

# **BEREC Guidelines on the Criteria for a Consistent Application of Article 61(3) EECC**

## **Call for initial Stakeholder Input**

13 June 2019

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## **Procedural Note**

This call for input gives stakeholders the opportunity for an early involvement in the development of the BEREC guidelines on the Criteria for a Consistent Application of Article 61(3) of the European Electronic Communications Code (EECC).

Stakeholders' submissions will be published unless declared as confidential and will be used as an input to BEREC's thinking on draft guidelines, but BEREC would not be publishing a direct response to their input at this stage. Stakeholders will of course have an opportunity to provide further submissions to BEREC when Draft Guidelines are consulted and BEREC will respond to that input in a separate document.

Please provide your input to [Guidelines\\_61.3\\_input@berec.europa.eu](mailto:Guidelines_61.3_input@berec.europa.eu) by 15 July 2019.

# 1 Introduction and legal basis

According to Art. 61 (3) subparagraph 1 EECC<sup>1</sup> national regulatory authorities (NRAs) may impose – upon reasonable request and regardless of any findings of significant market power (SMP) – access to wiring and cables and associated facilities inside buildings or up to the first concentration or distribution point as determined by the NRA. Access obligations may be imposed on electronic communication network (ECN) providers or owners of such network elements, where replication of the network elements concerned would be economically inefficient or physically impracticable.

Where access obligations pursuant to Art. 61 (3) subparagraph 1 EECC do not sufficiently address economic or physical barriers to replication, Art. 61 (3) subparagraph 2 EECC authorises NRA's to extend the imposition of access obligations (including active or virtual access obligations if justified) beyond the first concentration or distribution point up to a point capable of hosting a sufficient number of end-user connections to be commercially viable for efficient access seekers.

The policy principle behind Art. 61(3) EECC is the promotion of sustainable competition in the interest of end-users connectivity and efficient investment, in particular in very high capacity networks (VHCN), by giving NRAs the possibility to ensure access to non-replicable infrastructure where justified and proportionate, i.e. where bottlenecks would not allow an efficient operator to replicate network elements.

The current framework provides in Art. 12 of the Framework Directive (FD)<sup>2</sup> the possibility to impose obligations to provide access up to the first concentration or distribution point. Art. 12(3) of the Framework Directive, provides that NRAs are empowered to impose sharing obligations of wiring “inside buildings or up to the concentration or distribution point where this is located outside the building [...] where this is justified on the grounds that duplication of such infrastructure would be economically inefficient or physically impracticable”.

Art. 61 (3) EECC clarifies, extends and amends provisions of Art. 12 FD. For example, Art. 61 (3) EECC introduces a distinction between access to the first concentration or distribution point and access to a point beyond the first concentration or distribution point, as explained below. Relevant considerations can be found in recitals 152, 154 and 155. The full text of Art. 61(3) and the recitals are shown in the Annex.

Art. 61 (3) EECC is not without exceptions. Accordingly, subject to subparagraph 3, NRAs shall not impose access obligations beyond the first concentration or distribution point on ECN providers under certain conditions:

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<sup>1</sup> Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (EECC) (OJ L 321, 17.12.2018, p. 36) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1972&from=EN>.

<sup>2</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108, 24.4.2002, p. 33) available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32009L0140>.

- if the ECN provider is a wholesale only undertaking, fulfilling the conditions listed in Art. 80(1) EECC and makes alternative means of access to a very high capacity network available on fair, non-discriminatory and reasonable terms and conditions;
- a derogation from this exemption is possible in case the network concerned is publicly funded;
- this exemption may be extended to other ECN providers which offer access to a very high capacity network on fair, non-discriminatory and reasonable terms and conditions;
- the imposition of access obligations would impair the economic or financial viability of a new network deployment, in particular by small local projects.

According to Art. 61(3) subparagraph 4 BEREC shall publish guidelines by 21 December 2020 to foster a consistent application of Art. 61 (3) EECC by setting out the relevant criteria for determining:

- a) the first concentration or distribution point;
- b) the point, beyond the first concentration or distribution point, capable of hosting a sufficient number of end-user connections to enable an efficient undertaking to overcome the significant replicability barriers identified;
- c) which network deployments can be considered to be new;
- d) which projects can be considered to be small;
- e) which economic or physical barriers to replication are high and non-transitory.

BEREC invites interested stakeholders to submit input to the questions in section 2, which address the criteria that have to be set in the BEREC Guidelines according to Art. 61(3), subparagraph 4.

## 2 Questions and issues to be addressed in the guidelines

The consultation questions are structured according to points (a) to (e) for which criteria have to be defined in the guidelines.

### (a) The first concentration or distribution point

Art 61 (3) first subparagraph of the EECC states the following with regard to the first concentration or distribution point:

*"[...] national regulatory authorities may impose obligations, upon reasonable request, to grant access to wiring and cables and associated facilities inside buildings or up to the first concentration or distribution point as determined by the national regulatory authority, where that point is located outside the building. [...]"*

**Consultation question 1:** Which aspects do you consider relevant for determining the first concentration or distribution point (in particular where that point is located outside the building)?

Relevant considerations in this context can be:

- In which way does a distribution point differ from a concentration point?

- Should technical criteria play a role for determining the first concentration or distribution point? If yes, which criteria?
- Should economic criteria play a role for determining the first concentration or distribution point? If yes, which criteria?
- When can a concentration or distribution point be considered to be accessible?

**(b) The point beyond the first concentration or distribution point, capable of hosting a sufficient number of end-user connections to enable an efficient undertaking to overcome the significant replicability barriers identified**

According to Art. 61 (3) subparagraph 2 of the EECC, where a national regulatory authority concludes, that the obligations imposed on the first concentration or distribution point would not sufficiently address high and non-transitory economic or physical barriers to replication, it may extend the imposition of such access obligations beyond the first concentration or distribution point, to a point that it determines to be the closest to end-users, capable of hosting a sufficient number of end-user connections to be commercially viable for efficient access seekers.

At this stage, obligations imposed under SMP-regulation have to be taken into account, where applicable.

Please note that the criteria to assess economic or physical barriers to replication that are high and non-transitory are discussed under item e) in detail (see below). The following question deals with criteria on determining an access point beyond the first concentration or distribution point”, and is not directly related to criteria for determining high and non-transitory barriers to replication.

**Consultation question 2:** Which aspects do you consider relevant for determining the point beyond the first concentration or distribution point according to point (b)?

Relevant considerations in this context can be:

- Which location generally could be envisaged to set up an access point beyond the first concentration or distribution point (e.g. street cabinets, MDF, ODF)?
- In which way could different network-architectures (e.g. FTTC, FTTH, FTTB, HFC) affect the possible location of an access point beyond the first concentration or distribution point?
- Which factors other than high and non-transitory barriers to replication should be taken into account when determining the point beyond the first concentration or distribution point?
- Which factors should an NRA take into account when determining the commercial viability of an access point beyond the first distribution or concentration point?

**(c) Network deployments considered to be new**

Art. 61(3) subparagraph 3 of the EECC provides an exemption to the imposition of obligations to provide access to a point beyond the first concentration or distribution point if such access obligations “[...] would compromise the economic or financial viability of a new network deployment, in particular by small local projects” (subparagraph 3, letter (b)).

According to 61(3) subparagraph 4 of the EECC, BEREC has to set out criteria to determine which network deployments can be considered to be new.

**Consultation question 3:** Which aspects do you consider relevant for determining whether a network deployment is considered to be new?

Relevant considerations in this context can be:

- Is only the date of the network deployment to be taken into consideration or do other points in time come into play (e.g. starting point of planning or conclusion date)?
- When can a network upgrade of an existing network be considered “new” (e.g. upgrading Docsis 3.0 to Docsis 3.1)?
- Shall a migration from a legacy network (e.g. copper ADSL) to a Very High Capacity network - VHCCN (e.g. FTTH, HFC) be considered "new"?

#### **(d) Projects considered to be small**

Art. 61(3) of the EECC provides an exemption to the imposition of obligation in accordance with the second subparagraph (obligations up the point beyond the first concentration or distribution point) if those “[...] would compromise the economic or financial viability of a new network deployment, in particular by small local projects” (subparagraph 3, letter (b)). According to subparagraph 4, criteria have to be set to determine which projects can be considered to be small.

**Consultation question 4:** Which aspects do you consider relevant for determining whether a project can be considered to be small?

Relevant considerations in this context can be:

- How is a project defined?
- How should the category of the owner or undertaking (see recital 155) and its size affect the assessment?
- Under which circumstances would the imposition of symmetric access obligations impede the business case for small local projects undertaken by certain categories of network owners or undertakings, as referred to in recital 155?
- Which measure is appropriate to assess the relative size of a project (e.g. turnover, number of end-users connected, etc.)?

#### **(e) High and non-transitory economic or physical barriers to replication**

Art 61 (3) of the EECC states:

*“Where a national regulatory authority concludes, having regard, where applicable, to the obligations resulting from any relevant market analysis, that the obligations imposed in accordance with the first subparagraph do not sufficiently address high and non-transitory economic or physical barriers to replication which underlie an existing or emerging market situation significantly limiting competitive outcomes for end-users, it may extend the imposition of such access obligations, on fair and reasonable terms and conditions, beyond the first concentration or distribution point, to a point that it determines to be the closest to*

*end-users, capable of hosting a sufficient number of end-user connections to be commercially viable for efficient access seekers.” (emphasis added)*

**Consultation question 5:** Which aspects do you consider relevant for analysing whether economic or physical barriers to replication are high and non-transitory?

Relevant considerations in this context can be:

- Which economic barriers can be considered to be high and non-transitory?
- Which physical barriers can be considered to be high and non-transitory?
- Which additional aspects have to be taken into account when assessing high and non-transitory barriers?
- Which factors influence the costs of infrastructure roll-out (e.g. aerial versus underground cabling, availability and accessibility of ducts, civil engineering costs, labour cost, population density, etc.) and how should these be reflected in the criteria?
- Which demand side factors have to be taken into account (e.g. willingness to pay, expected ARPU<sup>3</sup> etc.) and how should these be reflected in the criteria?

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<sup>3</sup> Average Revenue per User



## Annex – Relevant provisions in the EECC

### Art 61 (3)

In particular, and without prejudice to paragraphs 1 and 2, national regulatory authorities may impose obligations, upon reasonable request, to grant access to wiring and cables and associated facilities inside buildings or up to the first concentration or distribution point as determined by the national regulatory authority, where that point is located outside the building. Where it is justified on the grounds that replication of such network elements would be economically inefficient or physically impracticable, such obligations may be imposed on providers of electronic communications networks or on the owners of such wiring and cables and associated facilities, where those owners are not providers of electronic communications networks. The access conditions imposed may include specific rules on access to such network elements and to associated facilities and associated services, on transparency and non-discrimination and on apportioning the costs of access, which, where appropriate, are adjusted to take into account risk factors.

Where a national regulatory authority concludes, having regard, where applicable, to the obligations resulting from any relevant market analysis, that the obligations imposed in accordance with the first subparagraph do not sufficiently address high and non-transitory economic or physical barriers to replication which underlie an existing or emerging market situation significantly limiting competitive outcomes for end-users, it may extend the imposition of such access obligations, on fair and reasonable terms and conditions, beyond the first concentration or distribution point, to a point that it determines to be the closest to end-users, capable of hosting a sufficient number of end-user connections to be commercially viable for efficient access seekers. In determining the extent of the extension beyond the first concentration or distribution point, the national regulatory authority shall take utmost account of relevant BEREC guidelines. If justified on technical or economic grounds, national regulatory authorities may impose active or virtual access obligations.

National regulatory authorities shall not impose obligations in accordance with the second subparagraph on providers of electronic communications networks where they determine that:

- (a) the provider has the characteristics listed in Article 80(1) and makes available a viable and similar alternative means of reaching end-users by providing access to a very high capacity network to any undertaking, on fair, non-discriminatory and reasonable terms and conditions; national regulatory authorities may extend that exemption to other providers offering, on fair, non-discriminatory and reasonable terms and conditions, access to a very high capacity network; or
- (b) the imposition of obligations would compromise the economic or financial viability of a new network deployment, in particular by small local projects.

By way of derogation from point (a) of the third subparagraph, national regulatory authorities may impose obligations on providers of electronic communications networks fulfilling the criteria laid down in that point where the network concerned is publicly funded.

By 21 December 2020, BEREC shall publish guidelines to foster a consistent application of this paragraph, by setting out the relevant criteria for determining:

- (a) the first concentration or distribution point;
- (b) the point, beyond the first concentration or distribution point, capable of hosting a sufficient number of end-user connections to enable an efficient undertaking to overcome the significant replicability barriers identified;
- (c) which network deployments can be considered to be new;
- (d) which projects can be considered to be small; and
- (e) which economic or physical barriers to replication are high and non-transitory.

#### Recital (152)

In situations where undertakings are deprived of access to viable alternatives to non-replicable wiring, cables and associated facilities inside buildings or up to the first concentration or distribution point and in order to promote competitive outcomes in the interest of end-users, national regulatory authorities should be empowered to impose access obligations on all undertakings, irrespective of a designation as having significant market power. In that regard, national regulatory authorities should take into consideration all technical and economic barriers to future replication of networks. However, as such obligations can in certain cases be intrusive, can undermine incentives for investments, and can have the effect of strengthening the position of dominant players, they should be imposed only where justified and proportionate to achieving sustainable competition in the relevant markets. The mere fact that more than one such infrastructure already exists should not necessarily be interpreted as showing that its assets are replicable. If necessary in combination with such access obligations, undertakings should also be able to rely on the obligations to provide access to physical infrastructure on the basis of Directive 2014/61/EU. Any obligations imposed by the national regulatory authority under this Directive and decisions taken by other competent authorities under Directive 2014/61/EU to ensure access to in-building physical infrastructure or to physical infrastructure up to the access point should be consistent.

#### Recital (154)

It is important that when national regulatory authorities assess the concentration or distribution point up to which they intend to impose access, they choose a point in accordance with BEREC guidelines. Selecting a point nearer to end-users will be more beneficial to infrastructure competition and the roll-out of very high capacity networks. In this way the national regulatory authority should first consider choosing a point in a building or just outside a building. It could be justified to extend access obligations to wiring and cables beyond the first concentration or distribution point while confining such obligations to points as close as possible to end-users capable of hosting a sufficient number of end-users, where it is demonstrated that replication faces high and non-transitory physical or economic barriers, leading to important competition problems or market failures at the retail level to the detriment of end-users. The assessment of the replicability of network elements requires a market review which is different from an analysis assessing significant market power, and so the national regulatory authority does not need to establish significant market power in order to impose these obligations. On the other hand, such review requires a sufficient economic assessment of market conditions, to establish whether the criteria necessary to impose obligations beyond the first concentration or distribution point are met. Such extended access obligations are more likely to be necessary in geographical areas where the business case for alternative infrastructure rollout is more risky, for example because of low

population density or because of the limited number of multi-dwelling buildings. Conversely, a high concentration of households might indicate that the imposition of such obligations is unnecessary. National regulatory authorities should also consider whether such obligations have the potential to strengthen the position of undertakings designated as having significant market power. National regulatory authorities should be able to impose access to active or virtual network elements used for service provision on such infrastructure if access to passive elements would be economically inefficient or physically impracticable, and if the national regulatory authority considers that, absent such an intervention, the purpose of the access obligation would be circumvented. In order to enhance consistent regulatory practice across the Union, the Commission should be able to require the national regulatory authority to withdraw its draft measures extending access obligations beyond the first concentration or distribution point, where BEREC shares the Commission's serious doubts as to the compatibility of the draft measure with Union law and in particular the regulatory objectives of this Directive.

#### Recital (155)

In such cases, in order to comply with the principle of proportionality, it can be appropriate for national regulatory authorities to exempt certain categories of owners or undertakings, or both, from obligations going beyond the first concentration or distribution point, which should be determined by national regulatory authorities, on the grounds that an access obligation not based on an undertaking's designation as having significant market power would risk compromising their business case for recently deployed network elements, in particular by small local projects. Wholesale-only undertakings should not be subject to such access obligations if they offer an effective alternative access on a commercial basis to a very high capacity network, on fair, non-discriminatory and reasonable terms and conditions, including as regards price. It should be possible to extend that exemption to other providers on the same terms. The exemption may not be appropriate for providers that are in receipt of public funding.