

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

## TIM's response to BEREC public consultation

### Executive summary

TIM welcomes the possibility to provide its comments to the draft BEREC Guidelines on the Criteria for a Consistent Application of Article 61(3) EECC.

As a general comment, we appreciate that BEREC guidelines do not refer to a specific technology, but remain technology neutral and leave to the NRA the exact determination of the points in the networks of national operators, according to the different architectures.

Indeed, it is worth noting that article 61(3) also encompasses symmetric access to wiring, cables and associated facilities (including civil infrastructures) not owned by providers of electronic communications networks, therefore also owned by a utility company. In this case the determination of distribution and concentration points may significantly differ in respect to electronic communications networks.

We confirm our comments sent one year ago in response to the call for input, we believe symmetric access conditions should be improved in order to facilitate the deployment of UBB and very high capacity networks (VHCNs), along with the review of the Broadband Cost Reduction Directive, pursuing the objectives of article 3 of the EECC and of the Gigabit society EC Communication.

To this end, we deem that:

- the NRA should assess the need to impose symmetric access obligations at the first point or beyond it on the basis of a general assessment of the level of barriers to entry for a generic efficient access seeker;
- symmetric access obligations should also include the access to civil infrastructures, as already provided by AGCom in Italy with Decision no. 538/13/CONS. Access to dark fiber at the distribution/concentration point should be imposed in case of unavailability of space in the ducts. Access to civil infrastructure is likely to be accessible at any suitable manhole/access network room;
- symmetric access obligations should be imposed at all the (intermediate) accessible points from the point beyond identified by the NRA to the first point;
- co-investment in new VHCN pursuant to article 76 of the EECC should be exempted by the imposition of symmetric access obligations; in this case, the co-investment commitments rendered binding by the NRA in application of the article 79 procedure apply. On the contrary, publicly financed networks should be never exempted;
- as regards the assessment of small projects, the size of the project is relevant to the extent in which it affects the viability of the project; instead, the size of the undertaking or its market share in the overall broadband market should not affect the assessment. Operators with a low market share in the broadband market should not be considered small if they have a high market share/footprint in the local area object of the new deployment.

The above issues are further developed in the document.

### Item (a): The first concentration or distribution point

As for points 25-30, there is the need to distinguish between concentration and distribution point: the distribution point covers few lines and it is located inside the building or just outside it, whereas the concentration point is more central in the network and, in principle, aggregates a certain number of lines (fibre lines or twisted pairs) or cables.

In the copper network, the cabinet disaggregates the cable in the feeder network into smaller (with few twisted pairs) cables up to the distribution point.

Instead in the FTTH GPON network, there is a disaggregation of a fibre cable into fibre lines at the “*Centro Nodale Ottico*” (CNO), also with two levels of splitting.

**Thus, the concentration point corresponds to the point where cables or lines are aggregated. The distribution point corresponds to the point where the lines are distributed to end users. At the distribution/concentration point there is never a traffic aggregation.**

As for points 31 and following, we welcome that BEREC guidelines also address the issue of accessibility, namely that the point where providing access shall be reasonably accessible. However, we fear that access could be refused, for example by the condominium, on the basis of non-grounded technical difficulties.

As for point 36, the reference to leased lines shall be deleted since leased lines should not be included among the civil infrastructure to which access should be provided.

In addition, we deem important to distinguish between the accessibility to civil infrastructure and the accessibility to dark fibre.

**The access to dark fibre may be accessible only at distribution and concentration points, while access to civil infrastructure is likely to be accessible at any suitable manhole/access network room, such as for example the manhole near the building entry.**

This is in line with point 69, where it is correctly stated that “*an access point beyond could be any existing network point that is accessible or any network point which can be set up and made accessible without unreasonable effort given the existing network infrastructure*”.

In any case, access to dark fibre shall be granted if the operator cannot provide access to civil infrastructures (e.g. due to the lack of available space).

As to point 37, it is important to highlight that the provision of active or virtual access instead of the passive one shall only occur where the provision of passive access at the first point risks to hamper technological innovation and the provision of VHC connectivity. For example, in case of G.fast technology deployed in an FTTB scenario, the presence of more than one operator with its transmission equipment at the distribution point is not possible because in this case vectoring, a mandatory feature for G.fast, cannot be implemented. This is a technological constraint that should be taken into account by the NRA. In these cases, we agree that the NRA shall prefer imposing on the operator deploying FTTB/G.fast the provision of an alternative access product, such as VULA at the local exchange.

We also agree with the approach at point 38, whereby it is clarified that the determination of the first concentration or distribution point should not be affected by replicability considerations (but technical one). Anyhow BEREC should clarify that the number of hosted end-user connections that an efficient access seeker needs for commercial viability only comes into play for the assessment of the point beyond and not for the imposition of access obligations at the first point.

**Item (e) High and non-transitory economic or physical barriers to replication and item (b) The point beyond the first concentration or distribution point**

As far as concerns the factors to be considered in the assessment of economic and physical barriers listed at points 61, 64 and 66, we agree with the factors highlighted by BEREC with the exception of “*the extent to which building costs can be shared with other undertakings*” (point 61). We deem that the assessment should be based on the costs of a generic efficient access seeker, irrespective of the fact that the access seeker chooses to share the costs with other undertakings.

As regards the procedure and the moment when the assessment of the barriers should be carried out by the NRA, there is the need to avoid burdensome and time-consuming procedures for getting access at the point beyond.

Points 65 and 72 provides that the assessment may be based:

- a) on the specific data of the individual access seeker requesting access and/or
- b) on assumptions on the characteristics of a (generic) efficient access seeker.

**We believe that the existence of barrier should be defined irrespective of the specific data of the access seeker, but only looking at the costs of deployment and the expected revenues according to factors affecting the demand side** (e.g., number and size of multi-dwelling buildings) which are independent of the access seeker features (e.g. expected market share). In this regard, the type of product the access seeker intends to provide for end-users and possibly also wholesale customers should not affect the assessment of the barriers.

This approach is consistent with the (correct) conclusion at point 78 regarding the fact that “*If access has already been imposed under Art. 61 (3) EEC at an access point beyond, the network operator should in principle provide access to this point on a non-discriminatory basis also to other access seekers*”.

The NRA should assess the need to impose symmetric access obligations at the first point or beyond it on the basis of a **general assessment of the level of barriers to entry for a generic efficient access seeker**.

We deem also important to maintain **a flexible approach as to the accessible points where symmetric access shall be provided**: if it is assessed the need to impose a symmetric access obligation pursuant to the 2<sup>nd</sup> subparagraph of article 61(3), the access at the first point and at any intermediate point between the two points (including any suitable manhole/access network room for the access to physical infrastructure) shall not be excluded. The access points shall not be in any case alternative, as instead provided for in the first part of point 19 of the draft guidelines, in order to take into account the different level of “infrastructuration” of operators.

As well, where the NRA defines that the viable concentration point is at the level of the local exchange, the symmetric access obligation shall also apply to the intermediate concentration point/s closer to the end-user.

As regards the imposition of an active/virtual access obligation, we deem that this last resort should be limited to the cases where there are technical constraints to passive access, and not also economic constraints as envisaged at point 77.

#### Item (c): Network deployments to be considered new

BEREC should set a consistent definition of new network deployment for article 61(3) and article 76. In any case, **the exception should be guided by the economic viability** and not by the short time since which the network has been deployed.

#### Item (d): Projects to be considered small

In order to be considered small, a project shall be limited in scope and in the extension (since it has to be local). Small shall refer to the dimension of the deployment and not to the dimension/size of the operator which is deploying the new network, as instead provided for by the draft guidelines.

Therefore, the size of the project is relevant, to the extent in which it affects the viability of the project; instead, the size of the undertaking or its market share in the overall broadband market should not affect the assessment.

The number of end user covered (irrespective of the fact that they are connected) and the extension of the covered area may be used to assess the size of the project. The market share should not be assessed for the overall broadband market, but in the local geographic area object of the new deployment. Operators with a low market share in the broadband market should not be considered small if they have a high market share/footprint in the local area object of the new deployment.

The exception shall apply if the NRA verifies that the NPV of the project would become negative in case of an obligation of granting access to third party at a point beyond the distribution point. Needless to say, the viability of the project cannot in any case be considered compromised due to increased competition as a consequence of the imposition of a symmetric access obligation.

Finally, it is worth highlighting that, as well as the exception under letter a), also the exception under letter b) related to the small size of a project should not apply to publicly financed project.