

EUROPEAN COMMISSION

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C(2013) 5879 final

Dear Mr Cash,

The Commission would like to thank the House of Commons for its Opinion concerning the Proposal for a Regulation of the European Parliament and of the Council on measures to reduce the cost of deploying high-speed electronic communications networks {COM(2013) 147 final}.

The development of the digital economy is a key driver for creating growth and jobs in Europe and has therefore a major role to play in Europe's economic recovery. Hence the ambitious broadband targets set out in the Digital Agenda for Europe to be reached by 2020. Moreover, ubiquitous high-speed networks are a prerequisite for bridging the digital divide and ensuring regional cohesion. Investments in Europe are lagging behind the rest of the world, so if we are to unlock the potential of the digital economy and strengthen Europe's competitiveness, our efforts will have to be stepped up significantly. The measure which the Commission proposed in March has the potential to reduce costs of EU-wide deployment by up to 30% (or 60 billion euros), notably by allowing the use of existing passive infrastructure under certain conditions and by cutting red tape.

The Commission understands that the House of Commons is of the view that the proposed Regulation does not comply with essential procedural requirements and with the principle of subsidiarity. In particular, the House of Commons expresses concerns that the Commission did not consult publicly on the legal instrument, and that it did not translate the impact assessment in all the official languages of the EU. It also argues that the objectives of the proposed action can be sufficiently achieved by Member States themselves rather than by action at EU level, and, in this respect, that there is no cross-border market effect, as the issues the Regulation seeks to address are not applicable to the core network that crosses Member State borders. Moreover, the Commission noted that the House of Commons contests the choice of the legal instrument (a Regulation instead of a Directive), as well as the credibility of the cost reduction potential, as outlined in the Commission's impact assessment. Lastly, the House of Commons is concerned over the impact of the proposed measures on the

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UK regime for wayleaves, their impact on the incentives to invest in infrastructure in grey areas and over the administrative cost for implementing the proposed Regulation.

The Commission takes note of the concerns expressed.

Regarding procedural requirements, the Commission would like to assure the House of Commons that all procedural requirements have been fully respected. In accordance with such requirements, for instance the executive summary of the impact assessment has been translated into all official languages, as has been the explanatory memorandum, which explains the way the proposed legal instrument complies with the principle of subsidiarity. There is no obligation for the Commission to translate the Impact Assessment (which has been drafted in English) into all official languages.

The same is valid for the public consultation, which ran from 27 April until 20 July 2012, and gave the chance to the stakeholders to express their views on the content of all the measures included in the proposal. Not least, feedback has been requested on the need for a more coherent regime of infrastructure sharing within the EU. Over one hundred contributions were received, from various stakeholders, such as incumbent and alternative operators, equipment manufacturers, or national regulatory authorities. Contributions were received not only from the electronic communications sector, but also from utilities, associations of utilities, local, regional and national public authorities¹.

The proposed Regulation aims at removing barriers to the functioning of the Single Market, which are caused by the existence of a patchwork of rules at national and sub-national levels. Such patchwork causes delays in network deployment, and affects the costs. In the Commission's view, addressing such fragmentation can best be achieved at EU level. Action at Union level is also better suited to ensure equal treatment and non-discrimination of undertakings and investors throughout the EU. In particular, it is an obstacle to the completion of the digital single market that utilities may economically exploit their physical infrastructure in one Member State and not in another. While the deployment of networks is effectively locally implemented, it is decided, financed and designed at national and supra-national level. Leaving aside international connectivity, which has a cross-border character per se, when electronic communications providers are deploying high-speed broadband, they do it on an efficient scale, which has effect at EU level.

The Regulation does not ignore, but on the contrary builds on national best practices and aims at scaling them up at EU level. EU action is necessary to tackle bottlenecks throughout the different phases of deployment, in order to achieve the full cost reduction potential in network deployment. National best practices are not affected by the proposal. In accordance with the principle of subsidiarity, Member States may adopt more detailed rules or provisions complementing the rights and obligations specified in the proposed legal instrument, for example data bases of existing physical infrastructure. Moreover, the possibility for Member States to exempt categories of infrastructure or buildings from the application of this

¹ Non-confidential contributions are available at: <http://ec.europa.eu/digital-agenda/en/news/results-public-consultation-%E2%80%99CeU-initiative-reduce-cost-rolling-out-high-speed-communication>

Regulation further demonstrates that the Commission has taken due consideration of the principles of subsidiarity and proportionality.

The proposal follows from a request from the Heads of State and Government meeting at the European Council in March 2012 to prepare measures to reduce the costs of roll-out of broadband in the EU². Last December, the European Council endorsed a legally binding instrument at EU level as part of the so-called Single Market Act II.³ The type of legal instrument, a Regulation, was carefully chosen by the Commission in view of its efficiency and effectiveness: by focussing on a limited number of directly applicable rights and obligations, it aims at removing identified obstacles and barriers to the development of the digital single market, without harmonising and interfering with organisational issues, which are left to the discretion of Member States.

The Commission understands that the House of Commons is also concerned by the impact that the obligation to meet reasonable requests for sharing physical infrastructure may have on the UK regime for wayleaves, i.e. payments made by utilities companies to landowners to install and maintain equipment on private property. While the Commission understands that certain adjustments may have to be made to enable shared use of the infrastructure, it is not intended to bring any change to the principle of charging wayleaves as such.

The House of Commons argues that the proposal would negatively affect small telecom providers rather than benefit them, because they would be obliged to open up their ducts to larger providers. First, smaller telecom providers only seldom own physical infrastructure. Their access to new markets will be facilitated since they could make use of passive infrastructure which may already be installed. Secondly, reasonable access to physical infrastructure under this proposal is to be negotiated on a commercial basis. Thirdly, small as well as large telecom operators are expected to benefit from access to other network operators' physical infrastructure, on a win-win basis, generating income and resources for utilities.

With regard to the risk of free riding on infrastructure built by network operators investing in the most hard-to-reach areas, the Commission would like to reassure the House of Commons that this risk has been duly taken into account in the proposal. Not only the economic viability of such investments, in particular in remote areas, but also the business case underpinning the investment, shall be taken into account when defining the price for access to the infrastructure. In this respect, the Commission would like to refer the House of Commons to recital 16 of the proposal⁴.

² Conclusions of the European Council of 1/2 March 2012, EUCO 4/2/2012, available at <http://register.consilium.europa.eu/pdf/en/12/st00/st00004-re02.en12.pdf>, page 5

³ Conclusions of the European Council of 13/14 December 2012, EUCO 205/12, <http://register.consilium.europa.eu/pdf/en/12/st00/st00205.en12.pdf>, item 17

⁴ "Any access obligation should take into account the economic viability of these investments based on any time schedule for the return on investment, any impact of access on downstream competition, any depreciation of the network assets at the time of the access request, any business case underpinning the investment done, in particular in recently built physical infrastructures used for the provision of high-speed electronic communications services, and any possibility offered to the access seeker to co-deploy"

As regards the impact assessment, the Commission would first like to clarify that impact assessment carried out by the Commission is a process that prepares evidence for political decision-makers on the advantages and disadvantages of possible policy options by assessing their potential impacts. Calculating cost-effectiveness ratios may require making a number of assumptions and is subject to the concept of 'proportionate level of analysis'⁵. While policy decisions should be based on sound analysis supported by the best data available, impact assessments support and do not replace decision-making.

Secondly, the Commission's estimates are based on a specific Analysis Mason study carried out on the cost savings which could be achieved by infrastructure sharing, by coordination of civil works, and by ensuring infrastructure ready buildings. The analysis is based also on concrete case studies. The estimation of the overall savings builds on a model combining assumptions on the actual take-up of the measures with potential CAPEX savings. In the specific case of infrastructure sharing, the figure regarding the potential savings of 75% for the shared parts of the deployed infrastructure is backed by other sources⁶ too, while the estimated 25% take-up is reasonable taking into account the high interest expressed by the industry in such infrastructure sharing and the cross-sectorial character of the measure⁷. The relatively low estimates for the take-up of the other measures (10% deployment coordinating civil works with other operators/utilities/public and private actors, 5% of deployment connects to NGA ready buildings) indicate that the figure on the overall savings potential of the proposal is in fact rather moderate.

In addition, a qualitative assessment of savings related to streamlined administrative procedures was also presented in the impact assessment (Annex IX), even if it was not quantified and was therefore not explicitly inserted in the quantification of the cost saving estimates despite its potential contribution. The same applies to savings related to damage prevention that could be ensured through the implementation of the proposed transparency measures and on which savings estimates presented in the impact assessment study are quite significant. The impact assessment indicates the savings as a range in terms of amount saved on deployment, since there is a variability of the figure regarding the potential savings from 20% to 30% applied on a variable amount of forecasted investments. The estimates of the savings are therefore to be taken as an overall estimation related to the overall package of measures, also because of their mutually reinforcing character.

Lastly, the Opinion claims that the proposed Regulation will induce additional cost to the public bodies for setting up and managing the single information point and ensuring the resolution of disputes. The Commission would like to underline that the proposed measures allow high levels of flexibility for Member States to adjust them to their national particularities. Hence, the administrative cost of implementing these measures depends to a large extent on the specific choices that the Member States will make. For instance,

⁵ Cf. Impact Assessment Guidelines, p. 13, SEC(2009)92

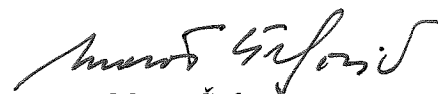
⁶ Enhancing Next Generation Access Growth in Europe (ENGAGE Group), consisting of 12 partners from 10 European countries that estimated that the initial cost of deployment in Western Europe using existing ducts ranges from EUR20 to EUR25 per meter, rather than an average of EUR80 to EUR100 per meter for deployments that require digging, thus resulting in a 75% cost savings

⁷ This estimates leads to an overall estimates of maximum 18% cost reduction linked to shared infrastructure

experience in Lithuania which applies dispute resolution for access to physical infrastructure shows that when the access obligations are clearly defined, the number of disputes is significantly reduced and the implementation cost relatively low⁸. While the administrative cost resulting from the proposed measures depends on the exact set up that each Member State will chose, the study prepared in view of the assessment of the impact of the proposed measures showed a potential for synergies further reducing administrative costs if the different functions provided in this draft proposal are assigned to one body. Furthermore, nothing in the draft proposal excludes that the cost of dispute resolution is passed over to the telecommunications sector. OFCOM, which would be the default dispute resolution body, if the UK legislator does not decide otherwise, has already the power to request a party to a dispute to make payments in respect of costs and expenses incurred in dealing with the dispute⁹.

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

Yours faithfully,



Maroš Šefčovič
Vice-President

⁸ Cf. Executive summary of the Impact Assessment, part 4.2.2

⁹ Cf. Ofcom Dispute resolution Guidelines, section 5.48