



Vodafone Group response on draft BEREC guidelines on the criteria for a consistent application of Article 61(3) EECC

31 July 2020

We appreciate the opportunity to comment on this consultation and trust that our comments are helpful to BEREC and National Regulatory Authorities (NRAs) as well as to other stakeholders. We remain at your disposal to discuss our submission to the consultation, or any other aspect relevant in the context of the latter.

To inquire about our response please contact:

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We are supportive of BEREC's work in the development of guidelines on the criteria for a consistent application of Article 61(3) of the European Electronic Communications Code (EECC).

We agree with the detailed points raised in the GIGA Europe submission regarding the key concerns with the proposed BEREC guidelines. In addition to those concerns, we would like to provide the additional comments as set out below.

Preserving incentives to invest in critical infrastructure

Digital connectivity and networks are critical infrastructure providing essential services for the functioning of European economies and societies. The COVID19 crisis has brought the importance of investments in modernising digital networks into sharp focus. The ability to invest, enhance capacity and expand the reach of connectivity services ought to be the key objectives of ensuring greater societal resilience and economic recovery from the turmoil of the current pandemic.

The EECC is a key instrument through which the EU is set to incentivise appropriate investments in order to achieve these policy goals. It is therefore of paramount importance that all relevant aspects of the framework act in harmony towards achieving its purpose. Symmetrical obligations, such as the ones set out in Article 61(3), can be intrusive and undermine incentives to invest. This is recognised in Recital 152 of the EECC:

However, as such obligations can in certain cases be intrusive, can undermine incentives for investments, and can have the effect of strengthening the position of



dominant players, they should be imposed only where justified and proportionate to achieving sustainable competition in the relevant markets

We do not believe that the proposed guidelines are currently providing clearly defined boundaries to ensure that the article will only be applied where “justified and proportionate to achieving sustainable competition in relevant markets”. The guidelines need to establish clearly defined boundaries for access regulation under the significant market power (SMP) regime and Article 61(3) to ensure any negative effects on investments, competition and consumer welfare will be avoided.

Without clear boundaries, there also is apparent risk that NRAs may inadvertently establish new access regulation by circumventing the burden of a proper SMP analysis, in particular regarding potential regional or local submarkets, without the need for necessary proof and rigor of market analysis. This is even more crucial as the criteria for application of measures according to Article 61(3) are largely similar to the well-established three criteria test from SMP analysis. Such distorted outcomes would have adverse effects of investment, competition and consumer welfare and would undermine the overall purpose and goals of the EECC.

The purpose of Article 61(3) and its place within the regulatory framework

Article 61(3) allows for access regulation outside the well-established SMP framework by introducing symmetric regulation that can be applied to any operator. It is based on the concept of economic network replicability and is intended to provide an additional tool for access regulation.

Access to electronic communication networks and physical infrastructure suitable for the rollout of these networks can be granted under three different relevant regimes. In situations where there is (i) no competition for the market (state aid), no effective competition (SMP), and infrastructure bottlenecks requiring measures to unlock supply (BCRD). Not least given the similarity of the latter with the situation that Article 61(3) is supposed to deal with, any access under this article must, in order to be effective and proportionate, take into account other access obligations set under the more encompassing and therefore higher ranking regulatory access regimes.

At the time when Article 61(3) was introduced into the EECC, there was some doubt as to whether the SMP regime would effectively deal with situations where anti-competitive oligopolies could create access bottlenecks. The developments in the Netherlands and Belgium show that joint SMP can be assessed by NRAs under the EECC. Therefore, the original purpose, relevance and applicability of Article 61(3) is no longer sufficiently clear. We therefore consider that the BEREC guidelines must be explicit and clear on certain fundamental aspects of the overall regime, and the place that Article 61(3) may find among them.



The guidelines should primarily safeguard the pro-competitive outcomes of a well-established regime. The boundaries between a competition analysis under the SMP framework and under symmetrical regulation must be abundantly clear and robust.

Specifically, conditions that should be met in order for Article 61(3) to be used to impose access beyond in-house wiring should be **all** of the following:

1. *Any other access obligations would be insufficient.* This should include SMP, BCRD and stated aid rules, as well as in-building access to be applied and considered in the first instance.
2. *In an existing or emerging market situation.* The guidelines currently do not provide sufficiently clear guidance on the assessment that needs to be made on whether there is an underlying market situation (either in existence, or emerging) that significantly limits competitive outcomes for end-users. As noted by GIGA Europe, this assessment should be made prior to assessing whether or not high and non-transitory barriers to replication exist. In order for Article 61(3) to apply, such a clear assessment would then need to be satisfied.
3. *The market situation would limit competitive outcomes to end-users.* The SMP framework is underpinned by the principle of end-user outcomes consistent with a competitive market and the same threshold should be applied when using Article 61(3), however only where the points 1, 2 and 4 set out here are also satisfied.
4. *High and non-transitory economic or physical barriers to replication exist.* The guidelines are not sufficiently clear on defining the barriers to replication in this context. In terms of the logic of hierarchy of the framework, the replication barriers could be said to be transitory where SMP regulation suffices to let challengers replicate network assets.

Additional comments

As noted above, we support the detailed points raised in the GIGA Europe submission, and would like to note that the following issues it raises need to be reflected in the guidelines:

- *Proportionality.* The guidelines should recognise the significant burden placed on network operators by possible obligations by introducing greater proportionality by placing some onus on access seekers to demonstrate that their request is reasonable, appropriate and necessary.
- *Active/virtual access.* The guidelines need to provide more guidance on the circumstances that warrant active/virtual access. We consider that any circumstances warranting active/virtual access must be a last resort and this should be clearly set out. It should be made clear that passive access is the remedy of first choice. Only where passive access cannot be realized due to technical impossibility, active/virtual access may be taken into account. However, even in such circumstances the imposed access points may not merely replicate usual bitstream access points on local, regional or even higher network level but must be located strictly at the “first concentration point beyond xx”. This is necessary notwithstanding the proposed cost/revenue consideration of access seekers and the “efficient operator” concept within the draft guidelines (see our comments on this issue below).



- *The introduction of the concept of “clusters”.* The concept of analysing access requests based on “clusters” is not included in the wording of Article 61(3). We are hesitant to expand the scope and wording of this provision as this may introduce further confusion as to its application. If this concept is to remain in the guidelines, we would encourage BEREC to provide greater clarity on its application – we refer to the GIGA Europe comments for some detailed suggestions.
- *Definition of “efficient operator” and proposed cost/revenue analysis for determination of feasible access point:* The inclusion of the “efficient operator” concept in order to determine a feasible access point is both cumbersome and dubious, as well as taking on a potentially inconsistent meaning with its use in other aspects of the regulatory framework. It considers solely the optimal requirements from the point of an access seeker or wholesale operator and does not appropriately recognise the cost and burden of an access provider. The outcome of the proposed cost/revenue analysis for an access seeker and the assignment of an “efficient operator” is mostly contingent on the network presence or footprint assumed in the analysis. A feasible access point according to cost/revenue profitability is obviously different for incumbent infrastructure with both national and local presence than for a local or regional competitor with a limited footprint. In the proposed formulation of this term, the determination of what constitutes an “efficient operator” includes arbitrary assumptions. This concept should therefore be removed from the guidelines. A more adequate approach is to take supply side issues into account instead.
- *Operators of varying sizes.* The guidelines need further clarity on how requests from operators of varying sizes should be dealt with.
- *Consistency of terms used with the overall framework.* Ensure the terms used in the guidelines have a meaning consistent with the rest of the regulatory framework. we specifically note inconsistent use of the term “efficient operator” which is likely to introduce confusion and complexity.

We refer to the GIGA Europe submission for the detailed discussion of these points.