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Mr Călin POPESCU-TĂRICEANU
President of the Senat
Calea 13 Septembrie nr. 1-3, sector 5
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Dear President,

The Commission would like to thank the Senat for its Opinion on the Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code {COM(2016) 590 final} ('the Code').

This proposal forms part of an ambitious package of EU telecoms rules designed to meet the growing connectivity needs of European citizens and businesses and boost Europe's competitiveness[1]*. In proposing these measures, the Commission is delivering on the promise in its Communication of May 2015, A Digital Single Market Strategy for Europe*[2]*, to present an ambitious overhaul of the regulatory framework for electronic communications with the view to, inter alia, ensure a more effective regulatory institutional framework 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 positive opinion by the Senat on the conformity of the proposal with the principles of subsidiarity and proportionality. However, it notes that the Senat expresses concerns with regard to what it considers as a limitation of the power to define the conditions of the rights of use of radio spectrum at national level; the maximum harmonisation of end-user rights as established in the Code; the financing of the Universal Service obligations from public funds; as well as with regard to a number of measures proposed in the area of access regulation.

The Commission is pleased to have this opportunity to provide a number of clarifications regarding its proposal in the annex to this letter and trusts that these will allay the concerns expressed by the Senat.

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.

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1 http://europa.eu/rapid/press-release_IP-16-3008_en.htm.
2 COM(2015) 192 final.

The Commission hopes that the clarifications provided in the annex to this reply address the issues raised by the Senat 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 points raised by the Senat in its Opinion and is pleased to offer the following clarifications.

The Senat believes that the Code reserves for the Commission a coordinating role in spectrum management while limiting the powers of the Member States with regard to determining the conditions attached to the rights of use of radio spectrum. Its concerns relate in particular to the possibility to set coverage obligations, as well as the price for licenses at a level maximising the benefits of end-users.

The Commission's proposal is not changing the primary prerogatives of the Member States to own and control spectrum within their national borders, but rather proposes better and more efficient coordination of spectrum assignment policies within the Single Market and across the borders. With regard to radio spectrum, the Commission's package aims, at (i) ensuring advanced connectivity by guaranteeing a faster time to market for radio spectrum resources; (ii) promoting sufficient investment to meet tomorrow's economic challenges, such as denser 5G networks, by simplifying regulatory intervention and ensuring greater consistency and predictability in radio spectrum assignment, in such a way as to avoid the delays and unpredictability that characterised some assignment processes for 4G in the past; and (iii) responding to the new radio spectrum management challenges raised by the development of 5G communications.

To achieve these objectives, the proposed rules include a series of carefully delineated measures aiming in particular at accelerating and better coordinating the assignment of newly harmonised spectrum bands through the coordination of assignment deadlines on the basis of implementing decisions. The Commission believes that while radio spectrum is indeed a scarce resource which belongs to Member States, a certain level of consistency in the management of that resource must be guaranteed to ensure that electronic communications can in particular achieve a common and coordinated, if not simultaneous, level of connectivity for all throughout the EU. However, there is no shift of decision-making competence to the EU level in this process and therefore Member States retain a high level of freedom to act.

The peer review mechanism, as introduced in the proposal, would allow each National Regulatory Authority (NRA) to rely on the experience of its peers through the Body of European Regulators for Electronic Communications (BEREC) to ensure that the regulatory and market-shaping measures foreseen in relation to the granting of spectrum usage rights would be the most appropriate to promote the internal market and competition, maximise the benefits for the consumer and achieve the objectives of the EU regulatory framework. In this process, specific national objectives would also be considered and national regulators would remain free to accept or reject the opinion expressed by their peers from other Member States.

Therefore, at all times the competent national authorities would remain responsible for the actual decision-making and execution in respect of spectrum assignment and would be able to adjust them to the national specificities, in particular to ensure coverage as well as to

determine the level of the fees for spectrum usage rights, while ensuring the achievement of common objectives of the digital single market. The provisions regarding fees that would encourage optimal use of frequency resources merely develop existing provisions of EU law, while the coordination implementing measures regarding coverage are designed to only establish common parameters for defining and measuring coverage obligations, without interfering with national policy decisions on the geographic or other scope of such obligations.

The Senat further considers that by providing for the maximum harmonisation of end-users' rights, the Code would prevent Member States from adopting measures providing for the additional protection of end-users.

The Commission would like to stress that its intention is to enhance end-users rights to a very high level of protection based on best practices currently available at Member States' level. The Commission also notes that full harmonisation applies only to the subject-matters governed by the relevant title of the Code on end-user rights. This for example means that Member States would be able to react quickly to any new challenges that are not covered in the aforementioned title of the Code.

With regard to access regulation, the Commission would like to clarify that the connectivity objective stands alongside the current objectives, including the one of competition, and therefore does not take precedence over competition, end-user interest or internal market objectives. The introduction of the connectivity objective makes clear that not only the short-term but also the long-term end-user benefit (availability and take-up of very high-capacity networks) should be taken into account when regulating markets.

The Commission acknowledges that there are many factors influencing the willingness of private undertakings to invest in networks and that all those mentioned in the Senat's Opinion play an important role. The Commission has in the past proposed rules aiming at facilitating access to financing of high-speed networks or at reducing the cost of deploying networks. The Code is part of a broader Connectivity Package, bundling regulatory and non-regulatory measures, such as the WiFi4U initiative. The aim of the Connectivity Package is not only to reduce regulatory barriers to investment and to create the right conditions for all operators to invest in new networks, but also to facilitate access to funding and support the demand for services. The application of the Code will therefore go hand in hand with the use of funding instruments existing at the European level, from the European Structural and Investment Funds (ESIF) to the Connecting Europe Facility (CEF) and the European Fund for Strategic Investment (EFSI).

With regard to the geographic survey of networks and investment intentions, the Commission considers that such a mapping is important in focusing regulation in the remaining bottlenecks and for providing authorities with a better understanding as to where additional efforts are needed to provide end-users with high-quality connectivity. The Commission acknowledges that private undertakings do not always schedule all their deployment plans in advance and that their deployment plans may be frustrated or altered because of different internal or even external parameters outside their control. This is the reason why the Code

provides for the possibility to sanction only undertakings deliberately providing misleading, erroneous or incomplete information. An operator would always have the possibility to provide a reasoned justification concerning why its plans have changed.

With regard to symmetric regulation, which applies to all operators regardless of market power, the Commission would like to underline that, in order to avoid the risk of overregulation, symmetric access is a measure to be employed by the NRAs only where it is economically inefficient and physically impracticable to replicate the necessary network elements. It is a form of access which should be part of the toolbox of the NRAs, which is already applied successfully by several of them alongside regulation based on Significant Market Power (SMP), and the Code reinforces their powers in this respect. As explained in the Opinion, the market structure in Romania is quite different from the structure of other Member States. Overall, the proposed rules in the Code offer the flexibility needed for their application by the Romanian NRA, ANCOM, which will find in the Code the powers it needs, should market conditions in the Romanian case require it.

As to commercial and co-investment agreements or competitive pressures from outside the market, these can provide sustainable competition and therefore should be taken into consideration where they exist. On the other hand, the proposal leaves discretion to the NRA to decide whether, in the specific national case, circumstances are such as to warrant deregulation, or to continue to impose obligations. Indeed, ex ante market regulation is an exceptional measure, justified by the existence of bottlenecks which affect retail competition, and should be applied only if appropriate and proportionate to solve market-specific problems. With regard to the proposal not to regulate new network elements of the SMP operator in case of an open co-investment offer, the Code includes a number of safeguards to ensure that the offer is pro-competitive and allows market participants of different size to participate in such co-investments. It is also the role of the NRA to assess if the co-investment offer complies with the requirements, before the SMP operator would benefit from lighter regulation.

Regarding termination rates, the Commission would like to stress that according to the Code, an NRA shall set maximum symmetric termination rates based on the traffic-related costs incurred by an efficient operator for providing wholesale termination services to third parties. The Code also foresees that single maximum termination rates will be set in a delegated act, for which the Commission may ask BEREC to develop an economic model. The figures set in the Code are not the rates that will be imposed, but represent a maximum value, which cannot be exceeded by the calculated rates, and which therefore limit the discretion of the Commission, and provide a degree of predictability to the market. The actual rates are not yet determined and cannot be prejudged before the relevant calculations are performed.

Lastly, with regard to the financing of the Universal Service, the Opinion takes the view that Member States should retain the possibility to have recourse to sector-financing, arguing that public financing only could jeopardise the achievement of the objectives of the Universal Service, that is to say ensuring access to basic electronic communications services for all end-users.

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 services. The focus on affordable access to basic broadband (rather than on the availability of services and underlying networks) is likely to generate limited costs. In addition, the exclusion of legacy services such as public phones at the EU level is likely to reduce the financial burden. Furthermore, 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. Sectorial funds are complex to set up and manage and their removal also contributes to simplification, a reduction of administrative burden and avoiding potential market distortions and uncertainty.