Association of Germany's Optical Fiber Industry (Bundesverband Glasfaseranschluss e. V. - BUGLAS)

Response to the

Draft BEREC report on Co-investment and SMP in NGA Networks
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BUGLAS is the association of German telecommunication operators, which are planning, constructing and operating optical fiber networks. BUGLAS' associate members are providers of technological components, content and consulting services.

Fiber access networks are considered to be the leading future networks, as only optical fiber networks will be able to satisfy the demand for bandwidth in coming decades. Fiber transmission avoids the disadvantages of other technologies such as bandwidth division between users (shared medium) or electro-magnetic interference. Moreover it affects environmental benefits for the public as it is considered the most energy-efficient way of transmission. Furthermore, cable distribution cabinets in the streets become dispensable, and a higher interference resistance and safety against sabotage are provided for.

The members of BUGLAS are planning investments in FttB/FttH-networks of approximately 1.2 billion € until 2014, which means that about 1.800.000 households will be made accessible by optical fiber then. So far, BUGLAS member companies have carried the lion's share of the FttB/H-deployment in Germany. By the end of 2011, the BUGLAS member companies have connected nearly 870,000 households, out of which 250,000 alone in the past year.

BUGLAS was founded in March 2009 in Cologne – initially by seven companies, today it represents more than three dozen members and is constantly growing.

Hereby BUGLAS takes the opportunity to respond to the Draft BEREC Report on Co-investment and SMP in NGA Networks of 8 December 2011.

Main statement 1: Co-Investments are constitutive part of a successful and comprehensive broadband deployment. Therefore co-investments should be basically regarded with an open and positive attitude and not mainly be seen as potentially endangering competition.

Co-investments should be considered as an important pillar of infrastructure deployment and, like other investments in fiber infrastructure, regarded with a positive attitude. Promoting investment in infrastructure and sharing of infrastructure are among the regulatory principles of the EU regulatory framework.

From BUGLAS´s point of view a promotion of broadband co-investments is desirable. The considerations concerning co-investments should generally be focussed stronger on existing commercial NGA-deployment, and the regulators' role should be restricted to cases of market failure respectively concentrate on the subsidiary promotion and organisation of the migration from copper-based to fiber-based access networks. So far market failure concerning NGA-networks is discernible only in rare cases. The way BUGLAS sees it, these cases are based predominantly on low transparency on the part of the former state monopolist, rather than on a lack of willingness to roll out NGA networks on part of the companies.

Co-Investments should not be impeded by premature regulatory intervention. By undertaking a co-investment the involved companies take a great economical and entrepreneurial risk. So far co-investments develop rather slowly. Therefore overcoming the difficulties connected to building co-investments and the possible contribution of the regulator to this should have priority. This approach is already pursued by the NGA-Forum in Germany, in which members of industry and associations are working together with the national regulatory authority on finding joint solutions for the NGA rollout. Such an approach of promoting the NGA deployment would be also favourable on the European level.

In our opinion the draft report shows a rather sceptical attitude towards co-investments. Although from BERECs point of view the effects of co-investments on the relevant markets and on the SMP assessment may be of major concern, co-investments should not primarily be regarded as a potential threat to the competitive conditions. In addition to the development of criteria for the measurement of a potentially negative impact of co-investments on competition, positive effects and prospects for competition should also be taken into account. Although the report generally acknowledges the possibility of a positive impact of co-investments on competition (p. 3), this is not sufficiently reflected in the conclusions.

Also the remarks on page 14 of the draft report show a certain amount of distrust against co-investment. The motives mentioned for entering a co-investment agreement have mostly a negative connotation or even describe a deliberately competition-damaging behaviour. Among the motives mentioned are collusion to the detriment of third parties, creation of a dominant position with the plan to abuse it, or the intended achievement of an improved company image by demonstrating their commitment to a wider geographic coverage. Such an assessment does not do justice – at least not regarding the status quo – to the commitment of the companies involved in broadband deployment.

Main statement 2: Consideration of Open Access and promotion of voluntary Open Access concepts.

One of the fundamental elements of NGA co-investments is Open Access. In Germany the concerned companies agree on the necessity of Open Access under equitable and transparent conditions. The promotion of such voluntary Open Access concepts should take priority over regulation.

In Germany the issue of Open Access regarding the NGA rollout has already been discussed for several years in collaboration with companies, associations and the regulator with the objective of developing joint concepts. It showed that there is a mutual general willingness to grant open access. It is also agreed upon that non-discrimination and transparency are essential parts of an Open Access concept. Although there remains further need to clarify details this way should be further pursued. There is a strong economical incentive for the companies to grant open access, because a high utilisation of the new infrastructure in short time is crucial for the profitability of the investment. The development of joint practical solutions takes precedence over regulation.

In the opinion of BUGLAS the aspect of Open Access has to be included in the assessment of co-investments. It is slightly astonishing that this is omitted in the draft report and the term Open Access is not mentioned in the whole consultation document. Although access conditions to third parties are analysed as an element of evaluation of co-investments, Open Access concepts are not included. Considering Open Access is imperative, though, as such a concept can make regulation dispensable (BNetzA, NGA-Eckpunkte, p. 20 ff.). The criteria developed by BEREC should be amended by adding the impacts of Open Access concepts.

Co-investment agreements should generally include the obligation to use open access procedures, e.g. as agreed upon in the NGA-Forum. It is to be left to the decision of the network operators which kind of open access model is offered. In case of breaches regarding SMP the national regulatory authority has, according to the German telecommunications act (TKG), the possibility to inhibit these breaches in due time. Analyses by WIK-Consult (Wissenschaftliches Institut für Infrastruktur und Kommunikationsdienste GmbH, Bad Honnef) show that NGA networks become efficient only if used with a capacity utilisation of > 50%. As a result opening the NGA networks to operators demanding access within the scope of open access models is nearly indispensable.

Main statement 3: Regulatory framework for dealing with co-investment is existent; currently no need for modification.

Basically an adequate regulatory framework for dealing with broadband co-investment is available. The assessment of co-investments is subject to the monitoring by cartel law. In cartel law as well as in telecommunication law the instruments of non-discrimination obligations and transparency obligations are available.

Also the legal framework requirements for broadband co-investments have been already analysed. In 2010 the German cartel office already scrutinised the framework requirements regarding fiber co-investments according to competition law.[1] The application and execution of non-discrimination obligations in cartel law and telecommunications law have been analysed by Bundesnetzagentur in collaboration with Bundeskartellamt.[2]

Additionally exemplary conditions for collaboration and at the same time principles of non-discrimination have been developed in cooperation by companies, associations and BNetzA under the roof of the NGA-Forum. Hereby basic rules and their application to co-investments were communicated, so that co-investment schemes can be planned and adapted. From BUGLAS' point of view it seems counterproductive to launch constantly/frequently further regulatory studies as by doing so a legal uncertainty is signalised.

Finally the amended German telecommunications act (TKG) offers in its new § 15 para 4 a possibility to obtain legal certainty in case of doubt. It follows from § 15 para 4 TKG that BNetzA, at the request of network operators, provides information about the prospective regulatory framework requirements or measures regarding the building and upgrading of next generation networks. This information will be given for precise regions and areas.

Given these facts there is currently no urgent need to establish additional guidelines for an SMP assessment of co-investments.

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[1] BKartA, Hinweise zur wettbewerbsrechtlichen Bewertung von Kooperationen beim Glasfaserausbau in Deutschland, 19.1.2010.

[2] BKartA/BNetzA, Prinzipien der Nicht-Diskriminierung (NGA-Forum 8.6.2011).

Main statement 4: Wait for market test of business models; allow for different co-investments models to develop.

Generally the development of business models for the realisation of broadband co-investments is still in its early stages. The decision for a certain business model depends on many different factors (e.g. regional circumstances, area of deployment, prospective demand), which are highly different in the member states. The draft report derives the developed key elements for evaluation from a study of the few already existent co-investments. Universally valid criteria for measuring all co-investments cannot be derived from these single examples, though.

There is a risk of suffocating alternative co-investment models and further possibilities of development by a premature setting of criteria. Possibly the assessment of newly developing co-investment models on the basis of the criteria compiled by BEREC would have the effect of a negative evaluation of their impact on competition from the beginning.

E.g., according to BEREC, a small number of co-investment partners and other market players have a highly negative impact on the competitive conditions. In practice co-investments with only two partners are likely to be the rule, because already a co-investment agreement between only two partners involves enormous efforts, costs and risks. According to the draft report’s catalogue of criteria such co-investment models would be marked as probably impairing competition from the beginning, which would increase the probability of regulatory intervention.

Thus in the worst case the broadband deployment in rural areas could be impeded. It is not likely that a great number of market players will be operating there. Especially in these areas a promotion of fiber deployment is necessary for the provision of broadband access, in no case should co-investments be made difficult in these areas. The example of rural areas also shows the need of including Open Access models into the assessment of co-investments. There is an interest in a capacity utilisation as high and as soon as possible, which is a strong incentive to open the network to third parties.

In which way the geographical rollout and technical realisation (multi-fiber or mono-fiber) of the co-investments are carried out depends on many different factors varying according to the specific region. None of the alternative models can be straightforward categorised as more competition-impairing than the others. The draft report by trend evaluates the implementing of multi-fiber as more positive for competition, although it also differentiates in its explanations and describes mitigating factors. Especially the implementation of multi-fiber increases the upfront investment without the certainty that co-investment partners with different fiber requirements for the respective investment area can be found. A higher requirement e.g. of multi-fiber would mean another obstacle for fiber rollout.

Main statement 5: Safeguarding transparency and non-discrimination for all market players.

An essential regulatory task regarding the NGA rollout is establishing transparency and non-discrimination for all market players. Ensuring transparency especially with regard to the migration towards NGA networks is imperative for a successful NGA rollout. Paragraph 40 of the NGA recommendation requires that the national regulatory authorities put in place a transparent framework for the migration from copper to fiber-based networks. BUGLAS sees herein an urgent regulatory task and supports this explicitly.

Hence the task of regulation should concentrate on establishing transparency. The work of BEREC should as well be based on that role of regulation, and let otherwise the market forces operate.

A crucial and urgent task of regulation is the removal of information- and access-bottlenecks and the establishment of the required transparency regarding network modification plans of SMP operators. Concerning that issue BUGLAS members have been demanding for some time from the national regulatory authority to carry out the regulatory task of organising the process of migration in a competition-enhancing way more strongly. BEREC should as well intensify its support in that regard.

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