

DIGITAL SINGLE MARKET – PART 2

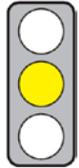
NOTIFICATION, SPECTRUM AND ACCESS PRODUCTS

cepPolicyBrief No. 2014-08

KEY ISSUES

Objective of the Regulation: The Commission wants to create an EU single market for electronic communications.

Affected parties: Telecomms providers and end-users, regulatory authorities.



Pro: (1) The coordination of radio spectrum by the Commission increases efficiency.

(2) The single notification system for EU providers operating across borders brings about a reduction – if small – in market entry barriers.

Contra: (1) The Commission's right to veto the regulatory decisions of national regulatory authorities, relating to EU providers, produces either absurd distortions of competition or a counter-productive standardisation of the regulatory conditions.

(2) The standardisation of all access products, by means of a "European virtual broadband access product", is misplaced.

(3) The obligation to provide a connectivity product is premature.

CONTENT

Title

Proposal COM(2013) 627 of 11 September 2013 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

Brief Summary

Part 2 of the cepPolicyBrief deals with the notification requirement for telecomms providers, radio frequencies and virtual broadband access. [Part 1](#) concerns net neutrality and the full harmonisation of the rights of end-users. The change to the Roaming Regulation and cross-border fixed-line connections within the EU will be considered in Part 3.

► Objective of the Regulation

The objective is the "completion of a European single market for electronic communications" (Art. 1 (1)). For this purpose, the Commission wants, inter alia,

- to introduce a single notification system, valid across the EU, for cross-border telecomms providers in order to reduce their administrative costs (Recital 9),
- to harmonise "certain aspects of radio spectrum assignment" at EU level in order to achieve the objective of the Digital Agenda for Europe (see [cepPolicyBrief](#)) (Recital 17 and 18),
- to promote the use of radio local area networks so as to meet the "massive growth" in radio spectrum demand (Recital 25),
- to introduce an EU-wide, harmonised "virtual broadband access product" at the wholesale level in order to facilitate the provision of services across national borders (Recital 31), and
- to bring in rules on the provision of connectivity products in order to promote technical innovations which rely on access to other networks (Recital 36).

► Definitions

- A provider of electronic communications to the public (hereinafter: telecomms provider) means an undertaking which provides public electronic communications networks or transmits signals on such networks [Art. 2 No. 2 in conjunction with Art. 2 c) of the Framework Directive (2002/21/EC)].
- A "European provider of electronic communications" (hereinafter: EU provider) means a telecomms provider that operates in more than one Member State, either directly or by means of subsidiaries, without being a subsidiary itself (Art. 2 (1)).
- A "virtual broadband access product" is a wholesale product which telecomms providers acquire from other telecomms providers. It allows these telecomms providers to offer end-users individualised broadband access without requiring the physical unbundling of the lines for the "last mile" (Art. 2 (11)).
- A "connectivity product" allows the networks of various telecomms providers to be connected together (Art. 2 (12)).
- "Harmonised radio spectrum" for wireless broadband communications means radio frequencies, not intended for broadcasting, certain technical features of which are harmonised EU wide (Art. 2 (8)).
- Radio local area networks are wireless networks with low power and range which use harmonised, non-exclusive frequencies (Art. 2 (10)).

► **Single, EU-wide notification system and regulatory responsibilities for EU providers**

- Following notification of the regulatory authorities in their home country, EU providers may operate in all Member States (Art. 3 (1) in conjunction with Art. 4 (1)).
- The notification must contain, in particular (Art. 4 (2), sub-clause 1)
 - a brief description of the networks or services offered and
 - the home Member State and the host Member States in which the networks or services are to be made available.
 The notification must be submitted in the language of the home Member State and those of any host Member State (Art. 4 (2)).
- EU providers already operating must submit a central notification by 1 July 2016 (Art. 3 (7)).
- The regulatory authority in the respective Member State is responsible for the regulation of EU providers
 - regarding, for example, obligations to grant access and the fees payable in this regard.
- These regulatory authorities notify the regulatory authorities of the home Member State of their decisions (Art. 3 (2) and Art. 5 (2)).
- Only the regulatory authority in the home Member State is permitted to prohibit an EU provider from operating (Art. 6 (1)). Until such a decision is made, "urgent interim measures" by other regulatory authorities are possible (Art. 6 (3) sub-clause 1 in conjunction with Art. 10 (3) of Directive 2002/20/EC).
- The Commission has a right to veto decisions of all national regulatory authorities relating to EU providers (Art. 35 (2) c).

► **Rights of use for harmonised radio spectrum: Allocation and fees**

- The Regulation contains rules on harmonised radio spectrum for wireless broadband communications (Art. 8 (1)).
- With regard to the allocation and use of harmonised radio spectrum, the national regulatory authorities must ensure (Art. 9 (4)):
 - a most efficient use and effective management of radio spectrum,
 - secure planning conditions to enable multi-territorial investments and the achievement of scale economies, and
 - "wide territorial coverage" of high-speed wireless broadband networks.
- The Commission can determine, by way of implementing acts, (Art. 12 (2)):
 - dates for the allocation of rights of use for radio spectrum,
 - dates from which individual radio spectrum can be used,
 - the minimum duration of the rights of use for radio spectrum and
 - when rights of use for radio spectrum will expire which have been allocated for purposes other than broadband communications.
- With regard to determining the fees for the use of radio spectrum, the national regulatory authorities must (Art. 10 (3))
 - achieve an "optimal distribution" of payments by providers, throughout the period of validity of the rights of use, in order to create incentives for network roll-out and radio spectrum utilisation, and
 - avoid under-utilisation of radio spectrum as well as foster investment.
- The Commission has a right to veto decisions of the national regulatory authorities relating to rights to use radio spectrum (Art. 13 (7) and (8)).

► **Radio local area networks**

- The provision of a radio local area network does not require authorisation (Art. 14 (1)).
- End-users cannot be prevented by telecomms providers or authorities from providing a radio local area network. Telecomms providers do not prevent end-users from using a radio network (Art. 14 (3) and (4)).
- Telecomms providers cannot be prevented by national authorities from granting access to their networks via radio local area networks. Where the radio network is located within the premises of an end-user, the latter must have authorised the granting of access (Art. 14 (2)).
- Anyone providing a radio local area network is not deemed to be a telecomms provider if such provision does not take place commercially or is only "ancillary" to another commercial activity (Art. 14 (6)).

► **EU-wide harmonised virtual broadband access product**

- The national regulatory authorities examine whether it is "appropriate and proportionate" for telecomms providers, already under a duty to grant wholesale access to their networks, to "instead" provide "a European virtual broadband access product" with "at least equivalent functionalities". This examination must take place "as soon as possible" after entry into force of the Regulation. (Art. 18 (1)).
- The "European virtual broadband access product" is an EU-wide harmonised "high-quality" access product which can be provided in up to the three variations (Art. 17 (1) and Annex I):
 - at a sub-regional handover point that is close to the customer (Layer-2 Product),
 - at a national handover point, remote from the customer (Layer-3 Product, which also permits the reliable transmission of video files or IP television) and/or
 - as a leased line.

The Commission can lay down additional requirements, by way of delegated acts (Art. 17 (2)).

► EU-wide harmonised connectivity product

- On written request, a telecomms provider must make a "European connectivity product" available to other telecomms providers if this is "reasonable". This is not the case where the requesting providers refuse to reciprocate by making a "European connectivity product" available to the aforesaid provider. (Art. 19 (2))
 - The "European connectivity product" is an EU-wide harmonised "high quality" connectivity product which, inter alia, (Art. 19 (4) and Annex II)
 - guarantees a certain quality of service,
 - can be provided EU wide,
 - is "cost effective" and
 - allows service providers to meet the requirements of their end-users.
- The Commission can lay down additional requirements, by way of delegated acts (Art. 19 (5)).

Statement on Subsidiarity by the Commission

The focus of the proposal is to "establish a single market for electronic communications" which, according to the Commission, can only be achieved at EU level. The Commission does not provide a separate statement on subsidiarity for the individual areas of regulation.

Policy Context

In October 2013, the European Council stated its intention to examine and pass the Regulation swiftly. It pointed out that the allocation of radio spectrum should be better coordinated whilst taking account of national jurisdiction. At the European Council meeting in December 2013, some Member States expressed severe misgivings.

Legislative Procedure

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|-------------------|--|
| 11 September 2013 | Adoption by the Commission |
| Open | Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force |

Options for Influencing the Political Process

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|-------------------------------|---|
| Leading Directorate General: | DG Connect |
| Leading Committee of the EP: | Industry, Research and Energy, Rapporteur: Pilar del Castillo Vera (EVP, ES) |
| Leading Federal Ministry: | Federal Ministry for Economy and Technology |
| Leading Committee of the BT: | TBA |
| Decision mode in the Council: | Qualified majority (Adoption by a majority of the Member States and with 260 of 352 votes; Germany: 29 votes) |

Formalities:

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|---------------------------------|--|
| Legislative competence: | Art. 114 TFEU (Internal Market) |
| Form of legislative competence: | Shared competence (Art. 4 (2) TFEU) |
| Legislative procedure: | Art. 294 TFEU (Ordinary legislative procedure) |

ASSESSMENT

Economic Impact Assessment

The Commission deserves general recognition for its proposal to remove barriers to the cross-border provision of telecomms services in the EU. In this respect, it is important, on the one hand, that the legislation allows telecomms providers to achieve economies of scale EU wide. On the other hand, this must not be allowed to weaken competition for infrastructure: there must still be sufficient incentives for network investment, and existing infrastructure investment must be reasonably protected. This is the only way to avoid permanently legislating in favour of sustainable competition in multiple networks. It is therefore problematic that the Commission is focussing on maximum harmonisation of regulatory conditions EU wide. This ignores the substantial, historical, technical and network-related differences between the Member States and may have a negative impact on willingness to invest and thus on competition for infrastructure.

The single notification system for EU providers operating across borders **brings about a reduction – if small – in market entry barriers.** On the one hand, the existing notification procedures of the Member States give rise to only minimal costs. On the other hand, other cost factors - such as staff costs - play a much more important role when it comes to starting cross-border operations. At the same time, the single notification system causes additional expenditure for EU providers who are already operating as well as for national regulatory authorities.

The Commission's right to veto the regulatory decisions of national regulatory authorities, relating to EU providers, **produces either absurd distortions of competition or a counter-productive standardisation of**

the regulatory conditions: Distortions of competition arise where the Commission – as in fact intended – "only" uses its right of veto to influence regulatory decisions relating to providers with cross-border operations. This may mean that the obligations to grant access, or the fees to be collected in this regard, applicable to EU providers, differ from those applicable to telecomms providers operating at a purely national level. If the national regulatory authority wants to avoid such distortions of competition, it is forced to "choose" to apply, even at national level, the Commission-oriented regulatory conditions for EU providers and thus accept a counter-productive standardisation of the regulatory conditions.

Supporters of the right of veto cite the Commission's neutrality and objectivity as the only way to prevent national regulatory decisions distorting cross-border competition. However, firstly, they **ignore the fact that erroneous decisions by the national regulatory authorities can be challenged in the courts** – and fast-tracked where necessary – so that a right of veto is not absolutely necessary. **Secondly, they fail to recognise that decisions by the national authorities must have a broad scope for discretion.** The idea that someone with a right of veto can exercise this discretion "neutrally and objectively" and therefore to the same extent in all cases, completely fails to take account of the nature of sector-specific regulatory conditions. Thirdly, the Commission is anything but neutral because it also plays an important legislative role and pursues political objectives.

The coordination of radio frequencies by the Commission increases efficiency. It avoids susceptibility to disruption in border regions and allows operators to exploit economies of scale arising, for example, from a standardisation of the period of use and the coordination of the timing of auctions for rights of use. Some of the Commission's powers to intervene go too far however: the Member States – rather than the Commission – should decide whether they are willing and able to do without the payment of fees for the use of spectrum over a long a period since this is quite likely to have budgetary implications.

A standard EU-wide virtual broadband access product facilitates the cross-border provision of telecomms services and strengthens competition. **The Commission's plan whereby all existing wholesale products throughout Europe are to be replaced by a "European virtual broadband access product" is, however, misplaced.**

In the course of the future roll-out of the fibre optic network, unbundled local loop wholesale products are likely, for technical reasons such as VDSL2 Vectoring, to lose importance in favour of other wholesale products. In view of the technical and network-related differences between the Member States, however, *one* "European virtual broadband access product" cannot solve all the problems even if the Commission proposes three different variants. In some Member States - particularly Germany – many alternative providers have reached their end-users via an unbundled local loop, thus fostering infrastructure competition. Depending on where on the network future bottlenecks occur, a virtual access product or local loop unbundling must be available for deployment as a wholesale product in the future.

The obligation to provide a connectivity product is premature. Firstly, its definition and technical specifications are not sufficiently precise. Secondly, it is problematic that this provision is to be completely independent of market differentiation and analysis, so that the existence of market strength will have no role to play ("symmetric regulation").

Legal Assessment

Legislative Competency

The Regulation is correctly based on Art. 114 TFEU (Internal Market).

Proportionality

As the Commission is seeking to achieve an EU-wide standard legal framework, the legal form of a Regulation is proportionate.

Compatibility with EU Law in other Respects

Unproblematic.

Impact on German Law

Unproblematic.

Conclusion

The single notification system for EU providers brings about a reduction – if small – in market entry barriers. The Commission's right to veto the regulatory decisions of national regulatory authorities, relating to EU providers, produces either absurd distortions of competition or a counter-productive standardisation of the regulatory conditions: The coordination of radio frequencies by the Commission increases efficiency. The Commission's plan whereby all existing wholesale products throughout Europe are to be replaced by a "European virtual broadband access product" is misplaced. The obligation to provide a connectivity product is premature.