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From:	General Secretariat of the Council
To:	Working Party on Telecommunications and Information Society
Subject:	Gigabit Infrastructure Act - Steering note

With a view to the Telecommunications and Information Society Working Party meeting on 8 January 2024, delegations will find in Annex the steering note on the Gigabit Infrastructure Act.

Introduction & state of play

The mandate for opening negotiations with the European Parliament on the GIA was granted by the Council on 5 December 2023. The adoption of the General Approach was immediately followed by an opening trilogue on 5 December, during which further works were delegated to the technical level with a second trilogue scheduled for 25 January 2024.

The Spanish Presidency, in collaboration with the incoming Belgian Presidency, have held several technical meetings with the Parliament and the Commission. During the Council Working Party of 8 January, the Presidency would like to collect the positions of Member States on the following points, which are mainly the points identified during the technical meetings needing further discussion:

- I. The extent of harmonisation;
- II. Guidance by the European Commission and implementing act;
- III. The obligations for land owners and owners of private commercial buildings to give access to land and commercial buildings respectively at fair and reasonable conditions;
- IV. The refusal to access to physical infrastructure in specific cases;
- V. Compensation;
- VI. Tacit approval of permits;
- VII. Deadlines, including date of application.

I. The extent of harmonisation

The Council clarified, in Article 1 (4) (**line 82**) of the Regulation, the implications of the principle of maximum harmonisation by specifying that it allows Member States to adopt stricter or more detailed rules. The European Parliament has chosen to largely maintain the Commission proposal but further extended the scope of maximal harmonisation. They added a reference to Article 7 (1) (**line 174**) in the list of articles which fall under maximal harmonisation, which would mainly imply that the MS have to ensure that the rules and procedures concerning granting of permits are nationally consistent. The Parliament did add a caveat in Article 7(1) (**line 174**), namely that the rules governing the conditions and procedures applicable for granting permits are consistent and, “where applicable”, harmonised.

The Council, on the other hand, clarified that only Article 4 (5) should fall under maximum harmonisation, for the reasons that Article 4 (4) applies to national critical infrastructure, where specific national circumstances apply and Member States need flexibility regarding the reasons to refuse access. The Presidency proposes to defend the General Approach and at the minimum to have Article 7 (1) removed from the list.

Furthermore, in **lines 125** (Article 3 (4)) and **188 (c)** (Article 7 (11a)), the Parliament has chosen to make mandatory the establishment of the coordinating body that ensures that access requests are coordinated and provides legal and technical advice and would like to require Member States to establish a body to coordinate the procedures related to permits (new addition of the Parliament). We propose to reject these

new provisions, and as a final compromise, could agree to the establishment of these bodies optional but not mandatory.

II. Guidance by the European Commission and implementing act

In its proposal, the Commission has put forward that it may develop guidance on the application of the Articles 3, 5, and 9. In addition in Art. 7 (8) (**line 185**), the Commission proposes to specify, by means of an implementing act, categories of deployment of elements that shall not be subject to any permit-granting procedure.

- In Article 3 (9) (**line 130**) the Council's text states that Member States may provide guidance on the application of the provision on access to physical infrastructure. The Parliament retained the proposal from the Commission but specifies that the Commission should take into account well-established principles and the distinct situation across Member States. The Parliament also proposes that the Commission shall issue guidance by the date of application of the GIA. The Presidency proposes to accept the proposal and wording of the Parliament, acknowledging that the Guidance would have a non-binding nature and would have to allow for sufficient flexibility, taking into account national specificities.
- In Article 5 (5) (**line 162**) regarding the coordination of civil works, the Council proposed that Member States may provide guidance on the application of this Article. The Parliament, on the other hand, has retained the possibility for the Commission to provide guidance, again with reference added to the specific situations in the Member States. The Presidency proposes to task BEREC in close cooperation with the Commission with the development of the guidelines, as BEREC has a better understanding of national specificities.
- In Article 9 (6) (**line 211**) on access to in-building physical infrastructure, the Council deleted the provision allowing the Commission to develop guidance, whereas the Parliament kept the Commission's text, adding again similar wording referring to the specific situations in the Member States. The Presidency proposes the following compromise wording:

“After having consulted stakeholders, the national dispute settlement bodies and other competent Union bodies or agencies in the relevant sectors as appropriate, ~~the Commission may, in close cooperation,~~ **BEREC shall provide guidelines, in close cooperation with the Commission, on the application of this Article and in doing so, shall take into account well-established principles and the distinct situation across Member States. BEREC shall regularly collect and report on the national best practices relating to the access to existing physical infrastructure.**”

The Presidency believes that this compromise wording is more in line with the necessity to grant some flexibility to national legal frameworks (leaving it to National Competent Authorities to specify the access framework). BEREC will contribute to the consistency of national regulatory approaches throughout the EU by closely monitoring the exercise of such powers and encouraging the sharing of best practices.

In Article 7 (8) (**line 185**), the Commission proposes powers by means of an implementing act to specify categories of deployment of elements that shall not be subject to any permit-granting procedure. The Council had put forward that only Member States may specify these categories, in accordance with national law. The Parliament has changed the implementing powers into a delegated act, setting out a minimum list of categories. The Presidency proposes not to show any flexibility towards the Parliament on this point and stick to the Council text.

- **The Presidency asks the delegations whether this proposed way forward (for titles I and II) would be an acceptable compromise. If not, please specify your reasons.**

III. The obligation for owners of private commercial buildings and land owners to give access on fair and reasonable conditions to private commercial buildings and land respectively

The Parliament has introduced two new obligations in Article 3 (1a) and (1b). Article 3 (1a) (**line 112a**) would oblige owners of land, on which associated facilities have been installed, to negotiate with undertakings that provide associated facilities under fair and reasonable terms and conditions and in accordance with national contract law, on the access to that land, including the price for access. The Presidency doubts whether this addition in the text is supported by sufficient empirical data and would be justified and proportionate. If the Parliament manages to provide sufficient justification and they maintain a strong position on this, the Presidency would suggest to have the MS monitor their national situation and possibly to add a review clause in the text on this.

Secondly, the Parliament introduces in Article 3 (1b) (**line 112b-112f**) the obligation for owners of private buildings used exclusively for commercial purposes (which are not part of a network to meet reasonable requests for access to those buildings, including rooftops, with a view to installing elements of VHCN or associated facilities under fair and reasonable terms and conditions, including price. This obligation would apply under specific conditions mainly aiming at rural areas without any existing non-private infrastructure. The Presidency's initial stand would be to refuse this addition to the text because this seems to be a disproportionate infringement of private property rights.

- **The Presidency asks whether line 112a is acceptable. In addition, we would like to ask the Member States whether the Parliament's proposal in line 112b-f could be acceptable.**

Please motivate your answer. If needed, certain condition such as the definition of rural areas could be further clarified.

IV. The refusal grounds to access to physical infrastructure in specific cases

In Article 3 (3.f) first subparagraph(**lines 123a – 123e**), the Parliament added a new reason to refuse access to physical infrastructure based on the availability of physical access to publicly-owned wholesale-only networks in rural or remote areas, when certain conditions are met, in order to protect possible public investment in physical infrastructure in those areas. The Council introduced a similar refusal ground (**lines 123f-lines 123h**) in Article 3 (3) which are however wider in scope as it allows the alternative access to be active (e.g bitstream) but is subject to Member States' transposition of such provision. The Parliament firmly rejects those refusal grounds, as these are too wide in scope. In addition it should be noted that Parliament introduced a similar provision on coordination requests in Article 5 (2a) (**line 153a**) deeming coordination requests unreasonable where civil works contribute to the deployment of an open access network and meeting the criteria set out in Article 3(3), (fh) (**lines 123a - 123e**).

- **The Presidency proposes to find a suitable common ground between the proposals of the co-legislators, converging towards the Parliament on provisions regarding the access to physical infrastructure. However, the Presidency proposes to reject line 153a.**

V. Compensation for the damage suffered

Throughout the text, the Council has deleted the explicit referral to compensation in Articles 7 (11) and 14, because the Council is of the view that compensation should remain the competence of the Member States. In addition, many MSs indicated that rules on adequate financial compensation for persons suffering damage, are already foreseen by national civil and liability law. For the Parliament, the aspect of compensation is an important political priority, to ensure that Member States respect the timing and procedures set out in the Regulation. The Parliament indicated that it has no flexibility to agree with a deletion of the concept of compensation as the provision already exists in BCRD, as a voluntary measure (Art. 7(4) and Art. 9(6) second subpara BCRD).

In Article 14 (**line 246**), the Presidency proposes to re-instate the obligation for Member States to lay down rules on adequate financial compensation for persons suffering damage as a result of the exercise of the rights provided for in this Regulation, whilst clearly specifying that Member States should not do so when such a legal regime already exists in national legislation.

In Article 7 (11) (**line 188**), we propose to re-instate the provision given that there is an explicit referral to “in accordance with national law”, also taking into account that a similar provision is already present in the BCRD, Article 7 (4).

- **The Presidency asks the delegations to indicate whether they can be flexible to re-instate the aspect of compensation, which would cover national compensation schemes already in place. Should this not be acceptable, please specify why.**

VI. Tacit approval of permits

In Article 7 (**lines 174 – 188**) of the GIA, concerning tacit approval, a lot of changes were made by the Council. Firstly, Article 7 (1) (**line 174**) was amended to take into account the specific division of competences within some Member States by providing that MS shall make their “best efforts” to make procedures and rules consistent across the territory. The Parliament added the specification “where applicable” into the first paragraph. The Presidency will try to make clear to the Parliament that it is not possible in Member States to impose fully consistent procedures due to the division of competences. It is crucial that a balanced wording is found here. The Presidency envisages to find a compromise here that would take into account the concerns previously raised by the Member States.

Article 7 (4) (**line 177**), regarding the initial deadline of 15 working days to reject an application if the minimum information has not been made available via a single information point, pursuant to Article 6(1) first subparagraph, was deleted by the Council but maintained by the Parliament. We will try to find a suitable wording on this paragraph. In **line 178**, the Council chose to retain the Commission’s proposed deadline of 4 months to complete a permit application procedure, whereas the Parliament shortened this deadline to two months. The Presidency will try to find the right balance in this, while pointing out that the initial proposal of the Commission was also 4 months. This will be linked to the general discussion on deadlines.

Paragraph 7 (**lines 184 and following**), on tacit approval, was deleted by the Council. The Parliament chose to rewrite this paragraph and added an exception for the principle of tacit approval, namely that it does not apply “where the principle of administrative tacit approval does not exist in national legal system”¹. This wording is taken from Art. 16a(6) of the recently adopted Directive (EU) 2023/2413 on the promotion of energy from renewable sources. However, Art. 16a(6) of Directive (EU) 2023/2413 only applies to intermediary steps in the permit-granting procedure and explicitly indicates that it does “not apply to final decisions on the outcome of the permit-granting procedure, which shall be explicit”. Moreover, that provision does not apply to rights of way, which is another difference with the GIA proposal.²

On this important point, the Presidency is open to suggestions from delegations on the way forward. From the Presidency’s perspective, the following approaches could be envisaged:

¹ The Parliament added that the applicant can receive a written confirmation that the permit has been granted tacitly.

² It should also be noted that the Council very recently refused to agree to a tacit approval procedure in the context of the negotiations of the Critical Raw Material Act (CRMA).

- a) Keeping the General Approach (i.e. no tacit approval procedure);
- b) Accepting the tacit approval procedure only for permits, and only where administrative tacit approval does exist in the national legal system, but rejecting it for rights of way (where the issue of interference with property rights arises);
- c) Accepting the EP text (i.e tacit approval for both permits and rights of way, except where the principle of administrative tacit approval does not exist in the national legal system).

The Parliament also added 2 additional sub-paragraphs, (7a) and (7b) (**lines 184b and 184c**) concerning the renewal of permits and small civil works. The Presidency proposes to accept the proposal of the Parliament, if necessary with further clarification in recitals (in line 184c, concerning, the delegated act, this is linked to the discussion on **line 185**).

The GIA further accords a right to exempt certain works from the need of having a permit (**line 185**). The Council decided to leave this decision to the Member States, whereas in the position of the Parliament, this is left to the Commission (delegated act instead of implementing act) after having consulted the stakeholders. The Presidency proposes to continue to hold the Council position on this point at the moment given the fact that certain exceptions can be really specifically tied to a local situation.

Finally the Parliament has added paragraphs (11a) (**line 188a**), (11b) (**line 188b**) and (11c) (**line 188c**) adding a monitoring obligation by the Commission, a referral to Article 57 of the EEC and the obligation for Member States to designate a coordinating body for procedures related to granting permits.

- In line **188a**, The Presidency sees no fundamental issues with this proposal but will propose to reduce the monitoring obligation to one report every two years. We will link this to the general discussion on Commission guidance, as well as the need for flexibility for the Member States.
- In line **188b**, the Presidency sees no problem in adding the Parliament's text concerning the referral to Article 57 of the Code.
- In **line 188c**, we propose to keep the designation of a coordinating body optional by replacing the word "shall" by "may".

- **The Presidency asks the delegations whether they agree with the suggested approach or whether they see alternative compromise wording.**

VII. Deadlines

Finally, throughout the text there are several deadlines which will be discussed with the Parliament concerning for example the deadlines to take a decision on permits or to coordinate works. All of these are coupled together with the general date of application of this Regulation (**line 257**) and will require further discussion at technical level in the coming weeks. The Presidency strives to find a right balance here between

both having reasonable deadlines and assuring that the regulation can still be applicable and produce positive effects before 2030.

- **The Presidency asks the delegations to already reflect on the various deadlines. We will revert back to the delegation on this issue in a later stage.**

