COUNCIL OF THE EUROPEAN UNION

Brussels, 22 November 2013

16637/13

Interinstitutional File: 2013/0309 (COD)

TELECOM 324
COMPET 868
MI 1067
CONSOM 202
CODEC 2679

NOTE

from:	Presidency
to:	Delegations
No. Cion prop.:	13555/13 TELECOM 232 COMPET 646 MI 753 CONSOM 161 CODEC 2000 + ADD 1 + ADD2
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 - Orientation debate

1. On 11 September the Commission adopted a Telecom package comprising three elements:

- a short Communication [1] summarising the expected benefits from a Single Telecom Market, the challenges addressed by the Regulation on measures concerning the single market for electronic communications and the Recommendation on Non-Discrimination and Costing Methodologies included in the package, and clarifying that this package is only an intermediate step.

[1] 13562/13

- a Commission Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment [2], which intends to (1) promote stable, cost-based access prices for "traditional" copper networks, (2) reinforce competition for "access seekers" by giving them equivalent access to incumbents' networks, and (3) remove price control regulation for high-speed internet networks under appropriate conditions. These clarifications will reduce regulatory uncertainty regarding the prices which can be charged for network access and therefore facilitate investment in broadband networks.

- a proposal for a Regulation of the EP and Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent [3]: This proposal was submitted with article 114 TfEU as legal basis, in the form of an amending act: it aims to amend legislation set out in three Directives, part of which were transposed only two years ago, and two Regulations [4], which define most of the current regulatory framework for telecommunications. Besides provisions on the objective and scope and on definitions (article 1 and 2), penalties (article 31), delegated acts (article 32), committee (article 33) and final provisions (article 39 and 40), the proposal comprises provisions on a single EU authorisation for electronic communications providers (article 3 to 7, and 34), European inputs, including harmonisation of spectrum inputs (article 8 to 16) and harmonised virtual access to fixed networks (article 17 to 20, Annex I and II), harmonised rights of end-users (article 21 to 29, and 36), facilitating change of provider (article 30), and provisions concerning the powers of national regulators (article 35), roaming (article 37), and BEREC (article 38).

[2] OJ L 251, p. 13, 21.09.13
[3] 13555/13
[4] Directive 2002/20/EC on the authorisation of electronic communications networks and services, Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services. All these Directives were amended in 2009. Regulation 1211/2009 establishing the Body of European Regulators for Electronic Communications (BEREC), Regulation No 531/2012 on roaming on public mobile communications networks

2. Given the co-decision nature of the proposed act it is worth noting that the EP adopted on 12 September a resolution on the Digital Agenda for Growth, Mobility and Employment [5] and on 24 October a report on the Implementation report on the regulatory framework for electronic communications [6]. On the proposal proper the EP appointed Mrs del Castillo as rapporteur, ITRE being the committee responsible, with IMCO, REGI, CULT, JURI and LIBE being the committees for opinion. The vote in plenary on the EP opinion is tentatively scheduled on 2 April 2014. The EDUC commission of the Committee of Regions delivered its opinion on the proposal on 13 November [7] while the plenary is due to vote at its session at the end of January 2014. Besides, on 17 October BEREC also presented its views on the proposal [8].

3. Four national parliaments submitted an opinion on the application of the principles of subsidiarity and of proportionality to the proposal: two of them concluded that the proposal did not comply with the principle of subsidiarity and another one that it did not comply with the principle of proportionality.

4. The proposal was presented to Coreper on 18 September and at the Working Party on Telecommunications (WP Tele) on 19 September. Delegations were invited to table possible questions on the proposal. On 29 October and 14 November the WP also considered the Impact Assessment prepared for the proposal. On 21 November delegations were invited to provide preliminary indications on how they assess the proposal in response to the diagnosis noted in section I of the conclusions of the October European Council (EUCO 169/13).

5. While, as also reflected in the conclusions of the October European Council conclusions, delegations shared, to some extent, the diagnosis having triggered the Commission into tabling the proposal as well as several aims of the proposal it appears from their preliminary comments as well as the large number of questions and observations they have tabled that most delegations have concerns *inter alia* regarding the process followed for the preparation of the proposal, the timeline envisaged for its adoption, the legal form of the act proposed and its substance. Some delegations have even called into question the whole proposal.

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[5] P7_TA(2013)0377, available on europarl.europa.eu
[6] P7_TA(2013)0454, available on europarl.europa.eu
[7] CDR5960-2013_00_00_TRA_PAC, available on cor.europa.eu
[8] BoR (13) 142, available on berec.europa.eu

- Regarding the process and timeline:

  Delegations pointed in particular to the lack of substantive public consultation and to what they see as a defective impact assessment. Several also noted the premature nature of the proposal given the very recent implementation of the current telecommunications framework as well as the recent adoption of some of its constituents (Roaming III, the RSPP). Given the complexity and ambition of the proposal, amending five existing acts, it also appears unrealistic to complete its examination and negotiation with the EP in a few months.

- Regarding the legal form of the act:

  Concerns were expressed about the choice of a Regulation as it will amend not only Regulations but also Directives, as the harmonisation a Regulation implies does not appear to be justified in all the areas covered by the proposal, e.g. if this would lead to reduced consumers protection, or because the same outcome, e.g. better coordination of spectrum allocation -- largely acknowledged as a worthwhile objective -- or international calls, could be achieved using means under the existing framework (spectrum) or by letting the market play as it is fairly competitive (international calls). This remark about making better use of the existing framework was made with respect to several of the proposed provisions.

- Regarding the substance:

  While delegations are generally supportive of the aim to improve competition, stimulate investment, achieve a high level of consumer protection, reduce roaming charges, and address net neutrality, concerns have been expressed *inter alia* about:

  - the approach envisaged for the single EU authorisation given the uncertainty it entails regarding the powers of the regulatory authorities involved in different Member States, other important aspects for operators (e.g. consumer and tax legislation) which are not differing across Member States, and the limited interest expressed by operators for such provisions
  - the consequences that several of the provisions could have on the investment climate (e.g. roaming, extensive harmonisation of end-users protection), stressing the need to strike an appropriate balance between consumers and operators

- the choice of approach for improved spectrum management, which should in any event preserve the value of spectrum and acknowledge national circumstances and competences and for which some would prefer the focus to be on common end dates for allocation rather than on a one-size-fits-all harmonisation process at EU level.
- the imposition of one specific means (European virtual broadband access products) to improve access to network
- the legal uncertainty that could result e.g. from provisions on roaming while Roaming III is about to be implemented as well as possible impact on domestic tariffs
- the net neutrality provisions where the envisaged extensive requirements on service quality might impair the further development of service providers, disproportionately affects small providers and relies on means (monitoring of speed access) affected by factors beyond the control of the providers
- disproportionate administrative burden, e.g. for regulators and operators involved in the single authorisation procedure
- smaller operators and markets as several provisions are seen as conducive to market consolidation and more beneficial to larger incumbents, which also puts into question the underlying approach of the proposal which instead of promoting efficient competition, as under the existing framework, seems to rely on market consolidation
- the shift of decision-making power to the Commission away from the national level, e.g. with respect to spectrum or market remedies, which appears unwarranted.

Several delegations also noted that the telecom sector is already quite heavily regulated as compared to other sectors and that several policy areas in a broader digital context (e.g. copyright and intellectual property rights, provision of digital services, cloud computing) are also relevant and would call for a more balanced treatment between telecommunication operators and OTT operators.

The Commission addressed several of these questions at the WP Tele on 14 and 21 November.

6. On 24-25 October the European Council addressed Digital issues in section I of its conclusions where paragraph 5 referred to the "Connected Continent" package [9]. In this section I the European Council also referred to several aspects (e.g. Cloud computing, Big Data, Digital platforms) of the Digital economy which are of strategic importance for the EU in terms of global competitiveness, are not regulated to the same extent as the telecommunications market although they may involve the same operators and affect their business model, and where interoperability issues need to be addressed.

7. With a view to contributing to the examination process encouraged by the European Council the Presidency considers it is timely to hold an orientation debate at Ministerial level on the proposal as well as related aspects highlighted by the European Council. To that effect the Presidency would suggest to structure the debate around the following questions:

   i. *Bearing in mind the orientations set out by the European Council and in the light of the perceived gap between the stated aim of the Connected Continent proposed Regulation and the requirements it proposes for a number of policy issues (e.g. favouring investment, reducing administrative burden for operators, availability of radio-spectrum, access to fixed networks, rights of end-users, net neutrality, roaming) what are, in your view, the policy issues on which it would be beneficial to focus on in order to further the integration of the telecommunication market and support the digital economy ? Should you select one of these policy issues what key elements would you advise to address at EU level ?*

[9] "Overcoming fragmentation, promoting effective competition and attracting private investment through an improved, predictable and stable EU-wide legal framework is crucial, while ensuring a high level of consumer protection and allowing Member States a degree of flexibility to take additional consumer protection measures. In this context, the European Council welcomes the presentation by the Commission of the "Connected Continent" package and encourages the legislator to carry out an intensive examination with a view to its timely adoption. It underlines the importance of better coordinating the timing and conditions of spectrum assignment, while respecting national competences in this area. "

ii. *As already noted the European Council drew the attention to several aspects (e.g. Cloud computing, Big Data, Digital platforms) of the Digital economy besides the telecommunication single market, which so far largely rely on soft initiatives (e.g. European Cloud Partnership) or are only lightly regulated, and for which the European Council referred to some form of framework. How would you see development in this respect at national and/or EU level ?*

As usual delegations may also raise issues they would see as important for the further examination of the proposal and are invited to supplement their oral intervention with written submissions if deemed useful.

8. Coreper is invited to confirm that the orientation debate at the TTE Council on 5 December can take place on the basis of the questions set out in paragraph 7.