse discrimination of less favourable national rules compared to EU ones), the proposal does not impose such a discrimination and Member States are free, if not encouraged by the harmonised EU thresholds, to apply the same to their purely domestic operators in the start-up phase. As a matter of fact de minimis thresholds are already applicable in several Member States, although on the basis of different criteria and in a fragmented way across the Union, while the proposal aims at harmonising it for multi-territorial operators in accordance with the subsidiarity principle.

The proposal seeks to achieve the right balance between the need to ensure regulatory consistency on conditions on access to the market and the respect of national competences in accordance with the subsidiarity principle.

Relationship with existing provisions

The Telecom Single Market proposal integrates the existing EU regulatory framework laid down in the Framework, Authorisation, Access and Universal Service Directives, by complementing the existing provisions with additional powers, rights and obligations aiming at tackling selected barriers to the establishment of a single market.

Therefore, on the one hand, the TSM proposal amends the existing Directives only marginally, to the extent that the changes are necessary to ensure consistency with the provisions contained in the proposal. Where more extensive modifications are foreseen, on the other hand (on end-user rights), the Regulation already provides a substitutive regime that is directly applicable.

In particular, with regard to amendments to Directive 2002/21/EC (Framework Directive) and Directive 2002/20/EC (Authorisation Directive) provided for in Articles 34 and 35 of the proposal, the proposed amendments concern provisions that are considered self-executing and/or relate to provisions addressed to the Commission.

As far as the modification of the Universal Service Directive is concerned (Article 36), the proposal provides for the repeal of several provisions, that would be fully replaced by the

directly applicable rules provided for in the proposal itself (and in particular those contained in Chapters IV and V). Such repeal would take effect as from 1 July 2016, in order to ensure smooth transition to the new set of common EU rules, and therefore the existing national provisions implementing the US Directive would remain applicable until that moment.

Finally, in order to ensure consistency between the proposed Regulation and the Regulatory Framework, the proposal clarifies that the Directives are to be read in conjunction with the proposed Regulation, underlining the interest in a holistic interpretation of the relevant principles and competences.

Spectrum

The Regulation would complement the Framework and Authorisation Directives as well as the Radio Spectrum Policy Programme; it creates rights and obligations for spectrum users. It clarifies the principles, obligations, criteria and conditions for spectrum use authorisation and for assessment of national measures. In line with subsidiarity and proportionality, it only seeks to avoid inconsistencies and fragmentation of the internal market (no single authority, no single or EU authorisation process or decisions; fee income remains national). It foresees some assignment harmonisation (regarding timing and licence duration) to complement current allocation harmonisation; enhanced coordination which, to be effective must be systematic, allows for a diversity of solutions as long as in line with single market and EU law; it recognises historical national circumstances and other national specificities. It also seeks to promote various means of spectrum rights acquisition including transfer and lease thereof.

Market segmentation and persistent barriers to entry do restrict competition, growth and investments, and lack of a Single Telecoms Market adds compliance and transaction costs and facilitates market concentration. The proposal should increase competition on infrastructure quality and price, strengthen innovation and ease planning of commercial and technical elements of investment decisions for entry or expansion on wireless or fixed markets.

Coordination of spectrum at EU level through the involvement of national authorities in the responsible committee may prove necessary to ensure equitable access to spectrum as well as the removal of inconsistencies or blockages preventing the effective use of spectrum, so as to allow all Member States to use the spectrum to which they are entitled under international and EU law.

Virtual Broadband Access Products

The initiative by the Commission in respect of harmonised virtual access products must be seen in relation with the overall objective of the proposed regulation, which aims at building a truly functioning single market for telecoms.

It is expected that the availability of harmonised virtual access product will ease cross-border market entry by European electronic communications providers and as a consequence enhance competition, which would have a positive impact on overall investment in network infrastructures.

The Regulation would complement and not replace the Access Directive, including the remedies that it proposes, and that Directive is not the subject of any amendments. The current proposal does not substitute the good solutions of the past, such as duct access and

physical unbundling, which remain important for developing infrastructure competition. Indeed, this proposal builds on the experience that was gained alongside National Regulatory Authorities (NRA) that have imposed virtual access products as remedies in broadband markets.

Virtual access products can address a number of market failures. The layer 3 bitstream product may be more relevant for new entrants into new European market and seeking to rapidly establish pan-European operations – it is designed to address a regulated access market in which a majority of NRAs currently impose remedies. The virtual unbundled local access product (VULA) at layer 2 is designed for access seekers which are planning to enter a market with levels of investment similar to the case of physical unbundling, as the hand-over point would be similar. According to the Commission's experience, such virtual unbundling products are increasingly used for the regulation of next generation broadband networks, particularly when technological obstacles - such as the deployment of gigabit passive optical networks (GPON) or vectoring - make other solutions impossible.

In any event, NRAs remain fully responsible for determining the most appropriate and proportionate physical or virtual remedy (or remedies) in the circumstances of their national markets.

The proposal aims to harmonise access products that can be imposed as Significant Market Power (SMP) remedies on the basis of country-specific market analyses, to remedy market failures that have been identified in those markets.

The product market in which harmonised products can be imposed would therefore depend on the results of that market analysis, conducted by the NRA. The proposal deliberately refrains from making an explicit reference to the wholesale physical network infrastructure access and wholesale broadband access markets provided in the Recommendation on Relevant Markets, which is in the process of being revised.

Furthermore, the three products that are proposed in Annex I are designed so that they can be imposed in different wholesale markets, to address different needs. It is not assumed that all such access products would need to be imposed in all cases, this would depend on the NRA's assessment.

No retail level offers are included in the proposal to harmonise wholesale access products.

Cross-border dispute resolution

The proposal envisages a faculty for the EU operator to request an opinion from the home competent NRAs in case of a national dispute in the host Member State. Unlike current cross-border dispute resolution mechanism, that may indeed also involve BEREC, the home NRA would not have a decision making competence in national dispute in host Member States. Therefore there would be no risk of conflicting decisions and the need for a third party (BEREC) arbitration role. In addition, the home NRA would be free to decide whether to deliver or not such an opinion, which shall be delivered "with a view to ensure consistent regulatory practices", in accordance with the equality of treatment principle pursuant to Article 3(5). The home Member State therefore would not be supposed to comment the situation in the host Member State, but rather to provide information about its own regulatory practice in comparable situations. As a matter of fact this is a soft coordinating mechanism on individual national disputes that in some Member States are quite numerous. Therefore the establishment of a permanent multilateral dispute resolution mechanism within

BEREC would have probably been not proportionate and could have resulted in increased bureaucracy.

More generally, it should also be noted that BEREC gathers all the NRAs responsible for ex ante regulation, but other regulatory competences provided for in the EU Framework, in accordance with the subsidiarity principle, may be assigned by Member States to other competent authorities which would not be part of BEREC.

With regard to the forum shopping risk, the concept of main establishment is already applicable in other pieces of EU legislation (for example Audio-visual and Media Services Directive) and requires an effective link with the place where main decisions on investments and business conduct are taken in the EU. As a matter of fact, within the overall system of allocation of competences between home and host Member State envisaged in the proposal, it is highly unlikely that EU providers may have incentives to move their main establishment as a consequence of the proposal: host Member State maintains significant enforcement and supervisory powers and safeguards, while de minimis thresholds may entail reduction on very small operators, but are unlikely to drive by themselves any establishment decision.

Net neutrality

The Commission's proposal guarantees open access to the Internet by prohibiting blocking, throttling, degradation and discrimination within the limits of any contracted data volumes or speeds. Thus all online content, services and applications would be available over the open Internet to all end-users, thus the proposal ensures unrestricted access to the Internet.

Under the proposal end-users may, in addition, conclude agreements with content and application providers and electronic communications providers for specialised services with an enhanced quality of service, provided such services do not cause "recurring or continuous" impairment of the general quality of the Internet access. This quality criterion is dynamic in character, having regard to technical advances over time.

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

Yours faithfully,

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Vice-President*