

Position of ANGA The Broadband Association (Germany) on the proposal by the European Commission for 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 – GIA)

COM(2023) 94 final

I. Introduction and Summary

On 23 February, the European Commission presented a set of actions aimed to make Gigabit connectivity available to all citizens and businesses across the EU by 2030. Among these proposals was the draft of the so called “Gigabit Infrastructure Act” (GIA), a regulation to replace the Broadband Cost Reduction Directive (2014/61/EU). Its objective is to enable a quicker and more efficient rollout of very high capacity networks, including fibre and 5G.

ANGA welcomes the Commissions willingness to speed up the rollout of gigabit networks. We support many of the approaches and tools chosen in the proposal to reach this objective. The most efficient and therefore most important aspect in this process is the enhancement and acceleration of the permit application process. In order to speed up public procedures, the application and approval of permits have to be digital, seamless and in a timely manner. ANGA supports the Commission’s steps in this direction.

In some aspects though, the proposal falls behind our expectations and sometimes even counteracts on its own objectives. This goes specifically with a view to differing market power shares between competing undertakings in the telecoms sector. The ex-monopoly factor should be considered stronger in many of the provisions of the GIA in order to better balance the remaining asymmetries between SMP operators and competitors. In fact, the GIA should refrain from introducing new symmetric access provisions or any provisions that invite strategically damaging behavior by the SMP operator.

The EU legislator has to implement safeguards that prevent distortion of competition. In this regard, Germany and its specific competitive situation and its fiber deployment status have to be taken into account: Germany is one of the big laggards in the nationwide roll out of fiber networks. It accounts for more than 30 per cent of the remaining fiber deployment in the EU. Hence, the GIA and its approaches have to work in and for Germany; otherwise it will not live up to the expectations. In Germany, we still have significant market power in one undertaking that is currently following a deterring strategy. This behavior must not be encouraged by the GIA.

We currently see economically and societally damaging behavior by Deutsche Telekom in their strategic overbuilding existing or planned fiber networks instead of using open access offers. This behavior could be supported by some of the suggested rules in the GIA. This goes for the right to access VHCN physical infrastructure instead of using VHCN active access offers, broad transparency obligations for all telecoms operators and the obligation to coordinate civil works or otherwise dimension ones network big enough for third-party access.

We call on the EU legislator to reconsider this further shift of power towards the ex-monopolists. The objective to accelerate the rollout of gigabit networks especially in the member states lagging behind in fiber deployment should be the driver of the following discussions about the GIA.

II. In detail

1. Article 3 – Access to existing physical infrastructure

a) Article 3 para. 1 GIA – Access to existing physical infrastructure

Article 3 of the GIA proposal offers network operators the possibility to utilize existing networks to deploy new very high capacity networks (VHCN). This claim entails any kind of physical infrastructure, irrespective of whether it is a utility network, a broadband network or even a VHCN. This last constellation can have specific competition implications that have to be considered.

The obligation for all VHCN operators to open up their physical infrastructures to competitors is *de facto* a symmetric regulation. Such symmetric regulation is tied to special conditions under the European Electronic Communication Code (EECC – Directive EU 2018/1972). Article 61 para. 3 sub-para. 2 EECC poses high requirements for such symmetric regulation beyond the first concentration or distribution point. That is necessary to prevent distortions of competition and strategical requests for usage especially by the SMP operator.

Article 3 of the GIA proposal does not foresee such requirements for the use of VHCN physical infrastructures by competitors. Recital 16 only states, that public electronic communications networks operators “may in appropriate cases give access to their networks so that other networks can be deployed” without further clarifying these appropriate cases. In ANGA’s view that is not enough to prevent distortions of competition between competing VHCN operators.

The same requirements as in the EECC should therefore apply for any access rules to VHCN in the GIA. As an alternative, VHCN should be removed from the obligation in Article 3 of the proposal.

b) Article 3 para. 3 lit. f) GIA – Exceptions from the access granting obligation

Article 3 para. 3 lit. f) GIA grants operators of electronic communications networks the right to refuse access to their physical infrastructures if they offer “viable alternative means of wholesale physical access to electronic communications networks” that are “suitable for the provision of very high capacity networks”. The chosen wording suggests that offering access to the given network on an active basis to provide a given service would not suffice to meet the requirements of the right to refusal. It would thereby deviate from the corresponding provision in the German telecommunications act (section 141, para. 2, no. 6 TKG).

The German law grants the right to refusal also if a requested network operator offers active access (e.g. bit stream access) to their network. This makes sense for the German market, as it helps balancing Deutsche Telekom’s market power: Deutsche Telekom cannot just ask for physical access for strategic reasons and overbuild an existing VHCN, especially fiber network. Requested network operators can prevent such overbuilt by offering active access and thereby also make most of their active network capacities – bringing down unit costs and energy use per customer.

ANGA therefore suggests, to leave it open to member states to apply diverging rules for alternative access under Article 3 para. 3 lit. f) GIA.

2. Article 4 para. 4 GIA – Exceptions from transparency obligations

Article 4 GIA introduces a new EU wide obligation for network operators to make available certain minimum information on their physical infrastructures. This obligation is limited by exceptions given in article 4 para. 4 GIA, especially as regards critical national infrastructure.

From ANGA’s point of view it is crucial to consider security threats to critical infrastructure. The benefits of a centralized data collection have to be weighed against the risks of an attack. The right to access the information in such centralized data storage has to be as narrow as possible to best prevent sensitive

data to be leaked to unauthorized persons. Also, the respective network operator needs to be informed about the data that has been requested about their infrastructure and the reasons and timespans for such request. The integrity of trade and business secrets always has to be ensured. On the other hand, access to information and respective transparency about infrastructures financed by public means and/or operated by the SMP operator needs to be available to all VHCN operators to limit the potential for – likely permanent – market power transfer from copper to fibre.

3. Article 5 – Coordination of civil works

a) Article 5 para. 2 – Obligation to coordinate civil works if publicly financed

Article 5 obliges network operators who conduct fully or partially publicly financed civil works to coordinate with other operators upon request. In the context of the Broadband Cost Reduction Directive the discussion arose if subsidiaries of municipal utilities automatically fall under this obligation as they are in the public domain. ANGA understands that this question has been clearly answered: subsidiaries of municipal utilities do not fall under the publicly financed obligation as they are economically independent from their municipal mother.

ANGA suggests to clarify in the GIA, that subsidiaries of municipal utilities do not automatically fall under the coordination obligation.

b) Article 5 para. 3 sub. para. 1 – Exceptions from coordination obligation

According to article 5 para. 3 network operators can skip the obligation to coordinate their civil works under certain conditions. Para. 3 does not mention its reference to para. 2, though. This leads to irritations: It remains unclear, if the exceptions also apply to civil works that are privately financed – which would imply that the obligation to coordinate in the first place would also apply to privately financed civil works. That would contradict article 5 para. 2 GIA that clearly only obliges operators to coordinate if they conduct publicly financed civil works. For ANGA it appears only logical, that para. 3 references to para. 2. In case of privately financed civil works operators have to be free to deny coordination for any given reason – or even without reason.

ANGA requests to clarify that article 5 para. 3 refers to para. 2.

c) Article 5 para. 3 sub-para. 2 – Dimensioning obligation instead of coordination obligation

Keeping in mind, that by the logic of article 3 para. 1, 2 and 3, requests to coordinate in case of privately financed civil works can be refused for any – or even without – reason, it appears irritating, that para. 3 sub-para. 2 foresees a special obligation to dimension one's physical infrastructure big enough to grant access to any requesting third operator in the future. This goes at least for privately built out areas. This obligation contradicts the economic freedom of operators to build their networks as they choose and also grant access to their network based on voluntary and market conform negotiations. It basically obliges operators to either coordinate their civil works even if privately financed which entails the immediate risk of overbuilt by the SMP operator or it forces them to open their networks on the passive level to any competitor which again is some sort of symmetric regulation. Both requires special justification that the Commission lacks to give.

ANGA therefore requests to delete article 5 para. 5 sub-para. 2.

4. Article 6 – Transparency on planned civil works

According to article 6 GIA all network operators have to make available information on planned civil works via the single information point. Other operators have the right to access the information in electronic format, upon request, via the single information point. This right can only be restricted in very

limited circumstances, i.e. to the extent necessary to ensure the security of the networks and their integrity, national security, public health or safety, confidentiality or operating and business secrets.

ANGA sees this broad obligation to make information available and the according broad access rights critical. Information on planned civil works is sensitive as it offers insights into the business plans of an operator. It can therefore be strategically used to disturb the plans of the undertaking by competitors. This goes especially for the SMP undertaking which would quickly lead to competition distortions in case the SMP operator pursues a deterrence strategy with intent to harm infrastructure investment incentives for third parties. This is certainly the case in Germany, so this requirement will endanger the rollout and investment goals of the EU.

As there is no obligation for operators to coordinate their civil works as long as they are privately financed (article 5) there should neither be an obligation to make available information on such civil works.

ANGA therefore requests to narrow the obligation to make available information on civil works only if they are publicly financed.

A more specific issue arises from the time limit in that the information on planned civil works shall be made available by operators. Article 6 para. 1 sub-para 2 requests them to make the information available as soon as it is available 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. This provision ignores two practical facts: (1) network operators employ contractors with their civil works and hence do not have the information in question; they would need to contractually oblige their business partners to hand over the information and (2) even contractors do usually not have the information three months prior to the submission of the permit request; i.e. such permit requests are sometimes issued only days before civil works are planned to be conducted. This is especially the case for civil works related to FTTH access networks and when using fast, modern deployment methods. In such cases civil works happen mostly within a day (from opening to closing the surfaces) – those reporting requirements will therefore dramatically reduce the dynamic and flexibility of the FTTH roll-out.

ANGA therefore requests to shorten the minimum time span to make available information on civil works to two weeks prior to the submission of a permit request.

5. Article 7 – Procedure for granting permits, including rights of way

a) Article 7 – Streamlining of permit granting procedures highly appreciated

ANGA highly welcomes the Commission's approach to introduce an obligatory single point of contact for network operators for the permit granting process. This obligation for member states is long overdue. The concentration of responsibilities as regards the permit granting is one of the biggest enablers to speed up the rollout of gigabit networks.

We also support the shortening of the time spans for the legal fiction of completeness (15 working days) and the legal fiction of permit granting (four months), article 7 para. 5 and 7.

b) Article 7 para. 4 – Rejection of permit applications

According to article 7 para. 4 GIA authorities shall reject within 15 working days permit applications if the requesting operator has not made available information on the planned civil works according to article 6 para. 1. ANGA sees this provision critically as it gives special force to the unproportionate obligation to make available information on planned civil works according to article 6 para. 1 even if the works are privately financed. We believe that such obligation should not exist for privately financed civil works (s.a.). Consequently, the permit granting must not be linked to the making available of such information.

ANGA therefore requests to delete article 7 para. 4 GIA.

6. Article 8 – In-building physical infrastructure and fibre wiring

a) Article 8 – Reference to the known concept of VHCN

Compared to the in-building provisions in the Broadband Cost Reduction Directive that refer to “high-speed-ready in-building physical infrastructure” the GIA makes a shift towards “fibre-ready in-building physical infrastructure”. The focus on fiber-ready irritates for two reasons. (1) The EU has not set any infrastructure objective. It has given itself the objective to provide all households with gigabit connections by 2030, irrespective of the used technology. (2) In the EECC the EU promotes the deployment and uptake of VHCN, again not fiber or any other given technology.

These broader approaches make sense as the focus on one specific technology does not represent current and near future technical practices. As long as different network technologies are used across and in member states, it appears illogical to narrow in-building infrastructure to one specific technology all across the EU.

In addition such a “fibre-only” approach would work to the detriment of existing VHCN like HFC-networks based on DOCSIS 3.1 for two reasons: 1) In new or modernized buildings which are covered already by HFC-networks “at the doorstep” customers can presumably not be connected by coax but only with fibre, which entails lower quality and higher cost. 2) Even in existing buildings with coax inhouse networks a regulatory supported “fibre-only” model may propel removal or exchange of coax for fibre only. Both will harm competition and consumer choice based on VHCN infrastructure competition.

ANGA therefore suggests to align the GIA with the EECC and refer to “VHCN-ready in-building physical infrastructure” in article 8. In addition it must be made clear that already existing VHCN capable in-building infrastructures may not e removed.

b) Article 8 para. 4 and 6 – Technical standards and specifications for in-building infrastructure to be permission requirement

Member states shall adopt the relevant standards or technical specifications to clarify the requirements for “fibre-ready in-building physical infrastructure”. Member States shall make the issuance of the building permits conditional upon compliance with these standards or technical specifications.

ANGA sees this link between technical objectives for in-building broadband infrastructure and the granting of much broader building permits critical due to the above (point 6 a)) mentioned reasons. ...

c) Article 8 para. 5 – Fibre-ready label

Buildings that are equipped according to the given technical requirements shall be eligible to receive a ‘fibre-ready’ label. As mentioned above, ANGA sees the Commission’s focus on one specific in-building broadband infrastructure critical. We suggest that all VHCN technologies should be considered when discussing labels for buildings and thus replace the term “fibre-ready” by “gigabit-ready” for instance. In general, informational gains of such labelling are doubtful and costly for operators with benefits for the certifying body in the first place.

Berlin/Köln, 16.05.2023

The German Broadband Association ANGA e.V. represents the interests of more than 200 undertakings from the German broadband industry. Among its members are network operators like Vodafone Germany, Tele Columbus (PYUR), EWE TEL, NetCologne, M-net, wilhelm.tel and several technology suppliers. They offer more than 20 million customers TV and broadband services.