



***DRAFT PUBLIC QUESTIONNAIRE***  
***Consultation on the proposed Recommendation for***  
***Internal Market Procedures under the European***  
***Electronic Communications Code***

**BEREC Draft Response**

**BoR(20)51**

Introduction

- Background

On 21 December 2020, the [European Electronic Communications Code](#) (the Code) will replace the [current framework](#) for the regulation of electronic communications networks and services. This change in regulation necessitates an update of the procedures in place to reflect the new provisions which will start to apply with the entry into application of the Code.

The present initiative for a '*Recommendation for Internal Market Procedures under the Code*' (*the Recommendation*) aims to update the existing [Procedural Recommendation](#), issued in 2008. The initiative seeks to provide National Regulatory Authorities (NRAs) with updated and clear guidance on the form, content, time limits and level of detail of the notifications and related procedures under the Code and based on past experience from the Commission and the NRAs.

Under Articles 32 and 33 of the Code (currently under Articles 7 and 7a of the Framework Directive), NRAs are required to notify the Commission, the Body of European Regulators for Electronic Communications (BEREC) and the NRAs in other Member States of their draft measures. The internal market procedures defined by these provisions aim to ensure that the regulation of electronic communications markets is consistent across the Union. The Recommendation will provide NRAs procedural certainty in their dealings with the Commission, BEREC and each other to ensure efficient and timely collaboration, as required by the Code and the fast-paced electronic communications industry.

The Commission services seek stakeholders' feedback on their experience with implementation aspects of the existing Procedural Recommendation, as well as views and suggestions concerning the need for any clarification of procedural issues related to both existing provisions and new provisions introduced by the Code.

Due to the technical nature, this consultation is largely aimed at NRAs and BEREC but everybody is welcome to take part in the consultation.

Thank you for your contribution.

## - The proposed initiative

The Commission services' preliminary assessment suggests that the proposed update exercise could encompass the following possible changes to the existing Procedural Recommendation:

### *Substance-related changes:*

- i. Clarify the form, content and level of detail to be given in the notifications and when Standard Form Notifications are required, in particular with reference to:
  - a. **new procedural aspects introduced by the Code**, i.e. in particular draft measures notified under Articles 61 and 76 of the Code (symmetric access obligations and co-investment offers) and under Articles 80 and 81 (wholesale-only undertakings, migration from legacy infrastructure). Further, the initiative aims to generally cover other provisions and procedures introduced by the Code, such as the so-called double-lock veto in Article 33(5)(c) and the new 5-year market analysis time-frame in Article 67(5)(a);
  - b. **measures adopted under other provisions** (for example under Article 97 of the Code in conjunction with Article 61 of the Code);
- ii. Explain the notification and related procedures (under Article 68(3), Code) for the imposition on operators designated as having SMP of obligations (in exceptional circumstances) others than those access remedies already indicated in Articles 69 to 74, 76 and 80 of the Code.
- iii. Emphasise the importance of the holistic approach to the assessment of the draft measures and recommend that remedies are included in the same draft measure concerning the market analysis, or at least notified at the same time.

### *Technical changes:*

- iv. Clarify procedural aspects related to the withdrawal of notified draft measures by NRAs in the light of Article 32(11) of the Code.
- v. Encourage and provide further guidance on informal pre-notification meetings with the Commission services.
- vi. Specify the cases where a standard notification or a short notification form is recommended as well as those circumstances (if any) where a notification would not be required, in line with Article 34 of the Code.
- vii. Update the set of Notification Forms (templates) for both Standard and Short Form Notifications.
- viii. Update and increase transparency on publication of documents and protection of confidential information.
- ix. Reflect the new numbering and cross-referencing of provisions in the Code and in other relevant instruments, i.e. amended Commission Recommendation on relevant markets.

## About you

1) \* Language of my contribution  
[Single Choice][Select Box]

2) \* I am giving my contribution as

- National Regulatory Authority (NRA)
- Electronic communications network or service provider
- Other public authority
- Industry association
- Consultancy
- Think tank
- Law firm
- Consumer association
- Citizen
- Other: BEREC

BEREC responds to certain selected questions which are particularly relevant for BEREC's role in the Art. 32/33 EECC notification procedure. The BEREC response does not replace the responses of individual NRAs, but complements it where appropriate. BEREC's overall objective with regard to the notification procedure is to make it as efficient as possible and to ensure the tight time schedule and deadlines can be handled by NRAs and in phase-II cases also by BEREC's expert teams.

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6) ↑ Transparency register number

Check if your organisation is on the [transparency register](#). It is a voluntary database for Organisations seeking to influence EU decision-making.

[Free Text]

7) \* Country of origin    EU NRAs + members without voting rights  
Please add your country of origin, or that of your organisation.  
[Single Choice][Select Box]

8) \* Publication privacy settings

The Commission will publish the responses to this consultation. You can choose whether you would like your details to be made public or to remain anonymous.

**O Anonymous**

Only your type of respondent, country of origin and contribution will be published. All other personal details (name, organisation name and size, transparency register number) will not be published

**X Public**

Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

9) X I agree with the **personal data protection provision**.

## Consultation Questions

### I. Feedback on the 2008 Procedural Recommendation and current practices

The electronic notifications of draft measures by national regulatory authorities (NRAs) takes place in the context of Articles 7 and 7a of the Framework Directive, which will be replaced by Article 32 and 33 of the Code (also referred to as “the internal market procedures” in the context of this document). Procedural aspects of the internal market procedures are governed by the Procedural Recommendation, issued in 2008. The questions in this section refer mostly to the experience with the 2008 Procedural Recommendation and aim at understanding what kind of improvements in the procedure are needed based on the past experience.

#### 1) Means of transmission of the notification

Article 32(3) of the Code, provides that: *“Except where otherwise provided in recommendations or guidelines adopted pursuant to Article 34 upon completion of the public consultation, if required under Article 23, where a national regulatory authority intends to take a measure which:*

*(a) falls within the scope of Article 61, 64, 67, 68 or 83; and*

*(b) would affect trade between Member States,*

*it shall publish the draft measure and communicate it to the Commission, to BEREC, and to the national regulatory authorities in other Member States, at the same time, stating the reasons for the measure...”*

The current Procedural Recommendation provides, in point 2, that national draft measures by NRAs should be notified by electronic mail with a request for acknowledgement of receipt. In the meanwhile, the CIRCABC platform has been introduced by the Commission and is used for, amongst other things, the notification of draft measures and for facilitating the exchange of information between the NRAs, the Commission and BEREC.

Question 1.1 Based on your experience, do you have any remark on the functioning and efficiency of the CIRCABC platform, and more broadly on the technical aspects of communication with the Commission, BEREC and other NRAs?

Yes

No

Please explain.

Question 1.2 Based on your answer above, would you support that the notifications of draft measures can be done solely by uploading draft measures to CIRCABC platform and not by email?

Yes

No

Please explain.

#### 2) Short Notification Forms

Recital 84 of the Code indicates that: *“Having regard to the short time-limits in the consultation mechanism at Union level, powers should be conferred on the Commission to adopt recommendations or guidelines to simplify the procedures for exchanging information between the Commission and national*

regulatory authorities, for example in cases concerning stable markets, or involving only minor changes to previously notified measures”.

The current Procedural Recommendation describes, in point 6, the categories of draft measures that should be made available to the Commission by means of a short notification form and a template form is contained in Annex II to the Recommendation. Currently the following draft measures should be notified by means of a short notification form:

- (a) draft measures concerning markets, not listed in the Recommendation on relevant markets, where the market is found to be competitive by the NRA, or where the NRA considers that based on the “three-criteria test” these markets are no longer susceptible to *ex ante* regulation;
- (b) draft measures concerning markets which, while included in the Recommendation on relevant markets, had been found to be competitive in a previous market review, and remain competitive;
- (c) draft measures that change the technical details of previously imposed regulatory remedies and do not have an appreciable impact on the market (e.g. annual updates of costs and estimates of accounting models, reporting times, delivery times); and
- (d) draft measures concerning a relevant market that has already been analysed and notified in relation to other undertakings, where the NRA imposes similar remedies on other undertakings, without materially changing the principles applied in the previous notification.

Question 2.1 Do you have any experience in using a short notification form?

Yes

No

If yes, please provide any relevant feedback on your experience and describe any question or issues encountered in relation to short notification forms.

Question 2.2 In your view, would it be appropriate to continue use of a short notification form in cases specified instead of the standard notification form?

Yes

No

Please explain.

In BEREC’s view the short notification form is a useful tool which should be improved with an added value e.g. in terms of shortening the overall duration of the procedure and expanded (see below answer to Q 2.4). Until now, its usage was limited, because the difference to the standard notification form was not clear cut enough. BEREC therefore suggests to distinguish more clearly between the standard notification and the short notification form (including implications for both) and work towards a simplified short notification procedure that streamlines the process for all – NRAs, BEREC and the Commission. Furthermore this question must be seen in relation to Q4 – no notification (see below response to Q4).

Question 2.3 Should the category of cases to be notified by way of Short Notification Form be expanded and, if yes, to which types of measures?

Yes

No

Please explain.

See suggestions under Q4. In general any sort of repetitive or follow-up notifications (similar to category 6 (d)) should fall at least under the short notification form. In this category would also fall a subsequent simplified notification acc. to Recital 201 on the basis of the same co-investment scheme, including

evidence of actual conclusion of an agreement with at least one co-investor (see below response to Q13.3).

Question 2.4 Do you have any suggestions concerning possible further simplification of the treatment of those cases to be notified under short form by the Commission?

Yes

No

Please explain.

The short notification form should provide an added value compared to the standard notification form. E.g. in terms of the overall duration of the procedure. This could be applied in particular for the cases of points 6.c) and 6.d) of the current Procedural Recommendation, if these cases are not moved to the list of circumstances not requiring a notification (see answer to Q4).

### 3) Standard Notification Forms

The current Procedural Recommendation indicates, in point 8, that draft measures (other than those subject to the short notification form) should be made available via the standard notification form set in Annex I. This point further indicates which categories of information should be included in the notified draft measure.

While it may be necessary to consider the additional information which would be relevant in light of the new provisions of the Code (see questions 12 to 16 in particular), this section focuses on the feedback that national regulatory authorities and other stakeholders may want to provide based on their experience under the current framework.

Question 3 Based on your experience in using the standard notification form, or in consulting on a notified draft measure on CIRCABC, do you have suggestions regarding the categories of information that should/should not be provided by the NRA when notifying a draft measure under the standard notification form?

Yes

No

Please explain

BEREC thinks that for the 2 double lock veto cases – Art. 61.3 + Art. 76.2 EECC – it is useful if more information is provided to guide the reading of both the Commission and NRAs to make the process more efficient in case of a Phase-II.

In BEREC's view the current standard notification form with the information required serves by and large the purpose, BEREC only suggests minor additions as outlined in Q12 (see below).

### 4) Circumstances in which no notification would be required

Articles 32(3) and 34 of the Code provide that the Commission may lay down circumstances in which notifications would not be required. Recital 84 indicates that "*Powers should also be conferred on the Commission in order to allow for the introduction of a notification exemption in order to streamline procedures in certain cases.*" This possibility, which exists under the current framework, has not been used.

Question 4 Do you identify any circumstances where you consider that it would be appropriate to lay down an exemption to the notification requirement?

Yes

No

If yes, please specify such circumstances and explain how, in your view, they should be defined in order to avoid creating legal uncertainty.

BEREC thinks that there should be clear criteria for no notifications.

According to Art. 32 and Art. 33 of the EEC, NRAs have to notify EC the draft measures that:

- a) fall within the scope of Article 61, 64, 67, 68 or 83; and
- b) would affect trade between Member States.

Nevertheless, draft measures which simply implement the obligations already imposed (according to Article 61, 64, 67, 68 or 83) and do not change significantly such obligations should not be notified. In BEREC's view having a well defined set of "no" or at least "short" notification cases serves time efficiency and lessens administrative burden for all involved parties. In this respect, in the Procedural Recommendation, reference could be made to the elements that would trigger the application of the exemption from the notification requirements. This may for instance relate to the expected minor impact in the market of the measures about to be adopted; the purely technical nature of the measure (e.g. periodic updates to a previously adopted measure); or the lack of a real margin of appreciation by the NRA when making the adjustments (e.g. when changes are necessary to take into account new data available on objective parameters such as the evolution of costs or of traffic/data consumption).

In particular, BEREC considers that in the following cases no notification should apply:

- RO (if the modifications only update the RO, but do not change the principles/obligations already defined and in proceedings where existing methodologies/principles are simply applied to another operator);
- Updates of e.g. ERT decisions without change of the underlying methodology (only testing of new prices/offers);
- Subsequent notifications of other operators' obligations using the same approach/methodology that was used already (e.g. for TR);
- Notifications in second instances (renotification);
- De-minimis services (e.g. with a low turnover, and thus no significant impact of the market etc. such as collocation electricity).

As mentioned above (Q2) BEREC considers that these cases should not require a (re)notification procedure (while the NRAs may still communicate the final measure to the Commission).

## 5) Timing and substance of the notification of draft measures under Articles 64, 67 and 68

Article 64 of the Code describes the procedure for the identification and definition of markets, which is the basis for the market analysis procedure set out in Article 67 and the imposition, amendment or withdrawal of obligations pursuant to Article 68. All such steps are subject to the internal market procedures referred to in Articles 32 and 33. The Commission has repeatedly stressed the importance of a coordinated national consultation and notification to the Commission of all relevant steps of the market analysis and assessment of remedies. This is important for the Commission to carry out a proper assessment of the NRAs' draft measures.

This is without prejudice to the obligation for NRAs set in Article 68(6) to consider the impact of new market developments and the necessity to review the remedies imposed on the undertaking found to have significant market power (SMP) in order to ensure their continued appropriateness.

Question 5.1 In your view, is there a need for guidance from the Commission on the links, as regards the timing and content of notifications, between the three-criteria test (where relevant), the market definition, the assessment of significant market power and the analysis of regulatory obligations?

X Yes

No

If yes, please explain and provide any relevant suggestions.

The decision in which way to notify is up to the NRAs.

Question 5.2 Should the Commission recommend that all those analyses have to be notified at the same time, in order to be able to comprehensively assess the proposed measures and their impact on the market?

Yes

No

If yes, please explain and provide any relevant suggestions.

## 6) Requests for information

The current Procedural Recommendation indicates, in point 13, that the Commission may seek further information or clarification from the NRA concerned. This point further clarifies that the NRA should endeavour to provide the information requested within three working days, where this is readily available.

Question 6.1 In your experience, did you encounter any issues in relation to Commission requests for information?

Yes

No

If yes, please describe the issues and provide any relevant suggestions that could in your view help address them.

Question 6.2 Do you identify information, other than those provided under standard notification form and discussed in section 3 of the present questionnaire, which could be better provided systematically at the initial notification stage?

Yes

No

If yes, please explain.

In BEREC's opinion for regular notifications the standard notification form is appropriate, of course it would be useful to add references to the relevant parts of the draft decision notified for ease of reference. As mentioned before (answer to Q3) and in the answer to Q13.1, BEREC suggests to have a more elaborate template for the 2 double lock cases where more information is appropriate to allow a first understanding of how the notifying NRA proceeded.

## 7) Treatment of confidential information

The current Procedural Recommendation refers, in points 15 to 17, to the publication and communication of the Commission's comments. This publication/communication may raise questions about the treatment of information, the confidentiality of which may be protected under EU or national law. In addition, handling of the notified confidential measures by the Commission and sharing them with BEREC and other NRAs needs to be carefully assessed.

Article 32(3) of the Code provides that, in those cases where an NRA is obliged to communicate draft measures under the notifications mechanism, it shall do so *"to the Commission, to BEREC, and to the national regulatory authorities in other Member States, at the same time, stating the reasons for the measure"*. Under Article 20(3) of the Code, the Commission, national authorities and BEREC should ensure the confidentiality of information transmitted to them for the application of the Code. Confidentiality should not prevent the sharing of information between these entities in a timely manner.



The requirement of simultaneous notification set in Article 32(3) implies that the documents shared with the Commission would, in principle, be shared with NRAs and BEREC. Such sharing of information would be relevant for the different steps of the internal market procedure (including initial notification and, possibly, the replies to the requests for information) given that the possibility to comment on draft measures is not limited to the Commission but extends to NRAs and BEREC. It would moreover be of particular importance in view of the enhanced role of BEREC under the Code (see question 13). It is therefore essential to ensure a secure process that keeps all involved parties (BEREC, NRAs) equally informed, while fully respecting the principles of confidentiality.

Question 7.1 In your experience, have you observed any issues in the treatment of confidential information concerning draft measures notified under Article 7 of the Framework Directive?

Yes

No

If yes, please explain.

BEREC considers that the current handling of uploading the draft measures to the confidential and non-confidential folder works well and should not be changed in order to protect confidential information adequately. BEREC will think of how to speed up the transfer of confidential information (incl. the English courtesy translation) to the BEREC expert team in case of a phase-II case, but that is more a matter of practicalities.

Question 7.2 Do you have any suggestions concerning additional safeguards that the Commission should adopt, or should recommend to NRAs or BEREC in relation to the treatment of confidential information in the context of the procedure now laid down in Articles 23, 32 and 33 of the Code?

Yes

No

If yes, please explain.

BEREC considers that the information exchanged between the Commission, the notifying NRA and BEREC's expert team in case of a Phase-II case should be deemed as confidential, and thus should be explicitly considered as such in the Procedural Recommendation.

Question 7.3 Do you have any suggestions concerning specifically the treatment of confidential information in the relevant exchanges between the Commission, the relevant NRA and BEREC during so-called "Phase II investigations" carried out by the Commission pursuant to Articles 32 or 33 of the Code, which require the opinion of BEREC?

Yes

No

If yes, please explain.

See answer to Q 7.2. Given the confidential nature of the internal exchange between NRAs, BEREC and the Commission (such as RFI and response to RFI), BEREC thinks that these exchanges should in principle not be shared with third parties. In any case, if third parties submit a request to the Commission for access to these documents, the NRAs (and BEREC) should be asked before authorising the disclosure of such documents.

Question 7.4 In your opinion, can CIRCABC platform be used to share simultaneously draft measures (including confidential information), under Article 7 of the Framework Directive (Article 32 of the Code), with BEREC and the NRAs?

Yes

No

Please explain and, if yes, explain what kind of confidentiality safeguards would be needed to allow for the simultaneous exchange of the draft measures (including confidential information) with BEREC and the NRAs.

BEREC considers that it is sufficient to ensure a swift sharing of information in the beginning of a Phase-II case.

## 8) Notification of draft decisions imposing exceptional remedies under Article 68(3) of the Code

Under Article 68(3) of the Code, where a NRA intends to impose on undertakings designated as having SMP obligations for access or interconnection other than the remedies contained in the regulatory toolbox specified in the Code (in Articles 69 to 74 and Articles 76 and 80), it shall submit a request to the Commission. The Commission shall, taking utmost account of the opinion of BEREC, adopt decisions by means of implementing acts, authorising or preventing the national regulatory authority from taking such measures. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 118(3). This procedure, which currently exist but has never been used, would for instance be applicable in the situation where an NRA intends to impose a functional separation obligation under Article 75 of the Code.

The current Procedural Recommendation indicates, in point 18, that the Commission will normally take a decision authorising or preventing the national regulatory authority from adopting the proposed draft measure within a period not exceeding three months, but that it may decide to extend this period for a further two months in view of difficulties raised.

Question 8 Do you have any remarks on the guidance provided in point 18 of the current Procedural Recommendation and do you identify other aspects of this procedure on which additional guidance would, in your view, be useful?

Yes

No

If yes, please explain and describe the issues and provide any relevant suggestions that could in your view help address them.

As the BEREC Opinion of Article 68(3) subparagraph 3 EECC is not yet mentioned in pt. 18 of the current Procedural Recommendation, it should be added using as a reference the explanations for phase-II cases.

## 9) Requirements concerning communication of final measures

The current Procedural Recommendation indicates, in point 20, that where a NRA adopts the draft measure after receiving comments from the Commission or another NRA made in accordance with Article 7(3) of Directive 2002/21/EC, it shall communicate to the Commission and other NRAs about the manner in which it took the utmost account of the comments made.

However, in practice, this communication to the Commission and to other NRAs varies from one Member States to another.

Question 9 Do you consider that it would be appropriate to provide additional guidance on how to communicate the manner in which an NRA took utmost account of comments made by the Commission, BEREC or other NRAs?

Yes

No

Please explain and, if yes, describe what kind of additional guidance you would consider to be useful.

## 10) Pre-Notification Meetings with the Commission Services

Point 21 of the current Procedural Recommendation mentions informal discussions of a draft measure between the Commission and an NRA prior to notification. Such pre-notification contacts usually take place in the form of meetings (physical meeting and/or telephone or video conferences) and represent an established practice, although at present they do not systematically occur before every notification.

Question 10.1 In your experience, do you find such pre-notification exchanges between the Commission and NRAs useful?

Yes

No

Please explain, provide views on your experience with pre-notification exchanges and describe any specific issues encountered.

BEREC considers pre-notification meetings with the Commission Services very useful and will encourage its members to use this tool as much as possible to facilitate a smooth procedure of the notification afterwards, potentially reducing the need for RFIs and lowering a risk of possible serious doubts. Such meetings could also be used by the Commission services to express some of their first elements of assessment.

Question 10.2 Should the Commission adopt more detailed recommendations concerning the timing, form and substance of pre-notification contacts with the NRAs?

Yes

No

Please explain and, if yes, provide any concrete suggestions, for example regarding the cases in which prior notification exchanges are particularly useful.

BEREC does not think that procedural rules are needed for pre-notification meeting as the success of them is mostly due to their informal character, to the fact that they are not predetermined and can be used in a flexible way.

## 11) Calculation of time-period

Article 32(3)(b) of the Code provides that in those cases where the NRAs are obliged to notify draft measures, NRAs, BEREC and the Commission may comment on that draft measure within one month. The one-month period shall not be extended.

During this one-month period the Commission services must assess the notified draft measure and conclude if they need to raise a comment or not or else if they need to launch a more in-depth assessment of the draft measure under a Phase II investigation (Article 32(4)) if it has serious doubts as to its compatibility with Union law.

Point 22 of the current Procedural Recommendation provides guidance on the calculation of time limits under the internal market procedures by referring to the relevant rules set in Regulation (EEC, Euratom) No 1182/71.

Question 11.1 Do you have remarks on the guidance provided in the current Procedural Recommendation?

Yes

No

If yes, please explain.

Given the tight deadlines BEREC encourages the Commission to handle the time lines with a maximum flexibility. BEREC will look for ways to ensure an efficient process in order to use the limited time period available as best as possible. As regards current wording of point 22 more clarification could be given on if the reference point for calculating periods are circumstances (e.g. official holidays) of the notifying NRA, BEREC or the Commission.

Question 11.2 Do you identify other aspects in relation with time limits on which additional guidance would, in your view, be useful?

Yes

No

If yes, please explain.

## II. Possible adaptations of the Procedural Recommendation in light of the new provisions in the Code and other possible improvements

### 12) General provisions of the Code falling under Article 32 and 33

The internal market procedures defined in Articles 32 and 33 of the Code will remain largely unchanged compared to the one currently in place under Article 7 and 7a of the Framework Directive.

In relation to the main provisions which apply to the procedure for identification and definition of markets (Article 64), the market analysis procedure (Article 67) and the imposition, amendment and withdrawal of obligations (Article 68) the principles set in the current framework will continue to apply. However, the Code contains certain changes, in particular through the codification of the three-criteria test (Article 67(1)) and in relation to the assessment of appropriate remedies (see Article 68(6) which provides that NRAs shall *“consider the impact of new market developments, such as in relation to commercial agreements, including co-investment agreements, influencing competitive dynamics”* and accordingly conduct a new market analysis or consider the necessity to review the remedies imposed to the undertaking found to have significant market power (SMP) in order to ensure their continued appropriateness.

Question 12 In your opinion would the revised provisions under the above-mentioned articles have an impact on the content of notifications and, if so, are any adaptations in the procedures applied so far necessary?

Yes

No

Please explain

BEREC suggests to integrate information regarding the 2 new elements mentioned in Q12 – i.e. the 3 criteria test and the impact of new market developments influencing competitive dynamics – in the standard notification form. BEREC would not see further changes necessary.

### 13) Specific provisions of the Code, including the reinforced role of the Commission and BEREC regarding specific draft measures, in particular the “double-lock veto”

In particular, the Code has, under the so called “**double-lock veto**” procedure, reinforced the role of the Commission and BEREC in certain specific situations where the EU legislator considered it particularly important to enhance the consistency of regulatory practices across the Union. More specifically, Article 33(5)(c) provides that, where BEREC agrees with the serious doubts expressed by the Commission, the Commission will have the power to take a decision requiring the NRA concerned to withdraw a draft measure:

- falling under the second subparagraph of Article 61(3) (draft measure imposing, outside of the frame of a market analysis, access obligations to wiring and cables beyond the first concentration or distribution point);
- or
- falling under Article 76(2) (draft measure by which an NRA, after having concluded that the co-investment commitments proposed by the SMP operator meet the condition set out in Art. 76(1), makes the commitments binding on this operator and lifts all other regulatory obligations imposed on this operator, or, by way of derogation, decides to impose, maintain or adapt remedies in order to address significant competition problems on specific markets pursuant to Article 76(2), third subparagraph).

In such situation, under the provisions of Article 32(7), which apply *mutatis mutandis*, the NRA would have to amend or withdraw its draft measure within 6 months of the date of the Commission’s decision.

Question 13.1 In your view, what categories of information should be included in the notification of draft measures issued under Article 61(3) and Article 76(2) in order for the Commission, the NRAs and BEREC to be able to assess it?

As mentioned above BEREC considers it useful to provide more information in the 2 double lock cases to steer the reading of the draft measures. BEREC considers that for these two cases relevant information and elements of justification guiding and referring other NRAs to the draft measure could be provided.

For the application of **Article 61 (3) second sub-paragraph** the following elements could be provided by referring to the draft measures:

1. the legal basis for the obligation to be imposed (article 61(3) second sub-paragraph (in case of a generic notification form));
2. reasons
3. description of the access obligation imposed;
4. outcome of national public consultation.

For the provision of the information, the separate notification form could follow the order of the BEREC GL on a consistent application of Art. 61.3 (to be approved at Plenary 4/2020) to facilitate a first understanding as NRAs and the Commission thus have a common schema/structure on how the information is displayed and can more easily follow the logic of the decision making (of course the draft decision as such is not replaced).

For the application of **Article 76(2)** the following elements could be provided by referring to the draft measure :

1. the legal basis (in case of a generic notification form);
2. description of commitments on co-investment offer that NRA already made binding/compliance of the offer with the conditions listed in article 76 paragraph 1 (letters a-e).

Indeed, in accordance with article 79(3) last subparagraph, the commitment decision (which include, in our understanding, the entire list of commitments that the NRA made binding) shall accompany the notified draft measure ex art. 76 (next point 5) – [see also answer to question 15](#)

3. description of regulatory treatment of new VHCN network subject to the commitments:
  - by way of derogation from the first subparagraph of article 76(2), justification of the imposition, maintaining or adaptation of remedies in accordance with Articles 68 to 74 in order to address significant competition problems on specific markets.
4. outcome of national public consultation.

Question 13.2 Do you identify the need for procedural guidance on the implementation of the provisions subject to the new “double-lock veto” procedure, and if so on which aspects?

Yes

No

Please explain. In particular, please describe how you see the sequence of the “double-lock veto” procedure and indicate whether you consider that the practice currently followed by BEREC (when it issues an opinion on the Commission's serious doubts letter) is fit for purpose in this context.

BEREC is of the opinion that the sequence of the “double-lock veto” procedure is the same as the sequence of the veto procedure. Hence, there is no need for further guidance on procedural aspects.

In the specific case of co-investment schemes falling under Article 76, recital 201 indicates that: *“In the interest of efficiency, a national regulatory authority should be able to submit a single notification to the Commission of a draft measure that relates to a co-investment scheme that meets the relevant conditions. Where the Commission does not exercise its powers to require the withdrawal of the draft measure, it would be disproportionate for subsequent simplified notifications of individual draft decisions of the national regulatory authority on the basis of the same scheme, including in addition evidence of actual conclusion of an agreement with at least one co-investor, to be subject to a decision requiring withdrawal in the absence of a change in circumstances.”*

Question 13.3 In the light of Recital 201, for which subsequent draft measure would you consider that a short notification form would be appropriate?

Yes

No

Please explain

BEREC would like to ask the Commission for further clarifications regarding Recital 201.

## **14) Notification of draft measures imposing obligations under Article 61 (symmetrical regulation), paragraphs 1 to 4 of the Code**

In relation to access and interconnection obligations and conditions, which can be imposed on undertakings that have not been found to have SMP pursuant to Article 61 (so-called ‘symmetrical’ obligations), paragraphs 1 to 4, Article 61(5) of the Code provides that:

- the draft measures shall, where applicable, be subject to the procedures set out in Articles 23, 32 and 33; and

- the national authorities which have imposed such obligations and conditions shall assess the results thereof “*by five years after the adoption of the previous measure adopted in relation to the same undertakings and assess whether it would be appropriate to withdraw or amend them in light of evolving conditions*”; the outcome of this assessment shall be notified in accordance with the procedures referred to in Articles 23, 32 and 33.

Question 14.1 In your view, what categories of information should be included in the notification of draft measures issued under Article 61(1) to 61(4) in order for the Commission, the NRAs and BEREC to be able to assess it?

BEREC would like to separate a notification of Art. 61(3) second sub para cases from the other notifications under Art. 61(1) – 61(4) as it could differ considerably from notifications of obligations based on other provisions of Art. 61 (1-4), in particular as only Art. 61(3) second sub para are subject to the double lock veto. For these notifications BEREC suggests a separate notification form as outlined in the response to Q 13.1.

For all other notifications under **Article 61(1) to 61(4)** the categories of information to be included in the standard notification form could be the following:

1. the legal basis for the obligation to be imposed ( in case of a generic notification form);
2. reasons for imposing ‘symmetrical’ obligations, according to Article 61;
3. description of ‘symmetrical’ obligations imposed;
4. outcome of public consultation.

Question 14.2 Would it be useful to provide guidance in the new Procedural Recommendation on other procedural aspects linked to these new provisions, in particular on the content and form of the outcome of the assessments undertaken by national authorities under Article 61(5) of the Code?

BEREC considers that it would be useful to provide guidance (i.e. dedicated form/specific question) considering that, although several cases have been notified under the current art 5 Access Directive (new art. 61), the number of these notifications could increase and may be more relevant in the future.

It is also noted that articles 61. 2 b) and c) and 61.4 of the EEC provide for the possibility, depending on the transposition made by Member States, that other competent authorities impose obligations on access and interconnection instead of the NRAs. These obligations, as established in Article 61.5 EEC, will be imposed in accordance with the internal market procedures (arts. 32 and 33 EEC). However, the obligations and competences established in the procedure of articles 32 and 33 refer only to the NRAs, without making any reference to the other competent authorities. It is, therefore, unclear which role and obligations the other competent authorities would have in the procedure, if any. In this regard, it would be useful to clarify the procedure for the cases where it is the other competent authority and not the NRA the competent authority to adopt such decisions.

## 15) Commitments procedure

Article 79 defines the procedure that the NRA has to follow where an undertaking found to have SMP offers commitments regarding conditions for access, co-investment, or both, applicable to their networks in relation, *inter alia*, to: (a) cooperative arrangements relevant to the assessment of appropriate and proportionate remedies by the NRA; (b) co-investment in very high capacity networks



pursuant to Article 76; or (c) effective and non-discriminatory access by third parties in relation to a voluntary separation by a vertically integrated undertaking.

Where these commitments relate to a co-investment offer that fulfils the conditions set in Article 76(1), the NRA shall make these commitments binding pursuant to Article 79(3) and refrain from imposing other remedies as regards the Very High Capacity (VHC) network elements subject to co-investment. For other commitments offered under Article 79, the NRA may decide to make the commitments binding, wholly or in part. In that case, it shall assess under Article 68 the consequences of that decision on the appropriateness of remedies that it has imposed or would have, absent these commitments, considered imposing.

In relation to the internal market procedures, Article 76(3) provides that: *“When notifying the relevant draft measure under Article 68 in accordance with Article 32, the national regulatory authority shall accompany the notified draft measure with the commitments decision.”* It therefore appears that the NRA is not required to notify the commitment decision as such, but that such decision should be communicated together with the notification of the draft measure imposing the appropriate remedies under Article 68.

Question 15.1 In your view, what categories of information should be included in the notification of draft commitment measures issued under Articles 79 and 76 in order for the Commission, the NRAs and BEREC to be able to assess it?

BEREC thinks that for the application of **Article 79**, the following elements could be provided by referring to the draft measure:

1. the legal basis (in case of a generic notification form);
2. commitment decision (describing commitments that NRA made binding);  
Indeed, in accordance to article 79 (3) last subparagraph, the commitment decision (which include, in our understanding, the entire list of commitments that NRA made binding) shall **accompany** the notified draft measure ex art. 79 (next point 5), but is as such not subject to the double lock veto;
3. description of draft measure reassessing the appropriate remedies under Article 68, considering the commitments that NRA made binding.
4. outcome of national public consultation.

The above list of information refers to a generic notification concerning commitments proceedings under Art. 79. For commitments proceedings regarding co-investment see also information listed in the answer to previous question 13.1.

From the text of Article 79, we understand that the draft decision on commitments (which NRA intends to make binding) does not have to be notified to the Commission under Article 33. NRAs are entitled to notify the commitment decision (already adopted) together with the notification of the draft measure reassessing the appropriate remedies under Article 68.

Question 15.2: In your opinion, would it be appropriate for the Procedural Recommendation to provide guidance on procedural aspects linked to this new commitment procedure?

Yes

No

Please explain.



In BEREC's view it would be useful to have guidance on procedural aspects linked to this new commitment procedure because it is a new provision, in order to assure consistency among NRAs. See also the answer to the previous question.

## 16) Procedural aspects in relation with other relevant provisions of the Code

The application of other provisions of the Code would be subject to the internal market procedures under Articles 32 and 33. In particular:

- Article 80 of the Code prescribes a different (lighter) regulatory regime for "wholesale-only" undertakings found to have SMP. The characteristics that an undertaking should have in order to be subject to this regulatory regime are defined in Article 80(1), letters (a) and (b). For the purposes of this article, NRAs may have to collect the relevant information, in particular from the concerned undertaking, in order to determine whether undertakings which are found to have SMP meet these criteria.
- Article 81 of the Code defines under which conditions an undertaking found to have SMP can decide to decommission or replace parts of its network (in particular legacy infrastructure) with a new network.

Question 16.1 In your view, what type of information should the NRA provide when notifying a draft measure which falls under Article 80?

In BEREC's view, it would be sufficient to include the following information:

- In section 2 of the standard form: clarify if the SMP operator is a wholesale only operator as defined in paragraph 1 letter a and b of art. 80;
- In section 3 of the standard form: justify the application of a lighter regulation (see art. 89, par2) on wholesale only SMP operator.

Question 16.2 In your view, what type of information should the NRA provide when notifying a draft measure which falls under Article 81?

In BEREC's view an NRA should fill in the section 3 of standard form with the following information:

- General information regarding the decommissioning plan of the SMP operator (e.g. transparent timetable and conditions, including an appropriate notice period for transition, and availability of alternative products).
- Withdrawal of obligations in presence of condition listed in art. 81 paragraph 2 letters a and b.

Question 16.3 In your opinion, would it be appropriate for the Procedural Recommendation to provide guidance on other procedural aspects with regard to the above-mentioned new provisions contained in the Code?

Yes

No

Please explain.

## 17) Interactions between the Commission and BEREC in the internal market procedures

BEREC plays an important role in the internal market procedures, and its role will be reinforced under the Code. However, its participation in the internal market procedures is not mentioned in the current Procedural Recommendation, which predates the creation of BEREC.

Question 17 Would it be appropriate to provide guidance in the context of the Procedural Recommendation on how the NRAs, the Commission and BEREC interact in the context of the internal market procedures and define more precisely their respective roles in the process?

Yes

No

Please explain.

In BEREC's view there is no need to specify the role of BEREC further in the Procedural Recommendation as the Code reinforces the role of the BEREC. BEREC will look at the internal procedural guidelines to improve the efficiency of the process for phase-II cases in practice.

### 18) Draft measures based on other provisions

The Court of Justice has recently held (judgments in case C-397/14 and case C-85/14) that “NRAs may, under [Article 97 of the Code], impose tariff obligations comparable to those referred to in [Article 74(1) of the Code] on an operator which does not have SMP but which controls access to end-users, if such an obligation constitutes a necessary and proportionate measure to ensure that end-users can access services using non-geographic numbers in the European Union”.

Question 18: In your view, should the Commission amend the Recommendation to take into account the procedural implications of these judgments?

Yes

No

Please explain.

### 19) Any other issues

You can raise any other issues that you consider important for the review of the Procedural Recommendation and provide or upload a document relating to the subject of the consultation.

Final comments

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