



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 12 January 2009

16496/08

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

ADD 1

**TELECOM 214
MI 502
COMPET 535
CONSOM 202
CODEC 1687**

DRAFT STATEMENT OF THE COUNCIL'S REASONS

Subject: Common position adopted by the Council on [...] 2009 with a view to the adoption of 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

DRAFT STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

1. The European Commission adopted a proposal for a Better Regulation Directive on 13 November 2007¹. This proposal forms part of the so-called *review package* of the EU regulatory framework for electronic communications, comprising two proposals for amending Directives (the so-called Better Regulation Directive amending the current Framework, Authorisation and Access Directives and the so-called Citizen's Rights Directive amending the Universal Service and Privacy Directives) and a proposal for a Regulation (establishing a European Electronic Communications Market Authority). This document refers to the proposal for a Better Regulation Directive.
2. The European Parliament delivered its Opinion at first reading on 24 September 2009², the Economic and Social Committee (EESC) delivered its Opinion on 29 May 2008³ and the Committee of the Regions (CoR) delivered its Opinion on 19 June 2008⁴.
3. The Commission adopted its modified proposal on 6 November 2008⁵.
4. The Council adopted its common position on [date] 2009.

II. OBJECTIVE

1. With its proposal for a Better Regulation Directive, the Commission aims to adjust the regulatory framework for electronic communications by improving its effectiveness, reducing the administrative resources needed for implementing economic regulation (the market analysis procedure) and making access to radio frequencies simpler and more efficient.

¹ COM(2007)697.

²

³

⁴

⁵ COM(2008)724.

2. The proposal aims to:
 - Move towards a more efficient management of spectrum so as to facilitate access to spectrum for operators and to foster innovation.
 - Ensure that, where regulation remains necessary, this is more efficient and simpler for operators and for national regulatory authorities (NRAs).
 - Make a decisive step towards more consistency in the application of EU rules in order to complete the internal market for electronic communications.

3. The most controversial issues in the Better Regulation proposal concern radio spectrum, the new telecoms authority, functional separation and the regulatory framework for Next Generation Networks (NGNs).

III. ANALYSIS OF THE COMMON POSITION

General comments

In adopting its common position, the Council has to a significant extent endorsed the approach and aims proposed by the Commission and has taken on board nearly half of Parliament's 126 adopted amendments. A number of changes to both the substance and the wording of the proposed Better Regulation Directive have nevertheless been made with a view to:

- take account of the opinion of the European Parliament;
- addressing a small number of specific issues which created difficulties;
- rendering some of the wording of the three Directives more precise and thus improving the legal clarity of the texts.

At a general level, the Council's common position differs from the Commission's original proposal with regard to the question of the use of comitology and with regard to the structure, function and tasks of the new telecoms authority. On both issues, the Council has taken a more cautious approach than proposed by the Commission, because in its view, the current regulatory framework for electronic communications has functioned reasonably well over the past few years and that there is no sufficient justification to overhaul the current institutional arrangements and responsibilities.

Specific comments

1. Principal changes made to the Commission proposal regarding the Framework Directive:

(a) National regulatory authorities (NRAs) (Article 3)

On NRAs, the Council agreed on a wording, which clarifies that, notwithstanding "supervision in accordance with national constitutional law", NRAs shall carry out their regulatory tasks "independently" and with "adequate financial and human resources".

(b) Consolidating the internal market for electronic communications (Article 7)

The Council does not share the approach proposed, that the Commission be granted the possibility to issue "decisions" on draft measures intended to be taken by NRAs, i.e. the Commission veto on remedies. The Council rather believes it appropriate for the Commission to issue non-binding "opinions" on draft measures proposed by NRAs and to require NRAs to publicly justify its final decision. This issue is at the core of the debate on the division of responsibilities in the implementation of the regulatory framework for electronic communications and should also be seen in relation to the proposal to set up a European telecoms authority in this area.

- (c) Radio spectrum policy (Article 9 on Management of radio frequencies for electronic communications services, Article 9a on Review of restrictions to existing rights and Article 9c on radio frequency management harmonisation measures)

The Council supports the Commission's proposals, which aim to move towards a more efficient management of spectrum so as to facilitate access to spectrum for operators and to foster innovation. However, the Council clarified in further detail the restrictions that may apply to the types of technology and services to be provided. As current arrangements already allow for the adoption of technical implementing measures in the area of radio spectrum, the Council deleted the proposed Article 9c.

2. **Principal changes made to the Commission proposal regarding the Authorisation Directive:**

- (a) Harmonisation measures, common selection procedure for issuing rights and the harmonised granting of rights of use for radio frequencies and harmonised conditions for pan-European networks or pan-European electronic communications services (Articles 6a, 6b and 8)

The Council examined in great detail the proposed provisions in the Authorisation Directive dealing with radio spectrum (in particular Articles 6a, 6b and 8), including the granting of individual rights of use, harmonisation measures and common selection procedures for issuing rights. Although the Council to a large extent shares the Commission's objectives in this regard, it feels that some of the proposals are too far-reaching in that they would too much alter without sufficient justification the current arrangements for radio spectrum policy-making. As a consequence, the Council deleted the proposed Articles 6a and 6b but reinstated Article 8 so as to allow for the harmonised introduction of pan-European electronic communications services, which rely on radio spectrum availability.

3. **Principal changes made to the Commission proposal regarding the Access Directive:**

(a) Functional separation (Article 13a)

The Council amended the proposed provision on functional separation so as to clarify that functional separation could be imposed by NRAs "as an exceptional measure" and subject to a decision by the Commission in order to achieve the appropriate wholesale provision of certain access products.

4. **The Council's position on the European Parliament amendments on the Better Regulation proposal:**

The common position incorporates approximately half of the 126 amendments proposed by the European Parliament at first reading.

4.1 **Regarding the Recitals:**

The Council accepted in full, in part or in principle amendments 2, 4, 5, 6, 15, 16, 17, 21, 22, 25, 27, 29, 30, 32, 33 and 35.

For certain of these amendments the near-complete wording has been taken on board, whilst others have been incorporated in a different form which nevertheless maintains the aim underlying the amendments or parts of the amendment.

The Council did not incorporate the following amendments in its common position: 1, 3, 7, 8, 9, 10, 11, 12, 13, 14/rev, 18, 19, 20, 23, 24, 26, 28, 31, 34, 36, 37, 38 and 39.

4.2 Regarding the articles in the Framework Directive:

The Council accepted in full, in part or in principle amendments 40, 41, 42, 43, 44, 45, 46, 47, 50, 60, 62, 63/rev, 64/rev, 65, 66, 69, 70,71, 73/rev, 74, 76, 77, 80, 81, 86 and 90. For certain of these amendments the near-complete wording has been taken on board, whilst others have been incorporated in a different form which nevertheless maintains the aim underlying the amendments or parts of the amendment.

The Council did not incorporate the following amendments in its common position: 48, 49, 51, 52, 53, 54, 55, 56, 57, 58, 59, 61, 67/rev, 68, 72, 75, 78, 79, 82, 83, 84, 85, 87, 88, 89 and 138.

4.3 Regarding the articles in the Authorisation Directive:

The Council accepted in full, in part or in principle amendments 107, 109, 110, 112, 113, 115, 116, 120, 121 and 124. For certain of these amendments the near-complete wording has been taken on board, whilst others have been incorporated in a different form which nevertheless maintains the aim underlying the amendments or parts of the amendment.

The Council did not incorporate the following amendments in its common position: 106, 108/rev, 111, 114, 117/rev, 118, 119, 122, 123 and 125.

4.4 Regarding the articles in the Access Directive:

The Council accepted in full, in part or in principle amendments 91, 92, 95, 96, 98, 100, 101, 102, 103 and 105. For certain of these amendments the near-complete wording has been taken on board, whilst others have been incorporated in a different form which nevertheless maintains the aim underlying the amendments or parts of the amendment.

The Council did not incorporate the following amendments in its common position: 93, 94, 97, 99 and 102.

IV CONCLUSION

Despite the fact that the Council is not able to accept all of the amendments adopted by the European Parliament, it agrees with the Parliament and with the Commission that the main outstanding issues in the Better Regulation proposal concern radio spectrum, the new telecoms authority and functional separation.

For each of these issues, the Commission, to a large extent supported by the Parliament, has proposed to change the (inter) institutional set-up and, consequently, the balance of power between the various actors, regulatory authorities, the EU institutions and other stakeholders. Although the Council believes that an update of the regulatory framework for electronic communications would be beneficial for the sector and allow for important investment decisions to be made, for instance in NGNs, it is of the view that this could be achieved by improving the current arrangements rather than by setting up alternative mechanisms. The Council's common position therefore seeks to clarify and improve the provisions dealing, inter alia, with NRAs, the Commission and the use of comitology and the role of EU institutions with regard to radio spectrum policy-making.

Against this background, the Council's common position is intended to be a basis for finding, with the notable assistance of the Commission, compromises with the European Parliament, which will result in a stable and predictable regulatory environment for the electronic communications sector.

The Council is looking forward to enter into constructive discussions with the Parliament in view of the adoption of the new texts towards the end of the current legislator.