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Body of European Regulators for Electronic
Communications (BEREC)
Market and Economic Analysis (MEA) Working Group
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Consultation on draft BEREC report on the regulatory treatment for fixed and mobile backhaul

Dear Ms. Caccinelli,

Dear Mr. Infante,

Dear Sir /Madam,

The German Broadband Association, BREKO, welcomes the opportunity to comment on the recently published draft BEREC report on the regulatory treatment for fixed and mobile backhaul, which gives an overview of the legal provisions currently applicable to regulate backhaul markets and the regulation in force of different types of backhaul networks and services in Europe. We are also pleased to see that the report takes into account the operators' input pursuant to the questionnaire of May 2021 on the regulatory treatment for backhaul, in which BREKO participated.

We recognise that the report duly considers the existing legal and regulatory framework, as defined by the European Electronic Communications Code (EECC), the European Commission's (EC) Recommendation on Relevant Markets (RRM) and the Broadband Cost Reduction Directive (BCRD) that is currently under review. The EECC is currently still in the process of being transposed in the Member States, the EC Recommendation was only adopted in 2020 and the outcome of the BCRD's review is still pending. It is therefore imperative that new regulatory measures

pertaining to backhaul infrastructures allow sufficient time for recently implemented legislative initiatives to take their course and be effectively applied, before any new market interventions are prematurely introduced.

Overall, as highlighted in our contribution to the BEREC consultation, we consider that the backhaul markets, in particular mobile backhaul and the connection of 5G base stations via fibre, is a functioning market that should under no circumstance be distorted by additional regulation. In Germany, fibre network operators have identified the connection of mobile sites as part of their business model and thus currently have a strong interest to cooperate with 5G operators. Excessive regulatory market intervention at this stage of fibre roll-out, which is expected to remain as-is for the foreseeable future, would threaten to hamper the dynamic of accelerated deployment. What is more, regulatory intervention would also disturb the existing balance in negotiation power between market players. A switch to regulatory solutions would, therefore, cause significant delays in the connection of 5G base stations. Negotiated agreements are crucial for increased economic activity, to safeguard countless jobs, to help connect underserved areas and to strengthen Europe's global competitiveness in the future. Moreover, given that there currently is a functioning market structure which tends towards effective competition, regulatory scenarios should not consider mobile backhaul markets as potentially falling within the scope of ex ante regulation since the three-criteria test established in the EECC cannot be satisfied. This is precisely why mobile backhaul was not considered a market susceptible to regulation by the EC under the new RRM.

With regards to the regulation of fixed backhaul infrastructures, the current level of progress in fibre deployment and overall market maturity across different Member States have to be taken into due consideration. Given that the German market still has significant developing potential, and the level of connectivity is relatively low compared to other EU markets, it is expected that the current market dynamics will significantly evolve in upcoming years as fibre deployment progresses. For example, the new regulatory order for wholesale local access market (market 1 of the RRM), which is currently under public consultation by the German NRA, foresees the introduction of an extended obligation for accessing empty ducts operated by the incumbent, going beyond the existing measures which otherwise only concern main and cable distributors. These changes may eventually also lead to a shift in the market share of respective incumbents, which is an important aspect to be considered in the definition of markets and ex ante regulation. As such, additional regulatory market intervention could disrupt competition and hamper the momentum that has been built in recent years on the German fibre market. It is equally important that market-based solutions are

prioritised by policy makers and that measures which may curb the growth in private sector investment in fixed backhaul infrastructures are avoided. Additionally, the present scope of the BCRD provides sufficient access opportunities with regards to the mobile backhaul and as such, considering evolving market trends and improving competitiveness, there is no pressing need for further regulatory intervention in view of access requirements for the time being.

The EC Recommendation acknowledges that wholesale ex ante regulation should only be applied where demonstrable competition problems exist at the retail level. It further clarifies that mobile backhaul retail markets are generally to be considered competitive on an EU-wide level and that asymmetric regulation should only be possible if a prospective analysis justifies its inclusion within a relevant market susceptible to ex ante regulation. The three regulatory scenarios in which backhaul can be integrated in the market analysis for regulatory purposes, as listed in the BEREC report, should therefore not be considered a recommendation to regulate mobile backhaul infrastructures. Any attempt to introduce additional regulation using these means would counter the word and spirit of the RRM, rendering the relevant policy decisions underpinning the Recommendation futile. During the discussions leading up to the revised RRM, BREKO stressed that the connection of 5G base stations was not a problem in all European Member States and the EC concluded that it was not reasonably justified to include backhaul access to 5G mobile sites in the remit of the initiative. The decision to introduce regulatory intervention was rather left to the NRAs in those Member States with competitive difficulties regarding the connection of 5G base stations. By doing so, individual Member States were given the necessary means to implement appropriate measures once they determine potential market distortion. It is important that any potential future legislation on mobile backhaul treatment does not reverse the accomplishments of the new RRM and that the present BEREC report states clearly that the imposition of remedies through National Regulatory Authorities (NRAs) is not recommended in Member States with functioning mobile backhaul retail markets.

BREKO supports freely negotiated solutions between market participants instead of imposing ex ante obligations, which could potentially curb the deployment of FTTB/H and other VHC-networks. Thus, it is important to encourage operators of emerging FTTB/H and 5G networks to negotiate solutions regarding mobile backhaul amongst one another and to incentivise private market investment. In order to meet the exponential growth in data consumption from mobile networks, it will be necessary to connect them with future-proof fibre connections, which underscores the importance of maintaining fibre momentum and accelerating its deployment. To give an example of successful

negotiations in this context, we would like to refer to the existing framework agreement between BREKO members and the 5G operator 1&1, which the BREKO Purchasing Group concluded to connect 5G base stations with fibre. These agreements show the willingness of fibre network operators to collaborate with mobile operators and give all market players the equal opportunity to actively participate in the roll-out of telecommunication networks.

Similar contracts and agreements can also be observed in markets that have reached a higher level of market maturity than in Germany. In Sweden, for instance, which has already deployed a very comprehensive fibre network, fibre operators rent out dark fibre to mobile operators through a common purchasing platform. In Denmark, fibre utilities are planning to introduce technically harmonised fibre products for mobile operators as they upgrade to 5G. This shows that also in countries which have reached a higher level of connectivity, with mature fibre markets, negotiated solutions remain the basis for the swift and efficient roll-out of mobile backhaul infrastructures. For this reason, it is crucial that any future regulatory framework does not introduce a one-size-fits-all approach and takes into account the differing market requirements between Member States. BREKO highlights the importance of allowing NRAs to combat emerging market challenges through flexible remedies according to their national needs and expansion rates.

With regards to the BCRD, BREKO concurs with the BEREC draft report about its significance to lower the costs of broadband deployment and to accelerate their roll-out in areas without high-speed connectivity. However, considering the directive's objective, access obligations for physical infrastructure owned by fibre network operators should not be deemed to fall under the legislation's remit. It should rather focus on access to physical infrastructures of undertakings which do not provide electronic telecommunication networks, i.e. undertakings providing electricity, gas, water and sewage disposal networks. In all other cases, negotiated solutions and open access agreements need to be the basis for ensuring access to physical networks. This is important to protect the first mover's business case and to maintain incentives for operators to deploy new networks without the risk of being overbuilt. A reluctance to build new networks will ultimately lead to fewer networks being deployed, thereby contradicting the main goal of the directive and discouraging privately funded network deployment. This is particularly true for areas that are less profitable to connect, due to their remote and rural character. The BEREC report should therefore take this aspect of the BCRD into consideration, bearing in mind that the current revision is still ongoing and changes to the relevant provisions might still occur.

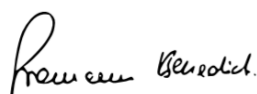
Concerning stakeholder input to the public consultation, the report appears to indicate a certain degree of willingness for alternative providers to accept increased regulation pertaining to mobile backhaul. A similar tendency is also observed with regards to fixed backhaul, be it nationwide or limited to prescribed regional areas. This position is contrary to the policy stance of BREKO as well as the specific needs and conditions in the German market. BREKO represents over 220 alternative network operators, driving German fibre deployment across all federal regions and playing a crucial role in connecting 5G base stations. Thus, it would be misleading to assume that alternative providers would be more favourable towards greater regulation simply by virtue of not carrying an incumbent status in a given market. As alternative providers, we are committed to the principle of fair competition on the market, and we consider that private investment is fundamental to achieving sustainable and viable nationwide infrastructure. As such, it is important that BEREC avoids recommending blanket regulation at the European level, but rather accord a wide degree of appreciation at the national authorities to develop and implement tailored regulatory interventions depending on the precise needs of the national, regional and local markets.

To conclude, BREKO would like to underline the importance of giving alternative network operators in Germany and across Europe the opportunity to negotiate agreements with one another according to the rules of the free market economy. This is necessary to protect an already functioning market and competition therein. The introduction of new regulatory measures for mobile and fixed backhaul infrastructures, now or in the upcoming years, would be to the detriment of fibre-rollout. It would undermine the business case of FTTB/H network operators by eliminating their investment incentives, which would in turn not promote but considerably hinder enhanced connectivity through VHC-networks.

Please note that the above-mentioned aspects raised on the future regulation of mobile backhaul are also equally applicable for the determination of regulatory treatment of fixed backhaul.

Should you have any further questions, please do not hesitate to contact us at any time.

Yours sincerely,



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