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Initiative on “High-speed broadband in the EU – review of rules” – Proposal of a Regulation of the European Parliament and of the Council “on Measures to Reduce the Cost of Deploying Gigabit Electronic Communications Networks and Repealing Directive 2014/61/EU (Gigabit Infrastructure Act)”

here: Position Paper of VATM e.V. Germany (does not include business and trade secrets)

We hereby submit the views of VATM and our member companies with regard to the review of rules on the high-speed broadband in the EU (Directive 2014/61/EU) and the draft proposal for a Regulation, the Gigabit Infrastructure Act repealing Directive 2014/61/EU.

VATM welcomes the public consultation and understands the undertaken revision as a measure in line with the targets set by the Digital Decade with a time horizon towards 2030 and the evolving connectivity needs of the EU citizens.

VATM takes note that the proposed Regulation addresses the existing discrepancies between the connectivity targets and thereby related thresholds set by the currently applicable Broadband Cost Reduction Directive (in the following, BCRD)¹, the European Electronic Communications Code (in the following,

¹ BCRD (2014): **Art. 1 (1)** “*This Directive aims to facilitate and incentivise the roll-out of high-speed electronic communications networks by promoting the joint use of existing physical infrastructure and by enabling a more efficient deployment of new physical infrastructure so that such networks can be rolled out at lower cost.*” **in conjunction to Art. 2 (3)** “*high-speed electronic communications network’ means an electronic communication network which is capable of delivering broadband access services at speeds of at least 30 Mbps*”. ([EUR-Lex - 32014L0061 - EN - EUR-Lex \(europa.eu\)](#), last accessed 9.05.2023).

EECC)² and the Digital Decade Policy Programme³. In addition, the proposal aims at harmonisation of measures reducing the cost of connectivity deployment on a Union level – issue, which, according to the Evaluation Report,⁴ BCRD was not fit to resolve. The draft Gigabit Infrastructure Act (in the following, GIA) sets the ambition to streamline the civil works related to broadband deployment while tackling inefficient administrative processes with a particular focus on transparency and permit granting procedures. The foreseen instrument to achieve this ambition is a symmetric regulatory framework targeting all players on the telecommunications market left outside the scope of other applicable regulation, with a particular focus on telecommunication infrastructure or any infrastructure suitable for the provision of telecommunication services as well as the owners and providers of such infrastructure. This ultimately puts **all alternative telecommunications providers in the centre of GIA's symmetric regulatory intervention**.

VATM would like to emphasize the paramount importance of giving priority to market driven development on the telecommunications market - focusing on the fibre and 5G network deployment, which are under ongoing expansion - thereby reducing any possible distortion of competition a symmetric regulatory intervention such as GIA might have.

We acknowledge that based on the data gathered by the European Commission (in the following, the Commission), there is a significant gap between the targets set by the Digital Decade and the current state of Gigabit connectivity infrastructure within the EU, as 30% of the EU households are still not covered by a very high capacity network (in the following, VHCN (as defined by Art. 2 EECC, in the

² EECC (2018): **Art. 3 (2) – General objectives**, in relation to the discussions targeting the draft GIA, the emphasis is on the objective set by **Art. 3 (2) (a)**: “Promote connectivity and access to, and take-up of, very high capacity networks, including fixed, mobile and wireless networks, by all citizens and businesses of the Union”. ([Directive \(EU\) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code \(Recast\)Text with EEA relevance. \(europa.eu\)](#), last accessed 9.05.2023).

³ *2030 Policy Programme “Path to the Digital Decade”* (2022): Art. 4 (2) (a) „all European households are covered by a Gigabit network, with all populated areas covered by 5G”. ([EUR-Lex - 52021PC0574 - EN - EUR-Lex \(europa.eu\)](#), last accessed 9.05.2023).

⁴ EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR COMMUNICATIONS NETWORKS, CONTENT AND TECHNOLOGY, GODLOVITCH, I., KROON, P., STRUBE MARTINS, S. (2023): *Support study associated with the review of the Broadband Cost Reduction Directive: Evaluation Report*, P. 155-157 (<https://data.europa.eu/doi/10.2759/560564>, last accessed 9.05.2023).

BEREC Guidelines⁵ and in accordance with the recently updated Broadband Guidelines⁶)).⁷ The Digital Decade Policy Programme sets the goal for this gap to be closed by 2030. Thus, regulatory intervention at the scale proposed in GIA may be considered appropriate only if it fulfils its promise for gigabit access for all households in the European Union. Nonetheless, we point out that thus far not institutional measures driven by political agenda, but the market has played the most crucial role towards broadband deployment. Infrastructure competition has insured innovation and driven private investment in the past. Today, respectively for the past couple of years, we have observed a strong trend towards an investment surge by long-term oriented private capital. In Germany, those private investments put forward by different market players tally up to more than 50 bn Euro. As this trend is still ongoing, VATM would like to note that the German telecommunications market in its infrastructure deployment segments has not reached a stage of maturity yet. This is of particular significance as the draft proposal targets the deployment of gigabit-capable technologies, such as fibre on the fixed telecommunications market and 5G on the mobile. **A symmetric regulatory approach as the one set out in the draft GIA must in any case take into account existing competitive distortions through persistent SMP and provide for functional market conditions and healthy competition dynamics.**

Based on the objectives set by the Commission and the state of play, VATM underlines the potentially strong relevance GIA might have in Germany as well as in other countries in a similar state of gigabit infrastructure deployment. According to the DESI Report 2022, Germany is the second least developed EU member state in terms of fibre deployment. Belgium is the only other country with a poorer deployment rate, both scoring with less than 20% total gigabit coverage.⁸ According to the most recent statistics, in 2021, a total of 197 mil households resided in the EU.⁹ In Germany, there are currently 40.9 mil households,¹⁰ which accounts for roughly a fifth of all EU households. Based on the data in the above-

⁵ BEREC (2020): *BEREC Guidelines on Very High Capacity Networks*, BoR (20) 165, P.8 (https://www.berec.europa.eu/sites/default/files/files/document_register_store/2020/10/BoR_%2820%29_165_BEREC_Guidelines_VHCN.pdf, last accessed 9.05.2023).

⁶ EUROPEAN COMMISSION (2023): Communication from the Commission: Guidelines on State aid for broadband networks (2023/C 36/01), 5.2.2.1. *Existence of market failure as regards fixed access networks*; 5.2.2.2. *Existence of market failure as regards mobile access networks* ([EUR-Lex - 52023XC0131\(01\) - EN - EUR-Lex \(europa.eu\)](https://eur-lex.europa.eu/eur-lex-content/document/?uri=CELEX:52023XC0131(01)-EN), last accessed 9.05.2023).

⁷ EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR COMMUNICATIONS NETWORKS, CONTENT AND TECHNOLOGY (2022): *Digital Economy and Society Index (DESI) 2022: Digital infrastructures*, P. 5, (<https://ec.europa.eu/newsroom/dae/redirection/document/88764>, last accessed 9.05.2023).

⁸ EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR COMMUNICATIONS NETWORKS, CONTENT AND TECHNOLOGY (2022): *Digital Economy and Society Index (DESI) 2022: Digital infrastructures*, P. 11, (<https://ec.europa.eu/newsroom/dae/redirection/document/88764>, last accessed 9.05.2023).

⁹ EUROSTAT (2023): *Household composition statistics* (Data extracted in May 2022) (https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Household_composition_statistics#Increasing_number_of_households_composed_of_adults_living_alone, last accessed 9.05.2023).

¹⁰ DESTATIS.DE: FEDERAL STATISTICAL OFFICE OF GERMANY (2023): *Population: Households and Families* (https://www.destatis.de/EN/Themes/Society-Environment/Population/Households-Families/_node.html, last accessed 9.05.2023).

mentioned DESI report, we can conclude that if all German households were connected to gigabit capable networks, this would close more than 50% of the existing coverage gap within the EU that has been identified by the Commission. These numbers demonstrate the importance of a fast and effective deployment in Germany, highlighting both the size of the German market and of the country's current level of fibre deployment.

Although Germany is the biggest country in terms of population and territory among the EU member states lagging behind, there are similarities among the countries in the lower part of the table. All of the “*laggard*” countries are characterised by rather decentralised administrative structures and/or geographical diversity (Germany, Austria and Belgium are federal states; Italy has a diverse topology and strong autonomy on regional level; Cyprus and Greece are island states with a geographically scattered population difficult to reach and strong autonomy of the regional authorities; Czechia is a mountain country with comparatively big rural population and a high administrative fragmentation on regional level)¹¹. However, their differences are far greater than their similarities. VATM would like to emphasize that each of those countries has implemented a different broadband deployment strategy, taking into account the respective country's network infrastructure characteristics (like copper networks capable of VDSL/vectoring). As one of the main objectives of GIA is to “*maximise the results of civil works fully or partially financed by public means, by exploiting the positive externalities of those works across sectors and ensuring equal opportunities to share the available and planned physical infrastructure to deploy very high capacity networks*” (Recital 33, draft GIA), another important aspect when assessing the country's situation is to establish whether there is a private capital on the telecommunications market and what is the extend of the state aid needed to close the deployment gap in each one of these *laggard* countries. In this regard, Germany stands out again as the fibre rollout is driven by competing private investments coupled with massive amounts of state aid interventions, in marked difference to other member states in a rather late stage of broadband deployment where only white areas/spots with proven market failure conditions remain to be covered.

In Germany, VHC networks are being rolled out at a rapid pace right now. This was made possible by massive private investment in VHCN deployment. VATM underlines that this acceleration of the broadband network rollout has been driven by the alternative operators - triggering an enhanced infrastructure competition with a tendency to grow further.¹² For that reason, we would like to underline that a **one-**

¹¹ These countries are identified to lay below EU average according to EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR COMMUNICATIONS NETWORKS, CONTENT AND TECHNOLOGY (2022): *Digital Economy and Society Index (DESI) 2022: Digital infrastructures*, P. 11, (<https://ec.europa.eu/newsroom/dae/redirection/document/88764>, last accessed 9.05.2023). The overview is based on OECD country profiles: OECD.ORG (2023): *Country profiles: regional facts and figures*, (<https://www.oecd.org/regional/regional-policy/country-profiles.htm>, last accessed 9.05.2023).

¹² DIALOG CONSULT, VATM (2022): *Marktanalyse Gigabit-Anschlüsse 2022*, P. 4. (https://www.vatm.de/wp-content/uploads/2022/05/VATM_Gigabit-Studie_2022.pdf, last accessed 9.05.2023)

size-fits-all approach would be unsuitable and even harmful for the healthy development of the German telecommunications market or any other market where the population is yet to be covered by a broadband network.¹³

Therefore, we urge the Commission to duly take into consideration the following:

1. Market development

VATM would like to emphasize that the German telecommunications market is overall in a state of growth. As shown in the DESI-Report's figures the German market is one of the least developed in the EU in terms of broadband deployment and gigabit connectivity. This is mainly due to the size of the country. For a long period, both the government and the market expected the incumbent SMP operator, Telekom Deutschland GmbH, (in the following Telekom) to begin the migration from its copper network to an all-out fibre network. However, in an attempt to "sweat its assets" and broaden its end customer base as much as possible, the SMP operator chose to upgrade its copper network by means of vectoring. While other EU countries like Spain and France had to base their connectivity strategies on fibre (due to lack of suitable copper network) - aided by existing ducts and labour-saving deployment techniques like aerial, as well as the systematic implementation of the national broadband deployment plan introduced by the government early on,¹⁴ Germany decided not to interfere in the market development. At the same time, the strategic choice of vectoring made the shift towards active access products inevitable. By gradually phasing out ULL access as a consequence of vectoring, bitstream access established itself as the key wholesale access product in Germany. In addition, rollout of VHC networks in Germany is more expensive than in other members states due to a less extensive duct network, no regulated access to the SMP operator's duct network, high minimum wages and no acceptance for aerial deployment from administration and homeowners alike.

Driven by the growing digital needs and accelerated by the almost completely digital character of the day-to-day life during the Covid19 pandemic, the market dynamics have shifted, and the country entered into a phase of fierce rollout competition among companies, which are seeking to exploit the so called *first-mover-advantages*. These companies rely predominantly on private capital which values above all a green field approach with the aim to invest in long-term efficient network infrastructures. Therefore, they are active in the rural and suburban areas where they would compete mostly only with the legacy

¹³ EUROPEAN COMMISSION (2021): *Updated Study on National Broadband Plans in the EU27* (29.10.2021): Nr.7: "There is no one-size-fits-all solution for broadband strategies across Europe." ([Updated Study on National Broadband Plans in the EU27 | Shaping Europe's digital future \(europa.eu\)](#), accessed 9.05.2023).

¹⁴ Arcep.fr: ARCEP (2023): *Le plan France Très Haut Débit (PFTHD): Qu'est-ce que le plan France Très Haut Débit?* ([Le plan France Très Haut Débit \(PFTHD\) | Arcep](#), last accessed 9.05.2023; [cahiers-des-charges-AAP-PNTHD-fev2013.pdf \(arcep.fr\)](#), last accessed 9.05.2023).

copper network and rely on the migration dynamics and ultimately copper switch off, which would secure their take up and the viability of their business model.

In the most recent developments from the past year, the market witnessed and continues to witness many cases of the SMP operator crowding out private investments in rural and suburban areas by either simply making the announcement that it would completely or partially overbuild the areas where first movers have planned to build or already built VHC networks or following through with a partial rollout. Even in areas where alternative companies have already started building a network, such announcements had a shake-up effect prompting some companies to abandon their plans and leave.¹⁵

It is, therefore, apparent that the private capital backing up the ongoing broadband deployment is vulnerable to anti-competitive actions by the SMP operator. An SMP operator with more than 60% captive customer base gaining access to the rural or suburban civil network infrastructure of the first mover is correctly perceived as a threat by the investor. This would erase the necessary investment returns based on full utilization of the passive and active infrastructures. Thus, all investor-based network operators do offer Open Access to their networks so that other operators can serve their retail customers and contribute to the full utilization of the network. Finally, under the current conditions on the German market, take up is possible only by offering a variety of products including various active products as the market demand is concentrated on those.

In the light of this overview, VATM would like to present our comments and remarks on the draft GIA.

2. Comments on the scope of GIA.

The regulatory framework in the EU and consequently Germany has put the emphasis on the asymmetric regulation. This is appropriate as the promising competitive dynamics have come to a standstill in broadband – the incumbent is still the designated SMP operator, and despite increasing fibre investment the SMP operator still holds more than 50% of the customers on retail level with a tendency for growth.¹⁶

Therefore, an intervention with a symmetric character is not appropriate without taking into account all obligations with the potential to strengthen the existing SMP position. This means that impact assessments must be performed before imposing any sort of additional burden to the alternative operators on the market, as they are those investing heavily in order to cover all German households and achieve the objectives set by the Commission by 2030.

¹⁵ handelsblatt.com: HANDELSBLATT (17.03.2023): *TELEKOMMUNIKATION: Deutschlands Glasfasermarkt läuft heiß.* (<https://www.handelsblatt.com/technik/it-internet/telekommunikation-deutschlands-glasfasermarkt-laeuft-heiss/29000526.html>, last accessed 9.05.2023).

¹⁶ DIALOG CONSULT, VATM (2023): *Analyse der Wettbewerbssituation im deutschen Festnetzmarkt*, P. 10-11. (https://www.vatm.de/wp-content/uploads/2023/05/Wettbewerbsstudie_Festnetzmarkt_040523_Web.pdf, last accessed on 9.05.2023).

With regard to the symmetric obligations arising from GIA, VATM notes with concern the following:

2.1 Art. 3 – Access to existing physical infrastructure

Art. 3 (1), draft GIA reads as follows:

*1. Upon written request of an **operator**, public sector bodies owning or controlling physical infrastructure or **network operators** shall meet all reasonable requests for access to that physical infrastructure under fair and reasonable terms and conditions, **including price**, with a view to deploying elements of very high capacity networks or associated facilities. Public sector bodies owning or controlling physical infrastructure shall meet all reasonable requests for access also under non discriminatory terms and conditions. Such written requests shall specify the elements of the physical infrastructure for which the access is requested, including a specific time frame.*

In its current wording Art. 3 (1), especially in conjunction to Art. 3 (5), draft GIA, clearly puts symmetric regulatory obligations on the alternative operators, including the possibility for price regulation. The Commission seems to think that the issue is sufficiently addressed by putting a number of safeguards in Art. 3 (2), which would presumably soften the impact of such price regulation. However, those have a rather limiting application scope as they introduce a lot more intrusive regulatory regime than the one under the acting BCRD. With regard to the above-mentioned stage of market development in Germany, VATM would like to highlight that this limiting approach does not reflect the situation on markets, which have not reached maturity yet.

It is our understanding that for the purpose of solving this issue, the Commission has set a list of reasons to refuse access in Art. 3 (3), draft GIA. The proposed Art. 3 (3), however, limits the scope of the same provision established by the acting BCRD (Art. 3 (3), BCRD) as it transforms the non-exhaustive list of grounds for refusal into a definitive list.

Therefore, Art. 3 (3), draft GIA, reads as follows:

*3. **Network operators** and public sector bodies owning or controlling physical infrastructure **may refuse access** to specific physical infrastructure **based on one or more of the following conditions**:*

*(a) there is a **lack of technical suitability** of the physical infrastructure to which access has been requested to host any of the elements of very high capacity networks referred to in paragraph 2;*

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| <p>(b) there is a lack of availability of space to host the elements of very high capacity networks or associated facilities referred to in paragraph 2, including after having taken into account the future need for space of the access provider that is sufficiently demonstrated;</p> |
| <p>(c) the existence of safety and public health concerns;</p> |
| <p>(d) concerns for the integrity and security of any network, in particular critical national infrastructure;</p> |
| <p>(e) the risk of serious interferences of the planned electronic communications services with the provision of other services over the same physical infrastructure; or</p> |
| <p>(f) the availability of viable alternative means of wholesale physical access to electronic communications networks provided by the same network operator and suitable for the provision of very high capacity networks, provided that such access is offered under <u>fair and reasonable terms and conditions</u>.</p> |
| <p>In the event of a refusal to provide access, the network operator or the public sector body owning or controlling physical infrastructure shall communicate to the access seeker, in writing, the specific and detailed reasons for such refusal within 1 month from the date of the receipt of the complete request for access.</p> |

However, this approach does not constitute an appropriate solution on the German market. Given the language used in Art 3 (3), VATM understands that the Commission wishes to limit the category of viable alternative means to the physical infrastructure or to the physical network components, thereby completely excluding active wholesale products such as bitstream access.¹⁷ **We decisively disagree with this proposal.**

We would like to reiterate that the historical development of the German market caused its dependence to active products. It is against the common sense and the needs of the market to completely exclude them from the scope of Art. 3.

As those considerations might be taken into account and tackled by the legislator in the transposition process on a national level, the draft GIA explicitly limits this possibility (Art. 1 (4)). Therefore, VATM urges the Commission to take into account the solution established by the German national legislator in §141 Telekommunikationsgesetz¹⁸ (*Telecommunications Act*, in the following TKG). VATM requests

¹⁷ EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR COMMUNICATIONS NETWORKS, CONTENT AND TECHNOLOGY, GODLOVITCH, I., KROON, P., STRUBE MARTINS, S. (2023): *Support study associated with the review of the Broadband Cost Reduction Directive: Evaluation Report*, P. 155-157 (<https://data.europa.eu/doi/10.2759/560564>, last accessed 9.05.2023).

¹⁸ Telekommunikationsgesetz ([Telekommunikationsgesetz \(TKG\) - dejure.org](https://www.dejure.org), last accessed 9.05.2023)

that the Commission takes a similar approach, as the text is adapted to the reality on the market and gives sufficient space for manoeuvre without compromising the clarity on what grounds a refusal is possible. § 141 (2), Nr. 6 TKG (*Ablehnung der Mitnutzung, Versagungsgründe*; “Conditions for refusal of access”¹⁹) corresponds to Art. 3 (3), f, which is dedicated to “*viable alternative means*”, as also foresees refusal of access on the basis of “*Verfügbarkeit tragfähiger Alternativen*” (Availability of viable alternatives²⁰):

(2) Der Antrag auf Mitnutzung darf nur abgelehnt werden, wenn einer der folgenden Gründe vorliegt:

(...)

6. die Verfügbarkeit **tragfähiger Alternativen** zur beantragten Mitnutzung passiver Netzinfrastrukturen, soweit der Eigentümer oder Betreiber des öffentlichen Versorgungsnetzes diese Alternativen anbietet, sie sich für die Bereitstellung von Netzen mit sehr hoher Kapazität eignen und die Mitnutzung zu fairen und angemessenen Bedingungen gewährt wird; **als Alternativen können geeignete Vorleistungsprodukte für Telekommunikationsdienste, der Zugang zu bestehenden Telekommunikationsnetzen oder die Mitnutzung anderer als der beantragten passiven Netzinfrastrukturen angeboten werden,**

As it is evident from the text, the German legislator has opted for defining the viable alternatives referred to and they are not limited to passive access products.

Therefore, VATM calls for the Commission to include a definition of “*viable alternatives*” in Art. 2 and broaden the concept of “*viable alternatives*”.

VATM puts an emphasis on the role of active products, in particular bitstream, and urges the Commission to duly note the importance these products have for the German market. The definition should also clarify that the viable alternative can be offered by means of an infrastructure still under construction which is available within a reasonable period of time. In addition, it must be clear that a viable alternative can also be offered by a third party: as long as there is a viable alternative, offered on fair and reasonable terms and conditions, which is objectively suitable for the access seekers’ purposes, offered by this third party at the location of the planned VHCN, there would be no need for a mandatory duct access.

¹⁹ Manual Translation

²⁰ Manual Translation

2.2 Art. 5 – Coordination of civil works

In the light of the considerations presented in respect of Art. 3, draft GIA, VATM proposes that “**viable alternatives**” are implemented in the scope of Art. 5 as well.

Art. 5, draft GIA, currently reads as follows:

1. **Any network operator shall have the right to negotiate agreements on the coordination of civil works, including on the apportioning of costs, with operators with a view to deploying elements of very high capacity networks or associated facilities.**

2. **Any network operator when performing or planning to perform directly or indirectly civil works, which are fully or partially financed by public means, shall meet any reasonable written request to coordinate those civil works under transparent and non-discriminatory terms made by operators with a view to deploying elements of very high capacity networks or associated facilities.**

Such requests shall be met provided that the following cumulative conditions are met:

(a) **this will not entail any unrecoverable additional costs, including those caused by additional delays, for the network operator that initially envisaged the civil works in question, without prejudice to the possibility of agreeing on apportioning the costs between the parties concerned;**

(b) **the network operator initially envisaging the civil works remains in control over the coordination of the works;**

(c) **the request to coordinate is filed as soon as possible and, when a permit is necessary, at least 2 months before the submission of the final project to the competent authorities for granting permits.**

VATM notes that the Commission aims at achieving cost efficiencies and deployment synergies in Art. 5 as introduced in Recital 33, draft GIA. However, the Commission seems to address VHCN-deployment doing false assumptions. On markets, such as Germany, where there is no available broadband network and one is planned or in the process of rolling out, the privately funded deployment is in the most cases facilitated in a close cooperation with the local authorities. This means that the first mover commits to cover also households, which otherwise would not be commercially viable to connect, and receives appropriated state aid as a compensation. In its current form Art. 5 (2), draft GIA, puts all such cases under scrutiny and makes the business case of the first mover vulnerable to predatory behaviour. For that reason, there are provisions in TKG sufficiently addressing this issue. VATM notes that the market is currently in a stage, where multiple network providers target the same geographic areas, but only the

first mover would have a viable business case. The provision of Art. 5 (2) diminishes this advantage, thus, would ultimately lead to crowding out private investments or prompt network operators not to apply such deployment strategies involving areas subject of state aid. Furthermore, Art. 5 (2) disincentivises any cooperation with the local institutions and thereby goes against the whole concept of Art. 5. In any case, this would have detrimental effect over the people living in scattered areas where the broadband coverage is urgently needed. The result would be additional slowing down of the VHCN deployment, not achieving the targeted efficiency.²¹

Therefore, **VATM proposes that the coordination of civil works is linked to the availability of “viable alternatives”, which would introduce a safeguard against potential misuse.** In addition, if there is a viable alternative and its use is prioritised, this provides for a significant acceleration of the planned VHCN deployment and expansion.

2.3 Art. 2 – Definitions

Building on the deliberations above, VATM urges the Commission to take a closer look into Art. 2, draft GIA, and optimise the list of definitions in a way that any confusion or misinterpretation would be avoided.

We would like to point out that even though Art. 2 explicitly states that the definitions established by the EECC apply, the text reintroduces the definition of an operator in EECC – Art 2 (29), EECC (Art. 2 (1) (a)).

In addition, the definition of “*network operator*” is put together in a way to cover also tower companies. The Commission explains in Recital 15, draft GIA, that:

taking into account the fast development of providers of wireless physical infrastructure such as ‘tower companies’, and their increasingly significant role as providers of access to physical infrastructure suitable to install elements of wireless electronic communications networks, such as 5G, the definition of ‘network operator’ should be extended beyond undertakings providing or authorised to provide electronic communications networks and operators of other types of networks, such as transport, gas or electricity, to include undertakings providing associated facilities, which thus become subject to all the obligations and benefits set out in the Regulation, except the provisions regarding in-building physical infrastructure and access.

Therefore, Art. 2 reads as follows:

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| <i>For the purposes of this Regulation, the definitions in Directive (EU) 2018/1972 apply.</i> |
| <i>The following definitions also apply:</i> |
| <i>(1) ‘network operator’ means:</i> |

²¹ VATM (2022): *VATM-Positionspapier zur „Strategie für Schnelligkeit und Qualität beim Glasfaserausbau“*, P.3. ([2022-07-07_VATM_Alternative_Verlegemethoden.pdf](#), last accessed 9.05.2023).

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| (a) an operator as defined in Article 2, point (29), of Directive (EU) 2018/1972; |
| (b) an undertaking providing a physical infrastructure intended to provide: |
| (i) a service of production, transport or distribution of: - gas; - electricity, including public lighting; - heating; - water, including disposal or treatment of wastewater and sewage, and drainage systems; |
| (ii) transport services, including railways, roads, ports and airports; |

This directly contradicts the evaluation report prepared for the undertaken revision of BCRD which states:

*The changes to the BCRD proposed in the preferred option would not involve the imposition of any new obligations on stakeholders which are not public bodies and/or which do not fall within the definition of “network operators” in the context of the BCRD. Thus, for example, private owners of non-network assets, such as **tower companies** and owners of commercial buildings, **would continue to lie outside the scope of the BCRD.**²²*

VATM considers that the Commission does not, again, take into account the state of development of the market segment. In Recital 15, the Commission refers to changes in the market that would now make it necessary to include tower companies. In addition to the undoubtedly increasing importance of mobile communications coverage, however, the Commission fails to recognize the fundamental changes that have taken place in the telecommunications sector and have led to a much more open and competitive market. In the past couple of years there has been a clear trend towards systemic separation of operations related to the facilitation of mobile services. This was mainly triggered by the evolution of the mobile networks and the need to expand the infrastructure assets and adapting them to the specificities of the 5G technology. As this has proven to be a time and cost intensive task for the mobile network operators (in the following, MNO(s)), the business model of the independent tower companies has emerged. This ultimately meant outsourcing the passive infrastructure for many MNOs, which lead to the effective separation between the provision of mobile network services and the ownership of the towers hosting the antenna sites.

²² EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR COMMUNICATIONS NETWORKS, CONTENT AND TECHNOLOGY, GODLOVITCH, I., KROON, P., STRUBE MARTINS, S. (2023): *Support study associated with the review of the Broadband Cost Reduction Directive: Evaluation Report*, P. 103 (<https://data.europa.eu/doi/10.2759/560564>, last accessed 9.05.2023).

VATM would like to emphasize that in the competition and regulatory praxis driven by the Commission the effective separation of operations and assets (which in many cases previously have been situated within the internal structure of one undertaking) is encouraged and seen as driver of competition.²³

For the current stage of development of this market segment this means that the towers owned by the tower companies – especially in cities with very high coverage density and correspondingly high coverage requirements, have a similar role as the buildings, which host mobile equipment on their rooftops. In that sense, the tower companies are comparable to building owners renting out their infrastructure as properly noted in the evaluation report cited above.

As the business model of the tower companies is still evolving and the sector is also facing unprecedented growth throughout different EU member states, we note that, currently, there is no indication of an effective obstacle to accessing infrastructure owned by a tower company even though there may be some rare cases of disputes. Regardless, these also exist with other infrastructure sites (antenna sites within localities), which have been left outside of the scope of the draft GIA.

VATM would like to reiterate that the Commission should take a very cautious approach when introducing symmetric regulatory obligations into a market, which has not reached maturity yet, such as the tower market. We, therefore, suggest that the Commission does a systematic and detailed review coordinated with the market to determine in which cases there are serious obstacles to access infrastructure related to tower companies. At the very least, however, the defence mechanisms must take effect in the same way as for other infrastructure providers since it is not clear why there should be an obvious disadvantage here.

We urge the Commission to reassess its approach to the definitions in GIA by adding definitions which are necessary and helpful such as “viable alternatives” and excluding tower companies of the scope of the “*network operator*” definition until an impact assessment has established the need for including them in the scope of GIA. As there is a clear indication of the opposite in the support study associated with the review of the BCRD (cited above²⁴) we request that the Commission carries out another impact assessment on this subject before GIA comes into force. If -and only if – this assessment would transparently establish that the result differs from the previous findings of the evaluation report, it would be justified to include tower companies in the scope of GIA.

²³ radiobruelleslibera.com: LIBERA, I. (8.05.2019): *The Separation of Telecom Networks in Europe: From Regulatory Remedy to New Business Models for Telecoms*. ([The separation of telecom networks in Europe: from regulatory remedy to new business models for telecoms – radiobruelleslibera](#), last accessed 9.05.2023).

²⁴ EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR COMMUNICATIONS NETWORKS, CONTENT AND TECHNOLOGY, GODLOVITCH, I., KROON, P., STRUBE MARTINS, S. (2023): *Support study associated with the review of the Broadband Cost Reduction Directive: Evaluation Report*, P. 103 (<https://data.europa.eu/doi/10.2759/560564>, last accessed 9.05.2023).

If an impact analysis is not possible up front, it must be possible to remove the tower companies and other owners of passive infrastructure from the GIA focus if it is afterwards shown that the GIA measures are not necessary as a functioning competitive market exists.

2.4 Art. 1 – Subject matter and Scope.

VATM welcomes the clarifications related to the subject matter and scope introduced in Art. 1, draft GIA:

1. This Regulation aims to **facilitate and stimulate the roll-out of very high capacity networks** by promoting the joint use of existing physical infrastructure and by enabling a more efficient deployment of new physical infrastructure so that such networks can be rolled out faster and at a lower cost.

2. If any provision of this Regulation conflicts with a provision of Directive (EU) 2018/1972 or Directive 2002/77/EC, the relevant provision of those Directives shall prevail.

3. Member States may maintain or introduce measures in conformity with Union law which contain more detailed provisions than those set out in this Regulation where they serve to promote the joint use of existing physical infrastructure or enable a more efficient deployment of new physical infrastructure.

4. By way of exception to paragraph 3, Member States shall not maintain or introduce in their national law provisions diverging from those laid down in Article 3(3) and (6), Article 4(4), Article 5(2) and (4), Article 6(2) and Article 8(7) and (8).

We see the adjustment of the scope in Art. 1 (1) to emphasize the VHCN-deployment as a timely and proportionate measure.

However, there is a need of clarification of the division between the scope of GIA and the EECC introduced in Art. 1 (2), draft GIA. Although Art. 1 (2) implies that GIA is subordinated to the EECC, there is a need for further reiteration of this relation. This is mainly due to the fact that various sections in the draft GIA such as the above-mentioned Art. 2 (1) (a) or Art. 3 (5) (“Physical infrastructure which is already subject to access obligations imposed by national regulatory authorities pursuant to Directive (EU) 2018/1972 (...) shall not be subject to the obligations set out in paragraphs 2, 3 and 4 (...)”) repeatedly refer to the application of the EECC. This represents a semantic tautology, which instead of legal certainty creates confusion.

In addition, the Staff Working Document issued by the Commission in relation to the ongoing revision of the Access Recommendation also underlines that the separation between the symmetric and asymmetric regulation must be made clear, stating in particular:

The Recommendation and the [proposal reviewing the Broadband Cost Reduction Directive] clarify that whenever an asset is subject to an access obligation under the Code, in particular SMP regulation, these obligations prevail over the access obligations under the horizontal provisions of the BCRD.²⁵

As this separation is outlined in Recitals 12 and 19 of the draft GIA in order to “ensure legal certainty” the provisions of Art. 1 do not contain the clarification it is referred to.

Therefore, we call for a further refinement of the text of Art. 1 (2), which should reflect the objectives set in the Chapeau of the GIA and coordinate those with any further clarifications in the provisions referring to the relation between GIA and the EECC and the prevalence of any obligations set by the EECC over those set in the GIA.

In addition, VATM notes that the Commission in Art. 1 (3) leaves space for further refinement of the text through the transposition in the national law with the exceptions listed in Art 1 (4). As Art. 3 (3) and Art. 5 (2) are explicitly mentioned as part of those exceptions and in the light of VATM's considerations presented in 2.1 and 2.2, **VATM urges the Commission to redefine the list by leaving Art. 3 (3) and 5 (2) outside the scope of exemptions in order to allow for more flexibility and adaptability to the national circumstances. We have demonstrated that in these cases the German national legislator has introduced a clear solution acceptable for all market players and reflecting the situation on the German telecommunications market. VATM is convinced that this would be a suitable measure, which would not compromise the Commission's efforts to introduce a better harmonised rules on infrastructure deployment throughout the Union.**

3. Obligations regarding transparency and reducing administrative burden

VATM notes that according to the draft GIA the objectives set by Recital 2 are to be achieved by the tools mentioned in Recitals 3 and 4, draft GIA, and explicitly state that the GIA is to speed up infrastructure deployment by introducing measures reducing the administrative burden.

We would like to underline that the transparency provisions introduced by Art. 6 (1) represent rather additional administrative burden than a relief. When we evaluate those also in relation to Art. 7, draft GIA, we do not recognise the proposal as a solution against lengthy administrative procedures. It is unfortunately quite the opposite – in our view, it represents an avalanche of additional information requirements, which take away any possibility to act in a time sensitive and agile manner.

²⁵ EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR COMMUNICATIONS NETWORKS, CONTENT AND TECHNOLOGY (2023): *Commission Staff Working Document: Explanatory Note Accompanying the Document Commission Recommendation on the Regulatory Promotion of Gigabit Connectivity*, P. 59. (<https://ec.europa.eu/newsroom/dae/redirection/document/93964>, last accessed on 9.05.2023).

3.1 Art. 6 - Transparency on planned civil works

From our perspective Art. 6 (1), draft GIA, introduces new information obligations for the companies deploying telecommunications infrastructure in a manner contra productive for the objectives set by the GIA:

1. In order to negotiate agreements on coordination of civil works referred to in Article 5, any network operator shall make available in electronic format via a single information point the following minimum information:

*(a) the **georeferenced** location and the type of works;*

(b) the network elements involved;

(c) the estimated date for starting the works and their duration;

(d) the estimated date for submitting the final project to the competent authorities for granting permits, where applicable;

(e) a contact point.

The network operator shall make available the information referred to in the first subparagraph for planned civil works related to its physical infrastructure. This must be done as soon as the information is available to the network operator and, in any event and where a permit is envisaged, not later than 3 months prior to the first submission of the request for a permit to the competent authorities.

(...)

The set of transparency requirements gives undue access to information for all competitors on the market and creates a risk that the first mover loses their competitive advantage. We would like to refer to the market development introduced in point 2 above and reiterate that the deployment of VHC networks in Germany it is largely dependent on private capital. Private investors are likely to be deterred by any additional obligation that jeopardise the return on capital of the VHCN deployment. This cannot be the intention of the Commission since it clearly disincentivises private investment.

Therefore, we consider the 3 months deadline for submitting information “*prior to the first submission of the request for a permit to the competent authorities*” disproportionate and even harmful. It runs counter to the Commission’s stated goal of fostering the fastest and most efficient way to deploy VHC networks. This provision allows the SMP operator to exactly pinpoint its detrimental overbuild (or co-deployment) proposals to the exact locations where altnets try take their first-mover advantage. This requirement largely negated the benefits for the first-mover in rural and suburban settings. Leaving this obligation in the provisions of GIA would in the best case slow down the further VHCN deployment in Germany and in the worst, completely

hamper it due to the timely information given to the SMP operator. Consequently with alternative investors deterred by an effective overbuild strategy of the SMP operator, the rollout dynamic and therefore the deployment itself will be reduced. Therefore, we urge the Commission to remove this possibility from the proposed GIA altogether.

3.2 Art. 7 - Procedure for granting permits, including rights of way

Building on point 3.1, VATM would like to emphasize that any additional information obligations on behalf of the alternative providers constitutes a burden for the whole VHCN deployment.

We, therefore, see the provision of Art. 7 (4) as completely unjustified. In its current form, it provides for legal uncertainty and completely diminishes the discretionary power of the administrative authority issuing the permit. Therefore, it goes directly against the wording of Art. 7 (1) and (5), which provide for the proportionality of the actions of the permit granting authorities in order to ensure foreseeability and accountability. In addition, their actions should not go against the economic interests of the VHCN deploying companies:

1. Competent authorities shall not unduly restrict, hinder or make economically less attractive the deployment of any element of very high capacity networks or associated facilities.

*Member States shall ensure that any rules governing the conditions and procedures applicable for granting permits, **including rights of way**, required for the deployment of elements of very high capacity networks or associated facilities are **consistent across the national territory**.*

(...)

4. The competent authorities shall, within 15 working days from its receipt, reject applications for permits, including for rights of way, for which the minimum information has not been made available via a single information point, pursuant to Article 6(1) first subparagraph, by the same operator which applies for that permit.

*5. The competent authorities **shall grant or refuse permits**, other than rights of way, **within 4 months** from the date of the receipt of a complete permit application.*

The completeness of the application for permits or rights of way shall be determined by the competent authorities within 15 days from the receipt of the application. Unless the competent authorities invited the applicant to provide any missing information within that period, the application shall be deemed complete.

The first and second subparagraph shall be without prejudice to other specific deadlines or obligations laid down for the proper conduct of the procedure that are applicable to the permit-granting procedure, including appeal proceedings, in accordance with Union law or national law in compliance with Union law.

By way of exception and based on a justified reason set out by a Member State, the 4 month deadline referred to in the first subparagraph and in paragraph 6 may be extended by the competent authority on its own motion. Any extension shall be the shortest possible. Member States shall set out the reasons justifying such an extension, publish them in advance via single information points and notify them to the Commission.

Any refusal of a permit or right of way shall be duly justified on the basis of objective, transparent, non-discriminatory and proportionate criteria.

(...)

Therefore, we urge the Commission to refrain from introducing any such obligation as in Art. 7 (4) and remove it completely from the proposal.

3.3 Additional remarks

Finally, VATM would like to address some of the introduced deadlines in the draft GIA.

As discussed in 3.1, we see the speeding up of administrative processes as one of the main objectives of GIA. Therefore, VATM invites the Commission to reduce the deadlines introduced in Art. 7 and Art. 11 in order to ensure the goals manifested in the Chapeau and in the Explanatory Memorandum – speeding up and streamlining of the civil works related to the VHCN deployment.

We would like to urge the Commission to reduce the deadline for permit granting or refusal thereof in the above-mentioned Art. 7 (5) to 3 months.

In addition, we note that the speed and legal certainty of the dispute settlement procedure should also be taken into account when providing for faster broadband deployment, which is addressed in Art. 11 (2), draft GIA, as follows:

(...)

2. Taking full account of the principle of proportionality and the principles established in Commission guidance, the national dispute settlement body referred to in paragraph 1 shall issue a binding decision to resolve the dispute at the latest:

(a) within four months from the date of the receipt of the dispute settlement request, with respect to disputes referred to in paragraph 1, point (a);

(b) within one month from the date of the receipt of the dispute settlement request, with respect to disputes referred to in paragraph 1, points (b), (c) and (d).

Those deadlines may only be extended in exceptional circumstances.

(...)

We invite the Commission to reduce the deadline foreseen in Art. 11 (2) (a) to 3 months. Another optimisation we see appropriate and in accordance with the objectives of GIA would be the **setting of a clear time frame for the extension of deadlines under exceptional circumstances.** This would provide for legal certainty and foreseeability of the actions of the dispute settlement body. For that purpose, **we propose a deadline of 1 month.**

In conclusion, VATM would like to emphasize that all proposed amendments are urgently needed in order to adjust the draft GIA to the reality and the needs of the German telecommunications market and to insure a sustainable VHCN deployment for all European citizens.