

Statement

Digital Single Market Package

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The Federal Association for Information Technology, Telecommunications and New Media (BITKOM) represents more than 2,000 companies in Germany. Its 1,200 direct members generate annual sales of about 140 billion euros and employ 700,000 people. They include providers of software and IT services, telecommunications and internet services, manufacturers of hardware and consumer electronics and digital media businesses. BITKOM campaigns in particular for a modernization of the education system, for an innovative economic policy and a future-oriented Internet policy.

The European Commission adopted a package of three measures on 11 September 2013. In addition to the proposal for a regulation governing the internal market for telecommunications, which requires the consent of the European Parliament and the European Council, it includes the Commission's notification on a single market for telecommunications as well as a recommendation for the harmonisation of accounting methods and non-discrimination requirements for wholesale products.

The following statements represent a preliminary assessment of the proposed regulations and are limited to those aspects of the draft that are considered particularly relevant.

1. Preliminary remarks

BITKOM shares the Commission's basic assessment that the EU must improve the framework conditions for investments in modern broadband networks and needs to create more favourable framework conditions for a strong European telecommunications sector, which is a prerequisite for growth and employment in all sectors of modern economies. For this reason, BITKOM is of the opinion that the regulation for the telecommunications market should take a significant step towards a regulatory framework that is balanced, simple, understandable and predictable and that will give companies the flexibility and security required for large investments in new and improved infrastructures. BITKOM had expected corresponding proposals in the draft regulation. Ultimately, however, they were not included.

On the one hand, the draft regulation may contain positive elements that could improve the competitiveness of the sector in the long term, in particular the proposals for closer coordination of frequency allocation and the rules for frequency auctions. On the other hand, though, it is difficult to see how the investment capacity of the telecommunications industry should be improved by measures that have a direct negative effect on the revenues of network operators. This applies, for example, to the planned rules for roaming and international calls. The same applies to those provisions that entail additional costs and further regulate and limit the freedom of contract, such as stricter

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requirements for customer protection. Such measures would result in additional regulatory uncertainty for investments that are so urgently needed in this sector.

Furthermore, the circumstances and the type of intervention set a concerning regulatory signal. The EU wants to dictate prices that are largely disconnected from the actual cost structures. Furthermore, the proposal would represent a price regulation without the mandatory market analysis procedure by national regulatory authorities. This mismanagement of the markets may threaten prosperity and growth. In particular, a cross-subsidy by consumers may result if they are forced to share the cost for services that they do not even request.

On other issues such as deregulation or EU-wide authorization (single authorization), BITKOM supports the basic objective of the proposals. However, these are often not suitable for achieving the objectives set, or not ambitious enough to have a significant effect. Overall, the proposals make an unsophisticated impression and should be thoroughly revised in the next legislative procedure. The required comprehensive restructuring of the European legal framework needs to be approached with a degree of thoroughness that corresponds to the complexity of the issue.

2. International roaming

The recently adopted Roaming III Regulation has pursued objectives similar to the ones in the present regulation proposal and has not yet been implemented in full. In the middle of a phase where the mobile phone industry is implementing the requirements of this regulation and must invest an estimated € 500 million throughout the EU, the Commission proposes an official change of course with the regulation of roaming services.

The regulatory approach mainly advanced by the Commission in 2012, which ensures more competition through so-called decoupling (choice of roaming provider regardless of the home provider), is taken to the point of absurdity by the current proposals. The mobile phone operator should be released from the duty to decouple through the formation of roaming alliances at so-called "roam-like-at-home" rates.

On the one hand, the mobile phone industry will have already made the necessary investments in decoupling when the new proposals take effect. On the other hand, the Commission's approach discourages new providers from entering the market, as no company will invest in a market that may not exist in two years.

BITKOM considers proposals for the creation of roaming alliances difficult to implement. Even for providers already operating in many EU states, it will be difficult to achieve the quorums proposed by the Commission (roaming alliance must exist in 17 member states and simultaneously cover 70% of the EU population).

The forced abandonment of the pricing of incoming calls when roaming and billing by the second for all calls (currently the billing is every 30 seconds and 1 minute) will also lead to further significant losses of revenue in the mobile phone industry.

3. International calls

The proposals for regulating the price of cross-border calls on the landline and mobile networks within the EU would constitute interference in a competitive market, which the EU Commission classified as competitive in its revision of the Markets Recommendation in 2007 and which the national regulatory authorities subsequently deregulated.

There are a variety of competing offers in this market, ranging from packaged offers that allow for free calls to some or all EU countries, prepaid calling cards and call-by-call offers to voice and video applications over the Internet (e.g. Skype). These offers are very widespread and increasingly independent of the network operator; blocking of these services is prevented by the proposed rules to maintain network neutrality.

In deviation from the basic principles of the European telecommunications regulatory framework (e.g. regulation only of companies with significant market power, primacy of wholesale regulation over retail regulation), the Commission now wants a regulation of end consumer prices without a detailed analysis of the market conditions here. In addition, a lack of cost coverage for international calls would result in other products being priced far above the actual costs. This cross-subsidy may penalise certain groups of consumers, for example when individuals with few international calls in the EU must co-finance corporate customers who make many calls to other EU countries.

The upper price limits for landline calls to other European countries as proposed in the draft should be rejected in this form. Connection prices must also reflect the additional costs and the expenses of using different networks. In any case, it must be ensured that set prices at least cover the (regulated) wholesale and interconnection fees. When determining regulated termination fees, it should be remembered that the approach of only pure surcharge costs (PureLRIC) is not convincing and also not uniformly applied by the responsible regulatory authorities in Europe for good reason. This is also confirmed in the recent decisions by the German National Regulatory Authority Bundesnetzagentur regarding mobile and fixed termination fees.

The proposed intervention would not only be unnecessary as a result and would imply a price regulation based primarily on political intention, but would again be a very negative signal to investors and financial markets in terms of the predictability of the European regulatory framework and would limit the sovereignty of the consumer.

4. Network neutrality

BITKOM is of the opinion that the proposals for network neutrality are very restrictive, as they could make new business models more difficult to implement and adversely affect future innovation and product diversity. The Commission's previous draft was more liberal and open and still offered internet users adequate protection against the blocking or throttling of certain content.

BITKOM supports the Commission's objective of ensuring internet users' access to all legal content, services and applications, i.e. to prevent the blocking of legal services. The companies in BITKOM are also explicitly committed to the best-effort internet, which will not be questioned, but rather enabled and further developed in the future. The current level of performance will not fall as a result, but should assume a permanent place alongside quality-guaranteed services. Innovative new services can be developed under both the best-effort model and in a quality of service environment.

Simultaneously, new business models and services emerge on the basis of traffic management and quality of service in the networks. As pointed out by the Commission, such services can support innovation and growth both in the telecommunications sector and beyond. It is therefore important that the EU legislation regarding traffic management and net neutrality should preserve the commercial freedom of operators so that innovative business models for the benefit of end users and content and service providers on the internet can be implemented without negatively influencing the competitive structure of the sector.

According to the Commission's draft, network operators should be able to offer specialised services with guaranteed service quality (e.g. IPTV, video-on-demand, high-resolution imaging in medicine). These operators can conclude agreements among each other and also with service and content providers. However, it remains unclear whether the planned possibility to conclude agreements with service providers should only be limited to areas outside current internet access, or whether quality-guaranteed services can also be offered on the open internet. Both the design of the specialised services and their forms of use must be clarified in detail within the context of the best-effort model.

Fundamentally, potential requirements for traffic management and volume limits for data in particular must remain flexible enough to allow for differentiated offers in line with customer requirements. Similarly, the rules must ensure that specialised services for legal content can be offered, regardless of the technology used (fixed or mobile) and without any technical requirements that would significantly affect the benefits of these services.

5. Harmonisation of frequency allocation

BITKOM welcomes the proposed measures for EU-wide harmonisation of frequency policy. They would create more consistent and predictable framework conditions for frequency allocation and use, improve the conditions for long-term investments in mobile broadband networks and help to achieve the broadband objectives of the Digital Agenda more quickly. At the same time, a coherent and coordinated allocation of frequencies also offers the opportunity to promote the acceptance of new mobile broadband use, provided that a common understanding is established early on as to how the most trouble-free coexistence of wireless and cable services can be guaranteed in these frequency ranges.

Although market participants in a few countries (especially Germany) have benefited in the past from a forward-looking and investment-promoting frequency policy, this has been outweighed by the disadvantages that the European mobile

phone industry incurs from the lack of harmonisation of frequency regulation compared to other regions in the world.

In particular, a lack of coordination in the assignment of specific frequency ranges (particularly 800 MHz - so-called "digital dividend"), false auction targets (Netherlands, Czech Republic) and partially different conditions for the allocation of frequencies must be avoided in future. A stronger Europeanisation of the frequency policy is welcomed in light of the frequency policy challenges we will face in the middle of the decade. However, it should be ensured that the "faster" regulators are not thwarted by the "slower" ones.

It is also necessary to make sure that nationally established structures based on historical frequency allocations (e.g. GSM / UMTS) are not used for regulation throughout Europe without allowing the national regulatory authorities to consider and adapt the respective national circumstances.

BITKOM also supports the Commission's proposals that facilitate the sharing of networks and the use of wireless networks for the relief of mobile networks, while reducing the licensing requirements for the commissioning of femto, pico and metro cells.

6. Customer protection

It is in the telecommunications companies' interest to ensure an adequate level of consumer protection. This is a prerequisite for sustainable customer relationships. BITKOM also shares the overall objective of the draft regulation for greater European harmonization, which is a prerequisite for the cross-border rendering of services under the same conditions. In the coming legislative procedure, it is therefore important to find a better relationship between the added benefits for customers and the additional costs for the telecommunications companies. Where a high level of customer protection is already enshrined in law, as in Germany, BITKOM is of the opinion that it would be disproportionately burdensome to introduce European regulations that go beyond pure recommendations and would directly apply in Germany.

In addition, from the perspective of BITKOM, the proposal's underlying idea of setting up a one-stop shop through the planned rules will not be achieved, since the Commission's draft only includes a portion of the requirements that are relevant for the cross-border offers and will be subject to harmonisation. The national regulatory authorities are also responsible for implementation and interpretation. It is therefore questionable to what extent the proposals in the draft will result in added value for consumers and to what extent additional burdens or costs for the telecommunications sector will actually prevail.

There are already existing directives with a set of rules that prescribe EU-wide standards for consumer protection, such as the Universal Service Directive, which was amended in 2009. In addition, the rules of the cross-sector directive on consumer rights will enter into force in June 2014. In the light of this, there is little justification for imposing additional restrictions on contract freedom for telecommunications companies and for rules that require the costly establishment of new billing systems and processes with extensive customer support, such as the reversal of prematurely cancelled contracts, as planned in the current draft of the regulations.

The current draft of the regulations contains some provisions that are not feasible in practice. For example, it is not technically possible to port telephone numbers in the landline or mobile network within one business day after the order has been placed by the customer. BITKOM shares the Commission's intention of ensuring that a customer who changes his telecommunications provider will not spend more than a day without a connection because of the phone number porting. However, the entire process takes more time in practice. Requirements to ensure an uninterrupted switching of providers were also implemented in Germany with the recent revision of the German Telecommunications Act (TKG-Novelle).

According to the Commission's proposals, consumers should have the option to terminate the contract with their provider six months after conclusion of the contract by giving one month's notice. A contract extension after the maximum initial contract period of 24 months is practically eliminated, since the contract with the consumer changes to a contract terminable at any time after the original term.

As a result, the proposal creates a special law for the telecommunications sector without further justification. There is no reason why it should not be possible to terminate telecommunications contracts, like any other consumer contract, at any time after six months, although prepaid offers have been well established in the mobile phone sector for a long time. When it comes to fixed telephony and fixed internet connections, there are also offers without minimum contract terms that allow for termination at short notice, which takes into account the customers' needs for a short-term contractual commitment.

The rules on net neutrality according to the Commission's draft should be accompanied by transparency requirements for the benefit of consumers and corporate customers. In Germany, however, such rules are already anchored in the Telecommunications Act and thus implemented.

The draft ultimately also requires the provider to disclose a substantial amount of information about data speeds. In part, this information can only be determined at very high cost for the network operator, while the added value for the customer appears to be low. Mandatory contract details, which cannot be guaranteed in a sensible way, are particularly problematic. As a result of this, these contract details would differ significantly and permanently from actual performance, which would result in the customer always having a special termination right in accordance with Section 28 (5). For example, the actually available amount of mobile communication depends on the customer's current location and on the present radio cell utilisation at a specific moment. In a fixed network, an accurate indication of actually available speeds in the contract, i.e. at a time before the line is hooked up, is not possible.

7. Single authorization

The original intention of reducing the bureaucratic burden with EU-wide approval and ensuring uniform business conditions throughout Europe is certainly to be welcomed. However, the planned rules are complex, difficult to understand and the potential benefits of the proposed method appear to be very limited. The requirements for single authorisation should fundamentally not create requirements that go beyond the existing regulations under the German

Telecommunications Act (disclosure obligation of telecommunications services, licences for rights of way) or establish a more bureaucratic process than this act. Therefore, it is currently difficult to predict what impact they would have in practice. Moreover, it must be ensured that the result is not a "race to the bottom", i.e. to set the lowest requirements. That would neither be good for the economy nor the telecommunications location of Germany.

For approval as such, it should be noted that for European telecommunications companies this is not viewed as a barrier to market entry in EU countries. With the existing Authorisation Directive, a simplified procedure is implemented in EU countries.

An additional consideration is that this regulation can lead to discrimination in favour of newly created companies over existing companies that must bear the high costs for authorisation in individual EU countries. Furthermore, predominantly non-European companies may benefit from the facilitation, thus the goal of strengthening European companies would not be achieved.