VERBAND KOMMUNALER UNTERNEHMEN e.V.

OPINION

Position paper on the Draft BEREC Guidelines on the Criteria for a Consistent Application of Article 61(3) EECC

Brussels/Berlin, 31st July 2020

Transparency register / registration number.: 1420587986-32

The German Association of Local Public Utilities „Verband kommunaler Unternehmen" (VKU) represents around 1,500 local public utilities in Germany, operating in the sectors of energy, water/waste water, waste management and telecommunication. In 2018, VKU's members, which have more than 275,000 employees, generated a turnover of around 119 billion euro of which more than 12 billion euro were reinvested. In the end-customer segment, VKU's member companies have a market share of 62 percent in the electricity market, 67 percent in the natural gas market, 90 percent in the drinking water sector, 74 percent in heating supply market and 44 percent in waste-water disposal. Every day, they dispose of 31,500 tons of municipal waste through separate collection and take a vital role in ensuring recycling rates of 67 percent, which rate the highest within the EU. Additionally, more and more local public utilities are committed to the deployment of broadband infrastructure. 190 members invest more than 450 million euro every year. They increase their investments by around 30 percent each year. When deploying broadband infrastructure, 93 percent of local public utilities rely at least on fibre to the building.

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DIE KOMMUNALEN UNTERNEHMEN

I. Background

The digital transformation is one of the most important current social, political and economic challenges. Local public utilities, as pivotal infrastructure service providers, contribute substantially to the success of the digital transformation by providing services and infrastructure that are indispensable in the digital age, not only for the individual citizen but also for economic value creation. They already make significant contributions by encouraging the deployment of full-fibre networks, often beyond metropolitan areas. Especially in sparsely populated, rural regions with low customer density the high civil engineering costs of such projects and the resulting long payback periods tend to considerably reduce their attractiveness for exclusively profit-oriented operators. Local public utilities, on the other hand, take responsibility for their respective region as modern public service providers – within a competitive framework, but strive for more than economic advantage. In VKU's membership alone, more than one in ten local public utilities is active in broadband roll-out, even more are planning to enter the market.

In its Communication "Connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society", the European Commission thus aims to equip all private households in Europe with connectivity of at least 100 Mbit/second by 2025 and provide the most important points of economic and social life with gigabit speeds. The European Electronic Communications Code (EECC) aims at 'promot[ing] connectivity and access to, and take-up of, very high capacity networks'. This is claimed to be the core of the EU's ambition towards a gigabit society. Therefore, the Body of European Regulators for Electronic Communications (BEREC) has been entrusted by the EECC with the task of drafting guidelines that establish criteria for a consistent application of Article 61 (3) of the EECC. Hereby we would like to therefore take the opportunity to comment on the draft Guidelines on the Criteria for a Consistent Application of Art. 61 (3) EECC.

II. Comments on the draft BEREC Guidelines for the consistent application of Article 61 (3) EECC

As the Guidelines set out, Article 61 (3) intends to promote sustainable competition in the interest of the end-user, connectivity and efficient investments without a replication of the network infrastructure. However, imposing access to networks of providers that do not have significant market power needs to be considered very carefully. These obligations hold the potential to stifle investments in full-fibre networks by the first mover which are needed in Germany as one of the European countries with the lowest roll-out rate of fibre networks. Such investments are made mainly by local public utilities. Even without a regulated access, 55% of VKU members offer access to their networks to other providers. An internal survey revealed that another 25% local public utilities plan to change their business model into an open access model.

To Item (e): High and non-transitory economic or physical barriers to replication

We generally agree with the definition of high and non-transitory economic and physical barriers as well as the list of barriers. However, following the logic set out by the guidelines we conclude that high economic barriers for an access seeker may only exist if the net present value of replication's business case is negative. According to paragraph 56, "the main economic barriers to replication of telecommunications networks are related to economies of scale and sunk costs". In rural and semi-rural areas access seekers will need to undertake civil engineering works, since there are no networks until the first concentration point that they can use to get access to. A network provider will have to initially deploy a network until the first concentration point in an area which, due to its rural nature and population size and density, is characterized by high economic barriers. In contrast, in urban areas, which are supplied through a third party's network, access seekers will be able to bypass civil engineering works by using the other provider's parallel infrastructure to access the first concentration point. In conclusion, the need for civil works is by definition of the guidelines very likely to cause high economic barriers. In turn the obligation of paragraph 2 of Art 61(3) EECC will be imposed on almost all private network owners in rural regions. This leads to a disincentivisation of first movers' private investments especially in rural areas. **The probability or the fear of being regulated after a short advantage period should be reduced by setting a minimum payback period of 10 years in order to account for the longer time it takes for infrastructure projects to amortize.** In addition, the period of five years that enables providers to capture the first-mover's advantage (advantage period) should be extended (see below).

To item (c): Network deployment to be considered new

We can expect that a five-year period of first mover advantage to jeopardize and reduce investments by increasing its risk. According to paragraph 88, "in case of new deployments, a first mover advantage might be needed in situations where the prospect of achieving economies of scale is low and there is low investment certainty including on future demand". On the other end, the draft argues in paragraph 89 that with an appropriate access price payed by the access seeker, the network provider could generally enhance the take up of the access network, which in turn would positively affect the economic viability for all network users. We share this view, that the opening of a network might lead to benefits for the access network provider. The development and trend among VKU members suggest this idea, however, they have initially had the flexibility to adjust during the first years. **In order to not scare of those investments that need a longer advantage period, the five years should best be extended to eight, but at least to a minimum of seven years.**

To item (d): Projects to be considered small

According to Art. 61 (3) subparagraph 3 (b) not only should the obligations not compromise the economic or financial viability of a new networks, but especially of projects that are small and local. We understand from paragraph 95 and 96 that the size refers to the size of the undertaking, not the project in question. The size of the undertaking, in turn, is judged relative to the total market in terms of turnover and/or broadband connections, according to paragraph 97-99**. We share the view that the size of the undertaking rather than that of the project is the relevant factor for the determination of access obligations. A simple rule of thumb is also appropriate. We do not, however, understand the last criterion (iii): it is not clear whether the 500 potential end-users refer to a specific project or to the total number of the undertaking's connections.**