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MEETING DOCUMENT

From:	General Secretariat of the Council
To:	Working Party on Telecommunications And Information Society (Attachés)
Subject:	Gigabit Infrastructure Act - Steering note from the Presidency

In view of the Working Party on Telecommunications and Information Society on 18 January, delegations will find in the annex the Presidency steering note on the Gigabit Infrastructure Act.

Introduction & state of play

The Presidency held several meetings at technical level with the Parliament in the past week and both co-legislators made reasonable progress in finding common ground.

Discussions were provisionally wrapped up on a first batch of articles that include **Art. 2** (incl. recitals 13, 15, 15a, 16), **Art. 4** (incl. recitals 25, 26, 27, 29, 30, 31, 53, 64), **Art. 6** (incl. recitals 25, 26, 27, 28, 29, 31, 32, 35a, 53, 64), **Art. 10** (incl. recitals 29, 53, 54, 55, 56), **Art. 11** (incl. recitals 57, 58, 59, 64), **Art. 12** (incl. recitals 60, 61), **Art. 13**, (incl. recital 41) **Art. 15**, **Art. 16** and **Art. 17** (incl. recital 65). The compromises found at technical level are reflected in the four-column document[1].

- The Presidency is of the view that the compromises found in these articles fall within the Council's General Approach from 5 December 2023 but it intends to ask the Committee of Permanent Representatives for confirmation during its meeting on 24 January 2023, so co-legislators can provisionally agree on the first batch of Articles during the trilogue of 25 January.

During the week of 15 January, the Presidency will continue the discussions on **Art. 1, 3, 5, 7, 8, 9 and 14**[2]. No changes have been made in the four-column on these articles yet (apart from some changes in Art. 8).

- During the Council Working Party of 18 January, the Presidency would like to collect the positions of Member States on the following points:
  - Title 1: Permit granting and ensuring the compliance with the deadline set out in Art. 7§5 and 7§6, compensation (Art. 14) and minimum harmonization (Art. 1).
  - Title 2: Access to physical infrastructure (Art. 3): land aggregators, private commercial buildings and exemptions for certain types of tower companies.
  - Title 3: Guidance by the Commission, Implementing Act & deadlines for the Dispute Settlement Body.
  - Title 4: The proposed way forward on various issues.

Title 1: Permit granting and ensuring the compliance with the deadline set out in Art. 7§5 and 7§6, compensation (Art. 14) and minimum harmonization (Art. 1)

The co-legislators have diverging views on the compensation mechanisms in the GIA (Art 14 – lines 245-246) as well as on the procedures set out in Art. 7 to grant permits. The discussions during the Spanish Presidency have proven that it's very challenging to agree to wording in Art. 7§7 that would

[1] Please bear in mind that the 4th column will still require fine-tuning:
- Some specific lines related to Art. 6 still remain yellow, as any agreement on these lines is pending on a larger agreement related to other articles, especially Art. 7. This is the case for line 164, 172 in Art. 6 and the recital in line 45a (see also Title 4 of this note).
- In the recitals, any references to guidance from the Commission or an Implementing Act still needs to be updated.
- In addition, the Presidency is still having a horizontal discussion of a legal nature on line 141, 161, 172, 203 in order to clarify who is the addressee of the respective provisions.
- Any wording related to the notification of critical infrastructure is still subject to discussion.
- Lastly, the 4th column does not yet reflect the provisional agreement found related to Art. 7 and the deletion of Implementing power of the Commission.

[2] **Art. 18** related to the entry into force, will be subject to negotiations with the Parliament at political level. On **Art. 1** regarding the subject matter and scope, the Parliament accepted the General Approach of the Council, with slight edited language suggested by the legal experts of both institutions. The only remaining issue is the reference to Art. 7§1 in line 82. Knowing that the Council has no flexibility on including Art. 7§1, the discussion will be linked with Art. 7. The same applies to **Art. 14** (cf. Title 1).

be acceptable for all the Member States, as the reasons to object the principle of tacit approval are heterogeneous[3].

The Parliament is of the view that tacit approval can eliminate slow permit-granting processes and prevent unnecessary delays in the deployment of VHCN. Ensuring compliance with the deadlines set out in Art. 7 is pivotal in order to reach an agreement with the Parliament.

The Presidency sees a compromise along the following principles: In Art. 7§7 (**line 184**): "In the absence of a response from the competent authority, within the deadlines referred to in paragraphs 5 and 6, Member States shall ensure that at least one of the following two incentives are in place in their national framework:

1. the permit shall be deemed to have been granted, building on the general principles set out in the 3rd compromise text of the Spanish Presidency[4];
2. compensation may be claimed by the applying operator for any damage suffered as a result of non-compliance with the applicable deadlines, in accordance with A7§11 (**line 188**) (was deleted in the Council position)."

This would give Member States the national flexibility to decide on how to best ensure compliance with the deadlines imposed by the text.

This offer would be conditional on keeping the deadlines set out in Art. 7(5) and (6) (**lines 178, 183, 184)** at 4 months. In exchange for this concession, the Presidency will also ask from the Parliament to limit the compensation mechanism in Art. 14 only to **line 188** and to drop the request for the mandatory establishment of coordination bodies in Art. 7(11c) (**line 188c)** and Art. 3(4) (**line 125)**, by keeping these voluntary**.** We will also add the discussion on Art. 1 (4) (**line 82**) in this package with regards to article 7(1) (line 174), which the Parliament put under maximum harmonization.

- The Presidency asks delegations whether this proposed approach is workable. Any other suggestions that would make the compliance of Art. 7 workable for the MSs, is welcome keeping in mind the spirit of compromise.

[3] Whereas certain MSs indicated they have flexibility to re-insert tacit approval under certain conditions or for certain types of permits, the reasons why Member States rejected include (amongst others):

- Concerns of a legal nature, due to the incompatibility with:
  - any national, regional, local legislation that gives autonomy to the competent authority;
  - the constitution of MSs;
  - established administrative/legal practices.
- Concerns related to the authority and rights that third parties have, which are not taken into account in this article.
- The disproportionality of the measure (breach of the autonomy/competence of local authorities).
- Fears regarding potential abuses, e.g. flooding competent authorities with applications knowing they will not be able to process or the de facto rejection of permits by local authorities.

[4] Ref: 13948/23, dating from 13 October 2023.

Title 2: Access to physical infrastructure (Art. 3): land aggregators, private commercial buildings and exemptions for certain types of tower companies

In an effort to bridge the digital coverage gap between rural and urban areas, the Parliament introduced two new obligations in Article 3(1a) (**line 112a**) and Article 3(1b) (**line 112b-112f**). They also created a different regulatory regime for certain types of towercos, to promote investments in VHCN (**line 116h**).

1. **Line 112a: the issue to tackle land aggregators (in the previous steering note still referred to as land owners)**

The Presidency conveyed the concerns raised by the Member States on the inclusion of land owners in the text and consequently, the Parliament clarified its intentions and redrafted their proposal related to line 112a to mitigate the Council's concerns. In fact, the Parliament's aim is to ensure that there is no disruption of connectivity of services and to tackle speculative behaviour by **land aggregators**[5] that was observed in several Member States[6].

In certain cases, after the expiry of the initial rental contract between the original landowner and the operator owning associated facilities, the land aggregators, who bought the rights from the land-owners, push for excessive rent increases. In other words, land aggregators act as intermediaries that interpose between landowners and infrastructure owners after the infrastructure is built. Based on the data collected from the operators, the presence of land aggregators as intermediaries has sometimes resulted in a considerable increase of rent or even the relocation of antenna sites if no suitable agreement could be reached[7]. The biggest issue in the case of relocation is the risk of discontinuity of services and decreased connectivity for end users.

In order to reinforce the goals of the GIA, the Parliament feels really strong about their new amendment, according to which, only in cases where there is a negotiation for access to land on which VHCN-infrastructure is installed, between an undertaking whose main activity is the acquisition and management of land on which VHCN-elements are installed and an undertaking providing associated facilities, the fair and reasonable principles should apply on the access to such land.

The redrafted text proposal introduced by the Parliament would now look as follows (to replace line 112a):

> *''1a. Where necessary to ensure the continuity of the electronic communication service, undertakings whose main activity is the acquisition and management of land on which elements of very high capacity networks are installed or will be installed, shall negotiate with undertakings that provide or are authorised to provide those associated facilities under fair and reasonable terms and conditions, and in accordance with national contract law, on the access to such land, including the price for such access."*

The obligation would thus no longer be applicable to land owners as such, but rather to the providers of intermediate services (land aggregators) providing services to associated facilities providers and operators further up in the chain.

2. **Lines 112b-f: the obligation for owners of private commercial buildings**

[5] The model of land aggregators is to either acquire or lease the land on which associated facilities are installed, in order to manage the lease of these pieces of land to operators. This is done either by signing a ground lease with the land-owner on whose land an associated facility is installed or purchasing the respective land from the landowner.

[6] According to the information the Presidency received from the Parliament, land aggregators are currently active in 9 Member States.

[7] Depending on the complexity of the infrastructure that needs to be relocated, the price for changing the location can generate additional costs between EUR 100k and 150k per site.

On the issue related to imposing an access obligation to private commercial building (lines 112b-f), the Parliament further limited the situations and scenario under which this obligation would apply, to address the concerns raised by Member States and make the conditions cumulative. The Parliament also proposed a recital[8].

In **Line 122b**, the following redrafting by the Presidency is suggested to mitigate the concerns of the Member States:

1b. Owners of private buildings used exclusively for commercial purposes, which are not part of a network, shall ~~***also meet***~~ ***negotiate with the access seeker on*** *reasonable requests for access to those buildings, including the rooftops of those buildings, with a view to installing elements of very high capacity networks or associated facilities under fair and reasonable terms and conditions, including with regard to the price for such access, where:*

Line 112c would now read (new wording)

> *(a) no very high capacity network is deployed in the area for which the request for access is made and there is no proven plan to deploy such a network according to the information collected via the single information point available at the date of the request, and*

Line 112d would now read (new wording)

> *(b) there is no existing physical infrastructure in the area for which the request for access is made, that is owned or controlled by network operators or public sector bodies and is technically suitable to host elements of very high capacity networks.*

Considering that this provision would fall in the objective scope of the GIA set out in Art. 1(1) – **line 79**, the Presidency sees scope for accepting this obligation, on the condition that the two cumulative criteria are well-defined and very limited.

The Parliament cannot accept making this obligation optional ("MSs may" provision) due to the higher goals that are targeted, i.e. bridging the digital divide and ensuring connectivity for all households also in rural areas. Additionally, they claim to have very limited flexibility to redraft their proposal to further clarity/limit the scope of the obligation.

3. Line 116h: Exemption for certain types of tower companies

The Parliament added a provision (line 116h) specifying an exemption for certain associated facilities with a "wholesale only" model from the criteria that can be taken into account when setting the price for granting access to the physical infrastructure concerned. The Council on the other hand, only added

[8] *(recital 17a) On the one hand, entire areas, especially in rural regions, could be left without connectivity due to the fact that the public sector infrastructure does not allow or is not suitable for the installation of elements of very high capacity networks. On the other hand, there are commercial buildings that are the only alternative to hosting such elements. Aiming to ensure connectivity in remote and scarcely populated areas and to bridge the digital coverage gap between rural and urban areas, while keeping the interference with private property to a minimum, the requirements to provide access to existing physical infrastructure should, in very limited situations, be extended to commercial buildings. The obligation to provide access in those cases would be justified provided that there is no alternative to developing very high capacity networks in the area concerned and subject to fair conditions, including concerning the remuneration for providing such access. That obligation would be applied only where the following conditions are met: there is no very high capacity network deployed in the area for which the request for access is made and there is no proven plan to deploy such a network according to the information collected via the single information point available at the date of the request; there is no available existing physical infrastructure owned or controlled by network operators or public sector bodies which is technically suitable to host elements of very high capacity networks in the area concerned.*

that the specific business model of the towercompanies needs to be taken into account when determining fair, reasonable terms and conditions including prices (line 115).

4. Questions for steering regarding this Title

- On **part 1** (line 112a), the Presidency asks delegations whether the redrafted amendment can be acceptable, having in mind the political priority of the Parliament to address the digital divide.
- On **part 2** (line 112b-f); The Presidency is still concerned about the encroachment on property rights and will initially refuse the redrafted proposal of the Parliament. However, knowing that the Parliament is open to accommodate any concerns from the Council, as long as the goal of this provision is preserved, the Presidency asks delegations if they can consider the provisions. The notion fair and reasonable terms and conditions" is further detailed in Art. 3(2) of the GIA. The Parliament's counteroffer would be in line with the situation that already exists today in the national legislation of certain Member States.
- On **part 3** (line 116h), the Presidency will show no flexibility[9] on this issue, in line with the General Approach adopted by the Council and continues to strive to keep tower companies fully in-scope of this text.

The Presidency wants to inform delegations that offering a concession towards the Parliament on their political priority to tackle the digital divide (cf. line 112a and/or line 112b-f) would allow the Council to ask for an additional concession from the Parliament towards the Council to meet our political priorities (the need for national flexibility as well as the need to restrict the additional administrative burden imposed upon the Member States within the GIA).

The Presidency sees a link with the mandatory establishment of coordination bodies in **lines 125** (Article 3 (4)) and **188 (c)** (Article 7 (11a)) where the Parliament has shown no flexibility so far. Additionally, the Parliament remains of the view that the "fibre ready label" in Art. 9§5 (**line 200**) should be mandatory. We will also link this discussion to the discussion on **Art. 18** (entry into force), as the implementation of any new obligations require additional time for the Member States.

[9] The Presidency sees no justification for this exemption from this part of the Regulation and as such, from having access to the DSB for any disputes that could arise. Additionally, the Presidency is concerned about the uneven level playing field (i.e. fragmentation) that this would create within the market of associated facilities. The Presidency will point out that towerco's are already in scope in the legislation of a large majority of Member States.

Title 3: Guidance by the Commission, Implementing Act & deadline for the Dispute Settlement Body

1. Guidance by the Commission & Implementing Act

The Presidency managed to strike a compromise at the technical level with the Parliament regarding the issue of guidance by the Commission in Art. 3, 5 and 9, implementing powers for the Commission in Art. 7 and deadlines that need to be respected for Dispute Settlement Bodies (Art. 11). For the Parliament, Commission guidance at EU-level is an important vehicle to achieve harmonisation.

In **Art. 3(9)** (line 130) regarding access to existing physical infrastructure as well as on **Art. 7(8)** (line 185) both co-legislators had completely opposing views, with no ground for compromise.

- For the Parliament, having Commission guidance on Art. 3 was crucial, as they are of the view that leaving the interpretation to the MSs of the criteria that can be taken into account when setting the price for granting access to the physical infrastructure, creates legal uncertainty, further increasing the number and length of disputes. They coupled the discussion with the share of cases that are referred to DSB[10], which delays negotiations between operators. The Parliament's reasoning is that COM guidance on the interpretation of Art. 3 would diminish the amount of future disputes.
- On Art. 7(8), Council and Parliament disagree on the implementing powers, with no willingness to move forward. Parliament insisted on having a Delegated Act.

In order to break the deadlock, the Presidency and Parliament provisionally agreed to the following compromise:

- In **Art. 5(5)** (line 162) regarding the coordination of civil works and **Art. 9(6)** (line 211) on access to in-building physical infrastructure, BEREC will be tasked with the development of Guidelines, in close cooperation with the Commission[11].
- In **Art. 3(9)** (line 130) regarding access to existing physical infrastructure, to revert to the text of the Parliament, stating that the Commission may develop guidance, whilst specifying that the Commission should take into account well-established principles and the distinct situation across Member States. The guidance would remain non-binding.
- In **Art. 7(8)** (line 185) related to the Implementing powers for the Commission to specify categories of works that are exempted from any permit-granting procedure, the Parliament dropped its request for an Implementing Act/Delegated Act in Art. 7(8), but instead proposes to add a list with some types of civil works that are exempted, based on the examples given in recital 41 (**line 51**). We can come back with exact wording during the next Council Working Party on 24/1. The list would specify only minimum types of civil works to be exempted. Member States can still choose to determine additional exemptions, as this provision is a "minimum harmonization provision".

Consequently, Art. 13 (Committee procedure) and Art. 16 (Transitional measures) will also be deleted (apart from the lines 251c-j, which is about Intra-EU communication).

2. Deadline for the Dispute Settlement Bodies

In Art. 11(2) (**lines 223-225**), the Presidency has had multiple discussions with the Parliament on the terms wherein DSB need to resolve disputes. Rather than having a discussion about the deadlines set out in lines 223-224, the co-legislators have different views on the possibility to extend the specified deadlines. The Parliament caps any extension of these deadlines to a maximum of one month, whereas the Council's General Approach has an open-ended extension (as proposed by the Commission). The

[10] Data gathered by the Commission shows that 73% of all cases handled by DSBs in relation to the BCRD are related to access to physical infrastructure.

[11] This language is in line with the wording used in the BEREC Regulation and the EECC.

circumstances which justify an extension of the deadline are listed in recital 58 (**line 68**). This list grants wide discretion for the DSB (one such an example of a justifying reason can be "the high complexity of the file").

The Presidency provisionally agreed with the Parliament to revert back to the Commission proposal with no cap on the possible extension of the deadlines. This provisional agreement takes into account the possibility for the Commission to issue guidance, which comforts the Parliament in that it should create more clarity on the application of article 3 and which can potentially have a positive impact on the number of cases that are lodged to the DSB.

1. **Questions for steering regarding this Title**

- The Presidency asks delegations whether the package compromise found related to Commission guidance and the deadline for DSBs, are an acceptable compromise.

Title 4: The proposed way forward on various issues

1. **The refusal grounds to access to physical infrastructure in specific cases**

As discussed during the Council Working Party of 8 January, two additional refusal grounds have been proposed by the co-legislators in Art. 3(3), **lines 123a-e** (Parliament's position) as well as **lines123f-h** (Council's position). Finding a common ground between the two different refusal grounds does not seem possible, as they both tackle different situations and pursue different aims. In addition, the Parliament is not willing to drop its amendment in line 123a-e, as this is related to their political priority to promote the deployment of VHCN in rural and remote areas.

- Taking into account the conclusions of our discussion on 8 January, the Presidency proposes, as a suitable way forward, to keep both refusal grounds, with some minor tweaks, without touching upon the underlying rationale and principle of the amendments.

2. **Transparency on planned civil works**

In Art. 6§1 (**line 164**), Council narrowed down the scope of the obligation to provide information on civil works to the SIP. After several rounds of discussion, the Parliament could still not agree with the Council's position, as this would decrease the transparency of information and affect the benefits of the coordination of civil works. The Parliament did agree to more flexibility in the standstill period for civil works (**line 170**) as well as flexibility for the provision set out in Art. 7§4 (**line 177**) related to the obligation for competent authorities to refuse permit applications for which transparency in the SIP was not provided (meaning the "shall" becomes "may" in line 177).

- In exchange for this concession from the Council (i.e. reverting back the Commission proposal in line 164 – broadening the scope again to Art. 5(1) as well as Art. 5(2), the Presidency will link this issue with the need to have realistic deadlines set out throughout the articles that still are open for further discussion.

3. **Notification of critical infrastructure**

As regards the notifications on exceptions related to critical infrastructure (lines 141, 172, the co-legislators agreed to respect the adopted agreement found in Art. 3(5) of the NIS2 Directive, which sets out the rules and procedures related to the notification of critical infrastructure. Consequently, a reference to the relevant Directive was added in Article 1(2) (**line 80**), stating that the NIS2 Directive prevails over the GIA in conflicts. Therefore, the notifications to the Commission would be in line with NIS2 relevant provisions, which would prevail in case of conflict between these provisions. Language was also added in **line 172**.

- The Presidency is of the view that the reference to the NIS2 Directive addresses the concerns of the MSs related to the notification of the Commission.

4. **Red lines on the articles in the first "batch"**

- Delegations may bring up any "red lines" related to the first batch of articles.