



Brussels, 22 May 2017
(OR. en)

9355/17

Interinstitutional Files:
2016/0288 (COD)
2016/0286 (COD)

TELECOM 129
COMPET 420
MI 432
CONSOM 221
CODEC 841

NOTE

From: Presidency

To: Permanent Representatives Committee/Council

No. prev. doc.: 9138/17 TELECOM 117 COMPET 341 MI 411 CONSOM 207 CODEC 794

No. Cion doc.: 12252/1/16 TELECOM 165 COMPET 486 MI 578 CONSOM 215 IA 72
CODEC 1269 REV 1
12257/16 TELECOM 166 COMPET 489 MI 579 CONSOM 216 IA 73
CODEC 1273

Subject: Proposal for a Directive of the European Parliament and of the Council
establishing the European Electronic Communications Code (Recast)

Proposal for a Regulation of the European Parliament and of the Council
establishing the Body of European Regulators for Electronic
Communications

- Progress report

The present report has been drawn up under the responsibility of the Maltese Presidency. On the basis of the discussions held over the past months, it gives an account of the state of play of the work done so far in the Council's preparatory bodies in the examination of the above-mentioned proposal in order to inform Ministers and to draw attention to the issues which will require further discussion.

The report clarifies the issues identified during the analysis of the impact assessment covering both the CODE and BEREC proposal, as well as during the first examination of the CODE. It also explains the progress made on the Services and Access parts of the CODE where the Presidency was able to table various compromise proposals, and summarises the issues that still remain to be tackled. Progress on the BEREC proposal is only addressed in relation to the Impact Assessment and institutional set-up.

I. INTRODUCTION

1. On 14 September 2016, in the context of its Digital Single Market Strategy, the Commission adopted its connectivity package. This package, a key element of the second pillar of the strategy designed to create an environment where digital networks and services can prosper to bring Europe, its citizens and businesses into the era of the Gigabyte society, included in particular two closely linked proposals:
 - a. A proposal for a *Directive of the European Parliament and of the Council establishing the European Electronic Communications Code*¹ (CODE) with Article 114 TFEU as a legal basis. The proposal aims to achieve the internal market for electronic communications and ensure its functioning;
 - b. A proposal for a *Regulation of the European Parliament and of the Council establishing the Body of European Regulators of Electronic Communications*² (BEREC).
2. The European Electronic Communications Code sets EU-wide common rules and objectives on how the Electronic Communications industry should be regulated. It applies to providers of both networks and services. The proposed recast brings these rules up to date, to take account of technological, market and consumer developments, networks and to safeguard consumer choice, while proposing additional investment-friendly measures. Key measures include some deregulation, enlargement of the scope to new communication tools (so-called over-the-top services) as well as new regulation supporting the roll-out of next generation networks such as 5G.
3. Under the Slovak Presidency, after the first presentation of the proposals and of the common impact assessment (IA) on 22 September and 4 October 2016, the Council Working Party on Telecommunications and the Information Society (WP TELE) discussed the impact assessment in detail on 22 November 2016 and started the examination of the aims, objectives and definitions on 29 November 2016.

¹ Doc 12252/1/16

² Doc 12257/16

4. In the European Parliament, Ms. Pilar del Castillo (ITRE, EPP) and Ms. Dita Charanzova (IMCO, ALDE) were appointed Rapporteurs.
5. The European Economic and Social Committee delivered its opinion on the CODE on 26 January 2017³ and on BEREC on 25 January⁴, while the Committee of Regions delivered its opinion on the CODE on 8 February 2017⁵.

II. IMPACT ASSESSMENT

6. In general, delegations welcomed the move to reform telecom legislation and the quality and quantity of analysis provided. Overall, the difference in reception was remarkably more positive compared to the Commission's previous attempt (initial proposal for a Telecoms Single Market).
7. Nevertheless, delegations still raised the issues concerning mainly:
 - a) the extent to which the IA meets **Better Regulation principles** (e.g. evidence of market failure or consumer harm, deregulation where possible), especially in areas where proposing extending regulation to newer markets (e.g. to number independent services);
 - b) the flexibility needed to address **regional or national issues** was not correctly considered, **nor were the potential local impacts**, for instance on spectrum management in the context of the external borders of the EU; and
 - c) the respect of the **principle of subsidiarity**, especially in relation to the institutional setup.
8. There were also some concerns regarding **specific areas** of the IA and relevant proposals:

³ TEN/612 OPINION 26/1/2017 PLENARY

⁴ TEN/613 OPINION 25/1/2017 PLENARY

⁵ CdR : SEDEC-VI/018 - 8-9 February 2017 Opinion - "The review of the Telecom Package"

- a) The explanation of, and justification for, the scale of **institutional reform** was widely seen as failing to illustrate the problem that the proposal was seeking to address and the added value of the recommended option.
 - b) The IA's consideration of options for improving **spectrum** harmonisation were also thought to give undue weight to the benefits of structural reform without sufficient explanation and analysis. Some Member States also questioned the representativeness of the answers to the Commission's public consultation which were used as a basis for the proposals.
 - c) The limited extent to which the choices for financing and the financial impact of funding the proposed **Universal Service Obligation (USO)** were set out in the IA was noted by a number of Member States, along with concern about the lack of analysis of the benefits of such changes. The Commission released further studies on the USO but these did not allay the concerns.
 - d) The evidence for the differentiation between **electronic communications services** based on numbers was perceived as insufficient by some Member States, especially as the trend to move away from number-based interpersonal communications services to number-independent is growing. Therefore those Member States questioned the future-proof quality of the proposal.
 - e) A significant number of Member States complained about the lack of evidence showing that the Commission's choice for **maximum harmonisation** would not harm consumers, especially as Member States would have less flexibility to react quickly to market changes.
 - f) The evidence for proposals regarding **co-investment** did not include sufficient details about both the models under consideration or the industry's views.
 - g) A few Member States questioned why proposals to address the issue of **duopolies** were not included as options within the IA.
9. Among these issues, institutional reform and spectrum were the areas with the strongest concerns.

III. STATE OF PLAY AND KEY OUTSTANDING ISSUES

10. The proposal for the **CODE** and the **BEREC proposals** reflect the scale of the policy ambition. Taken together the amended texts cover more than 300 pages. Despite this, and taking into consideration the importance of bringing new rules to the market fast to facilitate the digital transformation of Europe for its citizens and businesses, **the Maltese Presidency has aimed at progressing fast on the Code with a view to putting the upcoming the Estonian Presidency in a position to begin negotiations with the European Parliament this autumn.**
11. The main goals of the Presidency were to:
 - a) conclude the first examination of the CODE by April 2017; and
 - b) bring some parts of the CODE close to a Council position at the time of the June TTE Council.
12. The Presidency chose to divide the work into four sections: **Services, Access, Spectrum, and Institutional set-up and other matters.** The Commission introduced the proposals through discussion papers using this approach, and it has proven helpful in structuring consideration of the Code.
13. Under the Maltese Presidency, between January and May, **21 Working Party meetings** were devoted to the examination of either the Commission proposal or the Presidency compromises. The following sections will further develop the significant progress made in each part.

14. Throughout discussions it has been made clear that **all sections are interlinked and will ultimately need to be agreed as a coherent package**. Therefore it must be recognised that where the progress report records a degree of consensus or level of agreement at the working level, the principle remains that **nothing is agreed until everything agreed**. One example of this is the impact of the institutional arrangements on all sections, meaning **references to national regulatory authorities and competent authorities** in the latest Presidency proposals **are in brackets** pending further discussions. Another example is the need to take a step back to ensure that the combined provisions remain coherent with the overall objectives of the CODE of facilitating both investment and competition to extend connectivity, while continuing to provide a high level of consumer protection.

III.1. Services (Articles 40, 41; 59§1.c; 79 to 108)

15. The Presidency's first focus was on the elements of the Code relating to Services. These provisions include Security aspects, as well as those elements of Part III of the proposal: Universal Service Obligations, Numbers and End-User Rights.
16. The Commission's proposals sought to bring the existing regime up to date, reflecting changes in the market since the introduction of the current regime in 2009. For instance it focused the Universal Service Obligations on the obligation to provide an **affordable functional internet** connection while **taking away the possibility to use sectoral funding**, updated the numbering provisions to include **non-geographic numbers** and improve the conditions of the rights of use. But the biggest changes were in the area of End-User Rights which changed the **scope** of Electronic Communications Services and proposed **maximum harmonisation**. This title also included new elements regarding **bundles** following the development of triple- or even quadruple-play offers in many markets.

17. At the working level a significant number of issues have been addressed, including provisions that make the text more future-proof. **The Presidency is of the opinion that the latest compromise proposals reflect this in many aspects and therefore are a significant basis for a future Council position. At the same time**, it is also clear that progress on other Digital Single Market files, especially on the **Digital Content Directive** which could also set rules relating to over-the-top players and contracts, could partially impact the current text. Consequently, further deliberation of this section may be required once further progress is made on other sections of the CODE. The main issues discussed are set out below.

III.1.a. Security (Articles 40, 41)

18. There was broad support for the aim of these articles within the Working Party. The Presidency work consisted mainly of maximising consistency with the NIS Directive⁶. The Presidency has also proposed to include a provision coming from article 17 of the proposed ePrivacy Regulation⁷ to bring all security elements of Electronic Communications Networks and Services in one place. Following the comments received during the Working Party meeting of 19 May, the Presidency thinks that this subsection only requires fine-tuning.

⁶ Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union.

⁷ Doc. 5358/17

III.1.b. Universal Service Obligations (Articles 79-86)

19. The Commission's proposal that the universal service obligation be updated to **remove obsolete obligations** (e.g. public payphones, directory enquiry services) and **include the affordability of a functional internet access service** has been welcomed, and further clarified by Presidency compromises. But the proposal that Member States could only finance the Universal Service obligations through their National budgets was strongly rejected. Hence, **the flexibility to potentially finance the universal service obligations through sectoral funding** as set out in the current framework **has been reinstated**. Some Member States still require further flexibility in terms of being able to designate a provider of affordable/available universal services. While aspects of concern to some Member States such as this one remain to be addressed in this subsection and the related recitals, the Presidency is of the view that an agreement on this subsection is near.

III.1.c. Management of Numbering resources (Articles 87-91)

20. The most substantial proposal from the Commission regarding numbering resources concerned non-geographic or 'extraterritorial' numbers. Such numbering resources may be of increasing relevance, particularly for machine-to-machine communication. **Member States first sought clarity with regards to this provision and secondly to ensure that work within Europe was not duplicating efforts at the international stage**. The compromise text seeks to clarify the proposal, including on how competent authorities should interact when issues regarding the use of these numbers arise, and proposes that BEREC might be given certain tasks in order to facilitate the work by Member States.

III.1.d. End-User Rights (Articles 92-108)

21. With the support of delegations, the Presidency has clarified the **definitions in Article 2** to avoid that services where communication is an ancillary feature would be brought into scope. For instance a banking app for managing bank accounts and payments would not be in the scope if it also includes a communications service between the bank customer and a bank representative. This approach has been largely supported by Member States.
22. The latest compromise also makes it clear that for some provisions, in addition to **micro and small enterprises, also not-for-profit organisations could benefit from the same rights as consumers**. Other elements of improvements concern changes to ensure that Member States are not bound by rules that would be less favourable to consumers than the ones currently in place, for example on the **provisions to prevent bill-shock**, as well as clarifications made to the **bundle-related provision**.
23. However, the most challenging issues were linked to the **scope** of these provisions and to **maximum harmonisation level** proposed by the Commission.
24. **Regarding the scope**, the Commission proposed to clarify the current definition of Electronic Communications Services, by introducing such categories as internet access services and interpersonal communications services. Not all the end user rights provisions are applicable to all these service categories. Some provisions are only applicable to number-based interpersonal communications services and/or internet access services.

25. From the beginning of the discussions, despite Member States supporting the principle that equivalent services should be regulated equivalently and the idea that the Directive needs to be future proof; **delegations have been split on this issue**. On the one hand, some Member States have emphasized that no evidence, including on consumer harm, had been put forward to justify the regulation of number-independent interpersonal communications services, and that any **regulation could be detrimental to innovation, the establishment of new businesses**, and therefore to the EU economy. On the other hand, some Member States concurred that there was no reason not to apply provisions that were considered not to create an undue burden, especially when number-independent interpersonal communications services offer services with similar characteristics to number-based services.
26. In its compromise proposal, the Presidency has specified that the rules applicable to services should be **based on the characteristics relevant to the end-users (e.g. Quality of Service, Contract duration, Price)**, not the definitions of the different types of services. The effect of this approach on regulation of number-independent interpersonal communications services is that they are subject to **light regulation as only when these services have characteristics relevant to the regulation do the obligations apply**. This means that, in the Presidency proposal, **a citizen would be protected in the same way when using any electronic communications service without having to worry about how the service is delivered or by whom**.
27. The Presidency is of the opinion that **this is the good compromise between the diverging positions of delegations** that did not want to include number-independent interpersonal communications services in the end user rights provisions, and those who wanted to impose obligations to such services. However, a final agreement on the scope might require further clarifications in the text, for example by emphasizing the characteristic-based approach rather than an approach by type of service.

28. Regarding the **maximum level of harmonisation**, some Member States did not oppose the objective, but some noted that it **could lead to a lowering of existing consumer protections** in their country or to a lack of flexibility to address future market developments. The current compromise solution for **Article 94**, recognises the need to establish the principle of **maximum harmonisation for number-independent interpersonal communications services** which often operate across the Union without reliance upon any specific network. However, **Member States remain divided on the appropriate level of harmonisation for other electronic communications services and some have flagged concerns about a potential lack of level-playing field among different kinds of services. The Presidency proposal therefore strikes a fair compromise solution on the substance.** However future alternative compromises might have to be discussed, for instance by having by default maximum harmonisation while including exceptions in many end-user rights provisions.

III.1.e. Future-proofing the Directive (Article 59§ 1.c, and new Article 114(a))

29. Due to the fast moving nature of this sector, and especially the rise of number-independent interpersonal communications services, it is important that there be an element of flexibility built into the system so that it can respond effectively to future challenges. This is why **the compromise includes provisions for the monitoring of developments** with a view to the introduction of targeted legislation where necessary as well as retaining the possibility for interoperability requirements to be extended, or for regulatory obligations to be lessened . **Some Member States remain keen on using this tool to collect evidence in order to inform any future decision about the scope of the regulation, in particular regarding the inclusion of number-independent interpersonal communications services in the scope of this regulation.**

30. Delegations might also be keen to further improve these provisions by making the proposal more future-proof. For instance the balance struck between guidelines, implementing and delegated powers and future legislation may warrant a revision taking into account any outcome on institutional arrangements and the level of harmonisation. Moreover, further clarification may be needed on the application of provisions to various services either through additions in the text itself or through Commission guidelines or implementing acts.

Conclusion on Services

31. The Presidency's successive compromise proposals have clarified many aspects of the text and have paved a way for bridging different positions within the Working Party. However, the significant issues covered in this section of the Code require a very careful balance to be struck. **Hence the final agreement on this section will need to be considered in light of a holistic view of the proposal.** While it remains necessary to address specific issues, such as further clarifying the scope of End-User rights, for the most part this compromise text has brought initially divergent views significantly closer to each other.

III.2. Access (Articles 22, 32-34, 43-44, 57-78)

32. The Commission's proposals regarding access makes significant revisions to the framework with the objective of ensuring the right incentives are in place for both incumbents and competitors to invest in new networks and infrastructure in order to improve connectivity across Europe. This involves more proportionate regulation, the introduction of a specific mechanism to support co-investment and the clarification of regulatory powers. The direction of these proposals has been welcomed by Member States, and a number of concerns have been addressed by proposed amendments.
33. At the working level these provisions have been reviewed and multiple iterations of possible compromises have been discussed. Through this process a significant number of issues have been addressed, and an agreement on many articles or paragraphs has been reached. The areas where further discussions are needed are set out below.

III.2.a. Geographical Survey (Article 22)

34. The Commission proposed the introduction of 'digital exclusion zones' based on geographical surveys (Article 22). This was in principle supported by Member States. However, concerns were identified that the proposal was overly prescriptive and burdensome for regulatory authorities. Consequently the Presidency has proposed a compromise that includes this important tool, but **introduces greater flexibility for its implementation**. The Presidency is of the view that, apart from discussions in the context of the institutional setup, little additional changes seem to be needed to the current compromise proposal.

III.2.b. Internal Market Procedures (Articles 32-34)

35. The proposal contained provisions that would allow the Commission, with the support of BEREC, to require national authorities to withdraw measures (Article 33). Member States expressed strong opposition to this proposal because of the need for national authorities to have sufficient flexibility and because of concerns about subsidiarity. As a result, the Presidency proposal **reinstates the currently applicable provisions that the Commission should be able to issue recommendations** with regards to the consistent application of remedies. The Presidency is of the view that there is a broad agreement regarding this subsection.

III.2.c. Regulatory Powers and Responsibilities (Articles 59-60, excluding 59(3))

36. A large number of Member States expressed the view that **competent authorities need to retain flexibility** in order to be able to respond effectively, particularly with regards to the specificities of their national circumstances. This issue is most clearly visible in the article specifying the powers and responsibilities of regulatory authorities regarding access and interconnection (Article 59) which limited the extent of intervention to address access issues. The Presidency proposal tries to ensure that regulatory authorities have the flexibility to impose more intrusive measures where absolutely necessary. An agreement on this subsection is highly dependent on any agreement on the oligopoly issue that is discussed later in this document.

III.2.d. Access to Civil Engineering and Network Facilities (Articles 70-71)

37. The Presidency has sought to bring clarity to terms of the relative priority of regulatory interventions. Many Member States wanted to make clear that national regulatory authorities were not constrained as to what access obligations could be imposed. However, there was also a recognition that, in principle, **there should be a preference for minimising the impact of such interventions**, and therefore that the order of preference for intervention is civil engineering, passive access and active access. The Presidency proposal seeks to make clear this principle of priority, while **ensuring national regulatory authorities are able to impose the measures they deem appropriate**. The latest compromise will require further clarifications to bridge the gap between those Member States requesting additional flexibility, and those call for the reinforcement of the sequencing.

III.2.e. Termination Rates (Article 73)

38. The Commission's proposal for termination rates contained some positive elements for the single market but remained burdensome. Member States considered that more could be done. As such the Presidency proposes a **fully symmetric regulation with a single Union-wide cap for each of mobile and fixed voice termination rates** to be set by the Commission, based on the recovery of costs incurred by an efficient operator. Some Member States maintain reservations vis-à-vis the proposed compromise.

III.2.f. Co-investment (Article 74)

39. The Commission's proposal on co-investment (**Article 74**) is one of the key measures seeking to increase investment in infrastructure. **Member States welcomed the objective** but raised concerns over the **potential for gaming by operators**. The Presidency proposal has sought to address these concerns, primarily by ensuring that national regulators have the flexibility to address any issues that might arise following the application of the article. Further work is needed to limit the potential for gaming and the risk for fragmentation of the internal market.

III.2.g. Oligopolies

40. There has been a discussion about the efficacy of tools that Member States have at their disposal in order to address competition concerns arising from oligopolistic, and particularly duopolistic, markets. This issue has also been signalled in BEREC reports, but the issue was not addressed by the Commission in its proposal. The Commission regretted the lack of jurisprudence while remaining committed to update the Significant Market Power guidelines.
41. The concerns of Member States regarding oligopolistic situations have been widely recognised as meriting further consideration. The latest compromise text on *Article 59(2)* has not yet achieved the necessary balance between flexibility and full respect of the SMP regime. The Presidency suggests to start future discussions on this critical article on the basis of the proposal put forward by three Member States during the Working Party of 19 May.

Conclusion on Access

42. The Presidency managed to ensure broad support for most elements of the compromise text on Access. While the text does not go far enough for some in ensuring the maximum discretion for national authorities, it allows for significant flexibility while retaining the overall structure proposed by the Commission, focusing on addressing issues resulting from significant market power ahead of symmetric regulation. **The final agreement on this section will need to be considered in light of a holistic view of the proposal. In particular further discussion is required on the issues of Regulator's powers (Article 59), access to infrastructure (Articles 70 and 71) and co-investment (Article 74) to ensure that these support the aim of promoting competition and investments.**

III.3. Spectrum (Articles 4, 19, 28, 30, 35-37, 42, 45-56, 59(3))

43. The Commission's proposals regarding spectrum significantly amend the existing regime by introducing binding rules for enhanced coordination of spectrum management, with the aim of facilitating investment particularly in 5G networks. The Maltese Presidency conducted a first examination and gathered written comments. These showed that there was strong support for achieving this outcome, with Member States expressing their shared interest in moving forward with 5G and **strong commitment to making its roll-out a success**.
44. Nonetheless a number of concerns have been voiced, reflecting issues similar to those identified at the TTE Council in December 2016. The main concern is that the Commission's proposal limits the authority and flexibility of Member States with regards to spectrum management. This potentially restricts the ability to address nationally specific issues (particularly in those Member States sharing borders with third countries). Moreover, spectrum is a national resource that, in line with the principle of subsidiarity, should be disposed of according to the priorities as determined by the Member State in question.
45. In particular, **16 delegations signed a common position paper** making the case that the very detailed proposals on spectrum management would introduce ambiguity over the criteria that Member States need to consider and balance and thus would increase legal uncertainty and instability of spectrum allocation decisions. The minimum license duration of 25 years for harmonised spectrum proposed by the Commission is judged insufficiently flexible to adjust to market developments. And finally the governance model and empowerment of the Commission have been criticised.

46. The 16 Member States proposed to:

- reintegrate the general principles of European spectrum management laid down in the existing framework and therefore to solely focus on implementation and enforcement of existing principles rather than introducing more detailed and complex provisions; and
- improve political coordination through a reinforced RSPG composed of High Level Representatives of Member States and following a strategic approach concerned with all relevant aspects linked to spectrum.

47. Member States have expressed a shared desire for effective spectrum management across Europe and indicated a willingness to engage in a dialogue about how greater cooperation and more effective coordination of spectrum management can be achieved. However, this is tempered by a more optimistic assessment of the current challenges than that expressed by the Commission, and by the criticism of the cooperation mechanism proposed by the Commission. Any future compromise will need to **address the concern that the proposal in several areas unnecessarily limits Member State's flexibility**. Regarding the reinforcement of the cooperation mechanism, **delegations largely favour an approach that would involve RSPG rather than BEREC**.

III.4. Institutional Set-up (Articles 1, 3, 5-21, 23-24, 26-27, 29-31, 38-39)

48. The Commission's proposals regarding the institutional setup contained a **narrower definition of the National Regulatory Authorities** to strengthen their independence, but leading to a potential transfer of powers to the NRA from Member States or other competent authorities. It also extended the role of BEREC (for instance through its role in a potential veto mechanism on remedies proposed by NRAs) and proposed to transform it into an agency through the updated BEREC regulation proposal.
49. However during the impact assessment discussions, and the examination of the Code's institutional setup, Member States heavily criticised the Commission's proposal which, in their view, would create more administrative burden while not solving any issues. Moreover, it would **take away the organisational flexibility needed by some Member States**, for example to keep some tasks in ministries or other competent authorities such as competition authorities or consumer protection authorities. **The proposal for an updated BEREC regulation was not examined** as Member States preferred to **first analyse BEREC's tasks as set by the CODE**, before looking at what arrangements might be necessary to execute them.
50. Member States view the current institutional setup favourably, and therefore are most likely to support an approach which departs from this arrangement only where truly justified. The Presidency will organise a **policy debate in the TTE Council of 9 June 2017** to provide more guidance to the Working Party so that delegations can work on **defining the roles of the numerous actors (National Regulatory Authorities, Competent Authorities, Member States, BEREC or Commission)**

IV. CONCLUSIONS

51. The Presidency thanks the delegations for their continuous support despite the challenging rhythm the Presidency has imposed on the Working Party. The progress made over the past five months has been substantial. We have not only managed to complete a full first reading of the Code, but also to clarify a substantial set of issues and establish a space for compromise in some of the most difficult areas.
52. In addition to the need to further examine the spectrum provisions and the institutional setup, further discussions are required in particular on:
- a) regulatory powers and remedies to oligopolies (Art 59(2)),
 - b) harmonisation level (Article 94),
 - c) scope of the End User Rights (Articles 95 to 100),
 - d) the forward-looking mechanisms (Articles 59(1)c and 114a),
 - e) the link between articles 70 and 71 regarding access to infrastructure,
 - f) the co-investment possibilities (Article 74).
53. These issues will have to be dealt with by the upcoming Presidency when preparing a COREPER mandate or COUNCIL General Approach this autumn.
54. Delegations have clearly stated their understanding that, in the negotiation of the Code and the BEREC Regulation, “nothing is agreed before everything is agreed”. Given this caveat, this progress report and latest **Presidency compromise proposals provide a strong foundation upon which the final Council position on the Code and the BEREC Regulation can be built**, in the shared ambition of a more connected Europe and as a key contribution to the completion of the Digital Single Market.
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