

Initial appraisal of a European Commission Impact Assessment

European Commission proposal on a European single market for electronic communications and to achieve a Connected Continent

Impact Assessment (SWD (2013) 331, SWD (2013) 332(summary)) of a Commission proposal 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 (COM (2013) 627)

• Background

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's Impact Assessment (IA) accompanying the above-mentioned proposal, submitted on 11 September 2013.

Telecommunications networks and services are the backbone of the information society. The Digital Agenda for Europe¹, a flagship initiative of the EU's Europe 2020 Strategy, stresses the importance of ICT and network connectivity, and defines a set of ambitious targets to ensure that Europe taps the benefits of the digital economy.

The Digital Single Market contains a number of specific goals regarding broadband coverage, namely the entire EU to be covered by broadband above 30 Mbps by 2020 and 50 % of the EU to subscribe to broadband above 100 Mbps by 2020.

The 2013 Spring European Council conclusions stressed the importance of the digital single market for growth. The present initiative aims at creating a genuine single market for electronic communications.

• Problem definition

The main problem in need of EU action, identified by the IA, is a fragmentation into distinct national markets of the market for telecommunications, leading to additional compliance and transaction costs for operators, and facilitating market concentration. Regulatory fragmentation is also said to generate legal uncertainty and sometimes over-regulation.

Four sources of the problem are discussed in the IA:

¹ COM(2010)245.

The first problem driver is that, despite the attempt of the Authorisation Directive 2002/20/EC to reduced administrative formalities for authorization, national authorisation regimes require individual notification of activities in nearly all Member States. Moreover, regulatory obligations related to the provision of services are implemented by national regulatory authorities in very divergent ways. Secondly, according to the IA, there is a lack of coordination in spectrum assignments and regulatory uncertainty as to the availability of frequencies. This severely hinders the roll-out of next generation wireless networks. Thirdly, the IA mentions a lack of pan-European virtual network access and inputs (wholesale products which allow the provision of services using the network of another operator) with consistent service interoperability levels, hindering operators in the development of new business models. Finally, the IA states that market fragmentation is also detrimental for consumers, some visible examples of the absence of an unfinished Single Market being high costs of roaming and international calls, blocking or throttling of services, barriers to switching and uneven levels of consumer protection.

Comments: The IA explains how consumers and telecom operators, in different sectors, are affected by regulatory fragmentation, but does not clarify how these described regulatory shortcomings affect supply and demand for cross-border services, as requested by the IA Board. Neither does the IA explain what the effect of other factors, like the economic crisis, cultural diversity or divergence in wider regulatory issues, could be on the non-realisation of the Single Market for Telecommunications.

No prediction or estimation is given of how the baseline scenario (and the problems described) would evolve should no further action be taken at this moment.

• Objectives of the legislative proposal

The *general* objective of the Regulation is to 'complete the Single Market for electronic communication services, to ensure that: i) citizens and business have the right to access electronic communications services irrespective of from where they are provided in the Union, without being hampered by cross-border restrictions and unjustified additional costs, and ii) providers of electronic communication services and networks have the right to operate their networks and provide services irrespective of where the company is established or its customers are situated in the Union.'

This general objective is to be achieved by the following *specific* objectives:

- to enable unrestricted EU-wide provision of service by **removing obstacles** in the **authorisation** regime and as regards rules applicable to service provision;
- to ensure greater consistency in **spectrum assignment** and deployment conditions in order to allow wireless broadband operators to access spectrum across the EU on the basis of predictable rules and coordinated conditions;
- to ensure consistent European **wholesale inputs** to enable electronic communication service providers to offer their services across the Single Market;
- to enable consumers to freely enjoy electronic communication services seamlessly across the Union, and establish a common **high level of protection** to the benefit of both consumers and cross-border telecoms undertakings, providing the necessary **legal certainty** to develop new services and business models.

Comments: The IA does not define any concrete *operational* objectives. This makes ex post evaluation of the effect of the legislation, if implemented, very difficult. The indicators proposed for monitoring the application of the proposed measures are related to the specific objectives, but could have been better aligned to a clear set of operational objectives.

Furthermore, there is considerable confusion as to what the objective of the proposal actually is. While the text of the proposed Regulation indeed claims to 'complete' the single market (Art 1(1)), the executive summary sheet of the IA nevertheless states that the objective is to 'enable' the completion of that market; the explanatory memorandum of the proposal states that the objective is to 'move towards' a single market, and the Communication refers to 'further steps...needed to complete the single telecoms market'.

• Range of options considered

The 'no policy change' option is not explicitly assessed. The Commission simply refers to the 'baseline scenario' under the heading 'Problem description'.

The three following policy options are identified by the Commission.

Option 1 – Gradual regulatory harmonisation fostering the integration of the internal market. Under this option, the tools provided in the existing regulatory framework for electronic communications would be used to address the identified problems (specific recommendations, decisions to address inconsistencies in ex ante regulation by national regulatory authorities). The framework could also be reinforced by the review of its component parts, notably the universal service provisions in the Framework Directive, and the Roaming Regulation. This gradual harmonisation would be complemented by a reinforcement of coordination and cooperation measures such as the exchange of best practice or voluntary commitments.

Option 2 – A single legislative instrument complementing the regulatory framework with a view to completing the Single Market for electronic communications supported by enhanced EU coordination.

This instrument, most appropriately a Regulation, would tackle the four remaining bottlenecks hindering the achievement of the Single Market:

- a single EU authorisation for operators providing services in more than one Member State;
- a consistent and coordinated approach to spectrum assignment;
- the provision of harmonised inputs for fixed networks: availability and definition of common technical specifications for interoperable European virtual broadband access products or pan-European inputs (such as virtual unbundling or bitstream access and enhanced interface leased lines);
- a single e-communications space for end-users with a common high level of consumer protection, by eliminating price differentials, fully harmonising rules concerning contracts, transparency, quality of service and traffic management, and strengthening the obligations for operators related to switching and number portability;
- reinforcing the stability and leadership of BEREC (professional chairman for the board of regulators).

Option 2 is the Commission's preferred option.

Option 3 – A single legislative instrument complementing the regulatory framework with a view to completing the Single Market for electronic communications with a single EU regulator ensuring full coordination.

The measures under Option 3 would be largely the same as under Option 2, but the governance structure (based on mutual recognition) would be replaced by a **single EU regulator** with responsibility for supervision of the provision of electronic communications services by European service providers, flanking and coordinating the action of national regulators that will remain competent for national issues. The single EU regulator would also receive substantive powers in radio spectrum management and would be given competences to ensure the consistent application of consumer protection rules.

Comments: The IA does not justify why it is only considering this limited range of options, of which the second one is clearly the option preferred by the Commission, and receiving the most weight and attention throughout the IA. For example, the IA does not include the option of a comprehensive review of the framework for electronic communications, although the Commission is obliged to perform such a review periodically and the EP has called for the Commission to initiate it.

Moreover, the options are very broadly described. In all of its three opinions on earlier drafts of this IA, the Commission's IA Board has criticised the not sufficiently detailed description of the content of the policy options, in particular of the preferred option. The IA also fails to explain how exactly the proposed options differ from the status quo under the existing regulatory framework. For example, it should have made clear how exactly the proposed standardised virtual access products differ from the existing access remedies.

• **Scope of the Impact Assessment**

Not only is the content of the preferred option not described in sufficient detail, the actual assessment of the impact of the proposal seems to be largely limited to a broad analysis of the benefits of the single market for telecommunications. Although the IA provides a brief overview of the expected contribution of the three retained options to the achievement of the policy goals (using 0, +, ++ and +++), this does not replace a proper assessment of the expected impacts of the concrete measures proposed.

Under the heading 'General impacts of the Single Market for Electronic Communications', the Commission examines the effects on the creation of a Single Telecoms Market on telecoms markets (impacts on the demand and on the supply side), effects on other sectors and on the ecosystem, the effects on different Member States, the impacts on GDP, social impacts (employment and consumer surplus), and administrative impacts.

The IA Board has repeatedly called for 'a more comprehensive assessment of the direct and indirect impacts stemming from the different options under consideration', 'by presenting sounder quantitative evidence'. The IA should also 'consider the risk of unintended consequences that may arise.' Moreover, the IA should 'deepen its assessment of the overall impact on investment incentives and on the structure of the European telecommunications sector'. These requests have not been (fully) followed up.

The IA is silent on possible impacts of the policy options on relations with third countries.

Many of the key elements of the proposal will be decided via delegated or implementing acts. The Commission does not indicate for which of these measures it will carry out separate impact assessments.

• **SME test and Competitiveness proofing**

No specific assessment of the expected impacts on SMEs (the SME test) is made.

Although the Commission has undertaken to provide a specific test on competitiveness in all cases where certain sectors are concerned², no such competitiveness proofing has been

² SEC(2012)91, Operational guidance for assessing impacts on sectoral competitiveness within the Commission IA system. A competitiveness proofing toolkit for use in IA.

undertaken in this case, examining the expected impacts on sectoral competitiveness and on competitiveness of European enterprises vis-à-vis third country enterprises.

- **Quality of data, research and analysis**

The Commission indicates the IA makes use of data from two external studies: a study entitled 'Steps towards a truly internal market for e-communication', written by Ecorys and TU Delft, and a study 'The socio-economic impact of bandwidth' by Analysys Mason and Tech4i2.

The IA provides a mainly qualitative analysis of the expected benefits of the Single Market for electronic communications. The Commission warns that 'as the creation on a Single Telecoms Market for electronic communications is a proposal for which no comparable precedent exists, many of the expected impacts can be circumscribed merely in a conceptual rather than in a quantitative manner' (IA, p. 62).

An exception to the qualitative and descriptive character of the IA is the estimate put forward for possible GDP growth as a consequence of opening electronic communications national markets, namely a total of between 0,52 and 0,89 per cent (or 110 billion euro) per year. This figure seems to be taken from the Ecorys study, but is an estimation based on the theoretical full realisation of the Single Market for telecommunications, rather than on the measures proposed.

- **Subsidiarity / proportionality**

The proposal is based on Article 114 TFEU, which allows for the adoption of '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'.

Subsidiarity is said to be respected as 'Member States neither have the competence, the ability nor the incentive to change the current regulatory landscape to achieve an effective Telecoms Single Market' and 'EU intervention will be limited to cases that enable operators who so wish wider choice of services provided on a cross-border basis of a high level of protection' (IA p. 45).

The Commission's IA Board requested the originating DG CNECT 'to better justify the proposals in terms of the subsidiarity principle, in particular given the proposed increased harmonisation in the area of spectrum policy, authorisations, and standardised EU access products'. In response, the IA elaborates on how the EU measures foreseen will not limit the national margin of policy assessment more than is necessary to achieve Single Market goals.

According to the Commission, the concrete measures are proportionate in the sense that they 'will enable the relevant stakeholders to exploit synergies of a large Single Market and reduce inefficiencies in their operations and investments'. (IA, p. 46)

- **Budgetary or public finance implications**

The Commission states that the proposal would have no implications for the EU budget. In particular, there would be no impact on either the number of establishment plan posts or the EU financial contribution to the BEREC Office, although the Commission is proposing adding a full-time independent professional Chair to the BEREC Office establishment.

According to the Commission, 'no significant additional financial resources from Member States are expected', and 'increases in human resources in respect consultations at the occasion of spectrum authorisation procedures would be marginal' (IA, p. 79). However, no attempt is made to calculate these additional costs for Member States' authorities.

- **Stakeholder consultation**

In the preparation of this IA, no systematic public consultation was undertaken. At the request of the Commission's IA Board, the Commission acknowledges that 'due to time constraints a full (12 weeks) public consultation could not be organised' (IA, p. 15).

The Commission's Impact Assessment Guidelines³ impose on the authors of Commission IAs the obligation to ensure that all affected stakeholders are engaged, and that they can comment on a clear problem definition, subsidiarity analysis, description of the possible options and their impacts. The contributions should be analysed and reported fully in the IA report.

Annex I to the IA provides a 'detailed overview of consultation of stakeholders and other EU institutions'. This is a list of public events, organised by the Commission, including a brief overview, per specific objective, of the main stakeholder positions. However, it is clear that the Commission's self-imposed minimum standard for stakeholder consultation is not met in this case.

In its last (third) opinion on the IA, the Commission's IA Board requested the Commission to better incorporate stakeholders' views and, where those views are divergent or conflicting, to explain how their concerns have been taken into account and/or balanced against each other. This request does not seem to have been followed-up.

- **Monitoring and evaluation**

The IA provides for some examples of indicators that could be used for the monitoring of the application of the proposed Regulation. These are linked to the specific objectives. As stated above, the IA does not identify any concrete operational objectives.

The Commission undertakes to evaluate, on the basis of annual reports, BEREC's reporting and the Digital Agenda Scoreboard, the impact of the proposed measures, with a view to proposing necessary adjustments (IA, p. 95).

- **Commission Impact Assessment Board**

The Commission's internal quality control body, the Impact Assessment Board, issued three very critical opinions in total on the impact assessment. The first two, dating from 19 July 2013 and 29 August 2013 respectively, were overall 'negative', meaning that the author DG, DG CNECT, twice had to resubmit an improved draft impact assessment.

The IA Board's third opinion, from 6 September 2013, although no longer formally 'negative' is still very critical. Since the IA was not revised after the third opinion, the Board's comments and criticism remain entirely valid.

'- The IA should further improve the problem definition and clarify the overall objective by better explaining how the list of regulatory shortcomings has been identified and how these affect supply and demand for cross-border services.

³ SEC(2009)92.

- The IA should better present the detailed measures contained in the preferred option, in full alignment with the proposal.
- The IA should improve the assessment of impacts, presenting in a more focused way the impact of the proposed changes to Roaming III on different categories of operators (and their investments). It should also better present its assessment of the overall impact on investment incentives arising from the introduction of standard European access products.
- The IA should better incorporate stakeholders' views.'

- **Coherence between the Commission's legislative proposal and IA**

The broad and vague character of the preferred policy option makes an analysis of the coherence between the IA and the concrete elements of the legislative proposal very difficult. The IA would have benefitted from a clear alignment of options and proposed policy measures.

- **Committee follow-up**

The following is an indicative list of elements where the IA could be usefully complemented:

- Analysis of the claimed economic gains, given the discrepancy between the measures proposed in the Ecorys report as leading to those gains, and the more limited set of measures proposed by the Commission;
- Effect of the preferred option on investment incentives;
- SME test;
- Impacts of the proposed measures on the 'European passport';
- Effects / costs for national authorities of the new governance structure.

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This note, prepared by the Ex-Ante Impact Assessment Unit for the Committee on Industry, Research and Energy (ITRE), analyses whether the principal criteria laid down in the Commission's own Impact Assessment Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

This document is also available on the internet at:

<http://www.europarl.europa.eu/committees/en/studies.html>

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