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CEDEC Position

Proposal for a regulation on measures to reduce the cost of deploying high-speed electronic communications networks

On 26th March 2013, the European Commission published a proposal for a regulation on measures to reduce the cost of deploying high-speed electronic communications networks. The roll-out of broadband, an objective for the 2020 strategy of the European Commission is part of the Digital Agenda initiative of the European Union. CEDEC explicitly welcomes this initiative for an accelerated and cost-effective roll-out of broadband for all European citizens.

The proposal aims at higher efficiency and lower-cost through cooperation with other infrastructure and stipulates a number of rights and obligations for actors with regard to the use and extension of the infrastructure.

A central element of the regulation is the disclosure and mapping of existing physical infrastructure (pipes, masts, ducts, inspection chambers, manholes, cabinets, buildings or entries to buildings, antenna installations, towers and poles and their associated facilities) and their usage for an increased coordination of civil works, an acceleration of permitting granting procedures as well as the equipment of buildings with infrastructure for high-speed communication networks.

Providers of physical infrastructure for electricity, gas, district heating, water and sewage water and public lighting are directly concerned from this regulation. The Commission estimates that savings from cooperation can amount to 20-30% of investments needed for the deployment of broadband.

CEDEC is convinced that cost-efficiencies can be achieved by cooperation between energy distribution system operators (DSOs) and undertakings authorised to provide electronic communications networks. In fact, collaborations and joint usage of passive infrastructure between these actors are already common practice in many Member States.

For their core business DSOs need reliable and specific forms of telecom networks. These are sometimes provided by telecom providers and in many cases as a DSO owned network – a 'third' network besides electricity and gas networks. Reasons for this are the particular specifications of the network (re-routing demands, period of duration signal etc.) and the high level of security related to the transport of electricity and gas as well as data privacy. Most telecom companies cannot or have no interest in fulfilling these specifications. Moreover, in many cases, DSOs also provide telecommunication services and very actively pursue efficiencies through synergies. Also, municipalities are active in pursuing a 'one-dig-only' situation by stimulation and coordination.

Notwithstanding, some concerns remain about detailed prescriptions of the draft regulation.

General concerns:

- Principle of subsidiarity: The implementation of the proposal will take place on local level (information and infrastructure sharing, civil work coordination obligations for buildings). Moreover, in some Member States the penetration grade of broadband is already really high (e.g. in the Netherlands >85%) and the new legislation will probably not contribute to any further roll-out. Therefore, as the situation is widely differing, some flexibility should be left to Member States for the implementation.
- Principle of proportionality → Protection of ownership rights for DSOs needs to be ensured. Especially in situations where large nation-wide operating telecommunication companies work with small, local operated utilities.
- Security of supply is the main responsibility of DSOs and must be ensured at all times. Network maintenance and operation cannot be compromised in any way.
- Clarity about responsibilities and costs must be established and recognised by all parties. Regulation practices between DSOs and telecommunication companies are different, even within the same country.
- Reciprocity of rules: Telecommunication companies deploying infrastructure for broadband should also be obliged to grant access and/or information to DSOs about their infrastructure according to the provisions of this regulation.

Specific articles

Art. 3: Access to existing physical infrastructure

Right for network operators to offer access to its physical infrastructure. Obligation to meet reasonable requests for access to infrastructure under fair terms and conditions, including price.

CEDEC agrees that to a certain extent efficiency can be achieved between DSO and telecommunications and vice versa by a joint usage of infrastructure. Nevertheless, it has to be ensured that such collaboration will not impede security of supply for basic commodities, such as electricity, gas and district heating, which is the main responsibility for DSOs. Therefore, the conditions under which such collaboration can take place; have to be defined in detail, as well as criteria for the refusal of access.

In general, a clarification should be added to Art. 3 that work related to a shared use of physical infrastructure can only be carried out by the respective network operator or subcontracted by it. Undertakings requesting to share infrastructure cannot systematically be permitted direct access to the physical infrastructure of a network operator, as the latter is single-handedly responsible for the operability of his network for his own specific purposes.

Moreover, the reasonableness of the measures with regard to indirect impact on the efficiency or expertise of the network operator should be considered as a criterion for exemption.

Art 3 (2): The timeline of 1 month to refuse the access to its physical infrastructure is too short. It should be lengthened to at least 2 months in order to give the network operator sufficient time to evaluate the request and provide an answer, which is legally sound and supported by a stringent legal groundwork.

Art. 3(3) d: The term *"serious"* should be deleted. When there is a direct contact between the facilities for high-speed networks and the media for e.g. gas or drinking water transported in the physical infrastructure, it should be possible to deny access to the infrastructure where it cannot be guaranteed that these media will not be damaged.

Art. 3(3) f new: As additional exemption, contractual arrangements between a network operator and their customers should be added, if they have been concluded for reasons of exclusivity. For example, data processing centres frequently request exclusivity for security reasons.

Art. 3(3) g new: The protection of *"operating and business secrets"* should be added to the criteria for exemptions, as in Article 4.

Art. 3(3) h new: As laid down in Article 4 (10) on national exemptions from the obligation to provide information is also congruently applicable for the provisions in Article 3. If existing physical infrastructures are not considered technically suitable, in the context of notification at the single information point, it appears sensible and consistent to exempt the owner of the infrastructure not only from the obligation to provide information, but also from the obligation to provide access according to Article 3. Otherwise the network operators would be forced to provide written justification for the refusal to provide access to such infrastructures in each individual case.

Art 3.5: When verifying the price determination as provided for in paragraph 5, all expenses on the part of the infrastructure granting access – including those for investments already made, planning measures, additional investments to enable access, etc. – are always to be taken into account.

Art 4: *Transparency concerning physical infrastructure*

Right for information on existing physical infrastructure and planned works.

Greater transparency regarding existing infrastructure that can be used for broadband deployment is welcome. However, confidentiality of this information remains a key determinant in this process. Information about certain existing infrastructure is highly sensitive and should only be disclosed to legitimate parties.

Art. 4 (1): As specified in **Recital 18**, no new and additional mapping obligations should be imposed on Member States. Therefore, it should be clarified in Art 4 (1) that only information which is already available in electronic format should have to be transferred to the single information point.

It must be noted that "size" as a measurement for the physical size of an infrastructure is not specific enough to be used in judging suitability for the deployment of broadband. A further specification such as e.g. diameter, length, amplitude, empty space would be necessary. However, due to the multitude of different types of physical infrastructures, it is hardly possible to establish a uniform size designation. Therefore, this information should be avoided.

Additionally, it might be useful to subject only those infrastructures that belong to physical infrastructure operators that have actual spare capacity to the obligation to register information. This would ensure that the corresponding national register would not be overloaded with information on physical infrastructures that would be ultimately unable to contribute to the deployment of broadband.

It should be supplemented to state that when obtaining information from the single information point, applicants must prove their legitimate interest by demonstrating ownership of a specific expansion project (including applications for calls to tender). In addition, it must be made clear that access to the information is to be limited exclusively to the geographical area of the expansion project mentioned above. Furthermore, the provisions should also state that this information is to be treated as confidential, used exclusively for the intended purpose and may not be passed on either internally or externally by undertakings requesting access.

Art. 4 (2&3): The deadlines stipulated in the draft regulation appear too short. The minimum information provided via a single information point can essentially only represent the initial information for a basic, estimated network plan that usually features long lead times up to the ultimate implementation (financing negotiations, approvals, permits, etc.). Considering this and the fact that this information cannot replace specific negotiations with the infrastructure owner, it is clear that a cycle for the renewal of this information of less than one year is not appropriate and is not a common practice in the regulatory frameworks which operate in yearly terms even up to 3 - 5 years.

As a matter of principle, Member States should have the discretion to set the deadlines given in the regulation according to the specific conditions and regulations at national level.

Infrastructures for municipal energy and water supply are sensitive security-relevant facilities and information relating to them therefore requires high levels of protection. On this subject, we would particularly like to highlight the protection of critical national infrastructures. In the European Programme for Critical Infrastructure Protection, the EU Commission gives high priority to risk prevention. Undertakings must identify the possible risks and be able to protect their infrastructures correspondingly. This also includes the protection of information relating to these infrastructures. Undertakings must therefore be able to decide for themselves which infrastructures and what information require protection and should not be registered at a single information point or made available to undertakings authorised to provide electronic communications networks.

Art. 4 (4&5): The paragraphs should clarify that only undertakings with a legitimate interest and on the basis of concrete plans for broadband deployment shall have the right to request information about the physical infrastructure. It should be stipulated that request can only be made with approval of and through the procedures of official authorities such as the national regulatory authority or another authority authorised by the State. Moreover, all costs related to the in-site survey should be carried by the party requesting the information.

Art 4 (6): The obligation to provide a list of on-going or planned construction work generates considerable expense and efforts for all undertakings. It also does not stipulate whether the construction work allows for joint efforts. The deadline of 6 months before the submission of the

permit application seems unrealistic as usually the specific information is not yet available at this point in time.

The exemptions provided in Art. 3 (3) and Art. 4 (10) should be applied to Art. 4(6) correspondingly.

Art 4 (9): The conciliation procedure must not influence the originally intended timing for the planning, permission or construction of the physical network infrastructure. Otherwise it would no longer be possible to plan such construction work to schedule. A supplement should therefore be added stating that a conciliation procedure shall have no suspensory effect and shall establish no claims for damages or similar to the benefit of the undertaking authorised to provide electronic communications networks.

Art. 5. *Coordination of civil works*

All network operators have the right to negotiate agreements regarding coordination of civil works. (Partially) public undertakings have the obligation to provide electronic communications networks coordination agreements for civil works provided this does not entail any additional costs.

CEDEC welcomes the proposal for a coordinated civil works financed by public means to achieve economic and social benefits.

Art 5(2): It should be provided that undertakings authorised to provide electronic communications networks are to contribute appropriately to the costs of the construction work and in particular any additional costs – including delays, etc. – are to be borne by the undertaking seeking the collaboration. Moreover, the obligation should be limited to those construction projects that are objectively suited for the deployment of high-speed networks. The dispute settlement should not delay planning, permitting or construction works.

Public bodies like municipalities should have a specific role in coordinating civil works.

Art. 6 Permit granting

Access to information about the conditions and procedures applicable for permit granting for civil works via a single information point.

While we welcome the initiative for fast permitting procedures, which are in the general interest, separate permit procedures for construction work for building high-speed networks are established, to which other infrastructure construction work has no claim. Legally the responsibility for permit applications and the regulations regarding the involvement of other authorities are laid out in the relevant legal norms. These proven regulations would each have to be supplemented with a lex specialis relating solely to construction work for high-speed networks. It is to be feared that introducing an additional central authority will increase administrative costs rather than reduce them.

At this point it should be made clear that construction work under Article 5 is not covered by the provisions of Article 6, as this would inevitably lead to separate doubled permit procedures both for the part for high-speed networks and for the other construction work for physical infrastructures.

Art 7: In building equipment

All newly constructed buildings at the end-user's location, including elements under joint ownership shall be equipped with a high-speed ready in-building physical infrastructure, up to the network termination points.

Increased efforts regarding the equipment of building´s at the end-user's location with high-speed-ready infrastructure are fundamentally welcome as they facilitate further deployment with fibre-optic access up to the end users.

Art 9: Competent bodies

Art 9(2): The general regulations on dissuasive sanctions imperatively require a national basis. In particular, it remains unclear what sanctions may be possible in this instance and the definition of these sanctions should be left to the Member States.

Extensive sanction possibilities for physical infrastructure operators that are not concerned with the construction of high-speed networks are legally questionable for reasons of principle.

CEDEC Background information

CEDEC represents the interests of local and regional energy companies.

CEDEC represents 1500 companies with a total turnover of 120 billion Euros, serving 85 million electricity and gas customers & connections, with more than 350.000 employees. These predominantly medium-sized local and regional energy companies have developed activities as electricity and heat generators, electricity and gas distribution grid & metering operators and energy (services) suppliers.

The wide range of services provided by local utility companies is reliable, environmentally compatible and affordable for the consumer. Through their high investments, they make a significant contribution to local and regional economic development.