

**28.10.2024**

***BREKO position on the consultation on Guidelines on exclusionary abuses of dominance (Article 102 TFEU)***

The German Broadband Association (Bundesverband Breitbandkommunikation e.V. | BREKO) would like to thank the EU Commission for the opportunity to comment on the Guidelines on exclusionary abuses of dominance (“the Guidelines”).

BREKO and its more than 500 member companies active in the telecommunications market believe that maintaining a strong competitive environment plays a vital role to ensure the effective fibre optic roll-out in Germany and in Europe.

As the leading German fibre-optic association, BREKO successfully advocates for competition in the German telecommunications market. Its members are clearly committed to future-proof fibre optics and are responsible for more than half of the roll-out of broadband connections in Germany. In 2023, they invested 4.8 billion euros for this purpose. BREKO’s members impressively illustrate the positive effect that a competitive market with a great variety of companies can have on technological developments.

**Fair competition as the key enabler for efficient fibre roll-out in Germany and in Europe**

As BREKO, we do fully support the preliminary remarks outlined in the Guidelines on the necessity to apply Article 102 TFEU vigorously in view of growing market concentration in various industries, including on the telecommunications market.

Today, alternative telecommunication operators in Germany are responsible for 61% of fibre optic deployment in the country<sup>1</sup> and thus play an essential role to achieve the objectives of the digital decade both in Germany and in Europe.

Over the past 22 years, the dynamic towards competitive structures in our industry has been guided by the interplay between asymmetrical access regulation on an ex-ante basis and regulation on an ex-post basis. Both regulatory instruments are based on competition law. Consequently, they are intertwined. In this paper we want to highlight the importance a consistent and rigorous application of Article 102 TFEU has had in the past and why we believe this remains of vital importance for the future. Besides, we want to highlight specific practices linked to the telecommunications sector which we believe deserve scrutiny from a regulatory perspective.

We thus structure our contribution as follows:

We first want to highlight the importance of the Guidelines’ formal nature to enhance legal certainty and predictability regarding the interpretation of article 102 TFEU (I). Secondly, we want to underline the importance of vigorous and consistent ex-post review mechanisms to

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<sup>1</sup> [BREKO 2024 Market Analysis](#)

maintain fair competition in the relevant markets, especially regarding the telecommunications sector (II), and want to underline in this context the complementary benefits of interplay between competition rules and ex-ante regulation (III). Finally, we want to draw your attention on new market developments which hamper efficient competition on the German telecommunications market and which we believe require a more intensive regulatory oversight as to potential anticompetitive effects (IV).

#### **I. Guidelines enhancing legal certainty and a consolidated approach between competition law principles and European case law**

We welcome the fact that by adopting the Guidelines, the EU Commission consolidates the principles established by the European Courts regarding the application of Article 102 TFEU and favors alignment between competition law principles and European case law. We believe that the Guidelines can efficiently contribute to a better understanding of the legal application of Article 102 TFEU and thus enhance legal certainty and predictability which are paramount to successful commercial activities, especially in the telecommunications sector.

#### **II. The ongoing importance of Antitrust Law on regulated markets**

In chapter 4.2 of the draft Guidelines, the Commission links certain well-known and recurring constellations of abuse of market power (such as exclusive arrangements, tying and bundling, refusal to supply, predatory pricing and margin squeeze) closely to the tests developed for the purpose of analysis by the case law. BREKO fully supports the approach of the European Courts in this respect and appreciates the EU – Commission's approach to enshrine these principles in the Guidelines as a rock-solid basis for its future enforcement policy.

The importance of a strict application of these ex-ante regulatory tools cannot be overstated. Indeed, despite the telecommunications markets being regulated ex-ante, especially with regard to SMP, a significant corpus of case law at the level of the European Courts, national competition authorities and National Regulatory Authorities has emerged over time. This can be highlighted by referring to the European Court of Justice's judgment of 14 October 2010 (C-280/08 P) Deutsche Telekom case, in which the ECJ upheld a 2003 decision by the European Commission fining the German incumbent telecoms operator, Deutsche Telekom, EUR 12.6 million for abusing its dominant position in the market for local access to its fixed telephony network contrary to Article 102 TFEU based on a margin squeeze practice. Various subsequent ECJ rulings on margin squeeze practices have further underlined the importance of efficient ex-post regulation on other national markets<sup>2</sup>.

Moreover, beyond specific case law consolidating a set of anticompetitive practices, the Guidelines also state in chapter 4.3 that in certain scenarios, abuses of dominance may occur in the absence of specific economic criteria being met, in cases where the presumption of

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<sup>2</sup> Judgment of 10 July 2014, Telefónica and Telefónica de España v Commission C-295/12 P and Judgment of 17 February 2011, TeliaSonera Sverige, C-52/09 related to margin squeeze practices

abuse of dominance on the incumbent operator being less strong. In particular, the Commission addresses conditional discounts, bundled discounts, self-preferential treatment and access restrictions by the market-dominant company as examples. BREKO clearly supports the EU – Commission in its approach to equally include these types of scenarios in its enforcement activities. Besides, we believe this further underlines the importance of antitrust law as a “safety net” and ultimately facilitates the adoption of efficient and targeted regulation.

### **III. The importance of the interplay between ex-ante and ex-post regulatory frameworks to maintain competitive market structures**

Historically, access regulation has played a pivotal role in opening telecommunications markets to competition, especially by regulating (ex-ante) incumbent operators with SMP. Additionally, legal instruments such as the Recommendation on relevant markets have strongly enabled consistent access regulation in the EU Member States, and regarding the telecommunications sector, set the necessary basis for fair and efficient fibre deployment.

Conversely, ex-post control under competition rules alone would not have been sufficient to open the markets and create competitive structures, because competition rules apply ex-post (i.e. “after the fact”) and thus too late for opening markets, establish principles in individual cases only (rather than being generally applicable in favor of all competitors, like ex-ante determinations), and set ‘reactive’ remedies of a general nature such as fines (rather than establishing prescriptive, behavioral remedies, like under an ex-ante regulatory regime). Indeed, one of the prerequisites for conducting ex-ante regulatory procedures and for imposing ex-ante regulatory measures is that the application of ex-post competition rules is insufficient<sup>3</sup>. Given the huge disparities in market power between market players on telecommunications markets, BREKO believes that a withdrawal of sector-specific regulation at this stage would be detrimental to the efficient deployment of fibre infrastructure on the German market and to the overall commercial viability of alternative network operators.

In this context, the European Courts have left no doubt that EU - competition rules apply to areas which have already been addressed by ex-ante regulation at the national level. Thus, competition rules have an important complementary function which is still likely to increase in light of strong de-regulatory tendencies at the EU – level which appear to be imminent<sup>4</sup> or are already addressed in the law<sup>5</sup>, such as the possibility of regulatory forbearance in the case of an incumbent’s self-commitment models for cooperation. These models are very likely to have loopholes which favor abusive behavior and hamper fair competition.

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<sup>3</sup> Article 67, subsection 1, lit. c of Directive (EU) 2018/1972 (“European Electronic Communications Code” – hereinafter referred to as “EECC”)

<sup>4</sup> EC White Paper - “How to master Europe’s digital infrastructure needs?”, COM(2024) 81 final, Chapter 3.2

<sup>5</sup> Article 76 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (EECC).

Finally, we would also like to highlight that competition rules have significantly contributed to shape ex-ante regulation, especially through continuous identification of certain abusive market practices that ultimately have been incorporated into ex-ante regulatory frameworks.

To conclude, we would like to stress that without a regulatory framework relying on ex-ante measures – as shaped on the basis on the ex-post application of competition rules - which enable fair competition on the telecommunication markets, fibre deployment in Germany would not follow the same dynamic of development as it is currently the case. Indeed, regulated access to infrastructure at fair conditions, especially regarding infrastructure access and wholesale prices that allow operators to compete at the retail level, are paramount to safeguard the business models of fibre deployment network operators and will continue to do so in the foreseeable future.

#### **IV. The necessity to adapt ex-ante and ex post regulation to new competition challenges**

However, it is not only the continuation of current market regulation (ex-ante and ex-post) that must be guaranteed as far as possible. It is also essential to ensure that the regulatory frameworks are adapted to the new challenges arising on the market to further accelerate the expansion of fibre optics in Germany and achieve the goals of the Digital Decade set by the German government and the EU Commission. We thus want to highlight in this section, several unilateral behaviours by incumbent operators which hamper fair competition and the efficiency of fibre roll-out in Germany.

##### **a) The strategic Fibre Network Duplication of the incumbent**

In this context, we refer to the activities of incumbent operator Deutsche Telekom regarding the strategic overbuild of fibre networks or network duplication on the German market. In more detailed terms, Deutsche Telekom increasingly engages in the strategic overbuild of fibre networks in areas where alternative operators have committed to deploy or have already deployed fibre networks. In this context, the incumbent announces the deployment of its own fibre infrastructure in areas where competitors have planned to deploy, and found investors as well as customers to this end, and those alternative operators ultimately find themselves unable to realise their fibre roll-out projects because of the withdrawal of investors in light of the important market power of the incumbent. Furthermore, and in contrast to its competitors, Deutsche Telekom concentrates the overbuilding activities only on parts of municipalities (“cherry picking”) where it is most likely to transition its own customers from copper to fibre. As a consequence, many areas that would have been deployed by a competitor can ultimately only get fibre access via state aid, even though an economically viable alternative would have been possible.

The 2024 BREKO Market Analysis<sup>6</sup> references 284 cases of strategic overbuild. These overbuilding activities have a devastating impact on the investment and fiber roll-out plans

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<sup>6</sup> Supra 1

and ultimately hamper the deployment of fibre in Germany overall. In July 2023, the German NRA (BNetzA) started monitoring overbuilding activities and has established a register to this end<sup>7</sup>. The interim report of April 2024 confirmed that the overbuilding activities of Deutsche Telekom might be abusive. Nevertheless, no concrete action from the NRA has been taken so far. Indeed, the NRA does not initiate legal proceedings because it considers a proof of abusive intent necessary, which is - as far as we understand the Commission's guidelines – not required.

Along with strategic overbuilding activities, we witness a consistent refusal of Deutsche Telekom to commit to whole-buy arrangements despite most alternative operators offering non-discriminatory open access models, representing in this context a well-established market practice in the telecommunications market. From the view of the incumbent, the impossibility and ultimately refusal to commit to whole-buy arrangements is supposedly legitimating overbuilding activities.

#### **b) The need for a fair copper to fibre migration concept to avoid transferring SMP from the legacy copper onto the developing fibre market**

Beyond network duplication, we would also like to mention the worrying inactivity of the national regulator in Germany regarding a fair copper to fibre migration which avoids the **strategic shutdown of copper networks by the incumbent**. Legally, the switch-off can only be requested by the incumbent as the owner of the legacy network and thus grants the latter with the ability to strategically favor its own interest to the disadvantage of its competitors.

Following the EECC and the Commission's recommendation on the regulatory promotion of gigabit connectivity<sup>8</sup>, we believe the German NRA must safeguard effective competition and non-discriminatory behaviour of the incumbent before the switch-off procedure starts (see No. 68-77). As the incumbent is economically and strategically interested in submitting switch-off requests for the copper network only in areas where it has deployed its own fibre infrastructure, while in parallel running its legacy network as long as possible in expansion areas of its competitors, we strongly urge the NRA to intervene and present a concept for a non-discriminatory copper switch-off procedure.

In this context, on the national level, we strongly advocate to create a regulatory framework to avoid transferring the SMP of the incumbent (relying on its market position on the copper market) onto the emerging fibre market. As BREKO, we have drawn up a [concept paper](#) on how this migration progress could be organised fairly, and believe that the German regulator (BNetzA) already has sufficient legal basis for preventing this transfer of SMP.

In a nutshell, we propose that the BNetzA defines objective criteria as part of the migration concept under which the switch-off - regardless of who has expanded the fiber optic network - takes place, e.g. expansion quotas for Homes Passed and/or Homes Connected in relation

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<sup>7</sup> [Bundesnetzagentur - Doppelausbau-Monitoring](#) .

<sup>8</sup> EC Recommendation on the regulatory promotion of gigabit connectivity, C(2024) 523 final

to a specific area (e.g. a cable network). Additionally, competitors of the incumbent who have deployed fibre in defined areas (e.g. cable branch catchment areas) and offer wholesale services on fair, reasonable and non-discriminatory terms can notify the regulator of this. The regulator can then - if necessary, after reviewing the stated expansion status and the relevant services offered - request the incumbent to submit a disconnection request for the area in question. This will ensure a balanced and fair migration process.

### **c) Ensuring fair competition regarding mobile wholesale product offerings**

Mobile operators in Germany consistently refuse to provide suitable Mobile Wholesale Access products offerings to alternative network operators which also deploy FTTH networks, especially regarding 5G. While mobile operators offering broadband services benefit of open access offers from alternative network operators to fixed networks, reciprocity with regard to efficient mobile service offerings for fixed broadband offerings does not exist. The inability to offer competitive bundled services (broadband and mobile) is a major disadvantage for alternative network operators and should be scrutinized more closely by regulators in light of anticompetitive market behaviors, potentially with regard to collective dominance (or joint-SMP).

## **V. Conclusions**

To conclude, we would like to highlight the necessity to maintain both ex-ante and ex-post regulatory measures, as we still witness SMP on the remaining regulated markets in Germany. Given the huge disparities in market power between market players on telecommunications markets, BREKO believes that it is too soon to withdraw sector-specific regulation. If the overall market dynamics have massively evolved towards free competition, access pricing on the remaining regulated wholesale markets still proves necessary on the path of transitioning towards full network coverage.

At the same time, we hasten to add that the consistent and rigorous competition case law has been and will continue to be paramount to shape regulation in the sector and ultimately contribute to Europe's goals in terms of connectivity coverage.

Besides the necessity to maintain existing regulatory tools, we also wanted to use this opportunity to stress that new challenges to ensuring fair competition have arisen over the past years regarding the copper to fibre migration process, as well as the strategic overbuild of networks, which, besides distorting competition on the German market, risk to compromise the efficiency of the fibre roll-out dynamics in general. Finally, we also advocate for fair competition with regard to access to wholesale mobile access products, as this is paramount for network operators to address customers on a level-playing field with MNO's that also provide fixed broadband access services.

In light of the upcoming regulatory agenda in the telecommunication sector, especially with new regulatory frameworks embedded in a Digital Networks Act and an updated version of the European Electronic Communications Code, we believe it is premature to reduce ex-ante

regulation in view of the challenge of achieving the connectivity targets of the digital decade. Further, we believe that any regulatory changes should strictly comply with the case law and principles outlined in the Guidelines. We urge the EU Commission to update the regulatory toolbox of regulators to investigate new market dynamics which hamper fair competition and which we have outlined in the present feedback. Finally, we see these Guidelines as a basis for further dialogue, which we look forward to with interest.

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*BREKO is registered in the lobby register (R002215) for the representation of interests vis-à-vis the German Bundestag and the Federal Government and in the European transparency register (028570718529-43) for the representation of interests vis-à-vis the EU institutions.*