

Position of the German Broadband Association ANGA (Breitbandverband ANGA e.V.) on the Commission's White Paper "How to master Europe's digital infrastructure needs?" (DNA White Paper)

I. Introduction and Summary

On 21st February the European Commission presented a working paper entitled 'How to master Europe's digital infrastructure needs?'. The paper aims to form the **basis for the next European Commission's legislative agenda for the telecoms sector** and to identify the key policy reforms needed to improve the investment climate and structural market conditions in order to achieve the EU's digital objectives. It thus represents an **important step not only for the further roll out of digital infrastructures in the Member States**, but also for the creation of a genuine internal market for telecommunications in Europe.

ANGA strongly disagrees with the Commission's finding, that the regulatory system should be shifted away from the approach to address **significant market power** in an undertaking towards a **symmetric approach** regulating all network operators to the same extent. At least in Germany – but also other member states – the market situation does not justify such a paradigm shift. To the contrary, we fear **massive market disruptions** if the Commission would proceed in this direction.

The **migration from the incumbents' copper networks towards fiber networks** is one of the most important tasks for the coming years. This process will pre-design the future market situation to a large extent. It is now that we have to make the right decisions in order to prevent ex-monopolists to take along their significant market power from the old copper world into the new fiber world. ANGA strongly suggests that NRAs take action right away and design a **competition neutral and non-discriminatory migration framework** that allows all competitors to thrive.

II. Position in detail

1) Commission's evaluation of challenges go wrong in one major point

While we warmly welcome the Commission's recognition of the current challenges that European telecoms companies are facing and the fact that it identifies various options and perspectives for the urgently needed modernisation of the European telecommunications regulatory framework, it is very unfortunate that the Commission has made a mistake on one key point:

The Commission insinuates that there is sufficient competition in gigabit infrastructures that would (possibly) justify the reduction of the regulation of companies with significant market power (SMP regulation). That is not the case in Germany and other member states. In Germany, we see clear re-monopolisation tendencies in the fixed networks sector: Deutsche Telekom is still increasing its already high market share in the German DSL market from 53 per cent ten years ago to currently almost 60 per cent according to the latest VATM market study, 25 years after liberalisation.

It is clear that the former monopolists try to take along the market power they acquired and maintained on the old copper network to the new fibre-optic world. Therefore, **now is not the time to deregulate the dominant companies** in the fixed network sector. Instead, it is necessary to discuss which regulatory instruments are suitable to effectively control the considerable market power in a future fibre-optic world and to strengthen infrastructure competition.

The Commission's completely wrong assessment of the fixed market and the conclusions drawn from it in the area of access regulation, which is so important for future fiber roll-out, are then also a heavy burden on the white paper as a whole, as it strongly relativizes the many correct findings and descriptions of problems otherwise contained in the paper.

The Commission's approach is to push for a small number of pan-European telecoms operators, consolidating the market to a large extent. The objective is to make the EU more competitive in an international setting. What the Commission ignores is that in many EU countries, and especially in Germany, fibre roll-out is conducted to a large extent by alternative operators and not the incumbents. This dynamic would be hampered or even completely undermined by de-regulating the ex-monopolists and treating all telecoms operators similarly following a symmetric approach.

In the following we will point out our main concerns about the Commission's suggested approaches towards a future EU telecoms market.

2) Commission's proposed solutions raise problems

a) Pillar II: Completing the Digital Single Market: Objectives

The regulatory objectives define the framework within which the entire telecommunications legal framework operates. They are therefore of fundamental importance. We recognize that it is more and more challenging to find the right balance between the regulatory objectives when they come into conflict.

The connectivity goal in particular regularly collides with the goal of safeguarding end-user interests. In practice, this means that over-regulated consumer protection inhibits fiber roll-out.

The goal of completing the digital single market is also not without conflict, as the White Paper impressively demonstrates: The Commission wants to promote a powerful digital market in the EU by de-regulating national markets. However, given the fact that many national markets are still characterized by dominant operators and thus, necessitate regulatory intervention, competition is in danger of falling by the wayside in case deregulation takes place. From the point of view of national and regional network operators, this is an extremely bad sign. Therefore, the European Electronic Communications Code (EECC) should focus on competition which includes effective regulation.

There is a danger that the objectives will crumble away or that the focus will be on the one that "fits best" at the moment. It would therefore be useful to carry out a fundamental evaluation of the objectives as a whole instead of just introducing more objectives.

b) Pillar II: Completing the Digital Single Market: Scope of application

The white paper clearly identifies the significant differences in the regulatory treatment of telecom providers and so-called over-the-top (OTT) providers. These are no longer sustainable and should be eliminated. Services that are identical or at least very similar from the end user's point of view (e.g. sending text messages via SMS vs. text messages via WhatsApp) are still subject to completely different regulatory systems. The principle of "same services, same rules" should apply in these cases.

On the other hand, the term "regulatory level playing field" must not be understood as meaning that network operators should be treated equally regardless of size and market power (keyword: digital single market, EU champions, change to symmetrical regulation as standard and SMP regulation as an exception, see below). National companies with significant market power must not be deregulated in the context of a level-playing-field approach.

In the "Scope" section, the Commission also deals with the aspect of contractual agreement between application providers and network operators on the modalities of data traffic transport.

Fundamental to this is the hotly debated question: Should large content application providers pay their fair contribution towards network investments? From our point of view, yes. ANGA is in favour of the introduction of an obligation to invest in network costs for large traffic generators (LTGs). This is all the more true given that the EU Commission has identified an investment gap in the three-digit billion range in order to achieve the goals of the Digital Decade 2030.

The development of VHC networks across the EU is crucial for all social and economic sectors. So far, the investments required to achieve this goal have been made by the network operators – or their customers – and partly from state funds (subsidies). However, LTGs do not contribute to these costs to the extent that they benefit from VHCN roll out and that society should expect them to. In order to fulfil their social responsibility, LTGs should be obliged to participate in the financing of VHCN.

The legal mechanism for such an obligation should ensure:

- **Obligation to contract:** LTGs should be obliged to conclude a contract with every network operator – regardless of the size and market power of the network operator.
- **Contract negotiation:** Prices and other terms should be negotiated between network operators and LTGs.
- **Non-discrimination through collective bargaining:** In order to ensure non-discrimination against smaller network operators and similar terms and conditions, associations should be entitled to negotiate with LTGs on behalf of their members.
- **Dispute settlement mechanism with a binding decision** if no commercial agreement can be reached.
- **Obligation** for network operators to invest LTGs' payments in the **VHCN roll out**.

c) Pillar II: Completing the Digital Single Market: Copper switch-off

Digitalization, nationwide fiber roll out and sustainability: To achieve these goals, switching from the incumbents' old copper networks to future-proof fiber networks or alternative VHC networks (e.g. upgraded HFC networks) is essential. Both the EU Commission and the German government have recognised this and addressed it in several places; it is even explicitly stated as a target in Europe's Digital agenda for 2030.

The European Electronic Communications Code (EECC) and the German Federal Telecommunications Act do not contain any explicit requirements for migrating from copper to fiber or VHC networks. They only regulate the circumstances under which a SMP operator may switch off its old copper network. This includes having an alternative fiber or VHC network in place that can be used to supply customers after the copper switch-off. In its decision on the approval of the switch-off, the NRA has to decide – to a certain extent – at its own discretion.

In Germany the incentive for Deutsche Telekom to initiate a copper switch-off in a certain area is great if it can migrate existing connections to its own fiber network. If, on the other hand, a competitor has a local VHCN, there are often incentives for Deutsche Telekom to continue operating its own copper network for strategic and economic reasons and not migrate to the existing fiber or VHC network.

This strategic behavior of Deutsche Telekom would have devastating consequences for the fiber roll-out in Germany and the German telecommunications market:

- The nationwide fiber roll-out would be significantly delayed. It would take decades for all citizens to be able to benefit from digitalisation.
- The sustainability goals of the German government and the EU would be missed.
- Deutsche Telekom would strengthen its market power and successively build over existing fiber-optic networks of competitors destroying their business cases.

To prevent this, the copper switch-off must be designed to be neutral in terms of competition. The development of framework parameters must not be left to Deutsche Telekom.

The ANGA therefore demands:

- The NRA (BNetzA) must together with all interest groups develop a holistic concept for competition-neutral and non-discriminatory copper switch-off.
- This concept should be drawn up before the first regulatory procedure under § 34 of the German Federal Telecommunications Act (FTA; Article 81 EEC, respectively) is carried out. § 34 FTA enables BNetzA to develop appropriate framework conditions in advance. In view of the importance of the topic for the development of competition and the further fibre roll-out in Germany, it is imperative that BNetzA now makes use of this opportunity and discusses the open issues with the industry within a clear timetable.

d) Pillar II: Completing the Digital Single Market: Access policy in a full fibre environment

The Commission is pushing for regulatory simplification, which is basically tantamount to deregulation. While we are generally positive about simplification – e.g. by deleting irrelevant and factually unused provisions of the EEC such as e.g. co-investment commitments (cf. Artt. 76, 79 EEC) – regulation based on the identification of significant market power in a company must under all circumstances be maintained (SMP regime) in order to effectively address the bottlenecks that still exist in many markets.

The Commission erroneously assumes that there are no longer any nationally dominant undertakings requiring the definition of national markets. This would be fatal for Germany: Deutsche Telekom continues to be the undisputed dominant company in Germany on a national scale. Their de-regulation would therefore be unfounded and harmful to the telecommunications market in Germany.

The so-called "safety net" of SMP regulation in regional markets also turns out to be a sham. Such regional regulation would often affect Deutsche Telekom's competitors, who are pushing ahead fiber roll-out in Germany, while Deutsche Telekom, which has national market power, would be deregulated. That would be fatal in view of the need for further billions of investments. Over-regulating competitors drives away investors. At the same time, the reference to the three-criteria test made in the White Paper solely as a safety net is not sufficient. In order to preserve competition, it is necessary to maintain a minimum level of formalised conditions in order to maintain an assessment of market conditions by NRAs on the basis of common criteria. This is best achieved by not removing markets from the Commission's recommendation on relevant markets.

For the same reasons, the situation in Germany also prohibits the paradigm shift towards symmetrical regulation as standard and SMP regulation as an exceptional case.

ANGA therefore demands:

- The Commission should continue to issue a relevant market recommendation for the time being. Otherwise, the definition of national markets by NRAs would always require justification and would therefore be much more complex than it is today.
- The paradigm shift away from the standard of SMP regulation to symmetrical regulation is to be rejected.
- Shifting from nationally regulated markets to regionally regulated markets is not appropriate as long as SMP can be found on a national scale in one (or more) undertakings.
- EU-wide remedies: harmonisation makes sense, but one-size-fits-all will not work; in the end, there would be a meaningless minimum consensus.

e) Pillar II: Completing the Digital Single Market: Universal Service

We agree with the Commission that one important task of the universal service is avoiding a digital divide between rural and urban areas. Nevertheless, the universal service regime is the ultima ratio, if

private and state aid network roll-out are not sufficient to guarantee minimum connection to everybody. As long as state subsidised fiber roll-out focuses on the white areas there might be no or very low necessity for universal service measures. Even in Germany where the Government focusses its state aid on grey areas there has been only one universal service case identified by the NRA so far.

In order to attract further investments in fiber roll-out, it is important to have a triad, putting the clear emphasis on privately financed network deployment, complemented by a reasonable state aid policy and subordinately a universal service regime as a guaranteed minimum service at an affordable price. In our view, the universal service regime works as it is and does not need any alteration.

Therefore, we reject the view in the Whitebook that people need to have a claim for the best possible network. Such a requirement does not fit with the guidelines given by the EECC, which establish universal service access for providing a safety net for delivering a minimal set of services/applications. Otherwise, a requirement for providing the best possible network intends to be a right for providing fiber access. It must be highlighted that stronger requirements regarding the universal access obligation would rise the number of entitled persons. Subsequently, more universal access procedures will follow, which bind resources und impede privately funded roll-out by network operators. Ultimately, network operators would be forced to use limited construction capacities for providing connections under the universal service regime instead of using these capacities for deploying fiber for larger areas.

f) Pillar III: Secure and resilient digital infrastructures for Europe: Towards secure communication using quantum and post-quantum technologies

We welcome the fact that the Commission discusses this topic in a broader context. When we implement this technology in the public and private sectors, it is essential to have educated and trained experts available who will enable the industry to use this technology successfully. Our understanding is that this technology is at the level of standardization and has not yet access to education at universities. Without trained engineers, it is hard to implement this technology or build a regulatory environment for it. The Commission should refrain from regulating a technology before it even leaves the standardization level. For the work of standardization, we would like to recommend that the Commission sets up a Joint working group of the ESOs to harmonize the results of the standardization work. The Commission should set up a standardization mandate to guide the work of the standardization. That helps to handle the market surveillance in this area. With this work, the Commission will bring this technology to the member states and make it a success. The coordination and Commission's guidance of ETSI, CEN, and Cenelec is essential.

g) Pillar III: Secure and resilient digital infrastructures for Europe: Towards security and resilience of submarine cable infrastructures

We welcome the fact that the Commission now understands submarine cables to be important for economic security, which is reflected in the Commission's recent recommendation on "a safer and more resilient submarine cable infrastructure". ANGA supports measures to ensure the security and resilience of this infrastructure.

In this respect, we support the initiatives as well as we welcome the development of cable projects of European interest (CPEIs) and support the fair distribution of financial resources. Such allocation of resources should be based on transparent criteria, taking into account factors such as scale, expertise and operational capacity. It is imperative that all trusted industry partners have equal access to such financing to ensure fair competition and the best results for the sector and its customers.

Nonetheless, providing a secure and resilient submarine infrastructure cannot be considered as a single approach of Europe. Submarine cables are deployed around the world to secure intercontinental communication. Therefore, submarine cables are a key factor for the modern internet. For securing such key elements of world communication, it is truly right to provide further independent cables to get a

redundant network. However, regarding the aspects of a connected world and greater security, we recommend an intensive exchange with all trusted submarine cable operators instead favoring a sole European approach.

Berlin/Köln, 28.06.2024

The German Broadband Association ANGA e.V. represents the interests of more than 200 undertakings from the German broadband industry. Among its members are network operators like Vodafone Germany, Tele Columbus (PYUR), EWE TEL, NetCologne, M-net, wilhelm.tel and several technology suppliers. They offer more than 20 million customers TV and broadband services.

Through a subsidiary, we organize the ANGA COM – Europe's leading trade fair and congress for Broadband, Television & Online (www.angacom.de), which recorded 480 exhibitors from 35 countries and 23,000 participants in 2024.