Together we can

Vodafone response on the draft BEREC draft report on the regulation of physical infrastructure access (BoR (24) 178)

19 February 2025

We appreciate the opportunity to comment on this consultation and trust that our comments are helpful to BEREC and National Regulatory Authorities (NRAs) as well as to other stakeholders. We remain at your disposal to discuss our submission to the consultation, or any other aspect relevant in the context of the latter. To inquire about our response please contact:

[redacted]

Vodafone is supportive of BEREC's work to collect data on PIA through this report, but we would support further guidance to NRAs that could be in the form of common approaches/positions. We highly appreciate the efforts undertaken to investigate on the implementation of physical infrastructure access (PIA) in Europe because this rather low-tech access product is important for operators (by reducing deployment costs, ensuring faster deployment, etc.) and for the general public (less disturbance through civil works, faster network upgrades, etc.) alike. Additionally, PIA is prone to be further harmonized with regard to technical specificities of the product.

Below, we provide responses to the aspects of the report we deem more important. BEREC seems to be already aware of the issues that exist in some Member States regarding the implementation of PIA, and we trust that these are tackled in the future to create more harmonisation across Europe.
In Detail:

PIA under ex-ante market assessments (esp. c.f. Sections 3 and 5.1)

We believe that **access to PIA is essential to speed up and incentivise fibre deployment.** Therefore, it is of utmost importance that access seekers can benefit from predictable and efficient rules that are consistently implemented by the regulators. Like BEREC, we acknowledge the growing importance of defining a PIA standalone market (p.30) but would caution against a one-size fits all approach.

We have observed problems in countries, such as Germany, where PIA is included in M1/2020 (only) and thus, ducts cannot be used for M2/2020 purposes or mobile backhaul (c.f. p. 10 of

the draft report). As a result, having PIA only implemented as a remedy in M1/2020 results in the necessity to distinguish and separate the different 'types of traffic' (i.e. traffic originating from retail or enterprise customers or from the mobile backhaul) at the backbone level. This approach is not reasonable (technically as well as economically) and contradicts how modern networks are built. Thus, having PIA as a remedy for M1/2020 *only,* leads to questions such as (i) how can the network be improved using regulated PIA at all and (ii) how can the fibre rollout be efficiently planed if crucial use cases (e.g., connect a mobile site on the rooftop of a multi-dwelling building) and planning certainty are ruled out by design? This is even more important as integrated incumbent's benefit from a competitive edge in mobile as well.

We do acknowledge that the existence of these issues may depend on the special features of the national network architecture and "*to the way in which the markets have been defined*" (p. 9). However, the report lacks an explicit call to action to at least reduce these situations; although this would be necessary given the severe impact this decision has on access seekers.

Against this background NRAs should be committed to thoughtfully decide whether PIA should be regarded as a standalone market according to the characteristics of the market or whether it is sufficient to include PIA as remedy to M1/2020 and M2/2020. For Vodafone, what is key is that PIA is applied by regulators to allow use for mass and enterprise markets. Only predictable rules can lead to the roll-out of own infrastructure by challengers.

The relevance of considering wholesale-only operators (esp. Section 5.1)

It is of paramount importance to ensure that operators / joint ventures co-controlled by an incumbent do not become a vehicle to circumvent regulation. Therefore, as soon as an incumbent/ SMP establishes a wholesale-only division, or is part of a JV, **the incumbent's SMP designation should in principle spillover to the newly formed wholesale-only operator** (and PIA must thus be offered if it has been a remedy on the incumbent). This is pivotal to not jeopardise regulatory goals and should therefore be acknowledged by NRAs.

Conversely, if the incumbent is not part of the wholesale-only operator, regulation may not be necessary / needed as the operator has an inherent incentive to open the network via open access as part of the business case. This is even more true in areas where the network is deployed relying on state aid because open access obligations exist in these areas anyhow.

Dark Fibre as a remedy (esp. Section 5.1)

We strongly agree with the view of the majority of NRAs that access to dark fibre is a relevant and reasonable auxiliary wholesale product. **We strongly believe dark fibre should be**

considered in the scope for PIA at least as a subsidiary SMP remedy, but ideally as a stand-alone SMP regulated product. Having access to dark fibre is in line with the goal to build VHCNs fast and minimal invasively and leads to the establishment of a level playing field – also as a measure to not allow incumbents for regulatory gaming in defining areas where physical infrastructure is reserved for own (announced but not yet started) deployment. The essence of PIA is to lift the benefits of reducing the burdensome, invasive and costly civil works. Although not always feasible for the deployment use case, this is in general well achieved by access to dark fibre. Therefore, NRAs should be aware of this aspect and include it into their decision-making practice.

Pricing wholesale access to physical infrastructure (esp. Section 5.3)

We highly appreciate BEREC's efforts to providing an overview of one-off and recurring fees to accessing physical infrastructure. While it is certainly true that different Member States have national specificities, **we see it as paramount to strive for harmonization by defining a common ruleset that is applied nationally to reach harmonization on prices**.

By considering the information retrieved, on the positive side, the vast majority of European NRAs applies cost orientation as a basis to calculate wholesale duct prices (c.f. p. 13 and Tables AII.19 and AII.34). However, by considering Table 4, it would be interesting to understand why NRAs accept such a set of different one-off fees; especially as PIA is a relatively low-tech wholesale product that seems to be prone to further harmonization. There is thus indeed room for improvement, and we are confident that this is tackled jointly by European regulators as this has already been highlighted by BEREC (c.f. p. 31).

In this vein, we'd like to explicitly highlight the **importance to also consider the PIA wholesale price level across the Union**: although the different market conditions must be considered in the context of a benchmark, a significant higher price applied by incumbents must be an indication for excessive pricing. We see BEREC's effort to list all prices – especially recurring fees – as a right step for further harmonization and to limit the currently existing divergence. This is also important as the harmonisation of markets and competitive conditions – sought by the EU Commission – could otherwise not be guaranteed.

To achieve this harmonisation, it is pivotal to stick to the existing, well-known and established tools and to not define ever new aspects or price components due to assumed national peculiarities (e.g. impact on business case). As outlined above, physical infrastructure is a relatively simple product that has limited national peculiarities. Therefore, **all NRAs should stick to strict cost orientation regarding price control of regulated PIA**. This is also true for newly build physical infrastructure. It is promising that most NRAs seem to already share this view; but it is difficult to follow why e.g. the German and Belgian NRA seem to deviate from this path by considering the effects on the SMP operator's business case and

reasonable margins, respectively. We believe that the German implementation is not in line with European law; this already indicates that (e.g.) best practices would add value.

Asymmetric and symmetric access regime (esp. Section 6)

We appreciate BEREC's efforts to further investigate the relationship between asymmetric and symmetric regimes for accessing physical infrastructure. From our point of view, the NRA's responses are fully in line with our view **that is too early to only consider a symmetric regime**. Although incumbents are currently claiming for the abolition of the SMP-regime and that in the future it will be enough to rely on *ex post* competition enforcement, or symmetric regulation, to address dominance, this is currently clearly not the case.

Reliance on horizontal regulations only makes sense in markets where the players have similar market and bargaining power, which is not the case regarding physical infrastructure – also if non-telco infrastructure is taken into consideration as e.g. exemplified by Table AII.39 and Section 2. **Asymmetric regulation is aimed at tackling market power (symmetric regulation not) which makes the preferable tool to ensure PIA.**

In essence, GIA and BCRD are both examples of symmetric regulatory regimes, which do not go far enough in imposing obligations on the incumbent, particularly in markets still heavily dominated by an SMP operator. For example, the BCRD and the GIA do not foresee the possibility to impose cost-oriented prices for access to physical infrastructure, there is no need to have a reference offer in place and the need to resort to dispute resolution instead of being able to rely on clearcut obligations is less efficient for access seekers.

We agree with the view of most NRAs and BEREC that a symmetric regime is only complementary to SMP obligations. **SMP asymmetric obligations shall have precedence over symmetric rules. We understand that the majority of NRAs across the Union share this view, so it is paramount that BEREC continues supporting this point of view with policy makers.**

Dispute resolution (esp. Section 7.2)

We agree with some NRAs' views that dispute resolution mechanism may get increasingly complex (c.f. p. 29). We therefore **call for the recognition that dispute resolution mechanism should not be seen as a substitute for ex-ante regulation**: arguing that the existence of a dispute resolution mechanism justifies deregulation reverses the burden of proof, frustrates competitors, stifles competitive dynamics and unilaterally weakens alternative operators vis-à-vis incumbents. Therefore, we would appreciate if BEREC could further investigate this topic and find measures to circumvent the risk of implementing dispute resolution mechanisms as vehicle to deregulate markets.