



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 20 May 2014

9950/14

**Interinstitutional File:
2013/0309 (COD)**

**TELECOM 112
COMPET 286
MI 436
CONSOM 117
CODEC 1314**

NOTE

from: Presidency
to: Delegations
No. Cion prop.: 13555/13 TELECOM 232 COMPET 646 MI 753 CONSOM 161 CODEC 2000
Subject: 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, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012
- Draft progress report

The present report has been drawn up under the responsibility of the Hellenic Presidency and is without prejudice to particular points of interest and more detailed comments of individual delegations. It sets out the work done so far in the Council's preparatory bodies and gives an account on the state of play in the examination of the above mentioned proposal.

INTRODUCTION

1. The Commission adopted its 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*¹ on 11 September 2013 with article 114 TFEU as a legal basis. The proposal was a part of a package comprising two further elements: a Communication on the Telecommunications Single Market² and a Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment³.

The proposal seeks to establish the regulatory principles and rules necessary to complete a European single market for electronic communications. The main elements of the proposal include provisions on a single EU authorisation for electronic communications providers, European inputs, including coordination of use of radio spectrum and provisions on European virtual access products, harmonised rights of end-users, facilitating change of provider, and provisions concerning the powers of national regulators, roaming and BEREC. Next to the operative part of the Regulation, the proposal also seeks to achieve its aims by amending parts of the existing regulatory framework, namely Directives 2002/20/EC⁴, 2002/21/EC⁵ and 2002/22/EC⁶ and Regulations 531/2012⁷ and 1211/2009⁸.

¹ Doc. 13555/13

² Doc. 13562/13

³ Doc. 13566/13

⁴ Directive 2002/20/EC on the authorisation of electronic communications networks and services

⁵ Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services

⁶ Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services

⁷ Regulation No 531/2012 on roaming on public mobile communications networks within the Union

⁸ Regulation 1211/2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office

2. In the European Parliament, Mrs del Castillo was appointed as rapporteur, ITRE being the committee responsible, with IMCO, REGI, CULT, JURI and LIBE being the committees for opinion. Prior to the end of its term of office, the outgoing EP adopted its first reading amendments on 3 April 2014⁹. The European and Social Committee and the Committee of the Regions adopted opinions on the proposal on 21 and 30-31 January 2014 respectively. The BEREC presented its views on the proposal already on 17 October 2013¹⁰.
3. The European Council referred to the proposal in its conclusions of 24-25 October 2013¹¹ in the framework of its considerations regarding the Digital economy. The European Council encouraged the legislator to carry out an intensive examination with a view to its timely adoption. In its conclusions of 20-21 March 2014¹² it considered that the timely adoption of the proposal will contribute to the objective of completing and fully exploiting the potential of the internal market in goods and services, including in the digital economy, and fostering entrepreneurship.

STATE OF PLAY IN THE COUNCIL

4. The proposal was presented to Coreper and to the Working Party on Telecommunications and the Information Society (WP TELE) in September 2013, which was followed by consideration of the related impact assessment. Within the discussions in the WP TELE, delegations tabled a large number of questions and observations on the proposal. The results of the discussions were presented to the December TTE Council in a short state-of-play report¹³ which included also two questions for an orientation debate. Ministers discussed key policy issues for further integration of the telecom market as well as possible developments in other areas of the digital economy besides the telecom market, such as cloud computing and big data.

⁹ Doc. 8033/14
¹⁰ BoR (13) 142
¹¹ EUCO 169/13
¹² EUCO 7/14
¹³ Doc. 16637/13

5. The Hellenic Presidency initiated an in-depth examination of the proposal and, in the first semester of 2014, the WP TELE examined the proposal in ten meetings. After a thorough discussion on the Commission's six non papers, which were presented to delegations' questions raised under the previous Presidency, and after the initial reactions of the delegations, the WP TELE proceeded with a detailed article-by-article examination of the proposal. Due to the large amount of concerns and questions raised by delegations and to lengthy debates on most of the issues, the discussions covered Articles 1 to 23¹⁴. On the basis of those discussions, the Presidency put together the present progress report in order to inform Ministers about the state of play of the proposal and to draw attention to the issues that will necessitate further discussions.

General provisions (articles 1 and 2)

6. With regard to the objective and scope (art. 1), delegations proposed to delete, simplify or move into recitals various parts of the article. The main concern was the unclear link to and possible inconsistencies with the current telecom framework and its objectives. Delegations raised questions regarding some unclear wording, such as 'global competitiveness', 'sustainable competition' or 'highly efficient use of radio spectrum' (which would add to the complexity of regulatory principles to be taken into account by national competent bodies) and also regarding differences between the wording used in the proposal and in the current framework. Some delegations wanted to add additional objectives/principles, such as facilitation of investment into new networks or respect for national and local circumstances. It will also be necessary to come back to the subject matter (art. 1(3)) and definitions (art. 2), which will have to be adjusted once the main text of the proposal is more stable. Some delegations still have doubts about the legal instrument.

¹⁴ To be updated after the WP TELE meetings of 23 and 26 May.

Single EU authorisation (articles 3 to 7)

7. Most delegations were sceptical with regard to Chapter II on single EU authorisation. It is not clear what concrete problems this chapter is trying to address and why those problems could not be solved by better implementation of the current framework. Delegations questioned the added value of the Chapter and feared that it would increase complexity, administrative burden and related costs. They also warned against the risk of unequal treatment of EU and national providers, risk of forum-shopping and the impact on competences of host/home NRAs. Some delegations could support a light touch single notification system using a harmonised template and involving, one way or another, the BEREC. Nevertheless, in general, there seems to be support for the deletion of the whole Chapter.

8. Besides the general scepticism, delegations raised also a number of specific issues, such as the thresholds for the European electronic communications provider to be subject to administrative charges or contributions in the host Member State (art. 3(3) and (4)), the involvement of the home NRA in the case of disputes involving European electronic communications providers in the host Member State (art. 3(6)), vague terminology (e.g. 'objectively equivalent situations' in art. 3(5)) or the one-way provision of information on measures adopted for European electronic communication providers between the host and home NRAs (art. 5(2)). There was basically no support for art. 6 (suspension and withdrawal) and art. 7 (coordination of enforcement measures) since they were judged to set up a very complex system with unclear interactions and possibly conflicting competences between the home and the host NRAs.

Coordination of use of radio spectrum within the single market (articles 8 to 16)

9. While delegations understand the Commission's concerns with regard to the use of radio spectrum, many of them believe that the existing instruments and institutional set-up (RSPG, RSPP) could be used in a more effective manner to deliver the expected results. They found many of the new provisions too prescriptive and often overlapping or even conflicting with provisions of EU or national legislation (the latter misgiving applying in particular on art. 9 on regulatory principles). Some of them could also imagine another legal instrument, e.g. a Commission recommendation, to be better fit to deal with these issues. Moreover, it should be always borne in mind that spectrum is a national asset and national circumstances should be taken into account.

10. While some Member States could accept setting up of some high level criteria for radio spectrum use, many of them found art. 10 too prescriptive, and its paragraph 3 relating to the fees even unacceptable, interfering with Member States' prerogatives. Delegations' concerns with regard to additional provisions related to conditions for spectrum use (art. 11) included a possible conflict of paragraphs 1 and 2 with the Authorisation Directive, reference to compensation (art. 11(2) and (3)) and doubts whether establishing minimum technology performance levels (art. 11(4)) was technology neutral. While some delegations could see benefit of better coordination with regard to spectrum, most of Member States consider articles 12 and 13 to go too far, in particular with regard to the proposed competences and the veto right of the Commission and could support the deletion of those articles. Delegations do not seem to be completely opposed to the provisions on access to RLAN (art. 14) and on small-area wire-less access points (art. 15) but many of them fail to see the added value and what problems are addressed by those provisions. Most delegations would delete either the entire art. 16 on spectrum coordination among Member States or at least its paragraph 3.

11. Last but not least delegations indicated a large amount of unclear notions/wording, e.g.: 'integrated multi-territorial investment', 'least onerous system' (both art. 9(2)), 'other undertakings', 'equal treatment' (both art. 9(3)), 'coherent portfolios' (art. 10(1)(c)), 'more liquid market' (art. 10(6)(d)), 'synchronised' (art. 12(2)), 'initiatives that federate and make publicly accessible the RLANs' (art. 14(3)(b)).

European virtual broadband access products (articles 17 to 20 and annexes I and II)

12. Not too long discussions were held on this section of the proposal that did not find any support among Member States. They found the provisions too detailed and unclear at the same time and stressed the need for a thorough market analysis before any such regulation is introduced. They had concerns about the impact on the individual markets as well as the impact on investment. They did not support prioritisation of this particular product and did not want to limit the powers of NRAs in this regard.
13. With regard to assured service quality connectivity products (art. 19), Member States believed that there was no proven market failure that would justify a new regulatory burden and that regulation of business models should be avoided. The development of such products should be left for the industry without unnecessary regulatory intervention.

Harmonised rights of end-users (articles 21 to 29)

14. Delegations were of a more favourable view on the consumer provisions than on the other parts of the proposal. They would however support minimum harmonisation (as opposed to full harmonisation as in the proposal) since that would allow them to go further in consumer protection nationally, to respond to the changing needs of their respective markets and would not put in question some national measures already in force with the consequence of reducing rather than enhancing consumer protection. Related to this issue is the issue of the appropriate legal instrument, where a number of delegations would prefer to see consumer protection to be regulated in a Directive, preferably the Universal Service Directive.
15. A number of delegations were against regulating intra-Union communications terminating in another Member State (art. 21(3)), some of them fearing that it could have a waterbed effect on domestic prices.¹⁵

¹⁵ The paragraph will be further developed after the WP TELE meetings on 23 and 26 May.

16. While all delegations supported the principle of open internet (art. 23), views differed as to whether it is the right moment in time to regulate this issue now and whether to address it in this Regulation or in the Universal Service Directive or to even introduce in a 'soft' instrument, such as Recommendation or BEREC guidelines. Most delegations however agreed that the text could not stay as it is and would need to be improved substantially. Many delegations underlined the need for the text to be future-proof and pro-innovative and at the same time clear and understandable enough for end-users, service providers and NRAs. Therefore, definitions of 'internet access service' and 'specialised service' as well as the relevant paragraphs of art. 23 would need to be improved to provide a clear boundary between the two concepts and some notions (such as 'enhanced quality of service' or 'recurring or continuous manner' (both art. 23(2))) would need to be clarified. Moreover, many delegations found the list of allowed traffic management measures in art. 23(5) unsatisfactory, containing elements that should not be there (e.g. the reference to 'serious crimes') or that should be clarified (e.g. reference to 'temporary or exceptional network congestion') while missing other elements that could be included. It was also suggested to shorten and simplify the provision and/or to draft it as a non-exhaustive list. While delegations agreed that the right balance needs to be struck between net neutrality and reasonable traffic management, they had different views on how to achieve it. Before any new text can be put together, it would therefore be necessary to agree on the common underlying principles.

CONCLUSION

17. The intensive discussions in the WP TELE as summed up in the previous paragraphs have revealed serious problems that Member States see with the current proposal. Most Member States are worried, among others, about the red tape and financial burden, unclear link to the current telecom framework, the impact on the existing structures and on the competences of NRAs, consequences of the consolidation of the market for the effective competition, for consumers and for small operators and also about the shift of balance of power between the Commission and the Member States. There are many pending questions and concerns essentially with regard to all provisions of the proposal analysed so far but, even more importantly, many Member States do not see the need to cover a number of topics in the proposal at all. This concerns in particular the provisions on the single EU authorisation, some provisions regarding the use of radio spectrum and provisions concerning the European virtual access products.

The Presidency believes that if the work on this file is to continue and bear fruit, future efforts should probably focus on those provisions of the proposal that gathered at least some support among Member States and where solid progress is achievable. Based on the discussions held in the WP TELE so far, the Presidency would see such an opportunity to focus in specific chapters, for example, the chapter dealing with consumer rights and net neutrality.

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Following Coreper's consideration of this progress report on 28 May, the Presidency will present it to the Council with the invitation to take note of it.
