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Position Paper

On the European Commission's Proposal for a Regulation on Measures to reduce the Cost of deploying Gigabit electronic Communications Networks (COM 2023 (94) final)

Position Paper of the German Energy and Water
Industries

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The German Association of Energy and Water Industries (BDEW) and its regional organisations represent over 1,900 companies. The membership comprises both privately and publicly owned companies at the local, regional and national level. They account for around 90 percent of the electricity production, over 60 percent of local and district heating supply, 90 percent of natural gas, over 90 percent of energy networks and 80 percent of drinking water extraction as well as around a third of wastewater disposal in Germany.

Initial Remarks

On February 23rd 2023, the European Commission presented its legislative proposal to revise the broadband cost reduction directive (2014/61/EU) in order to further harmonise and accelerate the expansion of gigabit infrastructure. The present proposal for a regulation on measures to reduce the cost of deploying gigabit electronic communications networks (gigabit infrastructure act, GIA) aims at facilitating the deployment of broadband infrastructure in line with the goals of the communication on the 2030 digital compass and the digital decade policy programme.

The German Association of Energy and Water Industries (BDEW) welcomes the Commission's proposal to further develop the provisions of the Broadband Cost Reduction Directive and to adapt them to current EU goals and framework conditions. Ensuring a fast and comprehensive expansion of high-speed networks for electronic communication is of great importance for economic growth and the development of new digital business models. At the same time, synergies and corresponding obligations for the affected supply and telecommunications infrastructure must be implemented uniformly. One-sided cost advantages for individual sectors or companies and impairments of infrastructure operability should be prevented in order to maintain a high level of security of supply. In addition, the need for protection of physical infrastructure against attacks from third parties has to be considered.

BDEW represents both owners and operators of utility networks in the areas of gas, electricity, district heating and wastewater, which under certain circumstances must make their infrastructures available to operators of public telecommunications networks for joint use. In total, BDEW represents over 1900 companies. The spectrum of members ranges from local and municipal to regional and national companies (both public and private). They represent about 90 percent of electricity sales, 60 percent of local and district heating sales, 90 percent of natural gas sales as well as 80 percent of drinking water production and about one third of wastewater disposal in Germany. BDEW also accounts for 94 percent of the electricity grid length, 92 percent of the gas grid length and 78 percent of the heating and cooling grid length. Additionally, BDEW represents operators of public telecommunications networks themselves. As alternative network operators, BDEW member companies are responsible for 70 percent of the fibre infrastructure built in Germany.

As both users and deployers of broadband infrastructure, the expansion of high-performance networks for electronic communication plays a major role for the energy and water industries. BDEW welcomes that the current legislative proposal takes into account the special status of critical infrastructure when it comes to access to physical infrastructure and data. Moreover, with some specific amendments to the proposal, the GIA will increase investment protection and promote the expansion of gigabit networks while limiting duplication and overbuilding of existing infrastructure. However, with no clear stipulation of fibre as the gigabit infrastructure

of the future, the GIA missed the opportunity to create a framework to foster fibre as the most sustainable, energy efficient and green gigabit infrastructure.

Against this background, BDEW has drafted recommendations on the central aspects of the GIA, which focus on targeted measures that further promote the expansion of high-speed networks for electronic communications in the EU.

The BDEW Recommendations in Detail

1. Change of legal Instrument

We support general EU-wide requirements to enable the accelerated roll-out of high-speed electronic communications networks, allowing Member States and public utility network operators, as well as public telecommunications network operators leeway to implement measures in line with the principles of subsidiarity and proportionality. A harmonisation of measures throughout the Union based on a regulation instead of a directive can contribute to achieve greater homogeneity when it comes to access to gigabit infrastructure. Nevertheless, it has to be ensured that the flexibility offered by the current broadband cost reduction directive is maintained in order to react to specific local and regional needs. The regulation should not hinder Member States to respond quicker to emerging challenges while clarifying legal uncertainties identified in current practice and, in particular, define essential terms.

2. Exemption of Drinking Water Infrastructure

BDEW very much welcomes the exemption of drinking water infrastructure from the scope of the regulation. Drinking water is one of the most important common good for humans. In the context of water supply as a service of general interest, the focus lies on maintaining the quality of drinking water as a commodity and complying with the requirements of the EU Drinking Water Directive (2020/2184/EU). The EU Drinking Water Directive prescribes in detail the monitoring of water supply in the Member States. With the deployment of cables, substances can get into water pipes and drinking water installations in the European Union, which entail an increased monitoring effort for the authorities responsible for the health of the population. Deploying cables in drinking water pipes can represent an operational change to parts of a water supply system carrying drinking water, which can have a significant impact on the quality of the drinking water. The hygienic requirements of national and European legal requirements could not be guaranteed. Liability issues in the event of pipe damage or contamination that poses a risk to health could hardly be clarified in advance. The German Drinking Water Regulation

(Trinkwasser-Verordnung) already prohibits objects such as broadband cables in drinking water pipes for hygienic reasons in § 17.

In view of the above, the GIA should leave no room for interpretation on the exemption of drinking water infrastructure.

The BDEW therefore supports the explicit exemption of drinking water infrastructure from the definition of 'physical infrastructure' in Art. 2 (2) of the proposed regulation and thereby from its scope. This exemption must be maintained in the next steps of the legislative process.

Furthermore, BDEW recommends clarifying recital 18 with regards to the exemption access to critical infrastructure. If Member States deem it necessary to limit or prohibit network operators from negotiating access to physical infrastructures for specific reasons, these exemptions should remain possible.

3. Investment Protection by limiting the Risk of Duplication or Overbuilding of existing Gigabit Infrastructure

The measures proposed in art. 3 and 5 should be seen in the light of duplication or overbuilding of existing gigabit infrastructure by competitors. The potential of duplication or overbuilding of networks lowers the profitability of investments and the willingness for future investments. Instead of concentrating on the expansion in areas that have not yet been developed, existing networks are overbuilt. This ultimately slows down the expansion of high-speed networks for electronic communication in general and further hinders the goal of an EU-wide gigabit network. This is especially true considering the scarcity of construction materials and skilled workers as well as lowering the acceptance of citizens due to the inconveniences connected with civil works. Therefore, duplication or overbuilding through the obligation to gain access to existing physical infrastructure and coordination of civil works should be limited. Instead, whenever possible, open access in form of an offer of a viable alternative should be preferred and supported.

3.1. Access to physical Infrastructure: Avoidance of Duplication or Overbuilding of existing Gigabit Infrastructure

Access to existing physical infrastructure rarely achieves the desired effect. The joint use of empty conduits (passive network infrastructure) in the expansion of fibre optics is frequently impossible in practice because they are installed in the wrong place, are too short, too poorly accessible, or too narrow. The synergy potential therefore tends to be overestimated. In

addition, the direct deployment of fibre optic cables within pipelines of physical infrastructure - especially for gas or sewage - is hardly used due to the limited usability. This situation becomes particularly evident in the example of sewers in rural areas, where the need for shared use is particularly high, but the nominal widths of the sewers are not sufficient. In most cases, the laying of a fibre optic cable within a media line, especially in pressure pipelines, should be rejected because it would then no longer be possible to replace defective pipe sections without first removing the cable. Moreover, a renewal of a sewer pipe would make it necessary to remove the fibre optic cables beforehand. To maintain the functionality of sewers, it is necessary to clean them repeatedly with high pressure, and this may lead to severe damages of the cable infrastructure of fibre optic cables. In addition, the installation of fibre optic cables can lead to increased blockages, so that cleaning in this area would even have to be intensified. Therefore, BDEW welcomes the criteria in article 3(3) under which access to existing physical infrastructure may be refused. It should, however, be made clear that the list of reasons for refusal is not to be seen as exhaustive.

BDEW especially welcomes the exception if a viable alternative is offered under fair and reasonable terms and conditions. To ensure legal certainty, a detailed definition of the term "viable alternative" should be included in article 2. In practice, the existing legal uncertainty of the term disadvantages smaller market participants and can lead to a distortion of the market.

'Viable alternatives' as mentioned in Art. 3(4)(f) should be defined in Art. 2 and should include fair and appropriate access to bitstream. Viable alternatives should also be considered in the case of coordination of civil works according to Art. 5.

Other viable alternatives should of course not be excluded, as long as they are offered on fair and reasonable terms and conditions and are suitable for the intended provision of very high capacity networks. The list of viable alternatives should therefore not be exhaustive but open for technological development and should also acknowledge networks currently still under construction.

Overall, defining dark fibre and access to bitstream explicitly as viable alternatives helps to prevent duplication or overbuilding of existing gigabit infrastructure. Especially bitstream access as a viable alternative enables operators to negotiate fair and appropriate access and strengthens the competition on the market. Therefore it protects existing and planned investments as well as the willingness for further investments in the infrastructure. Using such viable alternatives to the existing infrastructure also reduces the overall time of construction works, reduces emissions, resource consumption, and in the case of bitstream access even energy consumption. Since there is a shortage in qualified labour and materials to build gigabit infrastructure, using viable alternatives could lead to an overall faster roll-out of the

infrastructure in terms of connected households. Limited construction capacities should be directed to areas where no network exists so far, instead of overbuilding existing infrastructure.

In addition, BDEW suggests making the absence of a viable alternative a prerequisite for the right of access in Art. 3, instead of establishing a viable alternative as a reason to refuse access. In practice, the concerned network operator cannot always demonstrate viable alternatives, because disclosure of such is prevented, for example, by confidentiality obligations. It is therefore essential that a viable alternative, e.g., bitstream access, may be offered by any party, such as an affiliated company or a different operator in the area. The access seeker should be obliged to check appropriate alternatives before being entitled to ask for co-use and therefore to overbuild existing infrastructure.

3.2. Coordination of civil Works: Avoidance of Duplication or Overbuilding of existing Gigabit Infrastructure

The importance of protecting planned or already performed investments is also connected to the coordination of civil works. Hence, the Gigabit infrastructure Act must ensure that duplication or overbuilding is only permitted in fully justified exceptional cases. Exceptional cases could be, for example, the connection of end customers or the construction of cross-connections between existing telecommunications network areas. The primary aim of the measures should be the creation of a high-performance infrastructure and not infrastructure competition. In this way, the business case of the companies that invest first can also be adequately protected.

In practical application, the right to co-deployment can create investment barriers, as it can result in the duplication of the fibre infrastructure. Consequently, investment planning of the first network operator runs the risk of becoming economically unviable. This applies particularly in cases where expansion projects concerned are located in areas in which broadband expansion has not yet been realised on a private-sector basis as the possible number of end customers supplied would not cover the investment costs of the network expansion.

Uncertainties about the validity of the right to coordinate civil works in the case of expansion projects supported by subsidies as well as self-financed expansion projects has led to investment concerns and ultimately to a lack of investments. According to Article 5(2) of the legislative proposal, network operators performing or planning to perform direct or indirect works, that are either fully or partially financed by public means, shall meet any request to coordinate these civil works. Based on this wording it remains unclear to what extent private entities with municipal shareholders (e.g., public utilities) are covered by the scope. The condition for the coordination of civil works that are fully or partially financed by public means should therefore be clarified to ensure legal certainty.

In Germany, many companies in the energy and water sector have public or municipal shareholders. The current wording could therefore be interpreted to mean that all their infrastructure projects could fall under the category of fully or partially financed by public means. Even completely privately financed projects of these companies could be eligible to meet any requests for coordination. This could lead to an unequal treatment of market players with public stakeholders. While such an interpretation certainly does not adequately reflect the spirit of the text or the provisions, a clarification is urgently needed. It should be made clear that not every entity with public participation automatically falls under the scope. BDEW therefore recommends a clarification on article 5(2) regarding the definition of the term “fully or partially financed by public means”. Public means should only exist if public funds or in-kind contributions are directly made available for the construction work.

Privately financed construction work by network suppliers with either full or partial public (co-)ownership should not be included in the definition of works fully or partially financed by public means according to article 5(2).

Furthermore, we recommend exempting all civil works that are fully or partially financed by public means from the obligation to coordinate if a viable alternative under fair and reasonable terms and conditions is offered. As mentioned above, if viable alternatives are offered, there is no need for a co-deployment through the coordination of civil works. Publicly financed projects of gigabit infrastructure should be protected from overbuilding if a viable alternative is offered in order to save investments and ultimately public funds.

If a viable alternative to co-deployment is offered under fair and reasonable terms and conditions, a coordination should always be optional.

4. Special Status of Critical Infrastructure and their Data

Companies of the energy and water industry represent critical infrastructures according to the NIS 2 Directive (2022/2555/EU) on European level and the KRITIS Regulation on national level. Against this background, the security of supply for the population should always be given the highest priority. As telecommunications infrastructure is also considered critical infrastructure, many parallels to the basic protection requirements of other physical infrastructures can be drawn.

In this context, the identification and mitigation of risks (e.g., possible attacks on infrastructure) go hand in hand with the resilience of such infrastructure. This also includes

the protection of information. Hence, no blanket information obligations should be introduced. The collection of data from these companies is of particular relevance for the smooth and secure functioning of the community of Member States. Disclosure of data is contrary to these obligations and could lead to the respective companies not being able to perform their tasks properly. Especially in times with high security concerns regarding the critical national infrastructure it is important to balance demands for transparency with demands for security.

BDEW welcomes the exemption of critical national infrastructure in articles 4, 5 and 6.

5. Implementation of a single digital Information Point

Generally, BDEW welcomes the introduction of a single digital information point. In Germany the so-called Gigabit Grundbuch will fulfil this role for broadband expansion. When implementing this measure, it has to be taken into account that a high level of information is already provided by companies and municipalities. A further tightening of information obligations that would go beyond the creation of a single digital information point without any apparent added value should therefore be avoided – especially as it could lead to a considerable, unacceptable additional effort, particularly for small and medium-sized enterprises. It should also be ensured that information obligations to the detriment of trade and business secrets are avoided. A clear added value for both utility infrastructure operators, telecommunications infrastructure, and other relevant stakeholders should be the underlying principle of which the single information point is established.

Moreover, BDEW welcomes the digitalisation of the approval process through the single information point in article 7(2) and (3). It should be noted, however, that while strengthening the single information point helps with the digitalisation of these processes, the danger of physical attacks on the concerned infrastructure rises when required cybersecurity measures are not correctly implemented.

BDEW welcomes the obligation to establish a single national information point in digital form. This measure should not lead to a disproportionate requirement to disclose further information when implemented on national level and has to fully conform with relevant cybersecurity obligation for the protection of the data.

6. Permit-granting Procedure

BDEW sees an increased risk of damage to existing infrastructure such as gas, electricity, district heating, wastewater and drinking water infrastructure if no structured permit-granting process exists. Therefore the Commission should act cautiously when specifying categories of deployment that shall not be subject to any permit-granting procedure within an implementing act according to article 7(8). The risk of damage on critical infrastructure must be prevented in every circumstance. Without a permit-granting procedure the standards on gathering information on existing infrastructure in the area of the planned network expansion could decrease. This poses financial and safety risks for the civil works company, the owner of the existing infrastructure and the consumer, who could be faced with a temporary disruption of essential services.

Instead of defining categories of deployment that are not subject to any permit-granting procedure, the acceleration of permit-granting processes is the adequate adjustment to speed up the expansion of gigabit infrastructure.

7. Fibre-ready Label

BDEW welcomes the provisions of article 8. In order to strengthen the rollout of gigabit infrastructure, BDEW deems particularly the introduction of a fibre-ready label and affiliated certification schemes as beneficial. For greatest coherence, this label should be used uniformly EU-wide and be consumer oriented. It should make clear to the consumer whether a building is truly fibre ready at first glance. BDEW therefore recommends clarifying for which network level the fibre-ready label would be granted. The decisive level for the decision of the citizens is the connection of their home, the fibre-ready label should only be granted if the infrastructure is able to provide that level.

To guarantee a coherent and consumer friendly label, fibre-ready labels should be awarded if the home is connected to the fibre network.

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