

**BEREC Report on the outcome of the
public consultation on the draft BEREC
Guidelines on the Criteria for
a Consistent Application of
Article 61 (3) EECC**

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1 Executive summary

BEREC published the draft Guidelines on the Criteria for a Consistent Application of Article 61 (3) EECC ('the draft Guidelines') on 16 June 2020. At the same time, a public consultation was opened, running until 31 July 2020 17:00 (CET).

The draft Guidelines and public consultation are in accordance with Article 61 (3) of the European Electronic Communications Code (EECC).¹ In particular, Article 61 (3) subparagraph 5 EECC stipulates that '*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.'*

The purpose of the Guidelines is therefore to set out relevant criteria for determining the legal concepts listed in points (a) to (e), which will be referred to as "items" within the Guidelines. It is also noted that the relevant criteria for determining item (e) are listed before item (b), as the determination of the access point beyond the first concentration or distribution point will be dependent on the assessment of high and non-transitory barriers to replication.

BEREC received 19 responses to the public consultation from various types of stakeholders (see Table 1). Two stakeholders who have requested confidentiality are referred to as "confidential contribution". BEREC published all non-confidential stakeholder responses received.

Table 1: Overview on the type of stakeholders who responded to the public consultation

Type of stakeholder	Number of stakeholders
Network operators ²	11
Associations of network operators at national level ³	4
Associations of network operators at European/international level ⁴	4
Total	19

Source: BEREC

¹ Directive (EU) 2018/1972 of the European Parliament and the Council establishing the European Electronic Communications Code, OJ L 321/36 of 17 Dec. 2018

² Bouygues Telecom, Deutsche Telekom, eir, KPN, Liberty Global, NOS, TIM, Vodafone Group, VodafoneZiggo and two confidential contributions (see also section 13 below).

³ Bundesverband Breitbandkommunikation e.V. (BREKO), NLConnect, Verband der Anbieter von Telekommunikations- und Mehrwertdiensten e.V. (VATM), Verband kommunaler Unternehmen e.V. (VKU).

⁴ Electronic Telecommunications Network Operators (ETNO), European Competitive Telecommunications Association (ecta), European Local Fibre Alliance (ELFA), GIGAEurope.

This report provides an overview of the responses BEREC received and the BEREC response to each topic addressed by stakeholders in particular regarding the need to adapt the draft Guidelines.⁵ Any references to paragraphs refer to the draft BEREC Guidelines published on 16 June 2020 (BoR (20) 106).

The overview of the responses BEREC received follows the structure of the draft Guidelines and also provides a section with more general stakeholder remarks mentioned by the stakeholders as follows:

- General stakeholder remarks
- Background and framework
- General considerations on replicability
- The first concentration or distribution point
- High and non-transitory economic or physical barriers to replication
- Determination of the point beyond
- Relation of new network deployments to financial viability and public funding
- Network deployments to be considered new
- Projects to be considered small

2 General stakeholder remarks

2.1 Stakeholder responses

General remarks on guidance provided

Bouygues Telecom remarks that in order to guarantee regulatory predictability for operators who are currently already subject to well-established and well-functioning regimes of symmetric regulation⁶, BEREC must avoid disruptions of existing business models when issuing its guidance. Aside from a number of specific aspects, Bouygues Telecom expresses that the draft Guidelines generally seem suitable to encompass the current French framework.

As a general point, GIGAEurope⁷ and Liberty Global recognise that BEREC has adopted a high-level, pragmatic approach to the Guidelines. GIGAEurope and Liberty Global, however, consider that there is scope for additional guidance in order to avoid fragmentation of the provision's application between Member States. GIGAEurope and Liberty Global are of the view that whilst BEREC has indicated that the scope of the Guidelines is limited under Article 61 (3) subparagraph 5 EECC, BEREC should provide additional guidance on topics which leave too much room for interpretation for individual NRAs to foster a consistent application of Article 61 (3) EECC.

⁵ The paragraphs the stakeholders refer to are the paragraphs in the consultation document (see https://berec.europa.eu/eng/document_register/subject_matter/berec/public_consultations/9282-draft-berec-guidelines-on-the-criteria-for-a-consistent-application-of-article-613-eecc).

⁶ Regimes of symmetric regulation have been implemented in France (2009/2010 by decisions nr. 2007/1106 and 2010/1312) and Italy (2013 by decision nr. 538/13/CONS). Other member states with provisions of symmetric regulations are Croatia and Poland (see BEREC's "Technical and economic replicability assessment in the context of symmetric access" (BoR (18) 214), p. 27 et seq.

⁷ NOS fully endorses and agrees with GIGAEurope's submission and therefore abstains from an individual statement.

GIGAEurope, Liberty Global, Vodafone Group and VodafoneZiggo point out that the significant burden placed on network operators by the access obligations should be recognised in the Guidelines.

ETNO regards the symmetric obligations under Article 61 (3) EECC as a provision existing parallel to the SMP regulation which addresses bottleneck infrastructures. ETNO regards it as important to balance the objectives pursuant to Article 61 (3) EECC, namely the roll-out and investment in VHCN and pro-competitive measures, in the application of Article 61 (3) EECC.

KPN highlights that the Guidelines do not address situations where networks are already replicated or parallel networks are present. Also, the impact on incentives to invest in very high capacity networks (VHCN) should be analysed before imposing access obligations based on Article 61 (3) EECC.

In NLconnect's view, the draft Guidelines clarify certain aspects of Article 61 (3) EECC but still leave too much room for interpretation, in particular with respect to "new" and "small" network deployments.

One confidential contributor endorses BEREC's approach in its Guidelines, which follows precisely the EECC's indications for the determination of the first concentration point, providing more guidance and clarification on the replicability considerations within Article 61 (3) EECC and the definition of the criteria for determining which economic and physical barriers to replication should be considered high and non-transitory.

Another confidential stakeholder points out that market conditions between member states vary significantly, for instance with regard to the owners of in-house cabling and the technical structures of ECNs. Thus, it is important that the Guidelines on the one hand give a stable common basis for a consistent application of Article 61 (3) EECC, but on the other hand leave NRAs enough room to take into account the national situation.

ELFA, BREKO and ecta are of the opinion that the draft Guidelines lack clarity, and thus fail to provide sufficient guidance and legal certainty to facilitate the consistent application of Article 61 (3) EECC.

In BREKO's view, the application of symmetric regulation should be limited to severe circumstances of market barriers and may be counterproductive as it could reduce the effectiveness of negotiating market access.

ecta voices the opinion that the draft Guidelines are not sufficiently based on previous BEREC work and other existing regulations. ecta is also in favour of BEREC monitoring and reporting on the implementation of the Guidelines.

2.2 BEREC response

BEREC acknowledges that four network operators, four associations of network operators at international level and one association of network operators at national level see the need for further guidance and raise concerns regarding the overall interpretation of the provision of Article 61 (3) EECC. Some of these contributions also express worries regarding the application of the legal provision in general. Otherwise these contributions mostly express no general disagreement with the actual depiction of the replicability considerations which play a role in the different stages of assessments carried out under Article 61 (3) EECC nor to the link to high and non-transitory economic or physical barriers to replication for the purpose of

defining the criteria for the relevant items. One confidential stakeholder explicitly agrees with BEREC's approach following close to the EECC.

GIGAEurope and Liberty Global generally express appreciation of the pragmatic approach undertaken by BEREC, but also see room for further guidance. Otherwise these contributions mostly address specific aspects of the criteria defined or aspects connected to the EECC's provision itself– sometimes with divergent views – which will be taken into account in further detail in the subsequent chapters of the consultation report. When defining the relevant criteria for the items, BEREC closely follows the EECC's provisions and regulatory concepts already familiar to BEREC and the NRAs.

With respect to the contributions aiming at further clarifications and guidance in general, BEREC would like to clarify that not all aspects raised are within the legal scope of the Guidelines as set out in Article 61 (3) subparagraph 5 EECC as recognized by GIGAEurope and Liberty Global. It has to be pointed out that BEREC cannot take aspects outside the legal scope of the Guidelines into account, unless a clear link to a relevant criteria is evident. This is also true concerning KPN's view the Guidelines should develop Guidance for parallel networks or networks that have been already replicated. This aspect would rather affect the NRA's assessment whether replicability problems are present and whether those underlie a situation significantly limiting the outcome for end-users.

Moreover, BEREC aims to provide criteria that guide NRAs to consistently apply Article 61 (3) EECC in their national regulatory environment. This means that BEREC does not actually define or determine the items listed in Article 61 (3) subparagraph 5 EECC (e.g. the first concentration or distribution point or the point beyond), but rather issues guidance in the form of criteria to NRAs. These criteria reveal which methodologies, considerations and information should be used by NRAs to determine the actual items using a consistent methodology, whilst taking national circumstances into account. One confidential stakeholder explicitly endorses the room given to take the divergent national circumstances into account – with respect to network architectures and competitive situations – while Bouygues Telecom welcomes that the guidance provided is suitable to encompass already existing models of symmetric regulation, – in this specific case – the existing regulatory framework in France.

Given this context, BEREC takes into account the different aspects raised and assesses whether an adoption or clarification in the Guidelines is necessary and within their scope in the subsequent chapters of the present report.

With respect to ecta's proposal to monitor the application of Article 61 (3) EECC, BEREC would like to remind that a report on the practical application of the Article 61 (3) EECC Guidelines is already foreseen in accordance with Article 4 (1)(j) of the BEREC regulation.⁸ To this end, paragraph 11 of the BEREC Guidelines clarifies, that this *"(...) report will provide input to an assessment of the need to revise the guidelines. This assessment will be undertaken within five years after the adoption of the guidelines."* Therefore, BEREC has already addressed the concern raised by ecta. BEREC is fully aware that attention needs to be paid when introducing a regulatory concept new to most Member States. At the same time,

⁸ Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009 (OJ L 321, 17.12.2018, p. 1–35), available at <https://eur-lex.europa.eu/legal-content/de/TXT/?uri=CELEX:32018R1971>.

an evaluation is not useful until NRAs have gained any experience on the application of Article 61 (3) EECC, which will be implemented by the end of 2020.

As regards ecta's view that the BEREC Guidelines are not sufficiently grounded on earlier work by BEREC, BEREC clarifies that earlier work is taken into account to the degree possible and suitable. It has to be reminded that – besides the case-by-case approach of the Broadband Cost Reduction Directive (BCRD)⁹ – symmetric regulation has not been widely applied as a regulatory measure to address market issues in most Member States. More precisely, the symmetric regulation in the EECC, in particular Article 61 (3) subparagraph 2 EECC, provides for an extended, amended and clarified framework for symmetric (market) regulation which introduces regulatory concepts not previously used in many Member States. Specific national transpositions of earlier regulatory concepts based on Article 12 (3) of the Framework Directive (FD)¹⁰, which could be observed in a small number of Member States, have been duly taken into account in the Guidelines.

3 Background and framework

3.1 Relation of different provisions on access obligations

3.1.1 Stakeholder responses

GIGAEurope, Liberty Global and VodafoneZiggo stress that the Guidelines currently do not address the hierarchy and relationship between ex post competition law, ex ante significant market power (SMP) regulation, and symmetric regulation under Article 61 (3) EECC.

GIGAEurope and Liberty Global are of the view that Article 61 (3) EECC is not meant to replace the SMP regime but rather to complement it. They are concerned that the draft Guidelines might blur the lines between (local) symmetric access obligations addressing replicability barriers and the ability to impose national level obligations akin to SMP-regulation, by lowering the legal standard for imposing more centralised access.

ETNO states that the primary "ratio legis" of Article 61 (3) EECC is to address access issues regarding bottlenecks in the parts of the network near the end-user. The reason for intervention hence relates to the status of a particular part of a network and not the status of the company controlling that network element, which in ETNO's view is a clear to SMP regulation. Symmetric access obligations under Article 61 (3) EECC should therefore be seen as parallel provision to SMP and not as a substitute. ETNO considers that the BEREC guidelines should clearly identify that new VHCNs deployed under a co-investment offer pursuant to article 76 EECC should be excluded from symmetric access obligations under Article 61 (3) EECC. ETNO also asks for clarification on the relation of Article 61 (3) to the BCRD and highlights the impact of access obligations under the BCRD on replicability problems.

⁹ Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks (Broadband Cost Reduction Directive) (OJ L 155, 23.5.2014, p. 1). Available at: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32014L0061>.

¹⁰ 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%3A32002L0021>.

Vodafone Group is of the view that SMP, BCRD and state-aid rules as the more encompassing provisions rank higher and should be considered in first instance before imposing access obligations under Article 61 (3) EEC. As recognised in recital 152 EEC, symmetric obligations can be intrusive and undermine incentives to invest. Therefore, the Guidelines should ensure that obligations under Article 61 (3) EEC should only be imposed where justified and proportionate to achieve sustainable competition in relevant markets.

VodafoneZiggo is concerned that Article 61 (3) EEC is seen as an alternative for imposing obligations under the SMP regime and comes with a lower burden of proof. Especially Article 61 (3) subparagraph 2 EEC should not be applied widely across the Member States, but rather in specific circumstances (e.g. low population density) and with a specific purpose of stimulating investments in VHCNs.

KPN states that the application of Article 61 (3) EEC should not be used by NRAs to bypass market analysis procedures and SMP designations which are key steps to be able to impose generic, nationwide access obligations.

VATM is of the view, that access obligations for companies without SMP should be avoided at all costs. Therefore the possibility of imposing such obligations needs to be as restrictive as possible.

eir is of the view that existing access obligations should be taken into account when assessing replicability, after having determined the first distribution or concentration or distribution point. Existing access obligations imposed under the SMP regime or otherwise might have an impact on the replicability of network elements.

3.1.2 BEREC response

In BEREC's view, the relationships of different regulatory regimes – i.e. ex post competition law, ex ante SMP regulation, access regulation under Article 61 (3) EEC, BCRD and state-aid rules – are outside the scope of the Guidelines as set out in Article 61 (3) subparagraph 5 EEC.

However, BEREC likes to point out that the EEC provides some indications on the relationship between the different provisions on access regulation and the need to ensure their consistent application (and the BCRD, respectively). BEREC is of the view that both, the SMP regime and the provision on symmetric access regulation according to Article 61 (3) EEC, are regulatory tools that should be applied without one prejudging the application of the other.

To this end, Article 61 (3) subparagraph 2 EEC states that an NRA may extend the access obligations to a "point beyond" "(...) *having regard, where applicable, to the obligations resulting from any relevant market analysis (...)*". Conversely and pursuant to Article 67 (2) EEC, NRAs should take into account "(...) *other types of regulation or measures imposed and affecting the relevant market or related retail market or markets throughout the relevant period, including, without limitation, obligations imposed in accordance with Articles 44, 60 and 61*" when conducting a market analysis, in accordance with Article 67 (1) EEC.

Regarding ETNO's question on the relation of Article 61 (3) EEC to co-investments pursuant to Article 76 EEC, BEREC notes that the regulatory treatment of co-investment addresses undertakings designated as having SMP and therefore in principle is part of the SMP-regime and not in the scope of the Article 61 (3) Guidelines. However, BEREC likes to point out that

Article 76(1) EECC foresees access conditions, including for access seekers not participating in the co-investment.

With respect to the application of Article 61 (3) EECC in relation to the BCRD, BEREC would like to draw attention to recital 152 EECC which states that: “[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 [BCRD]. 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.” Further regulations on the relationship between the BCRD and other provisions on access regulation are provided for in the BCRD itself. Therefore, BEREC does not share the views expressed by GIGAEurope, Liberty Global, Vodafone Group, VodafoneZiggo and KPN that there is a need to clarify the relation of the different provisions, neither does BEREC regard this as possible within the scope of the Guidelines.

BEREC would also like to highlight that the preconditions to impose access obligations under Article 61 (3) subparagraph 1 EECC and Article 61 (3) subparagraph 2 EECC respectively, have to be met. In particular, obligations subject to Article 61 (3) subparagraph 1 EECC shall only be imposed where “(...) justified on the grounds that replication of such network elements would be economically inefficient or physically impracticable (...)”, while obligations subject to Article 61 (3) subparagraph 2 EECC may only be imposed where an NRA concludes “(...) 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 (...)”.

In conclusion, BEREC does not see neither the possibility nor the need to amend the Guidelines with respect to the relation of different provisions on access regulation and also reminds, that any obligations according to Article 61 (3) EECC need to be justified and proportionate, taking the objectives of the EECC into account pursuant to Article 61 (1) EECC.

3.2 Competitive conditions

3.2.1 Stakeholder responses

GIGAEurope, Vodafone Group and Liberty Global regard it as necessary to get more guidance on the assessment of an underlying market situation that significantly limits competitive outcomes for end-users according to Article 61 (3) subparagraph 2 EECC. GIGAEurope and Liberty Global are concerned that there is a risk that Article 61 (3) EECC is used to address market failures normally subject to an SMP assessment. The stakeholders are of the opinion that the application of Article 61 (3) EECC requires (at least) the assumption that SMP regulation has been removed.

ETNO states that the outcome of the relevant market analysis process should be taken utmost into account when concerning competition issues related to markets susceptible to regulation pursuant to Articles 63 and 64 EECC. Where the markets are not yet or no longer analysed, these should be analysed with priority and be part of the elements to take into account.

Vodafone Group points out that developments in the Netherlands and Belgium show that joint SMP can be assessed by NRAs under the SMP regime. Thus, the application of Article 61 (3) EECC is not required.

VodafoneZiggo raises concerns that the provision of Article 61 (3) EEC comes with a lower burden of proof compared to the SMP regime, for instance, in cases where the market is characterised by the presence of two parallel networks.

KPN highlights that the Guidelines do not mention what NRAs must assess or decide when networks are already replicated. The number of existing parallel networks will have an impact on both, the barriers to replication for additional parties and the competitive outcome for end-users. KPN also considers that the question which of the parallel networks has to grant access remains open and that the possibility to access customers via Fixed Wireless Access (5G) needs to be considered, too. Furthermore, KPN considers that access to the copper network should be excluded from Article 61 (3) EEC as such networks are not regarded VHCN according to the BEREC Guidelines on very high capacity networks.

NLconnect points out that there will almost always be access to viable alternatives to non-replicable FttH networks in the rural areas in the Netherlands, namely DSL, mobile or fixed-wireless infrastructures. Therefore, NLconnect does not see any need to rely on Article 61 (3) EEC for FttH networks in rural areas, in particular where these are deployed by small parties or wholesale only undertakings.

In principle VATM supports the application of the three-criteria-test to guarantee competition and is convinced that the existing procedure to define access points should be maintained and defined as described in recital 154. VATM fears that symmetric access obligations would lead to a disadvantage for alternative suppliers. Access obligations for companies without SMP should thus be avoided, especially since the latter are the largest contributor to FttH/B deployments in some Member States.

ELFA is of the opinion that it is important to preserve competition and to regulate the respective operators with SMP. An extension of regulation to operators irrespective of SMP would have negative effects on competition.

BREKO recognizes that scenarios may occur in which it is necessary that symmetric regulation is enforced on operators with very large market power or where sustainable competition needs to be promoted in certain areas. Otherwise, symmetric regulation could deter investment incentives, devalue investments already carried out and could reinforce SMP-operators in their already dominant position.

ecta calls on BEREC to take full account of the objective to promote sustainable competition and finds it important to consider non-discriminatory multi-access situations concerning the same network elements. ecta considers it also critical to emphasize that obligations under Article 61 (3) EEC are not suitable to substitute for obligations seeking to address imbalance of market power and therefore proposes to make clear the conceptual difference between replicability considerations and SMP throughout the Guidelines.

One confidential stakeholder is of the view that there is no room for symmetric obligations in case of market deregulation under the SMP regime as this requires several alternative infrastructures being present. Moreover, obligations beyond the first concentration point should not be imposed when there are viable alternative means of wholesale physical network infrastructure access provided by network operators available.

Another confidential stakeholder highlights that the Guidelines should reflect that access obligations pursuant to Article 61 (3) EEC need to promote end-users' interests through

sustainable competition and efficient and technology-neutral investments in very high capacity networks in each country in the best possible way.

3.2.2 BEREC response

BEREC notes that the definition of the nature of competition problems to be addressed by Article 61 (3) subparagraph 2 EEC is not within the legal scope of criteria to be defined according to Article 61 (3) subparagraph 5 EEC.

BEREC also highlights that the NRAs have to demonstrate “... *an existing or emerging market situation significantly limiting competitive outcomes for end-users...*” according to Article 61 (3) subparagraph 2 EEC. Thus any market situation significantly limiting the outcome for end-users could be subject to access obligations on a point beyond, if high and non-transitory economic or physical barriers to replication are present.¹¹

With respect to the contributions of KPN, VodafoneZiggo and Liberty Global, it has to be noted that recital 152 EEC clarifies that “[t]he mere fact that more than one such infrastructure already exists should not necessarily be interpreted as showing that its assets are replicable.” Therefore the European legislator clearly sees room for market situations where limitations in the outcome for end-users, despite parallel networks, are present in the market. Otherwise replicability considerations in a market situation with parallel networks would be moot.

VATM’s reference to recital 154 EEC and the three-criteria-test seems to be based on a misinterpretation, as this recital clarifies that 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 (...)*”. Thus, a reference to the three-criteria-test is neither provided in Article 61 (3) EEC nor in recital 154 EEC. However, it should be noted that the application of Article 61 (3) subparagraph 2 EEC 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 (...)*”. In conclusion, the three-criteria-test is not applicable for Article 61 (3) EEC.

BEREC also finds ELFA’s view that Article 61 (3) EEC should not address competition problems irrespective of SMP, unsubstantiated. According to 61 (1) EEC, NRAs should take due regard to sustainable competition and maximum benefit for end-users when applying Article 61 (3) EEC. To that end, recital 152 states that “[i]n 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.” Further recital 154 EEC clarifies that Article 61 (3) EEC is clearly meant to complement the SMP regime (and other provisions governing access to network infrastructure) as a regulatory tool to promote competition.

¹¹ Within this context, recital 154 EEC further states: “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”.

With respect to ETNO's view, BEREC likes to point out that while obligations under SMP have to be taken into account where applicable, Article 61 (3) EECC otherwise is a different provision for access regulation, which seems to be also recognised by ETNO otherwise.

BEREC agrees to the possibility pointed out by KPN and NLconnect that where FWA is deployed FWA could be a relevant element to take into consideration when determining the "outcome for end-users" pursuant to Article 61 (3) subparagraph 2 EECC.

BEREC does not agree with KPN's view that Article 61 (3) EECC excludes copper networks and is limited only to VHCN. Article 61 (3) EECC is technologically neutral and specific reference to VHCNs is only made in the exemptions under Article 61 (3) subparagraph 3(a) EECC and to new network deployments in Article 61 (3) subparagraph 3(b) EECC. Accordingly, it is not precluded that Article 61 (3) EECC may be applied to networks that are not VHCNs.

In conclusion, BEREC does not see the need to adapt the Guidelines with regard to the contributions listed above. The Guidelines do not intend to give guidance beyond the provision of the EECC on the precise nature of competition problems to be addressed, as this is not included in the items listed in Article 61 (3) subparagraph 5 EECC, for which BEREC has to define relevant criteria.

3.3 Open access and commercial wholesale offers

3.3.1 Stakeholder responses

KPN states that NRAs should always take into account the availability of commercial wholesale offers to determine if regulation on the basis of Article 61 (3) EECC is proportionate. In KPN's opinion barriers to entry are absent if a commercial wholesale offer similar to SMP-regulated access is in place. In a situation where there is a competitive local market with multiple access networks, imposing this type of access will have a disturbing effect on the competitive field if one of the parties is forced to open its network (passively) on conditions defined by an NRA, while there already is a commercial wholesale offer in place being consumed by multiple providers.

BREKO notes that the discretion given to NRAs could result in a very broad application of Article 61 (3) EECC. This would in turn diminish the importance and effectiveness of negotiated access and would lead to access seekers gaining greater bargaining power vis-à-vis the current operator, since they could threaten to apply for access under Article 61 (3) EECC if the ECN operator does not grant access under the conditions proposed by the access seeker. In many cases negotiated access agreements to already existing networks and infrastructure will generally be more efficient.

ELFA states that according to Article 61 (3) subparagraph 3(a) EECC, wholesale-only undertakings shall be excluded from any obligation due to Article 61 (3) subparagraph 2 EECC. Furthermore, it should be possible to extend that exemption to other providers on the same terms. Even though the EECC does not assign the task to BEREC, ELFA sees an essential need to clarify which provider can expect to be such an "other provider". Thus, ELFA would appreciate if BEREC adds some remarks regarding this.

A confidential stakeholder notes that access obligations beyond the first concentration point should not be imposed when there are viable alternative means of wholesale physical network

infrastructure access available and offered under fair, non-discriminatory and reasonable terms and conditions.

3.3.2 BEREC response

The question which type of commercial wholesale offers should be considered at the different stages of application of Article 61 (3) EECC is beyond the scope of the Guidelines as set out in Article 61 (3) subparagraph 5 EECC. However, BEREC notes that NRAs will have to take existing wholesale offers into account when applying Article 61 (3) EECC.

According to Article 61 (5) EECC, any obligation and conditions imposed under Article 61 (3) EECC “(...) shall be objective, transparent, proportionate and non-discriminatory (...)”. In particular the principle of proportionality requires NRAs to assess existing commercial offers. The existence of open access granted on fair, non-discriminatory and reasonable terms and conditions, in particular is an important element to take into account when assessing the proportionality of any access obligation under Article 61 (3).

In addition, commercial wholesale offers of third parties also need to be taken into account to the relevant extent when assessing the business case of the access seeker, as it is consistently clarified throughout paragraphs 54, 57, 59, 63, 65 and 74 ii of the draft Guidelines.

Additionally, wholesale only operators – meeting the criteria of Article 80 (1) EECC – are exempted from access obligations if “*the provider ... 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*”. This exemption can be extended “*to other providers offering, on fair, non-discriminatory and reasonable terms and conditions, access to a very high capacity network*”, according to Article 61 (3) subparagraph 3(a) EECC. In this regard, Article 61 (3) EECC therefore foresees a specific application of the principle of proportionality, with respect to operators providing wholesale access to VHCNs.

In conclusion, BEREC sees neither the need nor the possibility to amend the Guidelines with respect to commercial wholesale offers.

3.4 Requirements for a reasonable request

3.4.1 Stakeholder responses

In KPN’s view, requests should be fairly precise, in principle local and aim for access to consumers in case there is (only) a unique or exclusive way of reaching them.

GIGAEurope and Liberty Global argue that the same conditions for reasonable access requests under Article 3 (2) BCRD should apply for Article 61 (3) EECC. The BCRD indicates that a reasonable request should specify the elements of the network/project for which the access is requested, including a specific time frame.

Liberty Global elaborates that Article 61 (3) EECC is not designed to allow for “blanket requests”, which means access seekers requesting access to an entire network and leaving it up to an NRA to determine which parts of that network are considered replicable. In Liberty Global’s opinion such a request must meet all criteria for application of Article 61 (3) subparagraph 2 EECC, which implies an access seeker must adequately reason its request by reference to convincing evidence with respect to e.g. competitive market outcomes, existing

SMP obligations and high and non-transitory barriers to replication that hamper the business case.

BREKO considers that access requests should contain a reasoned explanation as to why symmetric obligations are without any alternative. Moreover, access requests to the point beyond require a demonstration why the first concentration or distribution point is insufficient and why a commercial agreement could not be reached. An efficient network operator would negotiate and accept fair and reasonable access offers and only resort to apply for regulatory interference if no other option to circumvent replication barriers can be found.

ecta notes that the imposition of extended access obligations is not request-driven, but based on a review by an NRA of existing access obligations imposed pursuant to Article 61 (3) subparagraph 1 EECC. Accordingly, references to operators' requests in paragraph 76 do not appear appropriate in this context and should be removed.

3.4.2 BEREC response

BEREC notes that the definition of the requirements for a reasonable request according to Article 61 (3) subparagraph 1 EECC is not within the legal scope of criteria to be defined according to Article 61 (3) subparagraph 5 EECC. BEREC notes, that the requirement for a reasonable request is foreseen in Article 61 (3) subparagraph 1 EECC.

Concerning the relation to access requests under the BCRD, BEREC notes that recital 152 states that obligations according to Article 61 (3) EECC and obligations imposed under the BCRD should be consistent. In BEREC's view, this refers to the outcome of the regulatory procedure in terms of obligations imposed and not to the formal requirements a request has to meet in order for such a proceeding to be initiated.

Furthermore, while Article 3 (2) BCRD that “[...] any network operator has the obligation to meet all reasonable requests for access to its physical infrastructure under fair and reasonable terms and conditions” and that “such written request shall specify the elements of the project for which the access is requested, including a specific time frame”, it should be noted that the BCRD governs access requests between undertakings and lays down certain procedural conditions to that end. Dispute settlement bodies may, pursuant to Art. 3(4) BCRD, resolve disputes of whether access should be granted, but the application of the BCRD is not dependent on a decision of a DSB to grant access.

Article 61 (3) EECC, on the other hand, presupposes that a NRA adopts a decision to grant access and the conditions for initiating a proceeding will depend on national implementing measures.

In conclusion, BEREC does neither see the room nor the need to adapt the Guidelines regarding guidance on the requirements for a reasonable request.

4 General considerations on replicability

4.1 Stakeholder responses

Bouygues Telecom proposes to simplify Figure 2 of the Guidelines, but does not propose any specific suggestions. Bouygues Telecom also expresses that a high degree of replication of any fixed local loop would lead to inefficient investments and would result in higher prices for end-users. Therefore, Bouygues Telecom is of the opinion that only economic aspects of replication should be considered for both, the determination of the first concentration or distribution point and the point beyond. In light of the French symmetric framework Bouygues Telecom points out that the number of end-user connections to be reached with an access point should be taken into account as opposed to the wording of paragraph 38 in the draft Guidelines. When located outside the building, the minimum number of connections must be defined by the density of the population, which will drive the costs of the network roll-out. According to Bouygues Telecom, the number of connections should not be less than 1000 lines.

TIM considers that where access is granted to a point beyond, access should also be granted at any intermediary point between the latter and the first concentration or distribution point in order to take into account the different levels of existing infrastructure deployment of access seekers. TIM agrees with the approach in paragraph 38, where it is clarified that the determination of the first concentration or distribution point should not be affected by replicability considerations.

GIGAEurope, Liberty Global and VodafoneZiggo stress that the hierarchy within the symmetric obligations outlined in Article 61 (3) EECC itself is not made clear. GIGAEurope and Liberty Global agree with the step-by-step analytical process which is presented in the Guidelines, as it helps assuring the appropriateness of the measures taken under Article 61 (3) EECC and correctly depicts the hierarchy within the provision. On the other hand, GIGAEurope and Liberty Global are of the view that the principle of proportionality needs more consideration as paragraph 19 seems to suggest that NRAs may find it more appropriate or proportionate to impose access under Article 61 (3) subparagraph 2 EECC without first undertaking a full assessment under Article 61 (3) subparagraph 1 EECC.

GIGAEurope and one confidential stakeholder state that NRAs must first analyse whether there is indeed a market situation significantly limiting competitive outcomes for end-users. It also has to be considered whether this is caused by the presence of barriers to replication and finally, whether imposing an access obligation would take away these barriers or otherwise contribute to competitive market outcomes to such extent that the measure is proportionate.

Vodafone Group notes that network presence or footprint of the access seeker should play a role in the replicability assessment.

BREKO contends that any application for access to an NRA must contain a reasoned explanation as to why a symmetric obligation is without any other alternative. Moreover, any request for access to the so called “point beyond” should include a dedicated explanation as to why access to the first concentration or distribution point cannot be considered sufficient and why no commercial agreement could be reached. The imposition of obligations under subparagraphs 1 and 2 should be seen in conjunction with another. BREKO therefore suggests to clarify in the Guidelines the preconditions under which an extension under subparagraph 2 may be considered by the respective NRA.

One confidential stakeholder considers that if there already is an access obligation imposed on the first point of distribution, NRAs should not have the possibility to impose an additional access obligation on a point beyond as suggested in paragraph 19 of the Guidelines. The stakeholder considers access obligations beyond the first concentration or distribution point should only be imposed only in presence of exceptional circumstances well defined by the Code, namely in the presence of high and non-transitory barriers.

ecta calls on BEREC to remove guiding elements suggesting parallel imposition of obligations under the first and the second subparagraph of Article 61 (3) EECC and to clarify the procedural framework for the relation between subparagraphs 1 and 2. Furthermore, ecta states that networks may feature bottlenecks simply for architectural and dimensioning reasons, which may be addressable without imposing obligations under Article 61 (3) EECC. Thus, ecta suggests to remove references to bottlenecks in paragraphs 12 and 13. ecta also disagrees to the proposed separation of replicability considerations from the determination of the first concentration or distribution point.

In ETNO's view the considerations on replicability are sometimes imprecise or weak in the way they paraphrase the framework. In particular it should be made clear that the NRA has to demonstrate the presence of high and non-transitory economic or physical barriers to replication.

4.2 BEREC response

BEREC does not share Bouygues Telecom's view that only economic aspects to replication should be considered for the determination of the first concentration or distribution point and the point beyond. To the contrary, economic barriers should be considered when determining the point beyond. Otherwise, economic aspects to replication would be considered twice: (1) for the determination of the first concentration or distribution point and (2) for the assessment of the point beyond overcoming high and non-transitory economic (or physical) barriers to replication. Overcoming these barriers with access at the first concentration or distribution point would obviously render the application of Article 61 (3) subparagraph 2 EECC (and the exemptions to it provided in Article 61 (3) subparagraph 3 EECC) meaningless and fundamentally contradict the wording of the EECC. Therefore, the first concentration or distribution point needs to be determined exclusively with reference to technical aspects, including legal and administrative constraints, such as urban planning rules or safety standards. BEREC notes that there have not been any objections to this view by other stakeholders or associations.

Concerning TIM's proposition that access should be granted to any intermediary point between the first concentration or distribution point and a point beyond if obligations on the latter are imposed according to Article 61 (3) subparagraph 2 EECC, BEREC notes that the first concentration or distribution point should, according to recital 154, preferably be situated near to the end-user as this *"(...) will be more beneficial to infrastructure competition and the roll-out of very high capacity networks (...)"*. If the imposition of access obligations under Article 61 (3) subparagraph 1 EECC is justified, such obligations may be imposed up to the first concentration or distribution point in the direction from from the end-users. Only where the obligations would be insufficient to address high and non-transitory barriers to replication underlying a market situation limiting the outcome for end-users, an NRA *"(...) may extend the imposition of such access obligations (...) 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 (...). The notion of “to a point” does not include an obligation on any intermediate point or infrastructure per se. However, this is without any prejudice to the imposition of access to associated facilities, where necessary and proportionate to ensure effective access obligations.

With respect to the extension of access obligations, TIM's reading of the EECC's provision is shared by BEREC. The extension of access obligations under the second subparagraph clearly encompasses the possibility to impose obligations on the point beyond in addition to the obligations up to the first concentration or distribution point, where the latter are insufficient to address barriers to replication and the competition problems identified by an NRA. Therefore, BEREC considers that the view of ecta and a confidential stakeholder – stating that NRAs should not have the possibility to impose an access obligation on a point beyond if obligations on the first concentration or distribution point are imposed – have to be disregarded. To this end BEREC agrees with GIGAEurope and Liberty Global that pursuant to the principle of proportionality, it is important for NRAs to consider when deciding whether the extension of obligations to a point beyond is justified and whether in this case the obligations on the first point are to be imposed in parallel. BEREC would like to clarify that paragraph 19 of the Guidelines considers circumstances when generally high and non-transitory barriers to replication and competition problems give rise to a need to impose access obligations on the point beyond. However, some access seekers might still have a demand for access closer to end-users, e.g. because of access seekers different reach of existing infrastructure. In such cases the imposition of obligations at the first concentration or distribution point might be necessary to promote infrastructure competition and the take up of VHCNs.

Otherwise, with respect to the contributions of GIGAEurope and Liberty Global, BEREC does not see how paragraph 19 may lead to a misinterpretation that NRAs may impose access under Article 61 (3) subparagraph 2 EECC without first undertaking a full assessment under Article 61 (3) subparagraph 1 EECC. Paragraph 17 of the draft Guidelines clearly states that “...[r]eplicability considerations would also come into play in a second stage, as part of the second subparagraph of Article 61 (3) EECC. **After having determined the first distribution or concentration point**, NRAs have to assess whether, despite the imposition of access obligations according to Article 61 (3) EECC subparagraph 1, 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 would remain” (emphasis added). Furthermore, paragraph 19 (reciting the wording of the EECC) states “[w]here an NRA concludes that the imposition of access obligations under Art. 61 (3) subparagraph 1 EECC would be insufficient to address high and non-transitory barriers ...”. This wording clarifies that NRAs first have to examine the possibility of imposing access obligations according to subparagraph 1.

The different degree of network presence addressed by Vodafone Group should be taken into account by NRAs when evaluating access requests. However, NRAs should also pay attention to non-discrimination considerations in such cases, as access should in principle be granted at the same access points for different access seekers.

Concerning the statement of ecta, on replicability considerations, BEREC points out to the difference between determining the first concentration or distribution point and the assessment whether the imposition of access obligations up to this point is justified. Replicability considerations do in fact come into play when deciding on the imposition of access obligations,

as is stated in paragraph 16 of the draft Guidelines. In this regard paragraph 38 merely clarifies the difference between determining the first concentration or distribution point and imposing access obligations.

BEREC notes that the reference to network clusters in paragraph 19 might have given rise to misinterpretation, as network clusters serve the purpose to define different access points, where e.g. differences in population density would require the segmentation of a network. This example is therefore removed from paragraph 19 in the final Guidelines. Otherwise, BEREC does not see the need to adapt the Guidelines beyond this aspect.

5 The first concentration or distribution point

5.1 Definition of the term “concentration or distribution point”

5.1.1 Stakeholder responses

TIM appreciates that the draft Guidelines do not refer to a specific access technology, remain technologically neutral, and leave the exact determination of the points to NRAs. However, TIM sees the need to distinguish between the terms “concentration point” and “distribution point”. According to TIM, the concentration point corresponds to the point where cables or lines are aggregated while the distribution point corresponds to the point where the lines are distributed to end-users. Neither the distribution point nor the concentration point have traffic aggregation.

In NLconnect’s view, the chosen first concentration or distribution point (as well as the point beyond) seem suitable for both Point to Point and G-PON FttH networks, DSL, and HFC cable.

ELFA and one confidential stakeholder also fully agree to the definition of the term “concentration or distribution point”.

ecta welcomes the proposed technology neutrality with regard to different access technologies as well as the topologically identical definition of the concentration and distribution point. ecta is of the opinion that paragraphs 29 and 30 of the draft Guidelines contradict each other when first highlighting the concept’s extension to distribution points in the sense of the NGA Recommendation and only subsequently introducing the principle of technology neutrality.

5.1.2 BEREC response

BEREC notes that no stakeholder expresses disagreement with the technologically neutral approach to defining the term “concentration or distribution point”. Three stakeholders explicitly support this approach.

BEREC does not agree with the view of TIM to distinguish between the concentration and distribution point based on whether cables or lines are aggregated or distributed. At the concentration/distribution point cables are disaggregated (distributed) viewed in the downstream direction and cables are aggregated (concentrated) viewed in the upstream direction (see Guidelines paragraph 25). Contrary to TIM’s view, traffic is aggregated or disaggregated at the concentration/distribution point with, for instance, PON splitters (passive) or DSLAMs (active) (see Guidelines paragraph 27). Given that no other stakeholder shares the view voiced by TIM, BEREC does not see the need to change the definition provided in

paragraph 25 of the draft Guidelines where it is stated that “[f]or the purpose of the guidelines the terms “concentration point” and “distribution point” refer interchangeably to the same access point, where cables viewed in the downstream direction are disaggregated (distributed) and viewed in the upstream direction are aggregated (concentrated). At this point traffic may or may not be disaggregated from one line to several lines viewed in downstream direction and aggregated from several lines onto one line viewed in upstream direction.” Further explanations are provided in the draft Guidelines (see in particular paragraphs 27 and 28).

ecta’s suggestion with respect to deleting paragraph 29 and rewording paragraph 30 of the draft Guidelines is unclear to BEREC, as ecta also explicitly agrees with the interchangeable and technologically neutral definition of the term concentration or distribution point. In this regard, BEREC notes that the NGA recommendation, point 11, states that “[t]he ‘distribution point’ means an intermediary node in an NGA network from where one or several fibre cables coming from the MPoP (the feeder segment) are split and distributed to connect to end-users’ premises (the terminating or drop segment). A distribution point generally serves several buildings or houses. It can be located either at the base of a building (in case of multi-dwelling units), or in the street. A distribution point hosts a distribution frame mutualising the drop cables, and possibly un-powered equipment such as optical splitters.” In BEREC’s view, such a point is covered by the definitions provided for in the draft Guidelines and might be suitable to qualify as a first concentration or distribution point. BEREC cannot identify any inconsistencies between the Guidelines and the NGA recommendation in this regard.

In conclusion, BEREC does not see the need to adapt the draft Guidelines with respect to the contributions concerning the definition of the terms concentration or distribution point.

5.2 Accessibility

5.2.1 Stakeholder responses

Bouygues Telecom notes that the French symmetric framework on FttH fits with the Guidelines since they recognize that the first concentration or distribution point can be located outside private property. Bouygues Telecom wishes to alert BEREC on the consequences of having a concentration or distribution point located inside the buildings as all operators are facing problems accessing buildings when deploying or maintaining their network. Thus, localization of the first concentration or distribution point inside buildings should be limited to the minimum, e.g. to buildings with more than 50 dwellings. In addition, the localization of the first concentration or distribution point should only be driven by economic criteria to avoid inefficient infrastructure replication which leads to higher end-user prices.

Regarding accessibility, TIM welcomes that the point where to provide access shall be reasonably accessible. However, TIM fears that access could be refused, e.g. to the condominium, on the basis of non-grounded technical difficulties. TIM also sees the need to distinguish between access to physical infrastructure and dark fibre as dark fibre may be accessible only at distribution and concentration points, while access to civil infrastructure is likely to be accessible at any suitable manhole/access network room. TIM considers that access to dark fibre should be granted if an operator cannot provide access to civil infrastructures, e.g. due to a lack of available space.

GIGAEurope and Liberty Global strongly object to suggestions within the draft Guidelines that a lower test would apply in case of physical barriers to replication. For instance, in paragraph 33 BEREC suggests that physical replication barriers will be high and non-transitory if an access point is not 'easily accessible'.

Liberty Global requests BEREC to revise the section on accessibility in order to clarify the distinction between the test in Article 61 (3) subparagraph 1 EECC, which requires physical impracticability, and the test under Article 61 (3) subparagraph 2 EECC which requires high and non-transitory barriers to replication which underlie a market situation significantly limiting competitive outcomes for end-users.

BREKO agrees to the definition of the first concentration or distribution point as the point closest to the end-user that is accessible or can be made accessible without unreasonable effort. The definition should, however, not be broadened with respect to barriers to replication and the competition level.

ELFA appreciates the clear definition of the first concentration point that leaves only little room for different interpretations among NRAs and understands that accessibility will be given if physical access to and unbundling of passive infrastructure is possible without unreasonable effort.

ecta agrees with BEREC that for access obligations to be effective the first concentration or distribution point should be reasonably accessible to the access seeker. NRAs should assume the responsibility to assess the location of these points by themselves and reject arbitrary suggestions made by network operators and owners for where to place them. ecta, however, disagrees with BEREC reversing the principle of accessibility to the access provider's viewpoint in paragraph 33 where splicing is to be required as being possible without unreasonable effort by the ECN provider or network owner. ecta also considers that engineering solutions that restrict access by artificially separating the two points must be rendered accessible at the lowest possible costs to access seekers, even if this requires re-engineering of the access network.

One confidential stakeholder notes that it is important to determine the first concentration or distribution point in the proximity of a building to promote infrastructure based competition. However, the point should be easily accessible for access seekers, regardless of the network topology chosen by the access provider. The stakeholder agrees with the approach taken by BEREC.

Another confidential stakeholder notes that where the first concentration or distribution is located outside the building or the criteria for the "access point beyond" are fulfilled, it should be possible to impose obligations on the operator up to these points, where the in-house wiring is owned by the owner of the property. This stakeholder further suggests with respect to paragraph 32 that a point should only be considered accessible, if electricity is available and if there is enough room also for active equipment (e.g. an Ethernet switch) of several access seekers. Accessibility shall not be considered fulfilled if a point has room for active equipment of only one or few access seekers, as this would prevent non-discriminatory access for multiple access-seekers.

ETNO is of the view that accessibility issues to buildings arise by property rights of a third party and should not be solved by addressing the network owner or where the latter is the case without any additional costs for the network owner. ETNO further stresses that in paragraph 24 it should be clearly specified that under subparagraphs 1 and 2 of Article 61 (3)

EECC the NRA shall determine the accessible point in the network closest to the end-user and that the first distribution or concentration point is in no way decided by the NRA, but rather depends on the network architecture.

5.2.2 BEREC response

BEREC welcomes that most stakeholders and stakeholder associations agree that accessibility should be considered, when determining the first concentration or distribution point. In BEREC's view, NRAs should normally avoid to designate a concentration or distribution point as first access point if this point is not suitable to allow an access seeker to connect and maintain equipment in a reasonable way and if more viable alternatives exist or could be set up without unreasonable effort.

With respect to Bouygues Telecom, BEREC likes to point out that economic considerations do not come into play when determining the first concentration or distribution point. Economic considerations become relevant only for the determination of the point beyond, pursuant to Article 61 (3) subparagraph 2 EECC. This is clarified in paragraph 38 of the draft Guidelines where BEREC states that the *“determination of the first concentration or distribution point should not be affected by replicability considerations and the number of hosted end-user connections that an efficient access seeker needs for commercial viability. Instead such considerations come into play when determining whether or not to impose access obligations on the first concentration or distribution point and when determining the point beyond the first concentration or distribution point (...).”* This interpretation is cogent, as otherwise there would be no room to define a point beyond according to Article 61 (3) EECC at all, as the latter needs to be commercially viable to overcome the high and non-transitory economic or physical barriers to replication identified by a NRA. If the first point already needs to ensure this (which is not the case in BEREC's view) a point beyond the first concentration or distribution point would never be necessary. Thus, the inclusion of economic replicability when determining the first concentration or distribution point would be in direct contradiction to the wording of Article 61 (3) EECC.

Moreover, concerning GIGAEurope's and Liberty Global's objection, BEREC points out that paragraph 33 of the draft Guidelines is without prejudice to the physical barriers to replication that might be faced by getting to the access point but rather concerns the possibility to actually enter and make use of the access point itself. Not dissimilarly BREKO, while explicitly expressing agreement to the criteria of accessibility, notes that this concept should not be broadened to physical barriers to entry. From BEREC's perspective, any access point should be reasonably accessible to qualify as an access point. The criteria on accessibility serve the purpose to prevent the designation of non-sensible access points, where viable alternatives are present or could be set up without unreasonable effort. Ideally this should prevent the enforcement of access points which could provide to be intrusive for the access provider, the access seeker, or both parties. In this regard accessibility takes into account the principle of proportionality foreseen in Article 61 (5) EECC, which needs to be considered also for any access obligations pursuant to Article 61 (3) EECC.

Thus, when determining the first concentration or distribution point, NRAs do not need to ensure that high and non-transitory physical barriers to replication – where present – can be overcome by granting access to this point. NRAs only have to make such an assessment at a subsequent stage, when determining whether or not access obligations up to the first concentration point are suitable, as part of the proportionality assessment. If access

obligations up to the first concentration point are not suitable to address high and non-transitory economic or physical barriers, NRAs may – pursuant to Article 61 (3) subparagraph 2 EECC – consider imposing access obligations beyond the first concentration or distribution point. However, as this does not seem to be sufficiently clear in the draft Guidelines, BEREC will therefore explicitly clarify in the final Guidelines that the application of the criterion of accessibility should take into account the principle of proportionality.

BEREC recognizes the concerns expressed by TIM, that a refusal on the grounds of accessibility should not be used as an excuse to avoid the imposition of access obligations, BEREC states that accessibility is assessed by the NRA when determining the first concentration or distribution point.

Regarding ETNO's contribution BEREC likes to point out that paragraph 31 of the draft Guidelines already establishes that the first concentration point should be the closest point to the end-user, albeit taking into account the criterion of accessibility. BEREC also notes that the first concentration or distribution point is according to Article 61 (3) EECC determined by the NRA and not by the network operator as ETNO seems to suggest.

BEREC likes to remind the confidential stakeholder that obligations pursuant to Article 61 (3) subparagraph 1 EECC in principle can be imposed on both *“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.”*

Otherwise BEREC does not see the need to adapt the final Guidelines.

5.3 First concentration or distribution point on the grounds of active or virtual accessibility

5.3.1 Stakeholder responses

Bouygues Telecom notes that only passive access should be granted at the first concentration or distribution point as effective passive access is required to give access seekers their commercial and technical autonomy. Active or virtual access should only be granted at the point beyond.

As to paragraph 37, TIM highlights that the provision of active or virtual access shall only occur where the provision of passive access at the first point risks to hamper technological innovation and the provision of VHC connectivity, e.g. in case of an FttB-scenario with G.fast technology, as this requires vectoring. In these cases, TIM is of the view that an NRA shall prefer imposing on the operator deploying FttB/G.fast the provision of an alternative access product, such as VULA at the local exchange.

GIGAEurope and Liberty Global note that the draft Guidelines suggest that virtual obligations could be imposed under Article 61 (3) subparagraph 1 EECC which, in their view, is not the case.

KPN also is of the view that Article 61 (3) EECC should be about passive obligations, but only in exceptional cases (also the point beyond).

ELFA understands that NRAs may only consider virtual or active accessibility to define the concentration or distribution point if passive access cannot be provided and expresses agreement to this exception.

Deutsche Telekom welcomes BEREC's views that exceptionally, in cases where the accessibility requirements cannot be met, NRAs may determine the first concentration or distribution point on the grounds of active or virtual accessibility. Deutsche Telekom notes that when determining the first point of concentration or distribution, potential problems of interference between two networks should be taken into account, even if the first point is physically and technically accessible.

NLconnect argues that interference can occur on the xDSL layer when both the access provider and the access seeker install VDSL equipment. They recommend that BEREC addresses this topic as relevant to the technical accessibility in paragraph 32.

BREKO stresses the fact that NRAs may only consider the imposition of active or virtual access obligations at a point beyond the first concentration or distribution point under Article 61 (3) subparagraph 2 EECC, if its findings are substantial and clearly identifiable in economic or technical terms.

A confidential stakeholder notes that emphasis should always be to secure the possibility that access obligations up to the first concentration or distribution point are determined to dark fibre and active or virtual access obligations could be used only if dark fibre is not available and normally only in relation to the point beyond.

In ecta's view, the Guidelines should give more guidance on the determination of the relative closeness of a possible access point to the end-user. This is of particular relevance as paragraph 37 states that where accessibility cannot be guaranteed at a point "reasonably close" to the end-user, an NRA may determine the first concentration or distribution point on the grounds of active or virtual accessibility. In this regard, BEREC should also avoid an undefined notion of "active or virtual accessibility". At the same time ecta also proposes to delete paragraph 37.

5.3.2 BEREC response

BEREC does not agree with the view expressed by Bouygues Telecom, GIGAEurope, Liberty Global, KPN, BREKO and ecta that access at the first concentration or distribution point is exclusively confined to passive unbundling. On the one hand the wording of Article 61 (3) subparagraph 1 EECC indicates an emphasis on physical unbundling as the access provider has *"(...) to grant access to wiring and cables and associated facilities inside buildings or up to the first concentration or distribution point (...)"*, all of which are passive equipment. Equally important, recital 154 EECC explains that *"[s]electing a point nearer to end-users will be more beneficial to infrastructure competition and the roll-out of very high capacity networks"* whereas the most unrestricted and immediate type of infrastructure-based competition is the duplication of the access-line up to the end-users premises without relying on active services of a third party.

On the other hand, the definition of access itself also has to be taken into account. According to Article 2 (27) EECC the term "access" encompasses *"(...) access to physical infrastructure including buildings, ducts and masts (...) and access to virtual network services (...)"*. Moreover, recital 154 EECC, in principle referring to both, the first concentration or distribution point and a possible point beyond, states that *"[n]ational 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". Consequently, the presumption for passive unbundling does not follow from the fact that Article 61 (3) subparagraph 1 EECC does not mention "active or physical" unbundling, but rather from the aim to promote efficient infrastructure based competition. Thus, while the provision of Article 61 (3) subparagraph 1 EECC favours passive access, virtual (or active) means of access cannot be ruled out per se.

Taking this into account, BEREC is of the view that situations may arise where access by active or virtual means might be justified also with respect to the first concentration or distribution point. Within this context, TIM, NLconnect, ELFA, Deutsche Telekom and a confidential stakeholder share the view of BEREC that access by active or virtual means can be justified. When such situations would arise has to be determined by the NRA. However, BEREC, reminds that these considerations do not necessarily impact on the determination on the of the first concentration or distribution point, as the question of which type of access obligations a NRA should impose differs from the mere determination of the first concentration or distribution point

Therefore BEREC is of the view that Article 61 (3) does not generally exclude access by active or virtual means. However, BEREC, agrees that access to the first concentration or distribution point should normally be passive and any derogation from this principle needs a clear justification. To that end, BEREC does not see the need for any guidance beyond paragraph 37 of the draft Guidelines.

6 High and non-transitory economic or physical barriers to replication

6.1 Definition and scope of high and non-transitory economic or physical barriers to replication

6.1.1 Stakeholder responses

Bouygues Telecom agrees with BEREC's considerations on high and non-transitory economic or physical barriers in paragraphs 40 to 54 and points out that it is not efficient to roll-out several parallel local loops, which should get more emphasis in the Guidelines. Bouygues Telecom confirms that high and non-transitory barriers to replication are more likely to exist in less densely populated areas and this should be more emphasized in paragraph 67.

GIGAEurope and Liberty Global state that Article 61 (3) subparagraph 2 EECC is drafted as a measure for overcoming barriers to replication in specific circumstances, e.g. low population density, and with the specific purpose of stimulating investments in VHCNs. A widening of the scope and fragmentation of its application should be avoided. GIGAEurope and Liberty Global are of the view that the draft Guidelines whilst discussing high and non-transitory barriers to replication, fail to clarify the difference to high and non-transitory barriers to enter a market. The barriers to replication mentioned in the Guidelines are largely the same as the barriers to market entry referred to by the three-criteria-test and commonly considered in SMP assessments. GIGAEurope and Liberty Global therefore see a risk that market failures normally being subject to the SMP regime could be addressed with Article 61 (3) EECC. This

is a problem, in particular, where the market analysis failed to demonstrate market failure/dominance.

Vodafone Group states that in terms of the logic of the hierarchy of the framework, the replication barriers could be said to be transitory where SMP regulation suffices to let challengers replicate network assets.

KPN notes that paragraph 48 stresses that economic replicability should be assessed in specific areas and not in a nationwide context. Network replication might be economically efficient in one area, but might not be found in a different area where more networks already exist.

Economic or physical barriers to replication usually include sunk costs associated with civil infrastructure works, however, NLconnect does not consider legal or regulatory requirements as non-transitory barriers and argues that an NRA should work on removing these barriers with the responsible public authorities instead of forcing a provider to grant access to an access seeker based on legal or administrative requirements and restrictions that hinder network replication.

In relation to BEREC's approach of determining sunk cost and scale, ETNO notes that there seems to be certain overlap with barriers to market entry under SMP regulation. ETNO believes that BEREC should be explicit that physical barriers should be evaluated on their non-transitory character. ETNO notes that NRAs only need to establish and demonstrate that the obligations imposed under Article 61 (3) subparagraph 1 EECC do not suffice to address high and non-transitory barriers to replication which lead to significant competition problems or market failures. ETNO also points out that NRAs don't need to carry out such an analysis systematically, but rather "may" when relevant and appropriate. ETNO otherwise tends to agree with the statement in paragraph 49 regarding the differences in geography between Article 61 (3) EECC and SMP regulation reasonable access requests and the relevant market definition.

ELFA agrees with the Guidelines highlighting the role of sunk investment for civil work and low economies of scale especially when determining high and non-transitory barriers. In ELFA's view, such barriers are likely to be present in rural areas. ELFA shares the Guideline's definition of non-transitory barriers and also on physical barriers in particular, even though ELFA would appreciate some specification of legal or administrative barriers which are very likely to change in the near future. ELFA states that in rural regions access seekers in the very likely absence of any third network provider are de facto obliged to do some civil works to access the first concentration or distribution point. This will very likely cause high economic barriers, which might result in the imposition of obligations pursuant to Article 61 (3) subparagraph 2 EECC on almost all private network owners in rural regions.

BREKO notes that replication by its very nature is often not scalable since it is only complementary to existing infrastructure. Thus, the current benchmark of high and non-transitory economic or physical barriers is set too low and most likely will lead to an influx of access requests and discourage access negotiations among network operators.

VKU generally agrees with the definition of high and non-transitory economic and physical barriers as well as the list of barriers.

ecta is concerned that the guidance set out in paragraphs 55 to 66 is insufficient to assess which barriers are regarded as high and non-transitory. ecta thus encourages BEREC to

include more guidance in item (e) on the relation between market analysis and SMP regulation. ecta calls BEREC to either remove paragraph 49 or to underline that geographic areas under Article 61 (3) EECC do not constitute geographic markets. ecta also favours to remove paragraph 52 as the reference to “bottlenecks” is not welcomed.

6.1.2 BEREC response

BEREC notes that the stakeholders mostly agree to the definitions on high and non-transitory economic and physical barriers to replication. With respect to NLconnect’s remarks on “legal or administrative barriers” BEREC would like to point out that legal or regulatory requirements might also lead to situations where physical replicability effectively is prevented (or where such requirements could manifest in economic barriers to replication). Such requirements could for instance stem from fire safety regulation or restricted access to areas protected by e.g. environmental, cultural, architectural or historical considerations. In addition, statutory limitations in access to municipal property or industry standards on network deployment might qualify as such requirements.

On behalf of ELFA’s question as to legal or administrative barriers which are very likely to change in the near future BEREC points to the example of legislative changes which have been adopted but do not apply yet.

Regarding the remark of GIGAEurope and Liberty Global on three criteria test, BEREC points to the difference in scope between Article 61 (3) EECC and SMP regulation which is already clarified in paragraph 51 of the draft Guidelines. According to Article 61 (3) subparagraph 2 EECC high and non-transitory economic or physical barriers to replication have to be assessed when replicating networks or network elements. The three-criteria-test on the other hand includes an assessment of structural, legal or regulatory barriers of entry within the scope of SMP market analysis and concerns entry to a whole market defined under Article 64 (3) EECC. In addition, recital 152 EECC states that “[i]n 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.” Moreover, recital 154 EECC states that “[t]he 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.” It has to be noted, that the assessment of SMP should take into account a combination of factors (SMP-Guidelines¹², point 58). Some of these sources of market power are unrelated to network elements, like e.g. absence of or low countervailing buying power, easy or privileged access to capital markets/financial resources, product/services diversification etc.. Thus, BEREC is of the view that Article 61 (3) EECC and SMP regulation are significantly different regulatory regimes. However, BEREC, sees that it is beneficial to amend paragraph 51 for the final Guidelines to further underline these differences.

¹² European Commission, Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services, 2018/C 159/01, 07.05.2018.

With respect to Bouygues Telecom's comment, BEREC would like to point at paragraph 48 which already highlights the fact that population density often plays a crucial role for high and non-transitory barriers. BEREC also agrees with ecta that geographic markets in the SMP context are unrelated to geographic areas under Article 61 (3) EECC, as both provisions have a different scope as stated above. BEREC can see that paragraph 49 could highlight this difference clearer and will therefore amend this paragraph in the final Guidelines.

Regarding ETNO's statement that the non-transitory nature of barriers to replication should be subject to an assessment according to Article 61 (3) subparagraph 2 EECC, BEREC would like to refer to paragraph 44 of the draft Guidelines which already defines a standard of prove for this aspect.

Taking note of Bouygues Telecom's submission, BEREC also clarifies that paragraph 67 is the summary overview of the section on high and non-transitory economic or physical barriers to replication. All Guidelines of the document have to be taken into utmost account by NRAs, even if not explicitly mentioned in the summary conclusion.

Besides this aspects, BEREC does not see the need to change the provision on high and non-transitory barriers to entry for the final Guidelines.

6.2 Efficient operator

6.2.1 Stakeholder responses

TIM, GIGAEurope, Vodafone Group and Liberty Global are of the opinion that an NRA should assess the need to impose symmetric access obligations under Article 61 (3) EECC on the basis of a generic efficient access seeker. GIGAEurope, Vodafone Group, and Liberty Global see the need to further clarify on the concept on efficient operators to avoid inconsistency with the rest of the regulatory framework.

GIGAEurope and Liberty Global, Vodafone Group, and VodafoneZiggo additionally point out that the significant burden placed on network operators by access obligations should be recognised in the Guidelines and a greater responsibility to demonstrate whether an access request is reasonable, appropriate, and necessary should be placed on the access seeker.

GIGAEurope and Liberty Global point to the "modern efficient network" under the European Commission's cost and pricing methodologies as an example, which is based on the SMP operator's network. Additionally, as part of ex post competition law, the "equally efficient operator" or "as efficient competitor" (the so-called AEC test) should be considered with regard to existing efficient market participants. GIGAEurope and Liberty Global point out that Article 3 (2) BCRD indicates that a reasonable request should specify the elements of the network/project for which the access is requested and the time frame. The same conditions should apply for reasonable requests in Article 61 (3) EECC and should be considered in paragraph 82 of the Guidelines.

Vodafone Group, to the contrary, states that the inclusion of the "efficient operator" concept in order to determine a feasible access point is cumbersome and dubious and could take on a potentially inconsistent meaning to other aspects of the regulatory framework and should therefore be removed from the Guidelines. In the opinion of Vodafone Group, the Guidelines also need further clarity on how requests from operators of varying sizes should be dealt with. The outcome of the proposed cost/revenue analysis for an access seeker and the assignment

of an “efficient operator” is mostly contingent on the network presence or footprint assumed in the analysis.

TIM also believes that an NRA should assess the need to impose symmetric access obligations at the first point or beyond it on the basis of a general assessment of the level of barriers to entry for a generic efficient access seeker, to avoid burdensome and time-consuming procedures. The existence of barriers should be defined irrespective of the specific data of the access seeker, but only looking at the costs of deployment and the expected revenues according to factors affecting the demand side. TIM otherwise agrees with the factors to be considered in the assessment of economic and physical barriers besides the “the extent to which building costs can be shared with other undertakings” in paragraph 61. The assessment should be based on the costs of a generic efficient access seeker, irrespective of the fact that the access seeker chooses to share the costs with other undertakings.

ETNO deems that the assessment should be based on the costs of a generic efficient access seeker, irrespective of the fact that the access seeker chooses to share the costs with other undertakings.

Regarding the assessment of the commercial viability of the access seeker’s business case by an NRA, NLconnect suggests to deem access seekers efficient, subject to evidence to the contrary and thus lower the threshold to request access.

ecta asks BEREC for additional guidance regarding efficient access seekers, including relevant costing standards, for both access seekers and access providers, but otherwise ecta is of the view that multi-access situations concerning the same network elements should be considered to limit the possibility of discriminatory behaviour. ecta is of the view that Article 61 (3) EECC does not imply any specific efficiency standard at operator level, even though BEREC makes reference to replication by an efficient access seeker.

6.2.2 BEREC response

BEREC first takes note that Article 61 (3) subparagraph 2 EECC in particular states that the point beyond needs to be a point “(...) capable of hosting a sufficient number of end-user connections to be commercially viable for efficient access seekers (...)”. Thus the reference to an efficient access seeker is already made explicit in the EECC.

With respect to the comments received on different efficiency standards and supposedly lack in clarity, BEREC likes to point out that NRAs are able draw from their experiences with well-established efficiency concepts, e.g. in the context of SMP regulation, which will often be useful also for efficiency considerations under Article 61 (3) EECC. However, BEREC, would like to remind that the regulatory context of Article 61 (3) EECC is different compared to SMP regulation.

Firstly, BEREC would like to draw attention to the existing guidance on the notion of a “reasonably efficient operator” in recital 26 in the European Commission’s NGA Recommendation (2010/572/EU). It has to be noted that this guidance is written largely with the perspective in mind that an access seeker needs to have a sufficient margin to offer comparable retail services when access is provided by an SMP operator. As the access seekers will in this situation often not benefit from the same economies of scope and scale as the SMP operator (which in many cases is usually a large incumbent), the NGA recommendation normally regards the assumption of a reasonably efficient operator (REO) as more appropriate for such an assessment.

The European Commission provides further guidance in point 56 in the Recommendation on Non-Discrimination and Costing Methodologies (2013/466/EU, “NDCM recommendation”) where it is stated that under certain circumstances the *“NRA is deemed to impose the economic replicability obligations (...)”*. The details of this economic replicability test are further set out in Point 56(a) and Annex II, including the determination of the access seeker’s downstream costs. While the starting point of the assessment of the downstream costs of the access seeker are the downstream costs of an efficient SMP operator and consequently the “equivalent efficient operator” concept (EEO), the NDCM Recommendation observes the need to adjust to a reasonably efficient scale of the access seeker, e.g. *“where very low volumes of lines and their significantly limited geographic reach as compared to the SMP operator’s NGA network indicate that objective economic conditions do not favour the acquisition of scale by alternative operators”*. The limit thereof should be a market structure with a sufficient number of operators necessary to ensure effective competition taking into account competition by other platforms.

The BEREC Guidance on Margin Squeeze BoR(14) 160 notes that for the purpose of margin squeeze test under SMP conditions that *“[i]f the tests are carried out correctly both (EEO and REO) employ efficient operation, the cost level used in the REO/adjusted EEO test tends to be higher than the EEO test due to a lack of economies of scale. The REO/adjusted EEO approach of allowing higher downstream costs facilitates market entry whereas the EEO approach emphasises preventing anti-competitive foreclosure. This needs to be assessed on a case-by-case basis depending on market conditions by the NRA”*. A (scale) adjusted EEO test, as suggested in Annex II of the NDCM recommendation under certain circumstances, was grouped in the same category as REO for the purpose of the BEREC Guidance document, as both allow for the consideration of scale.

Concerning Article 61 (3) EEC, it has to be considered that access seekers might vary in size considerably. The point beyond should be sufficient to provide for a commercially viable business case, thus ensuring network replication for the access seeker up to the access point. As network replication requires a commercially viable business case (cf. paragraphs 20, 68, 70 and 71 of the draft Guidelines), the concept goes hand in hand with economic replicability. Where economic replicability is not possible, it will also not be possible to have a positive business case and thus to replicate the network up to a certain access point.

In paragraph 72 of the draft Guidelines, BEREC points out to the general possibility for NRAs to make assumptions on the efficient access seeker. To clarify that this clearly includes the possibility to assume a “hypothetical generic” efficient access seeker, BEREC will amend this provision in the final Guidelines.

However, BEREC refers to the possibility to take into account the specifics of an access seeker in paragraph 73 of the draft Guidelines, as it is necessary to leave room for consideration on operators of different scale and scope within symmetric regulation in particular. As it could have given rise to misunderstanding, BEREC will clarify that data of access providers is of course subject to an analysis by the NRA.

BEREC clarifies that the related concepts of REO and adjusted EEO may be well suited to provide useful input when taking on assumptions of a generic hypothetical, efficient access seeker. Also the concept of EEO might be considered for comparison. However, while the EEO test is applied in SMP regulation in some Member States to derive assumptions on an efficient access seeker, it has to be noted that normally the incumbent is designated with

having SMP and thus is the reference point for scale and scope considerations for an efficient access seeker, when the EEO-concept is used as a starting point.

Conversely Article 61 (3) subparagraph 2 EECC applies to situations not covered by SMP-obligations meaning that non-SMP operators and thus often also non-incumbent operators, might be subject to access obligations. This might lead to the need to consider a different reference point for efficiency assumptions, even though this might not always be necessary.

Noting this, BEREC is of the view that assumptions on a hypothetical generic efficient access seeker could normally be determined in a manner similar to when using the REO- or adjusted EEO-concept utilised in SMP-regulation, without excluding the possibility to consider the EEO-concept unmodified. This is without any prejudice whether the actual wholesale access price is determined via a retail-minus methodology (e.g. an ERT) or a cost-based pricing methodology, but rather aims to assumptions that are useful to assess the access seeker's business case.

6.3 Business case assessment

6.3.1 Stakeholder responses

GIGAEurope and Liberty Global state that the draft Guidelines fail to properly engage with the significant difficulties and costs faced by network operators to prepare for and implement access obligations, and the potential capacity and loss of quality. Access obligations may also reduce the network operator's return on investments in capacity.

KPN states that retail prices proposed by access seekers might be ambiguous and possibly too low, leading to wrong assumptions on the business case and consequently to a wrong result which access point is sufficient to overcome the barriers identified. Therefore, the starting point should be the ARPU. The ARPU should be derived from a weighted average of market prices including an expected mix of access speeds and QoS in the market. Also the payback period of the business case should reflect the technical and economic life. It should not be based on the preferences of the access seeker but rather on objective standards. The impact of access obligations on the provider should be recognised as well, especially where an infrastructure competitor is not regulated. KPN states that a thorough analysis of the effect of investment incentives in VHC networks should form an integral part of any analysis preceding access obligations on the basis of Article 61 (3) EECC. KPN conducts that a stated barrier of economic replication could very well be explained by the fact that the local market situation is already very competitive. In such a competitive situation it could be very hard for access seekers to attract enough customers and revenues to render a positive business case. Access obligations would not be proportionate in such a situation and even risk becoming a negative investment incentive. Moreover, KPN considers that if replicability has been proven viable in comparable areas absent access regulation, this should be treated as empirical evidence of economic replication and take priority over the analytical business case assessment.

Deutsche Telekom is of the view that the draft Guidelines do not make clear in paragraph 55 in conjunction with paragraphs 57-63 whether own existing infrastructure is part of the network deployment. These costs need to be included, as otherwise operators with own infrastructure would be discriminated. Moreover, this would otherwise limit incentives to invest in new and

existing infrastructure on the way to the customer (renting would systematically be cheaper than building).

air is concerned that while BEREC sets out in detail the relevant criteria for determining which economic or physical barriers to replication are high and non-transitory, the need for NRAs to regard to existing obligations, as set out in Article 61 (3) subparagraph 2 EEC, is not adequately referenced.

In paragraph 63 BEREC states that the expenses for available wholesale services are relevant for the assessment of high and non-transitory economic barriers. NLconnect assumes that this refers to wholesale products that can be used to reach access points and recommends to make this explicit. Furthermore, NRAs should not take wholesale products that can be easily withdrawn – i.e. do not offer sufficient certainty for access seekers in the long-term – into account in the assessment.

ELFA and VKU derive from paragraphs 55 and 65 that high economic barriers for an access seeker may only exist if the net present value of the replication's business case is negative. In order to maintain incentives of the first mover, VKU and ELFA propose to set a minimum payback period of 10 years to account for the longer time it takes for infrastructure projects, especially in rural areas, to amortize and to provide some additional certainty for first movers.

BREKO notes the absence of a clearly defined assessment method regarding an access seeker's business case in paragraph 65 and believes that a more detailed definition of barriers to replication as well as an inclusion of a catalogue of conditions and sources to be used will ensure a consistent and uniform application of Article 61 (3) EEC across the EU by the relevant NRAs.

One confidential stakeholder states that technical and economic barriers should be demonstrated by NRAs before determining the point beyond as such determination could have severe financial and economic repercussions on operators and on the markets in general. The business case of infrastructure operators should not be compromised. Also viable alternatives for network access, like SMP-obligation and commercial access offered under fair and reasonable terms and conditions, should be taken into account when determining the point beyond.

Another confidential stakeholder states that also costs of equipment and running costs (such as costs of co-location) needed in order to utilize the mandated access should be taken into account. These costs should be considered irrespective of the way to reach the access point i.e. whether reaching the access point by using wholesale products or rolling out own infrastructure or by a combination of both.

ETNO notes that it needs to be clarified that the "cost for deployment" as mentioned in paragraph 57 also include the costs of using existing infrastructure. Otherwise, renting would systematically be cheaper than building. Regarding the payback periods, ETNO refers to industry standards and stresses also that the business case study period should be in line with technical and economic lifetime of the technology of choice. ETNO states that there is no information in the draft Guidelines on what WACC should be used and points out that this cannot be the regulated WACC. Also costs should not be mixed up with risk. ETNO is of the opinion that the evaluation of the ARPU should be based on a market reference and not on the expectations of the access seeker. Moreover, in ETNO's view an impact assessment on

the business case of the other infrastructure providers in the market should be included in the assessment.

6.3.2 BEREC response

With view on GIGAEurope's, Liberty Global's, KPN's and one confidential stakeholder's contributions, BEREC notes that any wholesale price subject to obligations pursuant to Article 61 (3) subparagraph 2 EECC needs to be fair and reasonable. Additionally, any obligation pursuant to Article 61 (3) EECC in general shall be objective, transparent, proportionate and non-discriminatory according to Article 61 (5) EECC. Thus, the impact on the investment of the access provider clearly needs to be taken into account by an NRA. Moreover, in particular with respect to new network deployments and as an extra safeguard, access obligations pursuant to Article 61 (3) subparagraph 2 EECC should not be imposed, where these would compromise the commercial or financial viability, in particular for new network deployments by small, local projects according to Article 61 (3) subparagraph 3(b) EECC. On KPN's point regarding empirical evidence, BEREC agrees that the replicability assessment of a given network to which access has been requested can be informed by cases of actual replication of other networks, provided that the conditions are comparable. Given however that the conditions are unlikely to be exactly the same, BEREC does not agree that these cases should as rule be considered as conclusive evidence of replicability, eliminating the need for an analytical business case. BEREC will adapt the guidelines, in order to include these considerations.

With regard to the costs incurred on the network operator concerning the access obligation, BEREC likes to clarify that the wholesale price for Article 61 (3) EECC will be regarded as wholesale expenses and therefore part of the access seekers business case, which the NRA has to analyse. The impact on the access provider should thus be reflected in by the wholesale access price. At least all efficient costs incurred on the access provider would therefore have to be covered. Thus, the concerns of one confidential stakeholder with respect to running costs and costs for equipment does not seem to be justified. This is without any prejudice to the actual pricing methodology applied, as the concept of "fair and reasonable terms and conditions" is not directly linked to a certain pricing-standard.

With respect to NLConnect's, eir's and one confidential stakeholder's contribution, BEREC points at paragraphs 53 and 54 of the draft Guidelines, which state that the possibility to make use of wholesale products to reach an access point needs to be considered. This also is true for wholesale products imposed under SMP obligations or other regulations as well as commercial wholesale offers, where applicable. BEREC would like to clarify that these considerations are always included when an NRA assesses the business case of an efficient access seeker, which is already clarified in paragraph 63 with respect to the access seeker's wholesale expenses.

Concerning the statements by ELFA and VKU, BEREC agrees that where the net present value is negative, barriers cannot be overcome with access up to the access point under consideration by an NRA. Consequently, a different access point needs to be considered in those cases. Where, in contrast, the net present value at least equals zero; barriers to replication can be overcome. BEREC also agrees that the analysis will crucially depend on the assumed period of time for the business case/ investment. BEREC considers that the

notion of “payback period” in paragraph 65 of the draft Guidelines could have given rise to misunderstanding and thus will be exchanged for “time horizon” of the business case/investment. It also has to be noted that this time horizon is not identical to the period of time for which a network deployment is considered to be new. A network drawing close to the end of the investments time horizon is far from being recently deployed and thus is not new. To this end, BEREC will clarify in paragraph 65 that the reasonable payback period is not an indicator for the period of time for which a network deployment is considered to be new. To address KPN’s concerns, BEREC also wants to clarify that in order to assess a reasonable payback period it is indispensable to consider objective standards about the deployed infrastructure. Moreover, BEREC explicitly points to the average revenue per customer (ARPU) based on retail prices to estimate revenues in paragraph 64, item iii of the draft Guidelines.

As to the objection of NLConnect about sufficient certainty in the long-run, BEREC believes that if a wholesale product with, for instance, a very short contract period is offered, it would be necessary for the NRA to assess the prospect of wholesale access conditions that an efficient access seeker could rely on in the longer term.

In conclusion, BEREC does not see any need to adapt the draft Guidelines with regard to the assessment of the business case, beyond the adaptation to address KPN’s point on empirical evidence and the clarification on the use of wholesale products.

7 Determination of the point beyond

7.1 General remarks on the determination of the point beyond

7.1.1 Stakeholder responses

Bouygues Telecom is of the opinion that the accessibility criteria should also be considered when determining the point beyond. Also the existence of civil engineering should be taken into account as access seekers have to connect to the point beyond.

TIM is of the opinion that where access is imposed pursuant to Article 61 (3) subparagraph 2 EECC, access should also be granted to the first concentration or distribution point and any intermediate point between these two points. The obligation should include access to any suitable manhole/access network room for access to physical infrastructure in order to take into account the different amounts of infrastructure deployed by operators.

To ETNO it is unclear why figure 5 of the draft Guidelines as it seems to be open whether the access point is optimal chosen where revenues equal costs or where revenues exceed the costs.

One confidential stakeholder is concerned about BEREC’s definition of the criteria used to define the point beyond which would endanger the business case of infrastructure operators and the development of infrastructure-based competition and could limit investments made for the deployment of VHC networks. The point beyond should not be determined further up in the network than the main distribution frame, considering that this would give access to other operators to the entire network deployed.

ELFA agrees with the general approach to define the access point beyond.

ecta finds many of the conceptual and analytical considerations set out in this section of a general nature that is not specific to the determination of an access point beyond, and would therefore invite BEREC to provide more guidance on the specific requirements of Article 61 (3) subparagraph 2 EECC, such as costing considerations and modelling questions.

7.1.2 BEREC response

Concerning the existence of civil engineering infrastructure as raised by Bouygues Telecom, BEREC's understanding is that access to civil engineering itself is not part of accessibility but rather of barriers to replication. Both, the need for civil engineering and its alternatives (wholesale offers for e.g. duct access) are referred to in paragraphs 62 and 63 with respect to the assessment of high and non-transitory barriers to replication. The requirements for the actual accessibility in the sense of connecting to and making use of the point beyond is set out in paragraph 69 of the draft Guidelines. Paragraph 76 of the draft Guidelines further explains that the same criteria for determining the accessibility of the first concentration or distribution point are also relevant for determining the point beyond. Accordingly availability of civil engineering infrastructure in the proximity of such an access point is already included in the assessment of the point beyond.

As clarified above in chapter 4.2, BEREC does not share the view by TIM that access should also be granted to any point in between the first concentration and distribution point and the point beyond. BEREC elaborated above its reasoning that if access to any point between those two points was granted, this would either undermine the intention to grant access as close as possible to the end-user where this is commercially viable or prove the imposition of the access point beyond wrong. On the other hand, this is without prejudice to the possibility to impose access obligations on associated facilities where required and proportionate.

Regarding the confidential stakeholder's question on BEREC's criteria to determine the point beyond, BEREC would like to clarify that the approach for determining the point beyond sets out criteria to analyse which access point may qualify as an access point where an access seeker overcomes the significant replicability barriers identified. BEREC does not determine the access points itself, as the actual determination is carried out by an NRA. Moreover, as stated earlier, the possible financial impact first comes into play when an NRA has to consider the proportionality, pursuant to Article 61 (3) subparagraph 5 EECC, of an access obligation, pursuant to Article 61 (3) subparagraph 1 EECC, as well as when analysing the financial or economic viability of a new network deployment when considering an exemption pursuant to Article 61 (3) subparagraph 3(b) EECC.

With respect to ETNOs question regarding figure 5, BEREC notes that while in theory the optimal point would be the access point where the costs equal the revenues, such a point might not be identified in the practical application of Article 61 (3) EECC. As an access point where network replication would incur costs exceeding the revenues is not suitable to overcome the high and non-transitory replicability barriers identified, the first access point closest to end-user where the costs for network replication are at least covered by the revenues should be chosen by the NRA as access point beyond. This is already clarified in paragraph 70 of the draft Guidelines.

BEREC reminds ecta that Article 61 (3) subparagraph 2 EECC foresees that the imposition of access obligations thereof should occur on fair and reasonable terms and conditions. Article 61 (5) EECC further clarifies that obligations in accordance with Article 61 (3) EECC shall be objective, transparent, proportionate and non-discriminatory.

It also has to be noted that “fair and reasonable” has to be seen in the context of the regulatory objectives which need to be balanced out, e.g. with respect to the objective to “promote competition” (Article 3 (2)(b) and (d) EECC) or to “promote connectivity” (Article 3 (2)(a) and (d) EECC) and to “promote efficient investment and innovation” (Article 3 (4)(d) EECC). That being said, BEREC is of the view that NRAs are able to draw on their experience gained from the application of other access provisions, where this experience is useful and applicable.

In conclusion, BEREC does not see the need to adapt the provisions on the determination of the point beyond with regard to the contributions above.

7.2 Imposition of active or virtual access obligations on the point beyond

7.2.1 Stakeholder responses

Regarding the imposition of an active/virtual access obligation, TIM and ETNO argue that this last resort should be limited to the cases where there are only technical constraints to passive access and not economic constraints as envisaged in paragraph 77.

GIGAEurope and Liberty Global are of the view that the draft Guidelines provide little or no guidance on when NRAs are able to impose active/virtual obligations under Article 61 (3) EECC. Virtual obligations at the point beyond should be understood as a remedy of last resort and may only be applied in the event that passive access obligations — which have already met all the relevant market and non-replicability tests — are economically inefficient or physically impracticable. NRAs may consider a virtual access obligation only when this contributes to competitive market outcomes for end-users.

ETNO notes that the draft Guidelines don't include any guidance on the technical and economic ground which may justify the imposition of active or virtual access obligations.

Vodafone Group and VodafoneZiggo state that the Guidelines need to provide more guidance on the circumstances that warrant active or virtual access. Vodafone Group considers that any circumstances warranting active or virtual access must be a last resort and that passive access is the remedy of first choice. Only where passive access cannot be realized due to technical impossibility, active or virtual access may be taken into account.

BREKO stresses the fact that NRAs may only consider the imposition of active or virtual access obligations at a point beyond the first concentration or distribution point under Article 61 (3) subparagraph 2 EECC, if its findings are substantial and clearly identifiable in economic or technical terms.

ecta asks for a modification of paragraph 78 to clarify that non-discriminatory access must be granted within the perimeters set by the wording of Article 61 (3) subparagraph 2 EECC and that virtual access at a point beyond must remain exceptional and should only be a transitory solution where objective factors render physical access impossible. It should also be made clear that these requirements apply irrespective of whether access has already been imposed or is about to be imposed for the first time.

7.2.2 BEREC response

Concerning TIM's, GIGAEurope's, Liberty Global's, Vodafone Group's, VodafoneZiggo's, BREKO's and ecta's point that active or virtual access should only be granted if sufficient reasoning is provided, BEREC likes to refer to the wording of Article 61 (3) subparagraph 2 sentence 3 EECC that clearly states that the imposition of active or virtual access obligations may be justified on technical or economic grounds. To this end, recital 154 further explains that *"[n]ational 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."* Thus, the requirement to provide reasoning for the imposition of virtual or active access obligations is already evident from the EECC, while at the same time the possibility to impose such obligations is foreseen, where necessary to achieve the regulatory objectives of Article 61 (3) EECC.

Besides the legal framework referred to above and regarding ETNO's concern, a conclusion from BEREC that active or passive access obligations are only to be imposed as last resort is outside the scope of Article 61 (3) subparagraph 5 item (b) EECC. BEREC has to set out the relevant criteria for determining the point beyond, not the conditions for imposing certain access obligations as the latter is not within the scope of the Guidelines.

BEREC notes that the aspects raised by ecta are already addressed in paragraph 78 of the draft Guidelines and further guidance going beyond this provision is not needed In BEREC's view.

In conclusion, BEREC does not see the need to adapt the final Guidelines with respect to the imposition of active or virtual access.

7.3 Segmentation of network deployments into clusters

7.3.1 Stakeholder responses

Bouygues Telecom agrees that the key criteria to determine the point beyond is the cost per end-user incurred by the roll-out up to an access point. The economies of the roll-out will differ between areas with differences in population density. Bouygues Telecom recalls BEREC that access for copper-unbundling was given at the MDF, aggregating several thousand lines when unbundled by alternative operators. In very rare cases, alternative operators would unbundle smaller MDF. Bouygues Telecom estimates 3000 end-users in less dense areas to be necessary for economic viability. The corresponding access point for passive access would be the ODF. This should be considered in paragraph 79 of the Guidelines. Bouygues Telecom notes that paragraph 82 of the Guidelines gives too much latitude to an NRA to define a high number of different cases all over the territory, which should be avoided.

GIGAEurope and Liberty Global state that in particular the draft Guidelines suggest that access points could be grouped together in clusters based on population density and/or the size/number of MDUs, rather than conducting individual assessments. NRAs should be discouraged from grouping access points based on population density/MDUs alone. Whilst these are important factors, they are not the sole factors of the business case. This

assessment should also include all other determinants of costs and revenues that are relevant to the business case assessment. If it is not possible for an NRA to use modern economic modelling tools in the development of clusters, then it should be required to conduct an assessment of each access point individually to ensure that access obligations meet the principle of proportionality (i.e. that they do not go further than necessary) and to avoid market distortion.

Vodafone Group supports GIGAEurope's statement that the concept of analysing access requests based on "clusters" is not included in the wording of Article 61 (3) EECC. If this concept is to remain in the Guidelines, BEREC is encouraged to provide greater clarity on its application.

ecta finds the idea of clustering of access points insufficiently developed to assess its merits. ecta encourages BEREC to study the possibility of the inclusion of this concept on the basis of a systematic assessment of the current and emerging NRA practices instead of providing guidance already in this stage.

7.3.2 BEREC response

Regarding the comments raised on the possibility to segment a network into clusters, BEREC would like to emphasize that the scope of the application of Article 61 (3) subparagraph 2 EECC encompasses networks or network elements and is thus in principle only limited by the preconditions to be met. Moreover, the wording of Article 61 (3) EECC does not restrict the application of the provision to a very narrow case-by-case approach. As an access request might be directed at a larger segment of a network or even to a whole network, a cumbersome case-by-case assessment can be avoided, not least to ensure that the imposition of obligations can result in commercially viable access. This is without prejudice whether an access request meets the conditions provided for in Article 61 (3) EECC.

With respect to ecta's suggestions that BEREC should only provide guidance on clustering in the future, depending on how NRAs' regulatory practice evolves, BEREC would like to clarify that the provisions on clustering have taken the symmetric access regimes already in place under the current framework based on Article 12 (3) Framework Directive¹³ and the NGA recommendation¹⁴ as well as experiences from SMP regulation to the degree relevant, into account. For instance, the current symmetric frameworks in some Member States divide networks into clusters according to population density as opposed to an assessment of each and every single access point. Also experiences of NRAs in SMP regulation in some Member States show that certain access points, e.g. street cabinets, are more likely to be accessed in densely rather than in sparsely populated areas. In conclusion BEREC will keep the guidance on clustering in the final Guidelines.

¹³ Include proper reference

¹⁴ Include proper reference

8 Relation of new network deployments to financial viability and public funding

8.1 Stakeholder responses

TIM, Deutsche Telekom and another confidential operator share the opinion that the exception under Article 61 (3) subparagraph 3(b) EECC should not apply to publicly financed projects.

TIM argues that an exception shall apply if an NRA verifies that the net present value of the new network project would become negative in case of an obligation at a point beyond. On the other hand, the viability of the project cannot in any case be considered compromised due to increased competition as a consequence of the imposition of a symmetric access obligation.

NLconnect highlights that investments in significant network upgrades or in completely new networks, especially in rural areas, must in no way be discouraged.

eir expresses agreement, that the exemptions related to new (and local networks) have to be seen under the precondition that obligations would compromise the economic or financial viability of a new network deployment, in particular by, but not limited to, small, local projects. This should also be made clear in paragraph 9 of the draft Guidelines.

BREKO proposes that wholesale operators should be exempted from obligations under Article 61 (3) EECC, as well as operators who provide services to the end-user but offer access at fair, reasonable and non-discriminatory conditions.

VKU notes that imposing access obligations to network providers without significant market power could disincentive to investments in full-fibre networks.

ecta believes that the draft Guidelines, despite explicitly invoking the notion of financial viability for purposes of determining the newness of a deployment, provide insufficient clarity as to BEREC's understanding of those terms. The draft Guidelines disregard that any exemption pursuant to Article 61 (3) subparagraph 3 EECC is applicable only to electronic communications network providers, and can thus not be extended to, or invoked by, parties only owning or otherwise controlling the concerned network elements without actually engaging in provisioning activity. BEREC should also clarify that the derogation pursuant to Article 61 (3) subparagraph 4 EECC cannot be extended to the exemption granted under Article 61 (3) subparagraph 3(b) EECC.

One confidential stakeholder is of the view that there shall always be a possibility to impose access obligations based on Article 61 (3) EECC irrespective of the size and type of the undertaking if the network deployment has been publicly funded.

8.2 BEREC response

BEREC notes that, assessing whether the imposition of obligations would compromise the commercial or financial viability of new network deployments is always a precondition to any exemption granted under Article 61 (3) subparagraph 3(b) EECC. BEREC points out that any access obligation has to be proportionate in accordance with Article 61 (5) EECC and that the access conditions, including prices, have to be set on fair and reasonable terms according to Article 61 (3) subparagraph 2 EECC. Therefore, if obligations according to Article 61 (3) subparagraph 2 EECC are proportionate one can expect that these obligations would in principle not compromise the commercial or financial viability of a network deployment.

BEREC also reminds that even new networks will be subject to obligations according to Article 61 (3) subparagraph 2 EECC if the financial or economic viability is not compromised and all other preconditions are met.

With respect to TIM, Deutsche Telekom and a confidential stakeholder's proposal that publicly funded networks should never be exempted, it has to be noted that the extent of the exemptions in Article 61 (3) subparagraph 3 EECC and the derogation from the latter in subparagraph 4 are defined by the legislator. Even though BEREC shall set out relevant criteria to determine which projects can be considered new, this does not include a decision whether new projects which are publicly funded should be excluded from Article 61 (3) subparagraph 3(b) EECC. This also does not follow from the recitals (especially recital 155) and the wording of Article 61 (3) subparagraph 4 EECC – according to which, “(...) *by way of derogation from point (a) of the third subparagraph, a NRA may impose access obligations on ECN providers fulfilling the criteria laid down where the network concerned is publicly funded (...)*”. Thus, BEREC notes that exempting publicly funded networks lies within the discretion of NRAs. BEREC also reminds that in the case of a publicly funded network, access obligations might already be in place in accordance with the state aid rules (in particular Regulation (EU) No 651/2014¹⁵).

BEREC agrees with TIM, that mere effects stemming from an enhanced competitive environment should not in themselves be seen as compromising the financial or economic viability of a network deployment, as this would be in obvious contradiction to the very reasons for imposing any access obligation pursuant to Article 61 (3) EECC in order to achieve the objectives of the EECC to enhance competition as laid down in Article 1 (2), Article 3 (2)(b), Article 3 (2)(d), Article 3 (4)(d), Article 3 (4)(e) and Article 61 (1) of the EECC. Conversely, where the net present value following the imposition of access obligations would turn negative the deployment of a new network would be financially or economically be compromised in such a way that it is either not being carried out at all or could not recoup its investment afterwards. Nevertheless, the actual assessment of financial or economic viability and the concrete criteria to be applied lie within the discretion of NRAs, as they are not to be defined in the Guidelines according to Article 61 (3) subparagraph 5 EECC.

With respect to ecta's view that only ECN providers are subject to the exemptions according to Article 61 (3) subparagraph 3 EECC, BEREC notes the Guidelines do not refer to owners that are not ECN providers unlike what is provided 61 (3) Subparagraph 1 EECC which is consistent with recital 155 EECC.

BEREC does not agree with ecta's view that Article 61 (3) EECC is limited to ECN providers per se, although ECN providers might normally be the more relevant addressee in particular for obligations to the point beyond. There might, however, be circumstances, where the owner of the infrastructure is subject to such obligations. This is clarified in recital 155 where it is stated that “(...) *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.*”

With respect to BREKO's submission, BEREC points to Article 61 (3) subparagraph 3(a) EECC which already covers exemptions for wholesale-only undertakings which may be

¹⁵ Article 52.5 Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187 26.6.2014, p. 1).

extended by the NRA to other operators of VHCNs that offer access on fair, reasonable and non-discriminatory terms and conditions. This exemption is outside the scope of the present Guidelines.

In conclusion, BEREC does not see the need to adapt the Guidelines on behalf of criteria for the determination of the financial or economic viability of network deployment and the relation to publicly funded networks, as these concepts are outside the scope of the Guidelines.

9 Network deployments to be considered new

9.1 General concept of “new”

9.1.1 Stakeholder responses

In Bouygues Telecom’s opinion no network should be considered new at all, as the definition of newness might lead to undue network replication. Especially where the localization of the first concentration or distribution point and eventually the point beyond are defined before the roll-out of the network, no network deployment should be considered new. Thus, the exemption for new networks should be limited and not apply for networks recently deployed as defined in paragraph 93 of the draft Guidelines.

TIM states that BEREC should set a consistent definition of new network deployment for Article 61 (3) EECC and Article 76 EECC. In any case, the exception should be guided by the economic viability and not by the period of time since the network has been deployed.

ETNO is not convinced that it makes sense to have different approach on the notion of “new” under Article 61 (3) EECC and Article 76 EECC.

Deutsche Telekom argues that BEREC has been given the task to determine “which network deployments can be considered to be new” and not to determine which network deployments might need a first mover advantage to be profitable. It is up to the NRA in question to assess on a case-by-case basis the economic or financial viability of a new network deployment.

eir notes, with regard to paragraph 9 of the draft Guidelines, that this wording is essentially directly taken from subparagraph 3 of the EECC. But, looking at the provision as a whole, eir’s reading of Article 61 (3) is that it does not limit the exemption for new network deployments on the basis of them being small and/or local.

In NLconnect’s view, the economic or financial viability of existing construction that has been carried out before Article 61 (3) EECC was in place, may in no way be comprised.

BREKO is of the view that a first mover advantage is crucial for every fibre deployment project. There should be clear criteria, however, for assessing economic or financial viability as BEREC states this as precondition for granting an exemption.

VATM is of the view that the possibility of imposing obligations on undertakings without SMP under Article 61 (3) EECC should be as restrictive as possible in order to avoid a reduction in the intensity of competition and impede investments in fibre deployment, especially in less populated regions.

One confidential stakeholder supports the criteria identified by BEREC to define a network deployment as new - namely those networks that have been deployed recently but also raises

concerns whether the possibility for alternative operators to recover the investments made for the deployment of VHC networks is given where access obligations are imposed on the point beyond.

ecta suggests to link the newness to the completion of network deployment which should also have a time limit. NRAs should also have regard to the entity carrying out the deployment. In this sense, newness should be understood holistically also in relation to what that entity is, in accordance with the Code's emphasis on granting exemptions to categories of undertakings.

9.1.2 BEREC responses

In BEREC's opinion it is not possible to follow Bouygues Telecom's perspective that no network can ever be considered new. First, the EECC's provision clearly demands BEREC to define which type of network deployment can be considered new. Second, networks have been deployed at different points in time, some more recently and others a longer ago. Therefore, networks clearly have a different age.

With respect to TIM and ETNO, BEREC also notes that the concept "new" in Article 61 (3) subparagraph 3(b) EECC is not equivalent to the concept "new" in Article 76 EECC in terms of regulatory content. While the concept of "new" provides for an extra safeguard for new network deployments with regard to imposition of access obligations in the context of Article 61 (3) subparagraph 3(b) EECC, Article 76 EECC aims at fostering investments and deals with conditions for co-investment agreements for the deployment of new VHCNs. Within this context, the term "new" refers to networks that the respective co-investors are going to build. In contrast, the exemption for new networks in Article 61 (3) EECC is applicable to recently deployed networks, as it is also stated in recital 155 EECC. BEREC has clarified this in the draft Guidelines (see footnote to paragraph 91).

BEREC disagrees with Deutsche Telekom's proposal that the notion of "new" should not be linked to a first mover advantage. The regulation of Article 61 (3) subparagraph 3(b) EECC has to be interpreted as a safeguard for networks that have not been active in the market for a long time and thus might be in a situation where a large initial investment is faced with uncertainty – or where financial constraints are observable – in terms of take-up, ARPU and consequently revenues to recoup the investment. To this end BEREC reminds that recital 155 EECC states that "(...) *national regulatory authorities can exempt certain categories of owners or undertakings ... 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 (...)*". Thus a link between "new", "recently deployed network elements" and the financial or economic viability of the business case is clearly established already in the EECC. In this regard, an exemption for a new network deployment from the imposition of access obligations could possibly enhance the economic or financial viability of the business case, by allowing undertakings or owners of such a deployment to offer wholesale services exclusively at their own discretion, effectively preserving a first mover advantage where it would be required. BEREC therefore agrees with BREKO, NLconnect, VATM and one confidential stakeholder that it is appropriate to interpret the concept "new" in light of the need to preserve a first mover advantage for certain network deployments.

On behalf of eir's contribution, BEREC would like to draw attention to paragraph 86 of the draft Guidelines, where it is made clear, that *"the exemption aims to protect new network deployments, if the imposition of access obligations beyond the first concentration or*

distribution point would compromise the economic or financial viability of a new network deployment.” A reference to the notion of “small” is not included in this paragraph.

With respect to ecta’s perspective, BEREC highlights, that Article 61 (3)(b) EEC states that the exemption should be applied where *“the imposition of obligations would compromise the economic or financial viability of a new network deployment, in particular by small local projects.”* Thus, the network deployment itself cannot be equated to the undertaking or owner carrying out the deployment.

In conclusion, BEREC does not see the need to adapt the Guidelines with respect to the notion of a “first mover advantage” in relation to the concept of network deployments being considered as “new”.

9.2 Network upgrades to be considered as new

9.2.1 Stakeholder responses

NLconnect points out that significant upgrades may also count as new network deployments. This should, however, not be limited to significant investments in “civil infrastructure and/or new wiring and cables (e.g. fibre) in the access network”, but in the case of HFC networks may also include significant investments in the implementation of new DOCSIS standards, analog switch-off or extended spectrum.

Deutsche Telekom argues that according to the logic in paragraph 92, upgrades to DOCSIS are also considered “copper enhancing technologies” which do not require significant investments. This technology should consequently as well be listed under paragraph 92, besides Vectoring.

ELFA asks for clarification whether a DOCSIS 3.1 update can be seen as new deployment.

In BREKO’s view the approach of generally excluding upgrades should be clarified and upheld to avoid any possible exploitation of this exemption through frequent upgrades in the form of installations of new network elements. Thus, BREKO suggests that the exemption should only apply to new and genuine fibre deployment and should not cover mere installations of chipcards or minor alterations of existing networks.

One confidential stakeholder agrees to the exclusion of upgrades of existing networks, unless investments in physical infrastructure are significant and the take up or market share of the network is expected to be limited. The stakeholder regards the wording “normally” as sufficient to leave room for taking into consideration upgrades which incur significant investments but encourages BEREC to put more emphasis on this aspect.

ecta notes that the notion of upgrades is in literal contradiction with the focus of the provision on new deployments and therefore does not believe that considering upgrades falls within the scope of the exemption. Considerations of network upgrades should thus be removed from the Guidelines and not be mentioned in paragraph 93.

ETNO states that it is not appropriate for BEREC to already regard certain upgrades as more, less or entirely unlikely to be new. This should in an objective and proportional regulatory evaluation be determined based on a transparent and contestable analysis based on the fact and merits of the case.

9.2.2 BEREC response

BEREC notes almost full agreement of the stakeholders that network upgrades should normally not be considered “new”, unless the investment is significant. Regarding ecta’s proposal to go even further and exclude any network upgrade from the notion of “new” regardless of the scale of the investment, BEREC is sceptical. In BEREC’s view, it is not always possible to draw a precise line between what constitutes an upgrade of a network and what is a complete new network deployment. For pre-existing networks, legacy infrastructure might still be used to some degree, even when large investments in fibre deployments are undertaken. The extent to which existing infrastructures is re-used has to be determined on a case-by-case basis. In general, significant upgrades in any network infrastructure, such as deployment of new fibre lines, might require a first mover advantage where the take-up or market share of the network is expected to be limited. Where only or mainly active equipment is replaced, BEREC considers that a first mover advantage is unlikely to be necessary to ensure the financial viability of the project. This was for example observed when incumbent operators upgraded from VDSL to Vectoring/Super-Vectoring in some Member States.

Similarly, an upgrade in cable networks is unlikely to justify a first mover advantage, except possibly where this goes hand in hand with significant investments into fibre-infrastructure and where the take-up or market share of the network is expected to be limited. Normally, HFC-networks are upgraded step by step according to demand and HFC-network operators are normally able to draw on a well-established subscriber basis already.

In conclusion, BEREC does not see the need for any substantial changes to the Guidelines, taking into account that many stakeholders seem to agree with BEREC’s standpoint.

9.3 First mover advantage period

9.3.1 Stakeholder responses

NLconnect, ELFA, VKU, BREKO and one confidential stakeholder are of the opinion that a period of five years could be insufficient for a first mover advantage and thus could negatively impact investments. According to NLconnect, the period depends on the specific business case and should be set at least to 10 years. ELFA, BREKO and VKU are of the view, that the period should be extended to at least seven years, while VKU clearly preferences eight years. The confidential stakeholder proposes a period of seven to ten years and points out that it has to be acknowledged that, compared to the incumbent, alternative operators need more time to recover their investments in case of deployments of VHCN, considering their market position in terms of market share, network coverage and take-up.

Besides this aspect, ELFA and VKU agree with the draft Guidelines that the opening of a network might lead to a win-win situation for the access provider and the access seeker.

ecta states that the five-year period should be considered exclusively as a limitation period beyond which viability concerns in the context of obligations beyond the first concentration or distribution point will no longer be considered. In this context, the suggestion of a blanket exemption period of five years could essentially suppress the pro-competitive benefits of new deployments for an undue period of time. In this sense, ecta not only agrees that exemption periods *could* be shorter than five years, but believes they generally *should* be so, save in exceptional circumstances.

9.3.2 BEREC response

BEREC disagrees with NLconnect, ELFA, VKU, BREKO and one confidential stakeholder view, that a period of up to five years is insufficient. BEREC reminds that the notion of “new” is linked to recently deployed networks or network elements. This interpretation is also in line with recital 155 EECC, which states that “(...) *national regulatory authorities can exempt certain categories of owners or undertakings ... 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 (...)*”. A network element being deployed ten or seven years before can hardly be regarded as having been deployed recently. Moreover, the notion of “new” in conjunction with “recently deployed” is in BEREC’s view directed at preserving the chances of a having a financially and economically viable business case where this is less likely. Thus, a situation may be identified, where a project carrying out new network deployments might need an exemption from access obligations subject to Article 61 (3) subparagraph 2 EECC. Such an exemption would effectively preserve a first mover advantage for such a network, when required. A period of time to benefit from a first mover advantage exceeding a period of five years would hardly qualify as a first mover advantage. In fact, BEREC is of the opinion that the period of time should normally be shorter than five years, e.g. two years. The draft Guidelines therefore state in paragraph 92: *“If a first mover advantage is needed, BEREC considers a maximum period of five years from the start of service provision long enough to establish such an advantage. Therefore, in principle, an exemption would not apply to networks older than five years. However, the time period for an exemption to be in effect could also be shorter than five years.”*

BEREC recognises that VKU and ELFA take into account the benefits of a new network deployment when granting access in terms of an enhanced take-up. The take-up and utilization of a network deployment often is crucial for its financial viability, especially in early stages.

BEREC finds ecta’s concerns are not grounded with reference to a blanket period. It has to be reminded that the precondition of an access obligation compromising the economic or financial viability has to be fulfilled in the first place. Where this is not the case, there is no reason to refrain from proportionate access obligations on fair and reasonable terms and conditions, where the preconditions for the imposition of access obligations according to Article 61 (3) subparagraph 2 EECC are otherwise fulfilled.

In conclusion, BEREC does not see the need to adapt the section on network deployments considered to be new with regard to the contributions above.

10 Projects to be considered small

10.1 Relation of undertaking and project

10.1.1 Stakeholder responses

Bouygues Telecom reasons that the definition of “small” should be narrow for the same reasons expressed regarding the term “new” (inefficient infrastructure replication). As long as an operator’s headquarters and/or subsidiary is active on the broadband market, retail and/or wholesale, he should not be considered as a new entrant, even if its size on that market is

limited. Thus, the exemption may apply only in cases of very small projects and an NRA has to make sure that the operator does not split its network to fit in this criterion.

TIM is of the view that in order to consider a project small, it shall be limited in scope and in the extension since it has to be local. Small shall not refer to the size of the operator which is deploying the new network. The size of the undertaking or its market share in the overall broadband market should rather not affect the assessment.

In ETNO's view "small projects" is a category that is also subject to the criterion that "the imposition of obligations would compromise the economic or financial viability", which is supported by recital 155 EECC which links the status of small projects to the exemption.

In Deutsche Telekom's view the wording of the EECC's provision only refers to the size of the project, the size of undertakings should not play any role in the assessment. Deutsche Telekom also strongly disagrees with the assumption that local projects are "small by nature". The EECC sets an exemption from symmetric regulation for "new network deployments, in particular by small local projects". This clearly shows that: (1) small local projects are a subcategory of new network deployments and, most importantly, (2) not all local projects are small (by nature). The criterion "small" should be interpreted in relation to the economic or financial viability of a project. To determine the financial viability of a small project is thus subject to a case-by-case assessment – the commercial risk stemming from new network deployments needs to be evaluated in every single case individually upon a local basis. Only where the potential access provider proves that the business case of a small project would turn negative due to granting access to a point beyond it may be exempted. On the other hand, Deutsche Telekom points out that city carriers owned by a municipality are in general financially stable and have the possibility to spread commercial risks. Deutsche Telekom further argues that the exclusion of "projects by companies owned by communities rolling out municipal networks" (paragraph 100) is neither justified, nor would it be beneficial for competition.

NLconnect agrees with BEREC's suggestion that small projects should "only include projects carried out by undertakings of a limited size on the broadband market, whereas the size of the undertaking in question should be measured relative to the total turnover and/or total number of active or passive connections on the broadband market." NLconnect also proposes to clarify what is meant by a municipal network e.g. a definition which includes network companies in which local or regional authorities have a major share. Also non-profit organizations such as foundations should be included as being not active in the whole or a major part of the broadband market".

In general, ELFA shares the view that the undertaking's size is a relevant factor for the determination of the project size. ELFA considers that projects are mostly small by nature regardless of the size of the undertaking, whereas small undertakings are characterised by local economic activity and are not active in the whole or a major part of the market.

Similarly, BREKO welcomes the protections afforded to operators who would qualify as not being active in a substantial part of the market. Local projects carried out by local or regional network operators such as e.g. city carriers should be considered as small projects and thus be subject to the exemption. BREKO notes that the provisions create confusion as the terms 'projects' and 'undertakings' are used to determine the appropriateness of the exception, yet they appear to be used interchangeably and are not clearly distinguished from one another.

VKU is of 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 confidential stakeholder expresses agreement that projects carried out by large undertakings should not be considered small. This is especially true with respect to incumbent operators rolling out networks within their own footprint, because of the overall strong market position of these undertakings and the advantages attached to this situation.

ecta agrees that the notion of small should not be extended to large undertakings, notably SMP operators engaged in numerous network deployments, but suggests to either revise paragraph 101, which erroneously suggests a contradiction between local projects of varying sizes and categories of owners and undertakings, or to delete it.

10.1.2 BEREC response

BEREC agrees with Bouygues Telecom's position that undertakings or owners should not be able to split network deployments in order to be considered small. To that end, recital 155 EECC clarifies that "(...) 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 (...)". Thus, the entity subject to an exemption pursuant to Article 61 (3) Subparagraph 3(b) last subsentence EECC is not any small individual network deployment, but rather a small local project in the sense of an undertaking or owner that is small on the national broadband market and that carries out a geographically limited activity. TIM and Deutsche Telekom's disagreement to link the term "project" to the notion of "undertaking" or "owner" is therefore unconvincing in BEREC's view. BEREC notes, that Bouygues Telecom, NLconnect, ELFA, BREKO, VKU, ecta and a confidential stakeholder seemed to generally agree with this interpretation while ETNO seem at least to agree in principle with the link of "projects" to "categories of owners and undertakings".

ecta, however, remarks that BEREC's notion of small and local projects might be misleading as it should be established that local projects of varying sizes do constitute the categories of undertakings and owners themselves, which could be exempted. While BEREC does not agree with ecta's reading of Article 61 (3) subparagraph 3 (b) last subsentence EECC, BEREC considers that the outcome would effectively be the same when determining that certain undertakings may be small, rather than individual network deployments. BEREC notes that paragraph 95 of the draft Guidelines could be prone to misinterpretation and the paragraph will thus be amended for the final Guidelines.

With respect to Deutsche Telekom's opinion that the classification of the size of a project would depend on the financial viability of the latter's network deployments, BEREC would like to point out that the financial viability is a separate item to be assessed. A new network deployment could be exempted where its financial viability is compromised by the imposition of access obligations. This could in particular be the case, where the network deployment is undertaken by a small and local project. A direct conclusion on the size of a new network deployment based on the financial viability of the undertaking carrying out this deployment is not possible, however.

Directed at Deutsche Telekom's and NLconnect's contributions concerning certain categories of owners and undertakings, such as municipal networks, BEREC would like to clarify that the reference in paragraph 100 of the draft Guidelines only gives examples of certain deployment

models which are more likely to be considered small. This is without prejudice that such projects are categorized, following the assessment of an undertaking's size, as being small. This will also be clarified in the amended paragraph 95 in the final Guidelines.

Otherwise, BEREC does not see the need for adaptations on the Guidelines with regard to the relation between the terms "new network deployment", "project" and "categories of owners or undertakings".

10.2 Assessment of size

10.2.1 Stakeholder responses

TIM elaborates that operators with a low market share in the broadband market should not be considered small if they have a high market share or footprint in the local area of the new deployment.

ETNO considers that the number of end user covered (irrespective of the fact that they are connected) and the extension of the covered area may be used to assess the size of the project. The market share should not be assessed for the overall broadband market, but in the local geographic area object of the new deployment. ETNO notes that the draft Guidelines seem to single out projects as small and susceptible to exemption which are prone to be less vulnerable and potentially have a stronger profile to form a bottleneck. ETNO believes that on the contrary, public financed deployments should clearly be excluded from the exemption. In addition ETNO is concerned about the statement in paragraph 100 of the draft Guidelines that the size of the undertaking or corporate group in sectors other than electronic communication should not be considered as a relevant factor in determining the size. In ETNO's view such undertakings are often publicly owned and/or enjoy special, privileged position (often legal monopolies) on their incumbent market resulting in a stronger and financially much less riskier situation than other projects.

Deutsche Telekom states that while BEREC sets out different criteria to determine the size of an undertaking (paragraphs 97-99), such as turnover generated in broadband markets, it is not comprehensible why market turnover itself accounts to financial viability of an undertaking.

NLconnect notes that BEREC can provide more clarity by defining a market share and thus recommends a maximum of 5 % of the number of passive connections on the broadband market.

ELFA notes that with respect to the determination of local economic activities and the reference value indicating existence of a major part of the market share, there is quite some room for interpretation given to NRAs. For instance, it is up to NRAs to decide if local economic activity still exists and if a company owned by a municipality is active as an ISP outside its district borders. Especially regarding the definition of a major part of the market, some more specification should be added to the draft.

BREKO sees the need to further clarify the calculation of turnover and whether it involves all economic activity of the operator rather than that attributable to economic activity in the telecommunications sector.

VKU agrees that a simple rule of thumb is appropriate to assess an undertaking's size.

One confidential stakeholder argues that there is no reason to handle other large undertakings differently from larger telecommunications companies. Criteria for a small project/deployment should be changed so that the size of an undertaking/group in sectors other than telecommunications would also be a relevant factor. Electricity companies, for instance, may lay down fibre cables at the same time they lay down electricity cables and minimize the risks through building two networks at the same time. It would not be fair to compare this kind of deployment with a small local co-operative and it would not be fair to handle other large undertakings differently than large telecommunications companies.

ecta advocates to link the analysis of turnover and number of connections to the geographical area of the undertaking's activity.

10.2.2 BEREC response

BEREC welcomes that VKU expresses full agreement to the provision of the draft Guidelines with respect to the size assessment.

BEREC notes that the proposal of TIM and ecta might lead to a loop hole. If (only) the footprint of a network deployment was the basis for a size-assessment, no undertaking would likely be considered small, as the footprint would largely correspond to the geographic area to which access is requested. In consequence, the coverage, in terms of end-users potentially connected to its network, would be very high. This would also be reflected in the market share within the geographic area of activity. Thus the outcome of such an approach would not be helpful to identify small, local projects. The notion of small thus has to be considered on a nationwide scale.

With respect to Deutsche Telekom's contribution, BEREC clarifies that the notion of "small" and the requirement to assess the turnover and/or number of lines connected, is without any prejudice on the financial viability of the undertaking's network deployments. A network might be financially viable, even where access is imposed, e.g. due to an increased take-up of end-users connected. In this regard, turnover is a mere measure to assess an undertaking's size, not its financial viability.

Furthermore a fixed percentage of the market's turnover or passive connections, as suggested by NLconnect, would in BEREC's view likely lead to inappropriate outcomes. The size of different national markets varies considerably. As a consequence, applying the same percentage in very large Members States and very small Member States could lead to arbitrary outcomes in terms of e.g. how many lines deployed still qualify as small network deployments.

With respect to ETNO's, BREKO's and a confidential stakeholder's view regarding large companies entering the market, BEREC does not deem this to be problematic. On the one hand, new entries into the market will only be regarded as small and local as long as they are. On the other hand, in case of large undertakings (e.g. electricity companies) entering the market, the deployment and its growth may often be very significant. Thus, such network deployments conducted by large undertakings would eventually not be considered small and local.

In conclusion, BEREC sees no need to adapt the draft Guidelines with regard to the above mentioned aspects.

10.3 Network deployments by undertakings serving up to 500 potential end-users

10.3.1 Stakeholder responses

Bouygues Telecom fully agrees that projects encompassing 500 potential end-user connections over all the territory are to be considered small. Additionally, no other projects should be able to be considered small. An NRA has to make sure that an operator does not split its network to fit into this criterion.

NLconnect does not understand BEREC's assumption in paragraph 102 that a project with less than 500 potential end-users can be considered small as there is no relation to the size of the national broadband market. In the Netherlands, the fixed costs for demand aggregation, network development, project management, permits, and other overhead costs are too high to constitute a viable business case for such a small number of connections. In NLconnect's view, small projects generally pass a minimum of 2.000 homes. Moreover, projects of this size are often merged with other projects, since the limit for a successful independent exploitation in the Dutch practice lies at around 10.000 homes passed.

ELFA and VKU generally appreciate the adoption of a simplifying rule of thumb, but the wording of paragraphs 102 and 103 iii. does not clearly reveal if the 500 potential end-users refer to the concerned project or to the aggregated number of the undertaking's connections.

BREKO agrees with the presumption that the exemption should be based on the number of end-users connected to an operator's network. Nevertheless such a presumption should not exclusively be linked to an amount of 500 potential end-users.

ecta states that while 500 connections generally appear reasonable to describe a project as small, it has to be ascertained that the project indeed is limited to these connections. ecta observes that currently applicable rules in certain Member States set even lower thresholds beyond which the imposition of market power – independent of any access obligation – is considered reasonable.

ETNO lacks insight on the way the numbers in paragraph 102 have been established and question the reliability of standard numbers to qualify "small".

10.3.2 BEREC response

BEREC notes that ELFA and ecta generally seem to agree that it is suitable that an undertaking with 500 connections or less would normally be regarded as small.

With respect to Bouygues Telecom's contribution, BEREC explicitly agrees that it should not be possible to split network deployments into smaller portions in order to have them considered small. In this respect the draft Guidelines state in paragraph 102 that "*[p]rojects by undertakings where the undertaking in total has less than 500 potential end-users (homes and small businesses) connected to its network can usually be considered small.*" Thus, as also clarified above, the total deployment of an undertaking has to be considered. To this end the Guidelines aim to prevent regulatory gaming, which also answers the question of ELFA and VKU whether the specific project or the total number of an undertaking's connections have to be considered: The latter is the case.

However, BEREC, is not of the view that also other projects, or, more precisely, other undertakings cannot also be considered small, like Bouygues Telecom suggests. Whether a

project would be considered small or not will depend on an assessment pursuant to the specifics of the national market which is further clarified in paragraph 102 of the draft Guidelines, where BEREC states that “*projects by undertakings with a higher total number of potential end-user connections might still be considered small, depending on the outcome of an analysis according to paragraphs 95 to 101*”. Given the diversity of network deployments across Member States, BEREC sees the need to give NRAs flexibility in this regard. In this case, it has to be demonstrated that an undertaking is small relative to the national size of the market. BEREC takes note of NLconnect’s concerns and therefore clarifies that the notion of 500 is without a presumption that also larger undertakings could be considered small.

In conclusion, BEREC does not see the need to amend the Guidelines with reference to the contributions above.

11 Abbreviations

AEC	As-Efficient-Competitor
ARPU	Average Revenue Per User
BCRD	Broadband Cost Reduction Directive
BEREC	Body of European Regulators for Electronic Communications
BoR	Board of Regulators
cf.	compare (from Latin "conferatur")
DOCSIS	Data Over Cable Service Interface Specification
DSL	Digital-Subscriber-Line
DSLAM	Digital Subscriber Line Access Multiplexer
e.g.	for example (from Latin "exempli gratia")
ECN	Electronic Communication Network
EECC	European Electronic Communication Code
EEO	Equally Efficient Operator
ERT	Economic Replicability Test
etc.	and so forth (from Latin "et cetera")
FD	Framework Directive
FttH/FttB	Fibre to the Home/Building
FWA	Fixed Wireless Access
G.fast	fast access to subscriber terminals
G-PON	Gigabit Passive Optical Network
HFC	Hybrid Fibre-Coax
i.e.	that is (from Latin "id est")
ISP	Internet Service Provider
MDF	Main Distribution Frame
MDU	Multi Dwelling Units
MPoP	Minimum Point of Presence
NDCM	Non-Discrimination and Costing Methodologies
NGA	Next-Generation Access
NPV	Net Present Value
NRA	National Regulatory Authorities
ODF	Optical Distribution Frame
PON	Passive Optical Network
REO	Reasonably Efficient Operator
SMP	Significant Market Power
VDSL	Very High Data Rate Digital Subscriber Line
VHC(N)	Very High Capacity (Network)
xDSL	variant of DSL

12 List of Stakeholders

[Confidential contribution]

[Confidential contribution]

Bouygues Telecom S.A.

Bundesverband Breitbandkommunikation e.V. (BREKO), The German Broadband Association)

Deutsche Telekom AG

ecta (European Competitive Telecommunications Association)

eircom Limited (eir)

ELFA (European Local Fibre Alliance)

ETNO (Electronic Telecommunications Network Operators)

GIGAEurope

KPN N.V.

Liberty Global plc.

NLconnect (The Dutch broadband trade association)

NOS SGPS S.A.

TIM S.p.A (Telecom Italia)

VATM (Association of the Providers of Telecommunications and Value-Added Services)

VKU (The German Association of Local Public Utilities)

VodafoneZiggo Group Holding B.V.

Vodafone Group plc