ETNO reaction to the BEREC consultation regarding: Draft BEREC Guidelines on the Criteria for a Consistent Application of Article 61(3) EECC

Brussels, 31 July 2020

ETNO welcomes the opportunity to comment on the BEREC consultation regarding the Draft BEREC Guidelines on the Criteria for a Consistent Application of Article 61(3) EECC. ETNO, as an association of 40 companies that invest daily in Electronic Communications Network and being the main driver for investment in Very High Capacity Networks in Europe, is well placed to analyse and interpret the concerned issues and the present Guidelines. We are therefore pleased to share our insights and are open to further interaction with the BEREC Expert Workgroup dealing with the topic.

As a set of introductory remarks, ETNO would like to share some general observation regarding the Draft Guidelines.

- The primary 'ratio legis' of this Article 61(3) EECC is to address access issues regarding bottlenecks in the ultimate 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. This is a clear difference with SMP regulation.

- Secondly, Art 61(3) EECC is to give NRA powers to address appropriately the reasonable[1] requests from the operators to access to non-replicable network element(s) that have been deployed. Those symmetric access obligations under Art. 61(3) are in no way a substitute, but exist parallel to SMP regulation under art. 63 EECC and following as they do not serve the same purpose. According to art. 63(5) imposed obligations and conditions in accordance with 61(3) shall be "objective, transparent, proportionate and non-discriminatory" and a well-balanced implementation is therefore necessary.

- Article 61(3) is incorporated in the EECC and is thus reigned by the general framework of the Code and by its general objectives of Article 3 , which include the fostering of roll-out and investment in VHCN and balance access and pro-competitive measures with objectives to foster investment (cf. Art. 3 and Recitals (26) –(28)). When concerning competition issues related to markets susceptible to regulation pursuant Art. 63-64 EECC, it should take utmost into account the outcome of the relevant market analysis process.

[1] We note already that the principle of a reasonable request, laid down in art. 61(3) is valid for both access up to the 1st concentration or distribution point and to 'point beyond' this 1st point, as the analysis of a 'point beyond' derives from an initial assessment regarding the 1st concentration point. We will come back to this later on below.

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.

Further, in order to ensure a consistency between the distinct measures under the EECC and with the objective of maximising investment in VHCN, BEREC guidelines should in our view clearly identify that new VHC networks deployed under a co-investment offer pursuant to article 76 EECC (to which the co-investors are offered access to the whole capacity through co-investment on fair, non-discriminatory and reasonable terms and conditions) should be favoured as market practice (and thus incentive to co-invest should be preserved). These networks should therefore be excluded from symmetric access obligations under article 61(3).

Regarding **Replicability considerations**

We note BEREC develops in the Draft Guidelines (as from now referred 'GL' or 'the Guidelines') considerations regarding replicability. We understand that the purpose of this is to enable the development of the points mentioned in Art. 61(3) related to physical barriers to replication and subparagraph 5 EECC.
These considerations on replicability are sometimes imprecise or weak in the way they paraphrase the framework:

- §13 GL is taking rather a short cut regarding the casus of access to bottlenecks. It is not the mere existence of a bottleneck or barrier that leads to access, but the insurmountable character of such bottleneck. Namely Art. 61(3) EECC speaks of 'impracticable' and 'non-replicable' as the trigger for access, and only when justified and proportionate to achieving sustainable competition in the interest of the end-user.
- §18 GL mentions 'Where an NRA *considers* …', while this should rather be 'concludes' or 'has established'. In the same sense the phrase 'economic or technical grounds' as the base to impose virtual access is too vague and incomplete if compared with the legal provisions. This opens the Draft Guidelines with somehow a note of confusion that could best be avoided.

Regarding **Item (a) – The first concentration or distribution point**

§23 GL: Recital (154) makes clear that the access point should be inside the building or *just outside* the building. Priority should be given to identify a point inside the building, as is clearly stated in art 61(3), 1st subparagraph:

> "In particular, and without prejudice to paragraphs 1 and 2, national regulatory authorities may impose obligations, upon reasonable request, to grant access to wiring and cables and associated facilities inside buildings **or** up to the first concentration or distribution point as determined by the national regulatory authority, where that point is located outside the building. "

It derives the NRA determines the access point when it is not inside the building and identify such point just outside the building, not higher than the 1st distribution/concentration point.

§24 states "Thus, the EECC indicates that the first concentration or distribution point should be located close to the end-user, if feasible. However, it could be farther away from the end-user, where an NRA cannot identify an accessible concentration or distribution point close to the end-user". It should be clearly specified here that under subparagraphs 1 and 2 of 61(3) the NRA shall determine the accessible point in the network ***closest*** to the end-user, and that the 1st distribution or concentration point is in no way decided by the NRA.
In case the NRA considers justified to impose an access point outside the building, the NRA shall identify the access point as close as possible to the end user between the building and the 1st distribution/concentration point, which is based on the architecture of the network.
In addition, in this section there are elements and statements that are at odds with the legal framework and should therefore be addressed:

- §31 mentions that "in order for access obligations to be effective, other operators must be able to reach and access the first concentration point…" in respect to the efficiency of the provisions "other operators" should be replaced by "other efficient operators".
- §34 GL is making a reinterpretation of the Directive and the definition of network points based on external factors such as the accessibility of the building. It is not correct to define another point as 1st point because there are "major difficulties to enter or access the building". The difficulty identified is not the result of a network architecture, but of the (abusive?) exercise by a third party of its property right. We believe such an issue should be tackled preferably by addressing the problem directly and in its proper context. Should the problem be solved by addressing the network owner, this should in any case be subject to a serious proportionality assessment and the solution (to overcome difficulties of accessibility) should be at no additional cost for the operators involved.
- §38 GL has a confusing formulation, which should be clarified. The source of confusion is the beginning of the paragraph where "replicability considerations" and "the number of hosted end-user connections that an efficient access seeker needs for commercial viability" are dealt with together in one sentence. In the case of determining access to the first concentration or distribution point or not solely "replicability considerations" plays a role, while the second element (number of users) comes only into play to determine a point beyond the 1st concentration or distribution point. Hence the formulation "Instead such considerations come into play when …" is lacking nuance and could be read as both considerations apply to both points.

Regarding **Item (e): High and non-transitory economic and physical barriers to replication**

- § 41 GL refers to certain quotes of Article 61.3 and Recital 154, such as "having regard… to the obligations resulting from any relevant market analysis", which underlie an existing or emerging market situation **significantly limiting competitive outcomes**", and "replication faces high and non-transitory physical or economic barriers, **leading to important competition problems or market failures**". We consider that these quotes point to the exceptional character of this provision, which should be explicitly mentioned in the GL, which is not the case in the current project. The primary purpose of article 61.3 is to

mandate the sharing of in-building wiring or physical access up to the first concentration point, and the imposition of access obligations beyond this point should be justified in carefully assessed circumstances. The issue at stake is the risk of overregulating the access to the network of any entity, which involves a high degree of discretion of NRAs. It has a high potential for regulatory errors with important consequences.

- Art. 61(3), 2nd subparagraph contains following elements: "Where a national regulatory authority concludes, (…) that the obligations imposed in accordance with the first subparagraph do not sufficiently address (…) it may extend". From this derives that this step is attached to an initial obligation related to the 1st concentration or distribution point. Only when an NRA wants to go beyond that point, he needs to establish and demonstrate that the obligations imposed under 61(3) 1st paragraph do no suffice to address high & non-transitory barriers to replication and such leads to significant competition problems or market failures. Contrary to what §42 GL seems to suggest ('have to assess'), NRA's thus do not need to do this systematically, but rather 'may' when relevant and appropriate.
- §46 GL contradicts with the Art. 61(3) in the example given, in the sense it does not provide the necessary safeguards attached to this use case. The mere fact that an access seeker does not have access up to the first concentration or distribution point, is not sufficient to justify the imposition of the obligation up to the point beyond (as seems to suggest this paragraph of the Guidelines). Also, in that case there is still the barriers to replication to be demonstrated.
- §49 GL makes an interesting statement regarding the differences in geography between art. 61(3) reasonable access requests and the relevant market definition. ETNO tends to agree with this. The main reason in our view and understanding of the market functioning is the nature of the request, which in the case of Art. 61(3) is based on effective technical and economic barriers to replication by efficient access seeker, even SMP, making it economically inefficient or physically impracticable. Contrary to the outcome of a market analysis where SMP is found and imputed to an undertaking due to the absence of effective competition, under article 61(3) there is an access imposed on any owner of wiring and cables and associated facilities where replicability is not feasible for an efficient access seeker.

Regarding **Economic barriers**

In the §§ 55 to 65 GL, BEREC discusses economic barriers to replication and gives some indication on the relevant parameters to assess so. As a starting point BEREC states that "In order to be commercially viable, access at a specific access point must allow efficient access seekers to make a profitable business case and enable access seekers to overcome barriers to replication." For that purpose, BEREC considers the comparison of the (expected) costs and the (expected) revenues of the access seeker. We believe this is questionable from several perspectives:

- Following the EECC and in particular Recital (154) it is understood that to identify the economic barriers the NRA is expected to do an economic assessment of all market conditions, which should be done against the backdrop of the objectives of the Code and assess the economic conditions and impact on all parties. This encompasses the economic conditions under which the access seeking party can duplicate, but equally the economic impacts of a possible access for the existing networks in the markets and the possible impact on the viability of future investments and the viability of the access seekers plans in the general context of the market.

  We remind BEREC the foundations of the EECC that clearly identify this interplay, which does not allow for singling out one interest or perspective only. Recitals (26) to (28) clearly make the point that both perspectives need to be considered, and that efficient network roll-out requires a scope of the market:

  > (26) Both efficient investment and competition should be encouraged in tandem, in order to increase economic growth, innovation and consumer choice.
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  > (27) Competition can best be fostered through an economically efficient level of investment in new and existing infrastructure, complemented by regulation, where necessary, to achieve effective competition in retail services. An efficient level of infrastructure-based competition is the extent of infrastructure duplication at which investors can reasonably be expected to make a fair return based on reasonable expectations about the evolution of market shares.
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  > (28) It is necessary to give appropriate incentives for investment in new very high capacity networks that support innovation in content-rich internet services and strengthen the international competitiveness of the Union. Such networks have enormous potential to deliver benefits to consumers and businesses across the Union. It is therefore vital to promote sustainable investment in the development of those new networks, while safeguarding competition, as bottlenecks and barriers to entry remain at the infrastructure level and boosting consumer choice through regulatory predictability and consistency.

  This all requires a broader economic analysis not only assessing the feasibility of replication, but also the impacts of access on the investment level, future investment, and ultimately long run consumer welfare. The latter points are definitely relevant in relation to BEREC's considerations related to sunk costs and scale. The economic analysis at hands does not allow for a unilateral access seeking operator perspective.

- However, there is another consideration to be made in relation to BEREC's approach of sunk cost and scale. It is namely unclear to what extent such analysis as suggested is making a general assessment of market entry (rightly attributed as task to the relevant market analysis process) rather than an economic analysis of replication. All the considerations advanced, such as high sunk cost, uncertainty of demand, risk related to

take-up and scale, …; are elements generally explaining high barriers to entry and should be addressed in an SMP analysis.

In the context of art. 61(3) there should be an examination of the cost of roll-out, held against the background of an efficient level of infrastructure duplications as explained in Recital (27). It should be borne in mind as well that Art. 61(3) is not a means for access seeking operators to reduce the risk associated to a project but to overcome high and non-transitory economic or physical barriers to replication.

- Further, we understand on the one hand that in this context "wholesale expenses including those for access obligations which would be imposed under Art. 61 (3) EECC" (§57 GL) is purely concerning the access cost for access at the 1st concentration or distribution in the scenario that non-replicability of the internal cabling or last drop has been established.[2] We took also well note that §57 refers to the costs for deployment of network infrastructure of an efficient access seeker to be included in the assessment. This seems important indeed to preserve incentives to invest in new infrastructure to the end-customer. However, it needs to be clarified that the "cost for deployment" as mentioned in §57 also include the costs of using existing infrastructure. Otherwise, renting would systematically be cheaper than building and operators with own infrastructure would be discriminated.
- A second point is the evaluation of an efficient investment versus the reasonably to be expected revenue in a market. BEREC seems to build its full assessment on the business case of an access seeking operator, while this could only partly be informative for the assessment at hand. BEREC points rightly out that the costs should be the costs of an efficient operator, building its network in the most cost-effective way. We see however much less critical examination of the revenues. It seems that BEREC mainly bases itself on the expectations and ARPU's "based on the retail prices the access seeker intends to offer" (§64, iii GL) while also the payback period refers to the "data from the access seeker's request". There are several industry standards for payback periods that are reasonable. Also, the business case study period should be in line with technical and economic lifetime of the technology of choice.

  For the ARPU there is a market reference that should be used. Any business case can be negative (or overly positive for that sake) based on unreasonable expectations in terms of revenues. An evaluation of ARPU's should be based on reasonable behaviour of an investor seeking to recoup its investment and could indeed be based on an NPV calculation of the costs, possibly corrected based on market standards, whereby the relevant ARPU should be derived from a (weighted) average of current market practices. Deviation from (average) current market prices should only be allowed by NRA's if solid economic analysis shows that these prices are significantly above competitive levels. From BEREC's draft GL we get no information on what WACC should be used to do this exercise. This cannot be the regulated WACC referred to in the European Commission's Notice of 7th November

[2] As we remind, an access which is necessary to be imposed in order to consider an extension to a point beyond pursuant to 61(3), 2nd subparagraph.

2019 for legacy infrastructures, as the investments for the network elements concerned by Art 61(3) EECC involve much higher risks than those captured by the current methodology for regulated WACC. For this sake, the evaluation should be based on efficient entry, which is the meaning of the elements we brought to the table here above.

- The existence of barrier 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 (e.g., number and size of multi-dwelling buildings) which are independent of the access seeker features (e.g. expected market share).
- In the light of the previous and especially the balancing we indicated before with market effects on existing and future investors and the level of efficient infrastructure competition we also miss an essential element in BEREC's approach, which is an evaluation of the access seeker's business case based on an access in the a concentration or distribution point beyond the 1st point. Nothing guarantees that the failure of mounting a profitable business case is due to an issue of replication, not is there a guarantee that access to non-replicable assets will make such case float. In other words, the test whether the access would be effective, objective, and proportionate is not conducted; nor is the impact assessment on the business case of the other infrastructure providers in the market.
- This section should also clearly identify the factor of already existing infrastructure competition and the fact that duplication was done before. In line with what is said in the EECC in that respect, the "mere fact that more than one such infrastructure already exists should not necessarily be interpreted as showing that its assets are replicable." (Recital (152)), but this does not mean that this fact needs to be omitted. It does put the question on the efficient level of infrastructure competition on sharp on the one hand and it has an important influence on the economic viability of the already existing and planned investment of the targeted access provider. It is hence a material element that should be considered in the evaluation.

- Additionally
  - 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 have priority over theoretical business cases in determining whether economic replication is viable.
  - We disagree with §59 GL which once again mixes up costs with risk seems to derive the existence of a barrier to replication rather from the latter than the first.
  - We see a lack of consideration related to mechanisms for cost effective roll-out under the BCRD.
  - We also see not clear explanation on the issue of barriers to replication and the opportunity of them; nor do we understand how BEREC articulates replication versus SMP access regulation which might make the same case.
  - §61 lists also "*the extent to which building costs can be shared with other undertakings*" as a factor affecting the assessment. We deem 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 **Physical barriers**

We believe BEREC should be explicit that physical barriers should be evaluated on their non-transitory character. For many of the barriers cited, the fact that replication took place already and an initial investment was possible, puts in question the structural, non-transitory character of these barriers. The fact that these 'barriers' make deployment difficult is not sufficient as a standard to consider them high and non-transitory barriers.

On the conclusion summary, point ii should be deleted as it is not a consideration of replicability barriers. Indeed, access to non-replicable assets should not facilitate inefficient entry.

Regarding **Item (b): The point beyond the first concentration or distribution point**

The section on the determination of the point beyond the first concentration or distribution point is building largely on the previous evaluation of economic and physical barriers, so not all comments will be repeated here.

This section raises the question about what assumptions the regulator would take as to the required margin the access seeker would be allowed. Figure 5 GL does not clarify things in that respect: is the access point optimal chosen at [Revenue = Costs] or at [Revenue > Costs] (the Figure 5 states ' ≥ ')?

As regards the imposition of an active/virtual access obligation, we deem that – pursuant to the legislation - this last resort should be limited to the cases where there are technical constraints to passive access, and not also economic constraints as envisaged at §77.

Regarding **Item (c): Network deployments to be considered new**

First of all, we consider that there is no sense and it introduces confusion to have different approach of the notion of "new", that is the case when comparing these draft guidelines and the ones related to the article 76.

Regarding the need to evaluate the impact of a possible access on the existing and future investments, we refer for the economic viability to what we said above.

- §89 GL touches upon the role of existing wholesale offerings when evaluating the reasonability of a request. BEREC highlights the opportunity of additional wholesale revenues, but where wholesale already exists the imposed access can compete and have a negative effect. Where will existing wholesale offerings play a role in the evaluation?

- §92 GL contains a questionable position on the likelihood of upgrades being considered as new (read as important investment challenges). It is not appropriate for BEREC to already earmark 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.

Based on this we believe that the point ii of the conclusion should be rewritten to a more objective standard.

Regarding Item (d): **Projects to be considered small**

The position of BEREC regarding small projects is highly questionable:

- The GL seem to consider "smallness" as a standalone criterium, while in Art. 61(3), 3rd subparagraph, b) this is not the case. 'Small projects' is a category that also is subject to the criterium that "the imposition of obligations would compromise the economic or financial viability (…)". This is clearly supported by Recital (155) which links the status of small projects also to the exemption of economic viability. Therefore, size or turnover are not the right measure, but the nature and profitability of such projects.[3] 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.
- The focus on 'in particular small project' can be explained by a possible concern that such projects by their scale might be potentially more vulnerable. However, such is not a given. Small projects can potentially be highly profitable, with a much lower risk profile, especially where it concerns local monopolies (lower demand risk), and even more when they are publicly funded (public money, lower financial costs and risk). It is therefore striking that §100 GL seems to even consider such project as more worthy of an exemption (cf. typical projects regarded as small would e.g. be projects by companies owned by communities rolling out municipal networks, (…)).[4] Also the statement of §100 GL that "(…) the size of the undertaking or corporate group in sectors other than electronic communications should not be considered as a relevant factor (e.g. electricity network operators which only recently entered the electronic communication market)." is equally striking as this refers to initiatives of companies, which are often publicly owned and/or enjoy special, privileged position (often legal monopolies) on their incumbent market that brings them in stronger and financially much less riskier situation than other projects.[5] In

[3] provided its efficiency

[4] The latter point on public funded projects strikes, as for the exception under Art. 61(3), 3rd subparagraph, a) related to wholesale only, recital (155) contains a specific caution that "The exemption may not be appropriate for providers that are in receipt of public funding."

[5] Moreover this position seems to be in direct contradiction with §101 GL, in particular in the case of large utility companies such as electricity network operators.

other words, the GL 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. We believe that on the contrary, public financed deployments should clearly be excluded from the exemption. In addition, also operators with a low market share in the broadband market, should not be considered small if they have a high market share and/or (utility) footprint in the local area of its new deployment.

- The striking element regarding local and communal initiatives, is that where they have taken a local fibre initiative that often forms a monopoly, they also have a situation in which they have a potential conflict of interest, as they are also the authority supervising the issuing of building permits for roll-out. In other words they do not only have control over a bottleneck (in a local monopoly situation) but also the legal control over the admission / facilitation of alternative roll-out that would be able to lift the bottleneck (in that respect we refer to what the GL state in §42 and §66 which identify that as a potential barrier to replication; we also refer to the discussion in context of the BCRD where it is clearly identified that local permits are a real issue/obstacle to effective roll-out).
- We lack insight on the way the numbers in §102 GL have been established and question the reliability of standard numbers to qualify “small”.

Based on the previous, we believe this section and conclusions should be thoroughly rethought.
