Liberty Global response to draft BEREC Guidelines on Code symmetric access obligations

Liberty Global welcomes the opportunity to provide feedback on BEREC's draft Guidelines on the Criteria for Consistent Application of Article 61(3) of the European Electronic Communications Code (Code). Liberty Global also responded to BEREC's early call for input in June 2019. Broadly speaking we urged BEREC to ensure that these measures will be designed and adopted in line with the text and spirit of the symmetric access provisions, in a way which ensures they truly support and foster sustainable competition, and investments in new and improved networks. We also provided BEREC with a report by e-Conomics on the 'Symmetric access obligations under Article 61(3) EECC'.[1]

Under §1 of article 61(3), national regulatory authorities (NRAs) may require operators of networks to provide access to in-building wiring and associated facilities at the first concentration or distribution point (first c/d point) if replication of these network elements is economically inefficient or physically impracticable. Article 61(3) §2 provides that this obligation may be extended to a point beyond the first c/d point if the access provided under the above paragraph is insufficient to address 'high and non-transitory economic or physical barriers to replication' which underlies an existing or emerging market situation that significantly limits competitive outcomes for end-users. Under article 61(3) §5, BEREC is responsible for providing guidance on a number of key concepts under this provision in order to foster their consistent application.

We strongly support BEREC's commitment to engage with stakeholders, including the two-step process undertaken by BEREC – the early call for input, followed by this consultation — in line with best practice regulatory principles. As a general point, Liberty Global recognises that BEREC has adopted a high-level, pragmatic approach to the Guidelines. However, some of the approaches and interpretations by BEREC are — despite our earlier feedback — contrary to the text and spirit of the symmetric access provisions. Also, whilst Liberty Global accepts that article 61(3) §5 specifically requires BEREC to provide guidance on a limited set of concepts, we consider that there is scope for additional guidance in order to avoid the type of fragmentation between Member States that the Guidelines seek to prevent. In particular, we ask that BEREC take into account the following and makes changes to the Guidelines accordingly:

- Provide guidance to NRAs on the interrelationship and hierarchy between the various regulatory instruments (in particular, the hierarchy between competition law, Significant Market Power (SMP) regulation and article 61(3)).

- Provide further guidance on important considerations and assessments that have the potential to lead to significantly fragmented approaches and outcomes, such as:
    - the assessment of an underlying market situation that significantly limits competitive outcomes for end-users;
    - the circumstances which warrant active/virtual access; and
    - when and how to assess requests based on 'clusters.

[1] e-Conomics (in collaboration with Incyte Consulting and Radicand Economics), *Symmetric access obligations under Article 61(3) EECC – A report for Liberty Global*, May 2019 (**e-Conomics Report**).

- Adopt a more balanced and proportionate approach to imposing symmetric access obligations within the Guidelines that recognises the significant burden placed on network operators by such obligations, and which places greater responsibility on access seekers to demonstrate that their request is reasonable, appropriate and necessary.

- Adopt a consistent use of terms that have common legal and economic understandings within telecommunications regulations, including that of an 'efficient operator';

In this response, Liberty Global will first elaborate on the above items. This is followed by a number of paragraph-specific comments.

1. Hierarchy between various regulatory instruments

The objective of today's regulatory framework for electronic telecommunications — largely codified in the Code — has been to guide the market from state-owned monopolies to effectively competitive markets. The Code (recital 29) restates this objective as follows: *"This Directive aims to progressively reduce ex ante sector-specific rules as competition in the markets develops and, ultimately, to ensure that electronic communications are governed only by competition law".* However, BEREC's draft Guidelines do not currently advance this objective as they are designed in such fashion that they could result in more, not less, ex ante sector specific regulation. This risk results from the failure of the guidelines to clarify how symmetric regulation is to be fit within the broader context of the regulatory framework. In particular, the guidelines fail to give guidance on the interrelationship and hierarchy respectively between a number of regulatory instruments; (i) *ex post* competition law under the EU treaties, *ex ante* SMP-based asymmetric regulation and symmetric regulation under the Code, and (ii) within the symmetric obligations outlined in article 61(3) itself.

Ex post competition law, ex ante asymmetric and symmetric regulation are designed to be complements that address different market situations. Here we refer to paragraph 3.2 of the attached supplementary report by e-Conomics on 'A consistent application of Article 61(3) EECC' ('Supplementary Report)'.[2] Competition law applies to all sectors, including the telecommunications sector. It is a less intrusive tool, designed to address market behaviours that have a negative effect on the internal market, the competitive process and consumer welfare. The SMP regime, on the other hand, aims to break down high and non-transitory barriers to entering telecom markets — in situations where the presence of such barriers results in market structures that do not tend towards effective competition and in which competition law alone would not adequately address the market failure(s) concerned — to a point at which ex post competition law can take over.[3] In that context, the SMP regime is based on established competition law principles and analytical processes. The SMP regime also recognises that telecommunications networks are not natural monopolies, and that in almost all parts of the network it is possible *and desirable* to have infrastructure competition due to the dynamic efficiencies that it creates. The desirability of infrastructure competition has recently been emphasized

[2] e-Conomics, *A consistent application of Article 61(3) EECC — A report for Liberty Global*, July 2020, (**e-Conomics Supplementary Report**).

[3] See, for example, recitals 1 and 11 of Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation (EU) 2014/710, OJ L 295 [2014] (**Relevant Markets Recommendation**).

by the inclusion as a specific objective of the regulatory framework the encouragement of investment in and roll-out of very high capacity networks (VHCN).

The aim of article 61(3) is clearly not to replace the SMP regime; rather the provisions are designed as a complement to be applied in specific narrow circumstances. Article 61(3) §1 of the Code (and the former article 12(3) of the Framework Directive and the Broadband Cost Reduction Directive[4]) recognises that in some cases it may be economically inefficient and therefore undesirable to replicate in-building infrastructure (regardless of the market situation). In addition, the main purpose of article 61(3) §2 is to address situations, particularly in rural areas, where SMP regulation has been unable to stimulate investments by alternative operators in their own infrastructure deeper into the network due to the persistence of high and non-transitory barriers to rolling out VHCNs.

We notice a potential overlap between the high and non-transitory barriers to market entry that SMP regulation aims to address and the high and non-transitory barriers to replication that article 61(3) §2 aims to address, given that barriers to replicate a network constitute barriers to market entry as well. We refer to paragraph 3.2.1 of the Supplementary Report. Because of this potential overlap, there is a risk that article 61(3) is used to address market failures that would normally be the subject of assessment under the SMP regime, or to impose SMP-type regulation on operators where market analysis has failed to demonstrate the existence of market failure/dominance. Clearly, this would be a misuse of powers circumventing the long-established hierarchy within the regulatory framework (and the Code) that is designed to address such concerns. Here, Liberty Global is concerned that the draft Guidelines further blur (rather than clarify) the lines between (local) symmetric access obligations aimed at 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.

The draft Guidelines also ignore the role of the sunset clause in stimulating all network operators to invest in networks (in particular, VHCNs). We refer to paragraph 2.2 of the Supplementary Report. Given that the aim of article 61(3) §2 is to address situations where SMP regulation has not been able to stimulate infrastructure competition, its application requires (at least) the assumption that SMP regulation has run its course and been removed. The failure to do so may lead to the erroneous conclusion that certain elements of a network are non-replicable, whereas the business case for replication is only negative because wholesale access under the SMP regime tends to bias the make-or-buy decision by increasing the opportunity costs of replicating infrastructure.[5] In that case, the lack of replicability may be caused by regulation itself.

2. <u>Lack of guidance on key areas of interpretation</u>

The above concerns are exacerbated because the draft Guidelines remain silent or vague on important questions concerning the scope of article 61(3). The result is that they leave significant room for different interpretations by Member States and NRAs, which is likely to lead to fragmentation and maybe even misuse of article 61(3). Whilst BEREC has indicated that the scope of the Guidelines

[4] Directive on a common regulatory framework for electronic communications networks and services, 2002/21/EC, OJ L 108 [24.4.2002] (**Framework Directive**); Directive on measures to reduce the cost of deploying high-speed electronic communications networks (EU) 2014/61, OJ L 155 [23.5.2014] (**Broadband Cost Reduction Directive**).

[5] For more information on the necessary role of sunset clauses, see: e-Conomics Report, section 3.2.3; e-Conomics Supplementary Report, section 2.2.

is limited under article 61(3) §5 of the Code, this narrow focus is not applied evenly across the document. BEREC provides additional guidance on some issues that fall outside of the scope of article 61(3) §5, but not on others. The Code clearly places an obligation on BEREC to foster a consistent application of article 61(3). In this regard, and to make sure article 61(3) indeed complements the SMP regime (and does not replace it), we ask that BEREC gives further guidance on the following matters.

First, BEREC's draft Guidelines do not sufficiently address *which economic or physical barriers to replication are high and non-transitory*.[6] Application of article 61(3) §2 of the Code is subject to the identification of such barriers. Whilst the draft Guidelines do indeed discuss these barriers, they fail to clarify the difference between high and non-transitory barriers to *replication* and high and non-transitory barriers to *enter a market*. In fact, 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. We refer to paragraph 3.2.1 of the Supplementary Report.

Second, BEREC's draft Guidelines do not sufficiently address when "*barriers to replication underlie an existing or emerging market situation significantly limiting competitive outcomes for end-users*". Application of article 61(3) §2 of the Code is subject to the identification of such market situations. This means that NRAs must first analyse whether there is indeed such a significant limiting of competitive outcomes for end-users; second, whether these are caused by the presence of barriers to replication (and not e.g. by barriers to market entry); and finally, whether imposing an access obligation would take away these barriers to replication or otherwise remedy the market situation to such extent that the measure is proportionate.[7] To conduct these analyses consistently across Member States, NRAs need more guidance on the specific characteristics of a competitive market outcome that article 61(3) §2 aims to promote. We refer to section 2 of the Supplementary Report.

We are concerned that, in the absence of guidance on the above issues defining the scope of article 61(3) §2, NRAs will diverge significantly in their judgment on when it may be applied. There are significant differences between Member States in, for example, the number of network operators active, the quality of operators' networks, the geographical coverage of networks, existing (and as explained above, hierarchically preceding) network regulation, etc. In general, these differences may warrant a heterogeneous implementation of regulation, and perhaps even diverging views on the elements of a competitive market outcome that regulation needs to target. However, the legislative history of article 61(3) §2 implies that this does not apply to the application of symmetric access obligations for wiring beyond the first c/d point. Article 61(3)§2 is not drafted as a measure to be applied widely across the Member States, but as a measure for specific circumstances (e.g. difficult rural areas) and with a specific purpose of stimulating investments in VHCNs. In the absence of clear guidance, NRAs may develop diverging interpretations of the scope of article 61(3) §2, resulting in scope creep and fragmentation in the application of the article; as well as of SMP regulation. This would be opposite to what the Code intends to achieve.

[6] Article 61(3) §5, point e.

[7] The proportionality requirement is required under common law, but also specifically by article 61(5) Code.

We therefore encourage BEREC to provide and explain the factors NRAs are to take into account when conducting this analysis. In this regard, it is key that BEREC addresses the following substantive elements:

- As regards the market situation, we suggest that BEREC's guidance directs NRAs to analyse not just factors such as prices, the number of players and market shares, but in particular the actual and/or emerging conditions and incentive for (potential) operators to invest in VHCN. First, because this reflects the primary reasons for recasting the regulatory framework and second, because such incentives ultimately drive market dynamics and thus end-user outcomes. In this regard, an essential element of the market situation is the absence or presence of regulation or obligations based on competition law or SMP regulation, and the outcome of recent market analyses. As noted, due to the hierarchical structure of the various tools, this will be a known and important factor that therefore ought to be taken into account. Finally, the availability of commercial wholesale offers is an important element in analysing the market.

- As regards the limiting of competitive outcomes for end-users, guidance is needed only when this is "*significantly*" the case, as the Code requires. Similarly, in the wording of recital 154, "*important competition problems or market failures*" are required. These are clearly drafted as high thresholds, in light of the requirement contained in article 61(5) that obligations and conditions must be proportionate. However, in the absence of guidance, these thresholds are open to diverging and subjective interpretation by NRAs (or even complete inattention). This may result in unintended and undesirable outcomes for market participants, and moreover in fragmentation within the Union. We therefore suggest that BEREC mitigates the risk that such scenarios materialise by reflecting in the final Guidelines robust objective criteria by which NRAs should determine whether the thresholds are met.

Third, the draft Guidelines provide little or no guidance on when NRAs may impose active/virtual obligations under article 61(3). In particular, we note that the draft Guidelines seem to suggest that virtual obligations could be imposed under §1. Furthermore, they do not provide additional guidance on the circumstances justifying virtual obligations under §2. Regarding the reference to virtual access under §1, we note that the Code explicitly limits the use of virtual access obligations to §2. Regarding virtual obligations at the point beyond, we note that this 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; notably in terms of infrastructure competition. In our view, however, it is hard to imagine occasions where symmetric virtual access obligations would have such effect if similar remedies under SMP regulation have failed to catalyse challengers' investments in their own infrastructure.

Finally, the draft Guidelines introduce a new concept of analysing access requests on the basis of 'clusters'. In particular, the draft Guidelines suggest that when an NRA is confronted with the assessment of a potentially large number of access points, they could be grouped together in clusters based on population density and/or the size/number of MDUs, rather than conducting individual assessments. This concept is, however, not provided for in article 61(3) and as such lacks legal basis.

Zooming in on this concept, it becomes clear it is erroneous. First, it wrongly assumes that the application of article 61(3) §2 can be used widely and is not limited to exceptionally rare cases. Second, the reference to high and non-transitory barriers to replication of networks clearly implies a case-by-case assessment. These cases should be assessed within their regional context (as implied by recital 154 mentioning 'low population density' as an example of areas where the business case for alternative infrastructure rollout is more risky),[8] but it goes too far to equate this to a region-by-region analysis. Clustering MDUs would have to be based on a bottom-up analysis of the business cases at those MDUs, showing that they are complementary. In other words, the NRA must show that simultaneous investment in areas A+B, improves the return on investment compared to rolling out in area A and B independently. This assessment should include all determinants of incremental costs and revenues that are relevant to the business case assessment[9] and account for the profile of the access seekers being an efficient operator.[10] NRAs must thus be discouraged from top-down grouping of access points based on population density/MDUs. This would suggest an approach more akin to SMP-based geographic market segmentation. NRAs must instead employ a bottom-up business case approach, employing modern economic modelling tools that can ensure such a bottom-up case-by-case analysis of all access points.

3. Proportionality of imposing symmetric access obligations

We are significantly concerned that the draft Guidelines are almost wholly written from the perspective of alternative operators, with little regard or no consideration for impact on network operators on which access obligations would be imposed and the proportionality of such obligations. For example, the guidelines pay no attention to the fact that access obligations impose costs on network operators and may reduce the network operator's return on investments in capacity, or the need for access seekers to ensure their requests are reasonable and substantiated. This would have an opposite effect on the key objectives of article 61(3) – to truly support and foster sustainable competition, and investments in new and improved networks. We refer to section 3 and paragraph 4.3 of the Supplementary Report.

According to the Code, any obligations imposed by NRAs (and specifically any obligation imposed under article 61[11]) must follow the principle of proportionality; that is, they must be:

- appropriate – i.e. likely helps to achieve the desired objectives;
- necessary – i.e. there are no less severe means to achieve the desired objectives; and
- reasonable – any positive effects should be balanced against the negative effects.

In terms of appropriateness, we refer back to our earlier comments in section 1 on the role of article 61(3) within the context of the wider regulatory framework. In terms of necessity, the draft Guidelines

[8] Recital 154 of the Code states that 'such extended access obligations are more likely to be necessary in geographical areas where the business case for alternative infrastructure rollout is more risky, for example because of low population density or because of the limited number of multi-dwelling buildings. Conversely, a high concentration of households might indicate that the imposition of such obligations is unnecessary.'

[9] See e-Conomics Supplementary Report, section 4.2.1, which lists the particular categories of drivers of incremental costs.

[10] See e-Conomics Supplementary Report , section 4.2.2.

[11] See article 61(5) Code.

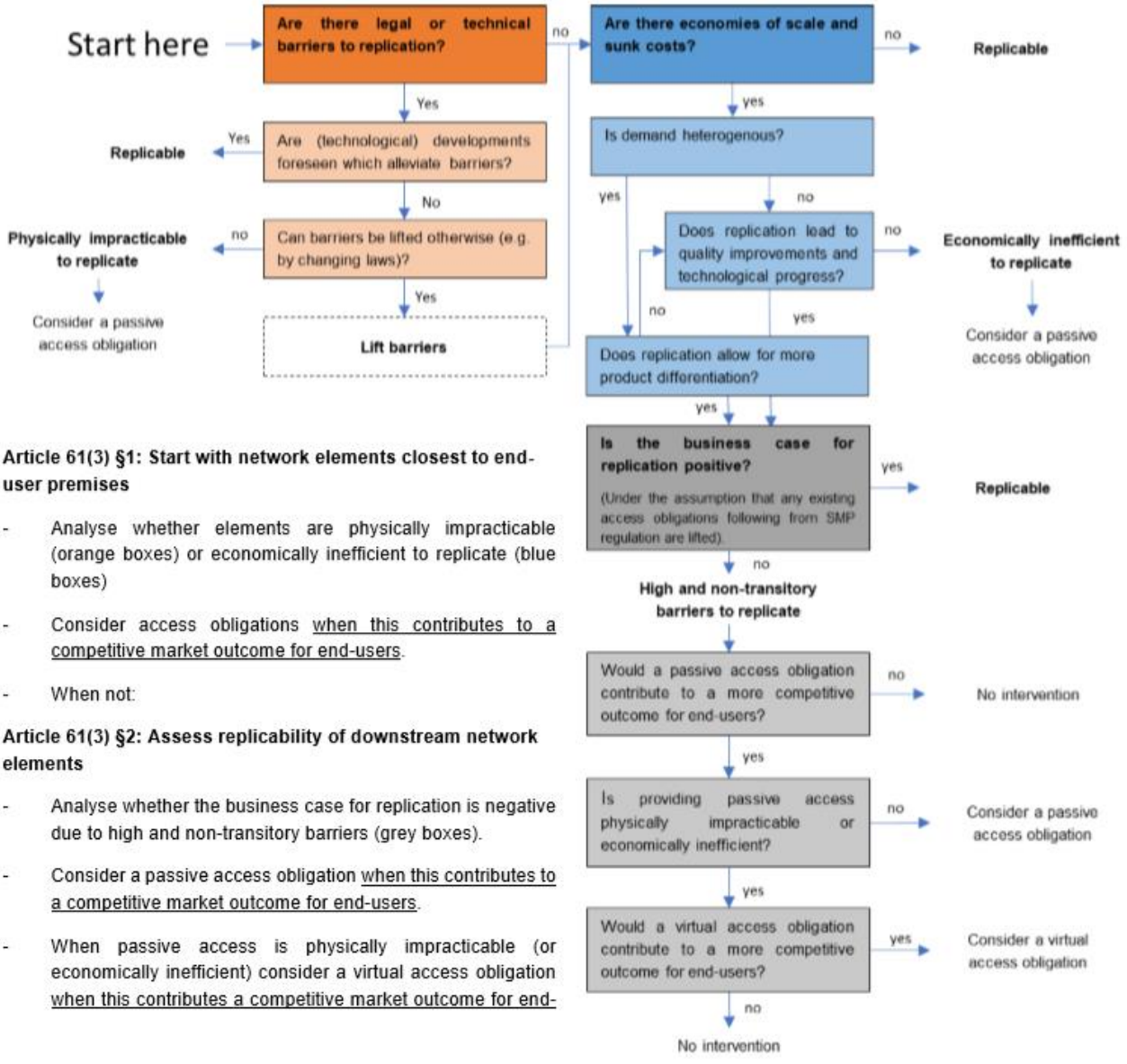
rightly point to a step-by-step analytical process, where all steps are required to be taken, and in the right order. This is important in order to preserve the hierarchy embedded within article 61(3) between §1 and §2 and the principle of proportionality—specifically that NRAs should first consider the imposition of access obligations under §1 (up to first c/d point) before considering access obligations under §2 (to the point beyond).[12] This hierarchy reflects the need for NRAs to adopt the least burdensome measure that is required to address the harm, i.e. competition problems or market failures at the retail level to the detriment of end-users (see recital 154). The provisions also clearly foresee a different, higher legal standard for NRAs to have to establish in order to impose access obligations under §2 than to impose access obligations under §1.

This hierarchy has been largely left unconsidered by BEREC in its draft Guidelines. For example, paragraph 19 seems to suggest that NRAs may find it more appropriate or proportionate to impose access under §2 of article 61(3) without first undertaking a full assessment under §1 as though it is an equal choice between these two provisions (rather than the outcome of a step-by-step analytical process that reflects differences in legal standards and principles of proportionality). Moreover, this disregards that symmetric access obligations are intended only to be used in exceptional circumstances.[13] We pictured the step-by-step analytical process below.

[12] See also recital 154 where it states that NRAs should first consider choosing a point in a building (or just outside) as this will be more beneficial to infrastructure competition and the roll-out of VHCN.

[13] See Commission Staff Working Document, Evaluation of the regulatory framework for electronic communications accompanying the document 'Proposal for a Directive of the European Parliament and of the Council' establishing the European Electronic Communications Code (Recast), SWD(2016) 313 (14 September 2016).

FIGURE 1 FRAMEWORK FOR ASSESSING REPLICABILITY UNDER 61(3)



Article 61(3) §1: Start with network elements closest to end-user premises

- Analyse whether elements are physically impracticable (orange boxes) or economically inefficient to replicate (blue boxes)
- Consider access obligations when this contributes to a competitive market outcome for end-users.
- When not:

Article 61(3) §2: Assess replicability of downstream network elements

- Analyse whether the business case for replication is negative due to high and non-transitory barriers (grey boxes).
- Consider a passive access obligation when this contributes to a competitive market outcome for end-users.
- When passive access is physically impracticable (or economically inefficient) consider a virtual access obligation when this contributes a competitive market outcome for end-

Regarding reasonableness, 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 issues that might arise for the network operator as a result of access being granted. Moreover, they disregard altogether the impact on incentives to invest in infrastructure (both by the network operator and the access seeker). This is surprising given that one of the key goals of these provisions is to promote infrastructure competition and the roll-out of VHCN.

In addition, paragraph 82 of the draft Guidelines blurs the concept of reasonability in relation to access requests by suggesting that access seekers may file a blanket request to a network, leaving it

up to the NRA to determine which parts of that network can be considered non-replicable. Such a procedure conflicts with the notion of a reasonable request which should underlie any access obligation under article 61(3). Article 3(2) of the Broadband Cost Reduction Directive indicates that a reasonable request should specify the elements of the network/project for which the access is requested and the time frame. There are good reasons to apply the same conditions to an access request under article 61(3) because such requests are foreseen only in rare cases, notably in the most difficult regions (and not networks) that are characterised by low population density.[14]

4. Consistent and coherent interpretation of concepts across the Code and competition law

In order for the novel powers granted to NRAs under article 61(3) to function coherently within the pre-existing framework of telecommunications regulation, particularly in light of the hierarchy between the various regulatory tools set out above, it is essential that the legal terminology employed in that article and in the final BEREC Guidelines — such as the term 'efficient operator' — is interpreted in a manner consistent with the rest of the framework within which it exists.

It should be noted in this regard that the Code is largely a recast of the existing laws and legal concepts. The stated aim of the Code, per recitals 4 and 323, is to "*simplify the current structure with a view to reinforcing its consistency*" and to achieve "*a harmonised and simplified framework for the regulation of electronic communications networks*". Adopting new meanings for pre-existing legal concepts, solely for the purpose of article 61(3) while the established meanings remain unaltered for other parts of the framework, would run counter to these objectives of the Code. Additionally, key concepts and definitions referred to in the Code are, and should remain, consistent with their meaning under EU competition law.

The interpretation of these legal concepts has been developed over many years through guidance and application of the regulatory framework by the Commission and in Member States. Providing a diverging interpretation of accepted (legal) concepts – or no clear interpretation at all – in the final BEREC Guidelines would undermine the robustness and predictability of the telecoms regulatory regime as consolidated over the past decades. We therefore suggest that the Guidelines additionally acknowledge relevant existing (legal and economic) definitions and formulate the intended guidance in a manner fully consistent with the application of the Regulatory Framework thus far.

[14] See: e-Conomics Supplementary Report, sections 4.1 and 4.3.

Specific comments on the draft Guidelines

Liberty Global provides our specific comments on the draft Guidelines as follows. This is in accordance with BEREC's request for stakeholders to include reference to relevant paragraphs or sections of the Guidelines in order to facilitate their processing.

Specific comments on section titled 'Illustration of replicability considerations within Art. 61 (3) Code'

Par	What	How
(16)	We note that in accordance with the principle of proportionality, Member States and NRAs should be encouraged to consider less intrusive means to address legal or other physical barriers to replication.	We request that BEREC encourage Member States and NRAs to consider less intrusive means to address legal or other physical barriers to replication.
(17)	As explained in section 2, we consider additional guidance is needed to ensure NRAs adopt a consistent approach when determining whether there are replication barriers significantly limiting competitive outcomes for end-users.	We request that BEREC provide and explain (a) the factors that NRAs are to take into account when conducting the analysis of what defines competitive outcomes for end-users, (b) what are high- and non-transitory barriers to *replication* (as opposed to high and non-transitory barrier to *market entry*), (c) when is there a significant limiting of competitive outcomes for end-users, (d) how to determine causality with barriers to replication, and (e) how to assess whether the resulting improvement of the competitive market outcome is proportionate to the intervention. We urge BEREC to take into account section 2 and paragraph 3.2.1 of the Supplementary Report.
(19)	This paragraph is not clear. It also appears to suggest that an NRA could summarily decide — without following the step-by-step analytical framework — that it is more appropriate or proportionate to apply access obligations under §2 than under §1. As noted in section 3 above, this would be inconsistent with the hierarchy and	We request BEREC to revise this paragraph to ensure that it is clear that NRAs are required to follow the step-by-step analytical framework when imposing access under §2—in line with the principle of proportionality (particularly that of necessity).

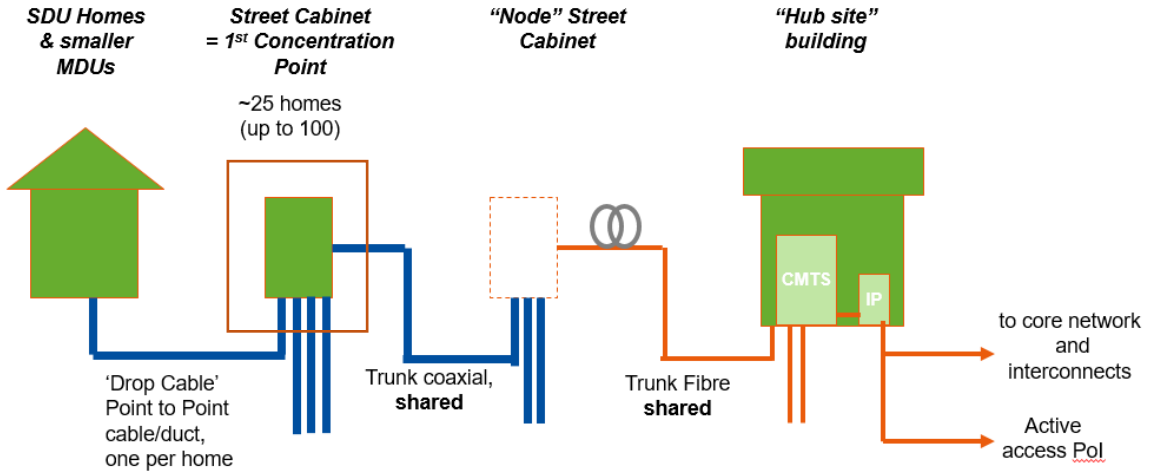
	the principle of proportionality embedded in article 61(3). There is also no mention of the significant burden placed on network operators by symmetric access obligations (particularly to the point beyond) and the need to take this into account when considering the reasonableness of such obligations.	We also request BEREC to encourage NRAs, when undertaking this assessment, to consider the reasonableness of such obligations, taking into account, in particular, the burden placed on network operators, as well as the negative impact on incentives to invest in infrastructure.
(20)	This paragraph is not clear as it appears to refer to imposing symmetric access obligations beyond the 'access point beyond', and therefore appears to disregard the step-by-step framework and hierarchy built within article 61(3) (see section 3). In terms of assessing whether this element of the network is economically replicable for an efficient access seeker, it is important to recognise that incremental infrastructure costs for rolling out own-infrastructure to a point deeper in the network (i.e. close to the end-user) will differ between different types of access seekers. This is an additional area where the draft Guidelines do not provide sufficient guidance, and which is likely to lead to fragmentation between Member States. In particular, BEREC's draft Guidelines do not address how NRAs should deal with different requests from different operators. For example, operators with significant core/backhaul infrastructure that are likely to have less difficulty in rolling out network in rural areas as opposed to service-based operators with limited own-infrastructure that wish to obtain access in various areas. Similarly, operators with higher market shares in other regions are likely to have less difficulty in rolling out network in rural areas. In addition, operators who intend to provide wholesale access to third parties themselves are likely to have less trouble deploying networks in rural areas, as compared to operators who do not.	We request that BEREC more clearly specify in this paragraph that, when considered whether to impose access beyond the first c/d point (and not beyond the access point beyond), that an NRA must first identify — starting from the point closest to the end-user and moving out — whether there are high and non-transitory barriers to replicating this element of the network. We also request that BEREC provide additional guidance for NRAs dealing with requests from different types of access seekers, in particular that the assessment under article 61(3) should be undertaken with an efficient operator in mind — in line with the harmonised regulatory framework and accepted (general) legal and economic principles as discussed in relation to paragraph 60 below.

Specific comments on section titled 'Item (a): The first concentration or distribution point'

Liberty Global generally agrees with BEREC's approach to defining the first c/d point, and the need to adopt a technologically neutral approach.

As noted in our previous response to the initial call for input, within HFC networks the first concentration point and the first distribution point are one and the same network element. In one direction (from the end-user), it functions as a concentration point — where numerous drop cables come together / are aggregated. This network element also functions as a distribution point — the point of connection to the broader network. This is not really addressed in Figure 3 or 4 of the draft Guidelines.

In Liberty Globals' HFC networks — the majority of which are designed according to the Star (tap) topology — the first c/d point is the street cabinet/underground footway box (generally for instance serving around 25 homes, and no more than 100), and for medium and large sized multi-dwelling units (MDUs), the first c/d point is usually inside the MDU.



In the context of whether replication of in-building networks (up to first c/d point) would be economically inefficient or physically impracticable under §1 — 'economically inefficient' means that replication is socially undesirable because access obligations result in similar welfare gains while avoiding duplication of costs. This is typically the case when there are high investments in combination with the absence of dynamic efficiency gains directly associated with replication. Replication of local access networks — that is, to the point beyond under §2 — is rarely economically inefficient because of directly associated dynamic welfare gains that outweigh the costs of duplicating investments. For this reason, focus of the regulatory framework to date has been on creating conditions for infrastructure-based competition through the SMP regime (see section 1 above). The role of article 61(3) is therefore to address limited situations, particularly in rural areas, where SMP regulation is unable to take away these barriers.

Par	What	How
(24)	This one of only a couple paragraphs in which BEREC recognises that a key objective of the Code and article 61(3) is to benefit infrastructure competition and the roll-out of VHCN.[15] In this regard, we note here that the negative impact on network operators and on incentives to invest in infrastructure (and the resulting longer term negative impact on end-users) has received little attention in the draft Guidelines.	We request BEREC to encourage NRAs to not only consider incentives to invest in infrastructure (and particularly VHCN) when determining the relevant access point—in line with the objectives of the Code and article 61(3), but also to consider the burden placed on network operators and the negative impact on investment incentives when deciding whether to impose symmetric access obligations — in line with the principle of proportionality.
(32-33)	In paragraph 32-33, BEREC seems to suggest that in order for access obligations under article 61(3) §1 to be effective, the first c/d point must be 'reasonably accessible'. It follows from this statement that obligations beyond the first c/d point under §2 could be imposed if an NRA deems the first c/d point unreasonably inaccessible. This, however, is not the relevant test for imposing access obligations under article 61(3) §2. Rather, the test is whether there are high and non-transitory barriers to replication. We therefore strongly object to suggestions within the draft Guidelines that a lower test would apply in the case of physical barriers to replication. For example, in paragraph 33, BEREC suggests that physical replication barriers will be high and non-transitory if an access point is not 'easily accessible'. This interpretation of the provisions clearly cannot be supported by the provisions and disregards the resulting significant burden that such access obligations place on networks operators. Regarding accessibility, Liberty Global considers — in the case of HFC — that the first c/d point is	We request BEREC to revise this section on accessibility to make clear the distinction between (a) the test in §1, which requires physical impracticability, and (b) the test under §2 which requires high and non-transitory barriers to replication which underlie a market situation significantly limiting competitive outcomes for end-users.

[15] See article 3 Code (which states that the Code's general objectives include promoting connectivity and access to VHCN and promoting efficient infrastructure-based competition) and recital 154 regarding the goals of article 61(3).

	accessible if it is physically accessible and enables access seekers to deliver and extract external signals passively by gaining access to the raw drop cable. Naturally, there may be circumstances where an access seeker has to invest in their own infrastructure in order to make use of such access (e.g. by installing their own street cabinet next to an existing cabinet if there is insufficient space). Such investments need to be taken into account in the access seeker's business case. Provided that such investments do not constitute high and non-transitory barriers to replication when undertaking the business case analysis, then access obligations under article 61(3) §1 will be sufficient. To extend access beyond that point, NRAs must follow the required steps under article 61(3) and establish that there is a market situation significantly limiting competitive outcomes for end-users and that this is caused by the presence of high and non-transitory barriers to replication.	
(34)	We note that in accordance with the principle of proportionality, Member States and NRAs should be encouraged to consider less intrusive means to address accessibility issues (for example, whether mediation to facilitate discussions with building owners, or other more direct legal measures could be adopted to facilitate access).	We request that BEREC encourage Member States and NRAs to consider less intrusive means to address *physical* accessibility issues.
(35)	See above in relation to paragraph 34. The same applies for relevant legal restraints such as urban planning rules or safety standards.	We request that BEREC encourage Member States and NRAs to consider less intrusive means to address *legal* accessibility issues.
(37)	As discussed in section 2, the draft Guidelines are not sufficiently clear on the circumstances in which active/virtual access obligations may be imposed. In paragraph 37, BEREC appears to suggest that the first c/d point may be determined on the grounds of active or virtual accessibility. This goes against the text and spirit of article 61(3) as active or virtual accessibility is	We request BEREC to provide additional and clear guidance that active or virtual accessibility is not a criterion to determine what is the first c/d point, and on when active/virtual obligations may be imposed to avoid discrepancies between how such requests are assessed across the EU.

	not a criterion to determine what is the first c/d point. Also, paragraph 37 appears to suggest that active/virtual access could be considered in relation to access obligations imposed under §1 of article 61(3), without having to meet the higher legal threshold of demonstrating high and non-transitory barriers to replication that underlie an existing or emerging market situation that significantly limits competitive outcomes for end-users as is required under §2. This goes against the hierarchy that is clearly embedded in 61(3), as explained in section 3.	Such guidance should reflect the hierarchy within article 61(3) and a higher legal threshold, in line with the principle of proportionality. Moreover, BEREC's guidance should not question clear boundaries set by the Code on the legality to impose virtual access obligations (i.e. only in relation to §2 and not in relation to §1).

Specific comments on section titled 'Item (e): High and non-transitory economic or physical barriers to replication'

Par	What	How
(43)	Replication barriers are high when a challenger, after investing in its own infrastructure and capturing a substantial part of the market, would not be able to earn a profit. This is largely reflected but should be made clearer in the final Guidelines.	We request BEREC to make more explicit that replication barriers are high when a challenger, after investing in its own infrastructure and capturing a substantial part of the market, would not be able to earn a profit.
(44)	Additionally, replication barriers are non-transitory if temporary SMP regulation cannot take away these barriers by facilitating challengers to build the necessary scale. This way the hierarchy within the regulatory framework between the SMP regime and article 61(3) as per section 1 above is respected. In our view, however, symmetric access obligations beyond the first c/d point are nevertheless unlikely to further stimulate infrastructure competition and the roll-out of VHCN, which is the main purpose of article 61(3).	We request BEREC to include in this paragraph that replication barriers are non-transitory — in line with the regulatory framework hierarchy — if temporary SMP regulation cannot take away these barriers by facilitating challengers to build the necessary scale. This way the guidelines also introduce a clear distinction between high and non-transitory barriers to *replication* and high and non-transitory barriers to *market entry*.
(46)	This paragraph is not clear. BEREC appears to suggest that a network is non-replicable if an	We request that BEREC more clearly specifies that the assessment of

	access seeker would have to replicate the part of the network from the core network to the first c/d point. This wording implies that something is not replicable because it has not yet been replicated, which is, of course, incorrect reasoning. Under article 61(3), consideration of replicability should be taken from the perspective of the first c/d point and only move outwards if there are high and non-transitory barriers to replication. Naturally, if obligations are imposed under §1, then an access seeker will need to roll-out their own infrastructure to the first c/d point.	replicability should be taken from the perspective of the first c/d point and only move outwards if the higher threshold of high and non-transitory barriers to replication is met.
(47)	In this paragraph, BEREC recognises that the wording of article 61(3) clearly requires an assessment of whether there are competition problems or market failures at the retail level leading to the detriment of end-users. We also consider that, when imposing obligations under article 61(3), NRAs should also assume that SMP regulation has run its course and is not able to take away more barriers to replication.	As noted in section 2, we request that BEREC provides and explains the factors NRAs are to take into account (such as impact on infrastructure investment and rollout of VHCN) when conducting the analysis of whether there is indeed a significant limiting of competitive outcomes for end-users We also request that BEREC reiterate within this paragraph the need for NRAs have regard to the outcome of recent market analysis procedures and to assume the activation of a sunset clause.
(50-51)	The concept of "high and non-transitory barriers" already exists within the SMP regime and is explained in detail by the Commission in paragraphs 11-15 of the 2014 Relevant Markets Recommendation as part of the so-called "three criteria test" for markets for which SMP regulation may be justified under the regulatory framework. Paragraph 51 of the draft Guidelines states that the "*criteria […] differ*" when analysing barriers within the contexts of articles 61(3) and 67(1). We do not agree with this wording; the criteria for assessing high and non-transitory barriers are the same. Rather, as paragraph 51 mentions, it is the barriers to which they apply that differ – namely,	We request BEREC amend paragraph 50 to more accurately reflect that the criteria for assessing barriers under the SMP regime and article 61(3) are the same but, rather, the barriers being addressed are different (namely, entry and replication barriers respectively). While non-transitory in the context of SMP regulation means that entry barriers are transitory when competition law alone suffices to allow market entry, it makes sense that replication barriers are transitory in the context of article 61(3) §2 when SMP

	network replication under article 61(3) and market entry under SMP regulation (as noted in section 1 above). This latter interpretation makes sense: both *replication* under article 61(3) and *entry* under article 67(1) can be subject to barriers, but the legal toolbox to analyse the barriers does not – and indeed should not – differ.	regulation suffices to let challengers replicate network assets.
(53-54)	Paragraph 53 is not clear. An efficient access seeker will need to replicate the part of the network between the point where access is granted (either the first c/d point or the point beyond) and their core network. BEREC seems to suggest that this entire section is non-replicable, whereas it needs only to assess the replicability of wiring between the access point and the nearest point-of-presence (POP) at which the access seeker should have (been able to have) a presence as a result of (past) SMP regulation. Had the access seeker rolled out to this nearest POP, then this investment is sunk and needs not be accounted for as part of the incremental cost. We refer to section 4.2.2 of the Supplementary Report. Moreover, it should be noted that presence or absence of regulation based on competition law or SMP regulation, and the outcome of recent market analyses, may significantly influence the analysis of barriers to replication under article 61(3). As these other forms of regulation must hierarchically be considered first (as set out in section 1), the final Guidelines should make explicit that this ought to be taken into account in the analysis.	We request BEREC to revise this paragraph to more clearly follow the step-by-step analytical process outlines in article 61(3), and only take into account the replicability of wiring between the relevant access point (i.e. the first c/d point or the point beyond) and the nearest POP at which the access seeker should have (been able to have) a presence as a result of (past) SMP regulation. We request BEREC to include language in paragraph 53, regarding factual existence of the presence or absence of regulation based on competition law or SMP regulation, and the outcome of recent market analyses as a relevant factor, and in paragraph 54 to make clear that these factors must be accounted for in the analysis.
(56)	This paragraph seems to confuse barriers to replication and barriers to entry, and the role of symmetric access obligations under article 61(3). For example, the necessity to build up scale is (also) a barrier to market entry that SMP aims to take away. Similarly, switching barriers will generally be faced by all end-users in the market and these are generally addressed through the end-user rights provisions in the Code. Moreover, market maturity is considered a critical factor here,	We request BEREC amend this paragraph to more accurately reflect the criteria for assessing barriers to *replication* (rather than entry) under article 61(3), including the role of market shares. We also request BEREC to revise this paragraph to encourage NRAs when undertaking this assessment to

	whereas the market for VHCNs is obviously not mature, indicating there is ample room for challengers to gain market share by rolling out first. As such, it would be more appropriate in this context to mention market immaturity as a factor lowering the barriers to replication. All in all, this paragraph appears to overly consider factors that may make entry difficult for access seekers, as opposed to replication, without sufficient consideration of the current competitive conditions and the burden placed on existing operators by the imposition of access obligations in the absence of SMP (see section 2 above). The test for replicability – that of high, non-transitory barriers – will depend on the relevant business case, including the incremental costs and revenues. The calculation of these should be based (amongst others) on the size of the addressable market and the share of that market the efficient operator can be expected to gain. The latter is informed by the market share that the challenger currently has in other regions, supplemented with the market share of third-parties – if relevant – who may be expected to purchase wholesale access from the challenger (as recognised by BEREC in paragraph 64-iv), and further extended with the additional market share that the entrant is expected to gain by moving first with the roll-out of VHCN capacity.	consider the burden placed on network operators, as well as the negative impact on incentives to invest in infrastructure—in line with the principle of proportionality.
(60)	In line with our comments in section 4 above, we believe that the draft Guidelines provide too much leeway for diverging interpretations of the concept of "efficient operator"—particularly given that article 61(3) is clearly intended to exist within a harmonised framework and in accordance with established competition law and economic concepts. This is because paragraph 60 (and 73) suggest that the efficiency of an access seeker may be determined by what NRAs deem "*sufficient*" to meet this standard. Rather than harmonising the method for analysis, this in effect creates an escape clause that NRAs may use to substitute their own subjective interpretation of	We request that BEREC provide additional guidance for NRAs dealing with requests from different types of access seekers, in particular that the assessment under article 61(3) should be undertaken with an efficient operator in mind and that this term should be interpreted in line with the harmonised regulatory framework, competition law and accepted (general) legal and economic principles.

	"*sufficiently efficient*" for any and all of the other guidance provided by BEREC on this topic. On that basis, NRAs can then presume the particular access seeker's economic specificities, without the need to compare these to an objective benchmark. In the context of telecoms regulation, the concept of an efficient operator is found, for example, in the 2013 Recommendation on non-discrimination obligations and costing methodologies.[16] The Commission describes a costing methodology based on "*a modern efficient network*" which is established with the SMP operator's network as the initial point of departure for the analysis. Similarly, in the context of determining whether wholesale pricing is discriminatory, the Commission explains that "*a lack of economic replicability can be demonstrated*" by comparing the access seeker to the SMP operator. Paragraph 65 of the 2013 Recommendation does permit limited "*adjustments for scale to the SMP operator's costs*", but does not provide scope to altogether abstract from the SMP operator as a benchmark. Additionally, as part of ex post competition law, the "equally efficient operator" or "as efficient competitor" (the so-called AEC test) is established with regard to existing efficient market participants. This provides an objective benchmark that allows for objective analysis, and recognises the public interest against supporting inefficient operators. More importantly, this principle aims to avoid that regulation results in scarce resources being devoted to inefficient economic activities. Considering that this is a specific objective of the Code and article 61(3) §1, it would be inconsistent for §2 to result in the opposite.	Here we refer to section 4.2.2 of the Supplementary Report, which puts forward that an 'efficient operator' should be assumed to meet the AEC test and have a presence at the nearest POP. Additionally, an efficient operator is expected to fully exploit the possibilities for scope economies and thus not to limit its business model to delivering telephony services only, but also internet access and TV – and potentially wholesale access provided the incremental revenues outweigh the incremental costs.[17]

[16] Commission Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (EU) 2013/466, OJ L 251 [2013].
[17] For more analysis of the characteristics of an efficient operator, see e-Conomics Supplementary Report, section 4.2.2.

(66)	We note that, in accordance with the principle of proportionality, Member States and NRAs should be encouraged to consider less intrusive means to address legal or other physical barriers to replication.	We request that BEREC encourage Member States and NRAs to consider less intrusive means to address legal or other physical barriers to replication.

Specific comments on section titled 'Item (b): The point beyond the first concentration or distribution point'

Par	What	How
(70)	Not clear here what BEREC means by 'endogenously defined'. We presume that BEREC is referring to the various factors that it has included in the business case analysis model. We consider this should also include obligations resulting from SMP regulation and the outcome of recent market analyses (given that NRAs are required to take this into account under §2).	We request BEREC to clarify here what it means by endogenously defined' and to include all determinants of costs and revenues that are relevant to the business case assessment.
(72)	In our view, NRAs *must* use assumptions on the characteristics of an efficient access seeker in accordance with the wording of §2. The wording of this paragraph suggests that this is optional and that NRAs could base their assumptions on an inefficient access seeker, which would be contrary to the wording and spirit of the Code. In addition, the NRA should assume that the access seeker will offer the full scope of products that an efficient provider would offer (i.e. not consider an access seeker that merely wants to offer a fixed telephony service).	We request BEREC to remove reference to 'sufficiently' efficient and adopt the interpretation of efficient operator in line with the harmonised regulatory framework and accepted (general) legal and economic principles. We also request BEREC to amend this paragraph to make clear that NRAs should assume that the access seeker will offer the full scope of products that an efficient provider would offer.
(73)	See our response to paragraph 60 regarding the determination of the efficient operator assumptions. We do not consider there should be room for NRAs to assess whether an access seekers own costs structures are 'sufficient' as it would likely leave scope for a business case analysis based on a less-than-efficient operator.	We request BEREC to remove reference to 'sufficiently' efficient and adopt the interpretation of efficient operator in line with the harmonised regulatory framework and accepted (general) legal and economic principles.

	As noted in section 4, it is important that such terms are interpreted in line with the harmonised regulatory framework and accepted (general) legal and economic principles.	
(75)	See response to paragraph 72. NRAs should assume that the access seeker will offer the full scope of products that an efficient provider would offer.	We request BEREC to amend this paragraph to state that NRAs should assume that the access seeker will offer the full scope of products that an efficient provider would offer.
(79-82)	As noted in section 2, we consider that NRAs should be discouraged top-down grouping of access points based on population density/size or number of MDUs alone. Rather, NRAs should instead employ a bottom-up business case analysis approach whereby access points are assessed individually—given there are many other additional and relevant determinants of costs and revenues. Failure to take these factors into account, and to assess each access point on its merits, suggests an approach more akin to SMP based geographic market segmentation (contrary to what is stated in paragraph 49 of the draft Guidelines).	We request BEREC to revise this paragraph to make clear that NRAs are required to assess each access point on a case-by-case basis based on all the determinants of cost and revenues, and not only on population or size/number of MDUs.

About Liberty Global

Liberty Global is one of the world's leading converged video, broadband and communications companies, with operations in six European countries under the consumer brands Virgin Media, Telenet and UPC. We invest in the infrastructure and digital platforms that empower our customers to make the most of the digital revolution.

Our substantial scale and commitment to innovation enable us to develop market-leading products delivered through next-generation networks that connect 11 million customers subscribing to 25 million TV, broadband internet and telephony services. We also serve 6 million mobile subscribers and offer WiFi service through millions of access points across our footprint.

In addition, Liberty Global owns 50% of VodafoneZiggo, a joint venture in the Netherlands with 4 million customers subscribing to 10 million fixed-line and 5 million mobile services, as well as significant investments in ITV, All3Media, ITI Neovision, LionsGate, the Formula E racing series and several regional sports networks.