
# FIBRE CABLE NETWORK INVESTMENTS IN GERMANY

Regulatory hurdles for investments in German fibre cable networks have hampered certain investment activities in this important infrastructure sector. The German Federal Network Agency has now published its vision for the future regulatory environment of fibre cable networks which will open the German telecommunications sector to new forms of cooperation and investment.

**Key issues**

- "Light" regulatory framework expected for FTTH/B network expansion in Germany
- Flexible business models may create investment opportunities
- Co-operation models allowed to incentify fibre network expansion

## BACKGROUND

Germany has been and still is – with regard to fibre network expansion – an underdeveloped country. Compared to all OECD member states, Germany places third last in its share of fibre network connections (fibre to the home/building – "**FTTH/B**"). Only 2.6 % of all broadband network connections up to the end-user ("**last mile**") are fibre network connections, while the vast majority of broadband connections still rely on copper cables, upgraded by the vectoring technology.

This lack in fibre network expansion is generally attributed to two major developments in recent years. Firstly, there were no real business incentives for the incumbent Deutsche Telekom AG ("DTAG") to intensify its fibre network expansion plans due to its longstanding significant market power in the telecommunications infrastructure sector. DTAG preferred to use vectoring technology to upgrade existing copper cable networks. Secondly, past efforts of DTAG to expand its fibre network by cooperating with other telecommunications companies or infrastructure investors Faced regulatory challenges. The German Federal Network Agency (Bundesnetzagentur – "BNetzA") considered such investments to potentially consolidate or even expand the already existing significant market power of DTAG.

## CURRENT REGULATORY DEVELOPMENTS

The EU passed the so called European Electronic Communications Code ("**EECC**") in 2018 by adopting Directive (EU) 2018/1972 as key part of its strategy to establish a digital single market. Its aim is to unify the member states' future digital policies and thus provides a legal framework, *inter alia*, for the fast and EU-wide expansion of the 5G network as well as FTTH/B networks.

Article 76 EECC stipulates a "light version" of the regulatory framework for undertakings with significant market power in case of investment in "new very high capacity network expansion" such as fibre networks. The regulatory burden is to be lifted significantly to facilitate co-investments, for example by agreeing on co-ownership or long-term risk sharing through co-financing.

Instead of imposing strict price control, transparency and non-discriminatory obligations as usual, the regulatory control is to be limited to the assessment of business commitments between telecommunication companies and other companies such as infrastructure investors. In case these commitments fulfil basic regulatory principles pursuant to Article 76 section 1 – such as non-discriminatory access for competitors – no further regulatory obligations will be imposed. This legal regime is designed to better take into account investment interests by third parties willing to enter the markets.

Although European legislation will only be transposed into German law by the end of 2020 (notably by changes to the Telecommunications Act – TKG) and therefore is currently not strictly binding, the BNetzA already considers the effects of the future regulatory framework: On 27 May 2019 the BNetzA has published its draft consultation paper "market definition and market analysis for wholesale access to the 'last mile'". The paper starts with assessing that DTAG still has significant market power in the telecommunication networks sector (including copper, coaxial cable and FTTH/B). However, with respect to copper networks on the one hand and fibre networks on the other the consultation paper stipulates that very different competitive circumstances exist on the markets justifying a different regulatory treatment supporting the envisioned expansion of the FFTH/B network. Also, with a view to the European legislation regarding "new very high capacity networks" this new regulatory treatment will differ profoundly from the current regime. The president of the BNetzA stated that the proposal will limit the role of BNetzA to that of a "referee" rather than a strict regulator in cases where access to fibre networks is granted to competitors.

The intention of the new regulation is to make investments in fibre optic networks more appealing by refraining from ex-ante regulatory obligations such as access and price regulation. Telecommunication undertakings as well as infrastructure investors are incentivised to enter into co-operations more easily and negotiate their own pricing models with the objective to replace existing copper cable network by fibre optics without the necessity of BNetzA to impose any regulatory burden. Cooperative investment models will therefore become easier.

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## OUTLOOK AND BUSINESS OPPORTUNITIES

Following the ongoing public participation phase a draft regulatory order will be issued by BNetzA which will set forth the new regulatory framework for the treatment of FTTH/B networks and their expansion. BNetzA expects to issue the final version of this order in early 2020.

By encouraging co-operations between companies active in the telecommunications sector and infrastructure investors the markets will be opened up for investment opportunities. The possibility to negotiate own pricing models instead of being bound by strict ex-ante regulation lays the ground for more flexible business models and is expected to speed up investments significantly Other Constraints such as the availability of fiber cable or access to construction capacity will remain.

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