



Constitutional and Legislative Affairs Committee

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 (COM(2013)147)

Briefing

Date of paper:

13 May 2013

This briefing has been produced by the Research Service for use by the Constitutional and Legislative Affairs Committee.

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1. Introduction

The 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 (**‘the proposed regulation’**) was issued by the European Commission 26 March 2013.¹ The Assembly subsequently received a copy of the Department for Culture, Media and Sport’s Explanatory Memorandum, which set out the UK Government’s views of the proposal, on 24 April 2013. A copy of the EM is included in full as an annex to this paper.

2. The proposed regulation

The proposed regulation contains eleven articles which are aimed at reducing the overall cost of deploying new superfast broadband infrastructure, primarily through measures intended to reduce the costs of civil engineering works during rollout. The key aims of the proposed regulation fall into four main areas:

- access to existing infrastructure;
- information provision around existing infrastructure;
- co-ordination of street works / permitting; and
- infrastructure in new buildings.

The proposed regulations support the the [Digital Agenda for Europe](#) and the European Commission’s main broadband targets of achieving 30 Mbps broadband speeds for 100% of households, and at least 50% of these households subscribing to speeds over 100 Mbps, by 2020.

3. Subsidiarity

The EM states that the UK Government’s position in relation to subsidiarity is as follows:

The UK Government has concerns that the Regulation is not justified in accordance with the subsidiarity principle. 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. **The Government believes 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 [RS emphasis].²**

The EM states that the UK Government’s key concern ‘is the use of a Regulation as the vehicle to implement these measures’ that would ‘enforce a prescriptive approach, no

¹ European Commission, [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](#), 26 March 2013 [accessed 8 May 2013]

² Department for Media, Culture and Sport, *Explanatory Memorandum on European Union legislation: 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*, April 2013, paragraph 18

matter what the current policies, regulations and structures are in a particular location’.³

The EM adds that:

Many of the policy objectives behind the Regulation could, in theory, be supported at the EU level if they were proposed in a different way using a different legal instrument.⁴

The EM also states that the language **contained in the proposed regulation** ‘does not provide any certainty on a number of issues, for example broadband infrastructure in new buildings’ **and that** ‘Introducing uncertainty into a market where return on investment is already precarious is unlikely to lead to additional investment’.⁵

The eight week deadline for reasoned opinions from national parliaments in relation to the proposed regulation is 31 May 2013.⁶

To date, no Member State has issued a Reasoned Opinion, however the German state parliaments of Baden-Württemberg and Thüringen have issued concerns in relation to the proposal.⁷ Both submissions suggest that a directive instead of a regulation would be sufficient in this case and that the proposal does not leave sufficient room for national decisions.

3.1. Views within the UK

Assembly officials understand that the Northern Ireland Assembly and the Scottish Parliament will be looking at whether the proposed directive raises any subsidiarity concerns over the coming weeks.

The House of Commons’ European Scrutiny Committee considered the proposed regulation at their meeting on 8 May. The proposed regulation is currently being **considered in the House of Lords by the European Select Committee’s** Sub-Committee B on Internal Market, Infrastructure and Employment.

The ability of both Committees to **incorporate the Assembly’s views into** a report to inform a possible debate on a Reasoned Opinion however is constrained by the Whitsun recess (which takes place between 21 May and 3 June). As a result, any correspondence from the Assembly relating to the proposed regulation should be sent well ahead of 21 May, to **allow for the Assembly’s views to be incorporated into** the reports of both Committees.

³ Department for Media, Culture and Sport, *Explanatory Memorandum on European Union legislation: 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*, April 2013, paragraph 21

⁴ Ibid, paragraph 19

⁵ Ibid, paragraph 23

⁶ IPEX, [Document COM/2013/147: 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](#), 26 March 2013 [accessed 7 May 2013]

⁷ Committee of the Regions, Subsidiarity Monitoring Network, [European Commission Document: 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](#), 26 March 2013 [accessed 9 May 2013]



3.2. *Views of the Assembly*

Although telecommunications and internet services are reserved matters in Wales, the content of the proposed regulation is of relevance to the Assembly as it relates to Subject 10: Highways and Transport of Schedule 7 to the **Government of Wales Act 2006**.⁸ The proposed regulation also impacts on the powers devolved to Welsh Ministers to make building regulations from 31 December 2011.⁹ These powers include setting standards for design and construction which apply to most new buildings and many alterations. The EM states that the Welsh Government was consulted by the Department for Culture, Media and Sport in the preparation of the EM.

Under the Subsidiarity Protocol, the Committee may raise formal subsidiarity concerns in relation to the proposal on behalf of the Assembly by issuing a written representation to **the Commons' European Scrutiny Committee and the Lords' EU Select Committee**. Those committees may then take account of such views in reaching their own conclusions on the proposal and in considering whether or not to recommend issuing a written representation.

4. Next steps

On the basis that no objections on the grounds of subsidiarity will be made by the required number of Member States before 31 May 2013, the proposed regulation is expected to be formally discussed at the Telecoms Council in early June 2013. The EM states that it is the European **Commission's ambition** to conclude negotiations by the end of 2013, with the proposed regulation coming into force soon afterwards.

⁸ [Government of Wales Act 2006](#) (Chapter 32) [accessed 9 May 2013]

⁹ [The Welsh Ministers \(Transfer of Functions\) \(No.2\) Order 2009](#) SI 2009 / 3019 [accessed 9 May 2013]

Annexe A

7999/13
COM (2013) 147 final

EXPLANATORY MEMORANDUM ON EUROPEAN UNION LEGISLATION

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

Submitted by the Department for Culture, Media and Sport on April 2013

SUBJECT MATTER

1. The proposed Regulation aims to reduce the overall cost of deploying new superfast broadband infrastructure, primarily through measures intended to reduce the costs of civil engineering works during rollout.
2. The measures in the proposed Regulation include streamlined procedures for applications for permits, and a requirement to make passive infrastructure available for sharing on request. The Commission cites independent estimates that up to 80% of the cost of deploying new superfast broadband networks is rolled up in civil engineering works. The Commission argues that implementing these measures would lead to savings of 20-30% of total investment costs, amounting to up to €63 billion by 2020.
3. The proposal directly supports the Digital Agenda for Europe, and the Commission's two main broadband targets: 30 megabits per second (Mbps) broadband speeds for 100% of households, and at least 50% of these households subscribing to speeds over 100Mbps, both by 2020. The UK supports the Commission's Digital Agenda targets, and the transformation we will see in UK broadband by 2015 (higher speeds, wider penetration, continued choice and competition) will play an important role in achieving them.
4. The key aims of the Regulation broadly fall into four main areas: access to existing infrastructure; information provision around existing infrastructure; co-ordination of street works / permitting; and infrastructure in new buildings.
5. The Regulation contains eleven articles:

Article 1 states the subject matter and scope of the Regulation.

Article 2 defines the terms used.

Article 3 states that any 'network operator' shall be obliged to meet reasonable requests to provide access to its physical infrastructure (e.g. ducts, pipes, overhead lines) to support



deployment of high speed communications infrastructure. The term 'network operator' is very widely framed, and explicitly includes electricity, gas, water, sewage, roads, railways etc. in addition to telecoms. The Article also sets out potential reasons for refusal (suitability, safety) and the proposed dispute resolution process.

Article 4 requires the setting up of a single contact point to provide information on the location, size and ownership of existing infrastructure. It sets out the method by which this information shall be gathered from public bodies and network operators, and the process by which any operator can request information from this central point to inform its network deployment planning.

Article 5 sets out the process by which any civil works partially or fully funded by public money must meet any reasonable request from communications network operators to coordinate their works.

Article 6 states that a single information point for the granting of permits (for example covering street works, planning and environmental permitting) shall be set up, and that communications network operators shall have the right to submit any permit applications to the central point, which would then be responsible for facilitating the granting of the permit.

Article 7 states that all newly constructed buildings and major renovations must 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.

Article 8 states that network providers will have the right to terminate their infrastructure at the access point (Article 7) and then access the in-built network.

Article 9 dictates that the National Regulatory Authority (Ofcom in the UK) will act as the dispute resolution body and single information point mentioned in Articles 3, 4, 5 and 6, unless the Member State designates or sets up another body.

Article 10 pledges to report to the European Parliament and Council on the Regulation's implementation.

Article 11 states when the Regulation shall come into force, and that it shall be binding in all Member States.

6. The Commission's impact assessment discusses a number of options:
- i. Maintaining business as usual
 - ii. Promoting efficiency gains via guidance and recommended measures
 - iii. A Regulation to implement the policy
 - iv. A combination of a Regulation and a Recommendation to the implement the policy
 - v. Legislation to complement the existing regulatory framework and mandate further measures



After analysis in the impact assessment, the Commission has chosen option iii, arguing that it is best placed to deliver a comprehensive solution across different Member States relatively quickly.

SCRUTINY HISTORY

7. The proposed Regulation was formally proposed on 27 March 2013, so this is the first occasion it has been subject to scrutiny by Parliament.

MINISTERIAL RESPONSIBILITY

8. The Secretary of State for Culture, Media and Sport has primary responsibility for UK telecommunications policy.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

9. Policy on telecommunications and broadband is a reserved matter under the UK's devolution settlements. However, Ministers from the Scottish Government, Welsh Government and Northern Ireland Executive will also have an interest as the proposed Regulation would also affect a number of devolved policy areas, such as roads and street works. The devolved administrations have been consulted in the preparation of the EM.

LEGAL AND PROCEDURAL ISSUES

10. Legal basis

The proposal is based on Article 114 of the Treaty on the Functioning of the European Union, with its objectives seeking to improve the conditions for the establishment and functioning of the internal market.

11. Legislative procedure

Ordinary legislative procedure.

12. Voting procedure

Qualified Majority Voting.

13. Impact on United Kingdom Law (including implementation issues)

Regulations are directly applicable in UK law. However, it will be necessary to give effect to the Regulation by establishing the principles to which Regulators should have regard when considering applications. It may be necessary to grant new powers to regulators and to create penalties for non-compliance.

14. Application to Gibraltar

The Regulation will apply to Gibraltar.

15. Fundamental Rights Analysis

Article 1 of Protocol 1 will be engaged as the protection it affords extends to businesses as well as individuals. The Regulators implementing the Directive would

need to take care that compensation is appropriate and set at the correct level.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

16. As a proposal with an Article 114 legal base, it is likely to be adopted throughout the European Economic Area.

SUBSIDIARITY

17. The Commission assesses that the proposed Regulation is justified by the subsidiarity principle, and that the measures it will put in place are necessary at European Union level. It cites the different rules, procedures and regulatory regimes currently governing broadband infrastructure deployment in different Member States as a barrier to rollout and the effective functioning of the Single Market.

18. The UK Government has concerns that the Regulation is not justified in accordance with the subsidiarity principle. 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. The Government believes 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.

POLICY IMPLICATIONS

19. The Government is committed to achieving the European Digital Agenda targets on broadband, and is supportive of measures at different levels which streamline and lower the cost of superfast broadband deployment. The Government is currently implementing a package of measures in the UK 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. Many of the policy objectives behind the Regulation could, in theory, be supported at the EU level if they were proposed in a different way using a different legal instrument.

20. We are, however, concerned that the proposed Regulation will not achieve its goals to lower the cost of civil engineering works, but instead place burdens on business, government and regulators, and potentially stifle progress while it is being implemented.

21. Our key concern is the use of a Regulation as the vehicle to implement these measures. The Regulation would be applicable in all Member States and would

enforce a prescriptive approach, 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. In addition, 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.

22. The Government also has concerns regarding some of the specific policy proposals, particularly around the effect of the measures on wayleaves – the payments made by utilities companies to landowners to install and maintain equipment on private property. The wayleave regimes in the UK 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 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.

23. While the current drafting of the Regulation advocates a commercially-led approach, the language does not provide any certainty on a number of issues, for example broadband infrastructure in new buildings. Introducing uncertainty into a market where return on investment is already precarious is unlikely to lead to additional investment.

IMPACT ASSESSMENT

24. The Commission has produced a detailed impact assessment alongside the proposed Regulation. The impact assessment estimates that savings of 20-30% on the civil engineering costs of superfast broadband deployment could be achieved by adopting the measures proposed in the Regulation.

25. Specifically, the impact assessment identifies for the proposed policy option (see paragraph 6 above) significant capital savings for communications providers thanks to 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.

26. 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. We will need to understand these assumptions better and in more detail.



27. The Government feels that, 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. We will need to understand in more detail what these administrative costs will be and to what extent they would be one off setup costs, in both the UK and in other Member States.
28. The Regulation would require all telecoms companies to make their passive infrastructure available for sharing on request. Ofcom 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.
29. Other impacts would include increased wayleave payments imposed on network operators whose infrastructure becomes shared by telecoms providers (paragraph 22 above), and the additional burdens around providing network information to the single point of contact in Article 4.
30. There is also a risk that co-operation and investment in broadband infrastructure would stall while the legal instrument was being drafted, and that the measures could ultimately disincentivise investment in the hardest to reach areas.
31. We have not, as yet, been able canvass the views of the various industries – gas, electricity, water etc. – who would be affected by the Regulation, but we will be seeking their views. When the Government consulted on infrastructure sharing in 2010, industry concerns included responsibility for installation and maintenance, and liability.

FINANCIAL IMPLICATIONS

32. The proposal notes that the Regulation would have no impact on the Commission's budget. However, the impact assessment does identify significant costs. In addition to the possible burdens on business outlined above, the measures would also have a financial effect on individual Member States and their national regulatory authorities. In the vast majority of Member States, a new body to oversee dispute resolution and set up 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 setup and running costs for such a body could be significant for individual Member States.

CONSULTATION

33. The Commission did consult last year on a series of measures to reduce the cost of communications infrastructure deployment, but not on a proposed Regulation.

TIMETABLE

34. The proposal is expected to be formally discussed at the Telecoms Council in early June, with the Commission's ambition to conclude negotiations by the end of 2013 and the Regulation to come into force soon afterwards.

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