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COMMISSION STAFF WORKING DOCUMENT

Executive Summary of the Impact Assessment

Accompanying the document

Commission Recommendation

**on consistent non-discrimination obligations and costing methodologies to promote
competition and enhance the broadband investment environment**

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1. PROBLEM DEFINITION

Under its Digital Agenda for Europe, one of the flagship initiatives of the Europe 2020 Strategy, the Commission has made high speed internet a key priority. The availability of high speed internet is critical to Europe's economic recovery and future prosperity. A high quality digital infrastructure underpins virtually all sectors of a modern and innovative economy. It is the backbone of the Single Market, a major and still to a large extent untapped source of growth, and a key factor for the EU's competitiveness. The strong link between high speed internet deployment and competitiveness has been recognised inside and outside Europe. In Europe, however, network operators have been reluctant to invest large sums in new ultrafast networks due to many factors.

In addition to the unfavourable economic situation, market players are faced with diverging regulatory approaches within and across the telecommunications markets in Europe. This is particularly evident with regard to the imposition by national regulatory authorities (NRAs) of non-discrimination and wholesale access price obligations on the legacy copper-based access networks as well as the next-generation access (NGA) networks belonging to dominant telecom operators. This problem was illustrated in a Commission communication of 2010 on market reviews under the EU Regulatory Framework. A study on the "Cost of non-Europe" commissioned by the Commission in 2011 added qualitative and quantitative evidence supporting the need for intervention. Inconsistent application of key remedies makes markets less attractive for entry and reduces incentives to invest, it forces cross-border operating companies to duplicate costs thereby limiting opportunities to realise economies of scale, and it results in a lack of standardised wholesale offers fit for multinational corporations and thus increases the operating costs for cross-border service provision. These perceived impediments create barriers to achieving a true single market in electronic communications and, thus, come with a high cost: they hamper cross-border investment, reduce competition and encumber innovation.

On the basis of our analysis of the problem, we conclude that without addressing it in a way that favours investment, significant barriers to growth will persist and the internal market for electronic communications will not fulfil its potential.

This impact assessment accompanies a legislative proposal that would, if adopted by the Commission, support successful deployment of new infrastructures - including fibre - to achieve the DAE targets. It does so by ensuring the legal predictability required to promote competition while, at the same time, fostering investment.

The legislative proposal concerns a Recommendation addressed to NRAs pursuant to Article 19 of the Framework Directive. It will recommend the approach that NRAs should take when imposing obligations of non-discrimination and wholesale access prices on operators that are designated as having significant market power (SMP) in specific markets.

2. ANALYSIS OF SUBSIDIARITY

The internal market is an area where the EU and Member States share competences. However, each Member State, through its NRA, only has jurisdiction to impose and enforce non-discrimination and wholesale access price obligations within its national territory and therefore cannot sufficiently achieve the objectives stemming from the Treaty. No single NRA, acting on its own, can assure sufficient consistency of regulatory measures across the

EU. Individual non-coordinated actions by Member States might hamper further development of and create obstacles to the internal market since European service providers and consumers would be treated differently in various Member States without objective justification. Further co-ordination at EU level is therefore required.

Lack of EU action would conflict with the requirement of the TFEU, stipulated in Article 114 TFEU, which requires the EU to adopt approximation measures for the establishment and functioning of the internal market. This general principle is reflected in the Commission's power to issue recommendations or decisions pursuant to Article 19 of the Framework Directive. This applies to those areas where the Commission identifies *divergences in the implementation by national regulators* of the regulatory tasks specified in the EU regulatory framework, which *may create a barrier to the internal market*. The discrepancies highlighted in the problem definition and the resulting fragmentation of the internal market along national or sub-national lines represent an obstacle to the internal market, giving therefore rise to an obligation to increase the level of approximation of regulatory rules in accordance with Article 114 TFEU.

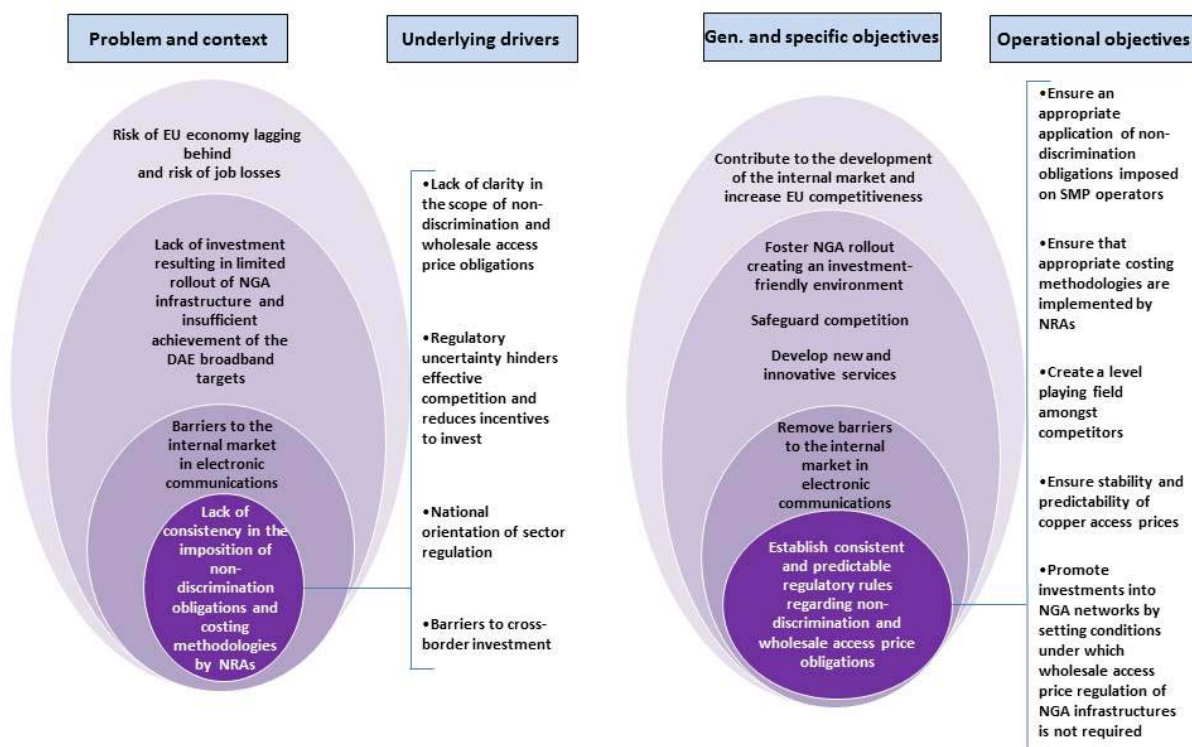
Action at EU level through a recommendation would enable a co-ordinated EU-wide approach, which would increase clarity and predictability of regulatory action across Member States, representing a clear benefit compared with action at the level of each individual Member State. Moreover, the proposed action is proportionate because it does not exceed what is necessary to achieve the objectives of the Treaties – in particular as set in Article 114 TFEU and in the secondary legislation, i.e. Regulatory Framework.

3. OBJECTIVES

The main objective underlying this guidance exercise is to achieve *regulatory consistency and predictability in order to ensure that appropriate incentives for efficient investment and innovation in NGA are provided whilst at the same time preserving competition*. Creating an environment in which access seekers will face comparable access conditions across the EU and allowing access providers at the same time a degree of flexibility to respond to uncertain demand, will contribute to the furthering of the internal market for electronic communications, the enhancement of competition and innovation for the benefit of consumers, and – as a result - ultimately contribute to the achievement of the DAE targets.

The general policy objectives, which this initiative aims to pursue, flow directly from Article 8 of the Framework Directive. In the present context, the following objectives are particularly relevant:

- Objective 1: Contributing to the development of the internal market for electronic communications networks and services;
- Objective 2: Promoting competition in the electronic communications sector for the benefits of consumers and citizens;
- Objective 3: Promoting efficient investment and innovation in new and enhanced infrastructures in the electronic communications sector.



4. POLICY OPTIONS

We have assessed four main potential approaches for addressing the problems identified in this document and assessed their likely impact:

- 1. *Business as usual:* This option consists in maintaining the status quo. No further Commission guidance, in form of a Recommendation, would be adopted. The Commission would continue to provide case by case guidance under the applicable EU consultation process. NRAs would be likely to continue (i) applying non - discrimination obligations on a more general (usually not very strict) basis and (ii) adopting diverging regulatory measures as to wholesale access price obligations.
- 2. *Stricter regulatory approach:* This option would recommend a range of very detailed provisions regarding the application and enforcement of non-discrimination obligation and a costing methodology for access to legacy copper networks that would result in significant price reductions for copper access in most Member States.
- 3. *Targeted regulatory approach:* This option would recommend that NRAs implement sufficient non-discrimination safeguards coupled with a costing methodology ensuring price stability for legacy (copper) infrastructure and thus providing a strong competitive constraint so that a wholesale access price obligation for NGA networks is no longer warranted and can be withdrawn (or not imposed in the first place).

- 4. *Light touch regulation*: This option would recommend general non-discrimination principles and the removal of the wholesale access price obligation for NGA networks, as well as a costing methodology for access to legacy copper networks that would result in significant price increases in most Member States.

5. ASSESSMENT OF IMPACTS

- 1. *Business as usual*: This option would fail to deliver the regulatory certainty necessary to ensure a coherent approach to non-discrimination and costing methodology in the EU. In addition, no furthering of the internal market and no additional impetus for investments in NGA networks is expected.
- 2. *Stricter regulatory approach*: Such an approach is prone to ensure short-term entry in NGA-driven markets but would have a detrimental impact both on investments, in particular from SMP operators, and on innovation.
- 3. *Targeted regulatory approach*: The imposition of tighter non-discrimination obligations coupled with a stable copper price anchor would provide a strong competitive constraint for NGA networks, which would support the removing of stringent NGA price regulation. This would, in turn, ensure that the right investment incentives for NGA are in place.
- 4. *Light touch regulation*: This option increases the prospective revenues of SMP operators. However, without well-defined safeguards, this option runs the risk not to deliver a sustainable service-based competition, and to compromise the investment case both for SMP operators and for access seekers.

6. COMPARISON OF OPTIONS

Based on a detailed qualitative and quantitative assessment of the options, the impact assessment concludes that the third option (targeted regulatory approach) is most appropriate to contribute to (i) strengthening the internal market by creating a consistent and predictable legal environment, (ii) providing the right incentives to invest in NGA while, at the same time, (iii) safeguarding competition.

The targeted regulatory approach offers positive effects on investments by limiting the degree of regulatory intervention when specific competitive conditions are met. Not imposing wholesale access price obligations on NGA networks will allow more effective risk sharing by network operators and access seekers, and introduce price differentiation to meet consumer preferences and foster broadband penetration. The proposed pricing methodology for legacy networks will provide in general for stable wholesale access prices over time, in particular due to neutralising the volume effect, which currently tends to exercise upward pressure on access prices for legacy networks in many Member States. Stable access prices benefit consumers, while stable and predictable revenues from legacy infrastructure will also benefit long term investments into NGA networks. These benefits will be shared with final customers at retail and wholesale level in terms of new and enhanced services. In addition further benefits to

retail prices coming from technical progress and competition can be anticipated in the longer term.

7. MONITORING AND EVALUATION

The proposed Recommendation should be implemented by NRAs under the supervision of the Commission in the process of Commission's Article 7 notification procedure. The impact on investment, competition and retail prices will be closely monitored by the Commission and BEREC, also based on the information provided by telecom operators to NRAs on their investments and roll-out plans.