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Re: Legal opinion on the compatibility with primary European Union law of the European Commission's Proposal for a Regulation of 21 January 2026, establishing a regulatory framework for the transition from copper networks to fibre-to-the-home (FTTH) networks.

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To: Connect Europe
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1. Introduction and regulatory framework

1. I have been requested to provide a legal opinion on the compatibility with European Union primary law of the European Commission's proposal for a Regulation of the European Parliament and the Council on digital networks, amending Regulation (EU) 2015/2120, Directive 2002/58/EC and Decision No 676/2002/EC and repealing Regulation (EU) 2018/1971, Directive (EU) 2018/1972 and Decision No 243/2012/EU (Digital Networks Act) (hereinafter, the "Proposal" or the "DNA"), published on 21 January 2026 [COM(2026) 16 final] .

The Proposal aims to establish a harmonized regulatory framework substantially revising the current rules governing electronic communications, replacing *inter alia* the *European Electronic Communications Code*[1].

2. The requested analysis concerns the compliance with primary EU law of the provisions contained in Part V, Title I of the Proposal (Articles 53–61), providing for the switch-off of copper networks (including FTTC) and the

[1] Directive (EU) 2018/1972 of the European Parliament and of the Council of December 11, 2018, establishing the European Electronic Communications Code.

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mandatory migration to fibre-optic infrastructure (FTTH) in all Member States. In particular, Article 54 imposes on Member States the obligation to order the cessation of copper network operations in areas designated as "copper switch-off areas" (hereinafter, "CSO areas") by 31 December 2035, subject to the fulfilment of specific sustainability conditions set out in Article 57(1).

3. More specifically, the Proposal provides that, until 31 December 2035, the switch-off of copper networks may be ordered only where two cumulative conditions are met: (i) fibre coverage of at least 95% has been achieved in the relevant CSO area; and (ii) retail connectivity services at affordable prices and with comparable quality levels are available to end-users currently served by copper networks (Article 57(1)). After that date, Member States shall order the switch-off in the remaining CSO areas as well, subject to limited derogations in cases where fibre deployment is not economically sustainable and no suitable alternative connectivity solution capable of replacing copper-based services is available.

4. In sum, the following aspects of European Union law seem to be relevant for the current analysis:

- the correct identification of the legal basis of the Proposal and its conformity with the principle of conferral laid down in Article 5(1) and (2) TEU, in particular as regards Article 114 TFEU as the chosen legal basis and Article 345 TFEU concerning the neutrality of the Treaties with respect to the property ownership regimes of the Member States;
- compliance with the principles of subsidiarity and proportionality enshrined in Article 5 TEU and Protocol No 2 annexed to the EU Treaties;
- compatibility with the Charter of Fundamental Rights of the European Union, in particular Articles 16 (freedom to conduct a business) and 17 (right to property), including an assessment of compliance with the requirements of necessity and proportionality pursuant to Article 52(1) of the Charter;

- compliance with the general principles of EU law of non-discrimination and consumer protection.

5. Furthermore, by way of preliminary observation, it should be noted that the impact assessment accompanying the Proposal was the subject of two separate opinions by the European Commission's Regulatory Scrutiny Board.

6. The first opinion, issued on 22 October 2025, was negative, on the grounds that it identified serious deficiencies in the impact assessment, including: (i) the absence of an adequate economic analysis of the problems identified and their underlying causal factors; (ii) the failure to demonstrate that the mandatory switch-off of copper networks constitutes a necessary and proportionate intervention, also in light of the coexistence of high levels of both copper and fibre coverage in certain Member States and the reluctance on the part of certain users to migrate to fibre; (iii) the insufficient assessment of economic and social impacts, including direct costs and their distribution among the various categories of stakeholders concerned; (iv) the lack of transparency regarding the methodology employed for estimating economic and environmental impacts, resulting in unreliable estimates. The Board also requested that the impact assessment examine alternative options that did not entail the mandatory switch-off of copper.

7. The second opinion, issued on 17 December 2025, was positive with reservations, nonetheless confirming the persistence of significant shortcomings, namely: (i) the insufficient treatment of uncertainties relating to key assumptions, resulting in unreliable projections and comparisons between options; (ii) the failure to quantify and monetise direct and indirect costs, administrative costs and environmental impacts for all options considered.

8. These findings of the Regulatory Scrutiny Board are of specific relevance to the present analysis, as they highlight the inadequacy of the evidentiary basis upon which the Commission relies in justifying the necessity and proportionality of the proposed measures, with potential implications for the

legality of the Proposal in light of the principles enshrined in Article 5 TEU and Articles 16 and 17 of the Charter of Fundamental Rights of the European Union.

2. Legal basis and competences of the European Union

2.1 Principle of conferral (Article 5 TEU)

9. The first area of concern relates to the potential infringement of the principle of conferral, enshrined in Articles 4, 5(1)-(2) TEU and in Article 3 TFEU. Under this principle, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein, with any competence not expressly conferred upon the Union remaining with the Member States. The repeated reference to these limits in the basic Treaties reflects the concern, already expressed in the Laeken Declaration on the Future of Europe of 15 December 2001 (point II), to curb "a creeping expansion of the competence of the Union" and to preserve the sovereign prerogatives of the Member States from undue erosion.

10. In principle, electronic communications fall within the scope of competences shared between the Union and the Member States pursuant to Article 4(2)(a) TFEU (regulation of the internal market). However, it is undisputed that the Treaties do not confer upon the Union an express competence to impose obligations for the decommissioning of privately owned infrastructure.

11. As regards the chosen legal basis, the Proposal refers to Article 114 TFEU, a provision which authorises the EU institutions to adopt measures for the approximation of national laws aimed at the establishment and functioning of the internal market. However, recourse to this legal basis is subject to stringent conditions, as elaborated by the Court of Justice in a series of

judgments[2] that have, on some occasions, led to the annulment of Union acts on the grounds of erroneous or abusive reliance on Article 114 TFEU[3].

12. It is important to note, in that regard, that, according to the Court's established case law, the existence of differing rules in the Member States for the conduct of activities relevant for the internal market is not in itself sufficient to justify the adoption of a Union act on the basis of Article 114 TFEU. To justify the harmonization of national laws in a matter of shared competence, the measure must *effectively* contribute to the elimination of *existing obstacles* to the establishment and functioning of the internal market[4]. In the absence of such a functional link, reliance on Article 114 TFEU constitutes a violation of the principle of conferral. It is also settled case law that, although recourse to Article 114 TFEU as a legal basis is possible if the aim is to *prevent the emergence of future obstacles* to trade as a result of divergences in national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them[5].

13. To fully understand the Court's approach, it may be useful to reproduce below the relevant passages from the judgment in *Germany v. Parliament and Council*, Case C-376/98, which remains the landmark judgment regarding the limits and conditions for invoking Union action for the harmonisation of national laws (note that the numbering of the Treaty articles corresponds to

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[2] See, among others, CJEU, 12 December 2006, Case C-380/03, *Germany v European Parliament and Council*; 10 February 2009, Case C-301/06, *Ireland v European Parliament and Council*; 2 May 2006, Case C-217/04*, United Kingdom v European Parliament and Council*.

[3] See, for example, CJEU, 5 October 2000, *Germany* v *Parliament and Council*, C-376/98.

[4] CJEU, *Germany* v *Parliament and Council*, C-376/98, EU:C:2000:544, paragraphs 84 and 95; *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraphs 59 and 60; *Arnold André*, C-434/02, EU:C:2004:800, paragraph 30; *Swedish Match*, C-210/03, EU:C:2004:802, paragraph 29; *Germany* v *Parliament and Council*, C-380/03, EU:C:2006:772, paragraph 37; and *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraph 32)

[5] See *Spain* v *Council*, C-350/92, paragraph 35; *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, paragraph 61; *Arnold André*, C-434/02, paragraph 31; *Swedish Match*, C-210/03, paragraph 30; *Germany* v *Parliament and Council*, C-380/03, paragraph 38; *Vodafone and Others*, C-58/08, paragraph 33); Poland v *Parliament and Council*, C-358/14, paragraphs 31-39.

that under the Treaty of Amsterdam, in force at the time of the judgment, and that Article 95 EC corresponds to the current Article 114 TFEU):

81 Article 95 EC empowers the Council, acting in accordance with the procedure referred to in Article 251 EC and after consulting the Economic and Social Committee, to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.
82 Under Article 3(1)(c) EC, the internal market is characterised by the abolition, as between Member States, of all obstacles to the free movement of goods, persons, services and capital. Article 14 EC, which provides for the measures to be taken with a view to establishing the internal market, states in paragraph 2 that that market is to comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty.
83 Those provisions, read together, make it clear that the measures referred to in Article 95 EC are intended to improve the conditions for the establishment and functioning of the internal market. To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in Article 5 EC that the powers of the Community are limited to those specifically conferred on it.
84 Moreover, a measure adopted on the basis of Article 100a of the Treaty must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article 100a as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory. The Court would then be prevented from discharging the function entrusted to it by Article 220 EC of ensuring that the law is observed in the interpretation and application of the Treaty.
85 So, in considering whether Article 100a was the proper legal basis, the Court must verify whether the measure whose validity is at issue in fact pursues the objectives stated by the Community legislature.

14. In the present case, serious doubts arise as to whether the mandatory switch-off of copper networks can legitimately be characterised as a harmonisation measure necessary for the functioning of the internal market, within the meaning of Article 114 TFEU. Before addressing this issue, it should be noted that the text of the proposal does not seem to contain sufficient information to understand on what grounds the Commission considers that the provisions on the copper switch-off, as included in the proposal, meet the conditions required by the Court of Justice to justify the adoption of measures

to approximate legislation relating to that specific objective. As a general rule, the duty to state reasons incumbent upon the institutions of the European Union pursuant to Article 296 TFEU also applies to the choice of the legal basis for the act in question. In other words, the identification of the legal basis for an act must be accompanied by an explicit indication of the reasons that led the legislator to conclude, in light of the guidance provided by the aforementioned case law of the Court of Justice, that the conditions exist for harmonizing national legislation and thus for the exercise of the Union's powers in an area that belongs to competences shared with the Member States. The statement of reasons required by Article 296 TFEU must show clearly and unequivocally the reasoning of the Union authority which adopted the contested measure. In practice, this justification is included in the Preamble of the act (the "Recitals")[6] and is intended to enable the persons concerned to ascertain the reasons for the measure and to permit the Court to exercise its power of review regarding compliance with the rules of the Treaties[7].

If it is true that the EU legislator is not required to go into every relevant point of fact and law, it is also evident that, where a Union act has a broad and diverse scope, as in the case of the Proposal, the justification for resorting to measures

[6] To cite just one example of EU legislative acts adopted under Article 114 TFEU, in which the justification for the legal basis is clearly set out in the Preamble, see Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (OJ 2014 L 127, p. 1). The relevant Recitals are reproduced below.

"4) In other areas there are still substantial differences between the Member States' laws, regulations and administrative provisions on the manufacture, presentation and sale of tobacco and related products which present obstacles to the smooth functioning of the internal market. In the light of scientific, market and international developments these discrepancies are expected to increase (…).

(15) The lack of a harmonised approach to regulating the ingredients of tobacco products affects the smooth functioning of the internal market and has a negative impact on the free movement of goods across the Union. Some Member States have adopted legislation or entered into binding agreements with the industry allowing or prohibiting certain ingredients. As a result, some ingredients are regulated in certain Member States, but not in others. Member States also take differing approaches as regards additives in the filters of cigarettes as well as additives colouring the tobacco smoke. Without harmonisation, the obstacles to the smooth functioning of the internal market are expected to increase in the coming years, taking into account the implementation of the FCTC and the relevant FCTC guidelines throughout the Union and in the light of experience gained in other jurisdictions outside the Union (…).

16) The likelihood of diverging regulation is further increased by concerns over tobacco products having a characterising flavour other than one of tobacco, which could facilitate initiation of tobacco consumption or affect consumption patterns. Measures introducing unjustified differences of treatment between different types of flavoured cigarettes should be avoided. However, products with characterising flavour with a higher sales volume should be phased out over an extended time period to allow consumers adequate time to switch to other products."

[7] See, to that effect, judgment of 18 June 2015, *Estonia* v *Parliament and Council*, C-508/13, paragraph 58 and the case-law cited.

to approximate national laws must cover all the fundamental choices made by the legislator and not just some of them.

15. However, a reading of the text of the Proposal (and in particular of the Preamble) does not suggest that this obligation to state reasons has been fulfilled with regard to the choice - which is entirely novel compared to the current rules and independent from other areas covered by the Proposal - to proceed with the mandatory decommissioning of copper networks, including the FTTC network. First, in Recital 2, the Preamble contains a general, "horizontal" statement, referring to the text of the Proposal as a whole, that "The internal market in the area of electronic communications remains fragmented into 27 national markets and European operators continue to face barriers to operating cross-border and scaling-up, limiting their ability to invest, innovate, and compete in the extended connectivity ecosystem on a level-playing field".
Second, if the Preamble contains more specific statements regarding the need to ensure the functioning of the internal market, referred to sectors covered by the Proposal that are *different* from the one under discussion here (see, for example, Recitals 39 and 42 on authorization regimes, or Recitals 71 and 95 on radio spectrum), it is *completely silent on the progressive decommissioning of copper networks*, as the Recitals dedicated to this objective of the proposal (146–160) contain no clarification regarding the need to adopt measures to approximate legislation in order to address current or potential obstacles to the functioning of the internal market. In the absence of any justification, in the text of the Proposal, for EU harmonization measures requiring Member States to impose copper switch-off, it follows that, should the Proposal be definitively adopted as proposed by the Commission, a violation of the obligation to state reasons imposed by Article 296 TFEU could be invoked before the EU courts via Article 263 or 267 TFEU.

16. In any case, returning now to the merits of the matter, I believe that it would be difficult for the Commission to provide adequate reasoning (and thus

justification) for the decision to compel Member States to completely decommission their copper networks.

First, the coexistence of copper and fibre optic networks within the territory of the Member States does not, in itself, give rise to obstacles to the fundamental economic freedoms of the internal market - in particular, the freedom of establishment and the free movement of services - nor to any appreciable distortions of cross-border competition: it reflects the different stages of development of national infrastructures, a circumstance which, in light of the case law of the Court of Justice already cited, does not constitute an "obstacle" to the functioning of the internal market capable of justifying harmonizing measures under Article 114 TFEU. Furthermore, and coherently with the above, it does not appear that situations have arisen in practice in which operators in the relevant markets have been subject to obstacles or restrictions in the exercise of the economic freedoms guaranteed by the Treaties, in particular constraints on the exercise of the freedom of establishment or the freedom to provide services in Member States other than their country of origin, nor does it appear plausible that such obstacles could arise in the future.

17. Second, it must be borne in mind that the EU competence and procedure under Article 114 TFEU applies "save where otherwise provided in the Treaties". The proposed measure appears to pursue predominantly structural and industrial policy objectives - namely, accelerating the deployment of next-generation fibre networks - which, however legitimate from the perspective of Union policies on networks, do not appear to find their appropriate legal basis in Article 114 TFEU, but rather in other sectoral legal bases (in particular, Article 173 TFEU on industrial policy)[8]. The competences mentioned above, however, are "supporting" competences, meaning that the Treaty does not authorize the Union institutions to harmonize the laws of the Member States. It follows that, in this respect, recourse to Article 114 TFEU to regulate the

[8] At pag. 5 of the Explanatory Memorandum, the Commission refers to the "objective of ensuring a timely and orderly transition from legacy copper networks to fibre-based networks", but no reference is made to trade barriers or other obstacles to the functioning of the internal market in order to justify recourse to Article 114 TFEU.

mandatory decommissioning of copper networks amounts to circumventing the limits of EU competences imposed by Article 173 TFEU.

18. Third, even assuming that the foregoing objections could be overcome and that the Proposal is indeed attributable to a purpose of internal market harmonisation within the meaning of Article 114 TFEU, it would nonetheless fail to comply with the principles of proportionality and necessity, exceeding the limits of the intervention permitted under that legal basis. In this regard, it should be recalled that the Court of Justice, in its judgment in *Germany v European Parliament and Council* (5 October 2000, Case C-376/98), annulled the directive on advertising and sponsorship of tobacco products, finding that Article 95 EC (now Article 114 TFEU) cannot constitute an appropriate legal basis where the legislative intervention exceeds the requirements of effective harmonisation of the conditions for the functioning of the internal market and amounts, in reality, to a disproportionate interference with the declared objectives. The Court clarified that recourse to this legal basis presupposes the existence of measures genuinely aimed at improving the conditions for the establishment and functioning of the internal market, and cannot legitimise interventions which, although formally attributable to that purpose, entail unnecessary or excessive restrictions on economic freedoms.

19. Applying these principles to the present case, the forced decommissioning of copper networks - by structurally affecting the organisation of operators' economic activity and significantly restricting freedom of economic initiative - falls outside the scope of harmonisation permitted under Article 114 TFEU, amounting to an intervention that exceeds the limits of the competence conferred thereunder. If the objective of promoting investments and access to very high capacity networks - already present in the European Electronic Communications Code (see Directive (EU) 2018/1972, Article 81 - *Migration from legacy infrastructure*) - is legitimate to the extent that it is addressed through policy supporting investments, the Proposal is now using article 114 TFEU to pursue a policy aimed at excluding from the

market a specific technology, based on a not sufficiently demonstrated direct link with increased fibre roll-out and take-up.

20. In sum, the Proposal falls outside the scope of internal market harmonisation measures, also inasmuch as it directly affects the property rights of electronic communications network operators by imposing upon them the forced decommissioning of assets of significant economic value.

2.2 Neutrality of the Treaties with respect to property ownership regimes (Article 345 TFEU)

21. In the present case, Article 345 TFEU is also relevant. It provides that "the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership". This provision expresses a principle of neutrality of the Union with respect to the choices of Member States regarding property ownership regimes, implying that the rules governing the sale, use and disposal of private assets fall, in principle, within the competence of national legal orders.

22. Nevertheless, the Court of Justice has clarified that Article 345 TFEU does not exempt national property ownership regimes from the application of the fundamental rules of Union law; in particular, such regimes remain subject to the provisions on the internal market, fundamental economic freedoms and the principle of non-discrimination (see Joined Cases C-105/12 to C-107/12, *Staat der Nederlanden v Essent NV* and Others, paragraphs 29-36). The Union may therefore adopt measures affecting the right to property where this is necessary to ensure the functioning of the internal market, provided that the general principles of Union law are respected, notably the principle of proportionality under Article 5(4) TEU.

23. It follows that, when Article 345 TFEU is read in conjunction with the principle of proportionality, Union measures which directly and substantially affect the structure of the systems of property ownership of the Member States

must be supported by a justification based on the general interest and must pass a rigorous proportionality test (see below, Section 4), the Union being unable to interfere with private property rights in the absence of such prerequisites (CJEU, 8 November 1979, Case 44/79, *Hauer*, paragraph 23; 3 September 2008, Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, paragraph 360).

24. The Proposal, by requiring the decommissioning of copper networks constituting privately owned productive and operational assets, gives rise to a serious and disproportionate interference with the right to property. Insofar as it deprives operators of the possibility to use and economically exploit such assets, the measure is liable to produce effects equivalent, in substance, to those of an indirect expropriation. In addition, the absence of a compensatory mechanism aggravates the illegality of the measure, as the deprivation of property without just compensation is incompatible with Article 17 of the Charter of Fundamental Rights (see below, Section 5).

25. In light of the arguments set out above, it is submitted that the Proposal exceeds the competences conferred upon the Union by the Treaties, both on the ground that Article 114 TFEU is unsuitable as a legal basis and by reason of the disproportionate interference with the property ownership regimes of the Member States, in violation of Article 345 TFEU.

3. Principle of subsidiarity

3.1 Regulatory framework (Article 5(3) TEU and Protocol No 2)

26. Under the principle of subsidiarity enshrined in Article 5(3) TEU, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

27. Union intervention is therefore contingent upon the fulfilment of two cumulative conditions, namely that Union action is more appropriate than action taken at the national (regional and local) level, and that the objectives cannot be sufficiently achieved by the Member States.

28. In the present case, it should be noted that the current Union regulatory framework for electronic communications - notably the European Electronic Communications Code (Directive (EU) 2018/1972, Article 81 - *Migration from legacy infrastructure*) - already confers adequate powers upon national regulatory authorities to supervise and manage the transition from copper to fibre networks. In several Member States, the migration process has already been completed or is underway pursuant to plans established voluntarily by the operators owning the copper networks, under the supervision of the competent national regulatory authorities. Member States have also adopted autonomous measures to support the deployment and adoption of FTTH fibre, availing themselves of both regulatory and economic incentive instruments.

29. In this context, the Proposal, while formally entrusting Member States and their regulatory authorities with the task of "implementing" the migration, in substance subjects them to binding and detailed requirements that leave no margin for discretion or, at the very least, significantly reduce their autonomy. The Commission establishes uniform switch-off deadlines and determines key elements of the regulatory concept itself - such as the details of the EU-level criteria for the definition of CSO areas - which, despite their essential importance, are not contained in the legislative text but are instead delegated to a subsequent implementing act with limited involvement of the Union's co-legislators. Such an approach, which effectively deprives Member States of their competences and drastically reduces the autonomy of national regulatory authorities through a uniform and prescriptive process that shifts the decision-making power to the European Commission, raises serious doubts as to its compatibility with the principle of subsidiarity.

30. Notwithstanding the formal and substantial obligations imposed by Protocol 2[9], the Commission provides only generic arguments in support of the necessity of Union intervention. While the text of the Proposal and the Recitals are entirely silent on this point, in the Explanatory Memorandum the Commission merely states that "divergent national approaches could fragment the single market, create legal uncertainty for operators active in several Member States and generate unequal conditions for investment and end-user protection", without, however, demonstrating the actual insufficiency of Member State action.

31. Accordingly, it is submitted that the Proposal is not in compliance with the formal and substantive requirements of the principle of subsidiarity, given that the Member States already possess adequate legislative and regulatory instruments to effectively manage the transition from copper to fibre networks and that the Commission has not demonstrated the insufficiency of national action to achieve the objective pursued.

4. Principles of proportionality and necessity

4.1 Regulatory framework (Article 5(4) TEU)

32. The principle of proportionality, enshrined in Article 5(4) TEU, requires that the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The Commission is required to demonstrate that the proposed measure satisfies a threefold test: (i) suitability: the measure must be suitable to achieve the objective pursued; (ii) necessity:

[9] Protocol 2 on the application of the principles of subsidiarity and proportionality, Article 5.
"Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved".

no less restrictive alternative must exist; (iii) proportionality *stricto sensu*: the measure must not impose burdens disproportionate to the expected benefits.

4.2 Questionable suitability of the proposed measures and shortcomings of the impact assessment

33. The Commission justifies the necessity of the proposed measures by reference to the benefits of fibre-based broadband access compared to legacy networks, and (controversially) includes FTTC, which is predominantly fibre-based, among those networks. However, the impact assessment, having considered alternative options and despite identifying only limited differences in quantitative impacts in terms of fibre coverage, take-up and GDP, ultimately opts for the most intrusive measure[10] and does not demonstrate to the required standard that the continued existence of FTTC infrastructure constitutes an obstacle to the availability or adoption of fibre. It is essential, for this purpose, to distinguish between increasing fibre availability (infrastructure deployment) and increasing fibre adoption (subscription by end-users).

34. The legitimate public policy objective would consist in ensuring that all citizens can access fibre services; the Proposal, however, targets users who already enjoy such access and who are already in a position to migrate voluntarily. The proposed measures would therefore not increase overall fibre coverage in Europe, but only the adoption rate in areas already served. This shortcoming was also identified by the Commission's Regulatory Scrutiny Board, which criticised the failure to demonstrate a causal link between the copper switch-off and increased fibre adoption.

35. If the Commission's declared objective is to accelerate the transition to fibre, it is essential to assess whether the proposed measures are actually suitable for that purpose. The approach adopted by the Proposal does not primarily address the question of fibre network availability across the territory, but

[10] See Impact Assessment, part 1, section 5.2.1 and 6.1.

instead focuses on the forced migration of users in areas already served by fibre and, after 2035, also in areas where fibre is not available, provided that a comparable alternative connectivity solution exists. The measures would therefore not ensure the deployment of new fibre connections. It would merely reallocate existing users in areas already covered or, in the latter case, impose migration to a different solution that in most instances is not even comparable to FTTC (for instance, Fixed Wireless Access - FWA or satellite connectivity services), thereby ultimately reducing the quality and reliability of end users' connectivity with paradoxical outcomes relative to the declared objective.
In sum, if the objective of the Proposal is to accelerate migration specifically to FTTH, the suitability of the measure depends on whether copper switch-off actually leads end-users to migrate to FTTH. This is not necessarily the case: even when FTTH is present, users might decide to migrate to alternative networks (e.g. Hybrid Fiber-Coaxial, FWA, mobile etc.). The measure would then not accelerate fibre migration, but merely shift demand from one "legacy" infrastructure to another (see below, para 57 ff.).

4.3 Availability of less restrictive alternatives

36. Less intrusive alternatives exist that are more consistent with the objectives declared by the Commission. If the intention were to place end-users at the centre of the Digital Networks Act, the focus should be on increasing fibre availability and accelerating its deployment, rather than on imposing mandatory migration where the choice is already available. While, under the Proposal, infrastructure competition would be reduced with negative impacts on end users' choice, ensuring universal fibre availability and preserving competition between alternative networks, so that all households may opt for fibre should they so wish, would constitute a more coherent consumer-centred public policy objective.
Measures to support fibre adoption could also be envisaged, such as public awareness campaigns, economic incentives for voluntary migration and technical support programmes. The Proposal, on the contrary, favours forced adoption over the expansion of availability, with the result of advantaging

certain categories of operators without generating broader benefits for the public or for consumers.

4.4 Disproportionate interference with economic and property rights

37. The proposed measures constitute a significant interference with the freedom to conduct a business and property rights of copper network operators. The justification put forward by the Commission is based on the argument that, in the absence of mandatory migration, fibre investments may not be recouped with sufficient speed. However, accelerating user migration by a few years through mandatory measures - where voluntary transition is already possible and underway - constitutes an insufficient basis for such an intrusive intervention in the fundamental rights of operators. The Regulatory Scrutiny Board raised significant concerns regarding the robustness of this justification, highlighting the fragility of the causal link between the proposed measures and the expected benefits. Although some modifications may have been introduced following the RSB opinion, concerns remain regarding the final text of the Proposal.
In particular, low voluntary fibre adoption does not in itself demonstrate that copper switch-off is necessary. A mandatory switch-off risks assuming a causal link between insufficient take-up and the continued existence of copper networks without sufficient evidentiary basis. In order to meet the proportionality test, the Commission should therefore be required to demonstrate, with sufficiently robust evidence, why less restrictive measures to increase voluntary fibre take-up and address concrete deployment bottlenecks would be insufficient before relying on the forced decommissioning of functioning copper/FTTC infrastructure.

38. Considering all of the above, it is submitted that the Commission's choice of mandatory switch-off over less intrusive options fails to meet the proportionality test required by EU law: the measure does not appear to be suitable, necessary or proportionate *stricto sensu* in relation to the declared

objective, and the Commission has not demonstrated the ineffectiveness of less restrictive alternatives.

5. Compatibility with fundamental rights

5.1 Freedom to conduct a business (Article 16 of the Charter of Fundamental Rights)

39. Article 16 of the Charter of Fundamental Rights of the European Union guarantees the freedom to conduct a business in accordance with Union law and national laws and practices. This freedom encompasses the freedom to pursue an economic or commercial activity and the freedom to operate in a competitive environment (CJEU, 22 January 2013, Case C-283/11, *Sky Österreich,* paragraph 42), as well as the right of every undertaking to "freely dispose, within the limits of its liability for its own actions, of the economic, technical and financial resources available to it" (CJEU, 27 March 2014, Case C-314/12, *UPC Telekabel Wien*, paragraph 49).

40. The freedom to conduct a business is not an absolute right and may be subject to limitations, provided that the cumulative conditions laid down in Article 52(1) of the Charter are respected: the limitation must be provided for by law, respect the essence of the right, be necessary and genuinely meet objectives of general interest recognised by the Union, or the need to protect the rights and freedoms of others, all in strict compliance with the principle of proportionality (CJEU 28 March 2017, *Rosneft*, C-72/15, paragraph 148 and the case-law cited)..

41. According to settled case-law, "the acts of the institutions of the Union must not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation at issue, it being understood that, where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued" (judgments of 8 July 2010, *Afton*

Chemical, C-343/09, paragraph 45; of 23 October 2012, *Nelson and Others,* C-581/10 and C-629/10, paragraph 71). In particular, *in Sky Österreich* (CJEU, 22 January 2013, Case C-283/11), the Court held that limitations on the freedom to conduct a business and on the fundamental rights enshrined in the Charter must pass a rigorous proportionality test under Article 52(1) of the Charter, requiring that the measure be suitable to achieve the declared objective, that it be necessary in the absence of less restrictive alternatives, and that it not impose disproportionate burdens relative to the expected benefit.

42. It is submitted that the Proposal constitutes a significant limitation on the freedom to conduct a business of the operators holding copper networks, which is not compatible with the principles developed in the case-law of the Court of Justice. The obligation to switch off such networks - privately owned infrastructure that is already fully operational, lawfully acquired and income-generating - deprives operators of the ability to continue a lawful and profitable economic activity, transforming functioning private assets into assets that can no longer be used. The Commission itself explicitly acknowledges that this measure "constitutes a limitation of the freedom to conduct a business within the meaning of Article 16 of the EU Charter of Fundamental Rights", while attempting to justify it in the name of a purported general interest, consisting of social, economic and environmental benefits.

43. Such justification proves insufficient for the reasons set out below.

44. First, the Commission does not demonstrate the existence of a direct causal link between the persistence of copper networks and an obstacle to the availability or adoption of fibre. The reliance on the notion of "general interest" remains abstract and insufficiently substantiated, without any proven causal correlation between the copper switch-off and greater fibre penetration. Recital (147) of the Proposal merely states that the transition from copper to fibre should be regulated in the "general interest", without, however, offering concrete evidence that copper networks, as such, prevent or delay the deployment or adoption of fibre.

45. Second, the context of the Proposal is clearly distinguishable from precedents in which analogous limitations on the freedom to conduct a business have been upheld. For example, the transition from analogue to digital terrestrial television concerned the reallocation of radio spectrum, a resource that is scarce by definition, in order to free up frequencies for new services (see Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009). Copper infrastructure, by contrast, does not constitute a scarce resource nor a public good subject to allocation requirements: its presence does not exclude or preclude the parallel deployment of fibre networks. The decommissioning of copper does not free up any scarce resource, but amounts to the mere elimination of a fully functioning privately owned infrastructure, with consequent economic loss for the owners.

46. Third, the measure fails to satisfy the necessity test, since the Commission confines its assessment to variations of the copper switch-off scenario and has neither examined nor demonstrated having examined less restrictive alternative measures capable of achieving the same objective.

47. Finally, it must be emphasised that limitations on fundamental rights may under no circumstances result in the impairment of their essential content. Article 52(1) of the Charter requires, as a non-derogable condition of legality for any restriction, respect for the essential content of the right subject to limitation. This requirement operates as an absolute and insurmountable limit: beyond this threshold, no justification based on the general interest, however significant, can legitimise the interference. The mandatory decommissioning of copper networks, with effects that are substantively expropriatory and in the absence of compensation (see below, Section 5.2), risks affecting the essential content of the freedom to conduct a business, constituting a limitation that exceeds the margins permitted by Article 52 of the Charter.

48. In any event, as to possible justifications of the restriction at stake, it would be difficult to maintain that consumers would derive effective and

immediately perceptible benefits from a migration imposed in areas already adequately served by fibre optic infrastructure. On the contrary, the introduction of a generalised obligation to decommission copper networks could have significant effects on the continuity, quality and stability of the services currently provided.
In particular, a significant proportion of users who currently enjoy stable and functional services over the copper network could face, at least during a transitional phase, operational disruptions, service interruptions or other difficulties related to the migration process. This risk is accompanied by a possible reduction in the effective freedom of choice of consumers, both in terms of the plurality of available providers and with regard to the variety of commercial offers, with possible repercussions also on the quality of technical assistance and on security standards.

49. Further critical issues arise with reference to customers who currently benefit from converged and integrated offers (such as fixed and mobile telephony, Internet connectivity and IPTV services), who could find themselves in a situation of uncertainty regarding the availability, following migration, of equivalent or at least functionally and economically comparable combined products. Such uncertainty could result in a fragmentation of the offer and a loss of efficiency arising from the discontinuity of the integrated models currently present on the market.

50. In this perspective, the Proposal would risk not expanding but rather restricting in practice the freedom of choice of consumers, producing a paradoxical effect: in certain areas, once the transition phase is completed, users could find themselves without alternatives fully comparable to the FTTC network in zones where fibre coverage is not yet complete or sufficiently widespread, with a consequent reduction in available options and potential asymmetry between different areas of the internal market.

51. The new regulatory framework envisaged by the Proposal appears problematic having regard to Article 38 of the Charter of Fundamental Rights

of the European Union, which requires a high level of consumer protection in Union policies. It follows that the Proposal itself and any technological transition measures provided for therein must be designed so as to ensure not only market efficiency and infrastructure development, but also effective protection of the economic interests of consumers, avoiding disproportionate effects in terms of accessibility, continuity and quality of services.

5.2 Right to property (Article 17 of the Charter of Fundamental Rights)

52. Article 17(1) of the Charter guarantees the right to property, providing that "everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions" and that "no one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss"

53. The considerations set out above concerning the infringement of the principle of proportionality and the failure to respect the essence of the freedom to conduct a business apply, mutatis mutandis, to the right to property. In particular, the Commission has failed to provide a sufficiently solid, detailed and proportionate justification for the limitation imposed, which interferes with the peaceful enjoyment of possessions. This deficiency is apparent from the impact assessment accompanying the Proposal, which fails adequately to examine either the patrimonial impact of the measure on operators or the existence of less restrictive alternatives. Furthermore, the limitation imposed on the property rights of copper network operators is so extensive and intrusive as to risk affecting the very essence of that fundamental right. The scope and nature of the obligations introduced by the Proposal substantially restrict the economic use of the assets concerned and adversely affect their value and economic-productive function, thereby giving rise to serious concerns as regards compatibility with Articles 17 and 52(1) of the Charter.

54. The Proposal is also liable to infringe Article 17 of the Charter, as well as Article 1 of Protocol No 1 to the ECHR, inasmuch as it requires the mandatory decommissioning of copper networks without providing for any form of compensation for the operators concerned. In substantive terms, the measure deprives operators of the economic enjoyment of lawfully acquired assets and produces effects equivalent, in substance, to those of an expropriation, irrespective of the formal classification adopted by the Proposal.
55. The absence of any provision relating to adequate compensation renders the measure incompatible with the guarantees enshrined in Article 17 of the Charter. It is not sufficient, indeed, that the measure pursues an objective of general interest; it is also necessary that the sacrifice imposed on the individual operator is not disproportionate to the collective advantage pursued and that, where such sacrifice assumes an expropriatory character, it be accompanied by adequate compensation.

56. In light of the foregoing, the Proposal gives rise to a serious risk of infringement of Articles 16 and 17 of the Charter of Fundamental Rights of the European Union. That risk arises cumulatively from: (i) the unjustified and disproportionate limitation of the freedom to conduct a business and the right to property of copper network operators; (ii) the deprivation of the economic enjoyment of lawfully acquired assets in the absence of any compensation mechanism; (iii) the insufficient demonstration by the Commission of the necessity and proportionality of the measure in relation to the stated objective pursued; and (iv) the risk of affecting the essence of the rights guaranteed by the Charter, a limit which considerations of general interest cannot legitimately override.

6. Violation of the principles of non-discrimination and free competition

57. The Proposal, while not formally aimed at favouring specific categories of operators, is liable to create a de facto competitive advantage for alternative operators active in fibre networks and those using alternative technologies. This effect appears problematic in light of the principles of equal treatment and non-

discrimination, which are an expression both of the general principles of the Union legal order and of Articles 20 and 21 of the Charter of Fundamental Rights of the European Union, as well as of the principle of an open market economy with free competition enshrined in Article 119 TFEU and the objective of a highly competitive social market economy under Article 3(3) TEU.

58. In particular, the principle of non-discrimination requires that comparable situations must not be treated differently unless such a difference is objectively justified (CJEU, 8 December 2011, Case C-389/10 P, *KME Germany* and Others v Commission; Opinion 1/17 of 30 April 2019, EU-Canada Comprehensive Economic and Trade Agreement (CETA), paragraphs 176 and 177; 14 July 2022, Joined Cases C-116/21 P to C-118/21 P, C-138/21 P and C-139/21 P, *Commission v VW and Others,* paragraph 95).

59. In the present case, the Proposal appears to introduce a differentiation of treatment between operators active on fibre networks and operators active on copper networks, as it provides for a decommissioning obligation only for the latter, thereby resulting, in practice, in a non-uniform impact on different business models.

60. Moreover, the Proposal asserts that competition would be optimally promoted through an "economically efficient" level of investment in new and existing infrastructure, *capable of ensuring investors the achievement of a fair return*.

61. Such an approach appears overly narrow and not entirely persuasive, insofar as it tends to subordinate the assessment of competitive conditions to the need to ensure the stability and remuneration of investments, attributing to this aspect a preponderant significance relative to the actual competitive dynamics of the market and the objectives of openness and contestability thereof.

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62. Even more important from a non-discrimination perspective, the Commission's analysis is incomplete since it is confined to a differentiation between copper-based and fibre-based business models, without adequately taking into account other functionally comparable infrastructures. (see above, para 35).

In particular, it fails to consider that cable and FWA networks, which also provide broadband connectivity services and today compete with copper-based and fiber-networks, would not be affected by a regulatory obligation to switch off copper networks. This gives rise to an asymmetrical regulatory situation: while operators of copper networks would be required to decommission their infrastructure, operators running other alternative networks would be able to continue operating their networks and could thereby potentially benefit from the forced migration of end-users.Especially insofar as the Proposal specifically aims at a migration to fibre networks (FTTH), it is not readily apparent why the regulatory burden is imposed exclusively on copper-based infrastructures, whereas other networks may continue to operate and are thereby indirectly advantaged. Against this background, it is questionable whether the differentiation between copper and fibre networks embedded in the Proposal is objectively justified, or whether it rather constitutes a form of selective market intervention that privileges certain infrastructures over others.

The omission of considering other networks from the analysis thus reinforces the concerns regarding a potential violation of the principle of non-discrimination and the risk of distortions of competition, insofar as comparable market participants are treated differently without a sufficiently robust objective justification.

63. In conclusion, the practical effect of the Proposal is to advantage certain economic activities to the detriment of others, without generating broader benefits for the public or for consumer welfare, thereby constituting a violation of the principle of non-discrimination and a potential distortion of competition.

7. Conclusions

64. On the basis of the legal analysis conducted in the preceding paragraphs, the Proposal raises multiple and converging grounds of potential incompatibility with primary European Union law, which may be summarised as follows:

(i) Excess of Union competence and inadequacy of the chosen legal basis, in violation of the principle of conferral under Article 5(1) and (2) TEU. In particular: (a) Article 114 TFEU does not constitute a suitable legal basis for the Proposal, as the coexistence of copper and fibre optic networks in the Member States does not, in itself, give rise to obstacles to the right of establishment and the free movement of services or to appreciable distortions of cross-border competition, thus lacking the essential prerequisite for legitimate recourse to that legal basis; (b) the Proposal predominantly pursues structural and industrial policy objectives - such as accelerating the deployment of next-generation networks and reducing operators' maintenance costs - which would more properly fall within the scope of other sector-specific legal bases (notably, Article 173 TFEU on industrial policy); (c) the forced decommissioning of copper networks exceeds the limits of the intervention permitted under that legal basis, in light of the principles enunciated by the Court of Justice (judgment in *Germany v European Parliament and Council*, cited above), by structurally affecting the organisation of operators' economic activity and the right to property over assets of significant economic value; (d) the Proposal is also in conflict with the principle of neutrality of the Treaties with respect to the property ownership regimes of the Member States enshrined in Article 345 TFEU, constituting an interference with private property rights that bears the characteristics of an indirect expropriation, in the absence of any compensatory mechanism;

(ii) Violation of the principle of subsidiarity under Article 5(3) TEU and Protocol No 2 annexed to the Treaties, given that the Member States already possess adequate and effective legislative and regulatory instruments to manage the transition from copper to fibre networks within their respective national legal orders, and that the Commission has not provided an adequate

demonstration of the insufficiency of action conducted at national, regional or local level;

(iii) Violation of the principle of proportionality enshrined in Article 5(4) TEU, as the Commission has not convincingly demonstrated either the suitability of the proposed measures to achieve the declared objective, or the necessity of the intervention in the absence of solid evidence that less invasive and restrictive measures affecting operators' rights are insufficient, or the proportionality *stricto sensu* of the measure relative to the burdens imposed on the parties concerned;

(iv) Unjustified and disproportionate limitation on the freedom to conduct a business recognised by Article 16 of the Charter of Fundamental Rights of the European Union, as the measure does not satisfy the conditions of legality prescribed by Article 52(1) of the Charter, lacking an adequate legal basis, a convincing demonstration of the necessity of the intervention and compliance with the principle of proportionality, with the concrete risk of undermining the essential content of the fundamental right in question;

(v) Violation of the right to property protected by Article 17 of the Charter of Fundamental Rights, insofar as the mandatory decommissioning of copper networks interferes with the right peacefully to enjoy and economically exploit lawfully acquired assets, producing effects substantially equivalent to an indirect expropriation, in the absence of any mechanism for adequate and timely compensation, and without the limitations imposed being supported by a proportionate and sufficiently detailed justification;

(vi) Significant risks of detriment to consumers, in terms of continuity, quality and stability of services, reduction of effective freedom of choice and fragmentation of the offer, in conflict with the objective of a high level of consumer protection enshrined in Article 38 of the Charter of Fundamental Rights of the European Union; as well as risks of de facto discrimination between electronic communications operators, insofar as the Proposal is liable

to create an unjustified competitive advantage in favour of certain categories of operators to the detriment of others, without generating broader benefits for the public or for consumer welfare, in violation of the principle of non-discrimination and the general principles of European Union law on equal treatment and the protection of competition.

65. Should the Proposal be adopted in its current or substantially unchanged formulation, consideration should be given to bringing an action for annulment of the act before the Court of Justice of the European Union pursuant to Article 263 TFEU or requesting national courts to refer questions on validity to the same Court pursuant to Article 267 TFEU. Such remedies should be based on formal and substantial grounds such as the violation of fundamental economic freedoms, the property rights guaranteed by the Charter of Fundamental Rights, the principles of conferral, subsidiarity and proportionality under Article 5 TEU, the principle of neutrality of property ownership regimes under Article 345 TFEU, as well as the general principles of Union law on non-discrimination and the protection of competition.

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I remain at your disposal for any clarification and/or further analysis.

(Prof. Avv. Roberto Mastroianni)