

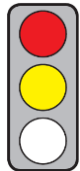
LOWERING THE COST OF BROADBAND DEPLOYMENT

cepPolicyBrief No. 2013-43

KEY ISSUES

Objective of the Regulation: The Commission wants to reduce construction costs in order to promote the deployment of broadband.

Affected parties: Operators of telecommunications networks and of transport, energy and water networks, owners of the physical infrastructure, building owners



Pro: The establishment of a central national information point is appropriate.

Contra: (1) Only TC broadband network operators with an unassailable market position should have to grant other TC network operators access to the physical infrastructure.

(2) An obligation to grant access, applicable to operators of non-TC networks, is not justifiable.

(3) Disclosure obligations should only apply to monopolistic TC network operators.

(4) The obligation requiring house owners to install internal building infrastructure when building or renovating is patronising and violates the basic right of ownership.

(5) A regulation is disproportionate as a legal instrument.

CONTENT

Title

Proposal COM(2013) 147 of 26 March 2013 for a **Regulation** on measures to **reduce the cost of deploying high-speed electronic communications networks**

Brief Summary

► Context and objectives

- By 2020, the Commission wants all Europeans to have internet connections with at least 30 Mbps and at least 50% of them to have connections with over 100 Mbps.
- A significant proportion of the cost of broadband deployment arises from the cost of civil engineering works (Recital 5). The Commission wants to reduce these construction costs in order to promote broadband deployment (Recital 3, Art. 1(1)).
- The Regulation sets out minimum rights and obligations for all types of network operator (Recital 9). It allows the Member States to issue "more detailed" provisions (Art. 1 (3)).
- The EU Telecommunications Directives continue to apply (Art. 1 (4)): Framework Directive 2002/21/EC, Authorisation Directive 2002/20/EC, Access Directive 2002/19/EC, Universal Service Directive 2002/22/EC and the Competition Directive 2002/77/EC.
- More specific "EU law and in particular any specific regulatory measures" by national regulatory authorities prevail over the Regulation (Recital 10).

► Definitions

- "Physical infrastructure" means any element of a network which is not active such as a duct or distribution box (Art. 2 (2)).
- "Network operators" are operators of (Art. 2 (1))
 - electronic communications networks, particularly landline and mobile telephone networks (hereinafter: TC network operators) and
 - physical infrastructure, intended to provide transport services or services for the production and distribution of gas, electricity, water and heating.
- "High-speed electronic communications networks" are networks capable of achieving speeds of at least 30 Mbps (Art. 2 (3)).
- "Major renovation works" are structural modifications of the in-building physical infrastructure requiring a building permit (Art. 2 (9)).

► Shared use of existing physical infrastructure

- Upon written request, any network operator must grant TC-network operators access to their physical infrastructure "under fair terms and conditions" (Art. 3 (2)), including price (Recital 15).
- Network operators must state the reasons for any refusal of access within one month, based on objective criteria. These include (Art. 3 (3))
 - the technical suitability of the physical infrastructure,
 - availability of space to host the elements,
 - integrity and security of any existing network and risk of interference,
 - the availability of alternative means of wholesale physical network infrastructure access provided by the network operator.

- Either party can invoke a national dispute settlement body where, within two months from the written request (Art. 3 (4)),
 - access is refused or
 - agreement on terms and conditions, including price, has not been reached.
- The dispute settlement body issues a binding decision on each case within four months. In its decision it can determine "fair terms, conditions and prices". Irrespective of the foregoing, any party may refer the case to a court. (Art. 3 (5))
- ▶ **Disclosure obligations and access to information about physical infrastructure**
 - The national regulatory authority shall perform the functions of the single information point unless the Member State appoints another competent body (Art. 9 (3)).
 - Public sector bodies must pass all minimum information concerning the existing physical infrastructure to the single information point provided the information is available in electronic form. Where the information is not available, the network operators must provide it at the request of the single information point (Art. 4 (2) and (3)).
 - The minimum information includes e.g. location, route and geo-reference coordinates as well as current use of the infrastructure (Art. 4 (1)).
 - On request, TC network operators must be granted immediate access to available minimum information from the single information point. Where the information is not available there, the network operator concerned must provide it within one month "under non-discriminatory terms" (Art. 4 (4)).
 - Upon written request, network operators must allow TC network operators
 - to carry out a "reasonable" in-site survey of "specific elements" of their physical infrastructure "under non-discriminatory terms" (Art. 4 (5)), within one month, and
 - to have "minimum information" concerning on-going or planned civil works; this includes information on location, type, object and duration of the work (Art. 4(6)).
- ▶ **Coordination of civil works**

Network operators performing civil works financed from public funds must meet any "reasonable" request from TC network operators for civil works coordination provided (Art. 5 (2))

 - coordination does not entail any additional costs and
 - the requests are filed at least one month before the submission of the final project application.
- ▶ **Simplified Approval Procedure for Civil Works**
 - TC network operators can submit permit applications to the single information point. The latter forwards them and monitors compliance with deadlines. (Art. 6 (2))
 - The authorities must grant or refuse permits within six months unless national or other EU law specifies different deadlines (Art. 6 (3)).
- ▶ **Linking buildings up to the broadband network**
 - Newly constructed or "majorly renovated" buildings must be equipped with a "high-speed-ready in-building physical infrastructure, up to the network termination points" (hereinafter: in-building infrastructure), allowing the connection of end-users with high-speed networks (Art. 7 (1) in conjunction with Recital 26).
 - Newly constructed or majorly renovated multi-dwelling buildings must also be equipped with an access or concentration point, by which the TC network operators can access the in-building infrastructure, such as by way of empty ducts from every dwelling to the concentration point (Art. 7 (2) in conjunction with Recital 26).
 - The Member States can exempt certain categories of building, in particular single dwellings and major renovation works, from the obligations when the cost of fulfilling those obligations is disproportionate. Sufficient justification for such exemptions must be submitted and the Commission notified. (Art. 7 (3))
 - Where in-building physical infrastructure already exists, TC network operators have
 - the right to connect their network to the concentration point, inside or outside the building, at its own expense, in order to access the existing infrastructure (Art. 8 (1)),
 - the right to non-discriminatory access to this infrastructure on reasonable terms if duplication is technically impossible or economically inefficient (Art. 8 (2)).
 - In the absence of available in-building infrastructure, operators can, at their own expense, terminate their network inside a building in the private dwelling of a subscriber, subject to the latter's agreement and provided that "impact on the private property is minimised" (Art. 8 (4)).

Main Changes to the Status Quo

- ▶ Currently, national regulation authorities can, in certain circumstances,
 - oblige TC network operators with an unassailable market position to grant access to non-active network components (Art. 12 (1) a) Access Directive) and
 - oblige TC network operators, irrespective of whether they have an unassailable market position, to share the use of cabling in buildings, empty ducts or distribution boxes (Art. 12 (1) Framework Directive).
 In future, all network operators - i.e. including non-TC network operators - will have to grant such access irrespective of whether they have an unassailable market position.
- ▶ Currently, the authorities can decide for themselves whether to keep a record of the "type, availability and geographical location" of network components and related equipment. They can then oblige the TC

network operators to provide information (Art. 12 (4) Framework Directive). In future, they will be obliged to keep such a record and all network operators will have to provide information.

Statement on Subsidiarity by the Commission

According to the Commission, action at EU level is necessary "in order to improve the conditions for the establishment and functioning of the internal market".

Policy Context

In 2010, the Commission defined its broadband objectives in the Communication "Europe 2020 – A strategy for smart, sustainable and inclusive growth" [COM(2010) 2020, see [cepPolicyBrief](#)] and confirmed it a few months later in the Communication "Digital Agenda for Europe" [COM(2010) 245; see [cepPolicyBrief](#)]. In October 2012, the Commission published the Communication "Single Market Act II - Together for new growth" [COM(2012) 573] in which the initiative under consideration formed one of twelve key actions to facilitate growth and employment and increase confidence in the internal market. The Netherlands, Romania, United Kingdom and Sweden lodged subsidiarity objections which the EP, Council and Commission must "take into account" (Art. 7 Subsidiarity Protocol).

Legislative Procedure

26 March 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

Leading Directorate General	DG Connect
Leading Committee of the EP:	Industry, Research and Energy, Rapporteur: Edit Herczog (S&D, HU)
Leading Federal Ministry:	Federal Ministry for Economy and Technology
Leading Committee of the BT:	Committee for Economy and Technology
Decision-making mode in the Council:	Qualified majority (Adoption by majority of Member States and with 260 of 352 votes; Germany: 29 votes)

Formalities

Legislative competence:	Art. 114 TFEU (Internal Market)
Type of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Procedure:	Art. 294 TFEU (Ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

The Commission wants to force not only operators of TC networks but also those of transport, energy and water networks to open up their physical infrastructure under "fair terms" to TC network operators, irrespective of whether a network operator has a dominant market position. This amounts to a two-pronged attack on the entrepreneurial freedom of the network operators. It is essential to differentiate firstly between the question of whether a dominant market position exists and secondly whether it is a TC network operator or another network operator.

The obligation of a TC network operator to grant access to physical infrastructure elements is only justified if the operator is operating a broadband network, and the accompanying physical infrastructure, in a defined geographical market and has an unassailable market position. The obligation of a TC network operator to grant access lowers market entry costs for alternative suppliers. If it is utilised, it will frequently result in TC network operators, who grant access, being unable to hold on to their monopoly thereby giving rise to competition *between* networks rather than *within* one network. The regulation of the more basic level of value added which currently predominates (principally: bit stream access) would logically then have to be withdrawn.

An obligation to grant access applicable to other network operators, such as those in the transport and energy sectors, cannot in any way be justified because TC network operators are not in competition with network operators in other industries per se. The latter cannot therefore misuse a dominant market position on the broadband market. The positive external effects of the deployment of broadband do not provide persuasive grounds for making this sort of blanket obligation to grant access applicable to non-TC network operators. Firstly, such effects cannot be reliably quantified: an obligation to grant access does not necessarily increase efficiency. Secondly, TC companies are often in a position to internalise the positive effects of broadband deployment. In this case, the positive effects are channelled into a willingness on the part of the TC network operators to invest and thus an obligation to grant access is unnecessary. Instead, preference should be given to voluntary cooperation between network operators and TC companies. The fact that numerous questions about liability remain unanswered also argues against an obligation to grant access. It is unclear, for example, who would be liable for loss incurred by broadband customers where broadband cables fail due to damage to gas pipes.

The establishment of a central national information point is appropriate. The information point facilitates cooperation between companies because it reduces the cost of acquiring the necessary information about the infrastructure suitable for deployment of broadband. **However, only monopolistic TC network operators should be obliged to disclose information to the information point** because it is only for these operators that an obligation to grant access can be justified. For other network operators, disclosure - and the granting of access - should be voluntary.

The obligation for house owners to install high-speed infrastructure, as well as access or concentration points, when building or renovating, is patronising. House owners choose their own fixtures and fittings according to their own preferences and future expectations. If they have a preference for fast internet connection in their house, or if this increases the subsequent sale or rental value of the house, they will carry out installation of in-building infrastructure on their own initiative. The Commission presumes to know the preferences of house owners better than they do themselves or is unwilling to accept their preferences. As a result, capital is channelled into providing something which delivers no corresponding added value to the owner. As a result, other investment or expenditure, which is more appropriate from the house-owner's point of view, is not carried out.

Legal Assessment

Legislative Competency

Art. 114 TFEU (Internal Market) is the appropriate legal basis.

Subsidiarity

Unproblematic.

Proportionality

A Regulation is disproportionate as a legal instrument. The Commission is aiming for a minimum level of harmonisation of national provisions; the Member States are expressly permitted to issue "more detailed" provisions. A Directive, which does more to preserve the autonomy of Member States, would suffice.

Other Areas of Compliance with EU Law

The obligation to equip new and majorly renovated buildings with in-building infrastructure and concentration points violates the right of ownership [Art. 17 Charter of Fundamental Rights of the EU (CFREU)]. The aim is to reduce the cost of broadband deployment and for this purpose the installation obligation is suitable because subsequent installation in the finished building would generally be more expensive. In view of this cost saving, the right, also contained in the Regulation, for all network operators to install their networks, at their own expense, into the private premises of a future subscriber, is no less extreme. Nevertheless, the installation obligation is unreasonable. Firstly, because the owner has to bear the costs of the installation; and secondly, the in-building infrastructure may remain unused if there is a lack of demand for broadband.

The obligation of companies to coordinate their construction works with network operators, on request, does interfere with entrepreneurial freedom (Art. 16 CFREU) and the right of ownership (Art. 17 CFREU). Such interference is, however, justified because the obligation is limited to companies who are carrying out publicly financed construction work and also because coordination does not increase the cost of the construction work or further delay it. The obligation to grant access also interferes with entrepreneurial freedom (Art. 16 CFREU) and the right of ownership (Art. 17 CFREU). This interference is justified, however, because access may be refused where there are objectively justifiable reasons and only has to be granted under "fair terms".

The right of TC network operators to connect their networks at their own expense into the private premises of future broadband users, if no in-building infrastructure is available, interferes, in the case of rented premises, with the right of ownership (Art. 17 CFREU) of the owner of the premises. This interference is however justified if one considers broadband deployment to be in the general public interest. The costs are borne by the network operator, there is no danger that the connection will remain unused and the network operator must "keep the interference with private property to a minimum", such as by reusing existing physical infrastructure.

Impact on German Law

The rights of shared use in the Telecommunications Act (TKG) must be extended even if they already exceed the current EU provisions. Although the TKG does contain a basic right for TC network operators to access federal A-roads and waterways (Sections 77c and 77d TKG), as well as to railway infrastructure predominantly in public ownership (Section 77e TKG), it must now be extended to include a right to share the use of the physical infrastructure of all network operators.

Conclusion

Only TC broadband network operators operating in a defined geographical market who have an unassailable market position should have to grant access to their physical infrastructure elements. An obligation to grant access applicable to operators of non-TC networks is not justifiable in any way. The creation of central national information points is appropriate; a duty of disclosure should, however, only apply to monopolistic TC network operators. The obligation for house owners, to install high-speed infrastructure when building or renovating, is patronising and violates the basic right of ownership. The right of TC network operators to connect their network inside the private premises of broadband users represents legitimate interference with the basic right of ownership. A Regulation is disproportionate as a legal instrument.