

## Contribution to a call for Input on remedies by ERG and European Commission

Deutsche Telekom welcomes the call for input of the ERG and the European Commission. We share and support the starting point of this joint call for input that “.. *regulatory action should be based on clear objectives and proportionate to identified market failures*”. We hope that this will be a first step in a constructive exchange between the European Commission, the National Regulatory Authorities represented in the ERG and market participants on what principles should apply to the proportionate application of remedies.

### Comments on the scope of the call for input

- Deutsche Telekom believes that in order to make the principles of proportionality and consistency operational, **practical guidance at EU level** should be given on
  - **a procedure for assessing remedies** and
  - **criteria to be used by NRAs in the assessment**

which regulatory obligation is suited to remedy an identified market failure and least burdensome for the undertaking concerned. Such common criteria will best ensure a consistent regulatory practice throughout the EU. With the attached position paper, Deutsche Telekom would like to propose an economics-based approach to the choice of specific remedies in the legal context of the New Regulatory Framework.

- The work of the ERG and the European Commission based on this call for input **should not lead to uniform remedies to specific ‘competition concerns’**. In a first step, principles for a proportionate imposition of remedies will have to be developed. Only after these principles are elaborated in more detail and generally accepted, a search for recommendations on specific competition concerns at EU level is possible on a consistent and agreed basis. It should be recalled that even where such recommendations are considered appropriate, under the principle of proportionality National Regulatory Authorities will have to assess in each individual case whether a specific measure is justified and proportionate.
- Against this background, Deutsche Telekom believes that the decision to invite market participants in the call for input to identify, “*regulatory and competition problems ...*” and “*preferred action(s) to resolve the problem*” etc. is premature. The outcome of a **request on specific “problems”** will be indicative of perceived competition concerns at best, and **will give no indication on which of these concerns actually merit regulatory intervention**. The results should not shift attention from the necessary debate on a common and consistent EU approach to remedies towards a discussion on numerous regulatory disputes, many of which are specific to national markets.

## Deutsche Telekom's key proposals on remedies

- It is important to **clarify which objectives NRAs will pursue when imposing SMP-obligations**. Most relevant for the imposition of SMP obligations are the provisions of Art 8 para. 1 (proportionality) and para. 2 a – c of the Framework Directive, namely to maximise consumer welfare, to avoid distortions of competition and to promote efficient investment in infrastructure. By contrast, e.g. the objective to ensure a universal service for end-users is being pursued under Art. 3-15 of the Universal Service Directive and should not interfere with SMP regulation.
- **A thorough analysis of market failure on retail markets is the starting point for determining regulatory action both at wholesale and retail level**. This is in accordance with the approach the Commission has taken for the definition of markets in its Recommendation on relevant markets and consistent with the objective of the New Regulatory Framework to increase benefits for users where market forces and application of general competition law exceptionally do not suffice to deliver an efficient market outcome.
- Deutsche Telekom proposes to introduce **a cost-benefit analysis as a core element of the proportionality test** which will determine whether a regulatory measure is suited to remedy an identified market failure and least burdensome for the operator concerned.
  - A methodology for a cost-benefit analysis must be suited to **evaluate the real benefits and costs of regulatory remedies** on electronic communications markets including the impact on investment and innovation.
  - The concept of a cost-benefit analysis is best suited to systematically assess **the impact of a regulatory measure on the relevant market as well as on the overall sector development**.
  - **Where in practice quantifiable results cannot or can only partly be obtained, an impact assessment should be carried out** that takes into account all likely benefits and costs of the proposed measure.
- As an undertaking whose investment and business decisions remain strongly influenced by regulation, we feel it is necessary to recall that regulatory intervention is *per se* a significant intervention into the fundamental rights of the undertaking concerned. This is reflected by the principle of the Directives to limit sector-specific regulation to what is strictly necessary to achieve its goals. The strong **impact of regulation on fundamental rights** of the addressee of a regulatory obligation has to be reflected in the remedies assessment process:
  - A **sound justification** is required for a measure, including whether the objective pursued by the measure is legitimate in the light of the New Framework.
  - The need for **high evidentiary standards** for NRAs when imposing remedies should be highlighted.
  - A **'double check'** is required as part of any proportionality assessment, i.e. a test whether an obligation – even where it is considered suitable to address an identified market failure – is not disproportionate because it is **overly intrusive** in view of the fundamental rights of the operator concerned.