Brussels, 30 July 2020

GIGAEurope response to the Consultation on the draft BEREC Guidelines on the Criteria for a Consistent Application of Article 61 (3) EECC

GIGAEurope[1] welcomes the opportunity to provide feedback on BEREC's draft Guidelines on the Criteria for Consistent Application of Article 61(3) of the European Electronic Communications Code (Code). Broadly speaking we urge BEREC to ensure that these measures will be designed and adopted in line with the text and spirit of the symmetric access provisions, in a way which ensures they truly support and foster sustainable competition, without hampering the ability and willingness of operators to invest in future proof networks.

Under §1 of article 61(3), national regulatory authorities (NRAs) may require operators of networks to provide access to in-building wiring and associated facilities at the first concentration or distribution point (first c/d point) if replication of these network elements is economically inefficient or physically impracticable. Article 61(3) §2 provides that this obligation may be extended to a point beyond the first c/d point if the access provided under the above paragraph is insufficient to address 'high and non-transitory economic or physical barriers to replication' which underlies an existing or emerging market situation that significantly limits competitive outcomes for end-users. Under article 61(3) §5, BEREC is responsible for providing guidance on a number of key concepts under these provisions in order to foster a consistent application of the provisions.

We strongly support BEREC's commitment to engage with stakeholders, including the two-step process undertaken by BEREC - the early call for input, followed by this consultation - in line with best practice regulatory principles. As a general point, GIGAEurope recognises that BEREC has adopted a high-level, pragmatic approach to the Guidelines. However, some of the approaches and interpretations by BEREC are contrary to the text and spirit of the symmetric access provisions. Also, whilst GIGAEurope accepts that article 61(3) §5 specifically requires BEREC to provide guidance on a limited set of concepts, we consider that there is scope for additional guidance in order to avoid the type of fragmentation between Member States that the Guidelines seek to prevent. In particular, we ask that BEREC take into account the following and makes changes to the Guidelines accordingly:

- Provide guidance to NRAs on the hierarchy and relationship between the various regulatory instruments (in particular, competition law, SMP regulation and article 61(3)).

- Provider further guidance on important considerations and assessments that have the potential to lead to significantly fragmented approaches and outcomes, such as:
    - the assessment of an underlying market situation that significantly limits competitive outcomes for end-users;

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- what constitutes 'high' barriers to replicating, especially with regard to the different needs and abilities of different access seekers;
- the circumstances which warrant active/virtual access; and
- when and how to assess requests based on clusters.

- We request that BEREC more clearly specifies, when considered whether to impose access beyond the first c/d point (and not beyond the access point beyond), that an NRA must first identify - starting from the point closest to the end-user and moving out - whether there are high and non-transitory barriers to replicating this element of the network. In this respect, BEREC should provide additional guidance for NRAs dealing with requests from different types of access seekers, in particular that the assessment under article 61(3) should be undertaken with an efficient operator in mind operating the existing network which is best suited to be the starting point of a replication.

- Adopt a more balanced and proportionate approach to imposing symmetric access obligations within the Guidelines that recognises the significant burden placed on network operators by such obligations, and which places greater responsibility on access seekers to demonstrate that their request is reasonable, appropriate and necessary.

- Adopt a consistent interpretation of terms that have common legal and economic understandings within telecommunications regulations, including that of an 'efficient operator'.

1. Hierarchy between various regulatory instruments

The objective of today's regulatory framework for electronic telecommunications - largely codified in the Code - has been to guide the market from state-owned monopolies to effectively competitive markets. The Code (recital 29) restates this objective as follows: *"This Directive aims to progressively reduce ex ante sector-specific rules as competition in the markets develops and, ultimately, to ensure that electronic communications are governed only by competition law".* However, BEREC's draft Guidelines do not currently address this objective as they are designed in such fashion that they could result in more, not less, ex ante sector specific regulation. Also, they do not currently address the hierarchy and relationship between a number of regulatory instruments; (i) *ex post* competition law under the EU treaties, *ex ante* SMP-based asymmetric regulation and symmetric regulation under the Code, and (ii) the hierarchy within the symmetric obligations outlined in article 61(3) itself.

Ex post competition law, ex ante asymmetric and the different levels of symmetric regulation are designed to be complements that address different market situations. Competition law applies to all sectors, including the telecommunications sector. It is a less intrusive tool, designed to address existing market behaviours that have a negative effect on the internal market, the competitive process and consumer welfare. The SMP regime, on the other hand, aims to break down high and non-transitory barriers to entering telecom markets - in situations where the presence of such barriers results in market structures that do not tend towards effective competition and in which competition law alone would not adequately address the market failure(s) concerned - to a point at which *ex post* competition law can take over.[2] In that context, the SMP regime is based on established competition law principles and analytical processes. The SMP regime also recognises that telecommunications networks are not natural monopolies, and that in almost all parts of the network it is possible and desirable to have infrastructure competition due to the dynamic efficiencies that it creates. More recently, the regulatory

[2] See, for example, recitals 1 and 11 of Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation (EU) 2014/710, OJ L 295 [2014] (Relevant Markets Recommendation)

framework has been adjusted to encourage roll-out of very high capacity networks (VHCN) by numerous providers.

The aim of article 61(3) is clearly not to replace the SMP regime, rather the provisions are designed as a complement. Article 61(3) §1 of the Code (and the former article 12(3) of the Framework Directive and article 9 of the Broadband Cost Reduction Directive) recognises that in some cases it may be economically inefficient and therefore undesirable to replicate in-building infrastructure. In addition, the main purpose of article 61(3) §2 is to address situations, particularly in rural areas, where SMP regulation has been unable to stimulate investments by alternative operators in their own infrastructure deeper into the network due to the persistence of high and non-transitory barriers to rolling out VHCN.

We notice a potential overlap between the high and non-transitory barriers to market entry that SMP aims to address and the high and non-transitory barriers to replication that article 61(3) §2 aims to address, however barriers to replicate a network constitute barriers to market entry as well. Because of this potential overlap, there is a risk that article 61(3) is used to address market failures that would normally be subject of assessment under the SMP regime - or in order to impose SMP-type regulation on operators where market analysis has failed to demonstrate the existence of market failure/dominance. Clearly, this would be a misuse of powers circumventing the long-established hierarchy within the regulatory framework (and the Code) that is designed to address such concerns. Here, GIGAEurope is concerned that the draft Guidelines further blur (rather than clarify) the lines between (local) symmetric access obligations aimed at addressing replicability barriers and the ability to impose national level obligations akin to SMP-regulation, by lowering the legal standard for imposing more centralised access.

Article 61(3) §2 notes that any assessment of symmetric access requests should not take place in a regulatory greenfield situation but 'having regard […] to obligations resulting from any relevant market analysis' and 'obligations imposed in accordance with the first subparagraph'. This indicates that a thorough analysis must clearly demonstrate that these measures will most likely be insufficient before symmetrical access may be imposed beyond the first c/d point. Furthermore, as long as remedies imposed as a result of SMP designation are in place, symmetrical access beyond the first c/d point cannot be imposed.

The draft Guidelines also ignore the role of the sunset clause in stimulating all network operators to invest in networks (in particular, VHCNs). Given that the aim of article 61(3) §2 is to address situations where SMP regulation has not been able to stimulate infrastructure competition, its application requires (at least) the assumption that SMP regulation has run its course and been removed. The failure to do so may lead to the erroneous conclusion that certain elements of a network are non-replicable whereas the business case for replication is only negative because wholesale access under the SMP regime tends to bias the make-or-buy decision by increasing the opportunity costs of replicating infrastructure. In that case, the lack of replicability may be caused by regulation itself.

2. Lack of guidance on key areas of interpretation

The above concern is exacerbated because the guidelines are silent or too vague on important questions within the draft Guidelines. The result is that they leave significant room for interpretation between Member States and NRAs, which is likely to lead to fragmentation and maybe even misuse of article 61(3). Whilst BEREC has indicated that the scope of the Guidelines is limited under article 61(3) §5 of the Code, this narrow focus is not applied evenly across the document. BEREC provides additional guidance on some issues that fall outside of the scope of article 61(3) §5, but not on others. The Code clearly places an obligation on BEREC to foster a consistent application of article 61(3) and in this regard, and to make sure article 61(3) indeed

complements the SMP regime, and does not replace it, we ask that BEREC gives further guidance on the following matters.

Firstly, BEREC's draft Guidelines do not sufficiently address *which economic or physical barriers to replication are high and non-transitory*.[3] Application of article 61(3) §2 of the Code is subject to the identification of such barriers. The draft Guidelines do indeed discuss these barriers, but they fail to clarify the difference between high and non-transitory barriers to *replication* and high and non-transitory barriers to *enter a market*. In fact, the barriers to replication mentioned in the Guidelines are largely the same as the barriers to market entry referred to by the three-criteria test and commonly considered in SMP assessments. While non-transitory in the context of SMP regulation means that entry barriers are transitory when competition law alone suffices to allow market entry, it makes sense that replication barriers are transitory in the context of article 61(3) §2 when SMP regulation suffices to let challengers replicate network assets.

Secondly, BEREC's draft Guidelines do not sufficiently address "*barriers to replication which underlie an existing or emerging market situation significantly limiting competitive outcomes for end-users*". Application of Article 61(3) §2 of the Code is subject to the identification of such market situations. This means that NRAs must first analyse — taking a forward looking approach — whether there is indeed such a significant limiting of competitive outcomes for end-users; second, whether these are caused by the presence of barriers to replication (and not e.g. by barriers to market entry); and finally, whether imposing an access obligation would take away these barriers to replication or otherwise contribute to competitive market outcomes to such extent that the measure is proportionate.[4] To do these analyses consistently across Member States, NRAs need more guidance on the specific characteristics of a competitive market outcome that article 61(3) §2 aims to promote.

We are concerned that, in the absence of guidance on the above issues defining the scope of article 61(3) §2, NRAs will diverge significantly in their judgment on when it may be applied. There are significant differences in, for example, the number of network operators active, the quality of the networks of those operators, the geographical coverage of networks, existing (and as explained above, hierarchically preceding) network regulation, etc. In general, these differences may warrant a heterogeneous implementation of regulation, and perhaps even diverging views on the elements of a competitive market outcome that regulation needs to target. However, the legislative history of article 61(3) §2 implies that this does not apply to the application of symmetric access obligations for wiring beyond the first c/d point. Article 61(3) §2 is not drafted as a measure to be applied widely across the EU, but as a measure for specific circumstances (e.g. low population density) and with a specific purpose of stimulating investments in VHCNs. In the absence of clear guidance, NRAs may develop diverging interpretations of the scope of article 61(3) §2, resulting in scope creep and fragmentation in the application of the article; as well as of SMP regulation. This would be opposite to what the Code intends to achieve.

We therefore encourage BEREC to provide and explain the factors NRAs are to take into account when conducting this analysis. In this regard it is key that BEREC addresses both substantive elements:

- As regards the market situation, we suggest that BEREC's guidance should direct NRAs to analyse not just factors such as prices, the number of players and market shares, but also the actual and/or emerging conditions for (potential) operators, and incentive for (potential) operators to invest in VHCN. First, because this reflects the primary reasons for recasting the regulatory framework and second, because such incentives ultimately drive market dynamics and thus end-user outcomes. Moreover, an

[3] Article 61(3) §5, point e.
[4] The proportionality requirement is required under common law, but also specifically by article 61(5) EECC.

essential element of the market situation is the absence or presence of regulation or obligations based on competition law or SMP regulation, and the outcome of recent market analyses. As noted, due to the hierarchical structure this will be a known and important factor that therefore ought to be taken into account. Finally, the availability of commercial wholesale offers is an important element in analysing the market.

- As regards the limiting of competitive outcomes for end-users, guidance is needed on when this is "*significantly*" the case, as the Code requires. Similarly, in the wording of recital 154, "*important competition problems or market failures*" are required. These are clearly drafted as high thresholds, in light of the requirement contained in article 61(5) that obligations and conditions must be proportionate. However, in the absence of guidance, these thresholds are very open to diverging and even subjective interpretation by NRAs. This may result in unintended and undesirable outcomes for market participants, and moreover in fragmentation within the Union. We suggest that BEREC mitigate such scenarios materializing by reflecting in the final Guidelines robust objective criteria by which NRAs should determine whether the threshold is met.

Thirdly, the draft Guidelines provide little or no guidance on when NRAs are able to impose active/virtual obligations under article 61(3). In particular, we note that the draft Guidelines seem to suggest that virtual obligations could be imposed under §1 which is not the case, but they do not provide additional guidance on the circumstances justifying virtual obligations under §2. Here we note that virtual obligations at the point beyond should be understood as a remedy of last resort and may only be applied in the event that passive access obligations — which have already met all the relevant market and non-replicability tests — are economically inefficient or physically impracticable. NRAs may consider a virtual access obligation only when this contributes to competitive market outcomes for end-users; notably in terms of infrastructure competition. In our view, however, it is hard to imagine occasions where symmetric virtual access obligations would have such effect if similar remedies under SMP regulation have failed to catalyse challengers' investments in their own infrastructure.

Finally, the draft Guidelines introduce a new concept of analysing access requests on the basis of 'clusters' – a concept that is, however, not provided for in article 61(3). In particular, the draft Guidelines suggest that access points could be grouped together in clusters based on population density and/or the size/number of MDUs, rather than conducting individual assessments. Recital 154 does mention 'low population density' as an example of areas where the business case for alternative infrastructure rollout is more risky.[5] However, NRAs should be discouraged from grouping access points based on population density/MDUs alone. Whilst these are important factors, they are not the sole factors of the business case. This assessment should also include all other determinants of costs and revenues that are relevant to the business case assessment (including the activation of a sunset clause). This can, for example, be done using modern economic modelling tools that can ensure a case-by-case analysis of all access points. Failure to take these factors into account, and to assess each access point on its merits, suggests an approach more akin to SMP-based geographic market segmentation. If it is not possible for an NRA to implement such an assessment tool in the development of clusters, then it should be required to conduct an assessment of each access point individually to ensure that access obligations meet the principle of proportionality (i.e. that they do not go further than necessary) and to avoid market distortion.

[5] Recital 154 of the Code states that 'such extended access obligations are more likely to be necessary in geographical areas where the business case for alternative infrastructure rollout is more risky, for example because of low population density or because of the limited number of multi-dwelling buildings. Conversely, a high concentration of households might indicate that the imposition of such obligations is unnecessary.'

3. Proportionality of imposing symmetric access obligations

We are significantly concerned that the draft Guidelines are almost wholly written from the perspective of alternative operators, with little regard or no consideration for impact on network operators on which access obligations would be imposed and the proportionality of such obligations. For example, the guidelines pay no attention to the fact that access obligations impose costs on network operators and may reduce the network operator's return on investments in capacity, or the need for access seekers to ensure their requests are reasonable and substantiated. This would have an opposite effect on the key objectives of Article 61(3) – to truly support and foster sustainable competition, and investments in new and improved networks.

Clearly, any obligations imposed by NRAs must follow the principle of proportionality; that is, they must be:

- appropriate – i.e. likely to be able to achieve the desired objectives, or address the harm;
- necessary – i.e. there are no less severe means to achieve the desired objectives; and
- reasonable– any positive effects should be balanced against the negative effects.

In terms of appropriateness, we refer back to our earlier comments in section 1 on the role of article 61(3) within the context of the wider regulatory framework. In terms of necessity, the draft Guidelines rightly point to a step-by-step analytical process, where all steps are required to be taken, and in the right order. This is important in order to preserve the hierarchy embedded within article 61(3) between §1 and §2 and the principle of proportionality—specifically that NRAs should first consider the imposition of access obligations under §1 (up to first c/d point) before considering access obligations under §2 (to the point beyond).[6] This hierarchy reflects the need for NRAs to adopt the least burdensome measure that is required to address the harm, i.e. competition problems or market failures at the retail level to the detriment of end-users (see recital 154). The provisions also clearly foresee a different, higher legal standard for NRAs to have to establish in order to impose access obligations under §2 than to impose access obligations under §1.

This principle of proportionality – which has been built into the Code provisions – has been largely left unconsidered by BEREC in its draft Guidelines. For example, paragraph 19 seems to suggest that NRAs may find it more appropriate or proportionate to impose access under §2 of article 61(3) without first undertaking a full assessment under §1 as though it is an equal choice between these two provisions (rather than the outcome of a step-by-step analytical process that reflects differences in legal standards and principles of proportionality). Moreover, this disregards that symmetric access obligations are intended only to be used in exceptional circumstances.[7]

Similarly, BEREC seems to suggest that in order for access obligations under article 61(3) §1 to be effective, the first c/d point must be 'reasonably accessible' and that under §2 could be imposed if an NRA deems the first c/d point unreasonably inaccessible. This, however, is not the relevant test for imposing access obligations under article 61(3) §2. Rather, is whether there are high and non-transitory physical barriers to replication. We therefore strongly object to suggestions within the draft Guidelines that a lower test would apply in the case of physical barriers to replication. For example, in paragraph 33, BEREC suggests that physical replication barriers will be high and non-transitory if an access point is not 'easily accessible'. To extend access beyond that point, NRAs must follow the required steps under article 61(3) and establish that there is a market situation

[6] See also recital 154 where it states that NRAs should first consider choosing a point in a building (or just outside) as this will be more beneficial to infrastructure competition and the roll-out of very high capacity networks.
[7] See Commission Staff Working Document, Evaluation of the regulatory framework for electronic communications accompanying the document 'Proposal for a Directive of the European Parliament and of the Council' establishing the European Electronic Communications Code (Recast), SWD (2016) 313 (14 September 2016).

significantly limiting competitive outcomes for end-users and that this is caused by the presence of high and non-transitory barriers to replication.

Regarding reasonableness, the draft Guidelines fail to properly engage with the significant difficulties and costs faced by network operators to prepare for and implement access obligations, and the potential capacity and loss of quality issues that might arise for the network operator as a result of access being granted. Moreover, they disregard altogether the impact on incentives to invest in infrastructure (both by the network operator and the access seeker). This is surprising given that one of the key goals of these provisions is to promote infrastructure competition and the roll-out of very high capacity networks.

In addition, paragraph 82 of the draft Guidelines blurs the concept of reasonability in relation to access requests by suggesting that access seekers may file a blanket request to a network, leaving it up to the NRA to determine which parts of that network can be considered non-replicable. Such a procedure conflicts with the notion of a reasonable request which should underlie any access obligation under article 61(3). Article 3(2) of the Broadband Cost Reduction Directive indicates that a reasonable request should specify the elements of the network/project for which the access is requested and the time frame. There are good reasons to apply the same conditions to an access request under article 61(3) because such requests are foreseen only in exceptionally rare cases.

4. Consistent and coherent interpretation of concepts across the Code and competition law

In order for the novel powers granted to NRAs under article 61(3) to function coherently within the pre-existing framework of telecommunications regulation, particularly in light of the hierarchy between the various regulatory tools set out above, it is essential that the legal terminology employed in that article and in the final BEREC Guidelines is interpreted in a manner consistent with the rest of the framework within which it exists.

It should be noted in this regard that the Code is a recast of the existing laws and legal concepts. The stated aim of the Code, per recitals 4 and 323, is to "*simplify the current structure with a view to reinforcing its consistency*" and achieve "*a harmonised and simplified framework for the regulation of electronic communications networks*". Adopting new meanings for pre-existing legal concepts, solely for the purpose of article 61(3) while the established meanings remain unaltered for other parts of the framework, would run counter to these objectives of the Code. Additionally, key concepts and definitions referred to in the Code are, and are to remain, consistent with their meaning under EU competition law.

The interpretation of these legal concepts has been developed over many years through guidance and application of the regulatory framework by the Commission and in Member States. Providing a diverging interpretation of accepted (legal) concepts – or no clear interpretation at all – in the final BEREC Guidelines would undermine the robustness and predictability of the telecoms regulatory regime as consolidated over the past decades. We therefore suggest that the Guidelines additionally acknowledge relevant existing (legal and economic) definitions and formulated the intended guidance in a manner which reflects full consistency with the application of the Regulatory Framework thus far.

Particularly in the context of identifying whether an 'efficient operator' faces high and non-transitory barriers, BEREC suggests in the draft Guidelines (paragraph 60 and 73) that the efficiency of an access seeker may be determined by what NRAs deem "sufficient" to meet this standard. Rather than harmonising the method for analysis, this in effect creates an escape clause that NRAs may use to substitute their own subjective interpretation of "sufficiently efficient" for any and all of the other guidance provided by BEREC on this topic. On that basis NRAs can then presume the particular access seeker's economic specificities, without the need to compare these to an objective benchmark. However, this ignores specific understandings of this concept in

the context of telecoms regulation — for example, on “a modern efficient network” under the Commission’s cost and pricing methodologies are based on the SMP operators network. Additionally, as part of ex post competition law, the “equally efficient operator” or “as efficient competitor” (the so-called AEC test) is established with regard to existing efficient market participants. This provides an objective benchmark that allows for objective analysis and recognises the public interest against supporting inefficient operators. More importantly, this principle aims to avoid that regulation results in scarce resources being devoted to inefficient economic activities. Considering that this is a specific objective of the Code and article 61(3) §1, it would be inconsistent for §2 to result in the opposite.

We remain at your disposal should you have any questions.

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