

16.12.16

Decision
Of the Bundesrat

Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Recast)

COM(2016) 590 final; Council doc. 12252/16

In its 952nd session on 16th December 2016 the Bundesrat adopted the following Opinion pursuant to §§ 3 and 5, Act on Cooperation between the Federation and the Federal States in European Union Affairs (EUZBLG):

Fundamental issues

1. The Bundesrat welcomes the Commission's inclusion in its 14th September 2016 Connectivity Package of a proposal to recast the legal framework for telecommunications to take account of recent and future developments in the telecommunications and broadband market. The Bundesrat considers the proposal that has been submitted to constitute a good basis for the forthcoming discussion process at the European level. The Bundesrat takes the view that it is also appropriate to combine the provisions previously incorporated into four Directives (Framework Directive; Authorisation Directive; Access Directive; Universal Services Directive) in a single piece of legislation. In this context the Bundesrat would however like to see more concise drafting of the Code.
2. The Bundesrat considers it essential that the successful principles enshrined in existing legislation be maintained in the recast of the legal framework for telecommunications; these existing provisions should only be restricted, modified or supplemented if this is justified in the light of market developments. The underlying principle in this process must be to ensure effective competition, which has made a decisive contribution to the development of telecommunications and broadband markets.

3. The Bundesrat therefore welcomes the fact that the new legal framework essentially adheres to the principle of regulation of operators with “significant market power” (SMP regulation), as well upholding competition as a fundamental principle of regulation. Making the SMP provisions less stringent would in the Bundesrat’s opinion only be justified if this did not jeopardize competition.
4. The Bundesrat also supports the new Code’s aim of making a significant contribution to the establishment and utilisation of “very high capacity” networks (VHC networks). At the same time, the Bundesrat emphasises its view that there should be no priority or subordinate objectives in the legal framework, now or in the future.
5. On the whole the Bundesrat is concerned that the new Code will not give rise to greater simplification, as is intended, but will instead lead to more regulation and render the procedures more complex.

Objectives

6. The Bundesrat welcomes the introduction of a new objective in Article 3, Sub-section 2, Letter a, namely promotion of broad-based access to and utilisation of very high capacity data connections (VHC networks). However the Bundesrat considers that there is a need to clarify that the four objectives indicated in Article 3, Sub-section 2 are of equal importance, as these objectives are not only connected but in many cases inter-dependent. For example, competition should be seen as the key factor driving innovation and investment in infrastructure in Europe (cf. BR Official Document 145/15 (Decision)).

Right of veto for the Commission concerning remedies (for market failures)

7. The Bundesrat is opposed to the right of veto for the Commission (together with GEREK; “double lock procedure”) envisaged in Article 33, Sub-section 5, Letter c, as this would constrain the fundamental autonomy of national regulatory authorities to an unacceptable degree.

Frequency policy

8. The Bundesrat is furthermore also opposed to the proposed broad extension of the Commission's rights to intervene in particular in the light of the numerous individual provisions foreseen for all general and specific aspects of frequency allocation procedures.

The mandatory decision-making powers foreseen in particular in Articles 38, 45, 46, 47, 51, 53 and 54, with GEREK involvement, would prevent Member States from freely choosing the form and means of regulation. It is however crucial for Member States to be able to decide freely, pursuant to the wording of Article 288 TFEU, which is a primary law provision; the level and detail of regulation envisaged by the Commission would therefore not be compatible with the legal instrument proposed in this case, namely a Directive.

9. In the Bundesrat's view, the Commission proposals on frequency policy do not reduce bureaucracy or lead to a more rapid and efficient allocation procedure, but would instead cause considerable delays and make regulatory decisions significantly more complex.

By giving the Commission the authority to have the final say on decisions relating to frequency allocation, the proposed configuration of the peer review process described in Article 35 would lead to quasi permanent legal and expert oversight of national regulatory authorities, including Germany's constitutionally enshrined cooperation between the Federation and the federal states on matters pertaining to frequency regulation.

10. In its Opinion on the proposal on utilisation of the 470 - 790 MHz frequency band in the European Union, the Bundesrat has already rejected stipulation of far-reaching coverage requirements by the Commission concerning utilisation of this frequency band (cf. BR Official Document 60/16 (Decision)).

The Bundesrat therefore reiterates its view, as elucidated in that Opinion, that stipulating coverage requirements is a matter for national procedures and must be defined on the basis of national market situations.

11. The Bundesrat is opposed specifically to undifferentiated determination of frequency allocations for a period of at least 25 years pursuant to Article 49, Sub-section 2. The Bundesrat cannot identify any basis that would justify such a blanket stipulation, nor any indication of the scrutiny of the impact on market access, competition, innovation incentives and future technical developments that would be required before introducing such a measure.
12. Similarly the Bundesrat cannot agree to powers being granted to the Commission pursuant to Article 53 that would empower the Commission, with the argument of harmonisation across the European Union, to arbitrarily reduce the utilisation period for frequency bands that have already been allocated. A decision of this kind would lead to a high degree of legal uncertainty for market participants and potential claims for compensation from rights holders.
13. The Bundesrat takes the view that the proposed Directive, contrary to the Commission's intentions, would have rather negative effects on states in the EU that have played a "pioneering role" in frequency spectrum allocation. In its Opinion on the Commission Communication on a Digital Single Market Strategy for Europe (BR-Official Document 212/15 (Decision)), the Bundesrat has already expressed its view that national administration of radio frequencies has proved to be an efficient means to maintain a balance between economic, social and cultural aspects. The Bundesrat continues to hold that Germany's rapid and forward-looking allocation of frequencies functions as an incentive for other Member States to meet the Commission's ambitious goals for the implementation schedule.
14. The Commission's proposals on frequency policy therefore in the Bundesrat's view extend far beyond the requisite level of regulation.

The Bundesrat is of the opinion that the new provisions on frequency policy should be limited to stipulation of a timeframe for implementation deadlines within the EU, establishment of substantiated minimum requirements for frequency allocation procedures, and realisation of the associated implementing provisions and implementation-related powers for the Commission.

Access regulation

15. Market analysis procedure (Article 65): the Bundesrat welcomes the establishment of the three criteria test as the fundamental basis for systematic regulation of matters pertaining to competition law. However, the Bundesrat takes an extremely critical view of the exemptions from the SMP regulation envisaged by the Commission. The Bundesrat for example would question whether VHC networks with been complementary expansion as part of a co-investment scheme involving more than one network operator should be exempt from existing access obligations for third parties, in as much as (virtual) access to the network is guaranteed before the new expansion was implemented. The Bundesrat doubts that curtailing competition in this manner would produce additional incentives for investments in new networks. Extending market analysis cycles to up to 5 (+ 1) years appears acceptable, but a more precise description is needed of the scope for national regulatory authorities to respond to market developments by initiating a new market analysis at an early stage.

Evaluating market failure solely from the perspective of end-user markets is not a sufficient response in the Bundesrat's view; market failure should (also) continue to be related to an appraisal of wholesale markets.

16. Access to civil engineering (Articles 70 and 71): in the Bundesrat's view such access is to be welcomed, however for systematic reasons it should be restricted to SMP firms. There should not however be any stipulation or recommendation of such a primary wholesale product. Instead, alternative wholesale products should be available on the basis of the infrastructure and market-related preconditions in each Member States.
17. Symmetrical obligations (Article 59): The Bundesrat considers that introducing additional symmetrical obligations would constitute an unacceptable paradigm shift compared with the provisions to date, which worked on the postulate that regulation is essentially only required for operators with significant market power. In the Bundesrat's view the proposed approach would lead to more regulation, would reduce market competition and impede investments by competitors. Furthermore, the EU Directive on Broadband Cost Reduction (transposed in Germany in the Bill on Facilitation of the Development of Digital High-Speed Networks (DigiNetzG)) has

already introduced additional symmetrical obligations; the market impact of these measures should first be observed. The Bundesrat is therefore opposed to the introduction of further symmetrical obligations.

18. Transnational markets (Articles 63 and 64): The Bundesrat does not in principle see any need for scrutiny and regulation of transnational markets. This would also risk devaluing national regulation. However, the Bundesrat requests the Commission to examine whether it might be advisable to foresee “an arbitrator function” for GEREK should problems arise at the borders between Member States.
19. Geographical surveys (Article 22): The Bundesrat acknowledges the Commission’s efforts to address the problem of “blank spots” in broadband network expansion and to tackle the risk entailed in overbuilding of existing high-performance networks. The Bundesrat however points out that the legal framework for telecommunications falls within the ambit of competition law and that it is not a suitable policy area to take action through state aids or other support, let alone for state planning of broadband network expansion. In addition, the instrument of geographical surveys would involve significant bureaucratic effort, without this producing any tangible benefits in the spirit of the proclaimed objectives. This measure could not be viewed as a viable incentive mechanism if national regulatory authorities were to be obliged in future to conduct geographical surveys of network operators’ intentions to invest in network infrastructure, with powers to impose penalties if false information were provided; instead, there is good reason to fear it would trigger increased reluctance to make new investments. The Bundesrat therefore proposes that these provisions be deleted and requests the Commission to examine alternative instruments, compatible with the legal framework for telecommunications, in order to attain this goal. Furthermore, the Bundesrat also calls for improved linkage of regulatory and state aid regimes.
20. Pricing flexibility for SMP operators (Article 72): the Bundesrat requests the Commission to substantiate why special provisions, deviating from the three criteria test, are purportedly justified.

21. Regulatory treatment of new network elements (Article 74): the Bundesrat considers that this provision (tantamount to a “regulatory holiday”) would have a significant detrimental impact on competition. This provision should therefore be deleted.
22. Migration from legacy networks (Article 78): the Bundesrat considers that it is very prudent to ensure transparency and national regulatory authorities' involvement in the migration process, as envisaged in the proposal. However the same regulatory provisions must apply for the new networks as for legacy networks on the basis of the three criteria test.

GEREK

23. The Bundesrat welcomes the proposed reinforcement of national regulatory authorities' independence and the proposed harmonisation of their remit.
24. The Bundesrat considers that the organisational form of GEREK to date, as an “umbrella” structure for the Regulatory Council, consisting of representatives of national regulatory authorities and the GEREK Bureau, has proved its worth. This structure ensures that GEREK functions as a grouping of national regulatory authorities to harmonise EU-wide provisions on telecommunications regulation, rather than being an EU Agency attached to the Commission with its own sovereign rights. The Bundesrat views this structure as providing the best guarantee of national regulatory authorities' independence.
25. The Bundesrat is therefore opposed to the establishment envisaged in the proposed Regulation for a “GEREK” Agency with its own legal identity and an expanded remit, and is also opposed to areas of responsibility previously within the ambit of national regulatory authorities being transferred to such an Agency. The Bundesrat also has particular concerns pertaining to the realm of frequency regulation, where it is envisaged that the new Agency would be granted substantial powers in all issues relating to grant and allocation of frequencies, even for detailed provisions.
26. The Bundesrat notes that the Commission has not yet provided a substantiated justification of the need for this type of comprehensive centralisation of frequency regulation. Instead, only general catch-all expressions such as

“harmonisation”, “uniform implementation of the legal framework”, “shortcomings in the existing institutional structure”, “a lack of coherence” “efficient oversight”, “greater influence”, “cross-border aspects”, “centralised register-keeping” are cited by way of justification.

27. The Bundesrat is opposed to the proposal that national regulatory authorities be subordinated to stipulations drawn up by a European Agency and the Commission; this would mean a loss of independence for national regulatory authorities.
28. The Bundesrat also takes a similar view of centralisation of frequency administration. The possible advantages of central coordination would be outweighed by cumbersome and bureaucratic harmonisation procedures, which, given the average level of development in the EU, would slow down or even prevent future developments in frequency utilisation.
29. The Bundesrat therefore vigorously rejects centralisation of GEREK in an Agency as envisaged in the proposed Regulation, and likewise rejects the proposal that such an Agency would handle frequency administration.
30. Instead the Bundesrat advocates independent regulatory authorities and frequency administration at Member State level. The Bundesrat underlines in this context that the existing GEREK structure and frequency administration system have, generally speaking, proved their worth and that their basic structure should in essence be maintained. The Bundesrat would however welcome measures to further strengthen GEREK (including improved staffing levels) within the framework of its existing structure and competences.

Regulation of Over-The-Top Players (OTT)

31. The Bundesrat broadly welcomes the Commission’s appraisal that OTT communications services are to be categorised as electronic communications services, as well as noting its awareness in this context of the fundamentally different market modalities for OTT communications services, which are often provided in return for a non-monetary consideration, for example access to personal data or end users’ willingness to view advertising.

Particularly in the light of the pronounced innovative potential of OTT communications services, the Bundesrat takes the view that telecommunications-specific regulatory obligations cannot be transposed verbatim to the structures of new OTT services. The Bundesrat however considers it advisable to ensure equal treatment of OTT communications services that constitute functional substitutes for telecommunications services, particularly with regard to data protection and consumer protection.

32. The Bundesrat shares the Commission's assessment that a future-oriented definition of electronic communications services cannot be based solely on technical parameters but must instead adopt a functional approach. However, the Bundesrat has considerable doubts as to whether the distinction proposed by the Commission between number-dependent and number-non-dependent interpersonal communications services can provide a practicable and enduring basis for further development of the legal framework for electronic communications in the long term, as the question of whether a national or international numbering resource is used, pursuant to ITU-E.164 stipulations, is primarily a technical parameter, which, for example, does not provide any information about the substitutability of an electronic communications services from an end-user perspective.
33. Against the backdrop of this extremely complex challenge, the Bundesrat notes that the Commission has on many points taken the right decision about the general orientation of policy, for example concerning measures to guarantee interoperability if there is a genuine threat to connectivity, or effective access to emergency services. With regard to other points in the proposed Directive, the Bundesrat however has a number of doubts as to whether in the long term the legislation will be able to reflect the foreseeable dynamics of innovation, as, for example, social networks are explicitly not categorised as interpersonal communications services, although further integration of communications services in this sphere appears possible.
34. Against this backdrop and in the light of the fact that there does not at present appear to be sufficient clarity as to the overlapping impact for example of the forthcoming ePrivacy Directive and the Data Protection Basic Regulation in terms of important aspects of inter-personal communications services such as data protection and consumer protection, the Bundesrat proposes that a structure that is fundamentally open to developments should be adopted in

categorising OTT communications services. To that end, the Electronic Communications Code should grant GEREK authority to use a replacement identifier or another such suitable identifier, as could for example be stipulated in the relevant “GEREK Guidelines for Electronic Communication”; this could create a basis that would offer scope for development and for a demand-driven approach, also concerning categorisation of OTT communications services.

35. The Bundesrat takes the view that this kind of forward-looking structure would in the long term afford greater scope to take a demand-driven approach in striving to attain an equal focus on data protection, data security and consumer services in classical telecommunications services and OTT communications services. Furthermore the Bundesrat also draws attention to its Resolution “Adapting the Legal Framework to the Digital Age in the Telecommunication Sector – Legal Security for Messenger Services, Location-Based Services and other new business models” of 22nd April 2016 (BR-Official Document 88/16 (Decision)).

Universal Services

36. The Bundesrat welcomes the moves to modernise provisions on Universal services by moving away from services that are no longer up-to-date, through a focus on language-based communication services and a functional Internet access service.
37. In the spirit of harmonisation of conditions across the EU, the Bundesrat takes the view that the sole definition mechanism foreseen for the Member States to establish arrangements for basic broadband coverage must not lead to a disproportionately differentiated approach in devising the policy on basic broadband coverage. The Bundesrat therefore requests that steps be taken in the further stages of the procedure to ensure that policy details devised by individual Member States are set within an EU-wide framework of provisions and procedures.
38. The Bundesrat also advocates steps to ensure that the successful model of market-driven broadband expansion in Germany, linked to market-compatible funding models developed for Germany to provide coverage for “blank spots” in broadband provision, is not thwarted by an inexpedient design of basic broadband coverage provision focused on universal services.

Consumer Protection

39. The Bundesrat broadly welcomes greater harmonisation of Europe-wide regulations on consumer protection.
40. The Bundesrat points out that particular attention has already been paid to sector-specific consumer protection in the telecommunications sector in Germany in recent years.
41. The Bundesrat notes that a high level of sector-specific consumer protection is guaranteed in Germany and that operators in the telecommunications industry have adapted to the associated regulations and procedures on a regular basis, expending considerable effort to do so.
42. The Bundesrat therefore requests that measures be taken to ensure as much continuity and legal certainty as possible in carrying over the existing German sector-specific consumer protection framework into the new EU-wide harmonised sector-specific regulatory framework that is to be established.
43. The Bundesrat reserves the right to address and comment on the proposed Directive again on the basis of progress in deliberations at the European level.

Direct transmission to the Commission

44. The Bundesrat shall transmit this Opinion directly to the Commission.