BEREC
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BEREC Opinion

on the Draft Gigabit Connectivity Recommendation

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Contents

Comments on section "Aims and Scope"

I. Introduction and general remarks

BEREC appreciates the Commission's work on promoting gigabit connectivity, which is one of the general objectives of Directive (EU) 2018/1972 (hereafter the Code or EECC). BEREC notes, however, that the other objectives of the Code, namely promoting sustainable competition, contributing to the development of the internal market and protecting the interests of end users, should be equally considered in this work.

BEREC underlines that competition is crucial in the telecom markets as it creates incentives for companies to innovate, invest in infrastructure, and provide better services to consumers and to ensure a fully functioning internal market. In a competitive market, consumers have the ability to choose from a variety of providers, which forces companies to differentiate themselves by offering unique products and services, better customer service, and more attractive pricing plans. Thus competition fosters innovation and encourages all companies to invest in new technologies and infrastructure, which ultimately benefits consumers.[1]

In the Commission's Draft Gigabit Recommendation, great emphasis is placed on achieving the connectivity objective, and in particular the deployment of very high capacity networks (VHCN) by the SMP operators. While BEREC supports these objectives, it is also important to underline the goal of promoting competition including efficient infrastructure-based competition which – together with the connectivity objective – should be pursued by the NRAs. BEREC notes that alternative operators (including wholesale only) equally invest in the deployment of fibre. Moreover, in a significant number of Member States fibre deployment and take-up are already well underway and important deployments are already planned (or even completed). This observation should from the outset nuance the demand uncertainties faced by SMP operators that could not justify alone the need for relaxing or even abolishing regulatory obligations, as it is always essential to verify the existence of the competition safeguards.

Although the objectives of the BCRD and those of regulating access to the SMP's CEI (civil engineering infrastructure) may converge, since both instruments lead to encouraging deployments, by reducing their costs, BEREC is of the opinion that overlaps between both frameworks should be avoided. While asymmetrical *ex ante* regulation of an SMP operator aims to remove barriers to market entry (on a non-discriminatory basis), and thus only imposes obligations on the dominant operator, the BCRD obligations are not designed to address competition issues, and apply to all operators controlling CE infrastructures, including the SMP operator (when applicable). Yet, as Point 32 of the Draft Gigabit Recommendation highlights, access obligations that are provided for based on the BCRD framework are not sufficient to address problems that SMP *ex ante* regulation is addressing. Therefore, BEREC is of the

[1] Additionally, competition prevents the creation of monopolies, which can stifle innovation and limit consumer choice.

opinion that BCRD rules should only be mentioned when necessary, otherwise they may lead to misinterpretations of the Gigabit Recommendation, and thus to designing access obligations on the SMP that are inconsistent with the *ex ante* regulation objectives, or not sufficient to achieve them (*cf.* details in section "Access to CEI").

It is also a major concern for BEREC that some terms of the Draft Gigabit Recommendation do not seem to be entirely in line with the provisions of the Code. To illustrate this, BEREC is concerned with the fact that the Draft Gigabit Recommendation when NRAs are deciding whether or not to regulate (especially regarding the access price) puts the existence of commercial (access) agreements on the same level as specific provisions that have been carefully negotiated by the EU legislators with regard to co-investment, commitments by an SMP operator and wholesale-only operators, all of which have a specifically designed regulatory process before deciding to deregulate on this basis. This threatens to put the delicate balance which was found in the Code at risk and seems to go beyond the Code.

The wording of the Draft Gigabit Recommendation (Point 39) also exceeds the provision of Article 74 of the Code. The latter states that the NRAs "shall *consider* not imposing or maintaining obligations (…)" whereas the Draft Gigabit Recommendation limits the flexibility left to the NRAs in the wording "the NRA *should* not impose or maintain (…)". Recital (193) of the Code mentions that "*National regulatory authorities should be able to decide to maintain or not to impose regulated wholesale access prices on next-generation networks if sufficient competition safeguards are present*." The final Gigabit Recommendation should be in line with the Code and not go beyond it (see below in section "Pricing flexibility (incl. ERT)"). As a general remark, BEREC considers that the highly detailed and prescriptive provisions of the Draft Gigabit Recommendation risk to unduly limit the discretion given to NRAs by the Code. Also, the detailedness increases significantly the administrative burden when applying the Gigabit Recommendation.

BEREC also notes the absence of sources or impact analysis clearly demonstrating that relaxing regulatory obligations (e.g. removing remedies such as price regulation; allowing for an increase in copper access prices) is a measure that speeds up the deployment or take-up of fibre networks. In general, it is understood that the most important driver for innovation in a market is competition. While BEREC agrees that allowing pricing flexibility may be one suitable way to promote investment in new technologies when sufficient competition safeguards are in place, it also underlines that, as recognized in the Staff Working Document accompanying the Draft Gigabit Recommendation (pp. 69-71), for example, pricing flexibility was so far used only in a relatively limited number of countries, sometimes in combination with other regulatory measures.

As recognised by the Commission in the Staff Working Document accompanying its 2020 Recommendation on Relevant Markets[2], the transition between existing and new Recommendations raises issues for all stakeholders. This applies equally to the transition

[2] Recommendation (EU) 2020/2245 and SWD (2020) 337 page 81/82. See also BEREC Opinion on the Draft Recommendation on relevant markets, BoR (20) 174, pages 3, 28-30.

between the 2010 NGA and the 2013 NDCM Recommendation[3] and the Draft Gigabit Recommendation. NRAs will need time to prepare for any implications arising from the Draft Gigabit Recommendation once adopted. The circumstance may arise that an NRA is in the process of conducting a market review (or an examination of remedies), i.e. has opened a proceeding already formally, and at the time of adoption of the Draft Gigabit Recommendation has already conducted a public consultation in accordance with Article 32/33 of the Code. It would be most helpful if the Commission could provide guidance on these scenarios. The Commission should also make it clear that, where an NRA has already conducted a public consultation on the basis of the previous Recommendations, the mere adoption of the Draft Gigabit Recommendation should not *per se* require the NRA to conduct a new public consultation. In addition, the entry into force of the Draft Gigabit Recommendation should be without prejudice to existing adopted market analysis decisions (whether market definition, SMP assessments or obligations imposed) adopted in accordance with Article 64 and 67 of the Code. Summing up the Gigabit Recommendation should foresee an appropriate transitional period before its full application, at least all formally open proceedings may be finished on the basis of the 2010 NGA and the 2013 NDCM Recommendation.

II. Putting different types of agreements (commercial agreements, co-investment, commitments) on the same level despite the EECC's explicit differentiation and implications thereof

(a) Recital (7) DR[4] seems to disregard the specific value the EECC attributes to agreements put forward as commitments under arts. 76 or 79 EECC by failing to distinguish them from mere *commercial* agreements (concluded outside the EECC framework for commitments). Accordingly, all these agreements are equally but misleadingly described as "*allow[ing] the withdrawal of regulatory obligations, or the application of lighter-touch regulation*".

Indeed, under the EECC only *co-investment* commitments — where they are made by an *SMP* operator and comply with *all* the conditions of Article 76(1) EECC — must, *in principle*, result in total or partial deregulation of the new VHCN (as per Article 76(2) EECC). Moreover, while commitments on cooperative arrangements made pursuant to Article 79(1)(a) EECC *can* lead to deregulation, NRAs that intend to make such commitments binding are only obliged to *assess* the impact this would have on remedies (that already exist or would otherwise be imposed). As regards commercial agreements (regardless commitments), the sole obligation for NRAs under the EECC (Article 68(6)) is that their influence on competitive dynamics must be considered in order to determine whether a new market analysis is required or, if not,

[3] Recommendation on regulated access to NGA 2010/572/EU; Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment 2013/466/EU

[4] BEREC refers to "Recitals" for the first part of the Draft Gigabit Recommendation and to "Points" when dealing with the recommendations in the second part of the Commission's document. All amendment proposals of BEREC are shown in the Annex to the BEREC Opinion.

whether a review of remedies imposed is needed.[5] **NB:** the SWD (pp. 17-18) —by contrast to Recital (7) DR — is in line with the EECC.

(b) Point 4 DR seems to express the same disregard just mentioned above, i.e. the differences between "co-investment agreements, commercial wholesale agreements or other cooperative arrangements" are disregarded.

More specifically, point 4 (a) should be clarified by stressing that *only* (i) co-investment commitments (made under, and in total compliance with, Article 76 EECC) and (ii) the case of wholesale-only SMP operators (fitting the criteria of Article 80 EECC) must, *in principle*, result in light-touch regulation. Indeed, for all other cases (i.e. cooperative arrangements under Article 79 EECC and other commercial agreements), the EECC does not provide for a deregulatory bias but asks only the NRAs to consider the impact of such commercial agreements that influence the competitive dynamics.

(c) Point 7 DR seems to blend the scenarios of commercial agreements (for access to VHCN) without commitments together with the specific case of commitments under Article 79 EECC (access conditions in cooperative arrangements ultimately made binding by an NRA).

The text indicates, as a consequence of both situations, that "*NRAs should consider monitoring the impact of those agreements and refrain from introducing intrusive remedies, in particular price control obligations".* If these commercial agreements have the same effect as the commitments, why should SMP operators still consider proposing commitments? Article 79 EECC will potentially lose its purpose and NRAs will correspondingly lose their "negotiating" power and leverage in this respect. The Gigabit Recommendation should instead say that in the presence of commitments NRAs are expected to give more relevance to the agreements in place without, however, constraining NRAs further than the EECC already does. In BEREC's response to the targeted consultation on the review of access Recommendations (**BoR (20) 169**), BEREC pointed out that commercial agreements that have a relevant impact on the market are basically those designed for a rather long duration, that have a high degree of reliability/binding force (see Article 76(2) and 79 EECC) and a significant structural effect on the relevant market. These are the agreements that can justify a reduction of regulatory control.

Thus, BEREC asks the Commission to clearly distinguish "commercial agreements" from "regulatory commitments acc. to Article 76/79 of the Code.

[5] So far only RTR considered commercial agreements in its market analysis, cf. Case AT/2022/2039 – RTR notification of Market 1/2020.

III. The restrictions on possible price control measures and, potentially, other intrusive remedies

Point 7 DR seems to impose restrictions on NRAs' ability to impose price controls. These restrictions would furthermore extend beyond price control measures to other undefined and unidentified "intrusive remedies". The conclusion follows from the text's general prescription — i.e. "NRAs should […] refrain from introducing intrusive remedies, in particular price control obligations" (own emphasis), which "should be considered by NRAs only where necessary to address significant competition problems".

Point 7 DR departs from the text of the EECC. Article 74 EECC already provides a detailed framework for assessing whether price control obligations "would be appropriate". The specific scenario described in the DR is not envisaged by the EECC and conversely limits the discretionary power of the NRAs which is attributed by the Code. The same goes for the stated prerequisite of a "significant competition problem". At most, it can be derived from Recital (192) EECC that "[p]rice control may be necessary when market analysis in a particular market reveals *inefficient* competition". More generally, Article 68 EECC prescribes that NRAs "shall choose the least intrusive way of addressing the problems identified". Notwithstanding other, remedy-specific, limitations *in the EECC*, it therefore cannot be stated (as in the DR) that NRAs should refrain from imposing intrusive remedies, in cases that are not envisaged by the EECC or, a fortiori, generally. The Gigabit Recommendation should be in line with the Code and not go beyond it.

IV. Other issues

While BEREC agrees that a periodic review of the geographic segmentations of remedies (Point 13 DR) can be useful in certain circumstances, it wonders if an annual review in between market reviews does not overly impede a predictable regulatory approach, which is also a general objective of the Code.[6]

Finally, **Point 8 DR** could be read as excluding *cable* networks. Given that the latter can (under DOCSIS 3.1) be viewed as VHCN, the scope of the DR should be clarified.

V. Proposal for amendments

With all the foregoing in mind, we propose the **following amendments**:

- **Recital (7) DR: "***Where a market is found not to be competitive and one of several undertakings have been designated as having SMP, Directive (EU) 2018/1972 provides for situations where market-driven solutions should be preferred over regulatory obligations, in particular intrusive obligations. Under certain conditions, Directive (EU) 2018/1972 allows the withdrawal of regulatory obligations, or the application of lighter-touch regulation. This is particularly appropriate (i) for*

[6] Cf. Article 3 §2 (c) of the Code.

commitments on co-investment agreements~~, commercial wholesale agreements or (ii) other cooperative arrangements, proposed by the SMP operator~~ pursuant to Article 76 ~~or Article 79, or both~~ of Directive (EU) 2018/1972, or where the SMP operator is a wholesale-only operator (Article 80 of Directive (EU) 2018/1972). Furthermore, and as a general principle, NRAs should be open to and duly take into consideration market initiatives, such as commercial agreements, and business models that contribute to VHCNs deployment, beyond what would happen in their absence, while enabling sustainable competition in downstream markets." **(additions underlined)**

- **Point 4 DR: "***This Recommendation is without prejudice to the treatment of situations justifying the withdrawal of regulatory obligations, ~~or market-driven solutions~~ in accordance with Directive (EU) 2018/1972, in particular:*
  a) in the presence of commitments on co-investment agreements~~, commercial wholesale agreements or other cooperative arrangements, proposed by the SMP operator~~ pursuant to Article 76~~, Article 79, or both,~~ of Directive (EU) 2018/1972,
  b) *where the SMP operator is a wholesale-only operator in the sense of Article 80 of Directive (EU) 2018/1972*" **(additions underlined)**

- **Point 7 DR: "***Without prejudice to Article 76 of Directive (EU) 2018/1972, the existence of commercial agreements and cooperative arrangements (including those to which the SMP operator is not a party) should also be duly taken into account by the NRA when considering the imposition of possible regulatory obligations on SMP operators. This is especially the case where the SMP operator offers legally binding commitments under article 79 of Directive (EU) 2018/1972 on conditions for access, including cooperative arrangements. ~~In particular, in areas where commercial agreements or legally binding commitments or both are in place, under which access to a VHC network is available to third parties, NRAs should assess whether the terms and conditions proposed by the SMP operator can be considered fair and reasonable and whether the agreements or commitments can preserve competition. Where this is the case, NRAs should consider monitoring the impact of those agreements and refrain from introducing intrusive remedies, in particular price control obligations. Such price-control obligations should be considered by NRAs only where necessary to address significant competition problems remaining or that might subsequently emerge on the market~~*."

- **Point 8 DR**: "*The principles set out in this Recommendation apply to the market for wholesale local access provided at a fixed location (market 1 of the Recommendation (EU) 2020/2245). The principles set out in this Recommendation also apply to other wholesale fixed access markets identified by NRAs, which are not covered by the Recommendation (EU) 2020/2245 but which are susceptible to ex ante regulation, and cover the following network layers, such as for example: (a) access to the civil-engineering infrastructure, (b) unbundled access to the copper and fibre loops, or the*

*copper sub-loop, (c) virtual network access, and (d) wholesale broadband access (bitstream services) over copper, **coax**, and fibre networks."* **(additions underlined)**

- **Point 13 DR: "***When NRAs differentiate remedies because differences in the conditions of competition are not stable enough to define separate geographic markets, they should consider updating the resulting segmentation periodically ~~– and potentially annually –~~ within the period of validity of the market analysis in which the segmentation is applied. The conditions of such updates should be clearly defined in the market analysis itself, and should be based on the same criteria as those used for the initial geographic segmentation of remedies, thereby assuring maximum predictability and a level playing field*."

Comments on section "Non-discrimination"

- ✓ **Recital (13)**: *NRAs' experience in imposing non-discrimination obligations under Article 10 of former Directive 2002/19/EC of the European Parliament and of the Council[10] and currently under Article 70 of Directive (EU) 2018/1972 indicate that regulatory approaches still vary across the EU. Nevertheless, there is a broad agreement that the non-discrimination obligation is an essential tool of ex ante regulation to foster competition in the presence of a vertically integrated SMP operator.* ***On the other hand, where the SMP operator is a wholesale-only operator meeting the conditions set out in Article 80(1) of Directive (EU) 2018/1972, it would in principle have no incentive to discriminate between downstream providers. As a consequence, NRAs should refrain from imposing non-discrimination obligations on wholesale-only operators, unless the NRAs can establish that there are specific circumstances that justify imposing such obligations.***

  This recital is in contradiction with Article 80(2) of the EECC *"If the national regulatory authority concludes that the conditions laid down in paragraph 1 of this Article are fulfilled, it may impose on that undertaking only obligations pursuant to Articles 70 and 73 or relative to fair and reasonable pricing if justified on the basis of a market analysis including a prospective assessment of the likely behaviour of the undertaking designated as having significant market power."* The EECC leaves NRAs the possibility to impose obligations regarding access, non-discrimination or fair and reasonable pricing (if justified on the basis of a market analysis) whereas the proposed recital more generally states that NRAs should refrain from imposing ND obligations. BEREC suggests therefore to remove the two last sentences. To the extent a ND obligation is imposed on a wholesale-only operator with SMP, the NRA in any event has to justify the imposition of such remedy (notably under the proportionality principle).

- ✓ **Recital (15)**: ***NRAs should encourage the SMP operator(s) to offer commitments under Article 79 of Directive (EU) 2018/1972 with a view to ensuring the effective and efficient application of the non-discrimination obligation.*** *NRAs should assess the costs and benefits of imposing the provision of regulated wholesale inputs on an EoI basis, compared to other forms of non-discrimination obligations, in particular EoO.*

  Article 79 of the EECC gives SMP operators the possibility to offer commitments: *"Undertakings designated as having significant market power may offer to the national regulatory authority commitments*…" Obliging NRAs to encourage such operators to offer commitments, however, would go further than what the Code provides for and might not always be useful or appropriate. We suggest therefore to delete the word "encourage" and substitute the sentence with the following "*NRAs should duly take into account the commitments under Article 79 of Directive (EU) 2018/1972 with a view of assuring the effective and efficient application of the non-discrimination obligation*". "

  Similar comments are made for Point 27 (see below).

Choice between EoI and EoO (Points 14-16)

✓ **Point 15**: *In conducting such proportionality assessment, the NRA should take into account, in particular:*

- *(a) incremental costs and compliance delays resulting from the application of EoI or EoO, including the costs of monitoring non-discrimination;*
- *(b) the potentially linked non-imposition of regulated wholesale access prices on VHCNs;*
- *(c) the potentially positive effect the application of strict non-discrimination in the form of EoI or EoO might have on investment in VHCNs, innovation and competition;*
- *(d) any voluntary commitment by the SMP operator to provide wholesale inputs to access seekers on an EoI or EoO basis, as long as such a voluntary offer meets the conditions set out in this Recommendation;*
- *(e) the number and size of the SMP operator(s);*

The decision on whether to apply an EoI or EoO regime should also be dependent on the current implemented standard of equivalence. For example, if an elaborate EoO regime is implemented and works well, it may not be proportionate to force the SMP operator to implement EoI. And vice versa: if EoI is already implemented, the NRA should also take this into account when conducting the proportionality assessment. Also, the proportionality assessment should consider the current standard of equivalence applicable for the products, services and associated facilities that are already mandated in an existing market. When the same or similar products, services and associated facilities are mandated in a different market and are already provided to the standard of EoI, the EoI standard should be continued unless a change to the standard of equivalence can be objectively justified. Therefore, BEREC suggests adding in Point 15 a last point **"(f) experiences from currently implemented standards".**

This proposal is also in line with the BEREC response (BoR (20) 169) to question 3 of the targeted consultation. Therein BEREC stated that "*Depending on the circumstances, however, EoO could be more appropriate and proportional in the individual case."* In particular, *"BEREC observes that, in practice, the boundary between EoI and EoO at a product level will not be clear-cut and that EoI is unlikely to be implemented across all of the inputs to wholesale products."*

BEREC continued that "*Proportionality testing on a product-by-product basis is likely to conclude that some inputs to a specific product can reasonably be delivered on an EoI basis, but that other inputs to the product (not so easily susceptible to EoI) are more appropriately delivered on an EoO basis. Further complications may arise where legacy products (e.g. wholesale line rental) are bundled with NGA products."*

✓ **Point 16**: *Where proportionate, strict non-discrimination in the form of EoI or EoO should be applied at the most appropriate level or levels in the value chain to those*

wholesale inputs which the SMP operator provides to its own downstream businesses. In general, NRAs should justify their choices between EoI and EoO on a wholesale product by product basis, taking national circumstances into account. If, however, a single wholesale input is used in multiple retail products, then the decision should be made on an input by input basis.

In its response (BoR (20) 169) to the targeted consultation, BEREC stated *that "the boundary between EoI and EoO at a product level will not be clear-cut and that EoI is unlikely to be implemented across all of the inputs to wholesale products."* BEREC continues to explain "…*proportionality testing on a product-by- product basis is likely to conclude that some inputs to a specific product can reasonably be delivered on an EoI basis, but that other inputs to the product (not so easily susceptible to EoI) are more appropriately delivered on an EoO basis."* BEREC understands that the proposed recommendation takes the remarks from BEREC into account but as the last sentence connects "*single wholesale input*" with "*an input by input basis",* it's unclear what's meant by "input by input basis" for a singular input. At the same time, the SWD more refers to "*multiple wholesale products*" instead of "*multiple retail products*".

Should it rather be *"single wholesale product*" or *"multiple wholesale products"?* This open interpretation might lead different NRAs to approach similar practices in a different way which might ultimately result in diverting decisions and thus in less regulatory predictability. A more detailed explanation of what is actually meant will prevent this type of deviations.

Ensuring technical replicability (Points 19-25)

✓ **Point 21**: *When assessing the technical replicability of the SMP operator's new retail offer, the NRA should take into account:*

- *(a) whether the corresponding wholesale input(s) for ordering, delivery and repair necessary for an efficient operator to develop or adapt its own systems and processes in order to offer competitive new retail services are made available to access seekers and*
- *(b) the availability of corresponding SLAs and KPIs.*

With regard to Point 21, BEREC wants to mention that the Recommendation 2013/466/EU also included the following statement: ***"… at a reasonable period before the SMP operator or its downstream retail arm launches its own corresponding retail service."*** under point (a), stressing the importance of having simultaneously access to the relevant wholesale inputs and information. Since timely access is important for promoting effective competition and a level playing field, we suggest to reintroduce this text.

✓ **Point 25**: *If the NRA considers that a retail offer which is not technically replicable would result in significant harm to competition, it should require, under Article 30 of Directive (EU) 2018/1972, the SMP operator to withdraw or delay the provision of the relevant retail offer pending compliance with the requirement of technical replicability.*

The reference to Art 30 EECC (*Compliance with the conditions of the general authorisation or of rights of use for radio spectrum and for numbering resources and compliance with specific obligations*) seems not to be correct as not relevant in this context. If the technical replicability is a condition imposed in the market analysis, NRAs can apply the market analysis rules, especially in case the technical replicability control is imposed ex ante and it is done by NRAs. We therefore suggest that this point is clarified.

Monitoring compliance with non-discrimination obligations (Points 26-27)

✓ **Point 27**: ***NRAs should encourage and duly consider any commitments proposed by the SMP operator in relation to non-discrimination*** *in accordance with Article 79 of Directive (EU) 2018/1972. In particular, such commitments can be proposed in relation to KPIs, SLAs and SLGs, including for their conditions, especially when access seekers agree with the proposals advanced by the SMP operator.* ***NRAs should use their powers to foster the proposal of commitments by the SMP operator.*** *NRAs should foster a multi-stakeholder dialogue between the SMP operator and access seekers to reach an agreement (i) on a comprehensive set of KPIs, SLAs and SLGs and (ii) on their terms and conditions, including an appropriate interval for updating the KPIs, SLAs and SLGs.*

In line with the suggestion made above for Recital (15), BEREC suggests deleting "*should* encourage" and just keeping "**should duly consider**".

Still related to Point 27 BEREC suggests to remove the sentence "*NRAs should use their powers to foster the proposal of commitments by the SMP operator*." In this regard, BEREC wants to point out that an agreement between the SMP operator and access seekers on KPIs, SLAs and SLGs may not be reached (or is in fact very unlikely to be reached) and that in such a case it is the task of the NRA to determine appropriate values. Therefore, the following should be added: "… *to reach an agreement* ***or inform a decision*** …"

Point 27 would thus read as follows:

Point 27-amended: *NRAs should* ~~***encourage and***~~ *duly consider any commitments proposed by the SMP operator in relation to non-discrimination in accordance with Article 79 of Directive (EU) 2018/1972. In particular, such commitments can be proposed in relation to KPIs, SLAs and SLGs, including for their conditions, especially when access seekers agree with the proposals advanced by the SMP operator.* ~~***NRAs should use their powers to foster the proposal of commitments by the SMP operator.***~~ *NRAs should foster a multi-stakeholder dialogue between the SMP operator and access seekers to reach an agreement* ***or inform a decision*** *(i) on a comprehensive set of KPIs, SLAs and SLGs and (ii) on their terms and conditions, including an appropriate interval for updating the KPIs, SLAs and SLGs.*

Asymmetry of information (Point 30)

Point 30: *When the wholesale arm of the SMP operator has prior knowledge of access seekers' deployment plans, NRAs should ensure such information is not shared with the retail arm of the SMP operator, to prevent the SMP operator from gaining an undue competitive advantage. At a minimum NRAs should ensure that the personnel involved in the retail activities of the SMP operator do not participate in company structures of the SMP operator responsible, directly or indirectly, for managing access to wholesale inputs. NRAs* ***should*** *require the SMP operator to provide an annual report documenting (i) its practices to prevent the sharing of sensitive information between its wholesale and retail arms; (ii) any allegations of violation, and any (iii) corrective actions that it has taken.*

BEREC agrees that it is important that information is not shared between the retail and the wholesale arm of the SMP operator. However, depending on the specific circumstances, an annual report as mentioned in the last sentence of Point 30 might not be proportionate. The last sentence should therefore be changed to "NRAs ***may*** require …" (instead of should).

Annex I

BEREC agrees with the content on Annex I, but wants to make the following comment on point (11) ("*NRAs should monitor any delays in the payment of penalties so as to ensure their dissuasive effect.*"):

In practice it can be very difficult for NRAs to monitor when payments are made and compare this to the time when they should have been made. A permanent monitoring may also be very burdensome and might only be proportionate if problems have been identified in the past. The text should be changed to reflect this, e.g., by adding **"In particular if significant problems have arisen in the past**, NRAs should …".

Comments on section "Access to CEI of the SMP Operator (incl. monitoring)"

Topics addressed in the 2010 NGA and 2013 NDCM Recommendations and during the revision process. BEREC notes that, compared to the 2010 NGA Recommendation, some remarks of Annex II regarding the application of the principle of equivalence for access to civil engineering infrastructures are not included in the Draft Gigabit Recommendation. These are mostly related to specific aspects concerning the reference offer and NRAs' monitoring of the access to CEI. Furthermore, some aspects that have been analysed in the revision process of the Access Recommendations (i.e. within the targeted consultation or the study performed by Visionary Analytics[7] for the EC) have not been explicitly included in the Draft Gigabit Recommendation. Specifically, this is the case for the topic of reparation, renovation and de-congestion of existing CEI to make capacity available for access seekers.

BEREC interprets these omissions in the Draft Gigabit Recommendation and the corresponding Annex II as the EC's explicit decision not to restrict NRAs' discretion in these aspects, but rather leave this discretion to NRAs to be able to evaluate country-specific circumstances and take proportionate decisions in the context of effective access to CEI. In fact, depending on the respective national circumstances, BEREC is of the opinion that the aforementioned aspects might be of unchanged relevance in remedy decisions performed in some Member States.

Relationship between the BCRD and SMP regulation. BEREC agrees with the statement contained at Point 32 of the draft Gigabit Recommendation, where it is noted that in principle access obligations to physical infrastructure resulting from the BCRD are likely not to be sufficient to address the competition problems identified in market analyses carried out under articles 64 and 67 of the Code.

In its response to the targeted consultation on the revision of the Commission's access recommendations (BoR (20) 169), BEREC already stressed that the BCRD and SMP regulation seek to achieve two objectives that are related but nevertheless may differ, that is, facilitating and incentivising the roll-out of high-speed electronic communications networks by promoting the joint use of existing physical infrastructure, on the one hand, and safeguarding the conditions of competition in a given market via the imposition of regulatory obligations to the operator that holds SMP, on the other hand. In this context, the obligations set under the BCRD may not be sufficient to remedy important competition problems identified under SMP regulation, which requires a frequent and more general regulatory intervention. Bearing this in mind, it should also be recalled that the decision on whether the BCRD may be sufficient, on its own, to ensure access to the physical infrastructure of the SMP operator, is a matter that is open to NRAs to assess on an individual basis in the context of their market reviews.

[7] https://op.europa.eu/en/publication-detail/-/publication/44c8f4c0-32e6-11ec-bd8e-01aa75ed71a1/language-en

Lex specialis. BEREC agrees with the statements set out at Recital (19) regarding the scope of the legal principle of *lex specialis* (according to which SMP-based access obligations prevail over the more general access obligations stemming from the BCRD). However, for the sake of clarity, the Gigabit Recommendation should also indicate that the principle of *lex specialis* does not apply in the case of assets that are not subject to the access obligations that may have been imposed on the physical infrastructure of the SMP operator on the basis of SMP regulation[8]. This could for instance be the case if the access obligations to the physical infrastructure of the SMP operator are limited in their scope (e.g. the SMP remedy only covers existing infrastructure of the SMP operator but not new infrastructure) or in their geographic remit (e.g. the SMP remedy only covers access to physical infrastructure in non-competitive areas, but not in competitive areas).

In BEREC's view, with regard to the assets of the SMP operator that are not covered by SMP regulation, the BCRD will continue to apply, as there is no risk in those instances of two access regulatory regimes being applied simultaneously to the same physical infrastructure.

Single information point (SIP). Recital (23) indicates that the effectiveness of regulated access to the CEI of the SMP operator "*is highly reliant on the availability for access seekers of information about the location, spare capacity, and availability of that infrastructure. Where the relevant information is contained in an internal database of the SMP operator, all access seekers, including the SMP operator's retail arm, should be provided with equivalent access to that database*". In addition, this Recital 23 points out that depending on national circumstances, the SMP operator may be required to fulfil its regulatory obligation to make available information on its civil-engineering infrastructure via a single information point (SIP) as provided for in the BCRD.

In turn, while Point 38 does not make any specific reference to the creation of a SIP as foreseen under the BCRD, it establishes that NRA should collaborate with other authorities to create a database which should be accessible to all operators, and which should contain specific information on the geographical location, available capacity and other physical characteristics of all civil-engineering infrastructure which could be used for the deployment of VHCNs in a given market or market segment.

In this regard, BEREC believes that the Gigabit Recommendation should be explicit as to whether the references contained in Point 38 are equivalent to the references made to the SIP in Recital (23). In the opinion of BEREC, in Point 38 the Gigabit Recommendation should clarify the different purposes and regulations existing between the design of the obligation of transparency of the SMP operator, consisting of giving access to its internal database to alternative operators, and the access to the SIP foreseen currently in the BCRD. As indicated in Recital (23), the effectiveness of the regulated access to the CEI of the SMP operator lies in guaranteeing competitors equal conditions of access to information on CEI, due to the relevance of the information included in the internal database of the SMP operator to promote

[8] This understanding is also to some extent incorporated in the Draft of the Gigabit Infrastructure Act, Recital (19).

roll-out of high-speed electronic communication networks under competitive conditions. On the other hand, the BCRD does not pursue the same objectives through the regulation of the SIP.

While BEREC agrees that full access by third parties to a well-developed SIP, where complete information on the location, availability and capacity of the SMP operator's infrastructure is made available, might be sufficient for the fulfilment of the transparency obligations generally foreseen under the SMP regime, it is important to explicitly state that the impact of such an instrument on the transparency measures should be assessed individually by each NRA in the context of its market analysis, after consultation with relevant stakeholders such as the SMP operator and access seekers. At present, the setting of SIPs is not uniform across countries, so the decision on whether access to the SIP is sufficient to ensure a high level of transparency will be highly case-specific. In any case, a SMP obligation related to transparency in access to infrastructure should be imposed independently from the desirable SIP implementation along Europe.

Notwithstanding the foregoing, BEREC considers that the references to the specific information that the SIP should provide should rather be addressed in the Gigabit Infrastructure Act and not in Point 38 of this Recommendation.

"Up to end user premises" and "end-to-end" wordings in Points 33 and 34. BEREC considers that the recommendation should not be so prescriptive regarding the concrete form of infrastructure competition at the local level, and should avoid this specification. The Commission is referring here to end-to-end competition: however, it is also possible to consider infrastructure competition at a local segment level. This is what is used by some authorities (for example, ARCEP does not consider end-to-end competition but competition at the local segment level). These two ways of considering competition can hardly be implemented simultaneously on the same market, without having one method that is more relevant than the other.

Clarification about the "network-specific access obligations" wording in Point 34 in the sentence *"In such cases, NRAs should set up an appropriate transition period for the application of network specific access obligations before relying solely on regulated access to civil-engineering infrastructure, in order to allow an efficient operator sufficient time to duplicate the access network."* BEREC interprets *"network-specific access obligations*" as all SMP-related access obligations under the Gigabit Recommendation other than access to civil engineering infrastructure. For the sake of clarity, BEREC considers that it would make sense to specify it in the sentence.

Observation about the timeframe for lifting the regulation and possible geographic segmentation of the remedies: While lifting regulation, when the prevailing market conditions justify doing so, is not problematic per se, it should not be done in too short a timeframe in order to avoid the reappearance of the competitive problems that justified regulation in the first place. Besides the potential setting of a transitory period whereby network-specific and CEI obligations could coexist temporarily in order for competition to

materialize (cf. Point 34), the recommendation should also acknowledge that the presence of different competitive conditions prevailing in different geographic areas (e.g. urban vs. rural) might justify the geographic segmentation of the remedies, whereby in some areas only the CEI obligations would suffice, while in other areas those obligations would still be coupled with network-specific obligations (cf. Staff Working Document accompanying the Recommendation (EU) 2020/2245 on Relevant Markets).

Comments on section "Non-imposition of regulated wholesale access prices on VHCNs" (Pricing Flexibility) and Annex III (economic replicability test)

The draft Gigabit Recommendation is based on a logic that is similar to that of the 2013 NDCM Recommendation on non-discrimination and costing methodologies. However, it significantly widens the situations where NRAs should refrain from imposing a price control obligation on wholesale access to VHCN. This development calls for remarks on two levels: first, the coherence between the draft Gigabit Recommendation and the provisions of the Code and, second, the justification to grant pricing flexibility to SMP operators in some of the situations considered by the Commission. Additionally, some improvements or clarifications to the text would be welcome in relation to the economic replicability test.

In the following more detailed comments on specific recitals and points of the draft recommendation are made.

NRAs flexibility in the choice of remedies

Recital (25): *Taking into account the rate of materialisation of demand for the provision of very high capacity services, it is important, in order to promote connectivity and access to, as well as take-up of, VHCNs, to allow those operators investing in VHCNs a certain degree of pricing flexibility where sufficient competition safeguards are present, as mentioned in Recital 193 of Directive (EU) 2018/1972. **Such pricing flexibility is necessary** to enable SMP operators to test price points and conduct appropriate penetration pricing. It also allows SMP operators and access seekers to share some of the investment risk by differentiating wholesale access prices according to access seekers' chosen level of commitment. This could result in lower prices for long-term agreements with volume guarantees, which could reflect access seekers taking on some of **the risks associated with uncertain demand**. In addition, pricing flexibility at wholesale level is necessary to allow both the access seeker and the SMP operator's retail business to introduce price differentiation on the retail broadband market in order better to address consumer preferences and foster penetration of very high-speed broadband services. **Given that competition, and in particular infrastructure competition, has significantly progressed in many markets and areas across Europe since the adoption of Recommendation 2013/466/EU, there is room for applying pricing flexibility on a significantly larger scale than has been the case so far**.*

BEREC considers that, 10 years after the publication of the 2013 NDCM Recommendation, the uncertainty about the demand is not necessarily such an important factor any more in a number of Member States. VHCN coverage and take-up are getting high in various countries and some SMP operators continue to invest. At the end of this recital, the Commission itself recognizes that infrastructure competition has significantly progressed in Europe. According to several Member States, pricing flexibility has contributed to that result (however, these experiences may be too limited in number to draw general conclusions). BEREC suggest

therefore to adapt the first sentence of Recital (25) in "**When there are uncertainties regarding the rate of materialisation of demand**…".

In addition, pricing flexibility at wholesale level does not seem to be "necessary" to allow price differentiation at the retail level, as cost orientation may be conceived in such a way (e.g. by tiering the wholesale price) that price differentiation at the retail level is possible. In absence of clear evidence about a causal link between pricing flexibility and VHCN take-up, the words "*is necessary*" should also be replaced by the words "**may be one suitable way**" in the sentence, as its usefulness will depend on national market circumstances.

In the latest sentence of the recital, the Commission seems to prejudge that infrastructure competition creates room for applying pricing flexibility on a significantly larger scale. However, infrastructure competition, notably in the case of duopolistic or oligopolistic markets, does not necessarily lead to retail price constraints and the retail prices for accessing high speed networks may sometimes be maintained at an artificially high level. For these reasons, the end of this sentence could be adapted in: "there **could be room, depending on the circumstances,** for applying pricing flexibility on a ~~**significantly**~~ larger scale than has been the case so far".

Point 39: ***The NRA should not impose or maintain*** *regulated wholesale access prices on VHCN wholesale inputs, pursuant to Article 74 of Directive (EU) 2018/1972, in instances where – as part of the same measure – the NRA imposes on the SMP operator non-discrimination obligations concerning VHCN wholesale inputs, pursuant to Article 70 of Directive (EU) 2018/1972, that are consistent with all of the following: […]*

The wording of the draft Gigabit Recommendation exceeds the provisions of Article 74 of the Code that state "**National regulatory authorities *shall consider* not imposing or maintaining** obligations pursuant to this Article […]" and therefore limits the flexibility that the Code leaves to the NRAs. BEREC would like to point out that this wording of Article 74 was specifically amended as a result of discussions and negotiations inherent to the co-legislative procedure.[9] Therefore, BEREC deems it inappropriate that the Commission seems now to give another interpretation of the outcome of this legislative process via a recommendation. Also, Recital (193) of the Code mentions that "National regulatory authorities **should be able to decide to maintain or not to impose** regulated wholesale access prices on next-generation networks if sufficient competition safeguards are present." The wording of the draft Gigabit Recommendation should be aligned with that in Article 74 of the Code.

[9] Cf. Position of the European Parliament adopted at first reading on 14 November 2018 with a view to the adoption of Directive (EU) 2018/… of the European Parliament and of the Council establishing the European Electronic Communications Code (EP-PE_TC1-COD(2016)0288)).

Circumstances that justify the non-imposition of regulated wholesale access prices on VHCNs

Recital (28) : *[…] Moreover, in the context of increasing VHCNs coverage and more granular geographic analysis,* ***emerging or prospective infrastructure-based competition*** *could also be found to sufficiently constrain the SMP's operators' ability to raise its prices.* ***Where VHCNs deployment has not yet started within the area, NRAs should assess the likelihood and viability of future VHCN deployment.*** *[…]*

Point 39 (ii): ***from emerging or prospective infrastructure-based competition****, in areas where the deployment of alternative infrastructures has started and is expected to cover a significant part of the area within the market review period, or*

Point 39 (iii): *in areas where there is clear evidence to show that* ***the deployment of alternative networks is realistic and viable****, in particular where such infrastructure competition is ensured by effective and non-discriminatory access to civil-engineering following the conditions set out in points 31 to 38 of this Recommendation.*

Recital (28) and Point 39 (d) (ii) and (iii) consider the situations where infrastructure competition should justify pricing flexibility. As the objectives of the Code are not listed in order of priority but have the same value, BEREC underlines that the objective to promote VHCN should not be considered in isolation from other objectives, in particular the objective of promoting competition. In the 2013 NDCM Recommendation, the Commission considered as demonstrable price constraints the constraints from the presence of alternative infrastructures or the take-up of upstream wholesale inputs (Point 48 of 2013 NDCM Rec.) or the fact that retail services were provided over one or more alternative infrastructures (Point 49 of 2013 NDCM Rec.). The draft Gigabit Recommendation significantly lowers the threshold for a demonstrable price constraint to be considered. In some of the situations considered by the Commission, especially when the "prospective" element of competition plays a decisive role, BEREC has strong doubts that a demonstrable price constraint may exist.

BEREC recalls that, as defined in Article 63 of the Code, an undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, namely a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers. In addition, it is generally recognized that deploying electronic communications infrastructures is costly and time-consuming and that such infrastructures are difficult to duplicate. The possibility of a demonstrable price constraint in the presence of significant market power should therefore be considered with caution.

In that perspective, BEREC is especially concerned that the Commission proposes to consider the non-imposition of regulated wholesale access prices on VHCNs when infrastructure competition is only "emerging", "prospective", or at any other low level of "likelihood" or "viability". BEREC notes that this would imply the existence of at least *potential* competition. However, the very notion of a "demonstrable" retail price constraint is irreconcilable with

references to possible developments of the market in a near or distant future. As the real impact on prices of future developments cannot be predicted, it is inappropriate to make assumptions about the existence of future demonstrable price constraints.

Besides, according to EU case law, potential competition cannot be inferred merely from the purely hypothetical possibility of a market entry or from the mere wish to enter the market; real and concrete possibilities of entry must exist, evidenced by the factual context at hand and an analysis of the structures of the market[10]. In addition, experience shows that significant delays of announced projects (often for several years) are not unusual. And, even if the roll-out materialises, a pricing constraint is not necessarily observed. The related passages of Recital (28) and Point 39 (ii) and (iii) should be deleted or, at least, strongly nuanced.

Furthermore, it is important to highlight that the mere existence of different infrastructures as such does not necessarily lead to retail price constraints (for example in duopolistic or oligopolistic markets where there may not be any, or insufficient, price competition at wholesale level).[11] Therefore, NRAs should in general take due consideration of the impact that pricing flexibility may have on competition.

BEREC is therefore of the opinion that future rollout should not be the only criterion which is taken into account when deciding on allowing pricing flexibility in certain geographic areas. For example, previous BEREC reports[12] have shown that NRAs usually apply several criteria when deciding about a geographic differentiation of remedies. In that case, it is recognised in Point 12 of the draft Gigabit Recommendation, that NRAs may use various criteria such as the number and characteristics of competing networks, distribution of and trends in market shares, prices and behavioural patterns. The Point 39 (ii) and (iii), as well as the Recital (28) should reflect the fact that the NRAs have the same flexibility when considering to grant pricing flexibility. In addition, the time horizon of any future rollout is important to assess the existence of a demonstrable pricing constraint.

BEREC underlines that, according to the Point 13 of the draft Gigabit Recommendation, NRAs should consider updating the resulting segmentation periodically within the period of validity of the market analysis in which the segmentation is applied. In the same perspective, NRAs could periodically review the competitive constraints in different geographic units and adapt the remedies if pricing constraints materialise.

Point 41: *The conditions set out in **point 38** of this Recommendation […] In particular, and in accordance with point 70 of this Recommendation, that could be when the business case to*

[10] See notably ECJ, Case C-307/18, Points 36-39. Cf. also Commission Decision C(2022)682 of 1st Febr. 2022 to withdraw its serious doubts in Case DK/2021/2346 following DBA's and BEREC's arguments, BEREC did not share the serious doubts of the Commission, BoR (21) 190.

[11] Cf. also Commission Decision C(2022)682 of 1st Febr. 2022 to withdraw its serious doubts in Case DK/2021/2346 following DBA's and BEREC's arguments, BEREC did not share the serious doubts of the Commission, BoR (21) 190.

[12] See notably BoR (18) 213 BEREC Report on the application of the Common Position on geographic aspects of market analysis.

deploy a VHC network would be marginally viable ***even in the absence of any regulation in that area****, for instance in areas of lower population density.*

The first sentence of Point 41 should refer to the **Point 39 (d)** and not the Point 38.[13]

The Commission should clarify further in the Gigabit Recommendation that regulation is not necessarily totally absent from low-density areas. Recital (193) of the Code considers indeed the possibility of not imposing regulated access prices "where lower population density reduces the incentives for the development of very high capacity networks and the national regulatory authority establishes **that effective and non-discriminatory access is ensured through obligations imposed** in accordance with this Directive".

Furthermore, BEREC thinks that by introducing the possibility to not impose price obligations in case of an only "*marginally viable* VHCN deployment" the threshold for pricing flexibility is lowered in a manner that is incompatible with the Code as this is unlikely to lead to sustainable infrastructure competition.

Appropriate anchor products

Recital (29): *Where the product offered by the SMP operator on the legacy access network is no longer able to exercise a demonstrable retail price constraint on the VHC wholesale product (for example in the event of a copper switch-off, or where the NRA finds that retail products provided over copper are not substitutable with those provided over VHCNs), it could be replaced by* ***a VHC-based product, such as an entry-level fibre product. The technical performances of that regulated product should be limited to what is required to exert a demonstrable retail price constraint****.*

Point 42 (b) and (c):

(b) where ***a copper-based product*** *(including VULA products provided over an upgraded copper network) is still able to exert a demonstrable retail price constraint over VHC-based products on a forward looking basis, the NRA should define that product as the regulated anchor;*

(c) only where the NRA concludes that a copper-based anchor would no longer exercise a demonstrable retail price constraint, and in the absence of a demonstrable price constraint due to the existence of alternative networks or regulated access to civil-engineering infrastructures, the NRA should define ***an entry level regulated product provided over a VHC network*** *in the relevant wholesale market as the regulated anchor.* ***The technical performances of this regulated product should be limited*** *to what is required to exert a demonstrable retail price constraint on a forward looking basis. […]*

According to the draft Gigabit Recommendation, only a copper product or an entry-level fibre product should be submitted to price control. This could however be insufficient to exert an

[13] This applies also to **Point 40**, the correct reference is **Point 39 (d)**.

effective price constraint on the SMP operator. BEREC notes that (i) there is a continuous evolving demand to higher speeds and (ii) the SMP could define strategically its retail products in a way that alternative operators always have access with delay to the most competitive products or to lock-in the access seekers in the less interesting market segments. The development of competition may also be hindered if access seekers face uncertainties regarding the moment and the price at which a wholesale VHCN input will be available to them. NRAs should therefore have the possibility to widen the scope of the anchor beyond copper or entry-level fibre products. To define an effective anchor, it could be necessary to opt for a combination of anchors (copper + VHCN) and/or to define as anchor a portfolio of products that is sufficiently representative of the consumer demand and network architecture.

Economic replicability test (ERT)

Recital (36): *The economic replicability test can be applied either to**: (i) individual products** (which can be either bundled offers or stand-alone products, for instance an internet-only offer); **or (ii) to a portfolio of products** (which is a set of individual products). […]*

Point 43, (a), (vii): *whether flagship products are intended to be analysed **on an individual basis or as a portfolio**;*

We welcome the possibility to consider a portfolio approach and not only a product-by-product approach. The Gigabit Recommendation should however specify that a multi-level or combined test (portfolio level + product level) may also be appropriate (such a test should take into account only the costs that are incremental at each level). A combined approach would preserve the pricing flexibility for the SMP and at the same time prevent squeeze practices that would target specific retail products addressed to specific segment of the demand (i.e. those referred in Annex III, (13)). Such an approach would also allow for a more proportionate intervention of the NRAs in the context of Point 43 (c) of the draft Gigabit Recommendation.

Additionally, BEREC would welcome that the Commission clarifies in Recital (36) that bundled offers and portfolios may include non-regulated products.

Recital (37): ***[…] In order to exclude cross-subsidisation between different products in a bundle or portfolio**, **NRAs should conduct only a single-level test**, i.e. between the retail services and **the most relevant VHC access input** for access seekers (for example fibre access at the cabinet or virtual unbundling). […]*

The draft Gigabit Recommendation considers an ERT only at a single-level test, i.e. between the retail services and the most relevant VHC access input for access seekers. There could however be circumstances that would justify to conduct an ERT for various access inputs, especially where a transition is needed between one access input to another. It may be the case if access seekers currently rely on central access inputs but local access inputs become available, or if access seekers currently rely on fibre unbundling or VULA but want to use civil engineering infrastructure inputs in the future. In such cases, there may be more than one relevant wholesale input during a transition period and the NRA should have the possibility to

submit each relevant wholesale input to an ERT that means, there could be several single-level tests between one retail product and different relevant wholesale inputs.

BEREC also considers that the expression "*in order to exclude cross-subsidisation between different products in a bundle or portfolio"* should be clarified, given that the relationship between cross-subsidisation at retail level and the performance of a single-level test is not clear.

Recital (37): *[...] NRAs should apply a long run incremental cost plus (LRIC +) model while taking into account the SMP operator's* ***audited downstream costs****. […] The design of the test, applying to the SMP operator's* ***audited downstream costs*** *and only for flagship products, aims to ensure that VHCN investments and the effect of the recommended pricing flexibility are not hindered by this safeguard. […]*

Annex III, (1): *Downstream costs are estimated on the basis of the costs of the SMP operator's own downstream businesses (Equally efficient Operator test). NRAs should use the SMP* ***operator's audited downstream costs****, provided that they are sufficiently disaggregated.*

Recital (37) and Annex III, (1) refer to "SMP operator's audited downstream costs". To obtain detailed information on these costs, it may be necessary that the NRAs impose some form of cost accounting obligations. In this regard, BEREC suggests that the Commission clarifies in the draft Gigabit Recommendation that NRAs may impose a sub-set of the obligations foreseen by Article 74 of the Code (Price control and cost accounting obligations), if appropriate and proportionate to conduct the ERT test.

Point 43 (b): *[the NRA] will conclude the test as soon as possible and i****n any case within 4 months from starting the procedure****. However, if the NRA has to follow up on changes in flagship products or revise the result of the replicability analysis according to updated information, that 4-month period can be extended by an additional month […]*

BEREC understands the need to conduct the ERT test in the shortest possible time. Nevertheless, BEREC underlines that a 4-month period is not realistic in many cases. However, Point 17b) of the Recommendation 2021/554/EU, on notifications pursuant Article 32 EECC, obliges NRA to notify the Commission «*updates of decisions concerning the Economic Replicability Test, which do not change the underlying methodology (such as testing of new prices/offers)*». That implies (i) to perform the Consultation and Transparency mechanism under Article 23 EECC (that is, a consultation period « in any event no shorter that 30 days »), and (ii) to notify the draft measure to the Commission, that will have the one-month review period. This new circumstance, not present when the 2013 NDCM Recommendation was approved, makes it extremely difficult to finish the ERT procedure within the proposed period, even taking into account the one-month extension period. This is especially true in the case of portfolio tests where the NRA may have to collect an extensive range of data.

BEREC suggests therefore to adapt Point 43 (b) in [the NRA] "will **perform** the test as soon as possible and in any case within 4 months from starting the procedure, without prejudice to

the subsequent notification to the Commission in accordance with Recommendation 2021/554/EU. However, if the NRA **has to handle complex cases, such as portfolio tests, or** has to follow up on changes in flagship products or revise the result of the replicability analysis according to updated information, that 4-month period can be extended by **three** additional month**s"** […].

Annex III, (9): *In particular, in order to ensure the right balance in national circumstances between incentivising efficient and flexible pricing strategies at the wholesale level and at the same time ensuring a sufficient margin for access seekers to maintain sustainable competition,* ***NRAs should give due weight to the presence of volume discounts and/or long-term access pricing agreements*** *between the SMP operator and access seekers, NRAs should give due weight to the presence of volume discounts and/or long-term access pricing agreements between the SMP operator and access seekers, in particular where a significant part of access seekers are actually receiving wholesale services* ***at discounted prices****.*

This Alinea is in contradiction with the Staff Working Document (p. 93) that mentions *"[…] smaller alternative operators might not have enough economic space to operate profitably. For this reason,* ***NRAs should in principle base the ERT on the non-discounted price*** *of wholesale services, and to use the scale adjustment to the EEO test to ensure that the market is sufficiently open to competition. Therefore,* ***in most cases, long term discounts and volume discounts to wholesale prices should be disregarded when conducting the ERT****."*

BEREC is of the opinion that, as mentioned in the Staff Working Document, NRAs should have consideration for smaller alternative operators that might not have enough economic space with the non-discounted rates. The inclusion of long-term discounts or volume discounts in the ERT calculations should be considered depending on the circumstances, in particular the degree to which the access seekers effectively rely on such discounts. BEREC would therefore welcome a clarification that NRAs should in principle base the ERT on the non-discounted price of wholesale services, but should give due weight to the presence of volume discounts and/or long-term access pricing agreements between the SMP operator and access seekers if a significant part of access seekers are actually receiving wholesale services at discounted prices (see also further down the BEREC considerations regarding the Long term pricing and volume discount section).

Annex III, (12): *NRAs should determine the level of aggregation (****product-by-product or portfolio of products****) that is appropriate for the economic replicability test, in the light of the assessment of competition problems identified in the market analysis.* ***In contestable markets****, leaving more flexibility to the SMP operator through a portfolio approach may be justified. […]*

We refer to the comments made on Recital (36): the Gigabit Recommendation should specify that a multi-level or combined test (portfolio level + product level) may also be appropriate.

In addition, it does not seem justified to qualify some markets as “contestable”, in the context of electronic communications networks. As mentioned in our remarks about Recital (28) and Point 39, it is generally recognized that such infrastructures are difficult to duplicate. The words “In contestable markets” should therefore be replaced by “***In those markets where competition at retail level is more developed***…”.

Comments on section "Consistent approaches to price control obligations" (Costing methodologies)

1) The Draft Gigabit Recommendation maintains the recommended costing methodology of the 2013 NDCM Recommendation.

The BU-LRIC+ costing methodology is foreseen, where a Very High-Capacity network (VHCN) (Next Generation Access (NGA) network in the NCDM Recommendation) is to be modelled. Broadly speaking, Points 46-50 and 52-53 correspond to Points 31-35 and 36-37 of the 2013 NDCM Recommendation, respectively. As to its implementation, Points 59 and 60 correspond to Points 46 and 47 of the 2013 NDCM Recommendation.

From a high-level perspective, BEREC values the proposal of maintaining the same costing methodology positively. This approach contributes to ensure the draft Gigabit Recommendation to be in line with the Code. BEREC notes that the draft Gigabit Recommendation considers the BU-LRIC+ costing methodology to also apply for setting the access prices to Civil Engineering Infrastructure (CEI). Since this was not the case in the 2013 NDCM Recommendation, there are currently NRAs applying other costing methodologies. BEREC recognises the advantage of adopting the same BU-LRIC+ costing methodology to set, when appropriate, the cost oriented prices of the wholesale access service along the same value chain (i.e. wholesale access products provided over copper networks and VHCN as well as the prices for access to CEI). However, where NRAs use an established cost model especially for reusable CEI it may be kept for reasons of legal certainty and minimizing the administrative burden.

Furthermore, BEREC wants to point out that Point 47 of the draft Gigabit Recommendation (i) replaces the reference to an NGA network, as it is currently the case in the 2013 NDCM (in Point 32), by VHCN and (ii) defines the latter in accordance with the definition as foreseen in the Decision (EU) 2022/2481 on establishing the Digital Decade Policy Programme 2030.

BEREC understands this update in light of the latest regulatory changes and the established connectivity targets. Nonetheless, BEREC observes that, by doing so, the draft Gigabit Recommendation misses an important factor when modelling the hypothetical efficient VHCN, i.e. the demand side. This may have unintended consequences as the modelling might not adequately reflect the fact that the number of subscribers determines the trend of unit costs and, in particular, that the take-up is expected to increase over time.

Therefore, BEREC proposes to add a reference to the **take-up** in **Point 47** (as was the case in Point 32 of the 2013 NDCM Recommendation) as follows:

> *"When modelling a VHCN, NRAs should define a hypothetical efficient VHCN, capable of delivering the targets set out in Decision (EU) 2022/2481, in terms of bandwidth and coverage **as well as** **taking into account take-up**. When modelling a VHCN, NRAs should include: (i) any existing civil-engineering assets that are generally also capable of hosting a VHCN; and (ii) civil-engineering assets that will have to be newly constructed to*

host a VHCN. Therefore, when building the BU LRIC + model, NRAs should not assume the construction of an entirely new civil infrastructure network for deploying a VHCN."

Going into more detail, BEREC notes the following.

2) The Draft Gigabit Recommendation introduces changes with respect to the valuation method for both the reusable civil engineering assets (CEI) and newly built CEI.

2.1 Alternative method for valuing reusable CEI

The indexation method is no longer the only method for calculating the value of the Regulatory Asset Base (RAB) for the reusable CEI, since (i) Points 48 and 49 set out that such method would be "in principle" the recommended method and, more importantly, (ii) Point 51 sets out that reusable legacy CEI and their corresponding RAB can be valued on the basis of current costs adjusted for depreciation.

The method, as proposed in Point 51, includes an alternative valuation and is aimed at facilitating the task of NRAs when calculating the RAB for the reusable CEI.

BEREC does not find the alternative method for valuing the reusable CEI to depart from the current 2013 NDCM Recommendation. Current costs adjusted for depreciation (i) differ from replacement costs, which are normally applied under a BU-LRIC methodology, and (ii) are based on the same economic principles that underpin the use of the indexation method:

- CEI is not easily replicable.
- Existing CEI can be reused for deploying a VHCN. Its availability depends on the national circumstances.
- The objective of cost recovery, instead of sending the right build or buy signals, prevails.

BEREC supports the introduction of another valuation method such as current costs adjusted for depreciation for CEI. This method is equivalent to the indexation method (in terms of objectives and costing principles) and further addresses the limitations concerning the available data and information on costing that NRAs might face when applying the indexation method. In sum, Point 51 provides NRAs with a valuation method that, depending on the circumstances, might be easier to apply.

2.2 Approach for newly built CEI

BEREC notes that Point 55 (i) explicitly concerns a scenario where the SMP operator would have to incur significant costs for deploying new CEI and (ii) finds the application of a higher risk premium to be justified. Point 55 does not deal with costing methodology as such but is concerned with the risk assessment of significant investment in new CEI. Point 56 addresses this issue and identifies the valuation method that would be applicable for newly built CEI when stating that "*NRAs should ensure that prices for access to newly built civil-engineering infrastructure reflect current market conditions and are based on the full costs incurred by the SMP operator*".

BEREC is of the view that both points should be read jointly since they address two aspects of the same issue as it is the calculation of costs (and prices) in a scenario where CEI is inexistent (or very limited) and significant investments in new CEI are required for deploying VHCNs.

BEREC appreciates that Points 55 and 56 aim to address the following request of the BEREC response (BoR (20) 169) to the targeted consultation: "*For civil engineering infrastructure that has been built or will be built specifically for full fibre network deployment (i.e. FttH/FttB), potential investment risks that are associated with such deployments by the SMP operator might differ from the risks associated with the maintenance of legacy civil engineering infrastructure or the deployment of such infrastructure for FTTC networks.*

Bearing in mind the above consideration regarding both **Points 55 and 56**:

- BEREC would suggest, in any case, moving the sentence starting with "In particular …"[14] of Point 55 from the section on the recommended costing methodology to the section on "Adequately rewarding the investment risk" where it better fits. BEREC is of the view that the risk assessment is more related to and should be carried out in accordance with Points 62-74. In fact, Point 66 b) already addresses this issue of assessment of the investment risk (including for newly built CEI) by referring to *uncertainty relating to the costs of deployment, civil-engineering works and managerial execution.*
- Since Point 47 foresees that the modelling of a VHCN can include not only *(i) any existing civil-engineering assets that are generally also capable of hosting such a VHCN* but also *(ii) civil-engineering assets that will have to be newly constructed to host a VHCN*, BEREC understands that Point 56 (i) falls under the recommended BU LRIC+ methodology and (ii) does not introduce a new costing methodology for newly built CEI, but further explains how NRAs should assess and value this particular type of assets.
- BEREC, however, finds the wording in Point 56 not to be particularly precise in identifying the valuation method for newly built CEI because it only refers to ***full costs***. In BEREC´s view newly built CEI would be valued at the current costs that the operator efficiently incurs when deploying a new VHCN in a situation where existing CEI cannot be reused or CEI (ducts) is inexistent. Newly built CEI would therefore be non-depreciated brand-new assets and would be valued at replacement costs, as (i) it is the case for any other asset under the recommended BU LRIC+ methodology (except for the reusable CEI) and (ii) Point 48 sets out.
- BEREC considers that the wording in Point 56 (and Point 60) should be adjusted to ensure clarity and avoid potential inconsistencies with respect to Point 48 and the costing terminology, i.e. follows the same costing methodology, namely a bottom-up approach

[14] "In particular, where the SMP operator would have to incur significant costs for civil-engineering infrastructure - beyond normal maintenance costs – the NRA should assess, in accordance with points 62 to 74, whether the risk profile of that investment justifies applying a higher risk premium to reflect the corresponding additional and quantifiable risk incurred by the SMP operator."

(optimized with regard to the newly built CEI project). Alternatively, additional explanations in the recitals, regarding the exact meaning of full costs in accordance with the recommended BU LRIC+ methodology would also improve the understanding of Point 56.

- BEREC further notes that Points 55 and 56 assume that NRAs can distinguish old and reusable CEI from new CEI and treat them differently by applying a different rate of return and valuation method. Depending on the quality and granularity of the available data on CEI, NRAs might not be able to identify separately the old and new CEI.
- BEREC is concerned about the risks that such assumption poses for NRAs when calculating access prices for CEI, as a whole. For example, in countries where the availability and reusability of existing CEI for the deployment of a VHCN is very high, NRAs would bear the risk of estimating too high costs (and set too high prices) for CEI if they weighted the newly built CEI above its actual use. Whereas in countries where the availability of existing CEI for hosting a VHCN is very low, the resulting prices could be too low if newly built CEI was weighted below its actual use.
- BEREC considers that the scope for applying the valuation method, as set out in Point 56 to newly built CEI should duly take into account the specific circumstances in each country allowing NRAs to establish the distinction between the two types of CEI as appropriate.
- Therefore, BEREC considers that the recitals should make clear that both Points 55 and 56 are addressed to countries where there is a well-established and identified lack of reusable CEI for the roll-out of a VHCN. In other words, BEREC finds price differentiation for newly built CEI to be justified only under the circumstances as foreseen in Points 55 and 56.
- For countries, where this is not the case and the existing CEI (i.e. legacy CEI for copper access networks) is available and can be reused for deploying VHCNs, BEREC finds Point 47 to be sufficient to (i) reflect the hybrid use of both the existing and the newly built CEI. In this regard, BEREC would like to outline that investments, within the category for old and reusable CEI, comprise the capital expenditure that operators incur to maintain the existing CEI as well as to refurbish it, restore it and enhance its capacity/functionality and, if necessary (but to a very small extent, as compared to the scenario in Points 55 and 56), deploy new ducts.

3) The Draft Gigabit Recommendation introduces a reference to inflation in **Point 58**.

While valuing the fact that the current macro-economic developments are taken into consideration BEREC is of the opinion that Point 58 does not fit into the section on costing methodology where the BU-LRIC+ methodology, together with replacement costs, indexation and current costs adjusted for depreciation are recommended and inflation is therefore a factor that is already taken into account when valuing the RAB. BEREC therefore strongly suggests removing Point 58 from the costing section altogether or, alternatively, if reinforcing the regulatory message regarding the inflation rate in the current macro-economic environment is required, moving it to the section “adequately rewarding the investment risk” (see comments below).

Comments on section "Long-term access pricing and volume discounts"

BEREC's key message on this section is that it notes the absence in the Draft Gigabit Recommendation of any competitive concerns which may arise with long-term access pricing and volume discounts that would materially impact economically efficient alternative investment by other network operators and hinder infrastructure competition.

For BEREC, while long-term access pricing and volume discounts could help stimulate demand supporting a timely transition off copper and onto fibre, and also benefit end users in the form of lower prices, they could also create uncertainty for access seekers and could give rise to difficulties in terms of compliance with other regulatory obligations (e.g. the non-discrimination obligation) and may raise competitive concerns or enable foreclosure strategies.[15]

Therefore, BEREC suggests adding text to the **Recital (59)** and at **point (3) and point (5) of Annex IV** of the Draft Gigabit Recommendation to ensure that these competitive concerns are taken into account when long-term access pricing and volume discounts are being assessed as shown below.

Another issue that BEREC is unclear on is the applicability of **Point 61** as it mentions "*Where the SMP operator is subject to price control obligations*". Recital (59) does not have this restriction. In light of BEREC's opinion on the "Pricing flexibility (incl. ERT)" section, BEREC is of the view that the linkage between ERT and this section requires the same treatment of long-term access pricing and volume discounts regardless of whether a price control obligation or an ERT is imposed as otherwise the same situation might be treated differently and consequently competition distorted, i.e. the competitive considerations need to flow into setting a regulated wholesale access price (under a price control obligation) as well as when running an ERT (in case of price flexibility). BEREC therefore suggests removing the restriction in Point 61 ("*Where the SMP operator is subject to price control obligations*") and generalize the wording (see below).

[15] For example, ComReg raised significant concerns in relation to a discount scheme proposed by the SMP operator in Ireland. ComReg considered that the scheme, which proposed tiered discounts on all FTTH volumes based on access seekers maintaining or growing their consumption of all broadband products (CGA, FTTC & FTTH) on the SMP operator's network, created significant uncertainty for alternative operators looking to invest in infrastructure roll-out as regards their ability to attract wholesale customers onto their networks. ComReg's view was that the scheme included features that are characteristics of retroactive loyalty-inducing rebate schemes. The SMP operator subsequently confirmed it did not intend to publish the proposed discount scheme. For more details see ComReg IN 23/24 and ComReg IN 23/25, published in March 2023.

Proposals for amendments

Recital (59)

Volume discounts and/or long-term access pricing agreements ~~are~~ **can be** an important tool to foster VHCN investment, in particular where take-up by consumers is still low. However, to ensure that market entry by efficient competitors **(including infrastructure competitors)** is possible, NRAs ~~should~~ **may** accept volume discounts by SMP operators **that do not foreclose market entry or limit existing competitors' market shares. Volume discounts should be applied to the SMP operator's** ~~to their~~ own downstream businesses, for example their retail arm, only if these discounts do not exceed the highest volume discount offered in good faith to third party access seekers. Equally, NRAs ~~should~~ **may** accept long-term access pricing agreements by SMP operators **that do not foreclose market entry. Long-term access pricing agreements should be applied to the SMP operator's** ~~to their~~ own downstream businesses, **for example** their retail arm, only if they do not exceed the highest discount for long-term access that has been offered in good faith to third party access seekers.

Long-term access pricing and volume discounts

Point 61

~~Where~~ The SMP operator ~~is subject to price control obligations with respect to~~ may apply price discounts to long-term access contracts or to contracts which are tied to volume commitments **for VHC wholesale-access products,** subject to the conditions set out in Annex IV.

ANNEX IV
Long-term access pricing and volume discounts as referred to in Point 61 of the Recommendation

Criteria to assess long-term access pricing for VHCN deployments, in particular FTTH

(1) Access prices adjusted for risk based on long-term access may vary depending on the period over which access commitments are made. Long-term access contracts may be priced at a lower level per access line than short-term access contracts. Long-term access prices should only reflect the reduction of risk for the investor and therefore should not be lower than the ~~cost-oriented~~ price to which no higher risk premium reflecting the systematic risk of the investment is added. Under long-term contracts, entrants would acquire full control of physical assets, which would also give them the possibility to engage in secondary trading. Short-term contracts would be available without long commitments and would therefore normally be priced higher per access line, with access prices reflecting the benefit to the access seeker in terms of greater flexibility.

(2) There is a risk, however, that the SMP operator would abuse the long-term access pricing over time by selling its retail services at an insufficient margin compared to its regulated wholesale price (since it would charge its own downstream retail arm lower long-term commitment prices), thereby foreclosing the market. Furthermore, alternative providers with smaller customer bases and unclear business perspectives face higher levels of risk. These

providers may be unable to commit to purchasing over a long period, and may therefore have to stagger their investments and purchase regulated access at a later stage.

(3) For those reasons, long-term access pricing should be acceptable only if NRAs ensure that **all** ~~both~~ the following conditions are met:

(a) long-term ~~commitment~~ **access** prices only reflect the reduction of risk for the investor; and

(b) over an appropriate timeframe there is a sufficient margin between wholesale and retail prices to allow for market entry by an efficient competitor in the downstream market.

(c) the long-term access prices do not foreclose economically efficient alternative investment by other network operators (infrastructure competition) that are either investing or creditably demonstrating a concrete plan to timely invest in VHC networks.

Criteria to assess volume discounts in case of VHCN, in particular FTTH, deployments

(4) Access prices adjusted for risk based on volume discounts reflect the fact that investment risk decreases with the total number of fibre loops already sold in a given area. Investment risk is closely tied to the number of fibre loops which remain unused. The higher the share of used fibre loops, the lower the risk. Access prices could therefore vary depending on the volume purchased. A single level of discount should be authorised, available at a uniform price per line to all qualifying operators. NRAs should identify the volume of lines which need to be purchased in order to get access to such volume discount, taking into account the estimated minimum operating scale for an access seeker to compete efficiently in the market and the need to maintain a market structure with a sufficient number of qualifying operators to ensure effective competition. The volume discount should only reflect the reduction of risk for the investor and therefore should not result in access prices that are lower than the ~~cost-oriented~~ price to which no higher risk premium reflecting the systematic risk of the investment is added. Considering that the risk premium should normally decrease following the overall increase in **net** retail and wholesale demand, the volume discount should also decrease accordingly and may no longer be justified once retail and wholesale demand are at high levels.

(5) A volume discount should only be accepted by NRAs if **all** of the following conditions are met:

(a) a single volume discount is calculated per area as appropriately sized by the NRA taking account of national circumstances and network architecture, and applies equally to all access seekers who, in the area concerned, are willing to purchase at least the volume of lines giving access to the discount; and

(b) the volume discount only reflects the reduction of risk for the investor; and

(c) over an appropriate timeframe there is a sufficient margin between wholesale and retail prices to allow for market entry by an efficient competitor.

(d) the volume discount does not foreclose economically efficient alternative investment by other network operators (infrastructure competition) that are either investing or credibly demonstrating a concrete plan to timely invest in VHC networks.

Comments on section "Adequately Rewarding the Investment Risk"

As stated in the BEREC input to the Commission's considerations for the WACC Guidance[16] "BEREC believes that a higher WACC is not *the* incentive for investments, but that the WACC is only one of many factors influencing the investment decision. In fact, market circumstances like competition, demand and retail prices in place are the major drivers for investments (…)".

The heading should reflect the fact that this section is effectively concerned with rewarding investment risk of new VHCN – in contrast to rewarding investment risk of legacy infrastructure, which is already adequately described in the (non-binding) Commission Notice[17] (hereafter WACC Notice). BEREC suggests to adjust the wording accordingly to: "Adequately rewarding the investment risk of **new VHCN infrastructure**". As Art. 74 of the Code privileges only new VHCN projects[18], the Gigabit Recommendation should correspondingly apply to the same, namely new VHCN projects, which is currently not the case. Therefore, BEREC hereafter proposes a number of amendments to this section of the Draft Gigabit Recommendation to ensure consistency with the relevant provisions of the Code.

A separate issue is how to deal with the temporary increase of inflation which we look at first before turning to the estimation of a VHCN risk premium.

Dealing with the temporary increase of inflation

Recital (60) in conjunction with **Point 63** states that "WACC employed should reflect the current market situation", which is further linked to the "current economic conditions, for instance a high inflation rate not reflected in the applicable WACC at the time". This issue brings forward factors that are exogenous to the regulatory framework[19], such as the macroeconomic context.

While BEREC acknowledges that the Draft Gigabit Recommendation seeks to ensure that current economic developments are adequately taken into consideration, BEREC draws attention to the fact that the Draft Gigabit Recommendation should not depart from the predictability and consistency principles that are core to the EECC[20]. Furthermore, Point 66 (e) already lists macroeconomic uncertainty as one of the investment risk factors NRAs should assess.

Emphasizing the aspect regarding inflation may provide national regulatory authorities a sort of "wild card" to deviate from the method to determine the applicable WACC, i.e. the WACC for legacy infrastructure, which is set out in the (non-binding) WACC Notice. It relies on a

[16] BoR (19) 13
[17] (2019/C 375/01) Commission Notice on the calculation of the cost of capital for legacy infrastructure in the context of the Commission's review of national notifications in the EU electronic communications sector
[18] See also BEREC Guidelines on Art. 76 EECC, BoR (20) 232
[19] As described in EECC SWD (vol. 1)
[20] Art. 3.4 lit. (a) and Recital (28)

proven, well-established and widely used state-of-the art methodology (CAPM/WACC), which already takes into account all types of investment risk where they exist.[21] The WACC Notice stresses the importance of a consistent regulatory practice when calculating WACC across the Union[22] which may be diluted when deviating from the method stated herein. While the Draft Gigabit Recommendation does not make any reference to the WACC Notice, the SWD[23] often refers to the WACC Notice and asserts that this point may not be adequately addressed in the WACC Notice.

While it is true that inflation has risen considerably in the recent past, it must also be noted that according to ECB projections, "Inflation should continue to fall during 2023, driven by declines in energy inflation. As cost pressures fade and the ECB's monetary policy measures gradually take effect, inflation should come back to the 2% target in the second half of 2025."[24] Thus, the issue of "high inflation" stated in Recital (60) is likely to be temporary in nature and therefore be unsuitable to reflect the market conditions over the longer period in which the Gigabit Recommendation is to be applied. Additionally, such considerations introduce a deviation from the current provisions of the (non-binding) WACC Notice by default, given that the WACC Notice already provides NRAs with the flexibility to depart from its provisions, when justified by national circumstances.[25]

BEREC fears that the flexibility to determine the regulatory WACC left to NRAs in Recital (60) and Point 63 may result in adjustments that may not necessarily reflect only current differences in the national circumstances and therefore result in investment distortions in the long run. Furthermore, Point 63 seems to mix up two different issues: a) taking into consideration current macroeconomic developments, i.e. high inflation, and b) the estimation of the VHCN risk premium. This could lead to the risk of taking inflation into account twice: when estimating the legacy WACC and when estimating a VHCN premium.

In order to deal with the inflation rate issue appropriately, BEREC suggests to adjust Recital (60) as follows: "*The weighted average cost of capital (WACC) employed should allow an efficient rate of return on capital employed to reflect the current market situation (for instance a high inflation rate)*". The reference to "updating the applicable WACC" should be avoided as it contradicts the stability and predictability principle and an inflation adjustment is a measure reflecting future developments, therefore past estimations should not be retroactively adjusted.

Furthermore, the following part of the first sentence of Point 63 should be added at the end of Point 62: "… an **efficient** rate of return on capital employed, taking into account the investment-specific risks **and ensuring that it reflects current macroeconomic parameters**

[21] And relies on long term historic data series for the calculation of certain parameters, cf. e.g. BEREC WACC parameters Report 2022 (BoR (22) 70).
[22] WACC Notice, 1. Introduction, No. 5.
[23] Commission Staff Working Document Explanatory Note, accompanying the document Commission Recommendation on the regulatory promotion of Gigabit connectivity, page 114
[24] https://www.ecb.europa.eu/pub/projections/html/index.en.html
[25] As recognized by the Commission in its comments letter to CNMC in the case ES/2022/2419.

(for instance a high inflation rate)". BEREC is of the opinion that this wording takes sufficient care of the issue and the remaining Point 63 is therefore dispensable.

Estimating a VHCN risk premium

Recital (61) maintains the provisions of the 2010 NGA Recommendation in terms of criteria for setting the return on capital for VHCN investment. However, while it does not quote the "sufficient incentives for *all* undertakings to deploy new and enhanced networks" (emphasis added), as stated in art 74 (1) of the EECC[26], it does not bring additional clarifications in terms of what is "sufficient", by detailing that "return on capital allowed ex ante for investment into VHCNs should strike a balance between (…) sufficiently high rate of return and (…) a rate of return that is not excessive".

Recital (62) highlights that "if the additional risk of investing into new VHCNs is not adequately reflected, the investor will hold back investments to the detriment of end-users and overall connectivity in society". As stated in BEREC's response to the targeted consultation[27] "it should not be forgotten that an investment decision is not only influenced by regulation, but by a multitude of factors mostly outside the control of regulators. (…) NRA should assess the risks incurred and include *where appropriate* a higher risk premium to reflect any *additional and quantifiable risk* incurred by the SMP operator (NGA Rec., Annex I, pt. 3 (emphasis added). Thus, in case a higher risk [compared to an investment in legacy infrastructure] is incurred, a [VHCN] risk premium is justified. If a [VHCN] risk premium can be justified, the risk difference must be *quantifiable* (measurable) which is still very complex and complicated to estimate. Without the necessary best estimation of the risk difference the NRA may distort investment decisions with all the negative consequences this entails." [28]

BEREC therefore suggests that Recitals (62) to (64) should refer to additional **and quantifiable** risk", consistent with Point 65.

By acknowledging that each project undertaken by the SMP operator may have additional risks, which may result in "multiple risk premiums being applicable, i.e. a premium for each specific VHCN project", **Recital (63)** does not appear to take into account the complexity and heavy administrative burden of quantifying these additional risks. As detailed in the BEREC Regulatory Accounting Report[29] "In general it is not possible to obtain a clear view of the corresponding systematic or non-systematic risk taken into account in this NGA risk premium. Uncertainty of demand is the main source of risk (…)".

[26] 4th subpara. "When national regulatory authorities consider it appropriate to impose price control obligations on access to existing network elements, they shall also take account of the benefits of predictable and stable wholesale prices in ensuring efficient market entry and sufficient incentives for all undertakings to deploy new and enhanced networks."
[27] BoR (20) 169
[28] BoR (20) 169
[29] Regulatory Accounting Report 2022 (BoR (22) 164), Chapter 5

While Annex I (6) of the 2010 NGA Recommendation lists the factors of uncertainty NRAs should inter alia take into account when estimating the investment risk, and these factors have been carried forward in the Draft Gigabit Recommendation (which is consistent with the BEREC response to the targeted consultation, by considering a premium for each specific VHCN project), the proposal in Recital (63) may run the risk of not adequately addressing the competition problems identified in the market analysis.

The proposed approach of multiple risk premiums being applicable, corroborated with Recitals (66) to (67) that invoke consistency and stability principles already enshrined in the regulatory framework and practice, could lead to situations in which the (different) project specific VHCN premiums may lead to (different) project related pricing decisions that may not adequately address the competition problems identified in the market analysis.

Recital (64) aims to clarify how to apply the risk premium ("on top of the applicable WACC"). BEREC appreciates this clarification but would also like to recall the following from the BEREC response to the targeted consultation[30] "NRA should assess the risks incurred and include *where appropriate* a higher risk premium to reflect any additional and quantifiable risk incurred by the SMP operator". BEREC maintains the view that a risk premium should be added "*where appropriate*". Thus, BEREC suggests incorporating this wording in Recital (64).

Recital (65) and **Point 68** advocate for a so-called "sensitivity check" to be performed after the risk premium has been established. This proposal is highly arbitrary and contrary to best practices in WACC calculation. As set out in BEREC's input into the Commission's WACC consultation[31] BEREC considers that to ensure consistency and predictability according to the provisions of the EECC[32], the WACC computation must use proven methodologies that can be verified and established financial theory and practices rather than (subjective) "investors' expectations". The results obtained by using this approach must not be adjusted by "sensitivity analyses" not specified in the WACC Notice. This would also contradict the principle of providing utmost legal certainty and hence a stable regulatory environment and regulatory predictability for market players (including the "reasonable investor"), which in turn may have a negative effect on VHCN investment and end-user prices – which is contrary to the main aim of the Gigabit Recommendation. Therefore, BEREC urges the Commission to remove Recital (65) and Point 68. In fact, Point 68 is asking NRAs to ignore (respectively deviate from) the results of its estimations following state-of-the art methodologies.

Recitals (66) to (67) aim to address the principles of stability and consistency, but in fact bring forward quite contradictory statements: Recital (66) states that "*risks and uncertainties change over time and may change NRA's perception of the risk*" (emphasis added). By highlighting that, in relation with the stability and consistency principle, the Draft Gigabit Recommendation

[30] BoR (20) 169
[31] BoR (19) 13
[32] Art. 3.4 lit. (a) and Recital (28)

acknowledges that, when facing uncertainties, the quantification of project specific risks for a sufficiently long period of time may not be adequately robust.

The SWD[33] mentions that "in general, the factors of uncertainty may change over time, in particular due to the progressive increase of retail and wholesale demand met. NRAs should therefore, in principle, review the situation at regular intervals and adjust the risk premium that would apply to new investments, considering time variations in the above factors. However, even in the case where the risk today *has* diminished compared to the risk at the time of the investment into VHCN, the NRA should also carefully consider the VHCN WACC applicable at the time of the investment and that the investor had a reasonable expectation that the expected return (maximum prices allowed) would result from a WACC at applicable at the time".

Therefore, BEREC is of the opinion that Recitals (66) to (67) should be reformulated, in order to factor in the principle of stability over a market review period, and only introduce the possibility of reviewing the calculation in case ***material*** changes of risks and uncertainties occur. This assessment should be left to the professional judgement of NRAs, provided it is accompanied by adequate justification.

Point 62 mirrors the wording of Article 74 EECC[34] "Where the national regulatory authorities consider price control obligations to be appropriate, they shall allow the undertaking a reasonable rate of return on adequate capital employed, taking into account any risks specific to a particular *new* investment network project". However, Point 62 omits the reference to ***new*** investments. BEREC strongly suggests to apply this reference to correctly reflect the aim and scope of the Code in the Gigabit Recommendation. More specifically, the reference to "*new* investment projects" is relevant for the estimation of the VHCN premium reflecting any additional and quantifiable investment risk dealt with in Point 65. Therefore, **Point 65** should read as follows (also including the reference to "*newly built CEI*" stemming from the second part of Point 55 as suggested above):

"*Therefore, when setting access prices to VHCNs, NRAs should consider applying in addition to the applicable WACC, a risk premium to reflect any additional and quantifiable ~~investment~~ risk* ***of the new investment network project (incl. newly built CEI)*** *incurred by the SMP operator. NRAs should be transparent about the application of the risk premium in addition to the applicable WACC*."

With regard to demand side uncertainty (Point 64 and Point 66 lit (a)) BEREC observes that compared to the situation at the time of the 2010 NGA and the 2013 NDCM Recommendation, the demand side risk may likely be lower in a number of Member States given the evolution seen since then (see also above).

[33] Commission Staff Working Document Explanatory Note, accompanying the document Commission Recommendation on the regulatory promotion of Gigabit connectivity, page 127
[34] Article 74, No. 1, 2nd paragraph, 3rd sentence

Point 69 clearly refers to the "Option Value of Waiting", further described in the SWD[35] as "the risk of investing today versus postponing the investment to a time where new information about demand/cost will be available". In its response to the targeted consultation[36] BEREC stated with regard to different risk assessment methods "Starting from the efficiency of capital markets as the objective risk assessing method leaves no room for the application of an alternative approach such as the "fair bet" principle as all risks are priced in already."[37] Furthermore, BEREC points to the risk of inconsistency when applying different methodologies for the "base-WACC" and the VHCN specific risk premium which acc. to Point 65 is to be added on top of the "base-WACC". Thus, as specified in BEREC's views stated in conjunction with Recital (65) and Point 68 above BEREC maintains, in the interest of the regulatory predictability and consistency principles, that alternative methods for determining a VHCN risk premium should be avoided. BEREC is therefore of the view that Point 69 should be deleted.

Point 70 does not add anything that has not already been taken into account when calculating the WACC but instead invites assessments of the calculation outcome that may lead to new uncertainties. In the interest of the regulatory predictability and consistency principles set out in the EECC[38] such uncertainties should be avoided; therefore BEREC suggests this point to be removed[39].

For reasons already stated in connection with Point 62, as well as for consistency purposes, BEREC suggests to use „***new** investment project*" instead of „investment project" in **Point 71.**

BEREC is of the opinion that the time period mentioned in **Points 71 and 72** should be consistent with the time period of the NRA's market analysis. The market analysis considers current as well as future market developments; furthermore, as set out in the 2013 NDCM Recommendation,[40] continuous assessments of market data allow for an adaption of the regulatory approach should market conditions ***materially*** change.

In **Point 73** BEREC suggests to delete the part of the sentence „…that make it possible to compare the volatility of returns of VHCNs and legacy networks" since this may incite the use of a new method to determine a VHCN premium, which should be avoided for reasons already explained by BEREC in previous points.

[35] Commission Staff Working Document Explanatory Note, accompanying the document Commission Recommendation on the regulatory promotion of Gigabit connectivity, page 120; for "fair bet" see pp. 129.
[36] BoR (20) 169
[37] BoR (20) 169
[38] Directive EU 2018/1972, establishing the European Electronic Communication Code, Recital (28)
[39] And consequently the reference to Point 70 in Point 41.
[40] Commission Recommendation 2013/466/EU, Recital (60)

Comments on section "Migration to VHCNs and Decommissioning of the copper network"

Point 76

Regarding the conditions for the decommissioning plan to fulfil Article 81(2), first subparagraph of Code, Point 76 indicates that NRAs should ensure an appropriate notice period (not longer than 2 to 3 years) and that it is necessary to establish that an appropriate alternative product is made available to access seekers.

BEREC welcomes the clarification regarding the duration of the notice period. However, BEREC also notes that Article 81(2) conditions these elements (transparent timetable and conditions, and availability of alternative products) to a given circumstance, by indicating "*if necessary to safeguard competition and the rights of end-users*". This is an important addition, since it allows NRAs to analyse specific circumstances (like national circumstances, or specific market situations in some areas) and adapt the decommissioning rules accordingly.

For this reason, BEREC considers that Point 76 should also explicitly contain this provision, in order to ensure that it is in line with Article 81(2). We suggest adding it right after the clarification for the alternative product: "*This should be established before the notice period starts, or sufficiently in advance of access obligations on the legacy network being lifted to allow for the decommissioning. These conditions should be considered by the NRA if necessary to safeguard competition and the rights of end-users*".

Point 77

BEREC agrees with the principles set out in Point 77. The requirement for a substitution matrix will offer transparency towards the alternative operators.

Regarding the content of the substitution matrix, BEREC is of the opinion that the format and necessary parameters should be entirely defined by the NRA. As there are many ways a substitution matrix can be defined depending on the local circumstances of the underlying affected market(s), the NRA needs maximal flexibility on this point.

BEREC agrees that KPIs (or rather service dependent technical parameters) and SLAs are important and need to be defined for each WAP, offered by the SMP operator or an ANO. However, which KPI / SLAs are used when defining the substitution matrix should be under the responsibility of the NRA, as this depends on the local market and underlying technology.

In that regard, BEREC supports the statement in the Staff Working Document (p.139): "*However, for some specific services or parameters (e.g. copper-powered applications), the new network cannot provide strictly equivalent performances as the legacy network for technical reasons*". Indeed, alternative products will not necessarily provide better values in each and every parameter.

Point 78

First of all, it is important to note that, as indicated for Point 76 above, the process outlined in EECC Art 81(2), and in particular the availability of alternative products, is to be performed "*if necessary to safeguard competition and the rights of end-users*".

However, practical experience in some countries show that VHCN deployment is not realistic in some areas, like rural, very low density areas with no fixed line broadband, and instead fixed wireless accesses (FWA) would be offered there.

BEREC considers important that realistic goals are set; in this respect, while full VHCN deployment can be the objective of operators, in practice it is often not possible to reach full (100%) coverage in all cases, due to technical/administrative limitations or also economic considerations for some specific subareas within the area to be decommissioned. The copper switch-off process should not be unduly postponed in these areas.

The determination of a VHCN covering threshold for alternatives products to the regulated legacy ones can be helpful in ensuring that, as a general rule, users can migrate to such alternative products. The Staff Working Document adds, in this respect, that such coverage needs to be "*high, near ubiquitous*". On the other side, the BEREC report BoR (22) 69 shows that the establishment of a coverage threshold is not common practice.

For these reasons, BEREC suggests changing the wording of Point 78 to "*NRAs should consider to determine a reasonable coverage threshold*".

Point 79

In Point 79 the European Commission (EC) recommends that full transparency and involvement of all stakeholders is ensured by the NRA, during the design of the decommissioning process and timetable. In addition, non-discrimination in access conditions between the retail branch of the vertically integrated SMP operator and access seekers has to be guaranteed during the migration and decommissioning phase.

BEREC welcomes the EC's proposal on full transparency and involvement of all stakeholders, as this has been adopted by most of NRAs, which set the rules for the migration process and copper switch-off, through public consultation.[41]

BEREC also agrees that the ceasing of services should happen at the same time for the SMP operator and for access seekers.

On the other hand, BEREC considers that a general provision regarding non-discrimination would be sufficient, as the last sentence of Point 79, that differences of the switch-off timeline between areas where the VHCN has been rolled out by the SMP operator and areas where

[41] *Cf*. BoR (22) 69, pag. 12.

the VHCN has been rolled out by an ANO need to be justified based on objective criteria, may be interpreted differently by NRAs and stakeholders. For instance, the above provision may put in question the ability of the SMP operator to decide when to start the decommissioning of the legacy network.

Having said that, there may be cases where stricter rules may be applied for copper switch-off for the benefit of end-users, when this is proportionate following NRA's assessment. As an example, the Greek NRA decided to impose an obligation on the SMP operator to switch-off the legacy network in subsidised areas where an alternative operator deploys the new network under the same conditions as in the areas where the SMP operator deploys the subsidised network.

Discrimination during the migration process may occur if the timetable of the switch-off is used strategically by the SMP operator; NRAs may verify the absence of this strategic behaviour in assessing the decommissioning plan, according with Article 81(2) of the Code.

BEREC therefore suggests deleting the last sentence in Point 79, adding a more general sentence, for example: "*NRAs should verify the absence of discriminating behaviour by the SMP operator in assessing the decommissioning plan, according with Article 81(2) of the Code*".

Point 80

While BEREC agrees with the intent of this point, BEREC would like to point out two inconsistencies:

1. As described in the comments to Point 76 above, it is important to note that Art 81(2) EECC only demands an alternative wholesale access product "*if necessary to safeguard competition and the rights of end-users*". This needs to be reflected in the text, as it helps stressing the assessment that NRA has to perform.

2. Commercial closures are associated to decommissioning, and this is bound to a certain area. This is already reflected in Point 78, where the threshold within a certain area needs to be reached before access obligations on the legacy network are fully lifted in that area. A reference to the area also needs to be done in the text of Point 80.

BEREC thus proposes the following modifications:

"*As part of the decommissioning process* ***in a certain area*** *provided for in Article 81(2) of Directive (EU) 2018/1972, NRA should consider allowing the SMP operator to implement a commercial closure in that area, subject to an appropriate notice period. Such commercial closure should only take place once an alternative access product is available pursuant to Article 81(2)(a) of Directive (EU) 2018/1972 as established by the NRA,* ***if the available access product would be necessary to safeguard competition and the rights of end-users****. However, accesses already existing at that point should be maintained until the complete withdrawal of remedies on the legacy network*".

Point 81

In Point 81 the EC describes the possibility for NRAs to allow for progressive relaxation of the price control obligation in case of cost-oriented wholesale copper prices after the switch-off plan has been assessed by the NRA and the notice period for the copper switch off has started.

BEREC welcomes the EC's proposal to give the NRAs different options and tools to tackle the important and complicated topic of copper migration. BEREC understands Point 81 to be a regulatory option for NRAs but would like to stress that it is of high importance that the final text of the recommendation should make clear that this is only one possible option and not a preferred option, as the described approach may be helpful in some market situations, but not useful in others; for example, if the migration is already proceeding well then the implementation of a price lever or other regulatory intervention are not justified, or, in general, not proportionate due to its intrinsic complexity in the practical application.

BEREC would also like to highlight that the effect of increasing wholesale copper prices may not require a progressive lifting of the strict price control obligation, depending on the national circumstances, if for example the same price effect would result within the application of the approved costing methodology, as a consequence of a decreasing number of lines and stable fixed costs. BEREC notes that the EC acknowledges this point in the SWD and suggests to also include this point in the final Gigabit Recommendation.

In general, BEREC would emphasize that any modifications of the pricing regulation previously adopted by the NRA should be consistent with the costing methodology in force, because otherwise, relying only on a discretionary approach, this would likely increase the level of uncertainness and litigation at national level.

On the other hand, a progressive lifting of the price control obligation might, depending on the market conditions, be detrimental to competition or unlikely achieve the desired effect on consumer behaviour. These points need to be considered in a case-by-case assessment by the NRA and then a more flexible approach is desirable.

Bearing in mind the need of maintaining flexibility in the pricing approach and considering the proposed approach only as optional, BEREC would like to point out the following:

BEREC agrees with the EC's intention to limit the price increase period to a necessary period as revenues of the SMP operator should not be unnecessarily increased. BEREC suggests including in Recital (74) the following information "*The NRA should ensure that the application of the price increase is not prolonged by any undue delay in the implementation of the switch-off plan. In order to ensure this, the NRA may consider for example penalties and/or a claw-back mechanism*."

The price increases should be applicable only when the alternative products are effectively available under competitive conditions. The aim of the envisaged lifting of the price control obligation is to incentivize switching and should not lead to additional rents on the legacy copper network for the SMP operator. The current wording "*Such a price increase should only*

be applicable in areas where the notice period for the copper switch-off has started" does not always require that the alternative products are effectively available in the area when price increases are applied. BEREC therefore suggests amending the wording as follows:

"*Such a price increase should only be applicable in areas where the notice period for the copper switch-off has started and the alternative products are readily and effectively available under competitive condition at wholesale and retail level ~~the notice period for the copper switch-off has started~~*".

The safeguards to limit the risk of "excessive retail prices" – point (c) – may be difficult to be applied, due to the absence of direct regulation of retail markets. BEREC considers that it might be more appropriate to include here a reference to the necessity to preserve competition in the market. In fact, when increased wholesale legacy prices are applied, BEREC considers that under competitive conditions on the retail markets, customers would migrate to the alternative fibre product. BEREC suggests modifying point (c) in the following way: "*the price increase should not lead to excessive retail prices hampering condition of competition in the market*".