



ecta RESPONSE

**TO THE PUBLIC CONSULTATION BY BEREC
ON THE**

**DRAFT BEREC GUIDELINES ON THE
CRITERIA FOR A CONSISTENT APPLICATION
OF ARTICLE 61(3) EECC**

BoR (20) 106

31 JULY 2020

Introduction

1. **ecta**, the **European competitive telecommunications association**,¹ welcomes the opportunity to respond to BEREC's consultation on this set of draft guidelines.
2. Upon adoption, the guidelines are to provide national regulatory authorities (hereinafter: 'NRAs') with direction when interpreting and applying Article 61(3) of the European Electronic Communications Code (hereinafter: 'EECC', or 'Code')² and corresponding national transposition measures, so as to ensure consistent application of those rules.
3. To achieve this, BEREC is to specify criteria that allow to administer a number of legally undefined concepts (referred to as 'items' by BEREC³) delimiting the scope of application of, and the exemptions to, obligations that NRAs may impose under Art. 61(3) EECC (hereinafter: 'the provision').
4. Considering the technical nature of the subject matter and the economic impact that such obligations give rise to, the complexity of the task as well as the urgent need for well-rounded guidance on this subject are equally evident.
5. **ecta** here particularly welcomes BEREC's clear identification of the promotion of sustainable competition as the objective of access obligations under the provision.⁴
6. The promotion of end-users' interests through efficient investments in new and enhanced connectivity solutions that such obligations enable, relies on a variety of complex determinations, and it is essential that proportionate and judicious decisions are clearly guided by this objective⁵.
7. Notwithstanding agreement on this basic orientation of the proposed guidance document, **ecta's** careful, considered review has identified a number of important weaknesses in the current draft that appear at odds with the achievement of this objective.
8. It is **ecta's** general appreciation from both the text and from the workshop sessions presenting the guidelines⁶ that the drafters have eschewed many pressing questions, so as to leave a maximum of discretion to NRAs in making their determinations.
9. Moreover, the draft lacks clarity in both content and structure. **ecta** members from both jurisdictions having experience with market power-independent ('symmetric') access regulation of the type under consideration here and jurisdictions having no such prior experience have found the text generally inaccessible, at times bordering on the unintelligible.

¹ <https://www.ectaportal.com/about-ecta>

² Directive 2018/1972/EU, (2018) OJ L321/36.

³ BoR (20) 106, para. 10, at 3.

⁴ BoR (20) 106, para. 3, at 2.

⁵ **ecta** relies on this normatively more accurate, and thus preferable, description of the standard by which the functioning of the provisions should be evaluated, rather than allusion to a mere 'policy principle' (ibid.).

⁶ Virtual meeting sessions on the draft BEREC Guidelines on criteria for a consistent application of Article 61(3) EECC, 23.6.2020.

10. This is problematic for any guidance document, as it signals that market participants are unable to derive necessary orientation therefrom. **ecta** considers this even more worrying for a document that not only complements and sits at the interface with the regulation of significant market power (hereinafter: ‘SMP’), but is likely to have a significant impact on competitors’ deployment choices and business development strategies.
11. These problems also extend to the interaction between market participants and NRAs. NRAs without pre-existing symmetric access regimes will, in **ecta**’s estimation, be unable to interpret the rules and advise market participants as to their application, while NRAs with such regimes will be uncertain to what extent the new pan-European rules imply a challenge to these domestic regimes, administrative practices and market functioning.⁷
12. Based on the analysis set out in this submission, **ecta** does not consider the draft document fit for adoption. The text requires—at times significant—revision to enhance accessibility, intelligibility and usability. More important, **ecta** finds the proposed guidance neither suitable to ensure consistent application, nor to effectively succeed in discharging the more basic mandate under the fifth subparagraph of the provision of establishing relevant criteria.
13. **ecta** considers it essential that the necessary revision is articulated around explicit recognition and implementation of the following ideas:
 - i. Market power-independent access obligations have not been conceived, nor are they suitable to replace market power-based access obligations;
 - ii. Such obligations under the provision may be ‘symmetric’ in that they do not require competitively prejudicial asymmetry between obligated parties and beneficiaries, but proportionality requires these obligations to reflect relevant differences among addressees, including in business models;
 - iii. Competition is most likely to become sustainable where competitors retain the largest possible degree of control between the access point and the end-user, which is achieved by physical access;
 - iv. Regulatory predictability is essential to making market power-independent access obligations promote sustainable competition, and such predictability is dependent on clear, focussed and normatively consistent construction of the provision;
 - v. Market power-independent access obligations must not reinforce market power.
14. In going forward, **ecta** invites BEREC to ensure timely stakeholder involvement on the further development of the guidance, and calls specifically for targeted consultation on an element of determinative import for the application of exemptions.⁸ **ecta** also calls on BEREC to ensure that the revised guidance avoid undue disruption of existing, well-functioning access regimes without legal requirement in the Code.

⁷ Including on essential procedural matters such as the filing of requests, cf. para. 155, at 24.

⁸ See section III.2.5, para. 191ff below.

15. The submission is structured as follows: In a first part dedicated to observations of a transversal nature, **ecta** identifies formal shortcomings and substantive omissions that weaken the draft's guidance value, including its internal and external coherence. A second part is dedicated to substantive comments on the replicability dimension and a third part addresses questions relating to the exemptions under point (b) of the third subparagraph.
16. **ecta** emphasizes that the important and noticeable weaknesses of the draft document also call into doubt the legitimacy of delegated rulemaking on techno-economic matters that the EU legislature has opted for. The proposed guidance surprisingly lacks any clear grounding in prior BEREC work on symmetrical obligations, in national administrative practices and adjudication, or in relevant scientific literature and expert publications.
17. This is particularly disquieting at a moment where the EU relies more than ever before on electronic communications providers to overcome the consequences and challenges of an epochal crisis. That **ecta**, as the representative pan-European organisation of competitors in electronic communications, issues comments that substantially exceed the length of a guidance document whose issuance is required by law and whose purpose is to create—and not to diminish—legal certainty for competitors (and market functioning more broadly), attests to the seriousness of the problems identified.
18. It is therefore **ecta's** and its members' expectation that, in addition to remedying the issues that this submission identifies, BEREC will lay out a clear plan for the monitoring of and reporting on the implementation of the revised guidance, including measures to demonstrate its contribution to the consistent application of the European Electronic Communications Code.

PART I: TRANSVERSAL OBSERVATIONS

I.1. Concerns regarding substance

I.1.1. Relation with market analysis and regulation of significant market power (SMP)

19. More broadly than specific economic and technical considerations, and beyond the scope of the provision itself, the interaction of market power-independent access obligations with market regulation under the Code must be borne in mind. **ecta** is concerned that the draft Guidelines do not provide the right regulatory incentives in this regard.
20. Given recent developments in market regulation as well as increased political and policy emphasis on infrastructure-based competition, including in the Code's recast wording of the competition objective, **ecta** considers it critical to emphasize that obligations under the provision are neither conceived, nor suitable to substitute for obligations seeking to address imbalances of market power.
21. **ecta** deems that this foundational distinction needs to be embraced and made clearer throughout the guidance in its entirety. Replicability considerations are not synonymous to implied findings of significant market power. Reinforcing the conceptual distinction between the two regulatory regimes will thus both contribute to greater clarity and promote consistent application of the provision itself.

22. The attempt to distinguish market regulation targeting significant market power from the imposition of obligations pursuant to Article 61(3) EEC in the context of geographical considerations, while shining a light on the issue, ultimately is ineffective in this regard⁹ and placed far too late in the document, without proper motivation. This belies the foundational importance of getting this relationship right.
23. It is furthermore revealing in this regard that BEREC omits any mention of the role of SMP obligations when discussing the preconditions for imposing extended access to address high and non-transitory barriers.¹⁰ Not only do these obligations form part of the statutorily required test to establish the ineffectiveness of access obligation up to the first distribution point, but in most Member States do SMP undertakings control relevant network elements.
24. BEREC's omission of this element therefore plays both an important substantive and signalling role in dogmatic and practical terms. This is further compounded by a lack of separate acknowledgement of, or commentary on, the remaining elements of that test, viz. that the relevant barriers underlie an existing or emerging market situation and that this situation significantly limits competitive outcomes for end-users.
25. The responses given by the Co-Chair of the FNE Working Group at the workshop presenting the consultation indicated that BEREC decided not to include guidance on the above elements as they do not fall within the part of its mandate defined by point (e) of the fifth subparagraph of the provision.
26. ecta considers this reasoning both formally and substantively unconvincing.
27. Formally, BEREC chooses on other points of the guidelines to deal with questions not immediately forming part of its legislative mandate as set out in that subparagraph. It is thus unclear why such a more extensive approach is merited on other guidance aspects, especially when these, unlike the elements concerned, do not form part of the wording of the provision.
28. Substantively, it is also unconvincing insofar as the expression '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' clearly constitutes a compound phrase, which has to be understood in its entirety.
29. The identification of high and non-transitory barriers does not constitute an objective in its own right, but has to be interpreted against the finality of that phrase, as expressed by these additional elements. This is confirmed by the objective of the provision, which BEREC itself identifies as the promotion of sustainable competition, and which the phrase reflects.
30. Indeed, it appears likely that, without guidance on those elements, administration of the second subparagraph threatens to become grossly inconsistent. This will notably be the case if NRAs both reject acknowledging them as providing much-needed orientation to the

⁹ Cf. the detailed discussion in section II.3.1, at paragraphs 114ff below.

¹⁰ BoR (20) 106, para. 40ff, at 11ff.

application of the high and non-transitory barriers test and, on those grounds, proceed to reach divergent conclusions about factually identical situations, or about situations that would have been sufficiently similar to merit identical treatment, had such guidance been provided.

31. Thirdly, the draft Guidelines similarly lack any reference to the clear requirement in recital 154 for NRAs to consider whether the imposition of extended access obligations to address high and non-transitory replicability barriers are likely to strengthen the existence of positions of significant market power.
32. **ecta** underlines that notably this consideration is of critical importance to ensure that deployment incentives remain fairly distributed and that alternative infrastructure investment by competitive operators can make a durable and successful contribution to the establishment of sustainable competition.
33. Finally, these omissions weigh all the more heavily when BEREC suggests it to draw on experiences from SMP regulation for evidentiary purposes without discussing the appropriateness of doing so relative to non-SMP operators.¹¹
34. For these combined reasons, **ecta** considers that delineation of the relationship between the provision and SMP regulation needs to play an adequately prominent and clear role, in terms of mutual demarcation as well as in terms of clarifying the application of subparagraph 2. As SMP operators are likely to represent an important number of cases that NRAs will have to assess, the guidelines should therefore be appropriately revised.
35. From a broader perspective, such clarification is also necessary to clearly address those discussions about, and developments in, market regulation that consider replacing SMP regulation by access obligations under the provision. In this regard, too, it is important for the Guidelines to express a shared understanding among NRAs assembled in BEREC of the provision's relationship with SMP regulation, as this will determine its application, including how the specific criteria are made sense of and administered.

I.1.2. Objective-oriented interpretation: Promotion of sustainable competition

36. BEREC has appropriately identified the promotion of sustainable competition as the main objective pursued by the provision.
37. This recognition is prominently placed in the opening paragraphs of the introduction of the consultation document,¹² accompanying the outline statement of the types of access obligations that NRAs may impose¹³.
38. Nevertheless, **ecta** finds the remainder of the guidance to pay insufficient attention to how this objective is to be achieved through interpretation of the different concepts in the provision building on the contents of the guidance and through administrative practice implementing it.

¹¹ BoR (20) 106, para. 73, at 18.

¹² BoR (20) 106, para. 3, at 2.

¹³ BoR (20) 106, para. 1f, at 2.

39. Indeed, in purely formal terms, no further reference is made to the objective throughout the body of the text.
40. This, in **ecta**'s view, reveals a certain misappreciation of the brief set out in subparagraph 5 of the provision: clearly, that brief is not limited to the mere listing of a set of criteria for each point in that subparagraph, but has to be read in the context of the administrative practices to be instructed by such criteria and the objective they are to achieve. The impact of BEREC's guidance on national transposition must also be considered in this respect.
41. While application has to take account of the specific operational setting in which the NRA evaluates individual cases, the context of application is also importantly shaped by the wider market context and notably the existence of significant market power.
42. The Code offers no basis for a conceptual disconnect between the *ab initio* inherently local settings in which the provision is applied and this wider context. To the contrary, the objective of promoting effective competition in a sustainable manner places both of them under the same normative roof. This is reflected in the explicit call by the legislature on NRAs to ensure that administration of market power-independent access obligations must not reinforce market power, as pointed out above.¹⁴
43. A mere checklist approach detached from its normative foundations would neither be commensurate with the Code, nor with BEREC's mandate following therefrom. It also could not ensure the necessary guidance that has to ensure not only formal consistency in application, but a discernible move towards more sustainable competition in electronic communications within the EU.
44. This is also important because the provision does not exhaust itself in the assessment of business case viability, but must have in view the wider pro-competitive impact of the access obligations that may be imposed under it. Precisely because this gives assessments a certain complexity, the criteria must also be spelled out in terms of their normative links and implications.
45. **ecta** therefore calls on BEREC to take full account of the objective of promoting sustainable competition when revising the draft guidelines in view of the above observations and requirements. This should notably include an examination of multi-access situations concerning the same network element(s) and clear limitations to possibly discriminatory behaviours in that context.

I.2. Concerns regarding formal aspects

46. **ecta** generally finds that, although reasonably comprehensive, the draft guidelines suffer from a number of issues related to the presentation of their content that render them less accessible, intelligible and consistent than would be desirable.

¹⁴ Cf. section I.1.1, esp. para. 31, at 5.

47. It is particularly remarkable that instead of developing a clearly articulated analytical reference framework within which elaboration of the different concepts ('items') can be situated, the draft guidelines disperse critical considerations across the body of the text without adhering to a discernible logic of organisation.
48. Fundamental, organising ideas such as the notion of which topological locations may constitute an access point for purposes of the guidelines are located halfway through the text, as an incidental reference framework for elaboration of another concept.¹⁵
49. The same concepts appear in different contexts with different levels of specification and detail, without context justifying these differences or explicit justification being offered. This leads to a disjointed presentation even on key aspects such as access seekers' relevant costs to be considered when evaluating access requests.¹⁶
50. Economic ideas are repeatedly relied upon to aid in the interpretation of legal concepts without the limits to these ideas, or their ambiguity and malleability, being acknowledged. Wholesale reference is made to the existence of different approaches in economic reasoning,¹⁷ without these even being referenced, or the approach in the consultation document being justified against them.
51. Arguments are repeatedly presented in syllogistic fashion, when the conclusion does not follow from the premises.¹⁸ This not only suggests false accuracy, spuriously suggesting justification for authorities to act on this basis, but involves important policy choices that go beyond the mandate of subparagraph 5.
52. Moreover—and beyond the substantive shortcomings already identified in the preceding subsections—the guidance recurrently appears to have been developed with little (and at times without any) regard to the normative framework. This gives rise to multiple interpretative difficulties, none of which are trivial.
53. Most important among these is the analysis of obstacles to replication under the first and second subparagraph of the provision. Even though the relevant barriers in both cases are categorised under the same headings of economic and physical, the guidelines fail to develop a coherent perspective on the relations among them, both in terms of overlaps and of differences, and instead suggest to remove consideration of replicability issues from guidance relating to the identification of the first concentration or distribution point.¹⁹
54. Another feature of this style of exposition is that certain parts rely excessively on economic ideas without legal correspondence, while, in other cases, normative elements of constitutive importance are given no guiding interpretation at all. This results in the

¹⁵ BoR (20) 106, para. 69, at 17.

¹⁶ Compare BoR (20) 106, para. 74, at 18 to paras 61ff, at 14f.

¹⁷ E.g., BoR (20) 106, para. 71, at 18.

¹⁸ E.g., BoR (20) 106, para. 87, at 20f.

¹⁹ BoR (20) 106, para. 38, at 10; cf. section II.2., at 11ff.

guidance gaining in ambiguity and losing in normative relevance, and inconsistent application becoming significantly more likely.

55. Finally, the summary boxes at the end of each section are generally not sufficiently faithful to the preceding text and thus provide the reader with inadequate orientation. This reinforces the danger of inconsistent application that the guidelines have been legislatively intended to avoid.
56. Taken together, the above aspects have to be expected to enhance—rather than to contain—divergences in application between NRAs even beyond economic and technical modelling decisions within a shared conceptual framework, and are thus susceptible to compromise achievement of the objective of promoting sustainable competition.
57. In view of the non-trivial presentational deficiencies outlined above, **ecta** calls upon BEREC to
 - i. Reorganise the text in a more accessible manner that reinforces its role vis-à-vis both regulators and market participants;
 - ii. Provide clearer alignment between economic concepts and constituent normative elements of the provision, highlighting the constraints the latter impose on the former and emphasising the need to ensure legal certainty and proper justification of decisions pursuant to the provision.

PART II: REPLICABILITY

II.1. Introductory considerations: Conceptual aspects of replicability

II.1.1. The use of the notion of ‘bottlenecks’

58. **ecta** notes BEREC’s approach to circumscribe replicability by recourse to the language of ‘bottlenecks’.²⁰
59. However, beyond the analytically unspecific scope of that notion, **ecta** also observes that Article 61(3) EECC does not imply any specific efficiency standard at operator level, even though BEREC makes reference to replication by an efficient access seeker.²¹ In fact, the standard of economic inefficiency in the first subparagraph is not inherently operator-specific, nor does that part of the provision, unlike subparagraph 2, indeed make any reference to the concept of an efficient access seeker.
60. Quite the contrary, the original reasoning underlying Article 12(3) of the Framework Directive was to not promote duplication of network elements that would imply resource wastage, irrespective of the particular efficiency characteristics of the deploying operator. This intervention logic, which has been carried forward in Article 61(3)(1) EECC, acknowledges that wasteful replication of the access network may legitimately be limited

²⁰ BoR (20) 106, para. 12, at 4.

²¹ *Ibid.*

for reasons of aggregate economic inefficiency, even if it might be possible for what BEREC refers to as an efficient access seeker.²²

61. Nor, in reality, are bottlenecks per definition non-replicable: networks may feature bottlenecks simply for architectural and dimensioning reasons, which may be addressable without necessitating recourse to the imposition of obligations under the provision.
62. For these combined reasons, as well as the fact that BEREC during its workshop dedicated to presenting the guidelines was unable to specify a relevant operator efficiency standard, [ecta](#) suggests that BEREC removes references to bottlenecks from the final version of the guidelines. Guidance elements such as paragraph 13 can easily be restated in a manner omitting that notion without losing any substantive meaning. That particular paragraph should also be redrafted to remove the implied suggestion that physical and economic replicability issues have to be cumulatively present or that the assessment has to occur at network level, neither of which is required by subparagraph 1. [ecta](#) accordingly suggests the following redrafting for disambiguation purposes:

‘13. ~~Thus,~~ If an operator faces technical ~~and~~ or economic barriers to replicate a **one or several network elements**, the operator **will** ~~may~~ need access to those **non-replicable** parts of the network ~~that are considered non-replicable and therefore constitute bottlenecks~~, in order to provide downstream services.’

II.1.2. Three stages of replicability: Substantive and procedural concerns

63. BEREC then goes on to suggest that replicability assessments²³ under Article 61(3) EEC occur in three stages,²⁴ as follows:
 - i. Replicability of internal wiring, cables and associated facilities up to the first concentration or distribution point (hereinafter: ‘CP/DP#1’);
 - ii. Persistence of high and non-transitory economic or physical barriers to replication;
 - iii. Determination of a point beyond the first concentration or distribution point up to which network replication would be commercially viable for an efficient access seeker.
64. While all of these elements do form part of the first and second subparagraphs of the provision, [ecta](#) considers that their bundling together under the heading of replicability in the draft guidance, as far as evident, provides little conceptual illumination or useful orientation for administering the provision, or indeed for providers wishing to rely upon it in order to solicit the access that the provision foresees.

²² Indeed, inefficiency in this sense typically derives from a mismatch between demand side potential and the costs of supplying an additional access network (rather than the specific cost profile of an alternative provider).

²³ Cf. title of Figure 1, at 5.

²⁴ BoR (20) 106, para. 16ff, at 5f.

65. This is notably so because the first and the second ‘stages’ of replicability are of a fundamentally different nature than the third, even if the draft guidelines do not make this distinction sufficiently plain: whilst the first two stages focus on the assessment of replicability barriers within a given topological reference framework from the network termination point up to CP/DP#1, the third stage is concerned with determining a point in the network topology beyond CP/DP#1 that allows the persistent replicability barriers confirmed at the second stage to be effectively addressed so as to foster sustainable competition. In other words, while the first two stages focus on economic and physical considerations, the third is dedicated to topological considerations.
66. At the same time, as subsequent discussion below will show,²⁵ it is essential to maintain integrity of the difference between the first and the second subparagraph of the provision to guard against wilful interpretation and undesirable outcomes contrary to the purpose of the provision.
67. **ecta** Is furthermore concerned that BEREC, despite relying on a terminology of stages, does not discuss the procedural aspects of the application of subparagraphs 1 and 2.
68. Indeed, at the workshop on 26 June, BEREC suggested that parallel application of obligations under the first and the second subparagraph would be possible, despite the wording of the second subparagraph clearly indicating that obligations under that part of the provision can only be imposed where obligations pursuant to the first subparagraph in combination, where relevant, with applicable SMP obligations, have not sufficiently addressed high and non-transitory barriers (hereinafter: ‘HTNB’) to replication.
69. Paragraph 19 of the draft guidance appears to articulate the same position when holding that NRAs ‘might decide to impose obligations under both Art. 61(3) subparagraphs 1 and 2 EECC’,²⁶ without, however, explaining the relevant standard of justification required.
70. Moreover, the first sentence of that paragraph goes further by suggesting that NRAs would be able to impose obligations under the second subparagraph if their prospective analysis suggested that obligations under the first subparagraph would be insufficient.
71. Yet this appears to presume that the barriers identified under the first subparagraph correspond, contrary to the explicit wording of the provision, to the barriers under the second. To the extent that HNTB can only be identified as a result of the unsuccessful imposition of access pursuant to the first subparagraph, the simultaneous imposition of both types of obligations appears to be barred by the relevant standard of substantiation.
72. In any case, the material difference between the different types of barriers addressed by each subparagraph must be discernibly circumscribed in order to foster appropriate regulatory predictability for both access providers and access takers. BEREC should also recognise the disincentivising effects on deployment decisions resulting from parallel

²⁵ Cf. section II.2.2, at 12ff.

²⁶ BoR (20) 106, para. 19, at 6.

application of obligations under both subparagraphs, notably in view of the legislature's clear attempt to distinguish between the two types of barriers.

73. **ecta** also believes it inappropriate to immediately push for more far-reaching obligations pursuant to the second subparagraph as this will also trigger the need to enter into a detailed assessment of possible exemptions (see Part III below). In the interest of proportionate application, it is indeed necessary to recognise the incentive effects of access obligations already at the level of the first subparagraph.

74. Overall, **ecta** therefore calls on BEREC to

- i. Revise its replicability discussion in line with the comments provided above, notably by removing guidance elements suggesting parallel imposition of obligations under the first and the second subparagraph of the provision;
- ii. Clarify the procedural framework for the relation between subparagraphs 1 and 2, and provide market participants with clarity as regards NRAs' intended administration thereof.

II.2. The first concentration or distribution point (CP/DP#1)

II.2.1. Introductory remarks on BEREC's general approach

75. In elaborating its remarks on CP/DP#1, BEREC

- i. Embraces a topological definition that places the concentration and the distribution point at the same location;²⁷
- ii. Introduces the characteristic of that point's accessibility;²⁸ and
- iii. Endorses a technology neutral approach.²⁹

76. **ecta** welcomes the proposed neutrality with regard to different access technologies as well as the topologically identical definition of the concentration and distribution point. Indeed, **ecta** calls on BEREC to emphasize that engineering solutions that restrict access by artificially separating the two points must be rendered accessible at the lowest possible cost to access seekers, even if this requires partial re-engineering of the access network. Rigorous enforcement of this principle must notably obtain vis-à-vis SMP operators and entities engaging in new deployments.

77. In the interest of technology neutrality, **ecta** would nevertheless draw BEREC's attention to the fact that the current drafting appears to create a contradiction between paragraphs 29 and 30 when first highlighting the concept's extension to distribution points in the sense of the NGA Recommendation and only subsequently introducing the principle of technology neutrality.

²⁷ BoR (20) 106, paras 25 and 29, at 8, 9.

²⁸ BoR (20) 106, paras 31 and 39, at 9.

²⁹ BoR (20) 106, para. 30, at 9.

78. **ecta** therefore suggests to delete paragraph 29 and reword paragraph 30 as follows:

30. Finally, the concept of **concentration or distribution** point is technologically neutral for the purposes of these guidelines **and their administration**, and **should accordingly** be applied to all types of networks. **Distribution points in the meaning of the NGA Recommendation are also covered by this definition.**

79. Generally, **ecta** would also encourage BEREC to consistently use the expression ‘concentration or distribution point’ to fully align the text of the guidelines with the Code, including the mandate it has under point (a) of the fifth subparagraph of Article 61(3) EECC, and avoid any possible misunderstandings.

80. Finally, **ecta** stresses that NRAs under the first subparagraph of the provision are not only endowed with responsibility to guarantee reasonable access to CP/DP#1, but also to in-house wiring and associated facilities. Whereas the wording suggests that NRAs are to determine CP/DP#1 only where that point is located outside the building, for purposes of regulatory predictability, BEREC should clarify that access to a CP/DP#1 located inside the building is treated identical to access to wiring, cables and associated facilities inside buildings, consistent with its proposed guidance³⁰.

II.2.2. Specific remarks on the accessibility of the concentration/distribution point

81. BEREC rightly observes that for access to be effective, there not only has to be a point at which such access would be theoretically possible, but that point must be reasonably accessible to the access seeker.³¹

82. Agreeing with BEREC on this point, **ecta** contends that disregard for this aspect would essentially amount to rendering the provision in its entirety ineffective. It is therefore imperative that NRAs assume the responsibility to assess the location of these points by themselves and reject arbitrary suggestions for where to place them, as these may be made by network operators and owners, and **ecta** therefore welcomes this element of the guidance.

83. **ecta** also considers it appropriate to define requisite accessibility in physical terms as a combination of an accessible and manageable distribution facility allowing access seekers flexibility in their technology choices and permitting their own equipment to be hosted and standard operations to be performed.³² This interpretation is consistent with the purpose of the provision to enable physical access to promote sustainable competition close to the end-user.

84. In line with this objective, **ecta** is concerned, however, that BEREC does not elaborate on the perimeters of the feasibility assessment that NRAs have to conduct to determine the relative closeness of the relevant interconnection point to the end-user, as referred to in

³⁰ BoR (20) 106, paras 32 and 34, at 9f, 10.

³¹ BoR (20) 106, para. 31, at 9.

³² BoR (20) 106, para. 32, at 9f.

recital 154, despite referring to this element.³³ Instead, the draft guidance simply declares the relevant point to be the point closest,³⁴ respectively close³⁵ to the end-user.

85. This is particularly critical as BEREC goes on to suggest that where accessibility cannot be guaranteed at a point ‘reasonably close’ to the end-user, the NRA may opt to determine CP/DP#1 ‘on the grounds of active or virtual accessibility.’³⁶
86. In this regard, **ecta** considers not only that the guidelines must explicitly link the features of physical accessibility to a protocol for determining the feasibility of them being fulfilled at different points close to the end-user, but also that BEREC must abstain from construing an undefined notion of ‘active or virtual accessibility’.
87. The implicit suggestion that active or virtual access might be imposed in this context contradicts the wording, the organisation and the objective of the provision, all of which unequivocally limit recourse to these types of access to situations subject to high and non-transitory barriers to replication under subparagraph 2.
88. **ecta** emphasizes that only in scoping a necessary extension beyond CP/DP#1 may NRAs, for distinctly identifiable technical or economic reasons, contemplate the imposition of active or virtual access obligations. Such considerations are therefore *ex lege* beyond the determination of CP/DP#1 for purposes of subparagraph 1, in relation to which relevant replicability issues have to first be established.
89. Were one indeed to follow the direction that BEREC suggests in paragraph 37, this would invalidate the provision in its entirety since mere ‘technical or economic grounds’ under the last sentence of the second subparagraph could always be invoked, thus allowing the far more specific grounds for intervention specified by the first and second subparagraphs to be arbitrarily displaced. Administrative practice built around such an interpretation would not only fail to promote sustainable infrastructure-based competition, but effectively amount to *ultra vires* action.
90. This result, which is required by statutory interpretation, is further confirmed by the economic reality that only if provided at a point beyond CP/DP#1 could active or virtual access provide a level of scale of interest to the access seeker that might offset the lost benefits from physical access to which he would be entitled up to that point.
91. To make such physical access workable, **ecta** wishes to corroborate two considerations that BEREC identifies as probate elements of assessing its feasibility close to the end-user: the existence of infrastructure that the access seeker can use³⁷ and difficulties in entering or accessing a building³⁸.

³³ BoR (20) 106, para. 24, at 8.

³⁴ BoR (20) 106, para. 31, at 9.

³⁵ BoR (20) 106, para. 37, at 10.

³⁶ *Ibid.*

³⁷ BoR (20) 106, para. 36, at 10.

³⁸ BoR (20) 106, para. 34, at 10.

92. However, as regards differences in the identities of the network owner and of the owner of a building as a source of limitations to regular in-building access, **ecta** considers that solely the existence of such differences must not exercise decisive influence over whether to locate CP/DP#1 in- or outside the building.
93. NRAs will have to acknowledge that these differences prevail in most contexts and therefore require differentiated assessment. The guidelines should acknowledge this reality and call on BEREC's members to make full use of their information gathering powers as well as their competence to impose obligations both on network providers and building owners. In particular, this criterion must not enable network owners to exclude access seekers by concluding exclusivity agreements with building owners. **ecta** therefore calls on BEREC to refine this point in the final version of the guidelines.
94. Of greater relevance in the overall assessment of where to situate CP/DP#1 should be the availability of infrastructure on which access seekers can rely to bridge the gap between their own network and the access point. **ecta** endorses BEREC's reference to capacity constraints of such infrastructure, yet would again underline that application of this criterion must not incentivise under-dimensioning of relevant infrastructures and that NRAs therefore should conduct capacity reviews with this problem in mind.
95. While agreeing that other legal and administrative constraints may also impact the possibilities for situating CP/DP#1, **ecta** does not consider that these should have any bearing on NRAs' determination of that point in response to a specific access request. First, NRAs will formally not necessarily be competent to apply relevant rules, nor have requisite awareness and knowledge thereof. Secondly, the determination of CP/DP#1 must not be inhibited by an infinite legal regress that could be triggered by reference to potentially relevant rules, which would delay implementation of Article 61(3)(1) EEC and thus competitive entry. Thirdly, and most important, as determination occurs with regard to already existing networks, deployment of which has been completed,³⁹ determination of CP/DP#1 must proceed based on the presumption that operation of these networks occurs in compliance with applicable law and relevant sub-statutory obligations.
96. Against the background of the preceding observations, **ecta** cannot endorse BEREC's proposed separation of replicability considerations from the determination of CP/DP#1.
97. **ecta** and its members are substantially concerned that such separation would be procedurally highly inefficient and lead to significant delays in the administration of obligations pursuant to the first subparagraph. There appears to be little reason to examine a variety of technically possible CP/DP#1 locations, before proceeding to subsequently assess hypothetically existing replicability barriers for each of these points, when, as a matter of network design, identifiable locations for CP/DP#1 exist for which replicability barriers can be assessed.

³⁹ Including for new deployments, as BEREC underlines, cf. BoR (20) 106, note 16, at 21.

98. In this regard, [ecta](#) observes that the proposed guidance, as consulted upon, does not succeed in specifying a bridge between mere enumeration of factors potentially relevant to CP/DP#1 determination and operational realities encountered by access seekers. In order to ensure consistent application of the suggested criteria that results in a consistent EU-wide promotion of sustainable competition, this link is essential and requires greater clarity.
99. Taken to its extreme, the approach outlined by BEREC might imply that each reasonable access request would lead to a separate CP/DP#1 determination before replicability questions are engaged with. This, however, negates two fundamental considerations.
100. First, the criteria discussed above for determining CP/DP#1 do immediately encapsulate and condition replicability issues that fall within the category of what is covered by physically impracticable replication for purposes of subparagraph 1. Already at this level, the proposed separation therefore proves manifestly unsustainable.
101. Secondly, and more important, the inefficiency barriers to replication will equally be shaped by the very same factors. In this context, it has to be recalled that, contrary to BEREC's reasoning,⁴⁰ these barriers under the first subparagraph do not necessarily imply, or indeed require, an operator efficiency standard as does the second subparagraph.⁴¹ [ecta](#) therefore also does not support BEREC's backwards extrapolation, in paragraph 38, of the commercial viability standard from the latter part of the provision to the assessment of barriers to replication under the first subparagraph.
102. This position is confirmed by the requirement for NRAs to unconditionally grant access to wiring, cables and associated facilities inside buildings where barriers to replication can be reasonably established. Unless physical conditions within the building allow especially for physical impediments to be addressed (so that replication barriers can be overcome), this test will generally be met. From an economic point of view, this reflects the concerns over resource wastage that deployment without suitably accommodating preconditions would imply.⁴²
103. Considering that existing networks will often feature an in-building CP/DP#1, and purposively meaningful interpretation of the first subparagraph must cover these,⁴³ the both interpretatively and practically salient question is, as BEREC's draft guidance at least implicitly acknowledges,⁴⁴ whether the NRA may nevertheless determine the CP/DP#1 to be located outside the building.

⁴⁰ BoR (20) 106, para. 38, at 10.

⁴¹ Cf. section II.1.1, para. 59f, at 8 above.

⁴² Nevertheless, it needs to be borne in mind that different types of operators (and their respective clients) may have different requirements in this respect, which NRAs should take into account when considering access requests. Notably the difference between residential and business customers may be of relevance here, and the first subparagraph of Article 61(3) EECC should therefore not be construed in a manner preventing access requests for B2B purposes.

⁴³ Cf. paragraph 80 above.

⁴⁴ BoR (20) 106, para. 34f, at 10.

104. However, the draft guidelines—rather than explicitly and persuasively addressing this point—simply take the distinction for granted. From an inductive point of view, it is relevant to observe that the localisation of a concentration/distribution point other than the CP/DP#1 is often rooted not only, or even primarily, in accessibility, but also in replicability considerations. Also this point illustrates that the separation of CP/DP#1 determination from replicability analysis that BEREC suggests at paragraph 38 of the draft guidelines is not sustainable.
105. Finally, a particular concern for **ecta**, beyond the points discussed above, is the wording of paragraph 33, which reverses the perspective on accessibility from the access seeker's to the access provider's viewpoint, when requiring splicing to be possible 'without unreasonable effort by the ECN provider or network owner'.⁴⁵ In **ecta**'s view, it is to be expected that unreasonableness in this sense will anyway be given where the physical surroundings are such as not to allow for an appropriate distribution facility that complies with the abovementioned physical and operational characteristics.
106. As a result of the above arguments, **ecta** calls on BEREC to
- i. Delete paragraphs 37 and 38 from the guidelines;
 - ii. Explicitly recognise the existence of concentration/distribution points outside the building and outline an approach to their inclusion in access obligations that is consistent with subparagraph 1 where an in-building CP/DP#1 exists;⁴⁶
 - iii. Ensure that accessibility requirements throughout are consistently specified from an access seeker's perspective.

II.3. High and non-transitory barriers to replication

II.3.1. Introductory remarks on BEREC's conceptual considerations

107. At paragraphs 40 to 54, BEREC outlines the concepts underpinning its discussion of high and non-transitory economic and physical barriers to the replication of network elements.
108. Agreeing with the possible interaction between and interdependence of economic and physical (including technical) barriers to replication of network elements,⁴⁷ **ecta** considers this point to reinforce its own arguments about the impracticality of attempting to remove analysis of replicability issues from determination of topological access points addressing them.⁴⁸ Clearly, awareness of these barriers must drive selection of the locality of an appropriate remedial access element. Also for this reason, **ecta** would therefore ask BEREC to delete paragraph 38 to remove the inconsistency with paragraphs 42 and 43.
109. As regards BEREC's interpretation of the non-transitory dimension of barriers that may justify the imposition of extended access obligations,⁴⁹ **ecta** generally agrees with the

⁴⁵ BoR (20) 106, para. 33, at 10.

⁴⁶ This is notably pertinent for existing access regimes relying on such access points.

⁴⁷ BoR (20) 106, para. 42f, at 11f.

⁴⁸ Cf. section II.2.2., para. 81ff (96), at 12 (14).

⁴⁹ BoR (20) 106, para. 44, at 12.

proposed guidance in that these have to have a durable, ‘long term’ impact. However, **ecta** cautions that even strong probability for change in the near future, as suggested by BEREC,⁵⁰ does not appear to constitute sufficient to refuse imposition of such obligations. For such change to be treated by NRAs in a predictable manner, **ecta** considers it essential that only changes that have already been decided, but not yet become applicable should be treated as effectively removing the non-transitory nature of the barrier.

110. This is of particular importance when considering that relevant barriers under the second subparagraph are both non-transitory and high. However, while also broadly sympathetic to BEREC’s exemplary identification of the sources of such barriers,⁵¹ it is not clear to **ecta** that BEREC’s qualification of high barriers in paragraph 43 allows for clear identification of what high levels of risk amount to and how they would differ from normal levels.

111. **ecta** also does not consider reference to the prohibitive impact on replication by an efficient operator alone as sufficient in this regard. This follows from the fact that the establishment of the high nature of non-transitory barriers follows prior imposition of remedial access obligations. As the imposition of extended access obligations occurs as a result of the NRA finding that initial obligations were insufficient, **ecta** believes BEREC should more clearly specify the relation between barriers under each subparagraph and how their relative assessment will impact the finding of high barriers.

112. In **ecta**’s view, it further emerges from this context that also the qualification of an efficient access seeker as reaching the access point ‘by using the most efficient options’⁵² cannot successfully resolve this issue. First, the proposed conceptual approach, opening the door to multiple options, does not by itself seem able to lead to an unequivocal identification of such an access seeker. Secondly, it would appear that if—unlike what **ecta** believes—that standard were to already apply in respect of replicability hindrances under the first subparagraph, there would be little or no room left for identifying high barriers separately under the second subparagraph.

113. Therefore, **ecta** asks BEREC to clarify its reasoning regarding efficient access seekers, including relevant costing standards, and its relation to the qualification of barriers as high, in the interest of promoting consistent application of the second subparagraph for both access seekers and access providers. **ecta** notably emphasizes in this context that appropriate allowance must be made for differences in relative efficiencies between SMP undertakings, undertakings whose business model is deployment-centric, undertakings climbing the ladder of investment and new entrants, as well as end-user cooperatives.

114. At paragraphs 49 to 52, BEREC sets out its understanding of the relation between geographic areas considered under the provision and geographic markets in the context of market analysis.

115. The proposed guidance on this point can be summarised as stating that

⁵⁰ Ibid.

⁵¹ BoR (20) 106, para. 45, at 12.

⁵² BoR (20) 106, para. 54, at 13.

- i. Geographic areas do not necessarily constitute distinct geographic markets⁵³ because
 - ii. The relevant barriers subject to analysis in each context differ.
116. **ecta** finds the guidance on what is a key demarcation line in both substantive and procedural terms for NRA activity too brief and unspecific. As a result, it does not provide adequate orientation, when it is critically important to underline that the normative context and the associated implications are fundamentally different.⁵⁴
117. **ecta** therefore calls on BEREC to redraft paragraph 49 to underline that geographic areas under the provision do not constitute geographic markets. This appears not to be a question of degree, but of principle. As the wording of the second subparagraph unequivocally recalls, SMP analysis and its resultant obligations exist independently of the provision. This is all the more critical when recital 154 explicitly calls on NRAs to consider whether extended access obligations might strengthen significant market power.
118. More broadly, it remains unclear why these considerations of a general nature, which do not have any clearly discernible link to the specific type of barriers to replication under the second subparagraph, are placed here.
119. Indeed, paragraph 52 goes as far as to invoke ‘technical or economic barriers’ in the most general fashion, without this having a statutory basis or immediate relevance to the test preceding the application of obligations under the second subparagraph.
120. Accordingly, **ecta** proposes to delete paragraphs 49 to 52 and, in any case, remove them from the introductory discussion of high and non-transitory barriers to replication. Separate and clear elucidation of the difference between SMP regulation and obligations under the provision should occur prominently at an early stage in the guidelines.⁵⁵
121. **ecta** further cautions that talk of ‘geographic areas’ may falsely suggest existing areas when, in fact, such areas are nothing but an aggregation of connections needed to secure replicability for an efficient access seeker facing such high and non-transitory barriers. As these ‘geographic areas’ furthermore result from NRAs’ scoping decisions, **ecta** believes that the guidelines should avoid ambiguities on this point and instead seek the most normatively compelling and technically accurate representation thereof.
122. **ecta** urges BEREC and its members to adopt and communicate about them in an appropriately neutral, accurate manner in order to dissociate determinations under the second subparagraph from political expectations.
123. Finally, **ecta** would encourage BEREC to choose another label for the access point to be determined pursuant to subparagraph 2, as the ‘access point beyond’ lacks both specificity

⁵³ BoR (20) 106, para. 49, at 13.

⁵⁴ Cf. paragraph 13, at 2 and section I.1.1, at 4f.

⁵⁵ If such exposition were to build on the current text, paragraph 49 should be revised as suggested at para. 117 of this submission, while paragraphs 50 to 52 would have to be revised to accommodate that new context.

and clarity. As possible alternatives, **ecta** proposes ‘durable access point’, ‘second access point’ or ‘secondary access point’.

II.3.2. Comments relating to economic and physical barriers of a high and non-transitory nature

124. As regards the analytical exposition of the criteria to facilitate identification of high and non-transitory economic and physical barriers, **ecta** generally notes a certain imbalance in their respective levels of development, with the overwhelming part of the guidance discussion focussing on barriers of an economic nature.
125. Considering BEREC’s own recognition of the interdependence between economic and physical barriers,⁵⁶ **ecta** believes that some of the tendencies identified in relation to economic, could similarly be identified for physical barriers. One general point that could benefit from guidance in this context would be whether BEREC considers all of the criteria serving to identify physical barriers⁵⁷ in terms of their interdependencies and associated economic impact are adequately covered by the costs of civil infrastructure works.⁵⁸
126. Given the absence of any explanatory elaboration regarding physical replicability barriers, **ecta** urges BEREC to recognise that certain of the factors identified (e.g. limitations in physical space available⁵⁹ or soil conditions⁶⁰) can, in their own right, present irremediable, absolute barriers to replication by deployment.
127. For other factors that may exercise a similar effect on the possibilities for replication by purchasing of wholesale inputs,⁶¹ the guidelines should provide further specification as to the point relative to which they should be assessed, considering the malleability of access points within the concrete deployment context being analysed and notably the options for making them accessible.⁶²
128. Certain other factors in the domain of both economic and physical barriers to replication will benefit from further elaboration⁶³ and/or more distinct presentation⁶⁴. While **ecta** retains its general reservations towards considering legal and regulatory requirements in the context of identifying CP/DP#1,⁶⁵ it does seem appropriate to consider these from an access seeker’s perspective. **ecta** invites BEREC to pursue this item further by collecting information among its members on which requirements commonly present the most

⁵⁶ Cf. para. 108, at 16.

⁵⁷ BoR (20) 106, para. 66, at 16.

⁵⁸ BoR (20) 106, para. 61, at 14.

⁵⁹ BoR (20) 106, para. 66, pts. i. to iii., at 16.

⁶⁰ BoR (20) 106, para. 66, pt.v., at 14.

⁶¹ BoR (20) 106, para. 63, at 15.

⁶² BoR (20) 106, paras 33 and 69, at 10 and 17.

⁶³ E.g., BoR (20) 106, para. 66, pt. ii., at 16.

⁶⁴ E.g., BoR (20) 106, para. 66, pt. v., at 16.

⁶⁵ Cf. para. 95, at 14.

important barriers to replication. On barriers resulting from refusals to contract, **ecta** refers to its comments above.⁶⁶

129. Finally, and most important, **ecta** is concerned that the guidance set out at paragraphs 55 to 66 evidences no sign of applying BEREC's considerations regarding the qualification of barriers as high and non-transitory. In fact, the guidance in this section seems to be rather a statement on economic and physical barriers in general, as is also confirmed by the respective sections' lead paragraphs.⁶⁷

130. It is therefore **ecta**'s assessment that the draft guidelines on this critical point do not fulfil the mandate set out by point (e) of the fifth subparagraph of the provision and therefore invites BEREC to rework this part of the guidelines to ensure adequate regulatory predictability and consistent application of subparagraph 2.

II.4. The first point beyond

131. By way of introduction, **ecta** recalls its proposal to select a descriptively clearer designation for the access point at which NRAs may impose extended access obligations that are suitable for efficient access seekers.⁶⁸

132. Likewise, and similar to the remarks made above regarding the guidance on high and non-transitory economic and physical barriers to replication,⁶⁹ **ecta** finds many of the conceptual and analytical considerations set out in this section of a general nature that are not specific to the determination of such an access point, and would therefore invite BEREC to reorganise the text to better distinguish the general analytical reference framework for Article 61(3) EEC from the specific requirements of subparagraph 2.

133. As part of such a reorganisation, **ecta** would notably ask BEREC to ensure cross-sectional integration of all relevant elements. Illustratively, **ecta** highlights costing considerations and approaches to evidentiary and modelling questions as obvious points of emphasis for such streamlining work.⁷⁰

134. Both in presentational and normative terms, **ecta** reiterates the need to clearly separate out considerations regarding subsidiary imposition of extended virtual or active access obligations and signpost the special justificatory burdens that this is subject to.⁷¹

135. **ecta** would further ask BEREC for a modification of paragraph 78 to clarify that non-discriminatory access must be granted within the perimeters set by the wording of subparagraph 2 and that virtual access at a point beyond must remain exceptional and should only be a transitory solution where objective factors render physical access impossible. More generally, **ecta** also considers that guidance on this point should make

⁶⁶ Cf. para. 93, at 14.

⁶⁷ BoR (20) 106, paras 56 and 66, at 14 and 15f.

⁶⁸ Cf. para. 123, at 19.

⁶⁹ Cf. para. 129, at 20.

⁷⁰ BoR (20) 106, para. 72ff, at 18.

⁷¹ Cf. para. 88, at 13

clear that these requirements apply irrespective of whether access has already been imposed or is about to be imposed for the first time.

136. Moreover, [ecta](#) considers that the wording of subparagraph 2 and its normative context impose further requirements on the guidance that can be issued with regard thereto, which are not yet fully reflected in the draft.
137. First among these is the fact that the imposition of extended access obligations is not request-driven, but based on a review by the NRA of existing access obligations imposed pursuant to subparagraph 1.⁷² Accordingly, references to operators' requests⁷³ do not appear appropriate in this context and should be removed.
138. Secondly, [ecta](#) believes that it is even more important for the guidelines to acknowledge that the provision does not seek to enable broad-brush, generic access requests to networks in their entirety, as paragraph 82 appears to suggest. Such interpretation would not only significantly limit deployment incentives, but also render the provision in its entirety non-administrable. BEREC's recognition that the need to assess a large number of access points will have a negative impact on NRAs' ability to assess commercial viability in a targeted manner⁷⁴ is testimony to precisely this point.
139. [ecta](#) considers that the appropriate response to this problem is not to encourage such requests by portraying them as an option when the Code clearly does not provide for this, but to provide guidance on how initial requests under subparagraph 1 can achieve requisite specificity to allow NRAs' effective processing thereof.
140. In this context, [ecta](#) finds the idea of clustering of access points⁷⁵ insufficiently developed to assess its merits. The central underlying assumption of sufficient similarity of access points⁷⁶ appears to require validation according to the particularities of nationally distinct settings, as recognised by BEREC,⁷⁷ before being applied. [ecta](#) considers there not to be sufficient clarity around this idea for it to be enshrined in the first version of the guidelines, and would instead encourage BEREC to study the possibility of its inclusion on the basis of a systematic assessment of current and emerging NRA practices. A key element of such enquiry should, in [ecta](#)'s view, consist of full and proper appreciation of topological differences across different network technologies and associated deployment models.
141. Thirdly, and equally of principled importance, the wording of subparagraph 2 requires that extended access obligations assume relevance by ensuring commercial viability 'for efficient access seekers'. This wording, [ecta](#) believes, reflects the need for those obligations to allow not only for multiple parties to gain access on those terms, but also

⁷² Cf. para. 67, at 10.

⁷³ E.g., BoR (20) 106, para. 76, at 18.

⁷⁴ BoR (20) 106, para. 80, at 19.

⁷⁵ BoR (20) 106, para. 82, at 19.

⁷⁶ BoR (20) 106, para. 80, at 19.

⁷⁷ BoR (20) 106, para. 81, at 19.

for a certain variety among those access seekers.⁷⁸ In *ecta*'s view, this not only affirms the relevance for BEREC to provide further guidance on the arbitration between different costing standards and their associated evidentiary requirements, but also to indicate what levels of marginal variability can be considered acceptable within those standards, allowing, as relevant, for pertinent differences in operators' business models to be accounted for.

PART III: EXEMPTIONS

III.1. Introductory remarks

142. The third subparagraph of the provision provides for exemptions that NRAs must apply by default in cases where otherwise obligations to address persistent consumer detriment would be justified and necessary.⁷⁹
143. This means that because the competitive prejudice is particularly significant, these exemptions must be given a strict and particularly clear interpretation so as to limit hindrances to the establishment of sustainable competition to a bare minimum.
144. Overall, *ecta* does not consider the orientations set out by BEREC suitable to achieve this objective. Indeed, in its current form, the fuzziness and lack of conceptual clarity of BEREC's proposed guidance prejudices the interests of network owners, access seekers, and especially of access seekers considering to become network owners, as clear criteria as well as tangible interpretations of key concepts are missing, leading to a lack of legal certainty for all interested parties.
145. This is why *ecta* calls on BEREC to carry out separate targeted follow-up consultations on certain elements to set out its views in greater detail and allow stakeholders to make reasoned submissions on those guidance aspects, which in their current form cannot be assessed.⁸⁰
146. From a systematic perspective, *ecta* also finds the proposed draft guidance to disregard two highly significant points, which should be introduced into the revised text of the guidelines to ensure consistent application by all BEREC members.
147. First, the guidance needs to recall that any exemption pursuant to the third subparagraph of the provision is applicable only to electronic communications network providers, and can thus not be extended to, or invoked by, parties only owning or otherwise controlling the concerned network elements without actually engaging in provisioning activity.
148. Secondly, the guidance should also recognise the link between that subparagraph and the fourth subparagraph by clarifying that the (facultative) limitations imposed under the

⁷⁸ This appears also consistent with the wording of Figure 2 in BoR (20) 106, at 7, where reference is made to 'efficient access seekers' in the plural.

⁷⁹ The only exception to this rule is the possibility for NRAs to extend exemptions that would apply to wholesale operators pursuant to the first part of point (a) of the third subparagraph of the provision to other providers under the second part of that point. As this is without immediate relevance to the present discussion, this aspect is not further considered below.

⁸⁰ Cf. section III.2.6., at 30.

fourth subparagraph cannot, in any case, be extended to cases of new deployments. This means that even if a network provider receives public funding, he must not be barred from being granted a viability exemption pursuant to point b of the third subparagraph as long as the deployment in question meets the relevant criteria, as discussed below.

149. In the following sections, **ecta** examines in turn BEREC's treatment of the criteria for the newness of deployments (section III.2) and the smallness of local projects (section III.3) and comments on their salience.
150. Before proceeding to this examination, **ecta** wishes to underline a final substantive point that has to guide interpretation of the exemptions overall, but appears to be insufficiently recognised by BEREC: exemptions are granted to market participants, not to deployments *per se*. This point is underlined by recital 155 of the EECC when highlighting that proportionality considerations may make it appropriate to exempt certain 'categories of owners or undertakings, or both'.
151. **ecta** therefore makes proposals to revise the guidance in conformity with this underlying premise⁸¹ and asks BEREC to include this consideration unequivocally into the revised version of the draft guidelines for point b in its entirety, rather than only with regard to the notion of smallness⁸². Practically, this needs to consider the limitations that follow from the wording of the provision, which excludes exemptions for owners that are not providers of electronic communications networks.⁸³

III.2. Deployments that can be considered to be new

III.2.1. Introductory considerations

152. Interpretation of what constitutes a new network deployment is the key criterion for invoking the second exemption under the third subparagraph of Article 61(3). The criterion of 'smallness' only describes a subset of cases thus qualified.
153. Given its centrality to the application of obligations pursuant to the second subparagraph of the provision, **ecta** believes that BEREC should provide guidance as to how it will be practically administered. Specifically, as all new deployments must benefit from an exemption where the authority finds its economic or financial viability to be compromised by such obligations, interested access seekers should be able to quickly gain an overview of new deployments and determinations made by authorities in respect thereof.
154. As the duty for NRAs to make these determinations arises only out of the Code, some guidance is also required as to how NRAs should approach the process of reviewing deployments and communicating about its determinations. In the interest of promoting sustainable competition, **ecta** considers that NRAs should establish a register in the form of a publicly available database to this end, in which determinations are published.

⁸¹ Cf. para. 201, at 31.

⁸² BoR (20) 106, para. 95, at 22.

⁸³ Cf. para. 147, at 23.

155. Similarly, it is decisive to clarify in the interest of procedural economy and regulatory predictability that the process is initiated only where an access request has been made. Where no processes for filing such requests exist yet, the guidance should call on NRAs to establish these ahead of the becoming applicable of the Code.
156. Finally, while [ecta](#) does agree with BEREC that the purpose of the exemption consists of protecting network deployments where access obligations would compromise their economic or financial viability,⁸⁴ [ecta](#) is not convinced by BEREC's recourse to the notion of first mover advantage as the organising concept for interpreting this point.
157. That notion has no basis in the Code, nor an agreed interpretation, much less a definition in ordinary language. Its introduction is therefore liable to serve as a further source of inconsistency, which is most unwelcome in the context of an exemption to an access obligation that in its own right has to meet a high standard of proof. In the least problematic of all cases, the notion would serve as a shorthand for the conjunction of 'economic or financial viability', in which case it can be conveniently dropped from the guidelines. As BEREC's use of the concepts of economic and financial viability itself lacks precision,⁸⁵ [ecta](#) calls for BEREC to remove reference to the concept from this sensitive part of the guidelines.

III.2.2. Temporal scope of application: Commencement

158. For the consideration of newness, a first essential element consists of clarifying the temporal scope of application of the extended access obligations that NRAs may choose to impose beyond CP/DP#1, i.e. as of when such obligations may be applied.
159. In this regard, [ecta](#) finds BEREC's suggestion that obligations under the provision can be applied prior to deployment⁸⁶ unhelpful. First, this guidance statement appears to be in explicit contradiction with BEREC's own acknowledgement that 'newness' under the provision attaches to already existing infrastructure.⁸⁷
160. Moreover, access obligations, from which an exemption based on the newness of a deployment can be granted, themselves require such physically manifest network elements. This becomes patently clear when trying to assert what the content of access obligations prior to completion of the deployment were to look like.
161. As prior discussion has shown,⁸⁸ this suggestion also goes against the sequenced application of extended access obligations, which requires a prior assessment by the NRA of the effectiveness of access obligations pursuant to the first subparagraph as well as a finding that these have insufficiently addressed high and non-transitory barriers giving rise to a market situation characterised by significant competitive prejudice to end-users.

⁸⁴ BoR (20) 106, para. 86, at 20.

⁸⁵ Cf. section III.2.6, at 30f.

⁸⁶ BoR (20) 106, para. 21, at 7.

⁸⁷ BoR (20) 106, note 16, at 21.

⁸⁸ Cf. section II.2.2, at 12ff.

Incidentally, such imposition would also amount to pre-empting the required fact-based replicability assessment.

162. Furthermore, this guidance must also be expected to negatively impact the incentives for deploying entities in at least two ways. On the one hand, the suggested authorisation of extended access obligations without appropriate fulfilment of statutory requirements is likely to prompt litigation to have administrative acts relying on this guidance overturned. On the other hand, the guidance is susceptible to dampen willingness to invest and complexify the regulatory environment for all market participants.
163. Overall, this guidance appears likely notably to cause significant problems for both access seekers and access providers. In order to promote adequate legal certainty, it is therefore necessary in [ecta](#)'s view to limit the possibility of imposing obligations under the second subparagraph to situations in which the deployment has been completed, i.e. the network is effectively ready to deliver access, and proper sequencing of procedural steps has been observed. The assessment of a deployment's newness should therefore not be influenced by the proposed guidance statement, which [ecta](#) suggests to be withdrawn.⁸⁹

III.2.3. Relation of deployment to service provisioning

164. Similarly, [ecta](#) believes that BEREC's proposal to establish the newness of deployments relative to the effective provisioning of services to end-users is not only unhelpful, but contradicts the purpose of the provision, which is to promote sustainable competition by allowing competitors access to network elements whose replication is either not reasonably or at all feasible.
165. The unconditional obligation for NRAs to grant an exemption where the financial or economic viability of a deployment so requires, must by its very nature be restrictively interpreted in order to ensure that this purpose is not unduly diluted.
166. It therefore seems contrary to the very purpose of the provision to introduce discretion on behalf of the regulated party to postpone access by deciding not to offer services. Especially when the deployment serves localities where replicability appears not achievable, such an approach would allow the deploying party to effectively foreclose competition by delaying its service offerings, or possibly not engaging in service offerings at all. This will be particularly problematic where high and non-transitory barriers are caused by physical factors.
167. Furthermore, such an approach also seems to contradict the specific objective of the exemption, which consists of safeguarding the economic and financial viability of the deployment. By default, it must be assumed that the deployment is undertaken because there is a viable business proposition to support it, on which the investing party has to make good to achieve viability for the deployment.
168. If, on the other hand, the infrastructure could be viable for the investor without being brought into service, there is all the more reason to require access for third parties who cannot replicate it. Therefore, the decision not to activate the deployment should be taken

⁸⁹ Including for obligations pursuant to subparagraph 1.

as an indication that no viability concerns exist. In such cases, the exemption should be denied and access granted *ab initio*.

169. Finally, the interpretation proposed by BEREC is also contrary to the wording of the provision itself and should therefore not be adopted. The point of attachment for regulatory action is not the activation of the network elements, but the completed deployment thereof. Given their non-replicability, subject to high and non-transitory barriers, an access request would therefore eventually have to imply a requirement for activation, should this, contrary to viability considerations outlined above, not already have taken place.

170. **ecta** therefore submits that application of the provision should be based on a clear time limit for when the completion of deployment can be established, and calls on BEREC to agree clear criteria for that purpose.

III.2.4. Temporal scope of application: The relation between newness and limitation period

171. Removing the unjustified and inappropriate reference to the start of service provisioning, BEREC's proposed guidance essentially amounts to evaluating newness of a deployment up to five years after deployment has taken place.⁹⁰

172. This proposed approach does not by itself provide for any definition of what constitutes a 'new' deployment.

173. **ecta** notes that the replicability problems addressed by the provision concern all technology generations, without excluding or favouring any particular deployment choice. This neutrality with regard to technology choice—which extends beyond the draft's reference to the distribution or concentration point⁹¹—reflects the provision's emphasis on promoting sustainable competition in end-users' interest wherever a lack of replicability prevents them from being reached by alternative deployments.

174. Accordingly, newness may be an attribute of any deployed network element. In **ecta's** view, this attribute must be construed narrowly in order to ensure that the exemption remains appropriately limited in its effects. This is critical notably as the preconditions for imposing obligations under the second subparagraph are particularly strict and entail tangible consumer detriment.

175. At the same time, threats to viability must be taken seriously so as not to ultimately reinforce significant market power, as explicitly recognised by the Code.⁹²

176. As this points has regrettably not been addressed by BEREC, **ecta** suggests that NRAs when evaluating the criterion of newness, in addition to the formal aspect of effective deployment completion outlined above,⁹³ should also have due regard to the entity making the deployment. In this sense, newness should be understood holistically also in

⁹⁰ BoR (20) 106, para. 91, at 21.

⁹¹ BoR (20) 106, para. 30, at 9.

⁹² Recital 154 EECC.

⁹³ Cf. para. 169f, at 26.

relation to who that entity is, in accordance with the Code's emphasis on granting exemptions to categories of undertakings.⁹⁴

177. Such an understanding needs to entail a general presumption in favour of competitive operators both from a project and from a market perspective: as opposed to SMP operators, competitors investing in the access segment do not already possess existing network elements and therefore lack transition management options open to already established players that can boost viability. It is worth recalling here that, as the Code recognises,⁹⁵ the establishment of parallel infrastructures does not in itself necessarily reflect sustainable competition.
178. Furthermore, the relative newness of competitive investors in terms of market participation suggests greater potential for viability challenges. This is particularly true in the case of new entrants, as BEREC recognises.⁹⁶ [ecta](#) invites BEREC to appropriately extend this recognition to the interpretation of the first part of point b. The relevant challenges need to be assessed in a manner that is specific to the characteristics of the individual deployment and its interaction with the characteristics of the deploying entity, and need to take into account issues such as deployment context, scale and strategy.
179. Such an approach is not only consistent with general thrust of the exemption,⁹⁷ but also with the focus of the subordinate clause on small local projects, which directs attention to the identity of the entity assuming the risk of facilitating sustainable competition to emerge.⁹⁸ By default, SMP operators should therefore generally be unable to gain protection under this exemption when the ineffectiveness of SMP obligations in combination with obligations pursuant to the first subparagraph has been established.
180. In this sense, the five-year period should be construed exclusively as a limitation period beyond which viability concerns in the context of obligations beyond the first concentration or distribution point will no longer be considered. This is without prejudice to the NRA's determination of the actual duration of the exemption, which, [ecta](#) agrees, should be based on a case-by-case assessment.⁹⁹
181. In this context, [ecta](#) would nevertheless underline that the suggestion of a blanket exemption period of up to five years could essentially suppress the pro-competitive benefits of new deployments for an unduly long period of time. In this sense, [ecta](#) not only agrees that exemption periods *could* be shorter than five years,¹⁰⁰ but believes they generally should be so, save in exceptional circumstances.

⁹⁴ Cf. para 150, at 23.

⁹⁵ Recital 152 EECC.

⁹⁶ BoR (20) 106, para. 100, at 23.

⁹⁷ Recital 155 EECC; cf. para. 150 above.

⁹⁸ Cf. section III.3, at 32ff.

⁹⁹ See subsection III.2.6., at 30f.

¹⁰⁰ BoR (20) 106, para. 91, at 21.

182. Since pre-deployment planning under the Code will occur in full awareness of applicable law, deploying entities will be aware of the narrow exemptions that point b of the third subparagraph of the provision provides for. Indeed, it must not be forgotten that the exemptions provide an additional viability safeguard for a new category of cases that was not previously subject to regulation. Considering the strict preconditions for the application of extended access obligations, recourse to these exemptions must be limited in the same manner, as otherwise the purpose of the obligations would be compromised.
183. Lastly, [ecta](#) would highlight that while viability assessment should indeed consider the need for a reasonable return for the deploying entity, this return needs to be seen in the wider normative framework for infrastructure-based competition that the Code establishes. If an efficient level of investment to promote such competition is generally achieved where investors engage in infrastructure duplication to an extent that guarantees them a fair return,¹⁰¹ efficiency in a situation where network elements are not replicable cannot be attained by guaranteeing uncontested monopoly profits.¹⁰²
184. Reasonable expectations about the evolution of market shares in this context need to be judged against the specific deployment setting, and notably the existence of competing networks. They cannot, however, amount to expectations of market shares that would equate to a finding of significant market power in a wider market context, especially when the Code affirms that special attention must be had to the interaction between symmetrical obligations and such market structure. Where exemptions are required, [ecta](#) expects that NRAs institute appropriate review mechanisms to assess their functioning within a reasonable timeframe to confirm their continued appropriateness.

¹⁰¹ Recital 54 Better Regulation Directive, confirmed by recital 27 EECC.

¹⁰² In this context, it has to be borne in mind that exemptions allowing for more than a reasonable return would also distort access to financial resources since exempted deployments would yield higher returns than what could otherwise be attained.

III.2.5. Upgrades

185. Clarity is also essential relative to the notion of upgrades. The final guidance document must not permit any ad hoc qualification of established deployments as new, only then to be further exempted by a subsequent upgrade, potentially leading to successive application of exemptions for network elements controlling access to the same customers.
186. Conceptually, [ecta](#) notes that the notion of upgrade is in literal contradiction with the focus of the provision on new deployments and therefore does not believe that consideration of upgrades falls within the scope of the exemption and thus within BEREC's mandate.¹⁰³ Otherwise, the scope of legitimate protection might extend to any modification of any network element, and thus entirely undermine the objective of addressing replicability problems by allowing network elements to be opportunistically insulated from competitive access. The following paragraphs reinforce this finding on substantive grounds.
187. As upgrades presume the pre-existence of network elements attributable to the same entity, [ecta](#) considers that said entity will have all relevant information to estimate the likely impact of the update ahead of its implementation, including relevant pricing aspects for the access to be provided. This, as BEREC recognises,¹⁰⁴ will sustain the viability of the investment.
188. Given that the entity controls non-replicable assets, which, at the time of an upgrade, will already have been able to benefit from an exemption, there facially appears to be little reasonable justification to extend an exemption a second time. The decision to pursue an upgrade would rather seem to indicate that the entity has successfully amortised the initial deployment and is not facing challenges to its continued viability. As the entity retains full control of how to manage the assets, it will also be able to envisage a transition scenario eliminating viability risks for the upgrade, including forced migration from the legacy infrastructure.
189. Moreover, extending exemptions to upgrades is likely to have perverse anticompetitive effects due not only to a possible strategic sequencing of upgrades relative to the initial deployment—which, as emphasized above,¹⁰⁵ the guidelines must prevent—, but also because they may provide a pretext to evict access seekers from the upgraded elements. This would be all the more unacceptable where these very same access seekers have ensured the viability of the deployment, as recognised by BEREC. Upgrades not concerning the same elements should be assessed according to the relevant standards for new deployments.¹⁰⁶
190. As far as BEREC's proposed guidance is concerned, [ecta](#) in any case rejects the idea that active network elements fall within the scope of point b of subparagraph 3. The purpose

¹⁰³ Article 61(3), 5th subparagraph, pt. (c).

¹⁰⁴ BoR (20) 106, para. 89, at 21.

¹⁰⁵ Cf. para. 185, at 28.

¹⁰⁶ Care must therefore be taken not to disqualify migration from legacy technologies to fibre deployments as mere 'upgrades'.

of the provision is to enable physical access as close as possible to the end-user in order to facilitate sustainable competition on that basis. This is clear also from the only exceptional provision of virtual or active access pursuant to the second subparagraph.¹⁰⁷

191. Access to active elements occurs at such a high level in the access provider's network that viability considerations will not play any role there. To suggest otherwise would indeed seem to encourage providers to invoke a viability cascade to thwart access requests, thereby undercutting the emergence of competition for the benefit of end-users in situations where competitive outcomes are severely limited.

192. For these reasons, **ecta** considers that the guidelines should state explicitly that active networks elements cannot benefit from any exemption instead of opening up for the possibility thereof.¹⁰⁸

193. Similarly, consideration of network upgrades should be removed from the guidelines and their mention be removed from the summary guidance statement.¹⁰⁹ For purposes of legal certainty, the revised guidance should clarify that migration between network technologies that does not maintain pre-existing network elements will by default have to be treated as new deployments.¹¹⁰

194. Finally, and only incidentally, **ecta** remarks that the discussion of upgrades in the draft also does not address the question of what upper limit should apply for the time periods applicable to upgrades. Without prejudice to its views set out above, **ecta** considers that both limitation periods and exemptions for upgrades, in any case, must not be longer than those for initial deployments.

III.2.6. Economic and financial viability of the deployment

195. As argued above, **ecta** considers that the exemption provided by point b under the third subparagraph of the provision must be narrowly construed, while being proportionate to operator-specific risks.

196. While it is appropriate to consider aspects of both economic and financial viability in this context, as stipulated by the Code, **ecta** believes that the draft guidelines, despite explicitly invoking the notion of financial viability for purposes of determining the newness of a deployment,¹¹¹ provide insufficient clarity as to BEREC's understanding of those terms.

197. In particular, **ecta** notes that BEREC, beyond tying the notion of financial viability to the concept of first mover advantage,¹¹² appears to apply the concept of economic viability in a way pointing beyond the deploying entity, to include 'all network users'.¹¹³ It remains

¹⁰⁷ Cf. para. 88f, at 13 and para. 135, at 21.

¹⁰⁸ BoR (20) 106, para. 92, at 21.

¹⁰⁹ BoR (20) 106, para. 93, at 22.

¹¹⁰ Cf. para. 189, at 29.

¹¹¹ BoR (20) 106, para. 91, at 21.

¹¹² On which, cf. section III.2.1., para. 156f, at 24.

¹¹³ BoR (20) 106, para. 89, at 21.

unclear, however, how BEREC conceives precisely of such a broader notion of economic viability and how this relates to the viability of the project from the viewpoint of the deploying entity, notably whether this is to be conceived as co-extensive with or possibly opposed to the financial viability at the latter's level.

198. By failing to provide such clarity, the suggested guidelines could ultimately have a detrimental impact on deployment incentives, notably if a decrease in financial viability were to be justified by offsetting effects in terms of economic viability for a wider range of parties. Considering that the exemption is an exemption to access obligations grounded in the aim of offsetting end-user detriment that could not otherwise be overcome, such an interpretation would appear contrary to the purpose of point b and the relation between the second and the third subparagraph of the provision.
199. As, at this stage, it is impossible for ecta and its members to determine the precise scope and interaction of the two viability concepts as set out by BEREC, ecta calls on BEREC to issue a separate clarifying statement on the matter, on which a targeted consultation, with a reasonable deadline of at least two calendar weeks, should be held.

III.2.7. Conclusion

200. Finally, ecta calls on BEREC to ensure that revised guidance, taking account of the above comments, must avoid to convey false expectations by way of the statements contained in the summary box at the end of the section. As currently drafted, the first point suggests the existence of a per se rule when the actual guidance contents require a case-by-case assessment. This is unfortunate, as it could mislead the reader as to the overall approach to be applied and promotes inconsistent application. This source of inconsistency is further aggravated by the lack of any criteria for assessing economic and financial viability.
201. Based on the arguments set out in this section, ecta proposes for the summary guidance on the newness of deployments to be reworded as follows:¹¹⁴

Network deployments to be considered new, pursuant to **point b of the third subparagraph of Article 61(3) EECC**

- i. are limited to networks that **have been fully deployed and whose deploying entity can be qualified as new, taking into account**
 - a. **deployment context (including the presence of other electronic communications network providers),**
 - b. **deployment scale,**
 - c. **deployment strategy;**
- ii. **do not cover network upgrades; full-scale replacement of network elements should be treated in line with the rules for new deployments where they meet the relevant conditions, as should network technology migration;**

¹¹⁴ Proposed rewording in **bold** lettering; deletions not shown.

- iii. are to be examined once for potential prejudice to their viability from the imposition of access obligations up to five years from the completion of their deployment.

The assessment pursuant to point i shall be based on the presumption that only undertakings not enjoying significant market power can be qualified as new entities for purposes of this exemption.

III.3. Projects to be considered small

202. As pointed out above in the discussion of new deployments,¹¹⁵ local projects of small size identify a sub-class of such deployments on which extended obligations must not be imposed despite observably serious competitive detriment to end-users, as such obligations would threaten their viability,
203. In principle, [ecta](#) agrees with BEREC that the scope of this sub-class does not extend to large undertakings,¹¹⁶ notably SMP operators choosing to engage in a large number of local deployments, whether on their own or through a number of local subsidiaries.
204. Precisely to avoid that undertakings with significant market power attempt to benefit from exemptions for small local projects by reorganising their deployment activities in smaller subsidiaries, [ecta](#) also agrees that it is appropriate to scrutinise individual local projects with regard to their wider organisational situatedness, similar to the interpretation of the concept of an undertaking in EU competition law.¹¹⁷
205. However, to ensure consistent application of the rules of the Code, [ecta](#) would suggest the limitations to such analogous use as well as the relation to the authorisation regime to be clarified. Considering the potentially not insignificant degree of complexity that such scrutiny may bring to light, [ecta](#) believes that the guidelines should call on NRAs to make full use of their information gathering powers, including vis-à-vis undertakings not providing electronic communications.
206. [ecta](#) would further call on BEREC to remove several ambiguities in its current drafting.
207. To this end, it is essential to revise paragraph 101, which erroneously suggests a contradiction between local projects of varying sizes and categories of owners and undertakings. As is clear both from recital 155, to which BEREC itself refers,¹¹⁸ as well as literal and wider systematic considerations of interpretation,¹¹⁹ these projects are not carried out by owners and undertakings, but constitute themselves categories of either, according to their characteristics.

¹¹⁵ Cf. para. 152, at 23.

¹¹⁶ BoR (20) 106, para. 95, at 22.

¹¹⁷ BoR (20) 106, para. 96, at 23.

¹¹⁸ BoR (20) 106, para. 95, at 22.

¹¹⁹ Cf. para. 150f, at 23.

208. It is therefore unfortunate to create the impression, as BEREC does,¹²⁰ that it would be necessary to create such a specious dichotomy to make the obvious point that exemptions have to apply to deployments satisfying the newness criterion irrespective of whether the entity implementing them has the characteristics of a small local project. Contrary to what BEREC suggests, the relevant distinction here is not between small local projects and 'large *undertakings*',¹²¹ but between local projects of small and non-small size. The use of the term 'undertaking' is particularly unfortunate here when considering the complexities associated with BEREC's suggested analogous use (see paragraph 205 above).
209. Overall, **ecta** therefore proposes to either comprehensively revise the section in its entirety to present a coherent approach to the notion of undertaking as laid down in the Code, or to delete paragraph 101 entirely. Deletion would also address the only one-dimensional consideration of viability threats in their financial dimension, contrary to the wording of point b.
210. As regards actual criteria for determining the smallness of local projects, BEREC proposes (i) a threshold of less than 500 end-user connections¹²² and (ii) reliance on turnover.
211. BEREC appears to suggest that turnover should be calculated on the basis of all economic activity attributable to an undertaking in the sense of EU competition law to establish its size relative to the electronic communications sector in its entirety.¹²³
212. As BEREC does not specify any threshold value for determining smallness on the basis of this indicator, **ecta** cannot evaluate its appropriateness towards that end.
213. Conceptually, however, **ecta** finds this metric unsuitable insofar as BEREC suggests to determine this solely on the basis of turnover generated in broadband markets. This approach appears to be both too narrow and too wide at the same time: too narrow as it excludes revenue streams from other services for no discernible reason; too wide because it fails to offer an assessment relative to the local context in which the project is situated, and because it covers all broadband markets rather than only broadband access markets.
214. Accordingly, BEREC's approach would qualify a given local project as small relative to the size of the broadband market even if its size at local level might effectively be such as to qualify as not small. This would lead to such projects qualifying for an exemption even if, in reality, they could not legitimately be considered to meet the criterion of smallness.
215. This contradicts the emphasis that elsewhere is (appropriately) placed on the need for the economic activities of the 'undertaking' to be local in nature, which is further combined with a requirement for the undertaking not to be active in all of a major part of the

¹²⁰ BoR (20) 106, para. 101, at 23.

¹²¹ *Ibid.*, emphasis added.

¹²² BoR (20) 106, para. 102, at 23.

¹²³ BoR (20) 106, para. 98, at 23.

broadband market concerned¹²⁴ – even though it remains unclear why the emphasis here switches to a single rather than the entire range of broadband markets.¹²⁵

216. As regards the number of connections more generally as a metric,¹²⁶ BEREC should similarly ensure that the final version of the guidelines clarifies the geographical scale of reference to which analysis thereof is to be related. **ecta** considers indeed that this should be limited to the local level into whose context the deployment inserts itself.

217. While 500 connections generally appears to be reasonable descriptor of project smallness, it will still have to be ascertained that the project is indeed limited to these connections. At the same time, **ecta** observes that currently applicable rules in certain Member States set even lower thresholds beyond which the imposition of market power-independent access obligations is considered reasonable.

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In case of questions or requests for clarification, we cordially invite BEREC to contact Mr Oliver Füg, Director of Competition & Regulation at **ecta**, at ofueg@ectaportal.com.

¹²⁴ BoR (20) 106, para. 100, at 23.

¹²⁵ As is the relevant scope in respect of turnover, cf. BoR (20) 106, para. 98, at 23.

¹²⁶ BoR (20) 106, para. 99, at 23.