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ISPA COMMENT ON THE DRAFT TEXT REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL LAYING DOWN MEASURES CONCERNING THE EUROPEAN SINGLE MARKET FOR ELECTRONIC COMMUNICATIONS AND TO ACHIEVE A CONNECTED CONTINENT - COM(2013) 627

Dear Ms del Castillo,

ISPA (Internet Service Providers Austria) would like to thank the ITRE committee for the opportunity to comment on the draft regulation concerning the European single market for electronic communication and kindly requests ITRE to consider the issues discussed below.

ISPA in principle welcomes the Commission's idea to create a digital single market but would like to draw ITRE's attention to following issues.

ISPA stresses that small and medium operators are the source for competition, opposes the idea of shifting from traditional unbundling products towards wholesale and bit-stream products, is convinced that end-user prices caps are in contradiction with the idea of a free trade economy and an EU single market, is convinced that two operators per country are not enough and that the existence of competition needs to be measured by competent national authorities, highlights that the Single Authorisation regime must not constitute an additional burden for operators, warns that consumer rights provisions must not negatively affect cross country competition or hinder the development of new products, underlines that transparency and competition indispensable in regard to net neutrality and strongly rejects traffic management measures for the purpose of the prevention or impediment of serious crimes which will consequently lead to disproportionate infringements of fundamental rights.

1 Small and medium operators are the source for competition

ISPA questions some of the underlying assumptions stipulated by the Commission and would like to underline BEREC's views, which correctly reflect that actual download speed in the Europe is much faster than in the US, that the NGA coverage is quickly growing in EU member states, that 3G has been intensively deployed throughout the EU, thus establishing a profound basis for the

roll-out of 4G, broad band prices are on average lower than in the US and that almost all fixed line operators have a national footprint.¹

ISPA also finds it difficult to agree with the Commissions assumption that fewer operations per market will lead to increased performance and lower prices. The Austrian market has successfully demonstrated that development in the telecom sector is driven by competition which, in the case of Austria, has always had its source in small and medium operators. Whilst bigger operators have traditionally mainly focused their activities on urban and highly populated areas, small and medium size operators have always aimed at also connecting rural areas to the internet by deploying innovative wireless or sophisticated unbundling technologies. ISPA therefore urges that the value of competition and plurality on national markets which it sees endangered by e.g. the proposed 'one-fits-all' European virtual access products, be duly acknowledged.

2 The introduction of 'one-fits-all' virtual wholesale products must not frustrate investment of SME operators and put competition in national telecom markets at risk

ISPA does not object to an additional introduction of additional European virtual access products, but is very sceptical about any shift away from traditionally unbundling products towards mere wholesale or bit-stream products.

Traditional unbundling products have proven especially valuable due to their flexibility, allowing providers to create products which are better suited in terms of quality and services provided to fulfil the requirements of their customers than 'one-fits-all-products' offered as wholesale products. Such individual products would not be possible on a mere wholesale or bit-stream basis, thus endangering the existence of small and medium size operators, the provision of internet access for rural and remote areas and valuable workplaces in these regions. For this reason the existing unbundling products need to remain on the market. The proposed European virtual access product could thus only be seen as an additional product.

A shift towards 'one-fits-all' wholesale or bit-stream products would furthermore lead to sunk costs for operators who, on a large scale, following the idea of the ladder of investment, invested into collocation properties and equipment. ISPA therefore cannot support the suggested preference of the new European virtual access products, as expressed in recital 37 and Art 18 of the proposed regulation, over the traditional unbundling products which are currently successfully being used on national markets.

As far as the EU-wide offering of services for business customers is concerned ISPA would like to highlight that such services can already easily be obtained within national markets as retail or wholesale products.

¹ BEREC, BEREC views on the proposal for a Regulation "laying down measures to complete the European single market for electronic communications and to achieve a Connected Continent" http://berec.europa.eu/eng/news_consultations/whats_new/1673-berec-views-on-the-proposal-for-a-regulation-laying-down-measures-to-complete-the-european-single-market-for-electronic-communications-and-to-achieve-a-connected-continent (last accessed 29.10.2013).

Against this background ISPA objects to the idea of sacrificing effective competition in national markets and extensive investments by national operators for the mere sake of a very limited number of EU-wide business customers and the interest of a few multi-national telecom operators (e.g. AT&T). ISPA fears that the proposed measures would primarily convey advantages for a very limited number of multinational telecom operators urging to access European national telecom markets at the price of sacrificing effective competition and sustainable development in these markets which has in the past been driven to a substantial degree by successful small and medium size national telecom operators.

The Commission has in the past correctly emphasized the importance of small and medium size operators for the European economy². Against this background IPISA would like to underline that any shift away from traditional unbundling products towards wholesale und bit-stream products will severely affect these small and medium size operators. Such a shift would not only deprive them from the opportunity to develop new products which would also lead to frustrated investments, it would also decrease the likeliness that these operators remain the driving force of development on national markets.

ISPA therefore would like to express its serious doubts that paving the way for a small number of multinational telecom operators at this enormous price would be in the best interest of the development of the economy of Europe.

3 End user price caps are in contradiction to the idea of a free trade economy and the European single market

ISPA is surprised about the proposed measures concerning end-user price caps on international calls and roaming which in its opinion contradict the idea of a free trade economy but more resemble a form of planned economy. ISPA is especially surprised about it as there is effective competition on the market for international calls and roaming costs are already facing a steady decline due to the Roaming III regulation. Any measures interfering with the existing setting would not only impair these markets, but would also deter operators from further investments into the telecommunications market.

4 'Two is not enough': The existence of competition needs to be measured by competent national authorities

ISPA is of the opinion that, despite the eventual shortcomings of national regulatory authorities, (NRA) these regulatory bodies are best equipped to evaluate the existence of competition on national markets and to subsequently impose measures to stimulate the market. ISPA therefore rejects the de facto restrictions for NRAs proposed in Art 13 of the draft regulation. As a consequence, directives and guidelines which are subsequently implemented by NRAs should be

² Neelie Kroes European Commission Vice-President for the Digital Agenda Facilitating a competitive environment for SMEs to develop future Internet business models Telecom Conference of the SME Union Brussels, 14 July 2010.

chosen as a means of harmonizing markets. ISPA is therefore sceptical of direct interventions by the Commission.

ISPA strongly rejects the last two sentences of recitals 38, as the existence of competition needs to be measured in accordance with long established case law, as well as objective criteria and not by predefined numerical parameters.

5 The Single Authorisation regime must not constitute an additional burden for operators

ISPA seriously doubts whether the single authorisation regime would bear substantial benefits for providers, particularly in relation to the additional administrative burden that will presumably be created for providers who do not wish to offer their services throughout all member states.

6 Consumer rights provisions must not negatively affect cross country competition or hinder the development of new products

ISPA would like to highlight the importance of creating a level playing field for European telecom providers. Austria's level of consumer protection is above the European average and thus any regulatory approach in this field must take into consideration that providers stemming from countries with a high level of protection must not be discriminated by the obligation to fulfil European consumer rights provision in addition to their national provisions in this field at the same time.

ISPA would furthermore like to highlight a balance between end user rights and the ability of providers to offer competitive services needs to be struck. The question of a minimum contract period (§28 par 1) and after which period of time user shall have the right to terminate their contracts (§28 par 2) is essential for the development products which require an initial investment by the operator (e.g. provision of equipment, necessary modifications of existing infrastructure etc.). To avoid a steep increase of subscription fees ISPA therefore asks ITRE to support the opportunity for a contractual agreement to terminate a service after a minimum period of 12 month. ISPA furthermore also questions the feasibility of measures as e.g. the written assurance for parameters of the connection.

7 Transparency and competition indispensable in regard to net neutrality

ISPA would like to highlight that it sees competition and transparency should serve as cornerstones of any regulatory approach in this field. ISPA believes that if these requirements are met consumers and business clients will be able to take informed decisions while allowing the industry to develop services best equipped to meet their clients' needs.

8 Traffic Management for the purpose of the prevention or impediment of serious crimes will lead to disproportionate infringements of fundamental rights

ISPA strongly rejects the establishment of internet filters or web blocking as proposed in Art 23 par. 5 lit. a and recital 47.

ISPA therefore calls for the deletion of lit. a and the deletion of the last two sentences of recital 47.

ISPA in this respect would like to point to the implementation of the data retention Directive in Austria, which can serve as an example how the term “serious crimes” can be broadened by the national legislator to also include petty crimes. In Austria data retained under the data retention Directive, which aims at investigation, detection and prosecution of serious crimes, such as organized crime and terrorism, can be accessed for prosecuting all crimes, thus also covering crimes such as the mere theft of a newspaper. ISPA in this context would like to remind ITRE that the intellectual property industry has in the past shown no signs of reluctance to exploit measures created for the rightful purpose of fighting and preventing serious crimes such as child abuse to prosecute users infringing their intellectual property rights by streaming or downloading audiovisual content. Against this background ISPA is convinced that a provision such as the one suggested in lit. a of the aforementioned provision would create a “slippery slope” leading to deep packet inspection, filtering, blocking and would consequently constitute a disproportionate infringement of civil rights.

ISPA would like to reiterate that it is very thankful for this opportunity to contribute. For further information or any questions please do not hesitate to contact us.

Sincerely,
ISPA Internet Service Providers Austria



Dr. Maximilian Schubert
General Secretary

About ISPA: ISPA is the Austrian association of Internet Service Providers, representing approximately 200 ISPs. ISPA is a major voice of the Austrian Internet industry. Our goal is to shape the economic and legal framework to support optimal growth of the Internet and Internet services. We regard the use of the Internet as an important cultural skill and acknowledge the resulting socio-political responsibilities.