

BEREC's position on access regulation (market analysis) of the DNA

Key messages

- BEREC welcomes the preservation of the core SMP framework in the DNA.
- BEREC is concerned about the removal of the obligation to have a Relevant Markets Recommendation as it would increase the regulatory burden and decrease regulatory predictability.
- BEREC suggests not to define in the DNA a maximum duration for concluding the market analysis process. Alternatively, should a maximum duration be deemed indispensable, it should be of three years (to be exceptionally extended by one additional year).
- If the one-year threshold is to be maintained, the period should be counted from the opening of the public consultation on the draft measures to the submission of the notification to the EC. The possibility of extension should still be applicable in this case.
- The geographical surveys of network deployments should not be the trigger of a market analysis process.

Commission proposal:

The DNA proposes to preserve the core SMP framework (Art. 72, 73, 76 and 77-79) but removes the Commission's obligation to adopt a Recommendation on Relevant Markets (RRM)¹. At the same time, the proposal encompasses the elimination of Art. 76 on co-investments.

Another novelty of the DNA is the introduction of a pre-determined deadline of one year for the finalisation of a market analysis cycle. According to Art. 73, NRAs shall conduct market analyses in a timely manner, concluding the process within a period of one year.

BEREC's assessment:

As regards the **market analysis procedure**, BEREC welcomes the preservation of the core SMP framework in the DNA. This framework has contributed to significant gains in terms of competition, particularly infrastructure-based competition, regulatory predictability and harmonisation, preserving investment incentives and generating end-users' benefits in terms of lower prices, higher quality and variety of choice². Ex-ante regulation is applied in almost all Member States and has an important role in the transition from copper to fibre networks.

At the same time, BEREC supports the simplification of the current framework through the removal of the rules on co-investment in VHCNs infrastructure, as these provisions were not used due to their high complexity in application, despite BEREC having issued guidelines on

¹ Article 72 states that the Commission shall regularly analyse the overall trends in the Union, based on the results of stakeholders' consultation, and assess, by reference to Article 73(1)(a), (b) and (c), whether the adoption of a recommendation on relevant product and service markets ('the markets Recommendation') is required. The Commission may adopt the markets Recommendation, after public consultation, including with national regulatory authorities, and taking account of the opinion of BEREC.

² Particularly, BEREC is highly supportive of the EC's view expressed in the draft DNA, according to which "the SMP regime remains the key instrument for ex-ante regulation, ensuring that markets work well".

the consistent application of co-investment criteria³. Indeed, BEREC has analysed the sole attempt to apply the provisions of Art. 76 on co-investments⁴ and pinpointed the difficulties encountered.

Regarding **the RRM**, BEREC is concerned that the removal of the obligation to have a regularly updated Recommendation results in a discretionary option, leaving the potential imposition of ex-ante market regulation open-ended. Despite the current RRM still being in force for now, and thus requiring full consideration by NRAs, **BEREC is concerned about the signal that the EC's proposal sends to the market**. In the proposed setting of the DNA, the imposition or maintenance of ex-ante obligations might be interpreted as exceptional, despite the evidence available pointing to the continued need for regulation of the markets contained in the current RRM. The status quo is indeed that not many NRAs have found market trends allowing for large-scale deregulation of the wholesale local access (WLA) and wholesale dedicated capacity (WDC) markets⁵. Furthermore, the recent specific Romanian case on the WLA market has shown an instance of the need to revert to regulation in a market which was deregulated over 10 years ago⁶. The phase-out of the legacy copper infrastructure is likely to result in several local fibre monopolies, rendering ex-ante regulation essential in certain less competitive (sub-national) markets. Additionally, such a proposal is at odds with the introduction of a harmonised access product at the European level, which is inherently based on the assumption that ex-ante regulation is warranted.

At the same time, BEREC believes that **the EC's proposal reduces market certainty and predictability**. The sector is characterised by long-term investment decisions that rely heavily on stable, longstanding regulatory principles. The obligation for the Commission to “regularly analyse the overall trends in the Union” based on the three criteria test, but without reflecting this evaluation in a formal Recommendation, leads to uncertainty and reduced predictability regarding the expected regulatory outcomes. This is especially true for those operators that rely on access to the networks of the SMP operators. In fact, the DNA explicitly requires NRAs to perform a market analysis only i) where ex-ante regulation was imposed, ii) where a market is included in the RRM and iii) prior to the copper switch-off, in relevant markets covering at least the areas affected by the copper switch-off. In the absence of an RRM, the case for NRAs conducting market analyses unrelated to copper switch-off encompasses more complexity, rendering the proof needed for regulation increasingly difficult. Furthermore, related to point (iii) above, a market analysis is run to assess competition and not the impact of copper switch-off as an end in itself.

³ BoR (20) 232 BEREC Guidelines to foster the consistent application of the conditions and criteria for assessing co-investments in new very high capacity network elements, 11.12.2020, see: <https://www.berec.europa.eu/en/document-categories/berec/regulatory-best-practices/guidelines/berec-guidelines-to-foster-the-consistent-application-of-the-conditions-and-criteria-for-assessing-co-investments-in-new-very-high-capacity-network-elements-article-76-1-and-annex-iv-eecc>, Article 76 (1) and Annex IV EECC.

⁴ BoR (24) 83 Summary of the BEREC external Workshop on ex-ante regulatory experience concerning commitments, wholesale-only undertakings and commercial agreements review, as well as on an internal workshop on the same topic, 3.06.2024, see: <https://www.berec.europa.eu/en/document-categories/berec/reports/summary-of-the-berec-external-workshop-on-ex-ante-regulatory-experience-concerning-commitments-wholesale-only-undertakings-and-commercial-agreements-review>.

⁵ BoR (25) 146 BEREC Input to the European Commission's consultation on the revision of the Recommendation on relevant markets susceptible to ex ante regulation, 30.09.2025, see: <https://www.berec.europa.eu/en/all-documents/berec/opinions/berec-input-to-the-european-commissions-consultation-on-the-revision-of-the-recommendation-on-relevant-markets-susceptible-to-ex-ante-regulation>.

⁶ See Commission's Decision in case RO/2026/2623.

On top of identifying, at the European level, the list of relevant markets susceptible to ex-ante regulation, the RRM also provides for key analytical tools to adapt regulation to national circumstances, under a harmonised methodological approach at the **EU level**. Despite BEREC understanding that NRAs should follow competition law principles when reviewing markets, in the absence of an RRM, further unclarity would be determined in relation to the methodological elements on which NRAs may base the assessment of the products and services markets or geographic markets definition, as some of these methodological aspects would not necessarily be covered in other legal texts or replicated elsewhere. Especially the 2014 and 2020 RRMs set out numerous guidelines and methodology elements that are at the NRAs' disposal when conducting their market analyses. Therefore, BEREC firmly believes that NRAs should continue to have sufficiently flexible tools at their disposal to tailor regulation to local circumstances, in a clearly stated, harmonised framework. Furthermore, to date, this flexibility has enabled NRAs to account for variations in local competitive conditions, albeit contributing to the deregulation of targeted geographical markets where competition was likely to develop on a forward-looking basis.

Another very important issue for BEREC is related to **the envisaged increase in the burden of proof for NRAs**. Should the currently regulated markets identified in the 2020 RRM be no longer considered susceptible to ex-ante regulation at EU level (following EC's assessment resulting in a zero markets Recommendation), the evidentiary burden to justify national measures (and to defend them before Courts) would substantially increase for those NRAs identifying market failures and hence the need for regulation, leading to longer and more complex market analysis processes. In such a scenario, the fulfilment of the 3 criteria test would always need to be proved.

In the same vein, considering the statement in the DNA according to which there is a need to phase-out ex-ante regulation⁷, while BEREC agrees on the pursuit of this goal, it holds that, currently and in the foreseeable future, the sole reliance on ex post control is premature, considering the timeliness needed for intervention and the irreparable harm that may be caused in given circumstances.

Finally, on the single market dimension and in consideration of the inherent local nature of networks, BEREC cannot stress enough the important **harmonisation role that the RRM** had on the regulatory measures across the EU. BEREC has already made this point in previous contributions⁸.

Concerning the **timeframe of the market reviews**, BEREC notes that the DNA does not include any indication of the consideration of a starting point and an end point, rendering uncertainties on how this timeframe will actually be counted in practice.

With regard to the time necessary for a market analysis, NRAs' experiences from the past show that **one year is too short for a comprehensive and thorough market review**. A market analysis often starts with a comprehensive collection of data from the operators and from the demand side (including surveys and interviews), which may take several months. The assessment itself includes the market definition (product and geographic definition, possibly at

⁷ Recital (20) states that "It is necessary to reduce ex ante sector-specific rules in the future as competition in the markets develops and, ultimately, to ensure that electronic communications are governed only by competition law."

⁸ See footnote 5.

the retail and the wholesale level), possibly a three-criteria test (always if there is an RRM with no markets), the SMP analysis, the identification of potential competition problems and the selection of appropriate remedies, which have to be specified in detail. The review is usually consulted with the market (sometimes more than one consultation process is needed), and the inputs have to be taken into account. Only then can the draft measure be notified to the EC. This process usually takes two to three years.

BEREC also wants to point out that parties to the proceeding can, as long as the proceeding is not finished, always submit new inputs which have to be taken into account by the NRAs. This is particularly relevant in the case of **commitments** or **commercially negotiated wholesale access agreements**. This may lengthen the proceedings considerably, which is beyond NRAs' control. Furthermore, Art. 83 of the DNA specifies that "*Undertakings designated as having significant market power may offer to the national regulatory authority commitments*", which implies that there should be a proposal for SMP designation, at least in a draft decision. Differently put, the reading is that the aforementioned steps need to be undertaken anyway. This provision adds further complexity timewise.

At the same time, unlike under Art. 67(5)(a) of the EEC that provided for the possibility for the extension of the timeframe with up to one year, on an exceptional basis and based on a reasoned proposal, the DNA does not foresee any possibility of extension, irrespective of the circumstances.

Finally, BEREC is not aware of significant problems with the duration of the process having been observed/reported in the past. Reducing the duration of the process, if possible at all, is likely to require **significant additional resources for NRAs and may derive in less thought-through analyses**.

In terms of the interplay between the market analysis process and the geographical surveys of network deployments (GSND) (as per Article 183(12)), BEREC underscores a mismatch between the intention and the ends of the two processes. Particularly, while BEREC is highly supportive of the fact that NRAs need to take into account the data gathered through the GSND in their market reviews, as stated in Article 72(2), the main purpose of conducting GSND is rather to have an assessment of network coverage, not to determine competitive market dynamics, which is a significantly more complex task. Indeed, the decision to review a market requires an analysis of a broad range of data and behavioural elements, which extend beyond the scope of data on network availability. Additionally, the requirement of Art. 183(12) concerning the need to "make public the results" of the analysis undertaken can constitute a significant increase in the administrative burden of NRAs, particularly when they conduct the mapping exercise at shorter intervals than the maximum three years specified in Article 183(1), for example, annually.

To sum up, BEREC's detailed analysis regarding the Commission's proposals in the DNA relating to the market analysis procedure has resulted in questioning the potential to deepen the internal market integration in the case of the telecommunications networks, which are inherently local or regional in nature. Instead, BEREC is arguing that the currently in place framework has led to a high degree of market integration that needs to be preserved in order to keep the operators' incentives to invest in networks and assure real end-user benefits.

Alternative proposals:

In light of the above, as a first-hand option, BEREC holds that the current wording in Article 64.1 EECC⁹ should be maintained, and the EC should be obliged to update the RRM periodically, and not leave its adoption open-ended. The revised RRM should (i) uphold the established regulatory tools (e.g. the definition of product and geographical markets), (ii) include methodological guidance on market analyses and (iii) keep the current WLA and WDC markets as ex-ante asymmetric regulation may be still justified, at least, in certain local areas (or the entire territory if access to physical infrastructure is not feasible to a sufficient extent). Furthermore, BEREC considers it important for the EC to include in the RRM an analysis, explanations and methodological considerations regarding the circumstances conducive to the need to regulate PIA as a self-standing market, because in countries where physical infrastructure is available and reusable, the regulated access to this input has been key to facilitating the development of strong infrastructure-based competition and very intensive fibre roll-out.

Concerning the timeframe of the market reviews, BEREC suggests not to define in the DNA a maximum duration for concluding the market analysis process. As a fallback option, should a maximum duration be deemed indispensable by the EC, BEREC considers that it should be of three years, comparable to the existing rules in the EECC¹⁰.

On the other hand, if the one-year target is to be kept in the DNA, then it should refer to the period counted from the launch of the public consultation on the draft measures to the EC notification. This proposal is rooted in the fact that NRAs can better control this particular part of the market analysis procedure.

Moreover, quite importantly, the possibility of having a reasoned extension of the market analysis period, on an exceptional basis, upon notification to the EC, needs to be reinstated in BEREC's view¹¹.

In any event, BEREC advocates for retaining the possibility of an extension of the timespan of up to one year, on an exceptional basis, based on thorough reasoning¹². Such an approach proved extremely useful in instances when national circumstances were too unstable to conclude on the relevance of maintaining or withdrawing SMP regulation.

Finally, relating to the potential triggering of a market analysis process due to the information resulting from the geographical surveys of network deployments (GSND) (as provided by Article 183(12)), BEREC considers that it should not be the case, and para (12) should be completely removed.

⁹ "After public consultation including with national regulatory authorities and taking the utmost account of the opinion of BEREC, the Commission shall adopt a Recommendation on Relevant Product and Service Markets ('the Recommendation')."

¹⁰ For instance, the provisions in Art 67 (5) could be considered a relevant reference point. If the proposal of three years for the market analysis procedures is retained, the DNA needs to clearly establish the starting and ending point of the market review, as it will be considered by the EC.

¹¹ There have been NRAs having made use of such provision in the past for reasons outside their control, such as incorrect data reported by the operators, late provision of crucial information and alike. The negotiation of commitments or relevant wholesale access agreements mentioned above would also qualify as reasoned exceptions from the general rule regarding the timeline.

¹² Similar to the provisions in Art. 67 of the EECC.