ETNO POSITION PAPER

European Commission's proposal

"Gigabit Infrastructure Act"

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ETNO response to the European Commission call for feedback on the Gigabit Infrastructure Act proposal

ETNO attaches great importance to the current proper implementation of the Broadband Cost Reduction Directive (BCRD) and its successor, the Gigabit Infrastructure Act regulation, in order to help accelerate the deployment time of 5G and Gigabit broadband, as well as to help reduce the overall cost of deploying these networks.

The BCRD dates back to 2014, but has not been successfully implemented everywhere. ETNO believes a strengthened Regulation could improve this. From a practical timing perspective, **the EC proposal for a Regulation as a legal instrument is welcome.** We believe it is the only realistic way to get the renewed, strengthened legislation applicable in a timely manner as the most substantial part of the very high capacity networks (VHCN) roll-out will take place in the next few years. A new Directive, given the additional time given for transposition, would not be applicable in a timely manner to support VCHN deployment and Europe's effort to achieve the 2030 Digital Decade targets.

At the same time, it is also paramount that measures already taken by Member States that have proven to be effective in facilitating the deployment of high speed networks and which prospectively will also be able to support the roll-out of VHCN are not jeopardised by the new Regulation provisions. The measures provided in the Regulation should be the minimum to be adopted, especially in the area of permit granting, the Regulation should allow more favourable situations in Member States in terms of shorter deadlines and exemptions wider than those identified by the Commission through the implementing act.

1. Scope (article 1)

ETNO agrees that the Regulation aims at facilitating and stimulating the roll-out of VHCN, however it is also important that any network capable of contributing to the achievement of the Digital Decade Policy Programme 2030 is covered. In this regard, **we welcome that the provisions also cover elements of VHCNs** and the clarification at recital 19 "*These elements include those capable of delivering broadband access services at speeds of at least 100 Mbps in line with the technological neutrality principle*.".

In addition, we deem important that the Regulation specifies that **both fixed and wireless VHCNs are in the scope**. For the sake of legal certainty, **a definition of VHCN**, as defined in article 2(2) of Directive (EU) 2018/1972 (hereafter "EECC") should also be included in the Regulation.

2. Definitions and access to existing physical infrastructure (article 2 and 3)

a) Definition of physical infrastructure and entities obliged to meet access requests

The **extension of the scope to non-network physical infrastructure owned or controlled by public authorities, namely buildings or entries to buildings, and any other asset including street furniture (such as light poles, street signs, traffic lights, billboards, bus and tramway stops and metro stations) is essential**.

We **support the extension of the obligation to meet access requests to public authorities**, that can provide access to physical infrastructures relevant to the deployment of fixed and wireless very high-capacity networks.

Public authorities have public buildings, street furniture (benches, kiosks, …), traffic signalisation and lighting poles, etc. . Providing access to these elements would reduce a major barrier in the roll out of new 5G-based mobile networks.

The EECC already required Member States to ensure that operators have the right to access any physical infrastructure under the control of national, regional or local government authorities that is technically suitable for small areas access points, or that is necessary to connect such access points to a backbone network (art. 57.4 EECC). The EECC gave the examples of street furniture, such as light poles, traffic signs, traffic lights, billboards, bus and streetcar stops and subway stations.

Indeed, these infrastructures, due to their dense distribution, **constitute very valuable locations for the placement of small cells**. For the roll out of so-called low-range wireless access points (small-cell 5G also called Small-Area Wireless Access Points (SAWAPs) which comes at a later stage, after the buildout of the basic coverage and capacity layers), mobile operators need a significant number of points to build a capillary network of small cells. For this to happen, operators must be given a smooth right of access to those public locations to adequately respond to demand. This includes public buildings as well as other public infrastructure (lampposts and traffic lights, etc.).

In addition, a similar need for access, not only to public buildings and physical infrastructure, but also to land itself belonging to public authorities, is increasingly relevant.

b) Fair and reasonable terms and conditions (article 3.1 and 3.2)

We welcome the effort made by the EC when proposing pricing measures that facilitate competition in an infrastructure market such as “fair and reasonable”, including the consideration of the recovery of costs incurred by operators.

However, in order to propose a pricing methodology that really favours the creation of a competitive infrastructure market and ensures the regulatory certainty necessary to encourage investment in new infrastructure, it is necessary that **the provisions of the GIA regarding “fair and reasonable” be further augmented and complemented with sufficiently detailed guidelines to avoid excessive prices**, and help to set, without inefficient delays and litigations, reasonable market prices to foster investment from operators. To facilitate the negotiation of economic conditions without the need to resort to dispute resolution, the Regulation should require the adoption of guidelines clarifying further the criteria for the definition of prices. Nevertheless, the consideration of “fair and reasonable” should not have a disruptive application in relation to those network operators which current business model is based on renting infrastructure to third parties (TowerCos, Wholesale-only operators) as it could lead towards long dispute resolution processes and put at risk agreed long-term contracts.

Moreover, public sector bodies owning or controlling physical infrastructure **shall meet all reasonable requests for access under non-discriminatory terms and conditions.** In case of a dispute, such bodies should justify any price for the usage of their physical infrastructure exceeding the administrative costs, on the basis of the duly justified imputable costs. The GIA should explicitly recognise that this should be a minimum standard. Additionally, it is without prejudice to other arrangements or rules for public sector bodies or network operators other than operators (as defined in Article 2, point (29) of Directive

(EU)2018/1972) that may either exist in a given Member State or may be adopted in the future reflecting on specific national needs to promote VHCN rollout, such as establishing a link between the price and costs caused by usage by operators.

We strongly believe that the above-mentioned approach to access prices to civil infrastructure regulated under GIA could lead to a true competitive market, where commercial agreements between operators could be entered into.

c) Relationship symmetric regulation & ex ante regulation (article 3.5)

It is important not to duplicate existing access regimes. We welcome the general principle for those assets where access obligations already exist under the EECC or under the national state aid rules.

But this provision seems to implicitly possibly indicate that ex-ante SMP regulation takes precedence over the symmetric regulation from this GIA Regulation.

However, the symmetric access obligation pursuant to the GIA regulation should be taken into account by the regulator, among other factors, as provided for in Article 67(2) of Directive (EU) 2018/1972, as a starting point for considering whether to impose the ex-ante SMP regulation. In case GIA consideration might not suffice to address infrastructure market situation, NRAs should duly justify this assessment.

We believe that a strong push to incentivise market-based conditions for symmetrical access to infrastructure would be the basis for the creation of an enlarged competitive infrastructure market.

As the objective is to favour access to different network infrastructures, but if in a part of the market, those assets corresponding to SMP operators are cost-oriented, the application of "fair and reasonable model" only for that part of the market without the qualification of SMP operator, could in some cases disincentivise investment in own infrastructure development by alternative operators.

We would like the provisions in Article 3.5 to take this point into account, or the Recitals to outline this broader framework.

3. Single Information Point

ETNO appreciates the clarity brought by the draft article. Further guidance on the functioning of the Single Information Point (SIP) is helpful. We think that a preliminary inventory of existing information, database, and process should be done at national level, to take lessons from possible good practices and include the existing ones, as far as possible.

We understand that the formulation 'via' the SIP means as an entry point, liaising with other possible platforms. It is important to stress in the context of the GIA that the current functioning platforms for relevant information on network infrastructure and for coordination as they operate under the legislation in accordance with the BCRD are recognised as compliant within this proposed GIA Regulation.

It is recommended to continue working with these platforms when relevant even if supplementary functionalities must be implemented to suit the new Regulation provisions.

4. Coordination and transparency of civil works (article 5 and 6)

a) Subjects obliged to accept coordination requests

The Regulation confirms current provisions of the BCRD that impose an obligation to accept coordination requests only on operators performing or planning to perform civil works partly or fully financed by public funds. **This obligation of coordination of civil works publicly financed of article 5.2 is appropriate.** In addition, also in alignment with the extended scope of Article 3 provisions, we deem that along with network operators performing publicly financed civil works, public sector bodies performing civil works shall also meet any reasonable request to coordinate presented by an operator with a view to deploying elements of VHCNs or associated facilities.

Provisions of Article 5.3 are unclear and should be amended. First, after the words "A request to coordinate civil works" it is necessary to insert "which are fully or partially financed by public means" to make clear that Article 5.3 is providing refusal grounds to a duty outlined in Article 5.2 as opposed to being an exhaustive list of refusal grounds to all possible requests. We would also suggest, for language consistency, to use the term "operators" as defined in Article 2 point (29), as used elsewhere in the GIA instead of "undertaking providing or authorised to provide public electronic communications networks".

Furthermore, the second subparagraph instead of "If a request to coordinate is considered unreasonable on the basis of the first paragraph…" should read "If a request to coordinate is considered unreasonable on the basis of the first subparagraph (…)". The first reason for this suggested amendment is that the first paragraph of this Article (i.e. Article 5.1) includes no such reasonability considerations, unlike article 5.3, first subparagraph, which does include them. Secondly, because if unchanged, the wording would create a manifestly disproportionate obligation to build extra capacity in cases of any refusal of coordination, not only of the coordination of works partially or fully funded via public means.

b) Agreements on allocation keys (article 5.1)

We support the addition in this provision that agreements on the apportionment of costs be included in the agreements on the cooperation of civil works. The announced guidance on this article 5 is welcome.

c) Transparency (article 6)

The minimum information to be **provided via the SIP related to planned civil works is intended to be mandatory** while in the existing Directive it is only upon request. This proposal may have disproportionate effects:

- As ex-ante regulation, including access obligations, will likely remain for some time in many EU countries, such wide scale duty would lead to the ability of potential access seekers to easily and well in advance monitor planned rollout projects by incumbents and subsequently benefit from the regulated access, instead of rolling out an own infrastructure, and reducing the retail competition instead of reinforcing it, therefore having a negative impact on end-users;
- In practice, many network roll out decisions, and subsequent filing for permits, are made closer to filing the request for permit than 3 months. As a result, this provision risks delaying network roll out by imposing an unnecessary "regulatory stillstand" between finalising the project filing and the filing itself, instead of speeding up network rollout. It may therefore compromise most of the benefits of the new, shorter deadline for permit granting generated by Article 7;

The reasons for refusing a request have been deleted, while we considered them as relevant and to be maintained.

Clarification is needed in the article 6.1 whether the information in the SIP is only accessible upon request.

5. Permit granting (article 7)

ETNO welcomes the proposed simplification of procedures concerning permit granting. Permit granting is widely fragmented and, regrettably lengthy procedures often involving various levels of administration, result in administrative burden that impacts network deployment. Therefore, consistent procedures, aligned timings and coordination in the permit granting should ease network deployment.

ETNO especially welcomes the new provisions introducing:

- The **principle of national consistency of the procedures applicable for granting permits**, including rights of way;
- The **right to submit and monitor the request via the SIP** in electronic format;
- The term of **15 days to refuse a request** due to incompleteness of information provided;
- The **silent-assent principle** ("tacit approval") for granting permits and rights of way;
- **Permit exemptions** to be defined by the Commission by the mean of an implementing act;
- **Fees not exceeding administrative costs**;
- **Compensation** for any damage due to delays in the permit granting.

a) Deadlines for permit granting

These provisions, some of which are already present in some Member States, will facilitate permit granting. However, we deem that the deadline of 4 months, to grant or refuse a permit, even if applied to a new definition of permit that includes the overall set of decisions taken simultaneously or successively by one or several competent authorities needed, **is still too long to properly accelerate and foster VHCNs roll out**. ETNO would like to point out that some Member States already apply shorter deadlines, however a **problem of enforcement still persists**. A deadline of **maximum 3 months** (that means that Member states may provide for a 3-month deadline or shorter if needed for some categories of permit) would better meet the objective of facilitating and fostering the deployment of VHCNs.

In addition, today there is a lot of fragmentation in the permit policy to work in the public domain, with a very heavy administrative burden that is sometimes difficult to coordinate: often several individual permit procedures to submit, and often extremely small-scale: street-by-street.

We ask to prescribe by default a more streamlined permit approach with global project permits (for the entirety of a broader homogeneous deployment area (e.g. neighbourhood approach) and this in line with the planned deployment cycles of the operator involved with only one notification afterwards for each local partial implementation issued within a short reasonable timeframe

A street-by-street approach from the existing licensing system still fits the situation of works on existing networks for telecom, electricity, gas. However, this is unsuitable for the roll out of large-scale, new infrastructures, such as fiber, where speed is an additional critical factor. The street-by-street approach creates overtime for the permitting authority and operators, with overly long waiting times for each construction in a new street.

Therefore, provisions of article 7.5 are important. In this way, public authorities have a limited initial period of 15 days to assess the completeness of the application file. This would mean that if the licensing authority does not request further documents, a decision must be made on the basis of the initial application. This could positively result in more applications being processed within the prescribed period.

The success of this proposed measure depends on proper implementation. Control and enforcement by national and EU authorities should be required.

b) Permit exemptions

Having an initial list of elements to deploy VHCN that shall not be subject to permit granting in the GIA will ease such deployment. It is then of utmost importance to get also the related implementing act finalised by the date of the entry into application of the Regulation (i.e. 6 months after entry into force of the Regulation). It shall be intended as a minimum list of exemptions, without prejudice to additional exemptions already present or that Member States may provide for in the future.

In this regard, we believe that the provisions of Article 16 should be deleted as contrary to the objective of promoting the development of VHCN.

Permit exemptions are already foreseen for specific works in several Member States. Where the deployed infrastructure follows certain technical specifications, its installation should be exempted from permits (i.e., max radiation, certain distance from power cable, etc.), as already provided by the EECC for small-cells. Such exemptions from permits should occur for example, but not be limited to:

- Roofs of public buildings
- Duct deployment along major roads
- Aerial cabling over posts and poles
- Upgrades of existing deployments and technologies not significantly altering the physical load of the infrastructure
- Civil works in low and middle depth of the ground, such as nano-trenching and micro-trenching

Additionally, permits and rights of way related fees that will not go beyond administrative cost will contribute to the reduction of the deployment costs.

As far as regards fees at article 7.10, by explicitly excluding rights-of-way in this provision, the Regulation seems to agree to charges for the use of the public domain.

The final wording of GIA must address the topic of excessive fees for rights of way which still hinder VHCN deployment in some EU countries. There is a visible discrepancy between the Article 7.10, which reads *"Permits, other than rights of way, (…) shall not be subject to any fees or charges going beyond administrative costs (…)"* and the explanatory memorandum which, on p.12, reads *"it lays down that fees and charges for permits, including rights of way, cannot go beyond the administrative charges."*. We are pleased that the topic of excessive fees for rights of way has been recognised by the EC, and we are convinced that also the wording of Article 7.10 should be amended to incorporate limits on fees for rights way.

We ask for a clear signal in the Regulation that imposing fees also for rights of way goes against the objective of the Digital Decade targets.

6. In-building infrastructure and fibre wiring (article 8)

We welcome that the Regulation now provides that new buildings and majorly renovated buildings are fibre-ready. The extension of the obligation to provide also inbuilding fibre cabling is acceptable, as long as the management of the service is given to operators.

As for the provision in article 8.4 related to standards or technical specifications it is important that those are developed by operators in accordance with their own technical rules and industry-led best practices, thus in consultation between network operators and building owners/building promoters/installers.

7. Access to in-building physical infrastructure (article 9)

We note that the GIA includes a provision at article 9 paragraph 5 regarding the right to property. We fear that this provision may (even though unintentionally) constitute an obstacle to the migration to full fibre very high capacity fixed network, contrary to the objective of the EECC and the GIA itself if it opposes the right to access an access point, in-building infrastructures or the premises of the subscriber.

We have also to remind the need for clarifying the notion of "fair and reasonable" in order to avoid excessive prices (similarly as under article 3).

8. Dispute settlement (article 12)

The recourse to dispute should **be the last resort**. It could be avoided with more guidance notably on the notion of "fair and reasonable" terms and conditions to encourage partners to reach an agreement.

Regarding Recital 57, we deem that in order to assess whether a price is fair and reasonable, the dispute settlement body should take into account any specific national conditions and any tariff structures put in place, but it should not take as reference any previous imposition of remedies by the NRA (ie. cost orientation). Accordingly, we suggest avoiding any reference to remedies previously imposed by national regulatory authorities when setting guidance about what market prices can be in the provisions of symmetric regulation proposed by GIA. In any case, the dispute resolution should be based on a case-by-case assessment.

ETNO believes that four months for having a binding decision to resolve the dispute is too long in respect to the operator's deployment plannings. ETNO would welcome a shorter period (i.e. maximum 2 months) as it is already observed in practice. In any case the Regulation should provide for a maximum period without prejudice to shorter deadlines that may be set by Member States.

9. Competent bodies (Article 13)

The fact that competent body for dispute settlement must be independent from the public bodies covered by this proposal is a healthy provision.

10. Entry into force and application (article 18)

ETNO **supports the EC proposal to apply this Regulation 6 months after its entry into force**. This timeline will support speeding up the deployment of VHCN and should not be extended. To achieve the digital decade targets 2030, the Gigabit Infrastructure Act should be applied in Member States as soon as possible.

ETNO (European Telecommunications Network Operators' Association) represents Europe's telecommunications network operators and is the principal policy group for European e-communications network operators. ETNO's primary purpose is to promote a positive policy environment allowing the EU telecommunications sector to deliver best quality services to consumers and businesses.

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