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Body of European Regulators for Electronic
Communications (BEREC)

Addressed to the Chairpersons of the Fixed
Network Working Group

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

Dear Mr. Schramm,

Dear Mr. Jonassen,

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) EECC. Complementary to our submission from July 2019, on the “call for input” for the development of the BEREC Guidelines on the Criteria for a Consistent Application of Art. 61(3), we want to expand our position and comment on the draft BEREC Guidelines for a consistent application of Art. 61(3) EECC.

BREKO concurs with the European legislator that Art. 61(3) EECC would benefit from further clarification. Thus, we generally welcome guidelines on the criteria for the consistent application of Art. 61(3) EECC. However, the draft guidelines under review lack the required clarity to adequately provide guidance and legal certainty to facilitate the consistent application of Art. 61(3). Not only do the guidelines not provide adequate guidelines for national regulatory authorities (NRAs) to apply Art. 61(3), they also create a significant amount of legal uncertainty for market participants in general and competitive operators in particular.

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In our experience with symmetric regulation, a paradigm shift away from preserving competition and regulating the respective operator with significant market power (SMP) to regulating all market participants irrespective of their market power has negative effects on competition within the respective market. These negative effects include deteriorating investment incentives, devaluation of investments as well as the possibility of reinforcing SMPs in their already dominant position. Overall, the prerequisites for the application of symmetrical regulation should be interpreted narrowly and the exceptions should be interpreted broadly in order to minimize the effects of regulation on competitive operators which operate in a market that is currently still not trending towards effective competition.

Therefore, we would like to address several crucial proposals that BEREC should consider when finalizing the guidelines on the application of Art. 61(3).

1. Assessing the need for symmetric regulation

BREKO recognizes the occasional need for symmetric obligations in order to overcome different types of obstacles - or so-called "bottlenecks" as BEREC refers to them - that might deter an efficient network operator from network replication.

Nevertheless, the imposition of such obligations must be restricted to cases which cannot be resolved in any other way. Thus, the scope of application should be interpreted narrowly to prevent a widespread application of Art. 61(3) which would interfere with competitive operators' investments and investment plans. This would consequently be contrary to the objectives of the EECC as it would most certainly slow down the connectivity of VHC-networks and distort competition.

Furthermore, we contend that negotiated market outcomes tend to be more efficient than conditions imposed by NRAs. The discretion given to NRAs under the current vague draft guidelines may result in a very broad application of Art. 61 EECC. This would in turn diminish the importance and effectiveness of negotiated access and would lead to access seekers gaining greater bargaining power vis-à-vis the current operator, since they could threaten to apply for access under Art. 61(3) from the NRA should the operator not grant access under the conditions proposed by the access seeker.

BREKO recognizes, as mentioned above, that scenarios may occur in which it is necessary that symmetric regulation is enforced on operators with very large market power, or where it is in the interest to promote sustainable competition in certain areas. However, the guidelines as they are

currently formulated are not sufficiently clear about the criteria that should be applied by NRAs when processing access requests.

We therefore contend that any application for access to the NRA must contain a reasoned explanation as to why a symmetric obligation is without any other alternative. Moreover, any request for access to the so called “point beyond” should include a dedicated explanation as to why access to the first distribution/concentration point cannot be considered sufficient and why no commercial agreement could be reached. This will not only reduce the workload of NRAs but also ensure a more consistent application of the regulation across the EU.

Overall, emphasis should be placed on enabling operators to negotiate access under normal market conditions, and the involvement of NRAs should occur only in a number of clearly defined but limited circumstances. Therefore, BEREC should recognize in its guidelines that an efficient network operator would negotiate and accept fair and reasonable access offers and only resort to apply for regulatory interference if no other option to circumvent replication barriers can be found.

2. Definition of the First Concentration or Distribution Point

BEREC correctly specifies that according to Art. 61(3) subparagraph 1 EECC the first concentration or distribution point is the closest point to the end-user that is accessible or can be made accessible without unreasonable effort. With regards to the assessment of access to these points and barriers to replication as well as the maintenance of the level of competition it is absolutely crucial that neither BEREC nor NRAs adopt any broader interpretation of the first concentration or distribution point.

However, BEREC also suggests that the first concentration or distribution point may exceptionally be determined on the grounds of active or virtual accessibility, if none of the points that are reasonably close to the end-user are suitable for physical unbundling.

In this regard we would like to stress the fact that NRAs may only consider the imposition of active or virtual access obligations at a point beyond the first distribution or concentration point under Art. 61(3) subparagraph 2 EECC, if its findings are substantial and clearly identifiable in economic or technical terms. By no means must NRAs generally consider this extension or consider the imposition of obligations under subparagraphs 1 and 2 in conjunction with another. BREKO therefore suggests the addition of some clarifying sections in the guidelines that clearly

lay down the preconditions under which an extension under subparagraph 2 may be considered by the respective NRA.

Once again, these clarifications are absolutely paramount with regards to providing adequate legal certainty and regulatory foreseeability for network operators.

3. Determining high and non-transitory economic or physical barriers to replication

BEREC demonstrates that an access seeking operator would face high and non-transitory physical or economic barriers when replicating a network. However, also in this regard BEREC's draft guidelines do not provide substantial clarifications beyond the actual wording of the EECC provision.

BEREC states that significant sunk costs combined with low expected economies of scale leading to low prospects of recouping investments will result in high and non-transitory barriers. Therefore, it seems evident that when an access seeker demonstrates that a profitable business case cannot be realized, the barriers to replication are too high and an access request should be granted. This however ignores the fact that replication by its very nature is often not scalable since it is only complementary to existing infrastructure. In many cases, negotiated access agreements to already existing networks and infrastructure will generally be more efficient. Thus, the current benchmark of high and non-transitory economic or physical barriers is set too low and most likely will lead to an influx of access requests and discourage access negotiations among network operators.

Moreover, BEREC states that in assessing the business case, the NRA should determine the relevant payback period for which it needs to estimate revenues and incremental costs. BEREC suggests that the NRA could use data from the access seeker's request as well as "any other suitable data source" (para. 65). This again underlines the vagueness in the criteria set out by BEREC and the amount of discretion that is left to NRAs in the absence of a clearly defined assessment method regarding an access seeker's business case, accounting for the fact that replication is most likely to be the economically least efficient solution in many cases. A more detailed definition of barriers to replication as well as an inclusion of a catalogue of conditions and sources to be used will ensure a consistent and uniform application of Art. 61(3) across the EU by the relevant NRAs. This in turn will increase legal certainty among operators who are planning infrastructure investments but may be deterred by potential influx of access requests

and the inability to negotiate based on insufficient bargaining power vis-à-vis potential access seekers.

4. Network Deployments Considered to be New

An exemption from obligations under Art. 61(3) is set out to be granted to new network deployments in order to preserve the first mover advantage. BEREC states that the NRA should investigate whether a network needs a 'first mover advantage' to be profitable and that the period to establish such an advantage should not exceed five years. BREKO believes that safeguarding the first mover advantage is vital for every fiber deployment project, due to the fact that the first mover advantage creates incentives for investments. Thus, the metrics with which such an advantage is to be determined must be clearly defined. In light of the current formulation, the operator has to meet a high standard of proof. BEREC states that the obligation of the NRA to grant an exemption, and that this determination should be based on the financial or economic viability of the deployment. To ensure legal certainty, financial and economic viability should be interpreted narrowly and there should be clear criteria for assessing economic and financial viability accounting for the context, scale, and strategy of the deployment to ensure that the respective SMP operators cannot exploit this exemption. Moreover, we recommend that the first mover advantage period should be extended to at least seven years to provide operators with more flexibility and autonomy in granting access to other operators before being bound by obligations under Art. 61(3). Moreover, BEREC must clarify whether network upgrades fall under this exemption or whether operators carrying out upgrades are bound by the obligations of Art. 61(3). It is stated in the guidelines that upgrades of already active network elements should not benefit from this exemption. This approach should be clarified and upheld to avoid any possible exploitation of this exemption through frequent upgrades in the form of installations of new network elements. Thus, we suggest that the exemption should only apply to new and genuine fiber deployment and should not cover mere installations of chipcards or minor alterations of the existing deployment.

5. Projects to be considered small

According to subparagraph 3 (b) of Art. 61(3) EEC, small projects shall also be exempt from the obligations of Art. 61(3). In its guidelines, BEREC has set out metrics that could be used by an NRA to identify whether a project is in fact small, including turnover, relative size, and the

number of connections controlled by the undertaking. Furthermore, it is stated that the definition of small projects should not encompass projects that are carried out by undertakings which are active “in whole or a major part of the broadband market”. This indicates that the exemption is specifically targeted at projects undertaken by city carrier and regional operators. BREKO welcomes the protections afforded to operators who would qualify as not being active in a substantial part of the market, however, there remains legal uncertainty as to when exactly the exemption would apply to an undertaking. We agree with the presumption that the exemption should be based on the number of end-users connected to an operator’s network, nevertheless such a presumption should not exclusively be linked to an amount of 500 potential end-users. Based on the wording of Art. 61(3) and the findings of BEREC, local projects carried out by local or regional network operators such as e.g. city carriers should be considered as small projects and thus should be exempt from the application of the obligations in Art. 61(3), unless this presumption can be disproven on a case-by-case basis. Especially projects of local and regional operators, that shoulder a significant share of the fiber deployment in Germany, need legal certainty and regulatory foreseeability in order to be able to continue the deployment of FTTB/H networks.

As with so many of the draft BEREC guidelines, the guidance set out at para. 84 still leaves a large amount of discretion to the NRAs to determine local economic activities and the market shares these activities account for, and the definition of ‘major part’ of the market will vary depending on regional and national differences which again hinders a consistent and predictable application of Art. 61(3) EECC. Particularly, clarity needs to be established regarding the calculation of turnover and whether it involves all economic activity of the operator rather than that attributable to economic activity in the communications sector. Furthermore, the provisions create confusion as the terms ‘projects’ and ‘undertakings’ are used to determine the appropriateness of the exception, yet they appear to be used interchangeably and are not clearly distinguished from one another.

6. Conclusion

In BREKO’s view, the application of symmetric regulation should be limited to severe circumstances of market barriers, and we contend that the regulations set out in Art. 61(3) EECC may be counterproductive as they essentially reduce the effectiveness of negotiating market access by promoting operators to file a successful access request.

In the absence of clear guidelines, definitions and criteria to be applied by NRAs to process access requests under Art. 61(3), NRAs will be faced with the task to define criteria for the broad terms and standards BEREC introduced in these draft guidelines. This will almost inevitably lead to case-by-case analysis and decisions for all future access requests under Art. 61(3) EECC. Moreover, the wide discretion and room for interpretation left to NRAs prevents the consistent application of the EECC and will result in discrepancies in application across the EU.

Furthermore, as it stands, competitive network operators face high legal uncertainty based on the vague guidelines provided by BEREC, because it is difficult to assess whether their projects would qualify for an exemption. Therefore, BREKO suggests extending the “first mover advantage” period as well as broadening the definitions of “new” and “small” projects. Furthermore, we propose that wholesale operators should be exempt from obligations under Art. 61(3), as well as operators who provide services to the end-user but offer access at fair, reasonable and non-discriminatory conditions.

Considering the draft guidelines’ lack in clarity, which would be required to adequately provide guidance and legal certainty to facilitate the consistent application of Art. 61(3), we find it very difficult to comment on these guidelines in greater detail. Thus, we would very much welcome some clarifications by BEREC before the final guidelines are being adopted.

Should you have any further questions, please do not hesitate to contact us at any time.



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