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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the functioning of the European Electronic Communications Code, Directive (EU) 2018/1972 ('EECC')

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1. INTRODUCTION

By this report the Commission fulfils its obligation to report to the European Parliament and to the Council on the review of Directive (EU) 2018/1972 establishing the European Electronic Communications Code ('EECC')[1], pursuant to its Articles 122 and 123(2).

The EECC in Article 122 requires the Commission to review the functioning of the EECC. Therefore, the general aim of this review report is to assess the functioning of the EECC since its applicability as of 21 December 2020.

In particular, it assesses the functioning of:

- the powers granted to national regulatory authorities (NRAs) to impose obligations to grant access to wiring and cables and associated facilities inside buildings in Article 61(3);
- the regulatory treatment of new very high capacity network (VHCN) elements in Article 76;
- the rules on voluntary separation by a vertically integrated undertaking in Article 78; and
- the rules on commitments offered by undertakings designated as having significant market power in Article 79.

The report also evaluates whether the *ex ante* and other intervention powers in the EECC are sufficient to enable national regulatory authorities to address uncompetitive oligopolistic market structures, and to ensure that competition in electronic communications markets continues to thrive to the benefit of end-users.

In addition, Article 122(2) requires that the Commission reviews the scope of universal service in light of social, economic and technological developments in Articles 84 to 92. This report provides an overview of the functioning of those provisions, presents the first lessons drawn from the EECC's application and functioning, and outlines the way forward.

Furthermore, Article 122(3) allows the Commission, taking utmost account of the opinion of the Body of European Regulators for Electronic Communications (BEREC), to publish a report on the application of the general authorisation provisions in Articles 12 to 19, including on the possible conditions and to submit a legislative proposal to amend those provisions where it considers this to be necessary for the purpose of addressing obstacles to the proper functioning of the internal market. Finally, Article 123 of the EECC requires that the Commission publishes a report on the application of end-user rights, taking utmost account of the BEREC opinion.

[1] OJ L 321, 17.12.2018, p. 36, ELI: http://data.europa.eu/eli/dir/2018/1972/oj

The aim of this report is to accomplish all these tasks as required in Articles 122 and 123(2).

Unless indicated differently, references to articles in this report are to articles of the EECC.

1.1. Overall review of the EECC

In view of new challenges concerning the competitiveness of the sector, and of the need to deepen the Single Market for electronic communications as well as security and resilience of networks, the need for a major regulatory reform has been identified. Therefore, this report includes the main findings from the comprehensive evaluation of the electronic communications framework accompanying the Impact Assessment (IA) of the Proposal for a Regulation of the European Parliament and of the Council on digital networks, amending Regulation (EU) 2015/2120, Directive (EU) 2002/58/EC and Decision No 676/2002/EC and repealing Regulation (EU) 2018/1971, Directive (EU) 2018/1972 and Decision No 234/2012/EU (Digital Networks Act), hereinafter referred to as the 'DNA'. The hereby mentioned evaluation for the purpose of the IA, apart from the assessment of the EECC provisions, includes an assessment of Regulation (EU) 2015/2120 on Open Internet Access (OIR)[2], of some telecom specific (number-related) aspects of Directive 2002/58/EC (ePrivacy Directive)[3] and of the Radio Spectrum Policy Programme (RSPP)[4].

This report is conducted together with the evaluation of the Regulation (EU) 2018/1971 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office) as required by Article 48 of the BEREC Evaluation.

Finally, the EECC is one of several pillars supporting and regulating the roll-out and provision of electronic communications networks and services. Other important pillars have not been covered by the evaluation report. The Commission will report about their reviews separately. More specifically, the full review of the Roaming Regulation[5] is scheduled for June 2029 and the report on the implementation of the Gigabit Infrastructure Act (GIA)[6] for May 2028.

This report presents only the main findings of the EECC review which are the following:

- The Significant Market Power (SMP) regime remains the key instrument for *ex ante* regulation.
- Radio spectrum is of outmost strategic and geopolitical importance; it is essential to enable communication, drive economic growth and social prosperity, and support critical services across various sectors.
- The universal service obligations (USO) in the EECC are a safety net to ensure all consumers in the Union have affordable adequate internet and voice communications services. However, the possibility to impose USO for the availability of the services is not widely used by Member States and the measures to ensure affordability, where used, differ across Member States.

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2 OJ L 310, 26.11.2015, p. 1, ELI: http://data.europa.eu/eli/reg/2015/2120/oj

3 OJ L 201, 31.7.2002, p. 37, ELI: http://data.europa.eu/eli/dir/2002/58/oj

4 OJ L 81, p. 7, ELI: http://data.europa.eu/eli/dec/2012/243(2)/oj

5 OJ L 115, 13.4.2022, p. 1, ELI: http://data.europa.eu/eli/reg/2022/612/oj

6 OJ L, 2024/1309, 8.5.2024, ELI: http://data.europa.eu/eli/reg/2024/1309/oj

- The provisions on end-user rights are mostly still fit for purpose but in some respects could be simplified.

For more detailed findings on the provisions covered in this report and for the full evaluation of EECC provisions, together with the other legislation revised for the preparation of the Commission's proposal for a Digital Networks Act (DNA) please refer to Annex 11 of the IA to the DNA legislative proposal: 'Evaluation – Review of the functioning of European Electronic Communications Code (EECC), BEREC Regulation, Open Internet Regulation, and certain aspects of the ePrivacy Directive' (Part 3 /3 of the IA).

1.2. Sources and transposition process

In preparing this report, the Commission gathered information and feedback from a variety of sources and targeted consultation activities carried out during the preparatory stages of the DNA proposal. The main sources are listed in Annex I of the IA (Part 2/3 of the IA).

Furthermore, the Commission considered findings from its ongoing monitoring of transpositions and application of the EECC provisions in the Member States and from the complaints received.

Firstly, only three Member States met the December 2020 deadline for transposing the EECC into national law. The transposition in all 27 Member States was only completed in August 2024.

Secondly, several Member States adopted national provisions which relate to the EECC provisions but go beyond what would be necessary for the completeness and conformity of the transposition. This resulted in overly complex national legislation and subsequently in unnecessary regulatory burden for operators, notably related to security incidents and threads to security of public electronic communications networks.

Lastly, it is important to consider that case law is only starting to be developed regarding the application of the EECC. Several cases are currently pending before the Court of Justice of the European Union ('the CJEU') concerning the interpretation of key EECC provisions such as those on rights of spectrum use – both for radio and for TV broadcasting and on the provision of contractual information to end-users. These judgments will provide more clarity and will contribute to a more harmonised approach amongst Member States.

2. REVIEW AND EVALUATION OF THE ACCESS PROVISIONS

In line with Article 122, the Commission reviewed in particular the market implications of Article 61(3) and Articles 76, 78 and 79 and assessed whether the *ex ante* and other intervention powers pursuant to this Directive are sufficient to enable national regulatory authorities to address uncompetitive oligopolistic market structures, and to ensure that competition in electronic communications markets continues to thrive to the benefit of end-users.

Wholesale access regulation has been widely applied across the EU. Such a system promotes regulatory predictability by ensuring a consistent regulatory approach. Access regulation has supported the development of competition (including efficient infrastructure-based competition) by granting access to physical infrastructure and of choice in broadband services, including VHCN, for a high proportion of households in the EU.

2.1. Access to in-building wiring

Article **61(3)** was, in principle, designed to limit network duplication inside buildings. It identifies a connection point for wholesale access and requires that any network operator grants access to competitors.

Eight countries have applied symmetric access to in-building wiring[7]. Limited use of Article 61(3) may be partly because it applies only upon reasonable request by an access seeker and NRAs cannot apply it *ex officio*.

Mandating access to in-building wiring requires the NRA to demonstrate that replication of the in-building wiring would be economically inefficient or physically impracticable. Extending the access obligations beyond the building and the first concentration point is possible under Article 61(3), if the access obligations to in-building wires "*do not sufficiently address high and non-transitory economic or physical barriers to replication which underlie an existing or emerging market situation significantly limiting competitive outcomes for end-users*".

Symmetric access to the network that goes beyond the in-building wiring is shielded by a high burden of proof to satisfy, notwithstanding the circumstance that there is limited decisional practice or case law.

The limited use of symmetric regulation under Article 61(3) in other Member States could be due to the fact that the EECC seems to prioritise SMP regulation, which provides an alternative means of mandating wholesale access including to FTTH. SMP based remedies are frequently applied as, contrary to the "optional" symmetric regulation, the requirement to conduct a market analysis of markets listed in the Relevant Market Recommendation as susceptible to *ex ante* regulation is, in principle, mandatory.

2.2. Functional separation, vertical separation and commitments by undertakings

Regarding co-investment under **Article 76**, there were no cases, in which the NRAs have formally applied this provision in the adopted measure[8].

Therefore, **Article 76** did not prove, over the past five years of application, to be an efficient tool to incentivise SMP operators to share investments with (potential) competitors on a voluntary basis. The co-investment provisions in Article 76 appeared complex, limiting their potential application. The provision, if applied, could potentially be counterproductive, as it would risk locking in customers to the SMP operators' network, thereby reducing the potential customer base that would be needed to support the entry of infrastructure-based competitors. Therefore, Article 76 provisions should either be substantially revised or removed.

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[7] In accordance with Article 61 (3) EECC. Of these, four countries (Cyprus, Greece, Italy and Poland) impose symmetric access for in-building wiring only, while the other four (France, Spain, Portugal and Croatia) impose symmetric access at the first distribution point with a possibility for this point to lie outside the building.

[8] Only in Italy an SMP operator sought to make use of the new possibility offered by the Article 76. AGCOM, however, withdrew its notification once the SMP operator unilaterally changed its offer on an essential element (prices), thus requiring a new assessment by AGCOM. Later, AGCOM requested amendments of the offer and eventually, when the SMP operator did not implement them, rejected the offer as non-compliant with the EECC.

The EECC contains two provisions regarding the separation of vertically integrated operators. **Article 77** empowers the NRAs to impose functional separation as a 'last resort' remedy, whereas **Article 78** obliges the SMP operators to inform the NRAs about voluntary separation. That allows the NRAs to re-assess the markets affected by the voluntary separation.

No NRA has ever mandated functional separation under Article 77. However voluntary legal or functional separation has been pursued in at least two Member States[9] under Article 78. Therefore, Article 77 could be considered for removal as the provision has never been applied not only over the past five years of application of the EECC, but also earlier, since introduction of this obligation the EU law in 2009. Removal of this tool would not have negative consequences for the NRAs who use standard obligations such as detailed non-discrimination rules to ensure equivalence of access and to offset the advantage stemming from vertical integration of an access provider, addressing the competition problems identified. Article 78 could be simplified and qualified as one of general regulatory commitments, which SMP operators can propose under Article 78.

2.3. Uncompetitive oligopolistic market structures and ensuring competition to the benefit of end-users

Since the entry into force of the EECC, NRAs found no cases of joint SMP which were confirmed by the Court of Justice of the EU. In its April 2018 SMP Guidelines, the Commission provided guidance on the interpretation and application of the joint SMP concept[10].

Under Article 32, NRAs notified only a very limited number of draft measures, in which they found collective dominance.

Still in 2018, the Dutch NRA ACM found joint SMP in the wholesale fixed access, a finding which the Commission did not veto[11] under the review procedure for market analyses in force at that time (Article 7(3) Framework Directive). However, despite the Commission's absence of serious doubts regarding the finding of joint SMP, the ACM's decision was subsequently annulled by the Dutch court[12]. More precisely, the Dutch court rejected ACM's position that commercial agreements cannot be taken into account in the market power assessment. On ACM's market power assessment, the court stated that demonstrating a hypothetical possibility of dominance is not a sufficient basis for regulation. Instead, the ACM should demonstrate that an undertaking has the incentive and the ability to restrict competition.

In February 2022[13] and in March 2023[14], the Commission adopted decisions requiring the Czech NRA to withdraw its proposed draft measures to regulate wholesale access to mobile networks in Czechia via a finding of joint SMP. The Commission found that other regulatory

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9 Denmark, Italy.

10 Communication on SMP guidelines | Shaping Europe's digital future.

11 Commission Decision C(2018) 5848 final of 30.8.2018 concerning Cases NL/2018/2099 and NL/2018/2100: Wholesale fixed access market in the Netherlands.

12 https://www.jdsupra.com/legalnews/highest-dutch-court-annuls-acm-s-joint-71679/.

13 Commission closes its in-depth investigation on the proposed Czech regulation on mobile access market | Shaping Europe's digital future.

14 https://digital-strategy.ec.europa.eu/en/news/commission-closes-its-depth-investigation-proposed-regulation-market-wholesale-access-mobile.

tools such as the enforcement of already imposed spectrum related obligations had the potential to solve the problems[15].

The Maltese NRA attempted to regulate the broadband access market with two local nationwide networks based on single SMP findings and to regulate only one out of two nationwide networks. After a thorough investigation, the Commission found that the Maltese NRA should take into account the competitive constraints exerted by the presence of a second undertaking operating an alternative cable infrastructure and determined that the draft measure would not be compatible with EU law and issued a veto[16].

No other proposed measures addressing findings of joint SMP have been notified.

Despite the small number of joint SMP cases, **competitive concerns in oligopolistic markets** (most often with only two operators) have been addressed in different ways.

For example, in the Belgian market they were addressed through distinguishing separate markets for, on the one hand, access to copper and fibre and, on the other hand, to cable. In each of those separate markets the NRAs identified single SMP.

In the Dutch market, following the above-mentioned Court decision, concerns were addressed by way of commitments, which the providers entered into following a market investigation under competition law.

In addition, the oligopolistic market structures in the mobile sector have, so far been addressed in two ways, either by conditions to provide access to mobile virtual network operators, among others, attached to the rights of spectrum use under the spectrum authorisation regime – or under competition law commitments in the case of merger approvals.

Despite the small number of cases where the NRAs proposed regulation of oligopolistic markets, the current approach, allowing the NRAs to regulate the markets with single and joint SMP should be maintained because SMP assessment (single or joint), based on the same principles of competition law ensures internal coherence and regulatory predictability. The SMP Guidelines[17] adopted by the Commission set out the main principles and criteria for determining single SMP and joint SMP.

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[15] In a 2023 study, see https://www.berec.europa.eu/system/files/2023-04/BoR%20%2823%29%2041%20Study%20on%20wholesale%20mobile%20connectivity%20trends%20and%20issues%20for%20emerging%20mobile%20technologies%20and%20deployments_final_0.pdf,

WIK-Consult noted that the nature of MVNO obligations in spectrum licences might affect the degree to which an MVNO could differentiate its services from that of its host and thus its potential to provide competitive disruption. It noted that in the Czech case, the spectrum licence provides "prices must allow equally efficient operators to profitably operate on the downstream (retail) market". The study noted in this context that "The fact that the spectrum licence MVNO obligations require wholesale prices to be set on the basis of an EEO margin-squeeze test in practice limits the potential for MVNOs to engage in price competition."

[16] C(2024) 1928 final.

[17] Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services (2018/C 159/01).

3. REVIEW OF THE SCOPE OF UNIVERSAL SERVICE

Universal service obligations (USO) in the EECC provide a safety net to consumers in the Union and ensure that they can have access to adequate broadband internet access and voice communication services at an affordable price. The definitions of adequate internet access vary between Member States. The possibility to impose USO for availability is not widely used by Member States, and the measures to ensure affordability, where used, differ across Member States. The sector-specific designation rules are administratively burdensome and procedures to benefit from affordability can be complex for consumers. However, USO continue as a safety net also in the contexts of urban-rural divide, levels of risk of poverty for EU consumers and technological evolution.

3.1. Availability of universal service

Thanks to widespread commercial roll-out of fixed and mobile networks, the availability (Article 86) of adequate broadband internet access (as defined individually by the Member States, typically in the range of 10 Mbit/s download speed) is not a concern because of the widespread prevalence of fixed and mobile networks which are sufficient to provide such basic broadband speeds. The availability is also addressed through alternative public policy tools such as State Aid measures or financial instruments. Nine Member States designated universal service providers but even where providers were designated, the actual number of imposed obligations was relatively low.

3.2. Affordability of universal service

Member States used widely diverging measures to ensure affordability (**Article 85**) for consumers with low income and special social needs. These included various forms of support, such as vouchers, social tariffs and discounts or addressing affordability through the social welfare system.

The methodologies used for determining what constitutes an affordable price vary. Lack of transparency and the complexity of procedures can be barriers for consumers to benefit from defined affordable prices and offers. While affordability measures are in place, their practical impact seems often limited due to low take-up, administrative burden, and lack of visibility.

Member States have additional measures to support consumers with disabilities through the universal services regime (**Article 85(4)**). These include, for example, higher quality of service, free service and equipment support.

The adequate broadband and voice communications at basic broadband speeds (taking into account both fixed and wireless technologies), are virtually universally available in the Union and the possibility to impose USO for the availability is not widely used by Member States. However, the USO rules provide a safety net for end-users' fixed locations at all areas. The share of people in the Union that could not afford an internet connection has declined over the last decade, but affordability especially for consumers with low income and special social needs remains an issue in certain cases. Further harmonisation of the assessment of affordability and determining the adequate internet access service could improve the effectiveness of the rules. In addition, simplification of the sector-specific designation and financing could reduce administrative burden both for Member States and for providers.

4. REVIEW OF END-USER RIGHTS

The **end-user rights provisions** (**Articles 98-116**) are mostly still fit for purpose. They complement general consumer protection rules and have supported the objective of promoting consumer choice. While they generally provide for maximum harmonisation, their effectiveness is reduced by the possibilities included in the articles to introduce additional national rules. The use by Member States of the possibility to deviate from sector specific rules has increased regulatory fragmentation of the sector-specific consumer protection rules for electronic communications. Industry stakeholders have flagged this as preventing them from operating at scale and from providing consistent cross-border services.

As to electronic communications mass-market services in general, end-users in the Union enjoy a high-level of choice, value-for-money, quality of service and protection in the electronic communication sector. The EECC, together with the EU's competition rules ensure consumer choice and competitive markets.

Further harmonisation of the rules would reduce single market barriers arising from divergent implementation of the rules and improve single market functioning especially for cross-border providers. This could reduce administrative burden, lower compliance costs and enhance the delivery of cross-border services. In addition, some updates and simplification could be beneficial for both end-users and service providers, for example, updating the requirements for information provision and streamlining the protection granted to business customers and further alignment with related legislation in the sector.

5. LESSONS LEARNT AND WAY FORWARD

The EECC, through its objectives of promotion of connectivity and access to, and take-up of, VHCNs, helped achieve/maintain effective competition in the market for electronic communications networks and services and protect the interests of the end users. However, the EECC, as a Directive leaves significant room for national divergence leading to fragmentation and therefore, the evaluation shows its limitations in deepening the single market for electronic communications. European operators continue to face barriers to operating cross-border and scaling-up, limiting their ability to invest, innovate, and compete with their global counterparts. Furthermore, electronic communications, including satellite-based services, and critical communication have received increased attention for ensuring security, resilience and preparedness.

The SMP regime coupled with symmetric regulation, remain the key instrument for *ex ante* regulation. *Ex ante* regulation is still an important tool to ensure that competition problems are addressed in a timely manner. However, there is a room for simplification of some key provisions that have either not been applied by regulators (Article 76 regarding co-investments, Article 77 regarding the imposition of functional separation) or were applied by some regulators but should be further simplified to enable their broader application (e.g. Article 61(3) covering symmetric regulation). Finally, as indicated above, the number of cases regarding oligopolistic markets, notified under Article 32 was very limited. Possible issues in oligopolistic markets have been addressed either under the spectrum authorisation regime or under competition law.

USO in the EECC remain as a safety net to ensure all consumers in the Union have affordable adequate internet and voice communications services. Simplification of the provisions in light

of national conditions could improve the effectiveness of the rules and a future review could ensure the rules follow social, economic and technological developments, including transition to fibre.

The provisions on end-user rights are mostly still fit for purpose but in some respects could be simplified and have scope for further harmonisation.