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## Draft BEREC Report on the regulation of physical infrastructure access BoR (24) 178

As follows: **Position Paper** of the Verband der Anbieter von Telekommunikations- und Mehrwertdiensten e.V. (VATM e.V) (Association of the German Alternative Providers of Telecommunications and Value-added Services)).

VATM welcomes the opportunity to comment on the draft *BEREC Report on Access to physical infrastructure in the context of market analyses (BOR (19) 94)* (in the following, “draft BEREC Report”). We thank BEREC and its members for their effort preparing this draft BEREC Report. VATM acknowledges that BEREC aims to present a detailed picture of ex-ante passive infrastructure access regulation based on significant market power (in the following SMP) and symmetric regulation based on the European Electronic Communications Code (in the following EECC) or the Broadband Cost Reduction Directive / Gigabit Infrastructure Act (in the following BCRD/GIA) amongst the different BEREC-members.

However, we regret to establish that the draft BEREC Report lacks a clear differentiation between the EU Member States and the rest of the BEREC-members. Clearly dividing the scope of the Report between EU and non-EU countries would bring a much-needed systematic overview of the situation and inform the decision-making process of the different institutions engaged in the process.

Furthermore, for systematic clarity VATM asks BEREC to optimise its presentation of the different regulatory regimes. Although Table All.44 provides an overview of the currently applied symmetric measures (based on Art.61 EECC or on BCRD/GIA) and Table All.39 addresses the applicability of the SMP regime for PIA (both in Annex II of the draft Report), their contents are not systematically presented in the text of the report. Therefore, we would like that BEREC includes an additional section, similar to Section 3 of the *BEREC Report on Access to physical infrastructure in the context of market analyses (BOR (19) 94)*, that provides a bird-eye overview of the currently applicable regulatory framework. In it, we wish to see a clear reference to its practical

implementation in the different Member States with a concrete mention of the NRAs, which have introduced PIA remedies based on the asymmetric SMP regime in the EECC, the symmetric SMP regime in the EECC, the symmetric regime of the BCRD/GIA, or have deregulated altogether (as according to Table AII.44. two countries have not imposed any regulatory measures). We would highly appreciate BEREC also including a comparative overview of the developments between the last report from 2019 and the current situation in this section.

With regard to the content and the material evidence presented in the draft BEREC Report, we acknowledge the great detail of information regarding the regulatory landscape of physical infrastructure access (in the following PIA). However, we would like to emphasize that some key findings highlighted in the different sections have been left unaddressed in the Executive Summary of the draft Report. In the following VATM would like to highlight some essential considerations which need a further emphasis.

VATM underlines the position expressed in Section 2 of the previous *BEREC Report on Access to physical infrastructure in the context of market analyses* published in 2019, which emphasizes the importance of asymmetric regulation referring to PIA and the positive impact this might have on network deployment and the overall connectivity:

*Facilitating greater use of existing physical infrastructure also has the benefit of promoting competition, as incumbent operators usually own a large proportion of the physical infrastructure already in place to deploy networks; therefore, having to replicate such physical infrastructure would create an important barrier to entry to ECS markets. As such, **effective access to the incumbent operator's physical infrastructure is crucial to promote the deployment of high capacity (fixed and mobile) networks, and, ultimately, connectivity.***<sup>1</sup>

The current draft BEREC Report highlights that this remains highly relevant as it reports in its findings that *“the rollout of own PI and, to a lesser extent, the access to telco's physical networks were the most important alternatives for the purpose of deploying a VHCN (...) The NRAs that considered access to telco's PI relevant further specified that such an **access pertained predominantly to the incumbent operator's infrastructure**”.*<sup>2</sup>

However, the draft BEREC Report leaves this aspect completely uncovered in the executive summary and, in this way, neglects the practical implementation experiences and key take-aways, which bring the actual value of the reporting exercise. Whereas there is a clear red line throughout the whole draft BEREC Report based on the testimonies of the NRAs pointing out to the

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<sup>1</sup> BEREC (2019): *BEREC Report on Access to physical infrastructure in the context of market analyses*, P. 3. ((BOR (19) 94): [\\*BEREC Report on Access to physical infrastructure in the context of market analyses](#), last accessed 17.02.2025).

<sup>2</sup> BEREC (2024): Draft BEREC Report on the regulation of physical infrastructure access, P. 4. (BoR (24) 178: [\\*BEREC style guide](#), last accessed 17.02.2025).

overwhelming evidence that the SMP based regulation for PIA remains the main and most flexible tool in the regulatory toolbox of the regulator, it is a point which has not been properly addressed and emphasized in the executive summary.

In this regard, VATM would like also to highlight the importance of the findings in Sections 6.2 and 6.3 dedicated to the interplay between symmetric and asymmetric regulation. It is clearly stated that due to the limited application of symmetric regulation as a regulatory tool it is difficult to assess the merits of such measures aiming to resolve identified competition problems on a widespread basis. A particular emphasis is put on the assessment of market failure, price conditions and access remedies.<sup>3</sup> Furthermore, the draft Report states that, at present, it is not possible to “*argue that the need for asymmetric obligations on PI has been made redundant*”<sup>4</sup> as:

***“A significant number of NRAs that responded to this part of the questionnaire (9 NRAs out of 11 in total) highlighted the importance of access to passive SMP infrastructure for the promotion of high-speed network deployments in their countries”.***<sup>5</sup>

The responses of the NRAs depicted in this section clearly and unequivocally point out that for the time being BCRD/GIA would remain “**a complementary or subsidiary instrument to SMP regulation**”<sup>6</sup> (see tables All.45 and All.46)

Therefore, VATM notes that, while there is clear evidence in Section 6 pointing to the significance of SMP regulation, shared by the majority of the NRAs, and the particular lack of applicability of BCRD/GIA, when it comes to solving competitive problems, in the conclusion at the end of the Section BEREC undermines it by taking the view that:

*“both symmetric and asymmetric regimes need to go hand-in-hand as regulatory tools for NRAs to resolve the competitive problems identified in their national markets.”*<sup>7</sup>

**VATM demands a correction which reflects on the actual content of Section 6 and clear differentiation.** We acknowledge that there is evidence for the use of both tools, however, based on the quantitative metrics, the most NRAs that provided feedback highlight the importance of the

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<sup>3</sup> BEREC (2024): Draft BEREC Report on the regulation of physical infrastructure access, P. 26, 28. (BoR (24) 178: [\\*BEREC style guide](#), last accessed 17.02.2025).

<sup>4</sup> BEREC (2024): Draft BEREC Report on the regulation of physical infrastructure access, P. 25. (BoR (24) 178: [\\*BEREC style guide](#), last accessed 17.02.2025).

<sup>5</sup> BEREC (2024): Draft BEREC Report on the regulation of physical infrastructure access, P. 25. (BoR (24) 178: [\\*BEREC style guide](#), last accessed 17.02.2025).

<sup>6</sup> BEREC (2024): Draft BEREC Report on the regulation of physical infrastructure access, P. 25. (BoR (24) 178: [\\*BEREC style guide](#), last accessed 17.02.2025).

<sup>7</sup> BEREC (2024): Draft BEREC Report on the regulation of physical infrastructure access, P. 26. (BoR (24) 178: [\\*BEREC style guide](#), last accessed 17.02.2025).

SMP regime at the present time.<sup>8</sup> In the same manner, the majority of NRAs state that the SMP regime is going to continue to be the necessary measure for PIA related measures in the future.<sup>9</sup> Therefore, **VATM emphasizes the need of change in the conclusion underpinning the weight the SMP regime has for the regulatory practices throughout the EU.** In addition, we would like to see these findings highlighted in the executive summary.

Finally, we would like to conclude with a clear reference to Germany – VATM's home market. We share the view expressed by the BNetzA in the draft BEREC Report that the asymmetric SMP regime provides far better safeguards for competition than the symmetric regime.<sup>10</sup> However, VATM underlines that Germany is probably the only state in Europe that is preventing the practical use of asymmetric PIA by continuously delaying its implementation until today. The continuous lack of PIA has led to a situation defined by disproportionately high added value for the incumbent in comparison to the competitors in the market, which distorts competition in Germany and Europe.

VATM underlines that the German market has not reached maturity yet and we are still at a very early stage of infrastructure deployment to share the considerations of the French regulator AR-CEP already looking at remedies concentrating on the long-term maintenance of the networks rather than on the infrastructure deployment. From the perspective of our home market in a deployment intensive stage, the asymmetric SMP regime for PIA is of paramount importance and must be implemented rigorously as soon as possible and without restrictions that factually restrict and hinder deployment as network planning and deployment does not differentiate between the different 'types of traffic' but considers an integrated approach. We believe this to be an important aspect also for other Member States, but it materializes especially in countries where the market review for Markets 1/2020 and 2/2020 are not synchronized, and NRAs simultaneously decide to not define a separate PIA market - both is true for our home market Germany.

Dem VATM gehören die größten deutschen Telekommunikationsunternehmen an, insgesamt rund 180 auch regional anbietende Netzbetreiber, Diensteanbieter aber auch Zulieferunternehmen. Zudem steht der Verband für wichtige Investoren, die den Glasfaserausbau in Deutschland deutlich voranbringen werden. Die VATM-Mitgliedsunternehmen versorgen 80 Prozent aller Festnetzkunden und nahezu alle Mobilfunkkunden außerhalb der Telekom. Seit der Marktöffnung im Jahr 1998 haben die Wettbewerber im Festnetz- und Mobilfunkbereich Investitionen in Höhe von rund 100 Milliarden Euro vorgenommen. Sie investieren auch am stärksten in den zukunftssicheren Glasfaserausbau direkt bis in die Häuser. 90 Prozent der angeschlossenen Kunden nutzen die gigabitfähigen Netze der Wettbewerber.