



Memorandum

Date: **19/02/2025**

Subject: **Public consultation on the Draft BEREC Report on the regulation of physical infrastructure access**

Company: **Deutsche Glasfaser Wholesale GmbH**

To: **BEREC**

First, we would like to thank you for the open consultation regarding the report on the regulation of physical infrastructure access.

As a fiber network operator in Germany, we would like to give our views and insights to this topic. Before we are going into detail, we want to emphasize the necessity to be more differentiated by regarding physical infrastructure access in the Member States. From a German point of view, the fiber rollout is in a developing status with less than 50 % HP coverage, and we are currently in rollout competition. It is of utmost importance to keep investment incentives high so that further financial resources will be available to achieve a full fiber supply of Germany. As buried construction is requested in Germany, fiber deployment is very costly and must be compensated by sufficient returns. Otherwise, further deployments, especially by alternative operators, will be slowed down, and fiber rollout speed will decline substantially.

In this regard, the discussion of providing physical infrastructure access is very important. As the incumbent in Germany has SMP not only on the copper, but also on the fiber market, we urgently recommend maintaining SMP regulation and avoiding any kind of symmetrical treatment. If physical access would be regulated symmetrically, especially alternative fiber operators would be punished. These operators are majorly responsible for deploying fiber in Germany and connect customers while the incumbent focuses on building homes passed. The competitors of Deutsche Telekom invest a huge number of financial resources and therefore need a reliable regulatory and legal framework. Alternative fiber network operators, as first movers, bear the deployment costs and the whole investment risk, whereas any access seeker gets access without having the costs regarding the construction works or the risk of utilization. In this regard, access seekers avoid the high costs and get all kinds of options for providing internet services for end users. This is even worse, in case the incumbent with its SMP uses it. In that case, the incumbent can provide all the services to the end users and can migrate its customer base and therefore its market power from copper to fiber networks by avoiding high deployment costs and investment risks. Contrary, the alternative operator does not achieve the end users, since they are further on the lines rented by the incumbent. The alternative operator has the costs, but no customers, whereas the incumbent has closely all customers without high construction costs. For the incumbent, this is the best strategy to keep all the customers and wholesale customers on a network he can at least control. This would not only lead to a lasting SMP but would also cannibalize the business cases of the alternative operators.

A fair treatment which also considers the deploying operators and enhances investment incentives, is not given. For this reason, we recommend BEREC to be more flexible in the market consideration. It is of high importance that BEREC analyzes the markets individually. Furthermore, BEREC should consider the remedies more flexibly so that especially

in countries, where a lot of construction works are still necessary, for companies without SMP virtual remedies are also considered and applied.

As a note, it is necessary to determine that we have the position physical infrastructure access only includes duct access. This means that any guidelines regarding dark fiber should not be considered. Besides these determinations, we request BEREC to analyze how deployments of VHCN and especially fiber networks are done in the Member States (regarding underground or aerial construction), since this has a massive impact on the determination of fees and simplicity of providing access to physical infrastructure and therefore should not be lumped together.

Transparency of Statistics

The BEREC report gives an overview of the answers from national regulatory authorities (NRA) to questions regarding physical infrastructure access. In general, it can be concluded that there is no unified view how physical infrastructure access is and should be regulated. BEREC tries to give a differentiated view about single answers of the NRAs; however, it lacks on transparency.

What does that mean?

BEREC recognizes that NRAs do not fully support or answer each question. This public recognition itself is positive. However, in the following passage BEREC considers the responses and tries to classify them. Here we have two lacks. On the one hand, BEREC sometimes considers only specific cases of the responses and does not reflect all answers. On the other hand, BEREC misses a right categorization regarding their outcomes e.g., that half of the national regulatory authorities did not answer the question. Therefore, some characteristics which may be fulfilled by a part of the NRAs cannot be used in general, because half of the NRAs did not answer these questions. Regarding this situation, we recommend a more careful analysis, especially regarding the number of the answers given. If the worst comes to the worst, the sustainable data base of BEREC only includes two responses, which cannot be representative for all Member States.

From our point of view, a misinterpretation lies in the interplay between the number of alternative operators, investments in VHCNs and demand for the SMP operator's PIA. BEREC argues with this statistic that PIA regulation may be one of the opportunities for boosting VHCNs rollout. Despite the fact that the usage of the ducts of the SMP operator could have a positive effect by avoiding construction costs for deploying fiber, Figure 3 does not say something about that. Figure 3 includes an interplay between the number of alternative operators, the number of national regulatory authorities and a differentiation of VHCN rollout. From 27 Member States, Figure 3 only includes several Member States, definitely not the majority. Furthermore, the number of alternative operators could be a sign of competition. However, it would be even more useful to consider, how many lines the operators deployed to support the stipulated link.

Physical Infrastructure

In the beginning of the report, BEREC considers physical infrastructure access mainly delivered by telecommunication infrastructures and with a lesser importance by non-telecommunication infrastructures. Regarding non-telecommunication infrastructure BEREC mainly sees access to electricity and transportation infrastructure. For practical relevance, we recommend expanding the outlook also towards gas and wastewater infrastructure, since new (esp. Backbone) fiber lines are often deployed in parallel.

Scope of Regulation

Commentating the scope of regulation, we would like to raise two concerns, which in our opinion are not sufficiently considered in the report. Firstly, in the overview BEREC misses to include the market situation of the distribution of infrastructure shares. It needs to be mentioned that in Germany the incumbent an infrastructure share close to 70%, which is different from other Member States. However, by considering any kind of market intervention, the analysis of significant market power needs to be included. Through such an unbalance in the German telecommunications market,

it is completely misguided to foster symmetric treatments and physical access regulation, whereas the incumbent overwhelms the market. Compared to other Member States, the German incumbent has considerable SMP. Therefore, it must be ensured that the incumbent does not migrate the market power from copper to fiber infrastructure by using the support of the already locked (contracted) wholesale access seekers. In this case, the incumbent uses passive access by avoiding construction costs and investment risks while keeping all the customers on its own ducts. The deploying fiber operator has no chance to achieve additional customers since the incumbent already committed all nationwide access seekers through rebated (commitment) contracts. The wholesale access seekers need to fulfill their commitments (number of customers). Because of the very high degree of capacity utilization, they have only very few incentives of negotiating wholesale access with alternative operators. They come on a piggyback from the incumbent. The incumbent receives the highest returns and has the customers on its own fiber lines, whereas the deploying fiber operator only receives a monthly return for providing ducts, which is no fair competition.

Secondly, BEREC does not see the different fiber rollout situation in the Member States. It must be clear that in countries which already achieve a high degree of fiber penetration (and where the rollout is nearly finished) any discussions about physical infrastructure access could be treated differently in comparison to countries which are in the construction situation.

Regarding Germany, we are in a developing status of rolling out fiber lines and depend on private investments. In this regard, any perspective of treating alternative private financed infrastructure with a symmetrical regulation would negatively affect any further engagement and investment. Therefore, we urge BEREC to avoid any behavior which would negatively affect private investments as well as fiber rollout. Otherwise, the fiber rollout in Germany would be further delayed and the incumbent could benefit from its market power on its copper network even more and leverage it to the fiber market.

Coming from this situation, in Germany we still need a strong and effective regulation of the SMP operator. Furthermore, any symmetrical treatment should be reduced to the utmost minimum. We support here that BEREC is in the opinion that it is too early to clearly determine an effect of symmetric regulation solving possible competition problems. As mentioned above, it is necessary to consider the market circumstances, where competition problems originate. From our perspective, we doubt that alternative operators are responsible regarding competition problems, as they are responsible for pushing forward fiber deployment and they have not a locked wholesale customer base as the incumbent, but profit from a non-discriminatory open access. Therefore, we urge BEREC not to punish these operators, which are not responsible for market failures. At last, from a German perspective, we also need to determine that the regulated access cannot be analyzed and estimated sufficiently neither since the regulated standard offer is now in the first phase. Any useful access possibility could, just in case, start after the standard offer process is finished.

Additionally, we do not favor a regulation of the entire physical network (e.g. including the backbone segment) within the scope of the ex-ante regulation neither as we do not want additional regulation beyond empty duct access in this context. More specifically, we do not want regulation for the provision of fiber deployment (dark fiber) for mobile stations.

Conclusively, we would like to remind BEREC on the findings within the GIA discussion. Although the importance of access to physical infrastructure is raised, it is also mentioned that virtual active wholesale products could be an alternative too; especially in providing access in case provided passive access would devalue taken investments. Any discussion to bring back symmetrical remedies regarding physical infrastructure access would jeopardize even these investments.

In this regard, the report figures out a variability in how PIA obligations are imposed, the manner of imposition, and the types of obligations applied to different entities. This variability highlights the complexities and challenges in establishing a uniform regulatory framework across different jurisdictions and raises the question of whether a "one size fits all" approach does justice to the diversity of the European telecommunications landscape. As summary, BEREC should consider the remedies more flexibly in order to not destroy competition, investment and the chance of a full fiber coverage. The result should be that virtual remedies should be considered as an alternative to physical remedies.

Prices for Ducts

We are thankful for the overview of the regulated fees for duct access. In this overview, we can determine that the regulated fees for Germany are comparatively cheap. Although we would like to highlight that the incumbent should not benefit from already depreciated infrastructure which originates from the monopolistic times before liberalization. Nonetheless, we figured out in the national consultations that these prices are too low regarding duct access. The overview presents a good comparison that a lot of other countries have valued duct prices with even higher fees, which is in line with our arguments.

Regarding the heterogeneity of prices and pricing practices as regards PIA, BEREC considers this as a topic where further harmonization can be envisaged. We would like to point out that further price harmonization will be very difficult and should be avoided. As in some countries, especially in Germany, deployment costs are high, and if average costs for harmonization will be taken into consideration, infrastructure investments in Germany could seriously suffer. Here, the probability is high that the payments would not cover the taken costs, which we have to avoid by all means.

Nonetheless, we support adapting fees by calculating specific WACC for physical infrastructure access. We requested Bundesnetzagentur to apply higher WACC for currently deployed ducts and similar infrastructure.

Data Provision

BEREC supports the arguments of NRAs that any lifting of regulation would lead to lesser transparency, especially data provisions from the incumbent. In Germany, we currently experience that the incumbent does not correctly deliver infrastructure data to the single information point at Bundesnetzagentur, also in cases where the incumbent received public funding. Here, the incumbent broke obligations and does not receive a punishment from our view. From that point, we request a greater engagement by Bundesnetzagentur to avoid any resulting misconduct.

Conclusion

We would like to support the findings of ANACOM that GIA is expected not to be sufficient to address the business protection of the alternative VHCN operators that need to have access to SMP PI to host their networks, especially if BEREC thinks about applying symmetrical treatments.