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**Subject: Austrian comments to the Draft Commission Recommendation on regulated access to Next Generation Access Networks (NGA) (COCOM 09-24)**

Please find in the following the comments from the Austrian Federal Ministry for Transport, Innovation and Technology and the National Regulatory Authority for Broadcasting and Telecommunications (RTR) concerning the Draft Commission Recommendation on regulated access to Next Generation Access Networks (NGA).

Austria welcomes that the Commission has decided to submit its revised draft NGA recommendation to market participants for a second public consultation. This shows the importance the commission attaches to competitive conditions to be set for future NGA deployment in EU member states.

Similar to the first consultation, Austria concurs in the observations by the European Regulators' Group (ERG) on specific issues in the draft NGA Recommendation in its latest response to the Commission, especially with regard to the continued need for regulatory flexibility and to the general importance of promoting competition.

Regarding the role of effective competition in NGA scenarios it should be clarified that the objective of the EU Framework is not only to encourage efficient investment and innovation, but also and equally important to promote effective competition (Art. 8 FD). We are persuaded that effective competition is one of the main drivers for efficient investment and innovation. Therefore we think that the NGA Recommendation should make clear that there is no contradiction between investment and competition.

In the Austrian view, the recommendation should provide high-level guidance to be followed by NRAs and allow an adaptation to national circumstances instead of anticipating the outcome of market analyses and limiting the choice and form of remedies. The provisions of the Recommendation should avoid the risk of applying remedies which do not adequately reflect specific national circumstances and possibly result in a higher level of uncertainty which could even hamper investment.

Austria would like to stress that the fundamental principles of the Regulatory Framework should be reflected in the NGA Recommendation, especially the fact that NRAs have to run a proper market analysis based on general competition law principles to determine SMP and to impose remedies. Only after finding SMP, regulatory obligations should be imposed in a proportionate and justified way. Applying a priori exemptions or presumptions solely based on mechanistic criteria like deployment type (i.e. multi-fibre) or the number of operators seems not to be in line with the EC Treaty and the EU framework and bears the risk that national market analysis decisions won't persist if challenged in court. As the proportionality principle requires that e.g. duct access or the sharing of civil engineering works are appropriate measures to match a corresponding competition problem, a conflict might arise between European soft law and national administrative law if those measures can not be deducted from the respective analysis of the relevant national market but their imposition is proposed in the recommendation. This may lead to a difficult situation as it already happened in the past when the Austrian High Administrative Court overturned an NRA market analysis decision by referring to the argument that insufficient consideration was given to Commission remarks.

With regard to the appropriateness of remedies we would like to stress that remedies should result from a thorough analysis by NRAs taking into account the specific circumstances in the country in question. As already stated by ERG, the deepest level possible to promote competition may change in an NGA environment due to the increasing economies of scale or a change of the possible access points. In an NGA environment the decreasing importance of LLU may imply both, a stepping back to Bitstream Access (BSA) on the ladder of investment rung (which means that BSA is likely to become more important and sophisticated) or stepping up to street cabinet/duct access/own deployment. The current draft NGA Recommendation does not provide NRAs with the necessary discretion with regard to the choice of remedies to deal with the complexities of NGA markets, especially when unilaterally favouring a multi-fibre scenario that may not be equally appropriate for all member states, geographic areas and roll-out strategies. Taking into account the status of NGA deployments being far from mature, in our view a one-size-fits-all approach does not seem to be the appropriate answer to the competitive situation in many member states at this point in time.

In our opinion, the same is true for the Commission's plans to allow an a priori exemption from cost-orientation in certain circumstances. We think that the imposition of cost-orientation always should follow a proper market analysis and be based on the specific competitive conditions of the market analysed. As an example, the current price-control remedy imposed by the Austrian NRA on market 5 is retail-minus. Therefore, it does not seem to be appropriate to presume a general obligation of cost-orientation nor to make mechanistic exemptions.

With regard to incentivising efficient investment, we agree with ERG's position emphasising the importance of calculating a reasonable rate of return that adequately reflects the risks as this is done now when regulating access prices *ex ante*. This means that a higher risk premium should not be applied only because new infrastructure is being rolled out, but rather after assessing a number of factors influencing the riskiness of a project (e.g. uncertainty regarding demand, ARPU,

technological issues, market dynamics, macro-economic developments or costs of deployment). As these factors will vary across Europe, NRAs should assess the corresponding risks before any definite statement is made.

Finally, Austria would like to state that we fully support the overall objective of the draft recommendation to provide regulatory predictability because this will have a positive effect on investment in NGA infrastructure as it reduces uncertainty through the announcement of e.g. regulatory guidelines before the investment decision is taken. Therefore we appreciate the possibility to comment on the draft NGA recommendation and will be happy to further cooperate in order to achieve the common goal of providing greater certainty to market players to incentivise efficient investment and at the same time ensure a competitive roll-out with regard to NGA infrastructures.

Kind Regards,

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