



# Axon Advisory Research



## **Untangling the wires: Implementation of Art. 61(3) EECC and wholesale access obligations beyond SMP determination**



As FTTH networks are being deployed Europe-wide, Article 61(3) brings in new regulatory tools for NRAs to encourage infrastructure-based competition. Our experts explain how.

### **Axon Partners Group**

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## 1. Background

The deadline of 21 December 2020 for the implementation of the European Electronic Communications Code (EECC) is closing in. There is little time left for national regulators to deal with a challenging set of new provisions spread across the EECC's 127 dense articles. To lighten this task, the EECC requires national regulatory authorities ("NRAs") to rely on guidance adopted, or to be adopted, by BEREC (the Body of European Regulators for Electronic Communications) in selected areas. Such guidance should hopefully ensure a consistent reading, across the EU, of some of the EECC's trickier provisions.

On 11 June 2020, BEREC published draft Guidelines "on the Criteria for a Consistent Application of Article 61 (3) EECC" (the "Draft Guidelines"). Stakeholders were invited to provide their comments by 31 July 2020, and BEREC intends to issue the final text of the Guidelines on 21 December, as required under the EECC.

Article 61(3) EECC deals with a form of symmetric regulation, i.e., rules that can be legally binding on all telcos, regardless of whether they have significant market power (SMP). Its text sets out the conditions under which NRAs may mandate a telco's access to wiring, cables and associated facilities inside a building, up to the first concentration or distribution point, and even beyond.

Although the content of Article 61(3) EECC is not entirely new, its text opens the door to new forms of regulated access and tests, relying on a chain of conditions, exceptions (and exceptions to the exceptions). While not exactly discretionary, these conditions benefit from a generous margin of interpretation at each stage of a multi-test process NRAs will now have to apply in practice.

The Draft Guidelines are supposed to reduce such legal uncertainty even if, ultimately, they are not binding, and cases may still end up in courts if the stakes justify an escalation. As will be discussed, however, and although most of the Draft Guidelines' content should be helpful to NRAs, some of their suggestions seem to veer off in a questionable direction. Unless this is rectified in the final version, NRAs may find themselves having to fix this somehow.

*European NRAs must implement the EECC's provisions by 21 December 2020*

*Article 61(3) sets forth the conditions for symmetric access regulation*

## 2. Where Things Stand Today

Symmetric obligations for access to in-building wiring are not a novelty in the EU regulatory toolkit, even if the EECC provisions expand their scope well beyond building premises and their immediate surroundings.

Since 2009, Article 12(3) of the Framework Directive has empowered NRAs to “impose obligations in relation to the sharing of wiring inside buildings or up to the first concentration or distribution point where this is located outside the building, on the holders of the rights referred to in paragraph 1 [i.e., on facilities-based telcos] and/or on the owner of such wiring, where this is justified on the grounds that duplication of such infrastructure would be economically inefficient or physically impracticable.” Such regulatory initiatives should be preceded by a public consultation and be notified to the European Commission for review, as other ex-ante measures.

Some EU Member States, inclined to encourage infrastructure-based competition (France, Spain and Portugal in particular), have made use of this option and introduced relevant measures in their telecoms legislation or regulations. A BEREC report of 2018 included Croatia, Cyprus, France, Greece, Italy, Poland and Spain in the list of EU Member States with symmetric obligations for in-building wiring<sup>1</sup>. The details of these obligations vary considerably across the different jurisdictions that have imposed them, but it looks as if FTTH/B rollout in, at least, France, Spain and Portugal has significantly accelerated after the adoption of such symmetrical regulations.

In a complementary regulatory context, access to in-building wiring is also part of Directive 2014/61/EU “on measures to reduce the cost of deploying high-speed electronic communications networks”. Article 9 of this Directive requires any owner or user of in-building physical infrastructure to meet all reasonable requests for access from public telcos under fair and non-discriminatory terms and conditions, including price. Exceptions to this obligation are possible where access to an existing network termination point at the end-user's location, suitable for the provision of high-speed electronic communications, is ensured on

*Similar provisions had already been issued in 2009 and were actively adopted by some NRAs to encourage infrastructure-based competition*

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<sup>1</sup> See BoR (18) 214, page 15.

objective, transparent, proportionate and non-discriminatory terms and conditions.

Overall, there are some indications that even if the combination of these measures has contributed to FTTx network rollout, costs remain high and a barrier to more infrastructure-based competition. At the same time, some operators have been pressing for more effective (and intrusive) symmetric regulation.

This perceived need for more broadly scoped and effective regulations on in-building wiring lies behind the new provisions of Article 61(3) EECC.

*Art. 61(3) is aimed at broadening the scope and enhancing the effectiveness of earlier provisions*

### 3. The New Access Obligations

As Article 61(3) EEC is a dense chain of nested conditions and exceptions – the product of a typical EU regulatory compromise –, whose most important features are briefly described below:

▶ **What obligations may NRAs impose under Art. 61(3)?**

Access, upon reasonable request, to wiring and cables and associated facilities, with specific conditions on transparency, non-discrimination, and apportioning costs of access (taking into consideration risk factors)

▶ **When may NRAs do this?**

Where the replication of such network elements would be

- Economically inefficient, or
- Physically impracticable

▶ **Where may NRAs impose this?**

- Inside buildings
- Up to the first concentration or distribution points outside the building

▶ **Anywhere else?**

Yes, namely access or virtual access to the point closest to end-users beyond the first concentration/distribution point that can host a sufficient number of connections to be commercially viable for efficient access seekers. But there are conditions for this: Infrastructure sharing inside buildings or up to the first concentration:

- must not sufficiently address high and non-transitory, economic or physical barriers to replication
- thus significantly limiting competitive outcomes for end-users.

Even if these conditions are met, NRAs may not impose such access conditions if:

- the access provider is a wholesale-only operator, offering access on fair, non-discriminatory and reasonable terms;
- (optional, at the NRA's choice) the access provider is not wholesale-only, but offers access to an optical fibre or similar network on fair, non-discriminatory and reasonable terms;
- such access obligations would compromise the economic or financial viability of a new network deployment, in particular by small local projects.

However, the NRA may still impose obligations on access providers falling under one of the first two above bullet points, if they are publicly funded.

*Art. 61(3) provides several conditions for, and exceptions to, symmetric (non-SMP) access obligations*

► **On whom?**

- Telcos
- Owners of the buildings (if they are not telcos)

As can be concluded from this table, the main difference between the new provisions and the old, shorter, text of Article 12 of the Framework Directive is the allowed extension of the access obligation to a point beyond the building of a first concentration point inside or outside the building. This extension has been conceded at the price of several qualitative conditions and assessments by the NRAs, which are bound to raise issues of interpretation. To reduce uncertainty and instil a measure of uniformity in the NRAs' approach, Article 61 EECC also requires BEREC to publish guidelines on the following criteria related to the above table:

- (a). the first concentration or distribution point;
- (b). the point, beyond the first concentration or distribution point, capable of hosting a sufficient number of end-user connections to enable an efficient undertaking to overcome the significant replicability barriers identified;
- (c). which network deployments can be considered to be new;
- (d). which projects can be considered to be small; and
- (e). which economic or physical barriers to replication are high and non-transitory.

BEREC's Draft Guidelines aim to address all of the above questions. Those under (a), (c) and (d) are relatively straightforward and do not need to be discussed in more detail here. By contrast, BEREC's guidelines for the interrelated points (b) and (e) merit closer attention and arguably some rethinking, for reasons we discuss below.

*BEREC has published a draft set of guidelines to help NRAs to interpret the relevant EECC requirements*

## 4. Some Questions Raised by the Draft Guidelines

### 4.1. High and non-transitory, economic or physical, barriers

Let's start from (e), in inverse order (as do the Draft Guidelines), which concerns the notion of high and non-transitory, economic or physical, barriers to replication – a critical condition for extending access obligations beyond the first concentration point.

While the terminology sounds familiar – from the first, among the three criteria of the test justifying ex ante regulation in general – the circumstances in this case will require a different, narrower and more specific, analysis. For example, as remarked in the Draft Guidelines, the geographic areas to be looked at by NRAs under Art. 61(3) EECC will normally be much narrower than the relevant geographic market examined for general ex ante regulation purposes.

**Physical barriers** to replication of in-building or associated infrastructure, such as limitations in space, capacity constraints or urban planning rules, are a relatively objective criterion, and hence less prone to controversy. This is not the case with **economic barriers**, however, where a lot depends on the eyes (and pocket) of the beholder. The expected costs and revenues associated with access to a building's infrastructure hang on ex ante hypotheses that can turn out to be off the mark. They will also depend on the access seeker's profile, business expectations and, last but not least, the specific point of access targeted by the access seeker. In other words, NRAs may have to decide based on different moving goalposts, by potentially more than one access seekers, with different profitability profiles and an understandable interest to push their figures in the direction that suits their application. Not an easy match for the referee.

The risk of a regulatory pandemonium – if the stakes justify it, which may not be the case for a single building or access point – could be averted through stronger regulatory reliance on objective criteria of efficiency (for the access seeker) rather than profitability. There are tried and tested criteria for a "reasonably efficient" operator applied elsewhere in telecoms

*The assessment of economic barriers to entry hangs on ex ante hypotheses that may be misguided*

regulation – notably in the context of margin squeeze tests – which might be of use here too, albeit at a much narrower scale.

Instead, the list of criteria listed in paragraph 64 of the Draft Guidelines is an open-ended mix of relatively objective factors (e.g. the number of end-users that can be connected or the expected wholesale revenues, if relevant) with more subjective and contestable criteria, including:

- ▶ The expected market share of an efficient access seeker – taking into account the number and market position of **other operators** in the same area, and market developments (a notoriously speculative exercise in telecoms – and which market are we talking about? The “market” for a single building?);
- ▶ The expected average revenue per customer (ARPU) **by the access seeker** – which is obviously hypothetical, and based on a list of complicated variables listed by BEREC – instead of the access provider’s revenues as a starting point – which are, at least, something real and verifiable. It is not exactly unheard of for telcos to get their expected ARPU wrong, especially for a narrowly defined area, even if they have no interest to do so.

Rather than providing aid to a regulator, such a list is more likely to give a shopping list of ideas for operators to contest the regulator’s conclusions, one way or another.

It is also noteworthy that, under the Draft Guidelines, the downstream inputs (e.g. ARPU) to be considered in NRAs’ economic replicability assessments would mainly be taken from the access seeker, while its own network costs would be taken as the relevant upstream inputs. The approach currently described by BEREC would seem to go against the definition of economic replicability given by the European Commission itself<sup>2</sup> under which “a lack of economic replicability can be demonstrated by showing that the SMP operator’s own downstream retail arm could not trade profitably on the basis of the upstream price charged to its competitors by the upstream operating arm of the SMP operator”.

More generally, the concepts of economic replicability and commercial profitability seem to have been mixed throughout the draft guidelines, describing a suggested solution (performing economic replicability tests

*The definition of the access seekers’ ARPU or market share before its market entry is a candidate for serious controversy*

*It is unclear whether NRAs should assess economic replicability or commercial profitability*

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<sup>2</sup> See C(2013) 5761.

based on the access' seekers downstream inputs) that fits the definition of neither one nor the other.

## 4.2. The point beyond the first concentration or distribution point

The Draft Guidelines refer to this point as the "access point beyond". They define it, in paragraph 70, as "the point closest to end-users where incremental revenues of an efficient access seeker are (at least) equal to the efficient access seekers total incremental costs". This definition includes a welcome return to the objective standard of efficiency.

Helpfully, the Draft Guidelines also clarify, in their paragraph 72, that instead of looking at the characteristics of individual operators requesting access, NRAs can define the access point beyond using assumptions on the characteristics of an efficient access seeker. This still leaves a difficult task ahead for the NRAs but at least a single goalpost to deal with.

An overarching question is whether this potentially significant and contestable regulatory exercise must be performed each time an operator requests access to an "access point beyond". Those familiar with the complexity of comparable assessments on a national scale in other types of ex ante regulation can easily see the risk of an unmanageable flood of similar mini-exercises, building-by-building and point-by-point, which could outweigh any potential benefits of this regulation.

It is encouraging, therefore, that the Draft Guidelines expressly allow NRAs to assess the commercial viability of access points in clusters, grouping together "sufficiently similar" access points. This very welcome option opens a range of choices for NRAs which, although largely discretionary and open to discussion, should at least render their task more manageable.

To overcome such task, NRAs that face requests for the application of article 61(3) will need to combine traditional margin squeeze techniques with advanced Bottom-Up geographical cost modelling.

*NRAs are advised to assess the commercial viability of the access seekers at "sufficiently similar" access points*

*NRAs will need to combine traditional margin squeeze techniques with advanced Bottom-Up geographical cost modelling*

## 5. Conclusion

The Draft Guidelines, although generally helpful, provide NRAs with a challenging list of options, criteria and conditions which, despite best intentions, will require significant follow up work by NRAs, especially if the access requests covered by Article 61(3) EECC turn out to be of real interest to telcos as an alternative to other remedies (e.g., bitstream access) and/or are actively encouraged by regulators as a matter of policy. NRAs may also have to take decisions through the seemingly endless menu of the Draft Guidelines, in time before the kitchen closes.

Let's not forget that the Draft Guidelines are not a strict set of rules – neither do they pretend to be so. NRAs are simply required to “take utmost account” of BEREC’s guidelines, and the EU Court of Justice’s case law allows them to discard them, if they think this is appropriate, as long as they give reasons for their position<sup>3</sup>. Be that as it may, untangling the wires of Article 61(3) will require extra care to avoid sparks.

*Significant follow-up work is expected from NRAs if there is a real interest from operators in the use of Article 61(3) EECC*

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<sup>3</sup> *Koninklijke KPN and Others, C-28/15, EU:C:2016:692, paragraphs 37 and 38.*

## 6. About Axon Advisory

Axon is an international investment and advisory firm offering, through its Advisory arm, world class consulting and corporate finance services to a broad client base in the ICT industries.

In the last 10 years, Axon has executed +500 projects in +60 countries in the ICT domain, for major private companies, institutional bodies, and technology companies worldwide.

Axon has in-depth familiarity with the ICT markets in Europe, through ongoing work in all EU countries and frequent collaboration with the EC in major consultancy projects.

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<sup>4</sup> The views and opinions expressed in this article are those of the authors and do not necessarily reflect the view of Axon Partners Group.