

# Summary of the BEREC external Workshop on ex-ante regulatory experience concerning commitments, wholesale-only undertakings and commercial agreements review

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## 1. Introduction

On 11 April 2024, BEREC held a workshop with stakeholders in order to inform and report on their experience concerning the application of Article 76 on the regulatory treatment of new VHCN elements, Article 79 on commitments procedure, Article 80 on wholesale-only undertakings, as well as on the NRAs' assessment of commercial agreements in the market analysis process. The findings of the workshop are also meant to shape BEREC's thinking into the opportunity of undertaking a revision of the Co-investment Guidelines<sup>1</sup> and, wider still, the upcoming review of the functioning of the EECC.

The main objectives of the workshop were to (i) understand the procedural aspects related to the application of the said provisions as experienced by the operators, (ii) detail on the main points of focus of the negotiations – what was important to achieve, where there was some leeway and which were the “red lines” not to be crossed, (iii) discuss the relevant clauses of the commitments/commercial agreements and (iv) get feedback from the industry on what worked out well and what could be improved for the future.

The workshop was well attended, with 36 physical and over 200 remote participants. The speakers represented the European Commission and several operators (both incumbents and access seekers) from the countries where some relevant experience – Italy (Co-investments), Denmark, Finland and France (Commitments), Ireland (Wholesale-only), as well as Austria and Cyprus (where the adoption of commercial agreements led to deregulation).

In the first part, the European Commission noted that the provisions discussed are optional tools for NRAs complementing standard SMP remedies approach and that they have an important “signalling role”.

Thereafter, the second part related to the application of the procedures for co-investments, commitments and wholesale-only operators.

In Italy, the FTTH market is growing rapidly, driven by private investments and state aid schemes. In this context, the regulatory proceedings involving the SMP operator, TIM, relating to the evaluation of its co-investment offer (Art. 76) have ultimately not been successful because of the unilateral change in the price indexation mechanism by TIM, after the submission of the draft decision by AGCOM to the EC.

The Danish broadband markets' regulation utilizes binding commitments (Art. 79) as an alternative regulatory tool for operators with SMP, Denmark being one of the countries featuring experience also with the application of the wholesale-only undertakings provisions (Art. 80).

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<sup>1</sup> <https://www.berec.europa.eu/en/document-categories/berec/regulatory-best-practices/guidelines/berec-guidelines-to-foster-the-consistent-application-of-the-conditions-and-criteria-for-assessing-co-investments-in-new-very-high-capacity-network-elements-article-76-1-and-annex-iv-eecc>

In Ireland, National Broadband Ireland (NBI) is tasked with providing high-speed broadband to rural areas of Ireland not covered by commercial operators, proving so far a success story and having achieved significant connection rates facilitated by government subsidies.

As regards the broadcasting markets, two relevant examples have been identified in Europe, with the Finnish and French cases (Art. 79) having been presented. In Finland, suggestions for developing the commitments procedure include stricter timetables, increased disclosure of network costs to buyers, and ensuring a balance in the opportunity cost for the NRA. On the other hand, in France, a right balance among stakeholders has been reached, with continued progress of the previous SMP operator's main competitor, reduced regulatory costs, and underlined complementary nature of Article 79 to the traditional regulatory framework.

The third part was dedicated to the review of the relevant commercial agreements. The cases in which the NRAs have deregulated (at least partially) the broadband markets based on the conclusion of commercial agreements are under close scrutiny by both the regulators and the EC. While in Austria there has been a lively debate on the future competitive expected outcomes, in Cyprus there seems to be less controversy, with all wholesale customers having migrated to the commercial agreement, supposedly based on fair access for all the alternative providers. In any event, the two analysed cases are different in several aspects among which the national specificities of the countries considered (e.g. the size and population density of the countries), but also in the applicable SMP regulation (e.g. in Austria both markets 1/2020 and 3b/2014 have been deregulated, while in Cyprus market 1/2020 stays regulated).

The roundtable discussions revealed that, given the limited number of cases in which the relevant EECC provisions were implemented, it is too early to reach some definite conclusions of the functioning of the provisions of Art. 76, 79 and 80 and notably on the competitive outcomes following deregulation based on commercial agreements consideration. Especially for commercial agreements, there is an identified need to ensure predictability of market conditions. To that end, a timely intervention mechanism should be envisaged.

In conclusion, all these alternative tools are broadly seen as relevant for inclusion/maintenance in the future regulatory framework. Quite generally, they are considered necessary to make the SMP-regime more flexible and provide NRAs with the means to adapt to the market developments.

## **2. Part 1 – European Commission views and discussion**

In Part 1 of the workshop, the European Commission offered a presentation on their insights into Articles 76, 79, 80 and on commercial agreements, as well as the interplay between the several regulatory means/options in place for the NRAs to take into account in light of their national circumstances.

Firstly, they exposed the legal framework that NRAs must apply when conducting their market analysis. This includes, on the one hand, hard law with provisions of the European Electronic



Communications Code (EECC) on co-investments, regulatory commitments, wholesale only and commercial agreements. On the other hand, as soft law, the Recommendation on Relevant Markets, SMP Guidelines, the set of BEREC Guidelines relating to the review of relevant markets, but also the Gigabit Recommendation and (soon to be published) the agreed Gigabit Infrastructure Act.

Then, the EC representative focused on the Gigabit Recommendation, highlighting that there is no "hierarchy" of agreements (commercial vs made binding), but results in the markets may be different. In particular, (i) co-investment commitments — where they are made by an SMP operator - must, in principle, result in total or partial de-regulation of the new VHCN (as per Article 76(2) EECC), (ii) commitments under Article 79(1)(a) EECC can lead to deregulation but it is not necessarily the case (and we have seen examples during the workshop where, despite the binding commitments, additional SMP-obligations have been established), and (iii) commercial agreements under the EECC (Article 68(6)) must be considered in order to determine whether a new market analysis is required or, if not, whether a review of remedies imposed is needed. The main difference in applying all these procedures is the possibility of operators to negotiate – while in the traditional SMP setting there is remedies imposition, with the alternative way of setting remedies, the operators are given the possibility to negotiate and prove that the competition problems identified in the market analysis would be solved.

Different ex-ante market measures which the EC has approved were briefly presented regarding commitments under Article 79 and 80 (in Denmark, France, Finland), and commercial agreements (in Cyprus and Austria). In that sense, the EC highlighted some relevant text from their comment letters, in particular (i) in the Austrian case: *"regulatory commitments under Article 79 of EECC are in general the appropriate tool to be used by the NRAs to promote commitments"* – showing the preference for this tool, despite having agreed with the proposal by RTR (the case will be explained in detail later on), and (ii) in the Danish case as regards the application of Article 80: DBA should *"reassess its analysis as to the ability and incentive of wholesale-only operators to charge excessive prices"*. Regarding specifically the regulation of wholesale-only undertakings, the EC presented the conditions that an undertaking needs to fulfil to be considered wholesale-only, the regulatory treatment that could be considered given the fulfilment of the conditions and potential future cases, such as Sweden, Italy and Ireland. The most relevant aspect in the regulatory treatment of wholesale-only undertakings relates to (the fair and reasonable) pricing.

In the Q&A session, ECTA explained that the provisions on co-investments have initially been thought only for mass-market supply, a subparagraph to cover also the business operators having been added later on in the negotiation process of the Code's provisions. In the light of that, ECTA holds that the application of Article 76 does not need to lead to total deregulation of the markets and NRAs should impose remedies benefitting the business operators. Moreover, ECTA's representative explained that Germany is a good example of commercial agreements concluded under pressure, where operators are "forced" to enter into commercial agreements (and duct access is not mandated/implemented) and highlighted that when commercial agreements exist, it does not mean by default that competition works. More generally, the commercial agreements are working only against/by reference to the regulated

product. Finally, the opinion that regulated offers paved the way for the conclusion of good commercial agreements was shared.

In line with ECTA, Colt's representative explained that there is only a focus on mass-market products in the co-investments' schemes, while leaving aside business operators which cannot get good commercial agreements since incumbents ask for large volumes and behave strategically, playing with prolonged timing of negotiations.

The EC representative answered that NRAs are responsible for assessing the market circumstances and implications, while there is no *a priori* obligation on the alternative operators to accept any commercial agreements. Regarding the statement that the provisions in the Code only focus on mass-markets operators, the EC pointed to the fact that business services still belong to one of the relevant markets considered susceptible to ex-ante regulation EU-wide, and that on demand deployment is more feasible in that segment.

Vodafone pointed to the complexity of the provisions (i.e. Articles 76, 79, 80) and asked if, given the aim to simplify regulation going forward, it would make sense to keep this type of provisions in the Code review.

As a concluding remarks, the EC representative signalled that, from the initial regulatory framework in 2002 (where 18 markets were listed in the Recommendation), markets have evolved a lot, and that currently less intensity of regulation is needed. Finally, he highlighted that the provisions under discussion in this workshop are an optional tool for NRAs complementing the standard SMP remedies approach, being seen as useful and important.

### **3. Part 2 – Co-investments, commitments procedures and wholesale-only operators**

Part 2 of the workshop comprised of case studies from Italy, Denmark and Ireland – related to the wholesale broadband markets, as well as Finland and France – wholesale broadcasting markets, that were presented.

#### **3.1. Perspective of access seekers regarding TIM's co-investments' offer in Italy (application of Articles 76 and 79)**

Two alternative operators, Iliad and Vodafone, presented their experience during the negotiation process of the co-investment scheme proposed by TIM (the incumbent operator in Italy). The main difference between them is that Iliad is a subscriber of TIM's co-investment offer (which was finally not approved/made binding by AGCOM), while Vodafone is not.

To set the scene, Iliad firstly pointed out that in Italy FTTH is experiencing a relevant growth and represents one of the most competitive markets, with TIM registering a market share of 26% and the other alternative operators (OAOs) 73% cumulatively. Even if below the EU

peers, FTTH take up is quickly growing and the coverage – which currently is concentrated in black areas<sup>2</sup> – is expected to increase in grey and white areas<sup>3</sup> considering the private investments of Open Fiber and FiberCop, plus the state aid schemes.

In this context, Italy experienced the application of Articles 76 and 79 of the Code in the past 3 years, following the presentation by the SMP operator, TIM, at the beginning of 2021, of a co-investment offer and commitments related to the development of new VHCN elements. Pending the proceeding, 12 operators (2 big operators – Iliad and Fastweb – and other operators very small and active on local basis) signed co-investment agreements with FiberCop<sup>4</sup> on the basis of the proposed Co-investment Offer.

The proceedings were complex and implied 3 public consultations and several modifications of the Offer by TIM. The last one was in May 2022 and focused on the introduction of an indexation system for co-investment's prices to consider the inflation.

The proceeding ended in December 2023, with a decision of non-approval of commitments by AGCOM as the Offer (as lastly modified with the indexation price system) was not considered compliant with criteria set by Art. 76 EECC.

As regards the Co-investment Offer (the Offer thereafter), it concerned the creation of a new FTTH/B network, planned to reach 2,549 Municipalities by April 2026 (9.7 million of households in “grey” and “black” areas). The investment was foreseen to take place in the new network related to the secondary network (from optical cabinet to home/building).

TIM proposed a *One-way access model* consisting in a long-term risk sharing agreement whereby FiberCop deploys secondary fiber network and operators can co-invest via Indefeasible Right of Use (IRU) or minimum buying commitments (semi-GPON or P2P fiber optic connections). According to the Offer, OAOs had the possibility to adhere to the co-investment until 2030, with prices depending upon the year of entry into the project, lower prices being assured for early co-investors.

There were two main options for co-investors:

- Semi-GPON acquisition in Pay-per-use - 10-years agreement with volume commitments for selected municipalities (or part of large municipalities)
- Semi-GPON based on IRU access to cabinets - 20-years agreement, allowing the acquisition of Semi-GPON lines without volume commitments.

According to Iliad, the main benefits for co-investors were related to:

- (i) the possibility to purchase passive services on the FTTH network (not available on TIM's network at the time and for non-co-investors available only 5 years after);
- (ii) the clear commitment by TIM on the FTTH network roll-out;

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<sup>2</sup> Areas where at least two fixed ultrafast networks (i.e. delivering broadband services of at least 100 Mbps) are present or credibly planned in the relevant time horizon.

<sup>3</sup> White areas are areas where no fixed ultrafast network is present or credibly planned in the relevant time horizon, while grey areas describe the zones where only one fixed ultrafast network is present or credibly planned in the relevant time horizon.

<sup>4</sup> FiberCop was created in 2021 as an initiative of TIM, KKR and Fastweb, with the aim of accelerating the development of fibre infrastructures in Italy.

- (iii) the guarantee of long-term access to the FTTH network based on stable and predictable access conditions, capable to enable investments by co-investors;
- (iv) the reward of co-investors for their commitments, with the pay-per-use prices 20% lower than the regulated rates.

Therefore, co-investment remains a very good tool to assure predictability and stability for the alternative operators when investing in new VHCN.

On the other hand, Vodafone's presentation focused on the aspects regarding co-investments that could be improved.

The operator pointed out that the relationship between the SMP operator and the potential co-investors is 'naturally' asymmetrical and there is a certain risk of adopting opportunistic behavior by the former. To prevent such behavior, Vodafone holds it crucial to ensure ex-ante that enough information is available and that there is an ex-post monitoring and penalty system in place. In this regard, Vodafone specified the importance to guarantee a full disclosure of the roll-out plans, the full co-investors' involvement in the set-up of the deployment (collaboration and negotiation with the partners is needed), a full disclosure of technical details on products and processes and, finally, transparency and predictability of certain prices over the entire period. Moreover, a flexibility mechanism (since not all circumstances can be foreseen at the time of the conclusion of the co-investment agreement) and a penalty system should always be guaranteed ex-post.

Lastly, Vodafone highlighted that the prerequisite for deregulation should be the existence of adequate and irreversible competition both on the wholesale and retail markets. The mere presence of a co-investment offer and the existence of one only co-investor having whatever size (even 0,1% market share) cannot be considered sufficient in itself to justify a removal or even lighten the remedies on the SMP operator. This is crucial to avoid that even potential existence of a new (portion) of infrastructure built through co-investment should lead to an artificial – and automatic – deregulation. For this reason, Vodafone highlighted that deregulation should not be applied immediately and based on the existence of only one co-investor, but NRAs should verify the positive impact of the co-investment project on the market in terms of (i) increase in competition on the wholesale access market and (ii) dynamism and innovation taking place at retail level. To that end, the operator proposed that deregulation should not be adopted until two years have elapsed after the co-investment agreements are made binding and that, after deregulation, NRAs should closely monitor both the wholesale and retail markets and should reassess the need to restate previously imposed obligations.

In the Q&A session relating to the Italian case, there was a debate on when to consider, timewise, the starting point of the co-investment.

ECTA stressed the fact that the risk assessment related to a co-investment offer in a fixed and in a mobile setting is considerably differently perceived. And the example of Orange in Belgium was provided – in a fixed setting, while Orange wanted to co-invest in fiber assets with Proximus, the latter did not want to lose market share and so denied the option to co-invest; by contrast, in the mobile market, a joint-venture between Orange and Proximus was set up for the rollout of 5G networks.



### **3.2. Experience regarding the commitments' procedure in the broadband markets in Denmark (application of Article 79)**

The regulation of the Danish broadband market is an example of how the commitments procedure according to Article 79, which were made binding by the NRA, have been applied as an alternative regulatory tool towards operators with SMP. Despite the fact that this case was not the focus of the workshop, it is worth noting that the regulator in Denmark (DBA, the Danish Business Authority) seems the only one to-date to have also applied the provisions of Article 80 on wholesale-only undertakings.

DBA's latest market analysis of the wholesale markets underlying broadband internet access services of 2021 determined two product markets: a low-capacity market (consisting of copper and FWA) and a high-capacity market (consisting of cable and fibre). The high-capacity market was characterized by significant investments and a high fibre coverage (over 90% coverage with fibre or cable), and a low degree of parallel coverage of high-capacity networks, in particular a very low degree of parallel coverage of fibre.

The high-capacity market was geographically divided into 21 individual, regional submarkets, with an SMP-designation on 13 of the 21 submarkets. On 6 submarkets, the SMP operator is subject to remedies (4 of these as wholesale-only operators – where Art. 80 was applied, as mentioned above). Alternative regulatory treatment via binding commitments was applied on 7 submarkets and concerned 4 operators, TDC the former incumbent (with respect to 4 submarkets), Norlys, Fibia and AURA (for the other 3 submarkets). From a national perspective, regulation via binding commitments covers approximately 70% of the high-capacity market, including the largest regional submarkets. Thus, this is currently the most widespread means of ex-ante regulation imposed in Denmark as regards the broadband markets.

In practical terms, broadband access in Denmark is provided via three wholesale platforms (owned by TDC, Norlys and Fibia respectively). Each wholesale platform offers integration for service providers and facilitates access to several fiber networks. Thus, a very large part of the fiber infrastructure in Denmark is subject to third party access via these wholesale platforms, and many service providers are using all wholesale platforms.

Regarding the main players participating in the workshop, TDC NET represents the wholesale-arm of the former incumbent TDC, dealing with infrastructure, roll-out and wholesale access, and Nuuday the service provider on the retail market. TDC covered the territory with three fixed infrastructures - fiber (primarily in Greater Copenhagen and North Zealand), cable (in different parts of Denmark) and copper (nationwide), and until 2021 was subject to specific obligations for access to its copper and fiber networks. Access to TDC's cable network was granted solely on a commercial basis. Due to DBA's recent market review, TDC is now regulated via binding commitments granting access to cable and fiber on 4 submarkets (on the high-capacity market), and binding commitments at a national level granting access to copper (on the low-capacity market). Nuuday is the largest service provider in Denmark on both the business to consumer (B2C) and the business to business (B2B) market, and it used to be the retail division of TDC before 2018, when TDC was split.

TDC's commitments cover mainly (i) wholesale access to active copper, cable and fiber<sup>5</sup> products, (ii) non-discrimination and transparency, including continuation of reference offers covering among others SLAs, (iii) price models and price level on copper, cable, and fiber, including terms of annual price increases and anchor products on cable and fiber networks, (iv) a margin squeeze obligation, (v) new bilateral dispute resolution mechanism and (vi) the possibility to decommission the copper network locally.

On the other hand, Norlys is a cooperatively owned energy and telecommunications group consisting among others of the fiber wholesale division, Norlys Fibernet<sup>6</sup>. Since 2021, Norlys has become subject to sector-specific regulation via binding commitments. Even though Norlys owns both fiber and cable infrastructures within the company's submarket (Central and South Jutland), Norlys' commitments only cover access to its fiber network, since Norlys has stated to decommission its cable infrastructure within the submarket.

Norlys' commitments cover essentially (i) the obligation to use a standardized wholesale platform, (ii) the provision of network access on fair and non-discriminatory terms, (iii) the provision of a fiber layer 2 product designed for mass market and with core characteristics based on BEREC guidelines<sup>7</sup> and (iv) engagement of price control, including maximum average prices and a margin squeeze obligation.

In all cases, the commitments are to be applied (at least) in the timeframe of the market review, of five years.

Regarding the procedural aspects as experienced by the wholesale providers in Denmark, according to TDC NET, the process of negotiating commitments took much longer (one year more) than originally foreseen by the DBA and covered two rounds of public consultations. TDC NET called for more clarity about the commitments process and about the criteria to be met to constitute adequate commitments. The rationale behind the content of the commitments was, according to TDC NET, not widely known, which made acceptance difficult among service providers. Additionally, TDC NET emphasized the challenge for an NRA to ensure equal treatment between SMPs when negotiating commitments simultaneously (e.g. so that there is prevention of some SMP operators ending up with "softer" commitments than others).

Norlys, the important alternative operator, generally agreed with the procedural aspects as experienced and expressed by TDC NET.

According to TDC NET, the attractiveness of the commitments tool relates directly to the opportunity for SMP operators to achieve a more flexible regulation. This was in focus for TDC NET when negotiating price cap terms. TDC NET found negotiations with DBA tough and highlighted that DBA had its focus on cost-based prices (LRAIC), which, in its view, became visible quite late in the process. Hence, price-wise, the commitments largely turned out to

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<sup>5</sup> Fiber access in the form of a VULA product.

<sup>6</sup> Norlys Group also incorporates *Norlys Digital*, which constitutes the retail arm of the company, and *OpenNet*, a wholesale platform for the industry (see the mention above to the broadband access wholesale platforms).

<sup>7</sup> Common Position on Layer 2 Wholesale Access Products.

reflect a traditional market decision. At the same time, TDC NET noted that initially the company envisaged a long-term commitments period, but, with the benefit of hindsight, TDC NET understood that long-term commitments can pose challenges for the SMP operator, especially with reference to the drastic developments in market conditions (due to geopolitical changes and inflation).

Norlys generally expressed that the main objective for the company was to secure long-term business conditions that would provide incentives for fiber rollout. Norlys emphasized that a short regulation period would cause uncertainty for investors, and that rollout plans could be challenged if additional access obligations were imposed within the period. Additionally, Norlys noted that the purpose of price indexation should be to ensure a neutral effect of general cost increases relative to the point of departure. Current commitments do not take into account recent (high) inflation.

When it comes to what worked well and what can be improved in the commitments' procedure, in general, TDC NET was positive about the use of commitments as a regulatory tool, but found that the DBA was rather stuck in a traditional way of thinking in relation to the regulatory toolbox during the process. TDC NET finally emphasized that, in order not to end up with a too differentiated landscape of commitments across markets, and to achieve a more level playing field among operators offering commitments, more transparency during the commitments' procedure is needed.

Norlys was generally positive about the process and saw commitments as a step forward on the way from historical SMP regulation to a setup with agreements negotiated fully on commercial terms in the future.

Regarding the perspective of a service provider, Nuuday started by noting that the company was generally positive with respect to the commitments model and its overall effect on the opening of most of the fiber networks in Denmark (which could not have been achieved in a traditional setting, in their view). However, despite Denmark being a very digitized society with high availability of fiber, Nuuday emphasized that the Danish wholesale market is very fragmented and regulated via loose commitments. In addition, Nuuday noted that offered wholesale product constitutes only a "white label" centralized bitstream access product, which is highly restricted on functionality and lacks on quality incentives. In their view, there is no possibility for a service provider to innovate and differentiate end-user services, thus price became the only parameter for retail operators to compete on. Nuuday therefore pointed to the necessity of an improved access product. With reference to difficulties amongst market players in reaching common positions, Nuuday pleaded for soft-law instruments like the BEREC Guidelines to be codified into binding EU-legislation establishing precise criteria for wholesale access products<sup>8</sup>. In conclusion, according to Nuuday, the commitments model results in static market dynamics that reduce downstream competition and consumer choice and prevents reaping the benefits of rapid technological developments, as it drives fragmentation and complexity.

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<sup>8</sup> For instance, Nuuday highlighted that service level guarantees (SLG) should constitute European standards.

In the Q&A session, ECTA strongly supported Nuuday's point of view, which contained an essential and fundamental message, namely that service providers are left with no possibility to differentiate their supply towards end-users and to compete on any other parameter than price. ECTA emphasized with reference to the commitments tool that a more flexible regulation should not necessarily mean a lighter regulation since identified competition problems still need to be properly addressed. ECTA thus argued that the removal of SMP regulation is premature. According to ECTA, the previous market regulation towards the incumbent is still a good starting point for determining which criteria commitments should fulfil to be found sufficient to remedy the identified competition issues by an NRA.

Norlys was asked about the possibility of network owners to integrate on the OpenNet platform, which Norlys confirmed was openly possible.

Nuuday was asked, with reference to the company's general dissatisfaction with the regulated wholesale access product, whether it was able to get another or a better access product via its sister company, TDC NET. Nuuday informed that TDC NET – probably due to its history (legacy network and former regulation) – offers an access product with a better QoS than the one offered through the commitments. In general, Nuuday emphasized that the current mass market wholesale access product was too simple. According to Nuuday, digital services have become more crucial and are thus expected to be premium services, which require for service providers to be granted more control over traffic and QoS. In Nuuday's opinion, wholesale access should be provided by VULA.

### **3.3. Perspective of a wholesale-only operator active in the broadband market in Ireland**

National Broadband Ireland (NBI) is a wholesale-only provider of very high-speed broadband services to the rural population (23%) of Ireland, who are not served by other commercial operators. The locations where they provide FTTH connectivity are, collectively, referred to as the National Broadband Plan (NBP) Intervention Area. Due to the dispersed nature of this part of the population, NBI's network will cross 96% of Ireland's landmass connecting 564,000 premises (1.1 million people). It is an XGS-PON<sup>9</sup> FTTH network with minimum service speeds of 500 Mbps.

NBI submitted the winning tender for the Irish government's NBP initiative, a gap funding arrangement (state aid of €2.1 billion, with a €0.5 billion contingency). The procurement process commenced in December 2015 and the NBP contract was signed in November 2019, for an initial duration of 25 years. The NBP project agreement with the Irish government requires NBI to: (i) operate on a wholesale-only basis, (ii) provide services on a non-discriminatory basis, (iii) offer products, service and prices that are subject to approval by the government and (iv) offer certain wholesale products (e.g. Virtual Unbundling Access and Bitstream) with the freedom to offer others as well. Work commenced on the NBP network

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<sup>9</sup> 10 Gigabit Symmetrical Passive Optical Network.

build in 2020 and NBI is currently on target to complete the deployment of the NBP FTTP network in early 2027.

A key component to the rollout of this network is access to the physical infrastructure of the incumbent fixed line telecom operator in Ireland, Eircom<sup>10</sup>. NBI needs access to 1.5 million poles and 15,000 km of duct from Eircom. The scale of this physical infrastructure access (PIA) is unprecedented in Ireland and a Major Infrastructure Programme (MIP) arrangement was agreed with Eircom in order to manage delivery on this scale. As a wholesale-only operator NBI has to engage with retail broadband providers in order to get end-users to connect to the NBP network and it is the retail providers, not NBI, who contract directly with end-users. At present, there are 64 different retail service providers onboarded including all the main national providers of broadband.

Regarding NBI's experience as a wholesale-only operator, one of the key successes of the rollout is the connection rate following deployment, currently running at 30% within a year and 50% within 3 years. This is in large part due to the connection subsidy included in the government's funding model, which removes<sup>11</sup> the need to charge customers on an upfront basis for connection to the NBP network. A key challenge to the network rollout is the scale of PIA required from Eircom. This has involved large scale pole replacement and remediation works in all rollout areas on an ongoing basis. NBI noted that while this is challenging, it has a constructive relationship with Eircom which has ensured that the NBP network deployment remains on track.

NBI's has a unique place within the regulatory framework in Ireland. As the sole provider of next generation/VHCN wholesale local access services in the NBP Intervention Area, it might be argued that it holds a position of Significant Market Power (SMP) but the obligations imposed by the NBP project agreement remove any opportunity to take advantage of any dominant position that might exist. In the upstream PIA market, as the largest consumer of PIA in the state it might be similarly be posited that NBI has countervailing buying power. In reality, this is not the case due to the strict rollout targets set out in the NBP project agreement and due to the fact that no viable alternative infrastructure exists to facilitate network rollout at scale in the areas concerned. Once the NBP network has been deployed based on Eircom's infrastructure, redeploying it to another set of physical infrastructure would involve enormous end-user disruption and cost, which makes future switching of physical infrastructure access highly unlikely. In NBI's view, during the next round of broadband markets access review, should ComReg make a finding of SMP in relation to NBI, it is likely to treat NBI under the provisions of Article 80.

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<sup>10</sup> Access to PIA is through Open Eir, the wholesale division of Eircom.

<sup>11</sup> There is a €5,000 cap to this exemption over which NBI can ask customers for a contribution to the connection costs. To-date NBI has not invoked this cap.

### **3.4. Perspectives regarding the commitments' procedure in the broadcasting market in Finland (application of Article 79)**

In the 2022 market analysis, Traficom defined three wholesale product markets underlying broadcasting services in Finland: (i) the wholesale market for access to antenna site and capacity, (ii) the wholesale market for television transmission services and (iii) the wholesale market for radio transmission services. Traficom found that Digita has SMP on all these markets, which were defined nationally. The reasoning related mainly to the difference in coverage of alternative broadcasting platforms (Digita is the only vertically integrated supplier with nationwide television and radio transmission network coverage) and the capacity of these alternative networks that does not guarantee sufficient quality. One of the most important customers of Digita's in those wholesale market is Yleisradio (the Finnish Broadcasting Company), who was also represented during the workshop.

The commitments' procedure as experienced by Digita lasted for about 2 years. Quite generally, Digita ended up with a total of 10 commitments all related to the aforementioned wholesale markets. The main commitments concerned the obligations to (i) lease antenna capacity, (ii) provide TV transmission services in certain multiplexes, (iii) provide nationwide radio transmission services, (iv) use a cost accounting system, (v) publish delivery terms, price lists and reference offers, (vi) apply reasonable and non-discriminatory pricing in the services' provision, (vii) provide DVB-T capacity at certain prices, (viii) provide HD and SD channels at certain prices, (ix) not increase prices for TV transmission services save some exceptional circumstances, (x) provide each TV client with free-of-charge distribution of one HD Channel during the simulcast period, under specified conditions. Noteworthy, save the commitments made binding, Digita is also under the cost orientation obligation in the markets for access to antenna capacity and radio broadcasting services respectively.

Digita's representative finds that the decision to use the former SMP obligations as the foundation for the commitments proved to be the right move, ensuring their smoother acceptance. While the commitment procedure was laborious and time-consuming, all parties now appear to be satisfied and familiar with the outcome. The commitments have led to predictable and stable price levels and conditions. The commitment procedure provided a more flexible way to take into notice the market conditions – the HD transition has now finally been agreed and started in Finland. The commitments may not be easily applicable for all services (such as customized ones). In Digita's case, these are covered by the cost-orientation obligation mentioned above, this being the reasons for which not all the previously imposed SMP obligations have been dropped. Finally, in Digita's view, pricing commitments can be very risky if the market conditions change (e.g. the war in Ukraine in 2022). Therefore, there should be a possibility to amend the commitments quickly.

On the access seeker's side, Yleisradio's (Yle thereafter) representative finds that information asymmetry strongly favors the network operator (Digita) in the commitment process. In Yle's view, the NRA accepted commitments which, on the one hand, limit the available DVB-T2 capacity products to narrower options and, on the other hand, established the capacity prices in a discriminatory manner and not necessarily cost-based. Thus, the view that the accepted

commitments restricted the freedom of TV channels to choose their means to compete in retail market was put forward. Overall, Yle is of the opinion that the accepted commitments decreased the competitiveness of the retail market.

The reasoning lines essentially with the fact that the buyers got a smaller price decrease compared what the NRA had indicated in the earlier draft market analysis, having no other option than to acquire access to Digita's network. In Yle's view, Digita has the incentive to sell as much capacity and coverage as possible with high prices, being aware of the fact that buyers had no alternative supplier. Despite the buyers not being happy with the commitments' outcome, Yle holds that they were not willing to file a complaint due to the high cost of the complaint process and due to the long period of uncertainty that would delay the DVB-T2 transition.

Further on, Yle explained that, in the commitment procedure, the supplier and the buyers need to compare the advantages and disadvantages of having a commitment agreement in place with an alternative SMP decision, taking due account of the procedural costs. The NRA has an incentive to encourage acceptance of the commitments in order to avoid the workload of an ordinary SMP decision and likely court appeal (by Digita, a credible threat in the speaker's view). The NRA could assume that the buyers would be less willing to challenge the accepted commitments due to the high cost of the appeal process. However, the network operator/Digita would be more likely to challenge an ordinary SMP decision, as SMP price regulation is crucial to its profitability. Yle wondered whether such circumstances may prevent the NRA from acting as an impartial supervisor.

Finally, Yle posed several questions to which answer should be sought if an improvement in the commitments' procedure is wanted. For instance, the commitments procedure needs to be developed in such a way as to reduce the information asymmetry between the committing parties. A stricter timetable could slightly favour buyers. At the same time, subject to sanction powers, NRAs could build a credible threat for the network operators to fully disclose all relevant details. Moreover, closer scrutiny on which details are considered really business secrets under the Trade Secrets Directive<sup>12</sup> is needed.

### **3.5. Perspectives regarding the commitments' procedure in the broadcasting market in France (application of Article 79)**

TDF, the incumbent broadcaster and former legal monopoly, relies on its sites (masts, towers, telecoms infrastructure etc.) to provide television channels, radio stations and DTT multiplexes (with analog and digital terrestrial television and radio transmission), and broadcasting services. The latter (i.e. wholesale broadcasting transmission services) represent the focus of the presentation that follows.

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<sup>12</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0943>

TDF has a single competitor in the market and remains the only company to have at least one site in all the 1,626 zones used for DTT broadcasting. Since 2006, ARCEP considers that TDF has SMP and therefore imposed a certain number of obligations. In the context of increasing competitive pressure of alternative technologies on the DTT market at retail level (most notably IPTV-exerted pressures), as well as continuous progression of TDF's upstream competitor's market shares (TowerCast), TDF decided to offer commitments under Article 79 EEC in 2021. The objective of this decision was to conciliate the need to pursue regulation, as DTT remained necessary (for 20% of households, it was still the only means to receive TV) with the need to alleviate its cost.

Regarding the timeframe, it took approximately one year beginning with the transmission of the offer in April 2021 until the commitments were in place. The offer was discussed directly and extensively with ARCEP and went through two public consultations. Two other regulatory bodies were involved (ARCOM and the French Competition Authority). A modified version of the commitments was accepted by ARCEP in May 2022. The commitments that were accepted related in particular to network access on a non-discriminatory basis, publication of a reference offer, as well as to pricing (depending on whether the sites were replicable or not).

Regarding TDF's overall view on the commitments' procedure, the following points were stressed:

- The procedure was done in the context of a traditional market analysis;
- It did not deeply change the scope of obligations imposed on TDF;
- Nevertheless, some remedies were simplified or lifted, mainly those related to transparency obligations.

Following the two years in which the commitments were negotiated and discussed with the public authorities in charge, TDF came to the conclusion that this process created a balance between the various stakeholders involved based on a less formal approach than the traditional obligations setting decisions. Overall, the commitments' procedure gave more transparency to the market as a whole and the respective parties - regulator and other stakeholders.

Secondly, according to TDF, similar to the traditional regulatory approach, the commitments' procedure allowed its main competitor (TowerCast) to keep progressing in terms of market shares. In any event, the adaptation of remedies to a market decline was seen as delicate and, in the case of the commitment, the process can be seen as a revelation of information on the previous SMP operator's side, allowing the market to know which are acceptable terms, adapted to the new market conditions. This is important in TDF's view.

Another important point made by TDF was that the commitments option entailed lower regulatory costs, which allowed the company to focus its resources on other aspects of its business, including fibre deployment.

Finally, TDF's representative highlighted that the provisions of Article 79 do not replace the regulatory framework (i.e. the traditional SMP obligations etc.) but rather it is there to complement the alternatives in the regulatory toolbox.





As a conclusion to its intervention, TDF indicated that it always good to kept in mind that if the commitments' procedure failed, the usual traditional obligations would have been applied. Furthermore, given the fact that no legal proceedings were brought forth following the procedure (by TowerCast or any other third party), TDF considers that its results were satisfactory.

## 4. Part 3 – Commercial agreements

Case studies from Austria and Cyprus were presented. In both cases, the incumbent operators presented the main clauses comprised in their commercial agreements. In the Austrian case, the alternative operators have also been represented.

### 4.1. Experience from Austria

A case where the broadband markets (market for wholesale local access provided at a fixed location and the market for central access for mass market products provided at a fixed location) were completely deregulated due to commercial agreements happened in Austria in 2022. In its analysis of the wholesale broadband access markets, the Austrian NRA found that large parts of the retail residential market were competitive due to infrastructure-based competition and a declining market share of the incumbent A1 Telekom. Against this background, a large access seeker and the incumbent negotiated two contracts for nationwide access to the incumbent's infrastructure for virtual unbundled local loop access<sup>13</sup> and VHCN access. These contracts were concluded for five years and, later on, also signed by 18 other operators. They were thoroughly assessed by the Austrian NRA who reached the conclusion that they were sufficient to guarantee effective competition until 2027. The market was therefore deregulated in October 2022.

A1 Telekom (A1 thereafter), the formally regulated operator, presented its view on the case. The presentation started with a market overview pointing out that the market share of A1 decreased steadily over the last years and that significant investments in FTTB/H are necessary over the coming years. Since the conditions for fibre investments are very difficult in Austria (high costs of rollout, low price level, competition from cable and mobile broadband), A1 aimed to establish new partnerships for VHCN rollout. Two contracts were negotiated with the largest wholesale customer, Hutchison Three Austria, for the following services: vULL 2.0 (on the legacy network – including existing FTTH/FTTB) and VHCN access (on the newly build fiber network, FTTH/FTTB access). With the VHCN access contract, partners can commit to a certain purchase quantity for new FTTB/H projects and receive rebates on monthly fees in return. The vULL 2.0 contract allowed all other operators to remain on A1's network (mainly copper), an important precondition for deregulation. A1 concluded that the new contracts had a positive impact on the business case for VHCN investments and allowed to address the lack

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<sup>13</sup> vULL (=VULA) 2.0

of demand more effectively. Furthermore, there is more room for innovation and flexibility, while the wholesale access buyers can differentiate between business and residential internet access services provided at retail level both in terms of price and QoS.

ISPA, the Austrian Internet Service Provider Association, on the other hand, was critical on the fact that the Austrian regulatory authority used the three criteria test to deregulate the market. In their view, a proceeding according to Article 79 EEC (i.e. commitments' procedure) would have been necessary. Such a procedure would have been more transparent, and the commitments would have had binding status, allowing the NRA to intervene more effectively in case of problems. Moreover, the alternative operators have been faced, in ISPA's view, with no freedom of choice because of having to do a binary choice – either signing the commercial agreement with A1 or not signing and risking losing all its customers in the regions where no alternative network is available. ISPA would have preferred a situation with nationwide ex-ante regulation imposed for access to the incumbent's network.

During the Q&A session, ECTA made several comments supporting ISPA's view that Article 79 should have applied in the Austrian case. In their view, the Austrian case is an example of alternative operators left with no choice but to sign the commercial contracts with the former incumbent. ECTA continued with the statement that the contracts had not demonstrated their effectiveness and wondered why there have been no co-investment offers promoted by A1 Telekom. Clearly, in their view the deregulation was wrong. On the effectiveness of the competition in the new setting, A1's representative replied that the allegation also applies to NRA's decisions, whose functioning is also questionable/uncertain *a priori*. There was a question from the floor on the market developments after deregulation and, as the data show, the demand for A1 wholesale access services proved fairly stable so far. In any event, RTR is monitoring the market closely and will review it again in 2025.

## 4.2. Experience from Cyprus

The market context in Cyprus shows that Cyta's current FTTH coverage is approximately 80%, and, according to their representative, ensuring a robust and extensive infrastructure aiming to reach 100% geographic coverage within the next couple of years. In terms of regulatory obligations, Cyta was under a full set of remedies imposed in the wholesale market for local access provided at a fixed location (market 1/2020), namely (i) access, (ii) non-discrimination, (iii) transparency, (iv) accounting separation and (v) cost orientation, including the ERT (Economic Replicability Test) obligation. The same held true for the wholesale market for central access for mass-market products at a fixed location (market 3b/2014). Currently Cyta is still designated with SMP in market 1/2020, but, according to the 2022 market assessment, market 3b/2014 in Cyprus was deemed not susceptible to ex-ante regulation anymore. One of the main arguments related to the opening of Cyta's network on a commercial basis.

During its presentation, Cyta provided relevant background information on its proposed reference offer in 2018 in market 1/2020 (as a reflection of the imposed access obligations by OCECPR), explaining that its aim was to attract alternative network operators (ANOs) on its network. However, due to national specificities, the offer fell short. Specifically, it required

ANOs to establish 80 connections to local IP nodes in order to access Cyta's next generation network nationally, making it financially unfeasible for the access takers due to the limited number of subscribers. Conversely, in 2019, Cyta decided to propose a wholesale access offer on the market for central access for mass-market products (market 3b/2014), with the bitstream 2IP Plus commercial agreement streamlining the process of acquiring wholesale customers by reducing the necessary connections, thereby significantly lowering costs for ANOs, limiting them to just 3 connections at a national level. The product offerings under the commercial agreement encompassed copper-based services ranging from 10 Mbps to 100 Mbps, as well as fiber-optic services offering speeds up to 2 Gbps. This diverse range catered to various customer needs and preferences. The commercial agreement in this form was undertaken by the market.

According to Cyta's representative, the benefits stemming from the commercial agreement are manifold. For instance, Cyta fulfils its regulatory obligations while facilitating the transition from copper to fiber-based products. Simultaneously, it provides ANOs with a financially viable solution for accessing its network, fostering competition and innovation in the market. Consequently, all of Cyta's wholesale customers have migrated to the commercial agreement, ensuring equitable access for all providers.

## 5. Roundtable discussions and conclusions

The final debate of the workshop has been inspired by the following questions prepared to steer the discussions:

- 1) What is **the overall perspective on applying commitments instead of remedies**?  
How well did the commitments work in practice?
- 2) What are the **strengths and weaknesses** of commitments as a regulatory tool?
- 3) Do you see commitments (i.e. the commitments procedure) as **a way forward** and, if not, what elements would you change/how would you improve?
- 4) How do you see the **interplay between the commitment procedure** and the task of NRAs to take account of **commercial agreements** when reviewing the markets?

Quite generally, the view that it is too early to assess the effects of these procedures in the markets has been put forward. There was a common understanding that the competitive landscape (both at retail and wholesale level) may change as a result of the application of commitments, but the direction is yet to be seen.

In most of the cases, the procedures have been complex, have taken a lot of time to be concluded and their merits cannot be assessed at this early stage. However, some of the stakeholder expressed that they have proved an adequate means to address the significant market power identification differently than through the traditional remedies setting. They seemed important because they provide flexibility and the possibility to adapt to the market realities. Additionally, according to some of the stakeholders they (may) incentivize market-driven innovation.



Finally, from the regulators' standpoint, it is obvious that an assessment of the commercial agreements in the market at the time when conducting the market reviews is less costly than the close, effective monitoring of the ex-ante remedies imposed on the relevant markets.

To conclude:

- (i) the introduction on the EECC of the debated legal provisions was welcomed by BEREC;
- (ii) the practical experience accumulated to date is limited;
- (iii) the contractual clauses of either binding commitments or commercial agreements broadly mirror (at least as regards the most important aspects) the previously imposed SMP obligations; however, the more time elapses from the market deregulation based on commercial contracts, the further away from the traditional remedies the contractual clauses are expected to move; the same can be considered from the commitments but at a relatively slower pace;
- (iv) as far as commercial agreements are concerned, there is a stated need for assuring a reasonable degree of predictability in the market; at the same time, if those contractual provisions are not abided by or if their application results in suboptimal competitive outcomes, an efficient intervention mechanism needs to be foreseen; the intervention needs to take place timely.



## Annex I

### Agenda for the BEREC Workshop on ex ante regulatory experience concerning commitments, wholesale-only undertakings and commercial agreements review

<b>Location (hybrid)</b>	Brussels IRG Secretariat, Rue de la Science 14
<b>Date &amp; Time</b>	11 April 2024 09:30 – 16:30 CEST

09:00 – 09:30 – Opening of the virtual meeting room for login

#### **09:30 – 9:50 Start of Meeting**

09:30 – 09:40 – **Welcome words** (BEREC Chair) *Mr. Tonko Obuljen (HAKOM)*

09:40 – 09:50 – **Brief introduction into the workstream** (MEA WG Co-chairs) *Ms. Iulia Zaim-Grigore (ANCOM), Mr. Jordi Canadell Boix (CNMC)*

#### **09:50 – 10:20 Part 1 – European Commission views and discussion**

09:50 – 10:10 – EC's insights into Articles 76, 79, 80 and commercial agreements - *Mr. Przemyslaw Kordasiewicz, Acting Head of Unit B3, DG CNNECT*

10:10 – 10:20 – Questions/comments from the audience

#### **10:20 – 14:10 Part 2 – Co-investments, commitments procedures and wholesale-only operators**

*Experience and perspective of access seekers regarding TIM's co-investments' offer in Italy:*

10:20 – 10:35 – Iliad Italia, Italy – *Ms. Tiziana Talevi, Director of Regulatory Affairs & Competition*

10:35 – 10:50 – Vodafone Italia, Italy – *Ms. Giulia Sebastiani, Fixed Regulatory Manager*

*Experience and perspective of a network operator in offering commitments in accordance with Art. 79, para. 1 (a), and being subject to binding by the Danish NRA:*

10:50 – 11:05 – TDC NET, Denmark – *Mr. Christian Fröhlich, Head of Legal & External Relations*

11:05 – 11:20 – Norlys Fibernet, Denmark – *Mr. Morten Teilmann Gildsig, Director, Product Management & Optimisation; Mr. Niclas Renberg Gregersen, Senior Manager, Product Management & Optimisation*

*Perspective regarding the commitments' procedure in accordance with Art. 79 and binding commitments as a regulatory tool on the Danish broadband market:*

11:20 – 11:40 – Nuuday, Denmark – *Mr. Niels Bo Laursen*, Vice President – Special Projects & Strategy

*Perspective of a wholesale-only operator active in the broadband market in Ireland:*

11:40 – 12:00 – National Broadband Ireland, Ireland – *Mr. John Gunnigan*, Regulatory Affairs Consultant

**12:00 – 13:00 Lunch break**

*Perspectives regarding the commitments' procedure and its application in the broadcasting market in Finland and France:*

13:00 – 13:15 – Digita, Finland – *Ms. Sanna Tuominen*, Chief Legal Officer

13:15 – 13:30 - Yleisradio Oy, Finland – *Mr. Janne Holopainen*, Media Regulation Manager

13:30 – 13:50 – TDF, France – *Mr. Mathieu Denoix*, Director for Regulation & Public Affairs

13:50 – 14:10 – Questions/comments from the audience

**14:10 – 15:20 Part 3 – Commercial agreements**

14:10 – 14:30 – A1 Telekom Austria, Austria – *Mr. Peter Klune*, Senior Expert Regulatory Affairs

14:30 – 14:50 – ISPA (Austrian Internet Services Providers Association), Austria – *Mr. Philipp Sandner*, ISPA board member

14:50 – 15:10 – CYTA, Cyprus – *Ms. Eliana Liatsou*, Regulatory Officer Department, *Mr. Stathis Efstathiou*, National Wholesales Department

15:10 – 15:25 – Questions/comments from the audience

**15:25 – 15:45 Coffee break**

15:45 – 16:15 – Roundtable discussions

16:15 – 16:30 – Wrap up and conclusions (MEA WG Co-chairs).

**16:30 End of Meeting**

