BREKO German Broadband Association

VATM Enabling the Gigabit Society

Practical recommendations on objectives and network access in the proposed European Electronic Communications Code

1. **Strengthen innovative fibre performance benchmark: A technology-neutral solution on the way towards the Gigabit Society**

   With very high capacity (VHC) connectivity (Art. 3(2)), the proposed Code introduces a new regulatory objective next to competition, internal market, and consumer interest. **Whereas we consider VHC connectivity a necessary complement, we welcome at the same time that there is no hierarchy between the objectives that could jeopardise the achievements of the framework regarding choice, innovation, quality, and affordability.** The VHC definition itself (Art. 2(2) in conjunction with Recital 13) sets a performance benchmark based on fibre infrastructures, while remaining neutral on the technologies that are able to comply with it (including FTTP, cable, and 5G). The proposal avoids a lock-in into potentially inferior technological choices by explicitly stipulating technological neutrality in Art. 3(3)(c). Therefore, **we stress the need to maintain and strengthen the VHC definition.**

   On the European Parliament's Report on the Gigabit Society and 5G: Whereas the Code regards performance in a comprehensive manner (also including uplink bandwidth, resilience, packet loss, latency, jitter) and therefore adopts a clear perspective towards future applications such as connected cars or eHealth, the new broadband targets in the Commission's Gigabit Society Communication unfortunately focus only on download speeds, notably a general 100 Mbps download target by 2025. This short-sighted, narrow approach compromises the rollout of very high-performance FTTP networks. **Therefore, the European Parliament should set a fibre-based infrastructure target for all Europeans. In Germany, our members are committed to full FTTP coverage providing at least 1 Gbps by 2025. We further ask the European Parliament to acknowledge that, for the technological mobile standard 5G, a dense fibre network is the indispensable infrastructure.**

2. **Rethink biased investment narrative: Loopholes in the SMP regime undermine the stability of the regulatory environment and will prevent investments of all operators**

   On various occasions, the Commission has rightly stated that competition drives investment – the key principle of empowering the digital economy and society. Several provisions in the Code, however, are based on the assumption that there is a trade-off between competition and investment. In fact, the Commission expects that deregulating wholesale access (i.e. limiting asymmetric obligations that seek to reduce Significant Market Power, SMP) will lead to increased investments by former monopolist operators, even if a large part of competitors will be put out of business.

   This view needs to be

   i) corrected, as independent studies have shown that regulation fosters competition and competition stimulates incumbents to invest,
   ii) balanced, as it currently only focuses on promised investments of incumbent operators, thereby completely ignoring competitors' investments already taking place
   iii) realistic, i.e. not based on hopes of incumbent investments in an environment with much less competitive pressure to invest (if any), and,
   iv) reconsidered, as it is "in conflict with both the Commission's stated beliefs and the evidence of the last 15 years" (BEREC, BoR (16) 213, p. 6).

   Two examples:

   - Deregulation in case of (prospective) commercial access agreements or co-investment offers (throughout the proposal, e.g. Arts. 65(2), 66(6), 71(2), 74), neglecting that such agreements in practice have only materialised due to a strong asymmetric regulatory backstop (co-investment examples from France, Portugal, and Italy are often cited).
   - Limiting competition to the retail market (throughout the proposal, e.g. Recital 175, Arts. 3(3)(f), 65(2), 65(4), 66(4), 70(1), 71(1), 71(2), 72(1)), deliberately accepting that this may lead to an unregulated infrastructure monopoly (or duopoly, in the presence of a cable network).

Since the liberalisation of the telecoms market, German alternative network operators have invested more than the incumbent Deutsche Telekom (€ 68 bn vs. € 60 bn). While DT still has significant market power regarding its access network, alternative network operators re-invest a higher share of their turnover (24% BREKO vs. 17% DT in 2015) and they are responsible for more than 80% of FTTP deployment in Germany. Consequently, **the Commission's proposals in the mentioned articles have to be removed, as they considerably weaken the SMP regime, which lies at the heart of the telecoms framework and has proved to be crucial in promoting its objectives.** Whereas strengthening the SMP regime will further increase competitive pressure on all telecoms operators to invest, the Code should set the conditions to attract fresh money for fibre deployment. **Therefore, we propose to focus co-investments on sharing deployment costs of new fibre infrastructures, for example using separate vehicles that build the network and potentially operate it but do not engage in retail activities (wholesale-only model), with regulation geared to the degree of the incumbent's participation.** This would attract additional capital provided by financial investors with a long-term investment profile, especially if the vehicles in question allow for a controlling majority held by those investors.

3. **Avoid risky legislative experiments: New symmetrical obligations are prone to strengthen former monopolists**
   Whereas the Commission proposes on the one hand to weaken the SMP regime, it extends on the other hand in Art. 59(2) and (3) symmetrical access obligations to all operators (dominant or alternative). While these appear to be an easy regulatory tool to improve access to bottleneck infrastructures (e.g. inside buildings), their extension beyond these bottlenecks risks to be abused by former monopolists, whose market power was supposed to be reduced by the asymmetric SMP regime – the cornerstone of the framework. Disconnected from any SMP-oriented market analysis, the new rules will ultimately lead to deregulating incumbents as proposed in Art. 71(2), which could then avoid own investments, increase their power by using these rules to access alternative private infrastructures, and ultimately re-monopolise the markets. **Therefore, the framework has to make sure that the SMP regime is not jeopardised by any symmetrical obligations.** Furthermore, with the regime established under the Broadband Cost Reduction Directive (2014/61/EU) significant and very critical access obligations have already been imposed on non-SMP operators. **Before any additional symmetrical obligations are introduced, the Commission has to evaluate the effects of the Broadband Cost Reduction Directive – not least in order to provide regulatory certainty.** The evaluation foreseen in 2018 constitutes a good starting point.

4. **Prevent rigid one-size-fits-all approach: Hierarchy of remedies and state-planned deployment are not practicable in most European markets**
   We welcome the Commission's analysis on best practices in various Member States before drafting the Code. However, it is unfortunate that these are now proposed to be applied across the EU, irrespective of national specificities. While access to civil engineering such as ducts has proved to be a useful remedy notably in Portugal as well as Spain and has enhanced infrastructure-based competition there, it should not be the sole or primary remedy in all Member States as proposed in Arts. 70 and 71(1), simply because ducts do not exist in an equal manner across the EU. Access to entire physical network elements (the unbundled local (sub)loop - metallic or optical) has been and is expected to remain the main wholesale access product to climb the last rungs of the ladder of investment towards own fibre deployment and hence to ensure and promote sustainable competition from a pan-European perspective. Moreover, active products such as bitstream are indispensable for the availability of nation-wide or pan-European services, notably for businesses. Thus, in order to reduce barriers to market entry and avoid a regulatory patchwork that would fragment the Digital Single Market, **all remedies have to be made available from the toolbox of National Regulatory Authorities (NRAs), based on the respective national market requirements.** Only a strong regulatory 'safety net' provides clarity, predictability, and hence investor certainty.
   A rigid approach is also reflected in the mapping proposed in Art. 22. **Whereas centralising information on existing network deployment may improve coordination for the efficient allocation of state aid**, a three-year forecast also covering all private deployment would constitute a tremendous administrative burden and block the needed flexibility for fibre rollout, in particular by smaller operators. Fibre deployment would further be hindered by the threat of sanctions in case the rollout would not have been announced in the forecast. Most of all, the links to market definition, analysis, and remedies (also in Art. 62(3)) may result in different (sub)national regulatory regimes, including partial deregulation of SMP operators, ultimately leading to a regulatory patchwork that will further fragment the Digital Single Market. **It is therefore paramount to limit Art. 22 to mapping existing networks for the efficient allocation of state aid.**