



**KPN reaction to the public consultation of BEREC
of 16 June 2020 regarding**

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

31 July 2020

1. Introduction

KPN has taken note of the public consultation of the Draft BEREC Guidelines on the Criteria for a Consistent Application of Article 61(3) EEC. As ETNO member KPN has been involved in the comments of ETNO and refers to that reaction. However within most EU countries on a typical averaged regional base there is far less infrastructure based competition being established yet than is already the case in almost every region in the Netherlands. Therefore, KPN has written a separate response to the consultation, which should be considered in addition to the ETNO response.

2. The scope of Article 61(3) needs further clarification

Access obligations may be imposed on electronic communication network (ECN) providers or owners of such network elements, where replication of the network elements concerned would be economically inefficient or physically impracticable.

The purpose of this article is to foster efficient investments in infrastructure, in accordance with the objectives of Article 3 of the Telecom Code; it is not intended to accommodate requests for access from providers who do not intend to make network investments themselves. 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 is already a commercial wholesale offer in place being consumed by multiple providers. If passive access is imposed on the basis of Article 61(3), the regulated network operator has to accommodate and deliver additional manual activities in his access network, triggering risk of additional service level degradation, longer delivery times, while an infrastructure competitor who is not regulated is not affected by this. The application of this regulation in such situations for passive access obligations may result in loss of market share and distortion of the competitive field.

It should be made clear that such requests are not governed by this article and should be negotiated on commercial basis with network owners. Any decision should be coherent with market analysis outcomes. With effective commercial wholesale offers in place, NRAs should in principle not impose additional access obligations. In that situation it is unlikely that any additional access regulation will increase consumer welfare.

However, no mention is made of what NRAs must assess or decide when networks are already replicated, and when there are active investments in VHCN of many parties, demonstrating the replicability in practice. The possibility to access customers via Fixed Wireless Access (5G) is not mentioned as well. And no mention is made of, e.g., the question as to which network access should be offered in a situation where there are two or more networks – one, two, or all?

3. Not to be used as an alternative for SMP-based regulation

Although SMP designation is not required to impose access obligations under Article 61(3), the application of Article 61(3) should not be used by NRAs to bypass market analysis procedures and SMP designations that are key steps to be able to impose generic, nationwide access obligations. The purpose of Article 61(3) is to promote competitive outcomes in the interest of end-users, primarily by increasing the efficient build out of new local or regional access networks. Whereas a generic SMP access obligation would focus on increasing the level of competitiveness in a retail market by enforcing incumbent network providers to grant access to asset-light multiple service providers.

Any other “more generous” application of Article 61(3) towards access seekers would result in the failure of the 3 criteria test in market 3 since there cannot be barriers to entry (first criterion) if access comparable to SMP-regulated access is granted on the basis of this article. This would have as a consequence that market 3 should be removed from the list of relevant markets in the EC Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation (2014/710/EU). KPN assumes that this is not the intention of Article 61(3). Therefore, regulated access based on Article 61(3) should always be closer to the end user than regulated access in market 3.

WIK¹ recently published results from a study on the new list of relevant markets and also discussed the relation between SMP-based regulation and regulation based on Article 61(3). In the study, WIK states:

Symmetric regulation under Article 61 of the Code is unlikely to provide an efficient alternative to SMP access regulation, as its primary purpose is to mandate the sharing of in-building wiring or physical access up to the first concentration point, the provision of access may rely on dispute resolution, and the imposition of access obligations (including active access) beyond the first concentration point is likely to be justified only in exceptional cases and may be disproportionate when applied to non-SMP operators.

Article 61(3) is predicated on the first part, aimed at enhancing infrastructure competition, namely via a fairly precise and in principle local request for access to consumers in case there is a unique or exclusive way of reaching them. And even with the extended scope in the second part with the possibility to regulate access beyond the first concentration point, the idea behind Article 61(3) is still an access regulation which provides the possibility to rollout own infrastructure.

Therefore, Article 61(3) is about passive obligations which should only be imposed where justified and proportionate for achieving sustainable infra-based competition in the local markets. This requires a solid economic analysis to be performed before any access obligation is imposed. This economic analysis should be in line with recent competition law practice and case law².

4. Regulation should stimulate VHCN investment

Since the policy objective in Article 3 of the EECC is to promote efficient investment in very high capacity networks (VHCNs), the effects on investment incentives should be carefully investigated before access obligations are imposed. This investigation should not be limited to the actual investment intent of the newcomer but should also take into account the effects on the existing networks in the area. Where network replication in an area with one network is economically efficient, this need not be the case in an area where more networks already exist. The number of networks that are economically efficient to build, should be left to the market. There is no general rule to an optimal number of networks in an area from an economic viewpoint. The more networks in an area, the harder it

¹ <https://ec.europa.eu/digital-single-market/en/news/study-future-electronic-communications-product-and-service-markets-subject-ex-ante-regulation>

² See f.i. ECJ, 28 May 2020, CK Telecoms/Commission, ECLI:EU:T:2020:217, paragraph 111 (and the case law cited there), where the ECJ sets the standards for the burden of proof in a case where competition problems are expected but no firm with a dominant position is present in the market: “(...) the more a theory of harm advanced in support of a significant impediment to effective competition put forward with regard to a concentration is complex or uncertain, or stems from a cause-and-effect relationship which is difficult to establish, the more demanding the Courts of the European Union must be as regards the specific examination of the evidence submitted by the Commission in this respect.” This case law relates to merger control, but is relevant for the context of Article 61(3) EECC because it focuses on a forward-looking analysis of the market.

will be for an additional network to reach a sufficient margin. On the other hand, more networks in an area already leads to a competitive outcome, which makes regulatory interference unnecessary. The pitfall that should be avoided is that an NRA concludes that economic replication barriers are present in an area, while the main reason for a challenging business case for a newcomer in that area is the fierce competition between the networks already there.

A thorough analysis of the effect of investment incentives in VHCN networks should form an integral part of any analysis preceding access obligations on the basis of Article 61(3).

In examining entry barriers, NRAs must take account of rapid technological developments in the industry that may in the future overcome current barriers, and also they must avoid prioritizing short-term requirements for greater choice, thereby undermining the longer-term opportunities for network competition.

5. Copper networks are not VHC and should be excluded

When an FttP network is present or is being rolled out, next to an existing copper network, the imposition of access obligations to the copper network should be excluded from Article 61(3). After all, in the draft BEREC Guidelines on very high capacity networks copper networks are considered NGA networks and not VHC networks. Mandatory access to copper networks does not contribute to the purpose of Article 61(3) to stimulate the roll-out of VHCN or to remediate replication barriers on those networks.

Furthermore, the question is whether there are barriers to economic replicability in areas where only copper networks have been rolled out. We believe that this question should be answered in the negative, in particular in cases where – like in the Netherlands and some other European countries – alternative fiber rollout has occurred in areas where the incumbent copper network (and in some cases also a coax network) was available. In cases like this, alternative fiber rollout uses its first mover advantage in fiber.

6. Economic barriers to replication too much from access seeker point of view

The simple fact that relying on access is cheaper than deploying an own network solution is not a sufficient reason to consider that there is an economic barrier for replication.

The concept of economic barrier should be looked at in respect to the cases where it is economically viable for several operators to deploy their own network. If it is economically viable that means that there is no barrier.

Paragraph 48 also stresses that economic replicability should be assessed in specific areas and not in a nationwide context. Paragraph 48 can also be reversed: if alternative infrastructure has been rolled out in areas with low population density and/or a limited number of multi-dwelling buildings, despite the risks that are mentioned in paragraph 48, this is a strong indication that high and non-transitory economic barriers to replication are absent everywhere. If alternative rollout already has occurred, especially in apparently less attractive areas, this should be treated by the NRA as a counterfactual to any stated or calculated economic barrier to replication.

The basics of the economic replication is depicted in figure 2 of the draft Guidelines. The proposal essentially is a business case where the access seekers revenues are compared with the access seekers incremental costs.

In addition to the fundamental concerns of ETNO, regarding the “business case approach” in the draft Guidelines, KPN has the following remarks:

1. By using the retail prices the access seeker intends to offer, the whole exercise risks becoming a self-fulfilling prophecy. The access seeker can simply propose low enough intended retail prices to make sure its business case is negative by definition. The starting point should therefore always be an ARPU derived from (a weighted average of) current market prices. Deviation from (average) current market prices should only be allowed by NRAs if solid economic analysis shows that these prices are significantly above competitive levels.
2. Revenues should be based on a product mix that is in line with the current market situation. Many wholesale price schemes show increasing tariffs with higher speeds or Quality of Service (QoS). An access seeker that claims to be offering a very high speed at a very low price will in most cases end up with a negative business case when using current wholesale prices and will claim economic replicability is absent and obligations are necessary. Therefore, the ARPU’s used in the business case should be based on the current and expected mix of access speeds and QoS in the market.
3. If replicability has been proven viable in comparable areas, absent access regulation, this should be treated as empirical evidence of economic replication. Empirical evidence should always have priority over theoretical business cases in determining whether economic replication is viable.
4. 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 proportional in such a situation and even risk becoming a negative investment incentive.
5. Economic replicability is also proven in a situation where access seekers are able to achieve a positive business case by using commercially available wholesale products. The simple fact that access seekers would like changes in the commercial offer (like for instance a wide-open bit-stream offer without tariff differentiation) is not sufficient to prove that economic barriers to replication exist.
6. The business case study period should be in line with technical and economic lifetime of the technology of choice. A fiber network for instance has a very long technical and economic lifetime which implies a very long payback period or a considerable rest value. An approach where the business case study period is chosen on the preferences of the access seeker should be avoided as the access seeker often has the ability to sell the network to another investor that may very well have a more long-term vision.

7. Available commercial wholesale offers should play a significant role

If a commercial wholesale offer is available and access seekers have succeeded in gaining a market position on the basis thereof, it is questionable if regulated access on the basis of Article 61(3) is proportional. Therefore, NRAs should always take into account the availability of commercial wholesale offers to determine if regulation on the basis of Article 61(3) is proportional. A risk on disproportionality especially arises if the NRA upfront shows interest and willingness to engage in the conditions (like the tariffs) of such an offer.
