



VodafoneZiggo 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.

VodafoneZiggo is a 50-50 Joint Venture owned by Vodafone Group and Liberty Global. VodafoneZiggo has worked closely with Liberty Global in preparing a response to this consultation, which, most importantly, urges BEREC to give additional guidance on the application of article 61(3) in order to avoid fragmentation between Member States and even misuse.

As a Dutch operator, VodafoneZiggo is especially worried about this latter possibility. The Dutch Ministry of Economic Affairs has communicated to the Dutch parliament on several occasions how it sees 61(3) as an additional tool to tackle the supposed duopoly in the Dutch market:

*"That is why The Netherlands, during the negotiations [on the EECC], has aimed for additional regulatory tools that could be a solution to regulating a duopoly."*<sup>1</sup>

On March 17 2020, the Dutch court annulled ACM's WFA market analysis decision, based on which VodafoneZiggo was obliged to provide access to its network. Reason for the annulment was that the court did not follow ACM in its finding of joint dominance. In other words, the supposed duopoly does not exist.

Nevertheless, in a parliamentary debate on the Dutch implementation of 61(3), which was held a few weeks after the annulment, the Dutch market was still referred to as duopolistic and the Minister of Economic Affairs explained the possible application of article 61(3) as follows:

*"To again impose access obligations based on a finding of SMP will in the short term be difficult, given the current market structure and given the high burden of proof placed upon ACM by the court's verdict. The verdict therefore underlines the importance of creating, as soon as possible, additional possibilities to regulate. The article does exactly this, because it allows for regulation based on a different criterion, namely replicability."*<sup>2</sup>

<sup>1</sup> Translated from Dutch: "Daarom heeft Nederland tijdens de onderhandelingen gestreefd naar toevoeging van reguleringsopties die een oplossing kunnen bieden voor het reguleren van een duopolie".  
See: <https://zoek.officielebekendmakingen.nl/kst-21501-33-706.html>

<sup>2</sup> Translated from Dutch: "Het opnieuw opleggen van toegangsverplichtingen op grond van het AMM-regime is moeilijk op korte termijn te realiseren, mede gelet op de huidige marktverhoudingen en gegeven de hoge bewijslast die de ACM op grond van de uitspraak heeft. Deze uitspraak onderstreept in elk geval dat het van belang is dat zo spoedig mogelijk aanvullende mogelijkheden worden gecreëerd voor de ACM om tot regulering te kunnen overgaan. Dit wetsvoorstel voorziet hierin, omdat het regulering mogelijk maakt met toetsing aan een ander criterium, namelijk dat van replicatiebelemmeringen."  
See: <https://www.tweedekamer.nl/kamerstukken/detail?id=2020Z07431&did=2020D15889>



61(3) is thus seen as an alternative for imposing SMP-type obligations and conveniently enough comes with a lower burden of proof. This clearly goes against the text and spirit of the symmetric access provisions in the European Electronic Communications Code. Especially paragraph 2 of article 61(3) is not drafted as a measure to be applied widely across the Member States, but as a measure for specific circumstances (e.g. low population density) and with a specific purpose of stimulating investments in VHCNs.

To avoid misuse, we urge BEREC to:

- Provide guidance to NRAs on the hierarchy between the various regulatory instruments (in particular, competition law and SMP regulation);
- Provide further guidance on important considerations and assessments that have the potential to lead to significantly fragmented approaches and outcomes, or even misuse, such as:
  - the assessment of an underlying market situation that significantly limits competitive outcomes for end-users; and
  - the circumstances which warrant active/virtual access; and
- 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.

For a detailed explanation of the above points and paragraph specific suggestions on how they could be implemented in the guidelines, VodafoneZiggo refers to the Liberty Global response to this consultation, which will be submitted separately.