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NOTE

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No. prev. doc.: 16634/13 TELECOM 323 COMPET 866 CODEC 2677

Subject: Proposal for a Regulation of the European Parliament and of the Council on
measures to reduce the cost of deploying high-speed electronic communications
networks
- *Progress report*

The present report has been drawn up under the responsibility of the Lithuanian Presidency. It sets out the work done so far in the Council's preparatory bodies and gives an account on the state of play in the examination of the above mentioned proposal.

PROCEDURAL ASPECTS

1. Following the publication in 2010 of a Commission Communication on *European Broadband: investing in digitally driven growth*¹, on the basis of which the TTE Council of 2-3 December 2010 adopted conclusions², the Commission submitted, on 27 March 2013, a proposal for a Regulation of the European Parliament and of the Council on *measures to reduce the cost of deploying high-speed electronic communications networks* with art. 114 TFEU as legal basis.³ The proposal is part of the EU's efforts to realise the Digital Agenda for Europe (DAE) targets for the roll-out and take-up of high-speed broadband by 2020. The TTE Council of 6 June 2013 took note of the progress made with the examination of this proposal.⁴ The European Council, in its conclusions of 25 October, noted that "Legislative measures to reduce the cost of broadband roll-out should be adopted rapidly."⁵
2. The Committee of the Regions⁶ and the European Economic and Social Committee⁷ adopted opinions on the proposal on 3-4 July and 10 July respectively and the industry (ITRE) committee of the European Parliament [adopted a report and a set of amendments on 28 November].

¹ Doc. 13874/10.

² Doc. 16836/10 and 17068/10.

³ Doc. 7999/13.

⁴ Doc. 10088/13 and doc. 10457/13.

⁵ Doc. EUCO 169/13

⁶ 2013/C 280/10.

⁷ TEN/519.

3. Under the Lithuanian Presidency, the Working Group on Telecommunications and the Information Society (WP TELE) examined the proposal in 4 meetings⁸ on the basis of a number of clusters: access to existing infrastructures, coordination of civil engineering works, (access to) in-building equipment, and institutional aspects (permit granting, competent bodies).⁹ In many cases, the examination in the WP TELE proceeded in parallel to national consultations being carried out, with the consequence that quite a number of delegations maintained scrutiny reservations on (parts of the) text and were only able to express preliminary views. For these reasons, it has not been possible for the Lithuanian Presidency to put together a revised text. However, on the basis of the discussions, a number of key issues and themes can be identified, which were brought up by several delegations and on which a further approximation of positions will be required, as set out below.

SUBSTANCE

4. The proposed measures are aimed at facilitating broadband investment, such as by re-using existing physical infrastructure, making sure that civil engineering works systematically involve potential investors, streamlining permit granting, improving availability of information on physical infrastructure suitable for high-speed network deployment and reducing the cost of access for the end-user by ensuring the existence of appropriate physical infrastructure inside new buildings. The proposal sets rights and obligations with regard to: access to existing physical infrastructure; transparency on physical infrastructure; permit granting; coordination of civil works; in-building physical infrastructure, and dispute settlement. Delegations generally support the objective of cutting down civil engineering costs, which can make up to 80% of the total deployment costs, and on fully exploiting synergies between electronic communications networks and the networks of other utilities. According to the Commission's impact assessment accompanying the proposal, which many delegations criticised for different reasons (see the progress report of June), operators (capex) savings could be 20-30% of total investment costs, on the assumption that 25% of new developments would be on shared infrastructure, which is claimed would translate in achieving savings of up to €63 bn by 2020 on an estimated €221 bn of total NGA investments.

⁸ On 5/9, 3/10, 22/10 and 12/11/2013.

⁹ Doc. 12318/13.

5. When it comes to the details of the proposal and in general terms, not all delegations are convinced whether the proposed measures are proportionate to the objective pursued and whether the perceived benefits will outweigh the potential costs and increased administrative burdens. Regarding the implementation of the proposal, many delegations point to the consequences for building owners and landlords and the implications on property rights, whereas the proposed measures might also be difficult to implement in countries with a federal structure. For these reasons, the choice of a Directive rather than a Regulation is an issue, which keeps coming back in the discussions.
6. With regard to the cluster on *access to existing infrastructures* (Articles 2 and 3 and Recitals 11-16) and the corresponding *transparency requirements* (Article 4 and Recitals 17-20), the proposal sets out that that network operators, including utility companies (such as electricity, gas and transport but also water) should meet all reasonable requests by telecoms companies for access to their physical infrastructure in order to deploy high-speed fixed and wireless broadband networks (above 30 Mbps). Delegations are seeking clarifications on the definitions used and their link to those contained in other relevant pieces of EU legislation, such as in the EU regulatory framework for electronic communications. Further discussion will be needed on the definitions of 'network operator' (e.g. should drinking water utilities and telecoms networks be included, the latter already being subject to the telecoms rules?) and '(in-building) physical infrastructure' (e.g. includes active/non-active and underground/above the ground elements?) in particular as well as on the meaning of 'permit', 'major renovation works', 'civil works', and 'high speed electronic communications' networks'. Some delegations also argue for the inclusion of additional definitions, such as on 'concentration point', 'single information point' and 'national dispute settlement body'. Furthermore, the meaning of, and conditions for, 'reasonable' requests for access needs further clarification as well as the procedure and timings for submitting requests for access to the physical infrastructure of network operators. A number of delegations believe that the list of criteria to refuse access to networks should be extended, e.g. for reasons of protection of property rights, the environment, public safety and security, or public health. Finally, the discussion on the modalities for the settlement of disputes under the auspices of a 'competent national dispute settlement body' has not come to a conclusion.

7. With regard to the issue of *transparency*, the establishment and function of the proposed 'single information point' (SIP) will need further consideration. Member States would be obliged to make information available to telecoms operators on existing infrastructures through such a single SIP (a role for the NRA, unless otherwise decided). Rather than centralising access to information in such a SIP, some delegations appear to prefer to see the SIP more as a 'portal' for the exchange of (contact and registration) information on physical infrastructure, which would be less costly and less cumbersome from an administration point of view. Some delegations have pointed out that the proposed timeframes are too short and that adequate time should be given for the proper implementation of the act. Delegations have proposed that it should be made explicit that fees can be charged by the SIP for the making available of 'minimum information' to be provided by relevant bodies and operators according to set deadlines. Also here, there are provisions for the settlement of disputes in case the 'minimum information' is not provided or made available, the modalities for which require further consideration. It has also been suggested that it should be possible to limit access to 'minimum information' for reasons of network security and integrity or operating and business secrets. In general, further discussion on this point will be required, taking into account the current practice in Member States as well as the general orientation of the delegations of keeping costs and administrative burden to the minimum.
8. According to the proposed provisions for the *coordination of civil engineering works* (Article 5 and Recitals 21 and 22) and the corresponding *transparency requirements* (Article 4), network operators shall have the right to negotiate agreements concerning coordination of civil works; undertakings performing civil works, which are fully or partially financed by public means, shall meet any reasonable request by telecoms operators in this regard, subject to certain conditions. Also in this context, delegations are pointing out that in the proposed process, due account shall need to be taken to the protection of property rights, the environment, public health and public security and other reasons of general interest. They also seek for further clarification on the possible exemptions from the proposed obligations for civil works of 'insignificant value' (a threshold for which is not specified in the proposal) and, again, on the modalities for dispute settlement in case parties cannot reach an agreement.

9. On the *transparency provisions* on on-going or planned civil works, the inquiries from delegations are in broad lines similar to what is mentioned under point 7 above and concern *inter alia* the 'set of minimum information' to be made available by network operators to telecoms operators and the role and function of the SIP in this regard, which, as some believe, should focus on monitoring the permit granting process rather than coordinating it. Other delegations argue that the period for the granting process should start when all the required documents concerning the request have been submitted, i.e. when the request for a permit is complete and that some flexibility is needed with regard to the deadlines for permit granting.
10. On *in-building equipment* (Article 7 and Recital 26) as well as the *access* to such equipment (Article 8 and Recitals 27-28), some obligations are proposed regarding the installation of physical infrastructure in new buildings and buildings that undergo major renovation (i.e. where a building permit is required). For instance, high-speed-ready physical infrastructure up to the network termination point should be installed in newly constructed or significantly renovated buildings and multi-dwelling buildings should be provided with a 'concentration point' inside or outside the building and which shall be accessible to telecoms operators. Apart from inquiries about the terminology used in the proposal, such as 'major renovation', 'network termination point' (at the door of, or within the subscriber's house?) or 'concentration point', delegations are expressing concern about the fundamental issue of the rights of building owners and landlords and the costs they will be faced with as a result of the proposed obligations. Although the proposal foresees exemptions to the obligations where the costs would be disproportionate, some delegations argue that not only economic reasons could be a ground for exemptions but also cultural and historic considerations, for example. In general, it appears that further discussion will be needed on both the practical implications of the proposed measures as well as on the possible legal consequences, taking into account the numerous parties involved in the process. Some delegations suggest exemptions from the obligations for certain types of buildings, such as monuments and vacation homes.

11. On the issue of access to in-building equipment, delegations' inquiries are of a both technical, practical and legal nature and relate to the conditions according to which telecoms operators would be able to terminate high-speed broadband networks at the 'concentration point' or get access to high-speed-ready in-building infrastructure or, in case a building is not high-speed-broadband-ready, terminate their network at the subscriber's premises. There appears to be widespread concern among delegations about these provisions in relation to (the protection of) property rights of owners of buildings and the infrastructure therein. Questions remain also on the modalities and deadlines for the proposed dispute settlement procedure.
12. Finally, with regard to institutional aspects -- permit granting (Article 6 and Recitals 23-25) and competent bodies (Article 9 and Recitals 29-31), delegations are not yet clear on the proposed process to access information on specific civil works and the submission of applications for permits via the 'single information point', which is supposed to facilitate and coordinate the permit granting process and to monitor compliance with deadlines, such as the proposed but questioned 6-months default deadline for local authorities to grant or refuse a permit for civil works to deploy high-speed broadband networks. Also in this context, a number of delegations argue against the integrated SIP solution and propose instead a less complex and less costly information 'portal', where relevant entities and authorities could get in touch and which would also allow to apply directly to the relevant authority rather than via the SIP. Unless the Member States decide otherwise, the telecoms NRA shall perform the functions of the national dispute settlement body and of the SIP and shall have the power to impose sanctions; some delegations fear the increased administrative burden and costs for their NRAs in this regard and other delegations question the appropriateness of putting the (telecoms) NRA in the middle of all these cross-sector activities the proposal addresses. Some delegations prefer that Member States decide on the national dispute settlement body, the single information point for access to information and the single contact point for permits, rather than that reference is made to telecoms NRAs fulfilling these roles by default.

OUTLOOK

13. Taking into account that the general interventions from the delegations during the examination of the proposal were so far mainly meant to seek further clarifications on the provisions, further work on the detailed provisions will need to be carried out in the WP TELE so that the Presidency can put together a text, which reflects the Council's position on the proposal. Delegations are encouraged to support the Presidency in this regard and any drafting suggestions Member States may have would be given due consideration. The form of the legal instrument (Regulation vs. Directive) is a recurring issue throughout the proposal -- which after all mainly and directly concerns measures at the local level with only indirect cross-border effects -- in this respect there appears to be a very broad support in favour of a Directive.
14. The European Parliament's industry (ITRE) committee will take a vote on the proposal on 28 November and it is expected that at this occasion, the rapporteur will be granted a mandate to start exploratory talks with the Council in view of concluding this file in first reading and before the end of the current legislature. The Presidency will inform the WP TELE about the outcome of Parliament's vote in due course.

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Following its consideration by Coreper on 27 November, the Presidency presents this progress report to Council with the invitation to take note of it.
