



Body of European Regulators for Electronic
Communications (BEREC)

Article61_3_Guidelines@berec.europa.eu

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

Dear xxx

Dear Sir /Madam,

we would like to take the opportunity to comment on the draft Guidelines on the Criteria for a Consistent Application of Art. 61 (3) EEC.

The European Local Fibre Alliance (ELFA) is the European voice of local fibre operators. Its members are national associations from Austria, Denmark, France, Germany, United Kingdom, Norway, Sweden and the Netherlands. The companies represented within these national associations are the driving force behind the roll-out of extensive fibre networks across Europe. ELFA's goal is to establish fibre as the proper foundation for digitisation and to pave the way towards a comprehensive European digital society and economy. For this reason, ELFA calls for a clear-cut policy commitment to make full fibre networks a reality for all European citizens, businesses and public administrations.

Over the past years, ELFA has promoted solutions negotiated by market participants prior to the imposition of regulatory measures regarding the roll-out of FTTB/H networks. In practice we observe that our undertakings operating electronic communication networks (ECN) generally are willing to provide either passive or active access to their network for access seekers on a voluntary basis.

That's why we regret the addition of symmetric access obligations in the EECC. Setting the criteria for a Consistent Application of Article 61 (3) EECC, BEREC mentions in paragraph 3 of the draft, that "the promotion of sustainable competition in the interest of end-users, connectivity, and efficient investment" are the main principles to be considered. In our opinion, it is important to preserve competition and to regulate the respective operator with significant market power (SMP). Regulation targeted at all market participants irrespective of their market power has negative effects on competition within the respective market.

Since we especially advocate the interests of network operators and potential first movers, we would like to emphasise the importance of ensuring efficient investment not only for access seekers but also for first movers. Calculating their business cases, first movers expect the guidelines to provide certainty regarding a potential access obligation imposed by the respective national regulation authority (NRA). With this regard, we call the BEREC to clarify especially the definition of small projects and to provide more flexibility for first movers by increasing the advantage period from 5 to 7.

In the following we would like to address several crucial proposals concerning the guidelines.

1. Concentration or distribution Point

According to paragraph 25 of the draft, the concentration and distribution refer to the same accessibility point, where cables are (dis-) aggregated. According to our understanding, accessibility will be given if physical access to and unbundling of passive infrastructure is possible without unreasonable effort. If passive access cannot be provided, NRAs may consider the virtual or active accessibility to define the concentration or distribution point. We appreciate the clear definition of the first concentration point that leaves only little room for different interpretations among the NRAs.

2. High and non-transitory economic or physical barriers to replicate

Regarding the determination of the existence of high and non-transitory physical and economic barriers to replicate, we in general agree with the physical barriers listed in the guidelines, which might deter an efficient network operator from replicating a network. Also, we share the guideline's definition of non-transitory barriers, even though we would appreciate some specification of "*legal or administrative barriers which are very likely to change in the near future*".

Nevertheless, we are of the opinion, that the draft's definition of high economic barriers combined with the rather short "security period" of 5 years (paragraph 91 of the draft) for new projects essentially disincentivizes first mover's private investment, especially in rural regions.

From paragraph 55 and 65 of the draft, we derive that high economic barriers for an access seeker may only exist if the net present value of replication's business case is negative. According to paragraph 56 of the draft, "*the main economic barriers to replication [...] are related to economies of scale and sunk costs*". Since low economies of scale especially in the initial period can generally be assumed, in practice, the amount of sunk costs would be the crucial factor to determine the degree of economic barriers. However, as mentioned in paragraph 62 of the draft, "*investment costs are often significant and will usually be sunk*" if civil work has to be done by the access seeker to reach the first distribution or concentration point. In urban regions, access seekers rather may face the opportunity to bypass civil work by using parallel infrastructure of a third provider to access the first distribution or concentration point. But in rural regions, access seekers in the very likely absence of any third network provider are de facto obliged to do some civil works to access the first distribution or concentration point. Since the need of civil work is very likely to cause high economic barriers, the obligation due to paragraph 2 of Art 61(3) EEC will be imposed on almost all private network owners in rural regions. Thus, to prevent disincentivising first mover's private investment especially in rural regions, the probability or the fear of being regulated after a short advantage period could be reduced by the following measures.

- For the calculation of the access seekers payback period, a minimum payback period of 10 years could be added. Since infrastructure projects usually face high costs in the beginning, the net present value for a potential access seeker is more likely to become positive after a long period, when marginal annual costs become neglectable, while annual revenues slowly increase. Even though the guidelines already call for a "reasonable payback period", a fixed minimum payback period would provide some additional certainty for first movers.
- Extending the advantage period of 5 years (paragraph 91 of the draft). We will refer to this later.

3. Network deployment to be considered new

Furthermore, we expect an advantage period for new deployments of only 5 years to essentially reduce the investment certainty of first movers.

According to paragraph 88 of the draft, *“in case of new deployments, a first mover advantage might be needed in situations where the prospect of achieving economies of scale is low and there is low investment certainty including on future demand”*.

Having defined a network deployment, BEREC has to specify which network deployments are to be considered as new in the light of economic and financial viability.

Considering the economic viability, BEREC argues in paragraph 89, that *“[...] the entry of an access seeker [...] could possibly positively affect the economic viability for all network users”*, leading to the conclusion in paragraph 90, that *“an advantage should not be preserved over an overly extensive period of time”*. In general, we share the view, that opening the network might lead to a win-win situation for both ECN operator and access seeker. But we are of the opinion, that in order to promote private investment in new deployments, the ECN operators should be as flexible as possible regarding access granting during the first years. It appears very likely that they will open their networks on a market driven way at an early stage. But to prevent disincentivising of those, whose economic business case needs a longer advantage period, the considered 5 years after start of service provision should be extended to at least 7 years. In other words, we share the view that an advantage period 5 years might be sufficient in order to ensure financial viability on the one hand but warn that such a short period might lead to an unnecessary restriction for private investors.

4. Projects to be considered small

According to subparagraph 3 (b) of Art 61(3) EEC, especially small projects shall benefit from the exemption. Defining “small”, BEREC argues in paragraph 95 of the draft, that small rather refers to the undertaking size than to the project itself, since ECN projects are mostly small by nature. Small undertakings are characterised by local economic activity and are not active in the whole or major part of the market, as concluded in paragraph 100. According to our understanding of paragraph 97 - 99, the relative size and the relative number of connections shall be considered to deter the market share. Moreover this, we read paragraph 102 as a “thumb-rule” for projects whose smallness can be identified at the first glance.

In general, we share the view, that the undertaking size is a relevant factor for the determination of the project size. Also, we generally appreciate the adoption of a simplifying “thumb-rule”, but the wording of paragraph 102 and 103 iii. according to our understanding does not clearly reveal if the 500 potential end-users refer to the concerned project or to the aggregated number of the undertaking’s connections.

Outside the sphere of the “thumb rule” a lot of room for interpretation is given to the NRAs, especially with respect to the determination of local economic activities and the reference value indicating the existence of a major part of the market share. For example, it is up to the NRAs to decide, if local economic activity still exists, if a company owned by a municipality is active as an ISP outside its district borders. Especially regarding the definition of a major part of the market, the definition of a major part might be chosen very arbitrary. Thus, some more specification should be added to the draft.

5. Others

According to subparagraph 3 (a) of Art. 61(3) EECC, wholesale-only undertakings shall be excluded from an obligation due to subparagraph 2. Furthermore, it should be possible to extend that exemption to other providers on the same terms. Even though the EECC does not assign the task to BEREC, we see an essential need to clarify which provider can expect to be such an “other provider”. Thus, we would be very appreciated if BEREC could add some remarks regarding this.

6. Conclusion

As a conclusion we in general agree with BEREC’s general approach to define the first distribution or concentration point and the access point beyond. Regarding the definition of projects considered to be new, we would like to ask for some clarification, whether an DOCSIS 3.1. update can be seen as new deployment and propose to extend the advantage period from 5 to 7 years. Finally, regarding the definition of small projects, we appreciate the introduction of a thumb rule on the one hand, but propose to add some clarification, to ensure a consistent regarding the determination of local activities and the major part of the concerned market. Should you have any further questions, please do not hesitate to contact us at any time.

In general we would like to emphasise that, in order to reduce negative impact on the market

competition, the imposition of regulation should follow a narrow definition, while exemptions should be interpreted in a broad definition. For the concerned guidelines, this implies that the exemptions stated in subparagraph 3 should be interpreted such that in case of doubts, a project or an undertaking can be excluded from an obligation due to subparagraph 2.

Finally we would like to bear in mind, that the ration behind Art. 61 (3) EEC is to prevent replication of existing network infrastructure, without disincentivizing first movers. Especially in rural regions, where the primary difficulty is first movers are primary struggling to set up a viable business case at all, they should be additionally confronted with the question, who to satisfy potential access seekers at a later stage.

It is important to highlight that the draft guidelines lack in clarity, and thus, fail to provide guidance and legal certainty to facilitate the consistent application of Art. 61(3). For this reason, we find it very difficult to comment on these guidelines in greater detail. ELFA would very much welcome some additional clarifications from BEREC before the final guidelines are adopted.

Yours sincerely,

European Local Fibre Alliance

represented for the purposes of this submission by BREKO, BUGLAS, CMG, Dansk Energi, FCA, Fiberforening, FNCCR, INCA, InfraNum, SSnF, VAT.