

eir

Response to Draft BEREC Guidelines on the Criteria for a Consistent Application of Article 61(3) EECC

BoR (20) 106



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RESPONSE TO CONSULTATION

1. eir welcomes the opportunity to comment on BEREC's draft Guidelines on the Criteria for a Consistent Application of Article 61(3) EEC. In particular, eir would like to seek some additional clarity in the final Guidelines with regard to the exemption for new network deployments and provide some input on paragraphs 41 to 66 dealing with the issue of barriers to replication.

Exemptions under Article 61(3)

2. As noted by BEREC, Art. 61 (3) EEC provides for some exemptions. Specifically paragraph 9 of the Guidelines references subparagraph 3 the relevant provision, in that *"NRAs shall not impose access obligations to access points beyond the first concentration or distribution point, where the imposition of such access obligations would compromise the economic or financial viability of a new network deployment, in particular by small, local projects."*
3. eir notes that this wording is essentially taken directly from subparagraph 3 of the EEC but looking at the provision as a whole, our reading of Art. 61(3) is that it does not limit the exemption for new network deployments on the basis of them being small and/or local. We would therefore appreciate if BEREC could clarify this in the final Guidelines and amend the wording of paragraph 9 to reflect the fact that the exemption applies where the imposition of obligations would compromise the economic or financial viability of a new network deployment, in particular by, but not limited to, small, local projects.

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

4. While BEREC sets out in detail the relevant criteria for determining which economic or physical barriers to replication are high and non-transitory, eir is concerned that the need for NRAs to have regard to existing obligations, as set out in the EEC, is not adequately referenced in the draft BEREC guidelines.
5. In particular, Art. 61 (3) subparagraph 2 states that the imposition of access obligations may be extended beyond the first concentration or distribution point only when *"[...] a national regulatory authority concludes, **having regard, where applicable, to the obligations resulting from any relevant market analysis**, that the obligations imposed in accordance with the first subparagraph do not sufficiently address high and non-transitory economic or*

physical barriers to replication which underlie an existing or emerging market situation significantly limiting competitive outcomes for end-users [...] [emphasis added].

6. Article 61 (3) makes clear that existing access obligations should be taken into account at the point where NRAs have to assess replicability considerations, having determined the first distribution or concentration point and whether the imposition of access obligations according to Art. 61 (3) of the EECC subparagraph 1, are sufficient to address any issues.
7. Moreover, Recital 154 states that “[t]he assessment of the replicability of network elements **requires a market review** which is different from an analysis assessing significant market power, and so the national regulatory authority does not need to establish significant market power in order to impose these obligations. On the other hand, **such review requires a sufficient economic assessment of market conditions**, to establish whether the criteria necessary to impose obligations beyond the first concentration or distribution point are met.”
8. While eir notes that the market review required, differs from the standard market review procedure in that an assessment of SMP is not necessary, eir considers that an NRA cannot fully assess the replicability of network elements, through an economic assessment of market conditions, without having regard to existing obligations, in the same manner that the standard market review procedure takes account of regulation present in other related markets, or through the general regulatory framework. This approach avoids erroneously drawing conclusions regarding existing market conditions.
9. In addition, the symmetric access provisions in the EECC are only one part of the set of regulatory tools to ensure adequate access and interconnection, interoperability of services, efficient and sustainable competition, the deployment of VHCNs and efficient investment and innovation. The EECC introduces a number of regulatory tools to encourage investment in VHCNs, including a lighter touch regulatory regime for SMP operators under certain strict conditions as well as the possibility to require passive infrastructure sharing for services that rely on the use of spectrum.
10. All such regulatory tools, as well as obligations already imposed through the SMP regime or otherwise, should be taken into account by the NRA whilst assessing economic or physical barriers to replication and in terms of ensuring interconnection, interoperability and end-to-end connectivity between end users. We therefore urge BEREC to expand upon this aspect of the assessment of replicability in its final Guidelines.