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NOTE

from: Presidency
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No. prev. doc.: 13383/14 TELECOM 164 COMPET 525 MI 677 CONSOM 173 CODEC 1852

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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
- General approach

Introduction

1. The Barroso 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* (the TSM proposal) on 11 September 2013 with article 114 TFEU as a legal basis. Doc 10109/14 describes the progress made on the file until May 2014. The main elements of the proposal included 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 including net neutrality, 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 sought to achieve its aims by amending parts of the existing regulatory framework, namely Directives 2002/20/EC¹, 2002/21/EC² and 2002/22/EC³ and Regulations 531/2012⁴ and 1211/2009⁵. Doc 10109/14 describes the progress made on the file until May 2014.

2. The political guidelines of the Juncker Commission state that it will present ambitious legislative steps towards a connected digital single market within the first six months of its mandate, including by adding more ambition to the ongoing reform of the telecoms rules. This has been further developed in the mission letters to Commissioners Ansip and Oettinger.
3. Without prejudice to any proposals in related fields, a number of existing instruments of relevance for the TSM proposal are subject to review in the near-term: A full review of the framework for electronic communications is expected to be launched during 2015, with proposals possible in 2016. Accordingly, the BEREC draft work programme for 2015 envisages a comprehensive analysis by BEREC of the areas of the framework that require review. The Directive on privacy and electronic communications (Directive 2002/58/EU), one part of the framework for electronic communications, is included for review in the Commission's Regulatory Fitness and Performance Programme (REFIT) for 2014. The Radio Spectrum Policy Programme (Decision 243/2012/EU) is due for review by 31 December 2015. Commission Recommendation 2009/396/EU on termination rates requires a review by 2016. The Roaming Regulation (Regulation (EU) 531/2012) is due for review by 30 June 2016. Furthermore, the Audiovisual Media Services Directive (Directive 2010/13/EU), covering content delivered using any technological means, including both linear and non-linear (OTT) services, is to be reviewed in 2015 under the REFIT programme. In addition, a proposal on copyright is expected during 2015.

¹ Directive 2002/20/EC on the authorisation of electronic communications networks and services

² Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services

³ Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services

⁴ Regulation No 531/2012 on roaming on public mobile communications networks within the Union

⁵ Regulation 1211/2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office

State of play in the Council

4. The file has been discussed at a total of 9 meetings of Working Party on Telecommunications and the Information Society (WP TELE) under the Italian Presidency. Furthermore, high-level political input has been sought by the Italian Presidency at the September informal ministerial meeting and a written consultation took place in July.
5. Based on the discussions up to then, the Italian Presidency presented a text containing new and substantially amended provisions on 19 September 2014 (doc 13383/14). Compared to the TSM proposal, the Presidency text introduced fundamentally different texts on roaming and spectrum, amended texts on open internet/net neutrality, and also addressed end-users' rights. Based on input received both at Working Party and at political level, the TSM proposal was simplified in doc 13383/14, with the deletion of the following parts: Chapter II on single authorisation, Section 2 of Chapter III on other inputs and Article 37 on BEREC. The new text has been discussed in WP TELE on 6 occasions. The Presidency has also arranged a joint Council-EP workshop with BEREC on 11 November to discuss roaming. BEREC is expected to deliver an opinion on possible approaches on roaming in early December.
6. Delegations generally accepted the deletions and the focus, in the text presented by the Presidency (Doc 13383/14), on roaming and open internet/net neutrality as the two core issues. Meanwhile, a number of delegations considered that the text still contained complexities with respect to roaming and that it did not yet offer sufficient solutions to the existing problems relating to open internet/net neutrality, on which they invoked a principles-based approach. The intensive examination of both the TSM proposal and of Doc 13383/14 has resulted in an understanding to focus continuing discussions only on the two core issues, primarily roaming but also open internet/net neutrality. The Presidency is also presenting a new, simplified text on spectrum, reflecting the common denominator between Member States' positions.

7. Other areas considered of lesser priority, such as end-user aspects, could be addressed coherently following full consultation and proper impact assessment in the context of the new Commission's work, including the reviews referred to above. The Commission is invited to take full account of the Council discussion on these areas in its review.
8. In particular roaming has been identified as a priority area. The current Roaming Regulation, adopted in June 2012, contains a number of structural measures aiming to finally address the roaming problem. It is valid until 2022 with a review set for 2016. One aspect for its 2016 review is whether it might then be necessary to introduce non-differentiation of roaming and national tariffs. The mere presentation of the TSM proposal, coming one year after adoption of that Regulation and before a number of the structural measures required by it were to be implemented, caused considerable uncertainty on the market to the detriment of users and providers. Most delegations therefore agree on the need to swiftly address roaming and are analysing various possible solutions in order to have an economically sustainable solution in place at the earliest possible date. The issue is however complex.
9. Secondly, there is broad agreement to consider open internet/net neutrality aspects. Basic provisions in that respect were introduced into the framework for electronic communications in 2009. The review of that framework, combined with the forthcoming review of the Audiovisual Media Services Directive, might offer a suitable opportunity for a comprehensive approach to the issue. However, a number of delegations consider a principles-based EU approach useful at this juncture to minimise divergent regulation in the Member States, and the issue is also of relevance to internet governance. As with roaming, issues relating to open internet/net neutrality are highly complex, involving fundamental rights, economic and technical aspects, content of communications, and also questions relating to appropriate scope (providers of electronic communications services/networks/other types of providers etc) and effectiveness.

Next steps/Way forward

The Presidency is proposing:

- a further revised text on roaming (overview in Annex I; explanatory statement and text in Addendum)
- a text setting out an approach in principle to open internet/net neutrality (Annex II; text in addendum)
- a revised text on spectrum (in addendum).

10. On roaming, the text aims at offering a solution to core issues subject to continued intense examination, including:
 - (i) the level of regulated wholesale prices;
 - (ii) the definition of any "fair use" criterion, including whether any such criterion should apply at both retail and wholesale levels and whether it should be based on domestic or EU-wide usage; the definition of any "roam like at home" provision;
 - (iii) the implications on national markets, including the risk of a "water bed" effect (i.e. increased domestic prices to compensate for any losses on roaming services incurred by the visited or home operator), and on investment;
 - (iv) the impact on flat-rate offerings;
 - (v) the relationship to the structural remedies, intended to promote competition, in the Roaming Regulation.

11. Discussions on open internet/net neutrality appear to be converging around the following core elements:
 - (i) a simplified principles-based approach, in order not to inhibit innovation and to avoid technological developments making the regulation obsolete;
 - (ii) not regulating "specialised services" (while not prohibiting them);
 - (iii) allowing necessary flexibility regarding traffic management measures (while not including measures relating to content lawfulness) and
 - (iv) allowing scope for national NRAs, coordinated by BEREC, to provide guidance.

12. On spectrum, in light of Member States' concerns and the discussions in WP TELE and taking due note of the European Council conclusions of 25 October 2013, the Presidency is proposing a further simplified text according to which:
- (i) the RSPG should be strengthened as the main forum for strategic advice, to the Commission and other EU institutions, but also to the Member States themselves;
 - (ii) the role of the RSPG in providing best practice advice to individual Member States on planned assignment procedures should not be obligatory, and when a Member State seeks such advice, it should not be a cause of delays; this can be achieved by creating the option to consult RSPG in parallel to the already required public consultation;
 - (iii) no new power to make specific recommendations on spectrum policy should be conferred on the Commission; and where the Commission exercises its existing power to make recommendations under Article 19 of the Framework Directive, as regards spectrum policy, it should seek the opinion of the RSPG as well as BEREC;
 - (iv) no specific provisions on timing of release of bands for WBB, if a coordinated approach is necessary for a band this should be done through tailor-made legislative instruments (such as the RSPP);
 - (v) requirements regarding minimum duration of spectrum licences for harmonised bands for wireless broadband should in general not exceed 15 years, while not restraining Member States from granting longer or indefinite licences;
 - (vi) provisions on the promotion of greater access to WiFi and on facilitating more efficient, denser networks based on small cells would be acceptable and could add value, and
 - (vii) principles on cooperation between Member States to ensure equitable access to spectrum in cases where international coordination is required would be acceptable, but no new powers should be conferred on the Commission.
13. In light of the above, with a view to making further progress delegations are invited to indicate their views on:
- the further revised text on roaming, bearing in mind the need to address the issues identified in paragraph 10,
 - the approach in principle to open internet/net neutrality, and
 - the further simplified texts on spectrum and open internet/net neutrality.

OVERVIEW OF REVISED PRESIDENCY ROAMING PROPOSAL

A. Sequence

(i) Adoption of new rules

(ii) Adoption + [6] months

BEREC to lay down guidelines for application of fair use criteria in retail contracts

(iii) [xx.xx.xxxx to be negotiated with EP, but not excluded before any changes to wholesale prices]

Introduction of mandatory Roaming like at home, unless explicit opt-out of the end-user

(iv) by 30 June 2016

Commission to conduct public consultation and presents a report on

- state of the market, including modification or removal of structural measures and
- the duration and level of maximum wholesale charges and/or
- any other arrangement addressing wholesale market problems, including fair use or other measure for protecting from abusive use of regulated wholesale roaming provision

(v) 30 June 2016 + X months

Adoption of any legislative proposal, if it is the case, and negotiation with the co-legislator.

(vi) 6 months after approval of legislative proposal under (v) / every two years after guidelines under (ii)

Review of BEREC guidelines on fair use

(vii) in case of divergences in application of guidelines under (ii) across the Union

Commission Implementing act with detailed rules on the application of fair use criteria

(viii) in case of unreasonable terms regarding fair use in a Member State

NRA may adopt binding minimum fair use allowances (reviewed every two years)

B. Level of regulated wholesale prices

Level foreseen in current Roaming III regulation, without prejudice to any change following the report under A(iv).

C. The definition of any "fair use" criterion (wholesale and/or retail level; domestic or EU level)

"Fair use" retail, domestic levels. Consumers should be in a position to replicate, to the extent possible, the typical consumption pattern associated with their respective domestic retail packages while periodically travelling within the Union, taking into account, inter alia, domestic price levels and the need to avoid market distortions in domestic mobile markets. Factors for the BEREC "fair use" guidelines include a range of criteria, such as: evolution of pricing and consumption patterns in the Member States; observable effect of roaming at domestic service rates on the evolution of such rates; evolution of actual wholesale roaming rates for unbalanced traffic between roaming providers; objective variations between Member States or between roaming providers concerning domestic price levels, typical volumes of retail packages, sustainability for certain roaming providers in view of effective wholesale rates, average period of travel.

D. The definition of any "roam like at home" provision

No surcharge in comparison to the charges for mobile communications services at domestic level on roaming customers in any Member States for any regulated roaming call made or received, for any regulated roaming SMS/MMS message sent and for any regulated data roaming services used, nor any general charge to enable the terminal equipment or service to be used abroad, subject to "fair use" (above).

E. Implications on national markets, including the risk of a waterbed effect

BEREC and Commission reports (A (ii) and (iv) above) and possible legislative proposal. "Fair use" guidelines and implementing acts.

F. Relationship to the Roaming Regulation structural remedies

Single-IMSI decoupling (first subparagraph of Article 4(1) of the current Roaming Regulation) would cease to apply by the date mentioned under A (iii) above. The Commission report and any legislative proposal mentioned under A (iv and v) above would address the remaining structural remedies (second subparagraph of Article 4(1) and Article 3 of the current Roaming Regulation).

G. Impact on flat rate offerings

Would be subject to the "fair use" provision. Traffic beyond the fair use allowance will be subject to the current retail eurotariff

PRESIDENCY PROPOSED APPROACH IN PRINCIPLE TO OPEN INTERNET/NET NEUTRALITY

Most Member States have confirmed their support to EU rules on net neutrality set at a level of principles, leaving more scope for BEREC guidelines and national enforcement.

On the basis of discussions at WP level and Member States comments the Presidency proposes to retain the following principles in order to develop provisions on net neutrality:

- Removal of the definitions of "net neutrality" and "specialised services".
- Instead of a definition of net neutrality there could be a reference to the objective of net neutrality, e.g. in a recital, which would resolve the concerns that the definition might be at variance with the specific provisions.
- Clear principles for **traffic management** in general, as well as the obligation to maintain sufficient network capacity for the internet access service regardless of other services also delivered over the same access. Such a text would clarify that traffic management is permitted provided that it is transparent, non-discriminatory and proportionate, and not anti-competitive.
- Traffic management measures that block, slow down, alter, degrade or discriminate against specific content, applications or services, or specific classes thereof could be permitted in four scenarios, namely court order and legislative obligations; network security and integrity; temporary congestion control; on the request of a user. They cannot be maintained longer than necessary.
- To maintain a "without prejudice to Union and national law" provision regarding the lawfulness of information, content, applications and services, and terminal equipment.

Finally, to simplify Article 24 considerably in line with Member States comments. NRAs shall have the powers and the obligation to monitor and enforce Article 23, including the imposition of quality of service obligations.
