

Ensuring continued NRA powers to impose symmetric access obligations

Amendments to Article 59, Article 13, Annex I of the European Electronic Communications Code

The draft Code and the draft ITRE Report

The Commission proposes to merge Article 5 of the Access Directive and Article 12(3) of the Framework Directive into Article 59 (paragraphs 1 and 2) of the draft Code, bringing together the provisions on symmetric regulation. The Commission is also proposing to further develop and specify the conditions under which symmetric regulation can be applied. The ITRE draft Report makes limited changes to the Commission's proposal.

As highlighted by BEREC in its Opinion of December 2016¹, we welcome the greater prominence the Commission has given to symmetric regulation in the draft Code. However, rather than expand NRAs' regulatory toolkit, as claimed, these amendments risk unjustifiably restricting NRAs' ability to apply symmetric regulation in practice.

The importance of existing (non-SMP) access powers

In a growing number of Member States, NRAs have imposed, or are considering imposing, symmetric regulation alongside the SMP rules, with a view to driving NGA investment and promoting competition. Symmetric regulation complements (but does not substitute for) SMP remedies – while SMP regulation allows NRAs to address specific competition problems identified via a market analysis, access obligations imposed under Article 5 of the Access Directive (Article 59(1) of the draft Code) are aimed at goals such as securing end-to-end connectivity or the interoperability of services. Access obligations under Article 12(3) of the Framework Directive (Article 59(2) of the draft Code) are aimed at addressing issues such as inefficient network element duplication and localised service bottlenecks which can arise in the normal course of infrastructure roll-out regardless of the overall market power of a specific network owner.

These symmetric powers are particularly relevant where there are multiple operators deploying NGA networks, a market structure which is developing in many Member States where local initiatives are incentivised as a means of promoting connectivity. One advantage of symmetric regulation in such markets is that the access to the infrastructure (which might be owned or managed by one or more operators other than an SMP operator) can be ensured from the start of deployment, rather than await an assessment of the market power of the undertakings, allowing NRAs to promote effective infrastructure-based competition from the

¹ http://bereg.europa.eu/eng/document_register/subject_matter/bereg/opinions/6615-bereg-high-level-opinion-on-the-european-commissions-proposals-for-a-review-of-the-electronic-communications-framework

start.² In some countries, network operators other than the SMP operator might have infrastructure in certain geographic areas to which access is required for rolling out NGA networks. In all such cases, it is important to ensure that NRAs have the ability to efficiently secure adequate access in order to open up relevant bottlenecks. This does not mean that the powers should be unconstrained, as further described below.

- **Article 59(1)**

Article 59(1) recasts (with some amendments) the provisions of the current Article 5 of the Access Directive, which the ECJ has confirmed is a broad power including the right to regulate prices³.

Such powers to impose access-related conditions under Article 59(1) are broad but they are constrained by the cumulative objectives that need to be secured by its intervention:

- the promotion of efficiency,
- the promotion of sustainable competition,
- the promotion of efficient investment,
- the promotion of innovation and
- the giving of maximum benefit to end-users.

Those objectives essentially reflect the criteria that condition the imposition by NRAs of price controls by means of SMP remedies (see Article 13(1) and (2) Access Directive), so they provide an important safeguard in ensuring coherence with SMP regulation and preventing NRAs from acting unaccountably. At the same time, these powers (and the criteria for their use) provide important tools for NRA to ensure that they are able to intervene in circumstances that are not envisaged or catered for under the SMP framework, with its clearly-defined process requiring regular reviews to address competition problems associated with SMP.

Furthermore, for the exercise of NRA powers under both the symmetric and the SMP regimes, the European Commission (with BEREC) retains oversight through the 'Article 7 process' (Article 32 of the draft Code).

This combination of a broadly defined power to impose access obligations combined with a clear set of criteria for its use and an oversight mechanism, provides a highly valuable set of regulatory tools both in its occasional application but also, importantly, in a 'reserve' power role, i.e. in encouraging commercial resolution (to avoid the need for a regulatory intervention) in a wide set of circumstances.

² Some countries, such as Sweden, already have a fragmented wholesale fibre market structure, with a profusion of municipal networks and smaller private operators. Regulating for competition in Sweden might involve over 200 market analyses.

³ It is now settled case law that the means by which NRAs are to ensure adequate access and interconnection, and also interoperability of services, are not exhaustively listed in Article 5: see Case C-192/08 *TeliaSonera Finland* (November 2009); C-556/12 *TDC v Teleklagenævnet* (June 2014); C-85/14 *KPN v ACM* (September 2015); and C-397/14 *Polkomtel v PUKE* (April 2016).

- **Article 59(2)**

Article 59(2) recasts (with substantial amendments) the provisions of the current Article 12(3) of the Framework Directive. These powers enable NRAs to impose appropriate symmetric access obligations where undertakings lack access to viable alternatives to non-replicable assets.

BEREC proposed amendments to the draft Code

The annexed proposed amendments seek to restore NRAs' powers under the current Framework. As well as amending Article 59(1) and Article 59(2) to ensure the Commission's drafting does not inadvertently have the effect of calling into question the existing broad nature of the access powers under Article 59(1), BEREC is also proposing to amend Article 59(2) in order to ensure that NRAs retain the discretion to impose appropriate access obligations where undertakings lack access to viable alternatives to non-replicable assets. To give full effect to these amendments, we are also proposing changes to the related recitals, and to Article 13 of the draft Code and its Annex 1.

Proposed amendments

Amendments to Article 59(1)

1. National regulatory authorities shall, acting in pursuit of the objectives set out in Article 3, encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and the interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, the deployment of very high-capacity networks **where relevant**, efficient investment and innovation, and gives the maximum benefit to end users. They shall provide guidance and make publicly available the procedures applicable to gain access and interconnection to ensure that small and medium-sized enterprises and operators with a limited geographical reach benefit from the obligations imposed. ***Member States shall ensure that national regulatory authorities have the powers to impose such obligations.***

In particular, without prejudice to measures that may be taken regarding undertakings with significant market power in accordance with Article 66, national regulatory authorities shall be able to impose:

(a) to the extent that is necessary to ensure end-to-end connectivity, obligations on those undertakings that are subject to general authorisation and that control access to end-users, including in justified cases the obligation to interconnect their networks where this is not already the case;

(b) in justified cases and to the extent that is necessary, obligations on those undertakings that are subject to general authorisation and that control access to end-users to make their services interoperable;

[(c) in justified cases, obligations on providers of number-independent interpersonal communications services to make their services interoperable, namely where access

to emergency services or end-to-end connectivity between end-users is endangered due to a lack of interoperability between interpersonal communications services;^{4]}

(d) to the extent that is necessary to ensure accessibility for end-users to digital radio and television broadcasting services specified by the Member State, obligations on operators to provide access to the other facilities referred to in Annex II, Part II on fair, reasonable and non-discriminatory terms.

The obligations referred to in point (c) of the second subparagraph may only be imposed:

- (i) to the extent necessary to ensure interoperability of interpersonal communications services and may include obligations relating to the use and implementation of standards or specifications listed in Article 39(1) or of any other relevant European or international standards; and
- (ii) where the Commission, on the basis of a report that it had requested from BEREC, has found an appreciable threat to effective access to emergency services or to end-to-end connectivity between end-users within one or several Member States or throughout the European Union and has adopted implementing measures specifying the nature and scope of any obligations that may be imposed, in accordance with the examination procedure referred to in Article 110(4).

Justification

The inclusion of the new wording at the end of the paragraph is intended to provide an opportunity for those Member States who transposed Article 5 of the Access Directive (of which Article 59(1) is, broadly, the transposition) narrowly to revisit their national transposition in light of the ECJ case law (cited in Recital 143).

The insertion of “where relevant” is to ensure that NRAs are able to continue to use these powers other than in relation to the deployment of very high-capacity networks.

Amendments to Article 59(2)

2. ***Without prejudice to the generality of the first paragraph, national regulatory authorities may*** ~~shall~~ impose obligations ~~upon reasonable request~~ to grant access to wiring and cables inside buildings or up to ~~the first~~ a concentration or distribution point ***close to the end users, as determined by the national regulatory authority*** ~~where that point is located outside the building,~~ on the owners of such wiring and cable or on undertakings that have the right to use such wiring and cables, where this is justified on the grounds that replication of such network elements would be economically inefficient or physically impracticable. The access conditions imposed may include specific rules on access ***to such network elements and to associated facilities and services***, transparency and non-discrimination and for apportioning the costs of access, which, where appropriate, are adjusted to take into account risk factors.

⁴ In this paper BEREC does not address any concerns it might have on this provision in relation to interpersonal communications services.

Where the obligations imposed in accordance with the previous subparagraph are insufficient to ensure adequate access to the networks elements mentioned therein, national regulatory authorities may impose additional obligations on ~~extend to those owners or undertakings~~ **to grant access, including active or virtual access, upon reasonable request, to relevant network elements** ~~the imposition of such access obligations, on fair and reasonable terms and conditions, beyond the first concentration or distribution point to a concentration point as close as possible to end-users,~~ **and** ~~to the extent strictly necessary to address insurmountable economic or physical barriers to replication,~~ **particularly** in areas with lower population density.

National regulatory authorities shall, **in considering the appropriateness and proportionality of imposing** ~~not impose obligations in accordance with the second subparagraph,~~ **take into account in particular** ~~where:~~

(a) **the existence of** a viable and functionally similar alternative means of access to end-users made available to any undertaking, provided that the access is offered on fair and reasonable terms and conditions to a very high capacity network ~~by an undertaking meeting the criteria listed in Article 77 paragraphs (a) and (b); and~~

(b) in the case of recently deployed network elements, ~~in particular by smaller local projects,~~ the **impact of** granting of that access ~~would compromise~~ **on** the economic or financial viability of their deployment.

Justification

The “without prejudice” language is intended to put beyond a doubt that the powers described in Article 59(2) do not have the effect of narrowing the scope of the powers described in Article 59(1).

The remaining changes seek to ensure NRAs are not restricted in their ability to apply symmetric regulation where undertakings lack access to viable alternatives to non-replicable assets, where appropriate and justified in their respective national markets.

- **Power vs duty.** The current Framework *empowers* NRAs to intervene, whereas the Commission’s proposal limits this to a *duty* to intervene and *only* when a reasonable request has been made to them. BEREC proposes to restore the NRA discretion, replacing “shall” with “may” in the first sentence.
- **“Size” of access point.** The “size” of the concentration/distribution point where access is provided (i.e. the number of lines accessible from it) is critical to the economic and technical viability of the symmetric access regime. It is therefore important to ensure that the symmetrically regulated operator cannot determine this unilaterally, so as not to risk undermining the pro-competitive and pro-investment objectives of the access obligation.

Under the Commission’s proposal, NRA powers are defined by reference to the “first concentration or distribution point” but neither term is defined in the draft Code. As the

proposed definition for “very high capacity networks” refers to the distribution point as a point located “at the serving location”, it is particularly important to ensure that the Code does not inadvertently restrict the scope of symmetric access powers in respect of such networks. BEREC therefore proposes to clarify that NRAs have the power to set the location and the size of the access point (distribution/concentration), taking into account the economic viability of the connection for access seekers in order to ensure effective access to the network. This would bring Article 59(2) into line with the Commission’s own approach, as set out in the NGA Recommendation.

- **Remove unjustified restrictions to symmetric regulation beyond the concentration point.** In some cases, and in particular in areas with lower population density, access at the concentration point (determined in accordance with the first subparagraph of Article 59(2)) might not be technically possible or economically viable. Where the NRA can demonstrate that the obligations which may be imposed under the first subparagraph of Article 59(2) would be insufficient to ensure adequate access, it should be empowered to impose additional conditions, under defined conditions.

In the Commission’s text, the exceptions defined in subparagraphs 3 to 5 of Article 59(2) introduce unjustified and unclear differences of treatment based on the business model of the operator (e.g. reference is made to the wholesale-only model in exception (a)) or their size (e.g. reference to the “small operators” in exception (b)). In practice, these factors should be taken into account by the NRA in assessing the appropriateness and proportionality of *any* obligation that it might consider imposing.

- **Meaning of “access.”** If the objective is to facilitate access for the deployment of competing infrastructure, then it is important to ensure that the symmetric access obligations are not limited to the provision of access to wiring and cables and civil infrastructures, but that they may include access to associated facilities and services (e.g. colocation at the access point or access to information related to network elements) in order to ensure that access to the network elements is effective, as well as active or virtual access (where access to dark fibre at the concentration/distribution point would be insufficient to ensure adequate access to the networks elements). We note the definition of “access” in Article 2(28) includes all such forms of access.

Amendments to Recitals (139) and (140)

(139) In situations where undertakings are deprived of access to viable alternatives to non-replicable assets up to ~~a the first~~ distribution point, national regulatory authorities should be empowered to impose access obligations to all operators, without prejudice to their respective market power. In this regard, national regulatory authorities should take into consideration all technical and economic barriers to future replication of networks. The mere fact that more than one such infrastructure already exists should not necessarily be interpreted as showing that its assets are replicable. The ~~size of the first~~ distribution point should be identified **determined by the national regulatory authority** by reference to objective criteria, **with the aims of maximising the scope for infrastructure-based competition and avoiding inefficient duplication of relevant infrastructure.**

(140) ***Where it is demonstrated that these obligations are not sufficient to ensure adequate access, it could be justified to extend impose additional access obligations, in particular to wiring and cables beyond the first concentration point in areas with lower population density, while confining such obligations to points as close as possible to end-users, where it is demonstrated that replication would also be impossible beyond that first concentration point. This can include the obligation to provide virtual or active access to the infrastructure, where for instance the passive access to the wiring and cables up to the distribution point would be economically unviable, or technically impossible due to the technical characteristics of the infrastructure.***

Justification

These amendments reflect the changes to the operative provisions.

Amendment to Recital (143)

(143) While it is appropriate in some circumstances for a national regulatory authority to impose obligations on operators that do not have significant market power in order to achieve goals such as end-to-end connectivity or interoperability of services, it is however necessary to ensure that such obligations are imposed in conformity with the regulatory framework and, in particular, its notification procedures. ***settled case law⁵ that the means by which national regulatory authorities are to ensure adequate access and interconnection, and also interoperability of services, are not exhaustively listed under the first subparagraph of Article 5 of Directive 2002/19/EC (Article 59 in this Directive), and this position shall remain under Article 59(1) of this Directive. National regulatory authorities are therefore empowered under Article 59(1) to impose on undertakings providing or authorised to provide electronic communications networks or services access obligations in circumstances other than those listed, such as obligations to grant access to wiring and cables inside buildings or up to the first concentration or distribution point or beyond it to a concentration point as close as possible to end-users, obligations in relation to the sharing of passive or active infrastructure, and obligations to conclude roaming access agreements. [Such obligations must only be imposed where justified in order to secure the policy objectives of Article 3 of this Directive, and where they are objectively justified, transparent, proportionate and non-discriminatory for the purpose of promoting efficiency, sustainable competition, efficient investment and innovation, and giving the maximum benefit to end-users, and imposed in conformity with the relevant notification procedures.]***

Justification

These amendments clarify the intention of the changes to the operative provision (Article 59(1)), including an explicit reference to the ECJ jurisprudence which has confirmed the scope

⁵ See, in particular, Case C-192/08 *TeliaSonera Finland*; C-556/12 *TDC v Teleklagenævnet*; C-85/14 *KPN v ACM*; and C-397/14 *Polkomtel v PUKE*.

of the powers in that Article. The wording in square brackets at the end of the recital is intended to make clear the conditions and procedures which apply to the use of Article 59(1). All of this already applies anyway (because of combination of Art 59(1), (4) and (5), and Article 3), so is not new.

Amendments to Article 13(2) and to Annex I, Part A, point 7

Article 13

2. Specific obligations which may be imposed on providers of electronic communications networks and services under Articles ~~43~~, **59(1)**, 36, 46(1) 48(2) or on those designated to provide universal service under this Directive...

Annex I, Part A (General conditions which may be attached to an authorisation)

7. Access obligations other than those provided for in Article 13(2) of this Directive applying to undertakings providing electronic communications networks or services, ***including, for the avoidance of doubt, under Article 59(2).***

Justification

Article 13 is largely a copy-out of Article 6 of the Authorisation Directive, which is a gateway for all regulatory obligations imposed under the Code. Article 6(2) of the Authorisation Directive expressly empowers NRAs to impose specific obligations on providers of networks and services under Article 5 of the Access Directive, which obligations shall be legally separate from the rights and obligations under the general authorisation.

Thus, as the specific obligations in Article 5 of the Access Directive are now transferred (with amendment) to Article 59(1) of the draft Code, Article 13(2) of the draft Code should set out that specific obligations which may be imposed on providers of networks and services under Article 59(1) of the draft Code shall be legally separate from the rights and obligations under the general authorisation.

Reference to Article 59 is currently missing from Article 13, which is an oversight in the drafting of the Code. The inclusion of a reference to Article 59(1) in Article 13(2) is intended to correct this omission.

Article 59(2) is a symmetrical obligation (as currently under Article 12 of the Framework Directive) and therefore a condition to be attached to general authorisations (as currently under point 14 of Part A of the Annex to the Authorisation Directive). This has been put beyond a doubt here by the explicit reference to Article 59(2) in the equivalent place – i.e. point 7 of Part A of Annex I to the draft Code.

Article 13(2) also includes an unnecessary reference to Article 13 itself, which should be deleted.