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Position Paper

Key recommendations for the triilogue negotiations on the Gigabit Infrastructure Act

Position Paper of the German Energy and Water Industries and the German Broadband Association

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BDEW Bundesverband
der Energie- und
Wasserwirtschaft e.V.
(German Association of Energy and
Water Industries)
BDEW Representation at the EU

Avenue de Cortenbergh 52
1000 Brussels
Belgium

www.bdeu.de

BREKO Bundesverband
Breitbandkommunikation e.V.
(German Broadband Association)

Avenue de Cortenbergh 172
1000 Brüssel, Belgien
Tel. +32 472 53 14 19

www.brekoverband.de

Introductory Remarks

The European Commission presented a legislative proposal on February 23rd, 2023, to replace the Broadband Cost Reduction Directive (2014/61/EU). As business associations, BDEW and BREKO represent over 2000 members who provide the basic infrastructure for citizens and, particularly, fast internet access through fibre networks. Currently, around two-thirds of all new fibre networks and two-thirds of all investment in VHC network infrastructure in Germany¹ is realised by alternative network operators, a large part of whom we represent.

We highly appreciate the explicit exception of drinking water infrastructure from the definition of 'physical infrastructure' in Art. 2 of the proposed Gigabit Infrastructure Act (GIA). It aligns with the requirements for drinking water set out in the respective legislative frameworks. Furthermore, BDEW and BREKO support the explicit exception of critical infrastructure in Art. 4, 5, and 6 in the final text versions of both Parliament and Council. We also support the intention to establish fully digitalised single information points (Art. 10), as long as such obligations align with the need to protect critical infrastructure.

As the GIA tries to aim towards a one-size-fits-all approach it fails to take national differences into account. We have already pointed out before that obliged sharing of physical infrastructure, as provided for in Art. 3.3 GIA, poses a significant risk for fibre deployment in Germany. We therefore strongly support the changes proposed by the Council that would allow network operators to refuse access to physical network elements if they offer viable alternative forms of wholesale network access.

In anticipation of the Triologue negotiations, BDEW and BREKO have drafted recommendations to emphasise the central demands of the GIA to ensure an expansion of high-speed networks for electronic communications in all EU countries, including Germany.

BDEW and BREKO recommendations in detail:

1 Right to refuse access to physical infrastructure (Art. 3.3)

Regulation on the access of existing physical infrastructure is a crucial aspect of the GIA. All three institutions aim to accelerate fibre deployment by granting access to existing physical infrastructure. A right to access other network operators' physical infrastructure may speed

¹ Böcker, J. (2023): [BREKO market analysis 2023](#).

up deployment of VHC networks in some Member States where legacy passive network elements are widely available. However, this is not true in markets where the physical infrastructure for fibre optic networks is still being developed, and considerable investments still need to be made. Extensive and costly civil works are required to build a physical infrastructure capable of hosting a fibre network. Moreover, the rules regulating access to physical infrastructure disproportionately affect small and alternative operators, creating a risk of severely damaging their sustainable business case.

The practice of overbuilding, or even the mere announcement of it, has the potential to adversely affect the profitability of business cases for significant investments, thereby reducing the possibilities for future investments². As WIK-Consult recently found out in a study conducted on the economic effects of overbuilding of fibre networks, this is not only the case in rural areas but also in urban areas, if the second undertaking to announce a VHC network rollout has a significantly greater market power than the first.³ Instead of advancing the availability of gigabit infrastructure in areas where it still needs to be developed, such practices could impede the achievement of connectivity goals and slow down fibre deployment. An obligation to provide access to physical infrastructure requires first movers to assist in having their own network overbuilt.

Parliament has introduced some exceptions for infrastructure in rural areas, operated on a wholesale basis, owned or controlled by public sector bodies. The text of the EP's triologue mandate is a positive step towards addressing the issue of gigabit deployment in the countryside and white spots. However, while exceptions have been made, it is important to broaden the conditions for denying access to specific physical infrastructure. Where fair and appropriate alternative means of wholesale network access are on offer, there is no need to facilitate overbuilding.

² It is worth noting that our concerns regarding the potential effects of this regulation have already been raised in the [BDEW position paper](#) and [BREKO's letter to the Commission](#).

³ Schwarz-Schilling, C. et al. (2023): [Doppelausbau von Glasfasernetzen – Ökonomische Analyse und rechtliche Einordnung](#).

BDEW and BREKO support the proposed changes by the Council allowing member states to determine that virtual network access can be a viable alternative to physical network access. This proposal in the Council’s trialogue mandate would allow Germany to react to the current state of FTTH rollout and the special structure of the German FTTH market, which is characterised by a large number of players who have invested heavily into FTTH networks and cannot afford to see this investment undermined. As a result, Germany relies heavily on the changes proposed by the Council, which at the same time do not affect other markets where there is no significant need to protect alternative investment into capital-intensive FTTH rollout by alternative players.

However, we see multiple aspects for improvement: For a network operator to be able to refuse physical network access, the Council’s text requires the viable alternative to be offered by the “same operator.” However, it is not correct to tie the right of refusal to this condition. The case of a utility which has their various networks organized in different subsidiary companies may illustrate the point. The current Council position would require any network operator, e.g. of an electricity network, to grant access to physical network elements such as empty ducts when approached by an access seeker. In this manner, they would be required to undermine the business case of an affiliate telecommunications network operator even though that company has a viable alternative on offer. This would amount to devaluating the first mover’s investment by granting an unjustified benefit to the second mover. Furthermore, the ducts of a second unrelated company could be used for overbuilding an existing FTTH network. Based on these reasons, we call for **the condition of “same operator” to be removed.**

The second condition in Art. 3 para. 3 (g) ii. requiring that there may not be a second FTTH network. This is based on the assumption that an overbuilt would be harmless if there are already two networks. However, the third network could further impair economic efficiency. In addition, **gigabit infrastructure currently under construction** would not be protected, jeopardising the expansion targets for 2030.

BDEW & BREKO Recommendation for Art. 3 para. 3 (after letter f)

Member States may provide that ~~the~~ network operators and public sector bodies owning or controlling physical infrastructure may refuse access to specific physical infrastructure where ~~the availability of a~~ viable alternative means of non-discriminatory open wholesale access to very high capacity communications networks **is available, provided by the same network operator** provided that:

- i. such alternative means of wholesale access is offered under fair and reasonable terms and conditions; and

ii. the deployment project of the requesting operator addresses the same coverage area as an existing and there is no other fibre network ~~connecting to connect~~ end-user premises (FttP) ~~serving this coverage area,~~ or one that is under construction.

2 Coordination of Civil Works (Art. 5 and Art. 6)

In the original proposal by the European Commission, in Art. 5 (2), network operators planning to deploy VHC networks must meet written requests by other operators for coordination of the respective civil works if the latter are fully or partially funded by public means. However, the current wording is ambiguous as to what that means for private entities that are majority-owned by public entities (e.g. municipalities, districts, etc.). In Germany, this ambiguity has raised fears that this language might indiscriminately subject all utility companies that are majority-owned by public entities to an obligation to coordinate civil works. We therefore welcome the **Council's proposal that Member States should be allowed to specify details, "including cases of partial financing."**

An effective coordination of civil works is necessary to further strengthen the protection of (planned) investments into gigabit infrastructure (Art. 5). Our major concern with the transparency on planned civil works, as stated in Art. 6, is the potential to encourage market players with significant market power to overbuild other planned FTTH networks, which could create an enormous disincentive for widespread deployment of fibre networks in Germany. Incumbent operators could use this information to announce network deployment in specific areas, which could force alternative operators to withdraw because their business models become unsustainable.

3 The importance of tacit approval of permits for a fast gigabit roll-out (Art. 7)

BDEW and BREKO are in favour of the rules on permit-granting procedures that were originally proposed by the Commission and upheld by Parliament. Slow and inconsistent permit granting procedures are among the major bottlenecks for fibre deployment in Germany. The proposed measures, including clear deadlines for the granting of permits, unified procedures, and an obligation to create digitalised single information points, are essential for faster gigabit infrastructure development. This is why we are concerned about the Council's proposal to completely eliminate art. 7 (7), and **we urge the Parliament and the Commission to oppose the Council's removal of tacit approval.**

Contact

BDEW

Richard Kaufmann
Berlin Headquarters
Phone: +49 30 300199-1674
richard.kaufmann@bdew.de

Sandra Struve
BDEW Representation to the EU
Phone: +32 2 774 5110
sandra.struve@bdew.de

BREKO

Daniel Schäfer
European Policy Officer
Phone: +32 472 531419
schaefer@brekoverband.de

Dr Pius Alexander Benczek
Phone: +32 173 2843409
benczek.extern@brekoverband.de