EUROPEAN COMMISSION
DIRECTORATE-GENERAL JUSTICE

Director-General

Brussels,
[redacted]

**NOTE FOR THE ATTENTION OF MR ROBERT MADELIN,
DIRECTOR GENERAL, DG CNECT**

RE: REPLY FROM DG JUST

TO THE INTERSERVICE CONSULTATION LAUNCHED BY DG CNECT

Note signed by: Ms F. Le Bail
Dated:
Reference: Consultation 2587463
Deadline for replies: 26/07/2013

Title: Proposal for a Regulation of the European Parliament and of the Council laying down measures to complete the European single market for electronic communications and to achieve a connected continent.

☐ Agreement

☐ Favourable opinion subject to comments being taken into account

☒ Negative opinion

Contact: [redacted] [redacted]

Comments:

Thank you for consulting us on this draft Regulation. Whilst we welcome its stated objectives to ensure the internal market for electronic communications networks and services, DG JUST issues a negative opinion on the proposal as it currently stands for the following reasons.

First of all, we are concerned about the provisions on Net Neutrality. As it currently stands, Article 20 of the proposal entitles end-users to agree with Internet Service Providers (ISPs) on "*data volumes, speeds and general quality characteristics*". However, such "general quality characteristics" are not further specified in the Regulation. This raises concerns about the fact that ISPs could misuse their possibility to offer different "general quality characteristics" to

end-users, including by applying discriminatory traffic management contrary to the Net Neutrality principle.

In addition, Article 20 enables content providers and ISPs to "*agree with each other on the treatment of the related data volumes or on the transmission of traffic with a defined quality of service*". In other words, this Article entitles content providers to negotiate with ISPs a priority treatment of their own content over the Internet. Whilst supporting the principle that Internet users should have the right to subscribe to specific content and require a guaranteed transmission quality of the chosen content, we have concerns that, if not properly ring-fenced, the unlimited contractual freedom of content providers to agree on priority treatment of their content with ISPs will lead to unintended anti-competitive and discriminatory consequences in the medium-longer term. In particular, taking into account the technical limits to transmission capacity, it could raise barriers to entry to those competing content providers who might not be able to agree on the same level of commercial fees paid by those having obtained priority treatment by ISPs. Reduced competition at the level of content providers and, possibly, in the longer run, also at the level of ISPs as such, would ultimately lead to reduced content choice for Internet users/consumers.

We are very concerned that such provisions risk having a negative impact on consumers' freedom of expression and information, as guaranteed by Article 11 of the Charter, which is also binding on this Regulation. It may also run counter to the fundamental right to the freedom to conduct a business (Article 16 of the Charter), if businesses find that their access to content or to the Internet as such has been restricted as a direct or indirect result of the Regulation. Furthermore, we consider that such limited possibilities of accessing Internet content and services of their choice would run counter to the stated objectives of Article 38 of the EU Charter of Fundamental Rights, whereby EU policies must ensure a high level of consumer protection.

Secondly, we consider that the current draft impact assessment fails to thoroughly assess the impacts on competition and availability of electronic communication services to end-users, including consumers, of what is a far-reaching reform of the existing EU telecom regulatory framework.

Thirdly, we would like to point out that the overall drafting and structure of Chapter 3, specifically dealing with "*Rights of end-users*", should be improved, in particular in view of the fact that the chosen instrument is a Regulation, which should clearly spell out the respective legal rights and obligations of its addressees. You will find in the attached file a number of concrete proposals for amendments. In particular, we consider that the structure of this Chapter should clearly distinguish between marketing requirements, pre-contractual information requirements and mandatory contractual requirements. The provisions on pre-contractual information should be aligned with those in the Consumer Rights Directive 2011/83/EU (CRD) and the scope of marketing obligations could be reduced. DG JUST is at your disposal to work bilaterally on the drafting of this Chapter.

Fourthly, we would like to raise our concerns about the fact that Article 21 of the draft Regulation provides for each national regulatory authority (NRA) to specify the quality of service parameters to be measured and the content, form and manner of the information to be published about these parameters, as well as the details of the information requirements regarding parameters of Internet access on their respective territories. These are far-reaching powers of the NRAs, which obviously undermine the full harmonisation objectives of the

proposal. If such information requirements are to be set nationally by the host NRAs in respect of services provided by European providers on their territories, it is also questionable that the NRA of the home Member State will be effectively able to enforce such different national rules. This will add further complexity to the proposed enforcement system whereby the home NRA supervises the compliance of European operators with Chapter 3 of the Regulation but the host NRAs continue dealing with end-user complaints about the activities of European operators on their territories.

Fifthly, concerning the proposed exemption of mobile operators' alliances from the decoupling obligations, which have been recently agreed upon by co-legislators within the framework of Roaming Regulation No. 531/2012, we consider that there should be a strong justification – currently lacking also in the Impact Assessment - for changing such a recent policy decision. Indeed, we have serious concerns regarding the legal and investment certainty for the industry taking into account the fact that, due to the time needed for the legislative procedure, the envisaged amendments allowing mobile operators' alliances to escape the decoupling obligations would only take effect after the current deadline for the introduction of decoupling, i.e. 1 July 2014. The short, medium and long term impact of the mobile operators' alliances on end-users, in particular the prices of domestic mobile services should also be assessed.

We are also suggesting, in the attached file, some additional recitals and amendments to the text of the Regulation with a view to ensure that individuals' personal data are protected when processed by electronic communications providers.

A new recital has been added also on fundamental rights. We would like to stress in this context that also the principle of non-discrimination (Article 21 of the Charter) is applicable since such a Regulation should not have a detrimental impact on cross-border access.

Finally, we note that the draft proposal uses the terminology of "EU passport" to designate the legal framework applicable to the European electronic communications providers in accordance with the Regulation. In our opinion, this term could lead to confusion with a personal identity and travel document, which is addressed in Article 77 TFEU and Directive 2004/38/EC on free movement. A designation such as "European electronic communications provider's passport" could be considered as an alternative.