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Subject: response to the draft BEREC Guidelines on the Criteria for a Consistent Application of Article 61 (3) EECC

Dear sir, madam,

NLconnect is the Dutch broadband trade association. Our 70+ members include companies that build, own and operate fiber, cable and wireless networks and companies that provide services on these and other broadband infrastructures, as well as their numerous suppliers. NLconnect strives for ubiquitous high quality and high speed broadband connectivity in the Netherlands. The rollout of new fiber networks is instrumental in achieving the goals of the Gigabit Society.

We appreciate the opportunity to respond to this consultation. During the current coronavirus crisis, we notice more than ever before that a future-proof fiber optic based infrastructure and high-quality digital applications are of vital importance for our society and the economy. The consultation is particularly relevant to the section of our membership base that offers broadband services and operates and owns broadband networks. These are mainly undertakings with relatively small market shares on the fixed broadband market.

Introduction

We have been deeply concerned for some time about a decline in competition in the residential market for broadband services in our country. The market is dominated by two major players with significant market power, who are not regulated on the basis of their (shared) dominance. We believe that wholesale access to the networks of these companies, if not voluntary then regulated, would improve competition and increase consumer welfare.

Within our membership there are many network owners and access providers that have limited size and scope but still have invested heavily in their services and networks in recent years. This has resulted in several significant network upgrades and new local and regional FttH and FttO networks in various rural areas (former 'white areas' in terms of state aid), in villages and towards student housing, apartment complexes and industrial areas.

In the Dutch situation, smaller network owners in particular often invest or attract investment in infrastructure projects that push the boundaries of profitability, for example in rural areas. In our view, imposing access obligations on these undertakings would deteriorate their chances of growth and success, thus leading to a shrinking market share for alternative providers. This is acknowledged in the EECC.

In light of the above we welcome the fact that BEREC has drawn up these Guidelines. In our view, the aim of these Guidelines must be to provide predictability and legal certainty for market parties to make investments in connectivity. The draft Guidelines clarify certain aspects of article 61 (3) but still leave too much room for interpretation. In particular the definition of new network deployments and small projects should be made more clear.

The first concentration or distribution point and the point beyond

The chosen first concentration or distribution point as well as the point beyond seem suitable to us for both Point to Point and G-PON FttH networks, DSL and HFC cable.

According to the Guidelines, the first point of concentration is the point that is both physically and technically accessible: it “should allow access seekers reasonable flexibility in their technological choices and enable them to host their equipment at this point”. In practice, interference can occur on the xDSL layer when both the access provider and the access seeker install VDSL equipment. We recommend that BEREC address this topic as relevant to the technical accessibility in recital 32.

High and non-transitory economic or physical barriers to replication

The EECC introduces the concept of an “*efficient* access seeker” and the Guidelines require an assessment of the commercial viability of the access seeker’s business case by the NRA. We would like to see more guidance from BEREC on this point and propose that BEREC states that access seekers are deemed efficient by the NRA, subject to evidence to the contrary. This lowers the threshold to request access.

In recital 63 BEREC states that the expenses for wholesale services — where available — are relevant for the assessment of high and non- transitory economic barriers. We assume this refers to wholesale products that can be used to reach access points and recommend this be made explicit. In this regard it is also relevant that NRA’s only considers wholesale agreements that offer sufficient certainty for access seekers in the longer term, i.e do not take into account in the assessment wholesale products that can be easily withdrawn.

We share the view that high and non-transitory economic or physical barriers to replication usually include sunk costs associated with civil infrastructure works and also that these are present if the prospect of cost recovery is low because an efficient access seeker is not able to achieve sufficient economies of scale. They also include the impossibility to gain physical access to buildings or soil. However, we do not consider the "legal or regulatory requirements such as urban planning rules, construction safety standards or other similar laws that hinder network replication" that are mentioned in the draft as non-transitory barriers. These are transitory barriers. In our opinion, no provider should be forced to grant access to an access seeker solely because of legal or administrative requirements and restrictions that hinder network replication. In such cases the NRA should work on removing these barriers with the responsible public authorities.

Incidentally, we note that there will almost always be access to viable alternatives to non-replicable FttH networks in the rural areas in The Netherland, via DSL, mobile or fixed-wireless infrastructures. We therefore do not expect that the Dutch NRA will have to rely on the rules of Article 61 (3) EECC) for FttH networks in rural areas, especially if these have been installed by smaller parties and of course not at all if wholesale only undertakings are involved. Mainly the two dominant fixed network parties in the Netherlands, which also have mobile networks, own and operate non-replicable networks for which there are no viable alternatives.

Network deployments to be considered new

NRAs shall not impose access obligations if these would compromise the economic or financial viability of a new network deployment, in particular by small, local projects. This is of great importance to members of NLconnect: investments in significant network upgrades or in completely new networks, especially in rural areas, must in no way be discouraged. This requires a broader concept of the term ‘new’ than given in the draft.

We share BEREC's view that significant upgrades may also count as new network deployments. We would like to add that this should not be limited to significant investments in “civil infrastructure and/or new wiring and cables (e.g. fibre) in the access network” but in the case of HFC networks may also include significant investments in the implementation of new DOCSIS standards, analog switch-off or extended spectrum. We would also like to add that major renovation work on networks also requires risky investments and in effect constitutes new networks. We recommend to add this to recital 92.

BEREC rightly suggests that the NRA should assess whether a first-mover advantage is needed. However, NLconnect has serious doubts about the maximum period of 5 years suggested by BEREC in this context. In our view, this period will have to depend on the specific business case. For networks in rural areas, it usually applies that the rate of return is low and return on investments can only be achieved in the longer term through subscription fees, unless end users co-invest in the network. In that context, we advocate a term of at least ten years.

In our view, the economic or financial viability of existing construction that has been carried out before article 61 (3) EECC was in place, may in no way be comprised. This should also be taken into account.

Projects to be considered small

Owners of local or regional networks who also provide multiplay services can potentially become challengers on a regional or national scale. They can do this by using their local networks as a basis from which they can also compete outside their local footprint by becoming access seekers or expanding their own networks. Hampering this development would be counter-productive to the interest of end users. This calls for a generous definition of small projects.

We share the assumption that the spirit of the exemption does not seem to be directed towards a large undertaking involved in many local projects, since every project is in a sense ‘local’. This exemption therefore concerns small enterprises that carry out small (and new) projects.

BEREC proposes to group certain categories of owners or undertakings under the definition of "undertakings which are not active in the whole or a major part of the broadband market". BEREC cites as examples co-operative end-user built networks or networks rolled out by new entrants in the market as well as small municipal networks. We propose to add non-profit organizations such as foundations as a category. Many small networks in the Netherlands are owned by foundations, such as 2015 European Broadband Award winner Stichting CAI Harderwijk. It should be clear to these small non-profit organizations that they are seen as a small project within the framework of new network deployment. We also propose to clarify what is meant by a municipal network: we would favor a definition that would include, for example, network companies in which local or regional authorities have a major share. We also advise to indicate under which conditions a company can be seen as a 'new entrant to the market'. Perhaps a certain market share can be part of this definition.

BEREC also suggests that small projects should "only include projects carried out by undertakings of a limited size on the broadband market, whereas the size of the undertaking in question should be measured relative to the total turnover and / or total number of active or passive connections on the broadband market." We agree with this suggestion but note that BEREC can provide more clarity by defining a market share, for example a maximum of 5% of the number of passive connections on the broadband market.

Against this background, we do not understand the assumption of BEREC that a project with less than 500 potential end-users can be considered small. This does not add anything to clarity, since BEREC adds a reservation ("can *usually* be seen") and only adds to the ambiguity as there is no relation at all to the size of the national broadband market.

In the Dutch market FttH-projects with 500 homes passed as a rule do not get built, since the fixed costs for demand aggregation, network development, project management, permits, and other overhead costs are too high to constitute a viable businesscase for such a small number of connections. The smallest Dutch projects therefore generally pass a minimum of 2000 homes. Moreover, projects of this size are often merged with other projects, since the limit for a successful independent exploitation in the Dutch practice lies around 10.000 homes passed. In our view — in the Dutch market — such small projects and ventures should certainly be seen as small.

We recommend that BEREC mentions a maximum broadband market share as suggested above.

Yours sincerely,

Mathieu Andriessen
managing director