



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 27 May 2013

10054/13

**Interinstitutional File:
2013/0080 (COD)**

**TELECOM 134
COMPET 355
CODEC 1203
INST 254
PARLNAT 121**

COVER NOTE

from: UK House of Commons
date of receipt: 22 May 2013
to: The President of the Council of the European Union

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

- Opinion on the application of the Principles of Subsidiarity and Proportionality¹
[doc.7999/13 TELECOM 60 COMPET 177 CODEC 686
+ ADD1 +ADD2 + ADD3 + ADD4 + ADD5 + ADD6 COM(2013) 147 final]

Delegations will find attached for information a copy of the above opinion.

¹ The translation can be found at the Interparliamentary EU information exchange site IPEX at the following address : <http://www.ipex.eu/IPEXL-WEB/search.do>



HOUSE OF COMMONS

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22 May 2013

Dear Mr President,

EUROPEAN UNION DOCUMENT NO. 7999/13, A DRAFT REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON MEASURES TO REDUCE THE COST OF DEPLOYING HIGH-SPEED ELECTRONIC COMMUNICATIONS NETWORKS

On 21 May 2013, the House of Commons of the United Kingdom Parliament resolved as follows:

That this House considers that the draft Regulation of the European Parliament and of the Council on measures to reduce the cost of deploying high-speed electronic communication networks (European Union Document No. 7999/13) does not comply with the principle of subsidiarity for the reasons set out in the annex to Chapter One of the Second Report of the European Scrutiny Committee (HC 83-ii) and, in accordance with Article 6 of Protocol No. 2 of the Treaty on the Functioning of the European Union on the application of the principles of subsidiarity and proportionality, instructs the Clerk of the House to forward this reasoned opinion to the Presidents of the European Institutions.

I enclose the relevant extract of the report.

Yours sincerely,
Robert Rogers

Sir Robert Rogers KCB, Clerk of the House of Commons
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Reasoned Opinion of the House of Commons

Submitted to the Presidents of the European Parliament, the Council and the Commission, pursuant to Article 6 of Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality.

concerning

a Draft Regulation of the European Parliament and of the Council on measures to reduce the cost of deploying high speed electronic communications networks¹

Treaty framework for appraising compliance with subsidiarity

1. The principle of subsidiarity is born of the wish to ensure that decisions are taken as closely as possible to the citizens of the EU. It is defined in Article 5(3) TEU:

“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”

2. The EU institutions must ensure “constant respect”² for the principle of subsidiarity as laid down in Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality.

3. Accordingly, the Commission must consult widely before proposing legislative acts; and such consultations are to take into account regional and local dimensions where necessary.³

4. By virtue of Article 5 of Protocol (No 2), “any draft legislative act should contain a detailed statement” making it possible to appraise its compliance with the principles of subsidiarity and proportionality. This statement should contain:

- some assessment of the proposal’s financial impact;
- in the case of a Directive, some assessment of the proposal’s implications for national and, where necessary, regional legislation; and

¹ COM(13) 147.

² Article 1 of Protocol (No. 2).

³ Article 2 of Protocol (No. 2).

- qualitative and, wherever possible, quantitative substantiation of the reasons “for concluding that a Union objective can be better achieved at Union level”.

The detailed statement should also demonstrate an awareness of the need for any burden, whether financial or administrative, falling upon the EU, national governments, regional or local authorities, economic operators and citizens, to be minimised and to be commensurate with the objective to be achieved.

5. By virtue of Articles 5(3) and 12(b) TEU national parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in Protocol (No. 2), namely the reasoned opinion procedure.

Previous Protocol on the application of the principle of subsidiarity and proportionality

6. The previous Protocol on the application of the principle of subsidiarity and proportionality, attached to the Treaty of Amsterdam, provided helpful guidance on how the principle of subsidiarity was to be applied. This guidance remains a relevant indicator of compliance with subsidiarity. The Commission has confirmed it continues to use the Amsterdam Protocol as a guideline for assessing conformity and recommends that others do.⁴

“For Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States’ action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community.

“The following guidelines should be used in examining whether the abovementioned condition is fulfilled:

- the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States;
- actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States’ interests;
- action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.”⁵

⁴ See, respectively, pp.2 and 3 of the 2010 and 2011 Reports on Subsidiarity and Proportionality (COM(10) 547 and COM(11) 344).

⁵ Article 5.

“The form of Community action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community shall legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures”.

Proposed legislation

Purpose

7. The purpose of the draft Regulation is to reduce the cost and enhance the efficiency of deploying high-speed electronic communications networks (defined as being capable of delivering broadband speeds of at least 30 Mbps)⁶ to improve the conditions for the functioning of the digital internal market.⁷

8. It aims to incentivise the roll-out of high-speed broadband by reducing network deployment inefficiencies and costs (mainly of civil engineering works) through four main actions:

- more intensive usage of existing physical infrastructures (for example, ducts, conduits, manholes, cabinets, poles, masts, antennae, towers and other supporting constructions);
- enhanced cross-sector co-operation and transparency in relation to planned civil works, enabling co-deployment and increasing legal and investment certainty;
- streamlining permit granting procedures; and
- removing obstacles to high-speedy-ready in-building infrastructure (newly constructed buildings and major renovations).⁸

Operation

9. The draft Regulation is based on Article 114 TFEU which creates a competence for the EU to adopt measures “for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market”.⁹

10. It proposes that:

⁶ Article 2 of the draft Directive, see note 1.

⁷ The Commission’s explanatory memorandum, p.2, para 1.1, “Objections of the Proposal”. Also, the draft Regulation, page 14, Recital 1 and Article 1 and the Commission’s impact assessment, p.2, para 1).

⁸ The Commission’s explanatory memorandum, p.2, para 1.1 “Objectives of the Proposal”; see also “Objectives, p.3 of the Commission’s summary of the impact assessment.

⁹ The Commission relies on previous case law confirming that this Article confers on EU legislature has discretion as to the harmonisation technique to be used (explanatory memorandum, p.6, para 3.1 “Legal Basis”). The EU has previously legislated to “foster local network infrastructure deployment, through unbundling the local loop” (explanatory memorandum, p.4, “General Context”).

- network operators (which extends to undertakings providing electricity, gas, water, sewage and transport networks) should meet reasonable requests for access to their physical infrastructure for the deployment of high-speed broadband and to provide such access under fair terms and conditions.¹⁰ This is subject to certain permitted grounds of refusal and a dispute resolution process;¹¹
- minimum information (on location, size and ownership of infrastructure and planned civil works) should be provided to network operators from a single information point by public bodies and other operators in accordance with a prescribed process, including dispute resolution;¹²
- network operators must accede to reasonable requests from other operators for the coordination of civil works, partially or fully funded by public money, on transparent, non-discriminatory terms;¹³
- network providers should be able to access a single information point for the viewing, submitting and granting of permits and that “competent authorities” should make timely decisions on permits subject to a maximum six-month limit (if a deadline is not provided in national or EU legislation);¹⁴
- newly constructed buildings, as well as those undergoing major renovation, should be equipped with in-built superfast broadband infrastructure, and that newly constructed multi-dwelling units (i.e. flats or office blocks) must also have a single access point connecting to the in-built infrastructure;¹⁵ and
- network providers should be able to terminate their infrastructure at the access point (referred to in Article 7) and then to access the in-built network.¹⁶

Subsidiarity

11. The Commission advances three main reasons to justify EU action.¹⁷ It says EU action is necessary to:

- remove barriers to the functioning of the Single Market caused by the patchwork of rules at national and sub-national levels, which impedes the further development and growth of European companies, has a negative impact on European competitiveness, and creates barriers to invest and operate cross-border, and thus obstructs the

¹⁰ Draft Regulation, p.24, Article 3, “Access to physical infrastructure”; explanatory memorandum, p.12 “Structure of proposal”.

¹¹ The National Regulatory Authority (Ofcom, in the case of the UK) will act as the dispute resolution body for the purposes of Article 3 and 4 and also the single information point for the purposes of Articles 4 and 6, unless the Member States appoint another body.

¹² Draft Regulation, p.25 and 26, Article 4; explanatory memorandum, p.12 “Structure of Proposal”.

¹³ Draft Regulation, p.27, Article 5, “Co-ordination of civil works”; explanatory memorandum, p.13.

¹⁴ Draft Regulation, pp.27 and 28 Article 6 “Permit granting”; explanatory memorandum, p.13.

¹⁵ Draft Regulation, p.28, Article 7 “In-building equipment”; explanatory memorandum, p.13.

¹⁶ Draft Regulation, pp.28 and 29; explanatory memorandum, p.13.

¹⁷ Explanatory memorandum, p.7, para 3.2. “Subsidiarity”; summary of the Impact assessment, para 2.

freedom to provide electronic communications services and networks as guaranteed under existing EU legislation;

- stimulate ubiquitous broadband coverage, which is a pre-condition for the development of the Digital Single Market, thus contributing to the removal of an important obstacle to the completion of the Single Market; and
- realise the significant untapped potential of cost-reduction and facilitation of broadband rollout.

Aspects of the Regulation which do not comply with the principle of subsidiarity

12. The House of Commons considers that the draft Regulation of the European Parliament and of the Council on measures to reduce the cost of deploying high speed electronic communications networks does not comply either with the procedural obligations imposed on the Commission by Protocol (No 2) or with the substantive principle of subsidiarity in the following respects.

i) Failure to comply with essential procedural requirements

13. By virtue of Article 2 of Protocol (No. 2) “Before proposing legislative acts, the Commission shall consult widely”. The House of Commons considers that this requirement has not been met; although the Commission consulted last year on a number of measures to reduce the cost of communications infrastructure deployment, it did not consult on the option of the draft Regulation.

14. By virtue of Article 5 of Protocol (No 2) “any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality”. The requirement for the detailed statement to be within the draft legislative act implies that it should be contained in the Commission’s explanatory memorandum, which forms part of the draft legislative act and which, importantly, is translated into all official languages of the EU. The fact that it is translated into all official languages of the EU allows the detailed statement to be appraised for compliance with subsidiarity (and proportionality) in all Member States of the EU, in conformity with Article 5 of Protocol (No 2). This is to be contrasted with the Commission’s impact assessment, which is not contained within a draft legislative act, and which is not translated into all the official languages of the EU.

15. The presumption in the Treaty on European Union¹⁸ is that decisions should be taken as closely as possible to the EU citizen. A departure from this presumption should not be taken for granted but justified with sufficient detail and clarity that EU citizens and their elected representatives can understand the qualitative and quantitative reasons leading to a conclusion that “a Union objective can be better achieved at union level”, as required by Article 5 of Protocol (No 2). The onus rests on the EU institution which proposes the legislation to satisfy these requirements.

¹⁸ Article 5.

16. The Commission's explanatory memorandum and the recitals to the draft Regulation do set out the justification for EU action. However, for the reasons given below, we do not consider that the Commission has provided sufficient qualitative and quantitative substantiation in the explanatory memorandum of the necessity for action at EU level. This omission, the House of Commons submits, is a failure on behalf of the Commission to comply with essential procedural requirements in Article 5 of Protocol (No 2).

ii) Failure to comply with the principle of subsidiarity

17. The first limb of the subsidiarity test provides that the EU may only act "if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States".¹⁹ The Commission asserts that "the objectives of the proposed action aiming at facilitating the deployment of physical infrastructures suitable for high-speed electronic communications networks across the Union cannot be sufficiently achieved by Member States".²⁰

18. The Commission accepts that some Member States have adopted measures intended to reduce the costs of broadband roll-out, but that those practices remain "scarce and scattered", are divergent and so hinder the development of a single market for the deployment of physical infrastructures for high-speed broadband. These Member State initiatives are not considered by the Commission to be "holistic" — they are not cross-sectoral, nor do they address all stages of the broadband roll-out process.²¹ The Commission further comments, that if action were left to Member States (the so-called "business as usual" option", paragraph 24 below) it would not "significantly reduce the costs of broadband roll-out all over Europe" nor "have a strong effect on investment".²² The Commission continues: "As only a very limited impact on investment is anticipated throughout the EU, its spill-over effects would also be limited. In addition, it is very likely that the current fragmentation of rules in the EU will increase. Given the limited impact on investment, the social and environmental effects would be marginal, too".²³

19. The House of Commons considers, however, that the measures supported by the Regulation — infrastructure sharing, information provision, street works coordination and in-built broadband equipment in buildings — would all be implemented at a local level. There is little prospect of these measures having a cross-border market effect, as the issues the Regulation seeks to address are not applicable to the core network that crosses Member State borders. It considers that the Regulation's intended aim — to support superfast broadband rollout by lowering the cost of civil engineering works — would be best achieved by action at Member State level.

20. The Commission's assertion of the necessity of EU-level action does not, in the House of Commons' view, take full account of current and prospective national action to streamline and lower the cost of superfast broadband deployment and achieve EU high-speed broadband

¹⁹ See Article 5(3) TEU.

²⁰ Recital 32 of the proposed Regulation.

²¹ Proposed Regulation, p.15, Recital 8.

²² The summary of the Impact assessment, p.5.

²³ As above.

coverage targets (see paragraph 22 below). In the UK, a package of measures is currently being implemented to sweep away red tape around planning, street works, access to land, and power supplies. The proposed Regulation does, in fact, contain a number of elements that reflect current UK priorities to promote broadband rollout, for example encouraging infrastructure sharing between telecoms providers and electricity suppliers, and streamlining the permit scheme process when carrying out street works.

21. The second limb of the subsidiarity test requires evidence that the objective of reducing the cost of deploying high-speed electronic communications networks can be better achieved, by reason of its scale or effects, by action at EU level. The Commission suggests that EU action is justified because different regulatory approaches may give rise to regulatory and administrative fragmentation which can have a negative impact on the internal market.

22. The Commission also suggests that the proposed Regulation is necessary to achieve fast and extensive roll-out of broadband in line with targets set out in the Digital Agenda 2010 Communication endorsed by Member States:

- by 2013, 100% basic broadband coverage for all EU households by 2013; and
- by 2020, access to speeds of above 30Mbps for all households and internet connection of above 100Mbps for 50% of households.²⁴

23. It also cites the Conclusions of the European Council of 13–14 December 2012²⁵ as calling for EU-level action to provide better high-speed broadband coverage, including reducing its cost.²⁶ However, the House of Commons considers that it is far from clear that the European Council contemplated that legislation of this nature would be necessary or desirable to meet the headline target. The Conclusions simply state “As regards the Single Market Act II, the European Council calls on the Commission to present all key proposals by the spring of 2013” and the Single Market Act II Communication²⁷ itself only refers to the Commission proposing “common rules which would enable operators to exploit fully the cost-reduction potential in employing broadband”. Moreover, as indicated above, we think it is too soon to conclude that EU level action by way of Regulation is necessarily the only, or the best, way of achieving the headline targets.

24. The Commission’s impact assessment discusses a number of options in considering which would best achieve these targets. The first option leaves action entirely to Member States (“the business as usual option”) with the other four involving increasing degrees of EU-level action, ranging from guidance and recommendations through to harmonising legislation. After further analysis in the impact assessment, the Commission has chosen option 3, a

²⁴ Proposed Regulation, p.15, Recital 2.

²⁵ Conclusions of the European Council, EU CO 205/12
<http://register.consilium.europa.eu/pdf/en/12/st00/st00205.en12.pdf>

²⁶ Proposed Regulation, p.15, Recital 2 and impact assessment, p.2.

²⁷ Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions :Single Market Act II <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52012DC0573:EN:NOT>

Regulation, arguing that it is best placed to deliver a comprehensive solution across different Member States relatively quickly.²⁸

25. The House of Commons questions the Commission's choice of a Regulation as the appropriate legal instrument, as this would enforce a prescriptive approach to broadband deployment, no matter what the current policies, regulations and structures are in a particular location. On infrastructure sharing, for example, network operators would be required, not just encouraged, to meet requests from telecoms providers to provide access to their infrastructure. We examine in more detail below (paragraphs 26 and 30) the undesirable consequences of such inflexible, mandated infrastructure sharing in relation to both costs of business and disincentivising broadband coverage in remote areas.

26. The Commission is proposing the option of a Regulation principally on the grounds that the measures in the Regulation could achieve 20%–30% savings in the civil engineering costs of superfast broadband deployment.²⁹ Specifically, the Commission states that these savings will be mainly due to significant capital expenditure savings on network investments (through infrastructure sharing, co-deployment and faster rollout). It also cites the potential additional revenues for network operators who share their infrastructure, arguing that this would outweigh costs. We are concerned that the Commission's estimate is predicated on assumptions about the level of network deployment that would occur in shared passive infrastructure – namely that 25% of new deployment would occur in shared infrastructure and that 75% of the civil engineering costs would be saved. These assumptions need to be explained better and justified in more detail. While infrastructure sharing could potentially lead to some capital expenditure savings, the impact assessment does not fully take into account the knock-on effects of the measure. On the issue of implementation and administrative costs incurred by Member States, for example, the impact assessment acknowledges that they are difficult to quantify and would vary significantly between different Member States; however, it then argues that the costs would be outweighed by the wider capital savings and potential synergies. The nature and extent of these administrative costs, in both the UK and in other Member States, also needs to be better substantiated. For example, it is not clear whether these would be “one-off” or repeated.

27. To summarise on this issue of costs, the House of Commons considers the proposed Regulation will not achieve its goals to lower the cost of civil engineering works, but instead place burdens on business. These burdens are apparent particularly as regards wayleave regimes (as discussed below) and information requirements in respect of civil works and infrastructure sharing. We are also concerned about burdens on government and regulators. In our view, the prospect of such burdens will potentially stifle progress while the Regulation is being implemented.

28. The House of Commons is also concerned about other disadvantages of EU-level action. Far from a desire to create an environment of legal, and, therefore, investment certainty, conflicts with local level requirements could cause confusion in Member States. For example,

²⁸ Summary of the Impact assessment, p.7.

²⁹ Summary of the Impact assessment, pp.5 and 6.

the current language of the Regulation does not provide certainty on a number of issues, for example, the references to broadband infrastructure in new buildings. Introducing uncertainty into a market where return on investment is already precarious is unlikely to lead to additional investment. The effect of the measures on the UK wayleave regime is another area of uncertainty. “Wayleaves” are payments made by utilities companies to landowners to install and maintain equipment on private property. UK wayleave regimes for communications and electricity, for example, are different to some other European countries where landowners do not enjoy rights of compensation for allowing infrastructure. It is unclear how this issue would be resolved if sharing were mandated, without major legislative changes to the regime for electric line wayleaves and the likely increase in burdens and costs on the public and private sectors. Issues around wayleaves and private property rights would also arise when implementing the plans for in-built broadband infrastructure in new buildings.

29. The Commission also argues that the Regulation’s harmonisation measures would be of particular benefit to smaller operators (SMEs) by lowering barriers to entry, increasing competitiveness and productivity and reducing fragmentation in the Digital Single Market.³⁰ However, the House of Commons notes that the proposed Regulation would require all telecoms companies to make their passive infrastructure available for sharing on request. Ofcom, the UK national telecoms regulator, already has the power to require passive infrastructure sharing on specific request, but subject to a proportionality test — i.e. whether the request is objectively justified and would not distort competition. The new Regulation reverses this presumption, in that small telecoms providers would be required to open their infrastructure to larger competitors. Under the Regulation, adverse effect on competition would not be a permitted ground for refused access. This would override the benefits claimed of increased “competitiveness” and access for SMEs to the market.

30. The House of Commons questions a further benefit of EU-level action identified by the Commission: that a higher broadband coverage would be achieved through the measures proposed in the Regulation. We consider that there is a risk that mandated infrastructure sharing underpinned by law could in fact act as a disincentive to network investment in the most hard-to-reach areas — precisely the places currently lacking in superfast broadband access — because of the risk of ‘free riding’ on existing infrastructure. There is also a risk that co-operation and investment in broadband infrastructure would stall while the Regulation was being drafted, and implemented in Member States, and that the measures could ultimately disincentivise investment in the hardest to reach areas.

31. The Commission maintains that compliance with subsidiarity has been ensured by drafting measures in the Regulation in a way that sufficiently respects Member States’ autonomy and their need for flexibility.³¹ One example given is how Member States may designate whatever bodies they choose as “competent bodies” for the tasks assigned in Articles 3, 4 and 6; the National Regulatory Authority being only a “default” suggestion. However, this approach, in our view, would entail significant costs for individual Member

³⁰ Summary of the impact assessment, pp.5 and 6.

³¹ Explanatory memorandum, pp.8 and 9, para 3.2 “Subsidiarity”.

States and their national regulatory authorities. In the vast majority of Member States, a new body to oversee dispute resolution and manage the single point of contact for information provision would have to be created, or an existing body (like the national telecoms regulator) greatly expanded. The Commission does not sufficiently recognise the significance of the setup and running costs for such a body.

32. In summary, the House of Commons believes that the measures proposed should be taken at national level but that if the Commission persists in EU-level action, the measures should be modified and contained in a Directive rather than a Regulation.

Conclusion

33. For these reasons the House of Commons considers this proposal does not comply with the principle of subsidiarity.