

Position

POSITION OF FEDIL – EUROPEAN ELECTRONIC COMMUNICATION CODE

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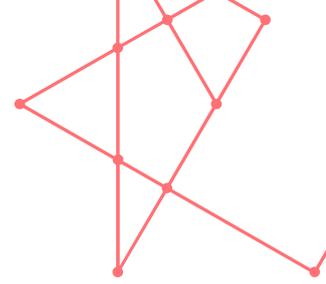
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This position paper constitutes FEDIL-ICT members' contribution to the



“Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communication Code (Recast)” published on 14th September 2016.

GENERAL COMMENTS

FEDIL-ICT generally supports the European Commission’s proposal for a general review of the regulatory framework for telecommunications at European level with the aim of promoting development of a genuine internal market for electronic communications in the Union and thus enhancing European Union (EU) competitiveness.

The position paper will focus primarily on the proposal for a Directive on the creation of an Electronic Communications Code (ECC) and on the proposal for a Regulation establishing the Body of European Regulators for Electronic Communications (BEREC) by making it a fully fledged agency with legal personality, both presented by the European Commission on September 14th 2016.

FEDIL-ICT understands the Commission’s objectives of making rules clearer and allowing stakeholders to better understand their rights and obligations and welcomes the EC proposal which aims at reducing the administrative burden and avoiding overregulation.

SPECIFIC COMMENTS

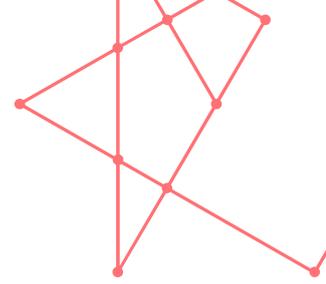
1. INCENTIVES FOR THE DEPLOYMENT AND ADOPTION OF VERY HIGH CAPACITY NETWORKS IN COMPETITIVE MARKETS

FEDIL-ICT values the clear definition of the regulatory objective to promote the generalisation of access and the deployment of high capacity connectivity, its adoption within the EU and its penetration into the market (Article 3).

FEDIL-ICT notes the importance of the new established criterion of investment in new broadband networks in parallel with competition and consumer protection.

PROVISIONS ON MARKET ANALYSIS PROCEDURES

FEDIL-ICT welcomes the extension of the maximum period of market review from three to five years and the shortening of the renewal maximum period of market analysis from three to one year, including a deadline of notification to the Commission of four months (Article 65 (5) (a)). We see this as a factor that will provide stability and predictability by allowing electronic communications operators to plan for the longer term and will endow National Regulatory Authorities (NRAs) with greater flexibility in the timetable of market analysis. Furthermore, this will leave NRAs the opportunity to reinforce other issues of importance that would require in-depth analysis with market participants. **Nevertheless, we would like to draw the Commission’s attention to the fact that this may lead to a longer period of regulation on markets that have become competitive meanwhile.**



PROVISIONS ON “DIGITAL EXCLUSION AREAS”

FEDIL-ICT is adamant that the principle of Technology Neutrality is fully embraced so that future communication solutions are cost effective, affordable, available, flexible and fit for purpose. Where appropriate, the provisions of the Code could be made clearer so that it “**neither imposes nor discriminates in favor of the use of a particular type of technology.**”

As regards the obligation of NRAs to carry out studies on the state of broadband networks and on investment plans throughout their national territory in order to enable them to take better account of local geographical specificities in market analysis introduced in Article 22¹, FEDIL-ICT would like to point out that, in the case of smaller Member States such as Luxembourg, where the question is not whether the coverage of the country will be reached but within what time frame and at what speed, this provision would add administrative burden for the national regulator. We nevertheless understand that this obligation is justified for larger Member States with large rural areas which currently do not enjoy the necessary coverage. However, we are concerned about the administrative burden that ensues and we would ask for a compromise on this subject in order to limit it. We propose that the Commission leave NRAs the possibility to carry out a geographical survey of the networks’ coverage according to national geographical specificities and to amend the text to this effect in paragraph 1 of this Article.

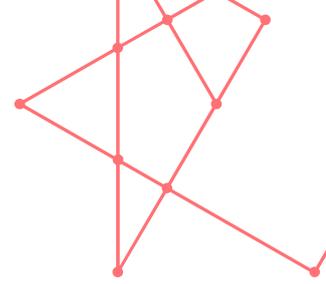
*“1. National regulatory authorities **may conduct** a geographical survey of the reach of electronic communications networks (...) and shall update it at least every three years **according to national geographical specificities.**”*

NRAs should only have the possibility to identify “digital exclusion areas”, where no operator or public authority has deployed, or is planning to deploy, very high capacity network, or have not modernized their historical network to reach a performance level of at least 100 Mbps downstream, nor do they intend to do so as introduced in Article 22 (2). This means a possibility to publish designated “digital exclusion areas” and to organize a call for expressions of interest in this field with a view to promoting the deployment of very high capacity networks in under-served areas and seeking investors as stipulated in paragraph 3 of the same article. FEDIL-ICT also suggests that this tendering procedure is only launched when the need for coverage is clearly established by NRAs in the case of an identified digital exclusion area, again depending on national geographical specificities. In this context, FEDIL-ICT would like to mention the Luxembourgish law on electronic communications networks and services of 27 February 2011. Indeed, Article 63 of Title 9^[1] of that law stipulates that the call for tender for the supply of universal service shall only be launched where the NRA finds that all or part of universal service is not or is no longer sufficiently or adequately insured. FEDIL-ICT proposes to amend the text in this sense.

PROVISIONS ON CALCULATION OF TERMINATION RATES

Article 73 (1) and (5) introduces a process at EU level aiming at determining a binding methodology for fixing fixed and mobile voice call termination rates and creating a capping mechanism for termination rates at EU level, with the purpose of easing administrative burden on NRAs, enabling them to concentrate their efforts on the analysis of most complex broadband markets.

In FEDIL-ICT’s opinion, this provision leads to the retention of a pure Long-Run Incremental Cost (LRIC) orientation for determination of termination rates, which does not allow for fair cost recovery insofar as it leads to wholesale



prices which are artificially below the actual costs borne by operators.

We believe that the level of detail proposed by the Commission for the calculation of termination rates is not justified and that a more balanced approach (such as price squeeze testing) would be more appropriate. Moreover, the fact of mentioning the amount prescribed in the tariff as stipulated in paragraph 4 does not reflect the reality of the costs and the dynamics of the market evolution.

2. SPECTRUM MANAGEMENT

FEDIL-ICT welcomes the Commission's proposal for the promotion of efficient and effective use of radio spectrum through the introduction of processes to increase consistency, transparency and predictability of the modalities for granting and renewing spectrum rights in Article 45. We particularly welcome the introduction of a mechanism allowing the temporary alternative use of harmonized radio frequencies and the promotion of a shared spectrum use as well as the simplification of spectrum trading and leasing process.

FEDIL-ICT also highlights the need to provide adequate protection of the incumbent service providers on which many consumers and commercial activities depend. This is particularly the case for the preservation of the provision of critical services or services that cannot be provided by other means, or for the promotion of an efficient usage of the spectrum resource.

PROVISIONS ON DURATION OF RIGHTS

FEDIL-ICT acknowledges the introduction of a new minimum long-term license duration in Article 49 (2). This will provide some regulatory predictability and a better legal certainty for business and investment planning, however FEDIL-ICT questions the financial modalities that will be linked to this provision.

PROVISIONS ON SMALL-AREA WIRELESS ACCESS POINTS

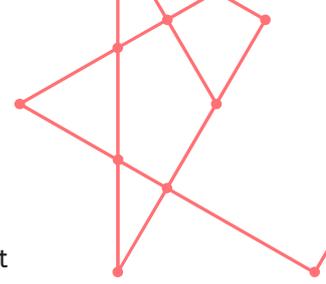
In addition, FEDIL-ICT would like to underline that the provision of small-area wireless access points (small cell), indeed, facilitates the deployment of very dense networks at European level, but, it is important to specify that implementation costs remain high for operators. Therefore, these devices do not represent an economic opportunity. (Article 56 (1)).

PROVISIONS ON GENERAL AUTHORISATION TO THE DETRIMENT OF INDIVIDUAL AUTHORISATION: ARTICLE 46

The Commission's proposal will improve the general authorisation regime to the detriment of the concept of individual authorisation. This is a big concern for the development of future networks (quality of service, trend of data, constraint of connectivity, ...). It limits the scope for individual rights of use that have been granted and which will continue to provide the best guarantee for investments in next generation networks. It is a necessity for high quality and affordable networks.

PROVISIONS ON SPECTRUM SHARING

We believe that sharing of active or passive network elements should remain



an option with regard to commercial interests while preserving competition. However, we do recognise that spectrum sharing ought to always take into account the protection of existing services that are essential or unique against harmful interference.

“USE IT OR LOSE IT” PRINCIPLE

FEDIL-ICT wishes to expand on the principle of “use it or lose it” proposed by the Commission in order to establish conditions for the use of the radio spectrum defining the level of use required under Article 47 (1) and Article 30 (1). Indeed, when long-term business plans are drawn up by operators, they indicate the use of certain frequencies whose rights of use have been granted to operators, depending on the take-up of services and the amount of data consumed by end users. Certain frequencies are therefore not immediately used after the implementation of a network but as the use of mobile data increases, the willingness to use them is clearly established. The Commission’s proposal, by this principle, wouldn’t leave the possibility for operators to dispose of those frequencies in time. In Luxembourg, operators have the possibility of obtaining licenses for frequencies which are not necessarily used from the beginning of the granting of rights. FEDIL-ICT wishes this flexibility to be maintained or that the criteria for loss of frequencies are clearly defined.

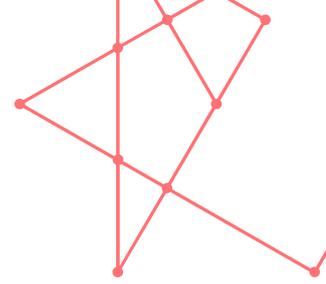
3. UNIVERSAL SERVICE

PROVISION ON AFFORDABILITY OF UNIVERSAL SERVICE

FEDIL-ICT notes the « affordability » of the universal service for all end-users in Article 79 (1) but also in Article 80 (2) for low-incomes or special social needs end-users. We understand, from the text, that operators will have to be able to propose two levels of different “affordable” tariffs depending on the end-user category, i.e. all end-users or end-users identified as having low-income or special social needs. We believe that the text lacks precision regarding the definition of « affordability ». We ask the Commission to provide the necessary clarifications for the proper understanding of the term “affordable”.

In addition, we understand, from Article 85, that an undertaking which is subject to an unjustified burden, which can be determined by NRA according to the method of calculation proposed in Article 84, may request to benefit from the compensation mechanism for the net costs as calculated, under conditions of transparency and from public funds. FEDIL-ICT supports this amendment.

Furthermore, the update and the modernisation of the Universal Service Directive also stipulates the removal of the EU-wide mandatory inclusion of universal services inherited from the scope of the universal service regime (such as public phones and directories, phone inquiry services), and we note that Article 82 states that « *Member States may continue to ensure the availability or affordability of other services than functional internet access as defined in Article 79 (2), and voice communication services at a fixed location that were in force prior to [set date] if the need for such service is duly demonstrated in the light of national circumstances.* ». In FEDIL-ICT’s opinion, this goes against the objective pursued by the Commission of updating the universal service directive and we propose to remove this flexibility from the text.



4. END-USER PROTECTION SERVICES

INCLUSION OF OTT SERVICES IN THE REGULATORY FRAMEWORK TO INTRODUCE A « LEVEL PLAYING FIELD »

FEDIL-ICT welcomes the review of the definition of « electronic communications services » which now includes OTT services (Article 2, paragraph 4, 5, 6). However, the proposed text does not mention the resulting regulatory obligations for OTTs. Indeed, in the case of market analysis or periodic statistics to be provided to regulators, as OTTs are not covered by the spectrum, they are not required to provide such information to regulators and, they will not be in the future. FEDIL-ICT asks the Commission to take a step further with regards to its initial proposal by applying the same regulatory obligations to OTTs. Indeed, considering statistics of established players, these include the activities of telecom and cable operators. However, OTTs activities are not taken into account when they take over a significant market share, notably in voice communications. For example, the Luxembourg Institute of Regulation (ILR) mentioned that, due to OTTs, fixed voice communications have decreased by 8,1%.

5. GOVERNANCE

FEDIL-ICT notes that the EC proposal is, on the one hand, in favor of a transfer of decision-making power from national regulators to the European Executive, whereas, on the other hand, the Commission gives more flexibility to NRAs, notably, to choose the « remedies » they may impose on operators (Articles 5, 6, 7 and 8).

FEDIL-ICT draws the Commission's attention to the fact that the Luxembourgish national regulator has always fulfilled its role and this proposal risks to introduce a certain distance between market players and the Luxembourg Institute of Regulation. Following the Commission's revision, the notification a new market player has to make when it wishes to settle in Luxembourg will now be given to BEREC rather than to the national regulator. Consequently, it will be necessary for the national regulator to approach BEREC in order to be informed of the new players that have declared themselves to BEREC. The transfer of decision-making power is also to be noted in the case of radio frequency spectrum management in Article 46, where the Commission is empowered to adopt binding measures in order to ensure coherence within the different types of licensing regimes and in Article 47 where the Commission is empowered to take enforcement measures to ensure consistency with regard to certain conditions, such as criteria for definition and measurement of coverage obligations, which importance is reinforced in the framework of spectrum efficiency. FEDIL-ICT considers that this will add an additional stage during authorisation procedures and create a distance between operators and NRAs. We are therefore not in favor of these provisions.

FOOTNOTES

1. <http://legilux.public.lu/eli/etat/leg/loi/2011/02/27/n1/jo>