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Public Consultation on the Draft BEREC Report on the regulation of Physical Infrastructure Access (PIA)

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General information

During the 61st BEREC plenary meeting (5 December 2024), the Board of Regulators has approved for public consultation the draft BEREC Report on the regulation of physical infrastructure access.
This draft BEREC report provides insights on the topic of regulation of physical infrastructure access for the deployment of fixed very high-capacity networks and is based on the analysis of data collected from 29 countries in Europe through an extensive questionnaire, during July 2024.
BEREC's research into the regulation of access to physical infrastructure elements is structured along the following themes: an overview of regulation concerning PIA (chapter 2), the approach the NRAs took when reviewing their nationally relevant markets as regards the treatment of PI elements (chapter 3), details on the data collected from non-telecommunications operators (chapter 4), provision of the remedies related to physical infrastructure imposed when SMP was found (chapter 5), measures undertaken meant to incentivize the rollout of VHCNs, including the interplay between asymmetric and symmetric regulation (chapter 6), as well as challenges related to PIA foreseen in the future (chapter 7). The preliminary conclusions of the work are presented in the last section of the draft report (chapter 8).

You are hereby invited to participate in the below public consultation on the draft report.

Your details

* Please select the language of your contribution:
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* First name

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Organization name *(in case you are replying on behalf of your organization)*

1&1

Date

18/02/2025

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Practical details of the public consultation

Stakeholders are invited to comment and provide their views on the different chapters of the draft report following its structure:

- Chapter1 Executive summary
- Chapter2 Overview of access to physical infrastructure in Europe
- Chapter3 Physical infrastructure access under ex ante market assessments
- Chapter4 Data collection for the market assessments
- Chapter5 Remedies
- Chapter6 Regulatory measures relating to physical infrastructure access for incentivizing VHCNs rollout
- Chapter7 Expectations for the future
- Chapter8 Conclusions

Stakeholders may also upload a document as a part of their contribution, see below.

In order to facilitate the processing of the responses, the comments provided should clearly refer to certain sections/subsections/paragraphs of the draft report.

Contributions should **preferably be sent in English.**

Stakeholders may submit their contributions **by Wednesday, 19 February 2025, close of business.**

In accordance with the BEREC policy on public consultations, BEREC will publish all contributions and a summary of these contributions, respecting confidentiality requests. Any such request should clearly indicate which information is considered confidential. In case the contribution is partially deemed as confidential, a non-confidential version of the submission needs to be delivered as well.

Public consultation

Please indicate comments on the **Executive summary** :

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The report focuses on access to PI for the provision of fixed high-speed networks.

The report provides a good overview of the sometimes very different approaches and solutions in the individual Member States. In our view, there is a lack of clear emphasis on the most successful approaches and a critical examination of misguided approaches. The surveys and evaluations carried out could certainly be used to draw conclusions as to which regulatory and implementation approaches were exemplary successful and thus contributed to the expansion of broadband networks and the strengthening of competition, and which were less successful and may even have led to the risk of re-monopolization and a further delay in network expansion.

In the following, we provide more detailed information on the regulatory efforts worthy of criticism and the dangers of re-monopolization in Germany.

Germany is probably the only state in Europe that is preventing the practical use of PIA by delaying its implementation and delaying the implementation process until today. The use of unbundled fiber is also not made possible. All wholesale customers in Germany must fall back on active products from the incumbent. The incumbent alone is allowed to create added value - and the regulation of fees is largely dispensed at the same time, which means that the incumbent is granted superior returns. This distorts competition in Germany and Europe (Telekom is the largest provider in Europe).

Please indicate comments on the **Chapter2 "Overview of access to physical infrastructure in Europe"**:

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no comment

Please indicate comments on the **Chapter3 "Physical infrastructure access under ex ante market assessments"**:

5000 character(s) maximum

PIA should be defined as an independent market to enhance the predictability of regulation in the wholesale and retail broadband markets. However, it should be emphasized that a separate PIA market cannot be a substitute for Markets 1 and 2, as access to PIA only solves part of the problems existing in these markets. While access to PIA supports network expansion, it does not enable alternative providers to serve all customers.
Ex-ante regulation remains necessary until the elimination of Significant Market Power (SMP) and the establishment of a fully competitive fiber market (if this can be achieved). Symmetric regulation is not useful in the current time considering the big discrepancies in the distribution of market shares.
It should also be noted that the existing framework already foresees a reduction in regulation depending on the development of competition. It is not understandable why this intelligent regime should now be replaced by de facto deregulation through the cancellation of the relevant markets.

Dark fiber should be a mandatory wholesale service. Besides access to ducts, dark fiber is the right balance for all European markets between the interests of network owners with access obligations and network and service providers with demand. On this basis, competition can also develop in the best possible way on markets or in regions where, as is currently the case in Germany, requests for ducts are turned down due to a lack of availability. Users of unconnected fiber optics can develop products largely independently. Access to dark fiber alone eliminates deficits in the regulated wholesale products that make it difficult or even impossible to map competitive end-customer products and enables competition on an equal footing.

In addition, there are two main problems with PIA regulation in Germany: firstly, the excessive charges for construction facilities, which alternative competitors are currently complaining about, and secondly, the overall considerable delay in the ordering and implementation of PIA access. In Germany, the BNetzA has still not been able to conclude the standard offer procedure, forcing alternative competitors to conclude contracts with the market-dominant Telekom in order to gain access to the construction facilities. These contracts were concluded in the knowledge that the standard offer procedure was still pending and with the reservation that the final regulations could only be expected later. The main criticism, however, in addition to the further delay in implementation, is that the PIA access only includes empty conduits, but not the dark fiber optics. Dark fiber is not even offered as a substitute if PIA access is not technically possible, for

example due to a lack of space. In practice, this means that PIA access cannot be implemented in most cases and therefore cannot contribute to the intended cost reduction, increased efficiency and network expansion.

Insofar as the BNetzA should therefore state for Germany that the PIA has been implemented, this is not correct. The implementation is still ongoing. Its usability has not yet been tested in practice. The essential substitute for Germany (dark fibre) is not required by the regulator.

Please indicate comments on the **Chapter4 "Data collection for the market assessments"**:

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no comment

Please indicate comments on the **Chapter5 "Remedies"**:

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5.1: The restriction imposed by the BNetzA in Germany on access to construction sites, which may only be used for the expansion of the fixed network but not for the expansion of the mobile network, is fatal and anachronistic. The result of this restriction is that this access option will remain largely meaningless. This is because, for every route used in this way, it must be reliably ensured for the entire duration of use that no mobile communication—no matter how unlikely—takes place. Such an exclusion and the documentation and control required for this are likely to be almost impossible in practice, where the network and traffic control of the data is highly complex and is in any case so complex that it excludes the use of PIA access from the very beginning.
5.2: Within the notification procedure for the fee approval procedure for access to Telekom's construction facilities (BK3-23/079), in which the BNetzA used a price standard based on the determined cost-oriented value and contained additional surcharges, such as a surcharge to take account of Telekom's business plan, the European Commission emphasized in its opinion of 15 July 2024, among other things, the need to abolish this surcharge based on the business plan, arguing that it was highly unlikely to be compatible with the EU legal framework at this point.
The BNetzA did not comply with the Commission's comments in its final decision and consequently applied an instrument intended for symmetrical regulation to asymmetrical regulation in violation of EU law, thereby maintaining tariffs that are significantly - up to 510% - higher than the cost-oriented values in favor of the incumbent operator due to the AGP surcharge, see Opinion of the Commission of 15.7.2024, C(2024)5144.
5.4: GIA sees symmetric guidelines in providing access to ducts. However, there is a strong disbalance in market power. Therefore, it is important to regulate the SMP operator and to avoid a symmetric approach, which may include a deregulation of the incumbent. In the proceedings for access to construction facilities, alternative competitors and access seekers have insisted on access to information in accordance with the principle of EoI (equivalence of input). This would have meant that the BNetzA would have ordered Telekom to allow alternative competitors and access seekers to work with the same information for PIA access as the market-dominant Telekom itself. Accordingly, access to Telekom's planning tool, Megaplan, was requested. The ruling chamber also initially tended to agree to a corresponding order for such information access, but then clearly deviated from this in the final decision. The regulatory order then only provided for access to information in accordance with the EoO principle (equivalence of output). According to this, the information available and retrievable in the infrastructure atlas via the Single Information Point (SIP) should be sufficient for access seekers. However, this is not the case for the following reasons:
- Telekom's Megaplan planning tool and the SIP's infrastructure atlas are different databases; this naturally leads to inaccuracies, a lack of congruence, errors and delays in updates and upgrades.
- Access to the infrastructure atlas is also restricted for users, as it not only requires registration but also an individual application and subsequent approval. And it is also only possible for specific projects and areas, i.

e. restricted to a specific area.
- Further restrictions result from the fact that, although those requesting access can view the data, there is no interface with which it can be used in their own planning tools. It is therefore only possible to work with the information from the infrastructure atlas by “manually” comparing it with their own planning.
- In addition, access is only possible on a case-, project- and area-specific basis for a limited period and is subject to the obligation that the data obtained will be deleted once the deadline has expired.
It follows from all of this that the information obligations imposed on the market-dominant Telekom in Germany in no way support and enable PIA access to the extent required.

Please indicate comments on the **Chapter6 "Regulatory measures relating to physical infrastructure access for incentivizing VHCNs rollout"**:

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As outlined above, it has not even been possible to complete the standard offer procedure for access to physical infrastructure in Germany. Accordingly, we can only agree with the conclusions in the draft report that there is currently insufficient information available on the effects of the remedial measures.

Please indicate comments on the **Chapter7 "Expectations for the future"**:

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The symmetrical regulations introduced by the BCRD, which were adopted by the EECC and will apply equally throughout Europe via the GIA in the future for shared use, co-location and in-house infrastructure, among other things, are not sufficient on their own to achieve the expansion and connectivity targets - as symmetrical regulations that apply to all providers in the same way. As useful as these regulations may be for reducing costs and increasing the efficiency of network expansion, they are not suitable for eliminating the imbalances and restrictions on competition that are still based on significant market power. To this end, asymmetric regulatory requirements are still required and, due to the hesitant interventions in recent years, are increasingly needed again, in particular to counter the risk of a transfer of market power and re-monopolization.

Please indicate comments on the **Chapter8 "Conclusions"**:

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The draft report rightly concludes that recourse to symmetrical regulation is not sufficient. Even if there is currently a political trend towards “regulation light”, the efforts of the NRAs in the member states under review show that asymmetric regulation is by no means obsolete. Differences in the application of the various regulatory instruments show that a “one-size-fits-all” approach is not possible. Asymmetric regulation is of the utmost importance in Germany due to the continued dominant market power of Telekom in the copper network and the risk that this market power will also be transferred to the newly emerging fibre optic market; re-monopolization tendencies make it clear that asymmetric regulation must not be dismantled, but rather applied emphatically.
A game changer for less competitive markets such as Germany is the strict demand for access to fibre optics. This is the best way to ensure competition by utilising networks that cannot be duplicated. BEREC should strongly emphasise this view.

Please upload your file(s), if any:

* Please specify which part of your contribution should be treated as confidential, if any.

None

Thank you for your participation in this public consultation!

Contact

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