Deutsche Telekom – Input on the BEREC draft guidelines Article 61 (3) EECC

Deutsche Telekom welcomes the opportunity to contribute to the draft BEREC guidelines on the criteria for a consistent application of Art. 61 (3) EECC.

I. Item (a): The first concentration or distribution point

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 were physically and technically accessible.

We therefore welcome 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**.

When determining the first distribution point, consideration whether this point might be closed or sold off in the near future should be considered – in order to ensure planning certainty for the access seeker.

II. Item (e): High and non-transitory economic or physical barriers to replication

Point (55) in conjunction with points (57-63) foresees that in order to determine economic non-replicability, the (expected) costs as well as the (expected) revenues need to be factored in. BEREC thereby aims to limit the costs only to those deriving from the "deployment of network infrastructure" as well as "wholesale expenses".
However, it is **not clear** from the draft guidelines whether **costs of own existing infrastructure** are part of the network deployment. **It needs to therefore be clarified that these costs are included**, to reach a fair result for the assessment of the economic replicability. Otherwise, operators with own infrastructure would be discriminated. 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).

III. Item (c): Network deployments to be considered new

Under point (92), it is stated that upgrades of only active network elements should normally not be considered a new network deployment, for instance *"certain copper enhancing technologies (such as vectoring) (…) may not require significant investments in new infrastructure."*

According to this logic, upgrades to **DOCSIS** are also considered "copper enhancing technologies" which do not require significant investments. This technology should thus consequently as well be **listed under point (92), besides vectoring**.

In general, 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.

IV. Item (d): Projects to be considered small

Under point (95), BEREC states that *"since many ECN deployments are local and therefore small by nature, it is important to take the size of the undertaking rolling out the network into account."*

We strongly disagree 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 wording of the article clearly only refers to the size of the project, the size of undertakings should not play any role in the assessment. Considering the size of the undertaking would be highly discriminatory and would lead to inconsistency in regulation.

Furthermore, the criterium "small" should be interpreted in relation to the economic or financial viability of a project. The sole determinator of Art. 61 (3) is, as clearly laid out in the article, the *"**economic financial viability** of a new network deployment"*. 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. We thus disagree with the assumption of BEREC that "*the spirit of the exemption does not seem to be directed towards a large undertaking involved in many local projects, as large ECN providers can spread commercial risk"*.

By inextricability linking small projects to the size of an undertaking, BEREC artificially narrows down the definition of small projects and preempts the case-by-case assessment of financial viability to be taken up by NRAs. Instead of solely defining small projects, BEREC presumes what is considered financially unviable (large vs. small undertakings), which is however not within its competence as laid out under Art. 61 (3) subparagraph 5.

In a second step, BEREC sets out different criteria to determine the size of an undertaking (points 97-99), such as **turnover** generated in broadband markets. It is not comprehensible **why market turnover itself accounts to financial viability of an undertaking**. Especially **city carriers owned by a municipality** are in general **financially stable** and have the possibility to **spread commercial risks**.

The **exclusion** of "*projects by companies owned by communities rolling out municipal networks*" (point 100) is therefore neither justified, nor would it be beneficial for competition, as this would lead to a **different regulatory regime** of the **very same project**, solely depending on the owner of the project instead of assessing the project itself. BEREC's assumption that "*the exemption seems to refer to categories of owners or undertakings, rather than to individual projects*" is thus in contradiction to the wording of Art. 61 (3).

Consequently, and in line with the wording and ratio of Art. 61 (3) subparagraph 3 (b), only those new local projects which are small should be exempted from the imposition of access obligations – and only in cases in which the potential access provider proves that the business case of a small project would turn negative due to the granting of the access to a network point beyond the first concentration or distribution point, it may be exempted.

We consequently do not support criteria i. and ii. of Point (103) – instead, useful criteria to determine which projects are small should be:

(1) Does the project include a wholesale offer? If a project is so small that it does not even include any wholesale offer, an imposition of access obligation might be a high burden. If the project offers other carriers' access, the burden of an access obligation is small and there is no need to exempt the project from Art. 61 (3).
(2) Does the small project differ from other projects (e.g. being extremely expensive) so that the burden of the imposition of an access obligation would compromise the economic or financial viability?
(3) In general, publicly financed projects should not fall under the exception of small projects