



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 17 November 2009**

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**Interinstitutional file :  
2007/0247 (COD)**

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**15864/09  
ADD 1**

**CODEC 1297  
TELECOM 241  
MI 424  
COMPET 475  
CONSOM 214  
AUDIO 51**

**ADDENDUM TO "I/A" NOTE**

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from: General Secretariat of the Council  
to: Permanent Representatives Committee (Part 1) / Council

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Subject: Adoption of the proposal for a Directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of electronic communications networks and services, and 2002/20/EC on the authorisation of electronic communications networks and services **(LA + S) (third reading)**

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- Statements

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## COMMISSION DECLARATION ON NET NEUTRALITY

The Commission attaches high importance to preserving the open and neutral character of the Internet, taking full account of the will of the co-legislators now to enshrine net neutrality as a policy objective and regulatory principle to be promoted by national regulatory authorities<sup>1</sup>, alongside the strengthening of related transparency requirements<sup>2</sup> and the creation of safeguard powers for national regulatory authorities to prevent the degradation of services and the hindering or slowing down of traffic over public networks<sup>3</sup>. The Commission will monitor closely the implementation of these provisions in the Member States, introducing a particular focus on how the "net freedoms" of European citizens are being safeguarded in its annual Progress Report to the European Parliament and the Council. In the meantime, the Commission will monitor the impact of market and technological developments on "net freedoms" reporting to the European Parliament and Council before the end of 2010 on whether additional guidance is required, and will invoke its existing competition law powers to deal with any anti-competitive practices that may emerge.

### STATEMENT OF THE NETHERLANDS

The Netherlands has great difficulty with the central role of the European Commission in the regulation of telecoms markets on the basis of Articles 7,15 and 19 of the Better Regulation Directive. The national regulators should have more latitude to take account of specific market circumstances and not be able to be overruled by the Commission in doing so.

The Netherlands maintains a preference for a regulatory committee procedure for drawing up the list of relevant markets (Framework Directive Article 15).

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<sup>1</sup> Article 8(4)(g) Framework Directive

<sup>2</sup> Article 20(1)(b) and 21(3)(c) and (d) of the Universal Service Directive

<sup>3</sup> Article 22(3) of the Universal Service Directive

The Netherlands also attaches great importance to good cooperation with other Member States and recognises the importance of reaching a political agreement. Taking all these factors into consideration, the Netherlands is abstaining from the vote.

STATEMENT BY AUSTRIA, BELGIUM, ESTONIA, FINLAND, GERMANY, IRELAND,  
LATVIA, MALTA, ROMANIA, SLOVAKIA, SPAIN AND UNITED KINGDOM

Citizens Rights Directive, E-Privacy Directive

The above Member States welcome the adoption of the three dossiers that form an integrated package of regulatory proposals for the electronic communications sector: the Citizen's Rights Directive and the BEREC Regulation, which were adopted by Council on the 26<sup>th</sup> October 2009; and the Better Regulation Directive, which was adopted by Council on 20th November.

The aim of Directive 2002/58/EC and of the Citizen's Rights Directive is to protect fundamental rights and freedoms with respect to the processing of personal data in the electronic communications sector, and in particular the right to privacy, and to ensure the free movement of such data.

Article 5(3) of Directive 2002/58/EC concerns the conditions under which information, including unwanted spy programmes or other types of malware may be placed on an individual's terminal equipment. It also applies to "cookies" and similar technologies, the use of which may in many instances be legitimate. The amended text of Article 5(3) clarifies that the existing consent requirement for the use of such technologies, applies regardless of whether they are delivered via electronic communications networks or other technical means.

These Member States] recognise that this clarification may require the modification of some national laws. However, as indicated in recital 52( a) {66} , amended Article 5(3) is not intended to alter the existing requirement that such consent be exercised as a right to refuse the use of cookies or similar technologies used for legitimate purposes.

These Member States also stress that the methods of providing information and offering the right to refuse should be as user-friendly as possible.

STATEMENT BY AUSTRIA, ESTONIA, FINLAND, GERMANY, IRELAND, ITALY,  
LATVIA, MALTA, POLAND, PORTUGAL, ROMANIA, SLOVAKIA, SPAIN AND  
UNITED KINGDOM

Better Regulation Directive, Framework Directive.

This statement concerns Article 21 of the Better Regulation Directive, which contains revised text for Article 19 of the Framework Directive.

The above Member States note that the power of the Commission to adopt decisions under Article 19 is expressly restricted to harmonising the National Regulatory Authorities' (NRA) general regulatory approach in application of Articles 15 and 16 of the Framework Directive.

Article 15 of the Framework Directive ("The market definition procedure") describes the procedures which have to be followed in identifying and defining economic markets.

Article 16 of the Framework Directive ("Market analysis procedure") requires NRAs to carry out an analysis of the relevant markets, taking into account the markets identified by the Commission's Recommendation on the issue, to determine whether the relevant markets are competitive.

Article 16 further requires that the determination of whether a market is competitive or not must be taken into account in deciding whether obligations need to be imposed or maintained on, or removed from undertakings under other specified provisions. Article 16 does not address what those obligations should be.

These Member States therefore considers that the scope of the Commission's decision-making powers under Article 19 of the Framework Directive by reference to Articles 15 and 16 of the Framework Directive is limited to matters concerning market definition, assessment of significant market power and the effect of market analysis on whether obligations should be imposed or not on undertakings but does not extend to the choice and design of remedies under Articles 8 of the Access Directive or Article 17 of the Universal Service Directive.