



Council of the
European Union

Brussels, 18 November 2016
(OR. en)

14401/16

LIMITE

POSTES 18
TELECOM 231
MI 713
COMPET 586
DIGIT 130
CONSOM 278
IA 111
CODEC 1655

**Interinstitutional File:
2016/0149 (COD)**

NOTE

From:	Presidency
To:	Permanent Representatives Committee/Council
No. prev. doc.:	13458/16 POSTES 15 TELECOM 199 MI652 COMPET 536 DIGIT 116 CONSOM 248 IA 92 CODEC 1479
No. Cion doc.:	9706/16 POSTES 4 TELECOM 110 MI 407 COMPET 348 DIGIT 65 CONSOM 135 IA 35 CODEC 795 + ADD1 + ADD2 + ADD3 + ADD4 + ADD5
Subject:	Proposal for a Regulation of the European Parliament and of the Council on cross-border parcel delivery services - Progress report

The present report has been drawn up under the responsibility of the Slovak 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.

I. INTRODUCTION

1. The Commission adopted, on 25 May 2016, the above proposal based on, in particular, Article 114 of the Treaty on the Functioning of the European Union. The general objectives of the proposal are to address specific issues relating to cross-border parcel delivery services. The proposed Regulation builds on and complements the rules on cross-border parcel delivery services provided by the Postal Services Directive 97/67/EC¹.

The specific objectives of the proposal are to:

- make markets work more effectively by making the regulatory oversight of the parcels markets more effective and consistent as well as to encourage competition;
- increase the transparency of tariffs in order to reduce unjustifiable tariff differences and to lower the tariffs paid by individuals and small businesses, especially in remote areas.

These specific objectives support the wider Digital Single Market objectives of increasing cross-border e-commerce and digital inclusion.

2. The opinion of the Economic and Social Committee was adopted on 19 October 2016 (INT/799 Parcel delivery).
3. In the European Parliament, the rapporteur has been appointed (Lucy ANDERSON, S&D, UK). However, no decision has yet been made as to the sharing of responsibility between the Transport and Tourism (TRAN) and Internal Market and Consumer Protection (IMCO) Committees.
4. The Permanent Representatives Committee/Council (TTE - Telecom) is invited to take note of this progress report drawn up under the responsibility of the Presidency. This report outlines the main issues discussed and concerns raised by delegations.

¹ Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ L 015 of 21 January 1998, p. 14 - 25).

II. STATE OF PLAY

The proposal was presented by the Commission to the Postal Services Working Party on 9 June 2016. This was followed by the examination of the impact assessment on 7 July and of the legislative text on 8 September, 18 and 25 October and 9 November. Due to the large amount of concerns and questions raised by delegations and the limited time available to reach a general agreement on the text, the Presidency decided to draft this 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.

Delegations hold general reservations/scrutiny reservations and continue to analyse in detail the provisions contained in the draft Regulation.

Main issues:

It is the Presidency's understanding that the objectives to improve the cross-border parcel delivery services, as presented in the Commission proposal, are generally welcomed by delegations. Delegations also expressed a positive view on the Presidency's efforts to address ambiguities and technical issues in the proposal as set out in the latest compromise text (doc.13458/16). This includes the further clarification of definitions, such as the definition of “parcel” and the scope of the measures and the operators and activities to which they would apply.

However, despite greater clarity, a number of issues have emerged from the discussions at the Working Party level, including overarching concerns about the proportionality of some of the proposed regulatory activities, the regulatory burden they would impose and the justification for measures relating to specific segments of the market. The main issues identified are set out below. These will require further in-depth consideration, without prejudice to particular points of interest of individual delegations or other provisions included in the proposal which have not yet been fully addressed. Furthermore, it should be noted that the deadlines throughout the whole proposal will have to be adapted once the related provisions have been agreed.

Scope and definitions (Articles 1 and 2)

With regard to the scope of the draft Regulation, some delegations raised concerns and questions on its relation to the Postal Services Directive (PSD). It was argued that the Regulation should be aligned with the PSD and thus be limited to the provision concerning postal services including only postal services operators authorised under national legislation. Other delegations agreed to a broader vertical scope including also providers other than traditional postal service providers, and have emphasised the necessity to include also new business models. The Commission explained during the examination that the proposed Regulation would complement the PSD, would constitute a "lex specialis" and clarified that the proposal does not contain contradictions with the provisions in the PSD.

An issue on which several delegations raised a concern is the access to multilateral agreements concerning cross-border parcel delivery services as set out under c) of Article 1 and specified in Article 6. According to these delegations, third party access should concern access to infrastructure and related services provided for in the multilateral agreements rather than to the agreements themselves. In addition, a few delegations would prefer to expand the scope to include also bilateral agreements. However, this was refused by a number of other delegations. The Commission explained that third party access to multilateral agreements would encourage competition and would make better use of existing networks.

As regards the definitions set out in Article 2, the Presidency has introduced a new definition of "parcel" as a postal item other than an item of correspondence with a weight not exceeding 31,5 kg. In Recital 8 it is further explained that postal items over 20mm are more likely to contain goods than correspondence. Some delegations are still considering if and how the scope of this definition, including both its upper and lower limits, might be improved. The definition will have certain consequences for operators dealing with the sorting of postal items, and it was noted that any solution should be precise enough to give operators a certain margin of appreciation (particularly in relation to the lower limit) while avoiding increased costs and administrative burden. Moreover, some delegations raised a concern on the implications of the definition in relation to the 15 postal items set out in the Annex which is considered, by some delegations, as an ambiguous mix of both letters and parcels.

The definition of "parcel delivery services" also triggered an extensive discussion in the Working Party. Several delegations claimed that this definition is not aligned with the definition of "postal services" in the PSD (*while using "or" instead of "and"*). According to these delegations, it would not be proportionate to impose an obligation on entities undertaking only one of the services in the postal value chain, such as clearance or sorting, to be subject to the relevant provisions of the proposed Regulation. This would create an administrative burden for these entities, including sub-contractors, and could increase the potential risk that the same information will have to be submitted to the national regulatory authorities by different parcel delivery services operators.

Provision of information (Article 3)

This provision was proposed by the Commission in order to increase the ability for the national regulatory authority (NRA) to better monitor the market, based on a minimum of harmonised knowledge and correct information of statistical data submitted by parcel delivery service providers exceeding a certain minimum size. This would also allow for an identification of potential market failures at an early stage.

Although the Presidency has made a strong effort to develop a balanced text in Article 3 while accommodating several concerns raised, some delegations still consider that this article imposes an increased and disproportionate administrative burden. A number of delegations have expressed the potential risk of double-provision of the information required by the service providers and/or of the fact that the NRA could already be in possession of the information required. Some delegations hereby underlined the importance of firmly applying the "once-only principle" and stressed the benefits of all actors, including the Commission, making use of digital technologies to facilitate the submission of data.

Another issue still under discussion is the criteria introduced by the Presidency on "*the average number of persons working for the provider*" and involved in the parcel delivery services as set out in paragraph 3(a), and the threshold for application of Article 3 as introduced in paragraph 6 being "*on average fewer than 50 persons*" working for the provider and involved in the parcel delivery services (unless the provider is established in more than one Member State). A number of delegations would like to align the criteria in these two paragraphs and, for instance, include also sub-contractors in paragraph 6. Other delegations would prefer to use criteria such as turnover, market share or employment instead of the average number of workers.

Transparency and affordability of cross-border tariffs (Articles 4 and 5)

These two articles, which are related, triggered extensive discussions in the Working Party and revealed various views and concerns among Member States on several aspects of the articles. Several delegations expressed the same concern as explained under Article 3 above on the increased and disproportionate administrative burden these provisions would imply. A number of delegations also questioned the applicability of these articles to only universal service providers which, according to these delegations, would distort proper competition in the market and impose unfair obligations, while creating unequal treatment of providers. Several delegations expressed the wish to delete Article 5 and include all parcel delivery service providers in Article 4, arguing that the same objectives could be reached.

Another concern raised by several delegations is the required submission to the NRA of the terminal rates applicable for each calendar year followed by their transmission by the NRA to the Commission and to the NRA of the originating Member State. Given that these rates can be commercially negotiated between the parties involved, they should be considered as business sensitive and confidential. Moreover, a considerable administrative burden would be the result of the obligation to provide these rates in all circumstances. Accordingly, several delegations have expressed their wish to delete paragraph 2 of Article 4. In response to delegations' wish to retain a high level of confidentiality, the Presidency introduced in both Articles 4 and 5 of its compromise text (doc.13458/16) provisions that the NRA and the Commission shall ensure the strict confidentiality when dealing with terminal rates as well as when assessing the affordability under Article 5.

As regards the concerns over the applicability of Articles 4 and 5 only to universal service providers, it should be noted that they have an existing obligation to provide affordable and cost-oriented parcel delivery services with transparent prices, for which they receive certain concessions in turn, such as a VAT exemption. Contrary to that the prices of non-universal service providers are often individually commercially negotiated tariffs and are often not public. The proposal does not alter the obligations already existing for universal service providers, it only seeks to allow national regulatory authorities to assess affordability of certain cross-border tariffs, treating all sensitive information in the strictest confidence, which has now been emphasised in the latest version of the Presidency compromise text. This text also clarifies that the affordability assessment procedure is following a filter whereby only those tariffs that seem to be unreasonably high will require a more in-depth evaluation on the basis of objective criteria, examples of which have been added to Article 5(2) and the corresponding recital 16.

Another issue raised by some delegations is the lack of clarity on the methodology to assess affordability which could create different treatment throughout the Member States. Following this concern, the Presidency introduced paragraph 6 under Article 5 in its compromise text, providing for the Commission to set out guidelines on the methodology to assess the affordability of the cross-border tariffs by an implementing act. This provision is still examined by delegations and different views have been expressed in the Working Party as to whether these guidelines should be included directly in the legislative text or in an implementing act.

Transparent and non-discriminatory cross-border access (Article 6)

Several delegations would like to delete Article 6 which provides for third party access to all network elements, associated facilities and relevant services and information systems necessary to provide cross-border parcel delivery services under multilateral agreements on terminal rates concluded by universal service providers. According to these delegations, no specific market failure which cannot be addressed by general EU competition law has been demonstrated. Furthermore, the NRA's involvement in the process of facilitating agreements between universal service providers and third party providers requesting access in case where no agreement can be reached, as provided for in paragraph 7, cannot be accepted by a number of delegations.

In this regard it should be considered that universal service providers have networks developed that cover the full territory of each Member State. Cross border access to these networks on the basis of underlying multilateral agreements among traditional universal service providers will often be essential for new market entrants who do not have sufficient scale and scope of their services to develop nation-wide delivery networks or reach cross-border delivery agreements with several providers. The possibility to access for new entrants should facilitate development of competition in cross-border parcel delivery, lead to innovative solutions and contribute to lower prices. Making better use of existing universal service providers' networks should also lower universal service providers fixed costs and benefit consumers in more remote areas. According to the Commission, competition law, as an ex post intervention, is insufficient in a fast developing industry characterised by high costs of market entry and the need to obtain and maintain high volumes quickly.

III. CONCLUSION

The intensive discussions on this proposal in the Working Party, as summed up in the previous paragraphs, have revealed a large number and variety of views and concerns expressed by Member States. A vast majority of Member States would need more time to examine the implications of the proposed Regulation, especially with regard to the potential regulatory and financial burden it may cause. Although the Presidency has made a strong effort in its compromise text to clarify the scope of measures to be undertaken under the proposed Regulation and the operators and activities to which they apply, including a new definition of "parcel", as well as the introduction of provisions on strict confidentiality (Articles 4 and 5) and on the way to set out guidelines on common methodology for affordability assessment (Article 5), there are still several pending questions and concerns, both technical and substantive in nature, to be resolved. Under the next Presidency these issues would need to be further examined in light of the awaited position of the European Parliament.