BoR (26) 88_9

BEREC's position on SMP Remedies (incl. Harmonised Access Products) of the DNA

2 June 2026

Key messages

- BEREC underlines the importance that remedies are designed to address the concerns identified by the market analysis in a proportionate and efficient manner and tailored to the national and, sometimes, local circumstances. From this perspective, the DNA proposal introduces an unjustified shift of powers towards the Commission and rigidity in the definition of obligations, undermining effective regulation.
- First, BEREC objects to the proposed extension of the Commission's veto powers to NRA decisions on remedies.
- Moreover, the establishment of a rigid sequence of remedies in the Regulation breaks the links between the obligations and the market analyses and also among the remedies themselves, as in many cases, those are complementary to each other and require joint imposition.
- Additionally, BEREC questions the benefits of introducing harmonised wholesale access products. Not only would these products be challenging to define, considering the diversity of networks deployed in the EU, but they would also be costly and lengthy to apply. Moreover, such a product would have a limited footprint in light of the maturity of the market and targeted regulation. In such a context, besides an unbalanced proportionality check, the potential contribution to the single market would be very limited.

Commission proposal:

Sequence of SMP remedies

Under Article 77(1) DNA, NRAs will be expected to first examine whether existing regulation, competition-law commitments or remedies, and relevant commercial agreements already address competitive dynamics in a given market before considering the need for regulatory intervention.

While the EECC already embeds the principle of proportionality by requiring NRAs to choose the least intrusive way of addressing the identified competition problems (Article 68 EECC), the DNA adds in Article 77(2) that NRAs shall consider the commitments offered by the SMP operator under Article 83 DNA proposal.

Whereas, according to Article 68 EECC, the NRA "shall, as appropriate, impose *any* of the obligations acc. to Article 69 to 74, and Article 76 and 80", the DNA proposal foresees a structured, sequential approach to SMP remedies (Article 77(4) DNA):

- "at the first stage", NRAs may impose transparency and non-discrimination;
- if those were considered insufficient, NRAs must examine whether combining them with access to passive networks (including dark fibre) under Article 80 DNA is "proportionate and sufficient";
- if additional access obligations are needed, NRAs shall first impose access to EU-harmonised access products, which may include local access products (Article 81 DNA);

- only where NRAs “provide substantiated justification” that these obligations do not adequately address identified competition issues, they may impose other access obligations, including active or virtual access to specific network elements and services (Article 78 DNA);
- In addition to the obligations mentioned in the paragraph above, where obligations from Articles 77 to 84 are not appropriate on their own, NRAs may impose costing obligations (accounting separation, price control and cost accounting).

EU-harmonised access product as the new default remedy

The DNA proposal introduces an EU-harmonised wholesale access product, which NRAs will be expected to impose in all member states where access beyond passive network elements under Article 80 DNA is required.

According to recital 207 DNA, harmonised access products may include FTTH unbundling and virtual unbundled local access, as these products are typically imposed in the wholesale markets serving mass market customers. In addition, such harmonised products could include Ethernet leased lines and quality of service parameters in the markets serving business customers when needed.

The harmonised access products will have to meet substantive requirements (Article 81(5) DNA).

The Commission may adopt binding implementing acts setting out the technical specifications, standard cost elements, cost methodologies for harmonised products and the corresponding reference offer based on a BEREC opinion.

Wholesale-only regulatory relief is addressing market foreclosure risks

Article 84 DNA largely preserves the approach set out in Article 80 EECC for wholesale-only operators.

The DNA, however, will adjust the rules to allow for broader application of lighter regulatory treatment for wholesale-only networks: the wholesale-only status is linked to the absence of retail activity in the analysed relevant market (and not anywhere in the EU).

Retroactive effect of remedies not allowed

To enhance legal certainty and predictability, the DNA will explicitly prohibit the retroactive effect of SMP remedies (Article 77(4) DNA).

Access to passive networks, including dark fibre

Access to civil engineering (Article 72 EECC) will be replaced by “access to passive networks” and will explicitly include dark fibre (Article 80 DNA).

Removed remedies

The proposed DNA will remove some remedies under the EECC that have not been used by NRAs in practice, namely the option for NRAs to impose functional separation (Article

77 EECC) and the rules on regulatory relief for SMP operators related to co-investment commitments (Article 76 EECC).

Procedural changes: Commission veto on most remedies

The draft DNA will extend the Commission's unilateral veto powers by allowing it to require NRAs not to adopt a proposed market review, to also include all regulatory remedies except access to passive networks and EU-harmonised access products[1].

BEREC's assessment:

Despite the call for simplification, the proposal related to ex ante regulation suggests a willingness to **centralise the judgment on which remedies to be imposed** while introducing, at the same time, vague legal standards and bureaucratic rigidities for NRAs. BEREC fails to see why centralisation would simplify the framework; rather, the opposite, as the procedure for such a decision is inevitably a multistage proceeding involving various levels (EC and NRAs).

In fact, while the SMP framework is formally kept, the cumulative effect of the proposed changes, namely

- downgrading of the objective to promote effective competition,
- no longer a mandatory Recommendation on Relevant Markets (RRM)[2],
- prescribing a sequence of the remedies imposed (i.e. limiting the NRAs' capacity to design the most adequate remedy/ies to address the issues identified in the market analysis) with additional justification obligations for NRAs,
- a prioritised, harmonised access product to be defined, and
- the unilateral veto on remedies

amount to moving away from a principle-based approach to an approach where the judgment of NRAs based on a thorough analysis becomes subject to a discretionary final decision by the Commission, without clear legal standards.

This creates legal and regulatory uncertainty - without any likely benefit in terms of simplification or advancing the single market - and risks undermining effective regulation, which is definitely not in the interest of European citizens. The new sequencing of remedies, plus the proposed veto on remedies (applied for the first time on the ranking-based approach), takes away the flexibility of NRAs that is necessary to tailor the remedies to the specific market situation and the competition problem identified in the market analysis, according to the principles of proportionality and subsidiarity. This shift from a bottom-up to a top-down centralised approach contradicts the fact that the Commission acknowledges the national/regional specificities of

[1] Under the EECC, the Commission may veto only the definition of a relevant market or the designation of an operator with SMP (Article 32 EECC). Where the Commission has serious doubts about the proposed remedies, it may issue only a non-binding recommendation to the NRA to withdraw or amend the draft measures (Article 33 EECC).

[2] See also BoR (26) 88_7 BEREC's position on access regulation (market analysis) of the DNA, 2.06.2026, see: link.

the electronic communications markets; consequently, that regulation needs to target regional/local market areas more and more (as confirmed by recital 380 of the DNA), which can best be assessed by NRAs.

The risk of diminishing the autonomy of NRAs will reduce the ability of NRAs to adapt regulation to the specific characteristics of the local market, will limit flexibility in managing technical or commercial issues that may differ significantly between member states and will create a gap between national realities and the decisions adopted at the European level. It should also be mentioned that a hierarchy of remedies can also lead to over-regulation — to reach a necessary remedy, the NRA may be required to impose something that is not strictly necessary but ranks higher in the hierarchy.

The provisions regarding the imposition of obligations (Article 77 – Article 85) together with the newly introduced provision of the unilateral veto on remedies seem to amount almost to a "presumption against regulation" which gives rise to risks of "false negative" cases, i.e. not regulating where it is required.

This can be seen, e.g. in the wording of Article 77.1, which starts as follows: "When assessing the competitive conditions of a specific market and the need for regulatory intervention,…." NRAs approach regulatory obligations after the assessment regarding the competitive conditions has already been completed, with the market analysis and the findings of the SMP. BEREC considers that remedies imposition – as in the current EECC - is not a matter of deciding, at this stage, on the regulatory intervention itself (yes or no) – since this has already been established as a result of the SMP assessment – but on *the way* to intervene and which least intrusive (combination of) remedies can effectively address the competition problem.

With Article 77.4, the **sequencing of remedies** foresees that "at the first stage of assessment" the obligations of transparency and non-discrimination may be imposed.

Thus, the DNA proposal considers the possibility for NRAs, as the first choice, to impose such two – albeit undefined – remedies (i.e. transparency, non-discrimination) regardless of the imposition of an access remedy. This seems to weaken the effect of the remedies, especially since in most cases the SMP operator is vertically integrated. In fact, the proposal does not specify which access products such obligations could be referred to (and BEREC considers that it is not effective, as it may refer only to the products the SMP operator decides to offer to third parties, with the specific characteristics it chooses). Moreover, these two obligations are not described in separate Articles anymore (i.e. Article 69 and Article 70 EECC are missing). Consequently, in order that the measures taken on this first stage of assessment are effective, the provision must refer to certain pre-existing conditions identified in market analysis (i.e. competition problems stem from a lack of clarity in the wholesale access offers, preferential treatment).

In case NRAs consider it justified and proportionate to impose access obligations additional to passive access (Article 80), they shall impose the **Union harmonised access products** acc. to Article 81 prior to imposing other access products. While significant efforts are needed at a EU level (both, Commission and BEREC) to define the harmonized access product considering different networks topology, architectures, operational and cost effectiveness, operational processes, access points and SLAs among members states (which could ultimately allow to doubt

about its effectiveness, also in the light of Article 81.5), this Article takes away the discretion of NRAs (“shall impose”) and prioritizes the harmonised access product (albeit without defined specifications) over the obligation of access to, and use of, specific network elements and associated facilities according to Article 78. Given that there are usually well-established access products in place - and considering that switching from those creates costs and delays which may interfere with timely access for alternative operators in case interfaces, functionalities and procedures need to be adapted - BEREC is highly sceptical of the proposed approach. BEREC also wonders about the rationale of the harmonised access product. The term “Union harmonised access product” seems to indicate that this would be available across the EU, and the rationale would be the further development of the single market. However, at this stage of market maturity, targeted (also geographically) regulation already is in place in many EU areas; the practical effect of such a product, once in place, would likely be very limited and probably fail any cost-benefit analysis.

With regard to the practical implementation, BEREC would like to point out that if the intention of the Commission is to define a technical standard with specified interfaces, quality of service, etc., i.e. define the harmonised access product in a way that operators can simply “plug and play”, this would require the cooperation of the entire industry in the standardisation process. Experiences from reference offer proceedings suggest that this would be highly difficult, as finding necessary technical agreements has already proven to be highly difficult at the national level. Such a procedure would go well beyond the general description foreseen in Article 81.5.

BEREC also underlines that the EECC removed an annex from the 2002 regulatory package regarding guidelines on reference offers, noting that “In light of the variety of network topologies, access products and market circumstance that have arisen since 2002, the objectives of Annex II to Directive 2002/19/EC, concerning local loop unbundling, and access products for providers of digital television and radio services, can be better achieved and in a more flexible manner, by providing guidelines on the minimum criteria for a reference offer to be developed by and periodically updated by BEREC. That Annex should therefore be deleted"[3]. As correctly recognised by the EECC, defining the minimum criteria for a reference offer requires flexibility. Conversely, it would be extremely complex for the Commission at this time to invert the approach and to set out (in 6 months) "the technical specifications, standard cost elements, cost methodologies for harmonised products and the reference offer related to the harmonised access product(s)" (Art. 81 of the Draft DNA). In addition, relying on implementing acts would result in a loss of the necessary flexibility.

Moreover, the provision of Article 81.4 foresees that the Commission “may adopt” (within 6 months of entry into force) specifications for its proposed “harmonised access product”, which increases ambiguity and acts contrary to its intended/declared “harmonisation” aim. The Commission will take into account the opinion of BEREC, but this opinion will only be consultative. These two factors add legal uncertainty to the current and future market analysis processes.

In addition, the obligation to access specific network elements and associated facilities may be imposed only when NRAs provide “substantiated justification” demonstrating that access obligations under Article 80 and Article 81 are insufficient to address the identified competition

[3] Recital 183 of the EECC.

problems. Thus, an additional burden of proof is introduced, raising the bar for effective imposition of remedies as considered proportionate, appropriate, based on the nature of the problem, and justified considering the objectives laid down in Article 3 by the NRA. The NRA's discretion is severely narrowed, and the flexibility to tailor the remedies to the national market situation is drastically reduced (almost eliminated). This is likely to result in less effective regulation as the NRAs have respected all principles foreseen in Article 77.2 and 77.3, based on the thorough assessment of the different possible remedies and taken a judgment on the most effective remedies to overcome the competition problem identified in the market analysis. Furthermore, according to Article 81.2, the NRAs shall explain why other access products (imposed according to Article 78) are more appropriate than the harmonised access products (albeit not clearly defined), which is another hurdle to effective regulation.

The sequencing of remedies acc. to Article 77.4(5) then goes on with the provision that only in case where the obligations acc. to Article 77 – Article 84 are not sufficient, the obligations of accounting separation (not described in a separate Article, i.e. Article 71 EECC is missing) and price control and cost accounting (Article 79 DNA proposal) may be imposed. Thus, again, a weakening of effective regulation as the NRA's discretion is further narrowed down. In addition, ranking accounting separation below non-discrimination remedies appears inconsistent, since accounting separation is a key tool to detect any discriminatory pricing behaviours.

The ultimate step of limiting and taking away the NRAs' flexibility on imposing effective remedies is the unilateral **veto on remedies** in Article 85.3 (c), with the exception for access obligations according to Article 80 and Article 81, without providing proper reasoning for its necessity. With this provision, the EC shifts the decisions on remedies to the EU level and ultimately replaces the NRAs' decisions based on a thorough technical analysis and exercising their discretion by applying the principles laid down in Article 77.2 and Article 77.3 with a centralised decision without clear legal standards.

Indeed, Article 85.3 and 85.5 empower the Commission to open a phase II investigation (and ultimately issue a veto decision) in case of serious doubts as to the compatibility of the draft measure with Union Law and in particular with the objectives referred to in Article 3. In BEREC's view, this wording creates unnecessary legal uncertainty, because it remains unclear if the last part of the Article that refers to the objectives of Article 3 of the DNA describes a further reason for serious doubts/a veto decision next to the reason "incompatibility with union law". It suggests that the balancing of regulatory objectives, which is the essential part of regulatory decision-making, would be superseded by a better judgment at the EU level. If the intention of the DNA was, for the Commission, only to intervene if there is such a level of disregard for the Article 3 objectives that would amount to a violation of EU law in itself, then it would not be needed. In particular, the Commission's decisions would replace the balancing of objectives under Article 3 carried out by NRAs. This risks a "reprioritisation" of objectives, e.g. valuing competitiveness over competition. This creates legal uncertainty, undermining the need for predictable regulation. Also, in terms of overall consistency of the proposal, it has to be highlighted that the favouring of access obligations imposed according to Article 80 and Article 81 by exempting them from the veto on remedies is inconsistent and justified only on a deregulation bias, which risks leading to less appropriate remedies, and weakening effective targeted regulation, which is to the detriment of European citizens.

With reference to the application of Article 81, the inconsistency in the proposal stems also from Article 84 on wholesale only undertakings, which is properly maintained as a pillar of the new regulatory approach but sees access obligations according to Article 78 as one of the main appropriate ex ante obligations without reference to the harmonised product (Article 81). This confirms that the sequencing envisaged in Article 77.4 cannot be considered of general application.

Moreover, the commitments procedure under Article 83 seems to invite "negotiations" instead of regulation, adding unnecessary delays in imposing appropriate regulatory obligations where needed. Instead of only removing Article 76 EECC (co-investment commitments), the proposed provisions regarding the commitments procedure should be reshaped in a way that does not give incentives to SMP to crowd out and delay timely ex ante regulation.

A further element of confusion related to market analysis procedures (Article 73) in the DNA proposal is the fact that Article 71.2 (which refers to symmetric measures) also opens up the possibility that NRAs, through market analysis, evaluate access obligations related to a retail symmetric non SMP measure, and even cost recovery calculation.[4]

Alternative proposals:

Article 77.1 should be deleted as it is misleading in identifying the cause-and-effect of regulatory intervention and may overwrite the market analysis (which assesses the existence of SMP positions to be regulated).

References to additional "justifications for imposing regulatory obligations should be removed. The principles for imposing obligations should follow the principle of proportionality, appropriateness (instead of a rigid sequencing), being based on the nature of the problem identified, justified in considering the objectives acc. to Article 3 and following the consultations on national and European level. These principles, together with the results of the market analyses, have proven effective and flexible enough to intervene where necessary and to withdraw obligations when regulation is no longer necessary, as competition has evolved and no SMP operator is designated anymore. BEREC therefore does not see a need for the provisions in Article 77.4 para 1-5. Harmonized access products should be in the NRAs' toolbox but should not be automatically prioritised over other access products and the use of other access products should not need a proof of need beyond the new "harmonized" product.

More specifically, harmonised products should fit into the principle of proportionality and should be considered as target products that could emerge under NRA regulation. As outlined above it is important to keep the flexibility for NRAs to implement efficient and proportional regulation. In order to ensure a consistent outcome, BEREC could, alternatively, provide guidance similar

[4] See also BoR (26) 88_11 BEREC's position on the Symmetrical Regulation of the DNA, 2.0.2026, see: link and BoR (26) 88_12 BEREC's position on Migration and Copper Switch-off (Articles 53-61) of the DNA, 2.06.2026, see: link.

to the minimum criteria for reference offer. This “bottom-up” approach leads to more appropriate results in terms of Union wide usable access products than the proposed rigid “top-down” procedure (incl. implementing acts by the Commission).

The first sentence of Article 83.3 should be rewritten as it suggests that commitments can replace regulatory obligations (in particular if read in conjunction with Article 77.1).

Finally, the Commission’s veto on remedies in Article 85.3 (c) should be removed.