



EUROPEAN COMMISSION

Directorate-General for Communications Networks, Content and Technology
Director, Electronic Communications Networks and services

Brussels

CNECT/

**NOTE TO LUIS ROMERO REQUENA,
DIRECTOR GENERAL OF THE LEGAL SERVICE**

Subject: WiFi4EU First Pilot Call: Legal options in light of operational experience

The purpose of this note is to seek the view of the Legal Service on options on how to move forward with regard to the WiFi4EU call, in light of a number of operational problems encountered with the online Portal (www.wifi4eu.eu) through which the call is conducted, taking into account the reputational implications for the Commission and the different impacts for the categories of applicants identified.

I. Background

On 15 May, the first WiFi4EU call for projects was launched at 13:00:00 (Brussels time¹), and was announced as lasting one month. Vouchers will be attributed on a "*first come, first served*" basis, taking into account a balanced geographical distribution among Member States². The launch was a huge success, in so far as thousands of municipalities across Europe applied within seconds/minutes after the launch of the call: over 3.500 municipalities applied within the first 5 seconds and over 11.000 in less than 3 hours. By then, all participating countries (but Iceland) had reached their guaranteed minimum quota of 15 vouchers; but it took less than 2 seconds to do so in 17 countries³.

However, this tremendous success was overshadowed by the fact that, while the call was ongoing, the Commission was alerted by an external source to two vulnerabilities affecting the WiFi4EU online Portal: one which could potentially enable unauthorised access to personal data of persons registering on behalf of municipalities and companies;

¹ CEST (Central European Summer Time).

² Minimum 15 vouchers per Member State, maximum 8% of the total, i.e. 95 per Member State in a call offering 1183 vouchers.

³ The probabilities of winning a voucher will probably be a matter of seconds or milliseconds: only looking at the "first come first served" rule, the first 1183 applications (equalling the total number of vouchers for this call) were made within the first 2 seconds after 13:00. Only Iceland had no application and 3 countries (LU, DK, LV) have reached just the required minimum or one more.

another one which could potentially impact the timestamping of the applications in the Commission's central database. The WiFi4EU Portal was therefore closed down approximately 4 hours after its opening. The call is therefore currently *de facto* suspended.

The IT system's first vulnerability (potential data breach) is the subject of checks by DIGIT both as regards the question whether there was in fact any inappropriate personal data breach and in order to test the adequacy of the steps taken to date to fix the vulnerability. These checks appear to indicate no inappropriate data access other than by the IT company which initially (and unilaterally) tested the Portal and detected and reported the vulnerability. DIGIT is in contact with this company regarding i.a. to ensure that if any data they accessed was copied, it was not exploited and it is now destroyed; the question whether the data breach notification procedure should be activated in this case is being examined⁴. This aspect is not decisive for the purposes of this note, i.e. to decide whether /how to proceed with the call, and is therefore not further examined here. However, the question when the online Portal can be considered secure and thus reopened for the upload of additional registrations and applications is relevant to the assessment below on next steps for the call.

The second vulnerability (risk of timestamp alteration) has been checked already by DIGIT. DIGIT confirms that it was *not* in fact possible for external parties to alter the timestamp of applications as recorded on DIGIT's central server⁵, i.e. there is an objective and unaltered record of the time and sequence of arrival of applications, which is required to apply the "*first come, first served*" principle.

II. The problem:

While analysing the revealed vulnerabilities, DIGIT detected a design flaw in the Portal application: the enabling of the "*apply*" button on the screen of the applicant was based on the applicant's own computer clock rather than on the central server clock (which should have been the reference for the WiFi4EU Portal). Thus, depending on each applicant's own clock, there most likely was (i) a group of applicants which were able *de facto* to apply before 13:00 as registered in DIGIT's system, (ii) another group which might have been prevented from applying exactly at 13:00 as registered in DIGIT's system (their clock being set later) and (iii) a category in between which applied right on time or directly afterwards. The first category potentially contains up to 1370 municipalities (the number registered before 13:00 CEST) and there is no technical way to determine among them whether their local clock was modified voluntarily or not. The second category is impossible to identify and quantify.

As a consequence, a potentially significant number of applicants might have a reasonable belief that they applied on time, but did not, in fact, do so according to our central server's clock, which recorded them as too early or too late to win a voucher. At the same time, given the mass of applications (around 5.500 just 1 minute before and after [13:00](#), for 1.183 vouchers to be allocated in this call), no applicant can have high expectations of success.

⁴ SG Note on *Guidance on data breach*, Ares (2014)3179059 of 26.09.2014.

⁵ Note of Th. Gageik to A. Whelan: "*List of applications for WiFi4EU*"; Ares(2018)2688859 of 24.05.2018.

III. The Options

Given DIGIT's confirmation that the record extracted from the applications with their corresponding timestamp, which is based on the time of DIGIT's system, is fully reliable, complete and accurate⁶, we have considered the following options:

1. Cancelling the Call

The Commission is always free to cancel a call for projects before the procedure is complete. In our first consultations, neither INEA nor BUDG has considered it necessary to cancel the call on the basis of the problems encountered; they have been willing to explore options (below) based on the continued validity of the call.

The consequences of cancelling the call from a reputational point of view are very significant, considering the high expectations raised and the flood of applications, all of which would have to be resubmitted in a subsequent call. Moreover, reasons would have to be provided for the cancellation, which would point to - or at least risk raising suspicions about - the robustness of the system and the soundness of the initiative itself, which is still in its pilot phase. Besides, a new first call could only be ready once the clock time system is fixed, which DIGIT confirmed could take several weeks or more. Only the second category of applicants - those which might have been constrained from applying at 13:00 because of their PC clocks - could hypothetically be better off with this solution. However, should the call not be cancelled, they still have the same chances in the following 4 calls, and their chances in a re-run of the first call are not higher than in any subsequent call for a similar number of vouchers.

While the circumstances are certainly not what would have been wished for, we believe that legal risks are rather marginal. First, the small value of the vouchers (15.000€) makes litigation an unattractive prospect. Second, the huge number of applications relative to vouchers available, in a very short space of time, is likely to deter most applicants from contesting the outcome of a procedure in which the difference between success and failure could, for most countries, be measured in milli- or nanoseconds. Third, while the Portal application design may have had an effect on the ability of applicants to apply either early or late, this was the case only in conjunction with the applicants themselves having unsynchronised, i.e. inaccurate, PC clocks. Fourth, category (ii) applicants are very unlikely to be able to provide concrete evidence that they came late solely because of the asynchronicity of clocks, while category (i) applicants are unlikely to be able to show positively that their clocks were not adjusted in order to exploit what was, it transpires, a relatively easily detectable flaw in the application⁷. Fifth, none of the applicants in categories (i) and (ii) has anything tangible to gain by the annulment of the first call.

Some of the foregoing arguments could certainly play out differently in terms of communications and public opinion, but the balancing of different reputational risks goes beyond the scope of the current consultation and is being considered at the political level.

⁶ *Ibidem.*

⁷ Moreover, for the early applicants, we have no way of knowing, even if we were to take their own respective PC clocks as the benchmark, whether they were more rapid than those who could and did apply directly after 13:00h CEST.

2. Consider the Call Valid

While the application flaw which linked the ability of municipalities to apply to the clock time of the PC being used rather than to the clock of the central server can be argued to have contributed to prejudicing the position of applicants in categories (i) and (ii) described above, the Commission is not responsible for the faulty clock settings of such computers and the call conditions are clear as to the opening of the call and ranking of applications as from 13:00 Brussels time. There are therefore grounds to defend the legality of the call in case of challenge. As mentioned, the small value of the vouchers makes formal legal challenge a marginal risk in any case. As regards public – and perhaps also judicial – perception of an admittedly imperfect first pilot call, the fairness with which the various categories of applicants are treated is likely to be decisive, in conjunction with adherence to the primary legal criterion of assignment of vouchers according to the central time stamps.

We would therefore argue that early applicants should simply be considered inadmissible on the basis that they applied before the call was open. The manner in which the grounds of non-assignment of a voucher are communicated to such applicants will be important in managing perceptions and the materialisation of litigation risk. Even if some of them proactively request and then contest their respective time stamps, reputational and fairness risks are arguably manageable as we use an objective criterion (and the one defined in the call conditions). The applicants who were enabled to apply inadmissibly early, and those who could only apply late, are treated equally. At the same time, this option safeguards the legitimate expectations of those who applied on time according to the DIGIT system and saves them from having to reapply. Those excluded will still have the opportunity to apply in subsequent calls.

2a. Continuation or closure of the call

Although the call is already, in aggregate, massively over-subscribed, it is not formally complete, as it was publicised as being open for a month (until 15 June), and the minimum national quotas have not been exhausted for all countries⁸.

From a reputational and operational point of view, it is preferable to close the call immediately. It safeguards the call and its success (in terms of number of applicants in very little time), it reassures all municipalities that have applied that they don't have to reapply. It eliminates possible criticisms by third parties regarding the continuing flaw in the clock feature of the Portal, and gives as much time as needed for the most thorough possible vetting of the data security of the amended Portal (which is likely to take several weeks to be done to the optimal standard). The announcement of the call's success and termination due to over-subscription is also likely to marginalise questions about the suspension of the Portal over the past few days.

From the legal point of view, we would argue that that early closure is feasible. This is accepted by BUDG and INEA. As already stated, the Commission is always free to cancel a call, it follows that it is also free to close a call early and to retain only the applications received up to that point in time (*qui peut le plus peut le moins*). On

⁸ See footnote 3. Apart from the lack of applications from Iceland, it is possible, in the case of Member States for which 15 or just a few more applications have been received, that some of these applications may be found to be ineligible on different grounds (fraud, inadequate documentation, etc.)

proportionality grounds, one could argue that it is pointless, as regards most Member States (and the vast majority of the 88.000 eligible municipalities), to maintain the fiction that vouchers are still potentially available. As regards Iceland (and any other Member State which, after analysis of applications, is found not to have reached its minimum quota of vouchers), the geographic distribution criterion could be addressed by granting them a carry-over of unused minimum quota in the next call.

IV. Conclusion

We would be grateful for the Legal Service's confirmation, on the balance of legal arguments *stricto sensu*, of the (low) probability of formal legal challenge, and of operational and reputational considerations, that it does not object to:

- (i) closing the first WiFi4EU call early on the basis of the applicant lists registered by DIGIT's servers between 13:00 CEST on 15 May 2018 and the suspension of the online Portal about three hours later; and
- (ii) processing those applications and assigning vouchers to successful applicants in accordance with the call conditions, i.e. in order of arrival after 13:00 CEST as registered by DIGIT's servers, subject to the announced geographic distribution key (minima and maxima per Member State).

[eSigned]

Anthony WHELAN

Annex: Call conditions.

CC:

_____ (SJ)

_____ (DG CONNECT).