MEMORANDUM

To: European Competitive Telecommunications Association (ECTA)

From: Jones Day

Date: 25 April 2023

Re: Legal Analysis of Draft EC Recommendation on the regulatory promotion of Gigabit connectivity

---

1. **Executive Summary.** ECTA instructed Jones Day to provide a legal analysis of the Draft Recommendation on the regulatory promotion of Gigabit connectivity released by the European Commission on 23 February 2023.[1] The purpose of this memorandum is to assess whether the Draft Recommendation complies with the European Electronic Communications Code[2].

2. Our conclusion is that the current version of the Draft Recommendation infringes the provisions and principles in the EECC, in that it:

   - restricts the discretionary powers of NRAs to impose price control obligations, in favor of wholesale price flexibility for SMP operators (para. 39 of Draft Recommendation),

   - restricts the discretionary powers of NRAs in deciding to impose other remedies than access to civil engineering infrastructure, in a way which provides a higher priority to access to civil engineering infrastructure over other remedies compared to what is currently foreseen by Art. 72 and Art. 73 of the EECC (para. 33 of the Draft Recommendation),

   - encourages the non-imposition of regulated wholesale price control obligations in low-populated areas (paras. 41 and 70 of Draft Recommendation), and

   - promotes wholesale price increases in the context of copper switch-off (para. 81 of Draft Recommendation).

3. After a brief introduction to the Draft Recommendation (**Section 1**), we will discuss the reasons why the above sections of the Draft Recommendation, in their current version, infringes the EECC (**Section 2**). Finally, we will describe some procedural issues with the release of the Draft Recommendation (**Section 3**).

---

1 Draft Commission Recommendation of 23 February 2023 on the regulatory promotion of gigabit connectivity ("**Draft Recommendation**").

2 Directive 2018/1972 of 11 December 2018 establishing the European Electronic Communications Code, OJEU, 2018, L 321, p. 36; ("**EECC**").

1. The Draft Recommendation

4. On 23 February 2023, the Commission released a set of initiatives aimed at making Gigabit connectivity and fast mobile data accessible to all citizens and businesses by 2030, including the Draft Recommendation.[3] The Draft Recommendation seeks to promote the EU internal market for electronic communications through consistent regulatory approaches that favor investment in very high-capacity networks ("**VHCN**")[4], while maintaining and ensuring effective competition[5]. With this objective in mind, the Draft Recommendation provides guidance to national regulatory authorities ("**NRAs**") on the conditions for access to electronic communication networks of operators with significant market power ("**SMP**").

5. The Draft Recommendation was sent for consultation to the Body of European Regulators ("**BEREC**"), which we understand will issue an opinion shortly. After taking into account BEREC's opinion, the Commission will adopt the final Recommendation. This final Gigabit Recommendation will replace the Access Recommendations adopted in the early 2010s[6], i.e. the Next Generation Access Recommendation[7] and the Non-Discrimination and Costing Methodology Recommendation.[8]

2. Violation of the Commission's substantive obligations

6. The current version of the Draft Recommendation does not comply with the EECC in:

- restricting the discretionary powers of NRAs to impose price control obligations, in favor of wholesale price flexibility for SMP operators (section **A**),
- restricting the discretionary powers of NRAs in deciding to impose other remedies than access to civil engineering infrastructure, in a way which provides a higher priority to access to civil engineering infrastructure over other remedies compared to what is currently foreseen in the EECC (section **B**),
- encouraging the non-imposition of wholesale price control obligations in low-populated areas (section **C**), and

---

3 The other initiative is a Proposal of 23 February 2023 for a Regulation on measures to reduce the cost of deploying gigabit electronic communications networks and repealing Directive 2014/61/EU, COM(2023) 94 final ("**Proposal for a Gigabit Infrastructure Act**"). At the same time, the Commission also opened an explanatory public consultation on the future of the electronic communications sector and its infrastructure. See the Commission's press releases:
https://ec.europa.eu/commission/presscorner/detail/en/ip_23_985
https://digital-strategy.ec.europa.eu/en/news/commission-presents-new-initiatives-gigabit-infrastructure-act-proposal

4 VHCN are defined in Art. 2(2) of the EECC. Fixed VHCNs include Fibre to the Home (FTTH), Fibre to the Building (FTTB) and Cable Docsis 3.1 (BEREC Guidelines of 1 October 2020 on Very High Capacity Networks, BoR (20) 165, section 5).

5 Recital 3 of the Draft Recommendation.

6 Draft Recommendation, para. 11.

7 Commission Recommendation 2010/572 of 20 September 2010 on regulated access to Next Generation Access Networks (OJEU 2010, L 251, p. 35; "**NGA Recommendation**").

8 Commission Recommendation 2013/466 of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (OJEU 2013, 251, p. 13; "**NDCM Recommendation**").

- promoting wholesale price increases in the context of copper switch-off (section **D**).

A. The restriction of NRAs' discretion to impose wholesale price control obligations

7. **Para. 39 of the Draft Recommendation** indicates that NRAs "*should not impose or maintain*" price control on VHCN wholesale inputs where there is demonstrable retail price constraint and a non-discrimination obligation under Article 70 EECC has been imposed with certain related criteria (*i.e.*, EoI or EoO, technical replicability and appropriate monitoring mechanisms, economic replicability test). Among these criteria, para 39 (a) also states that EoO suffices where the NRA has established that EoI obligations would be disproportionate and that EoO obligations would suffice to ensure effective non-discrimination.

8. **Why Para. 39 infringes the EECC.** This wording amounts to redrafting Article 74 (1) of the EECC, via a recommendation, for three reasons: (i) it removes the discretion that NRAs enjoy under the EECC for applying remedies (and in particular the removal of price control obligations), (ii) it states that the non-discrimination remedy under Article 70 EECC suffices to remove wholesale price control obligations, and (iii) it indicates that EoO would be sufficient.

9. Improperly removes NRA discretionary power. Article 74(1), third subparagraph, EECC provides that NRAs "*shall consider not imposing or maintaining*" (*emphasis added*) price control and cost accounting obligations if certain conditions are met (i.e. the existence of a demonstrable retail price constraint, the existence of effective and non-discriminatory access, and the imposition of an economic replicability test)[9].

10. It is worth recalling that the Commission Proposal for the EECC originally read as follows: NRAs "*shall not impose or maintain*" price control obligations when certain conditions are met.[10] The **Council dismissed this wording and replaced it with "*shall consider not imposing or maintaining*" in order to preserve the discretion of NRAs** *(emphasis added)*.[11] The Council expressly explained that the amendment ensured that "*national regulatory authorities* ***retain the possibility to impose obligations regarding new network development***".[12] Other language versions also confirm that NRAs are responsible for "*studying/envisaging*" the possibility of removing obligations: for example, the French version refers to the fact "*les autorités de régulation nationales étudient la possibilité de ne pas imposer ou de ne pas maintenir d'obligations [de contrôle des prix]*".

---

9 Article 74 (1) third para. states: "*National regulatory authorities shall consider not imposing or maintaining obligations pursuant to this Article, where they establish that a demonstrable retail price constraint is present and that any obligations imposed in accordance with Articles 69 to 73, including, in particular, any economic replicability test imposed in accordance with Article 70, ensures effective and non-discriminatory access*".

10 Art. 72(1)(3) of the Commission Proposal of 12 October 2016 for the EECC, COM(2016) 590 final/2, p. 208.

11 Council Presidency text of 9 November 2017, Document 14186/17, Article 72.

12 Note of 31 March 2017 of the Presidency to Delegations on Commission Proposal, Document ST 7721/17 INIt, Interinstitutional File 2016/0288 (COD), para. 31.

11. In the same spirit, the Council also broadened the Commission Proposal for the EECC concerning the scope of information that NRAs may take into account in their market analysis. While the Commission sought to restrict the scope of market developments to those "*which may increase the likelihood of the relevant market tending towards effective competition*"[13] such as co-investment agreements, the Council deleted this reference and the final Article 67 refers to "*market developments affecting the likelihood of the relevant market tending towards effective competition*"[14] in order to "*ensure national regulatory authorities are not unduly limited in what they consider in the market analysis*" *(emphasis added)*.[15] The underlying logic behind the Council's amendments is to preserve the margin of discretion of NRAs to assess all market circumstances at national or local level in imposing the remedies best adapted to achieve the objectives of Article 3 of the EECC.

12. However, use of the phrase "*should not impose or maintain*" in the Draft Recommendation considerably restricts the discretionary powers of NRAs to assess, justify and impose regulatory obligations on SMP operators. The Draft Recommendation seeks to force NRAs to allow a strong degree of "*pricing flexibility*" for SMP operators, irrespective of the complex economic circumstances prevailing at national or sub-national level and which NRAs are best placed to assess on a case-by-case basis.

13. Our interpretation of the Draft Recommendation is consistent with EU case-law and the Commission's practice in the EU consultation procedure. It is indeed settled CJEU case-law that the EECC is a Directive which harmonizes the electronic communications sector in a non-exhaustive manner.[16] As a result, the EECC leaves Member States, and in particular NRAs, a broad margin of discretion to adopt national decisions. Specifically, NRAs enjoy broad discretion in carrying out market analyses and in determining, on a case-by-case basis, the necessity to regulate a particular market, especially with respect to the imposition of price control obligations.[17] Similarly, in many Article 7 Decisions (now Article 32 EECC), the Commission itself acknowledged that NRAs have discretion in determining e.g., the costing methodology to impose price control obligations.[18]

14. Since, as recognized by the CJEU, "*in carrying out [its] regulatory functions, the NRAs have a broad discretion in order to be able to determine the need to regulate a market according to each situation on a case-by-case basis"*[19]*,* regulatory holidays foreseen in

---

13 Art. 65(2)(a) of the Commission Proposal of 12 October 2016 for the EECC, COM(2016) 590 final/2, p. 199.

14 Art. 67(2(a) EECC.

15 Note of 31 March 2017 of the Presidency to Delegations on Commission Proposal, Document ST 7721/17 INIt, Interinstitutional File 2016/0288 (COD), para. 22.

16 Art. 1(3) EECC; CJEU Judgment of 3 September 2020, *Vivendi*, C-719/18, EU:C:2020:627, para. 47; CJEU Judgment of 30 April 2014, *UPC DTH*, C-475/12, EU:C:2014:285, paras. 69-70.

17 CJEU Judgment of 20 December 2017, *Polkomtel*, C-277/16, EU:C:2017:989, para. 32; CJEU Judgment of 19 October 2016, *Xabier Ormaetxea Garai and Bernardo Lorenzo Almendros*, C-424/15, EU:C:2016:780, para. 48; CJEU Judgment of 15 September 2016, *Koninklijke KPN*, C-28/15, EU:C:2016:692, para. 36; CJEU Judgment of 24 April 2008, *Arcor*, C-55/06, EU:C:2008:244, paras. 153-156.

18 Case FI/2015/1718, p. 10; Case AT/2013/1475-1476, p. 7; Case NL/2013/1481, p. 4; Case CZ/2012/1392, p. 6; Case EE/2012/1305, p. 9; Case FR/2012/1304, p. 16; Case ES/2012/1314, p. 5; Case DE/2011/1218, p. 3; Case DE/2009/0908, p. 2; Case UK/2007/0733, p. 7; Case BE/2006/0433, p. 5; Case IE/2004/0121, pp. 6-7; Case FI/2003/0024, p. 5.

19 CJEU Judgment of 3 December 2009, Commission v Germany (Regulatory holidays), C 424/07, EU:C:2009:749, para. 61.

national legislation are prohibited. Similarly, regulatory holidays cannot be achieved by the Commission whether through a recommendation or any other form of derogation from the general principles of the EECC.

15. Improperly limiting remedy selection by NRAs. By solely focusing on the non-discrimination obligation under Article 70 EECC as a criterion for removing wholesale price control obligations (in the presence of demonstrable retail price constraint), the Draft Recommendation improperly ignores the fact that Article 74 EECC foresees that NRAs can take into account other remedies, as it refers to "*obligations imposed in accordance with Articles 69 to 73, including, in particular, any economic replicability test imposed in accordance with Article 70, ensures effective and non-discriminatory access"*. Thus, when exercising their discretion in considering whether to impose or maintain wholesale price control obligations, NRAs take a holistic approach that should weigh all obligations imposed. As such, an NRA may consider that a non-discrimination obligation under Article 70 is not sufficient, in itself, to justify removing a wholesale price control obligation. By only referring to Article 70 EECC, the Draft Recommendation introduces a bias against other types of remedies, thereby limiting NRAs' ability to adopt the holistic approach foreseen in Article 74 EECC.

16. **Equivalence of EoI and EoO**. Paragraph 39(a) of the Draft Recommendation indicates that equivalence of outputs ("**EoO**") suffices to ensure effective non-discrimination where imposing equivalence of inputs ("**EoI**") would be disproportionate.

17. To recall, EoI means the provision of services and information to internal and third-party access seekers on "*the same terms and conditions*", including price and quality of service levels, within the same time scales using the same systems and processes, and with the same degree of reliability and performance. EoO means the provision to access seekers of wholesale inputs "*comparable*", in terms of functionality and price, to those the SMP operator provides internally to its own downstream businesses albeit using potentially different systems and processes.[20]

18. The proportionality assessment of EoI includes a cost-benefit analysis. The Draft Recommendation implies that NRAs should evaluate the costs of setting up, implementing and monitoring EoI/EoO compared to their expected benefits in terms of regulatory burden and promotion of competition. In order to make this comparison, NRAs must rely on the quality of the reference offer, as well as the completeness and accuracy of Key Performance Indicators (KPIs), Service Level Agreements (SLAs) and Service Level Guarantees (SLGs).[21]

19. The real and unfounded change sought by Recital 15 to the Draft Recommendation is that the cost-benefit analysis between EoI and EoO must notably focus on: "*(i) a quantitative cost/benefit analysis, including implementation costs for both the SMP operator and the access seeker (emphasis added); and (ii) a qualitative estimation of the need to ensure 'stricter' non-discrimination for the wholesale-access products at stake*". The quantitative dimension of the cost-benefit analysis is novel and was not included in the NDCM Recommendation.

---

20 NDCM Recommendation, para. 6(g) and (h).

21 BEREC Guidelines on the minimum criteria for a reference offer relating to obligations of transparency, BoR (19) 238.

20. However, EoI will almost always impose a higher compliance burden on the parties (SMP operator and access seekers) than EoO. Recital 185 of the EECC indeed indicates that EoI "*is likely to trigger higher compliance costs than other forms of non-discrimination obligations*". EoI is especially burdensome for the adaptation of existing IT systems. This includes IT development/adaptation costs, license costs and training costs.

21. By definition, EoO allows the SMP operator to supply different wholesale inputs to its retail arm and to third-party access seekers. EoO is a less strict method than EoI to ensure non-discrimination between the upstream and downstream branches of the SMP undertaking. EoO is also harder to monitor for the NRA, which must dedicate considerable resources for enforcement.

22. In practice, by advocating a wider use of EoO based on a quantitative cost-benefits analysis, the Draft Recommendation pressures NRAs to abdicate their regulatory functions to the SMP operator. The Draft Recommendation ignores that effective non-discrimination is one of the conditions for wholesale pricing flexibility under Article 74(1)(3) EECC, whereas in principle, equivalence of Inputs (EoI) is the best way for achieving effective non-discrimination (recital 185 EECC). By favoring EoO to prove effective non-discrimination, the Draft Recommendation significantly relaxes one of the conditions of application of pricing flexibility. Indeed, the Draft Recommendation deliberately relaxes the non-discrimination obligation trigger (and thus the condition for permitting wholesale pricing flexibility) despite the Visionary Analytics Study's conclusion that there is no causal link between strict non-discrimination (i.e. EoI) and lower incentives to invest in VHCN deployment.[22]

23. **Conclusion.** Because the EECC is a Directive, it prevails over the Draft Recommendation which should not deviate from the Directive which is the higher rank norm. When adopting the final Gigabit Recommendation, the Commission must respect the provisions of the EECC. The current wording of the Draft Recommendation (in particular "*should not impose or maintain*") runs against the working and spirit of Article 74(1), third paragraph, EECC and established CJEU case-law. This same conclusion applies to the Draft Recommendation's unfounded bias in favor of the more relaxed and less effective EoO non-discrimination remedy over the stricter and more effective EoI method.

24. The Draft Recommendation's restriction of the NRAs' discretionary powers arguably also infringes the principle of subsidiarity under Article 5(3) of the Treaty on European Union. This principle ensures that the Commission does not take action, unless it is more effective than action taken at the national, regional or local level.

25. The proportionality of the proposed wording is also questionable: the Draft Recommendation falls well short of adequately balancing between (i) the objective of promoting connectivity, access to, and take-up of VHCNs pursuant to Article 3(2)(a) EECC and (ii) the other vital objectives of Article 3 (2) EECC, in particular the promotion of competition (Art.3 (2) (b)) and the maximum advantages in terms of choice, prices and quality (Art.3 (2) (d)).

---

22 Visionary Analytics Study, p. 106.

B. The restriction of NRA's discretion to impose remedies other than access to civil engineering infrastructure

26. **Para. 33 of Draft Recommendation** provides that NRAs should consider mandating access to civil engineering infrastructure "*before imposing any network specific access obligations pursuant to Article 73 [EECC]*". In particular, the Draft Recommendation makes access to civil engineering infrastructure the "*only access remedy*", which it deems likely to suffice when (a) the SMP operator controls extensive civil engineering infrastructure enabling deployment up to the end user premises and (b) a sufficient degree of infrastructure-based competition has emerged or there is a viable and realistic prospect that it will have emerged during the review cycle.

27. Pursuant to paragraph 34 of the Draft Recommendation, where infrastructure-based competition has not yet materialized, NRAs should assess whether it is necessary to impose, for a transition period, network-specific access obligations (under Article 73 EECC) "*before solely relying on regulated access to civil-engineering infrastructure*" (under Article 72 EECC).

28. In giving much more priority to access to civil engineering infrastructure (under Article 72) over other access remedies compared to Articles 72 and 73 EECC, the Draft Recommendation reflects the belief that, in the long-term, access to civil engineering infrastructure alone should suffice to promote investment into VHCN and encourage competition. The Draft Recommendation even presents access to civil engineering infrastructure as the "*only access remedy*", which should replace other remedies imposed on SMP operators. This predominance of access to civil engineering infrastructure is even more obvious in other sections of the Draft Recommendation:

    - Recital 28 indicates that the existence of effective regulated access to civil engineering is an important factor contributing to making infrastructure competition a viable and realistic prospect within the review period.

    - Para. 39(d)(iii) considers that price control obligations are not necessary, notably in areas where access to civil engineering infrastructures ensures the realistic and viable emergence of infrastructure-based competition.

    - Recital 20 of the Draft Recommendation further indicates that solely imposing access to civil engineering is likely proportionate to promote competition and end-users' rights where enabling the deployment of end-to-end infrastructure-based competition.

29. **Why para. 33 infringes the EECC**. In seeking to make access to civil engineering infrastructure the only access remedy, para. 33 of the Draft Recommendation (i) removes the discretion that NRAs enjoy under the EECC for applying access remedies in Article 72 and/or 73 EECC, (ii) erroneously suggests that access to civil infrastructure should be the "only access remedy" while it could be (and generally is) combined with other remedies, (iii) creates unfounded regulatory holidays, and (iv) violates the regulatory principle of the ladder of investments that has underpinned ex ante regulation since its inception.

30. Removing the discretionary power of NRAs. Pursuant to Article 72 EECC, NRAs may impose obligations on SMP operators to provide access to civil engineering, in situations

where the refusal to provide access would hinder the emergence of a competitive market and would not be in the interest of end users. Article 73 EECC provides for the same access obligations with respect to specific network elements and associated facilities.

31. Article 73(2) specifically provides that where an NRA considers imposing access obligations on the basis of Article 72 (civil engineering) or Article 73 (specific network elements and associated facilities), the NRA "*shall examine whether the imposition of obligations in accordance with Article 72 alone would be a proportionate means by which to promote competition and the end-user's interest*".

32. Notably, the adoption of Articles 72 and 73 EECC also triggered the same debates as with Article 74 EECC discussed above. In the Commission Proposal for the EECC, a NRA could impose access to specific network elements and associated facilities "*only where a national regulatory authority concludes that the obligations imposed in accordance with Article 70 [civil engineering] would not on their own lead to the achievement of the objectives set out in Article 3*" (*emphasis added*). [23] The Commission's initial idea was to give "*initial priority to a stand-alone access remedy to civil engineering*". [24] However, the Council considered that "*[a]ccess to civil engineering is to be preferred but* ***where this will, in the view of the national authority, prove insufficient, access obligations can be imposed in relation to specific network facilities***" *(emphasis added)*.[25] Thus, the priority in terms of the sequential order of remedy given to access to civil engineering infrastructure does not constitute a rigid hierarchy between the selection of appropriate remedies to be applied, as NRAs are free to impose access obligations on SMP operators listed in both Art. 72 and Art. 73 (including cumulatively) if and when justified by the market conditions.

33. In the end, the legislator chooses to safeguard and widen the discretion of NRAs, modifying the Commission Proposal such that NRAs are simply required to "*examine whether the imposition of obligations in accordance with Article 72 alone would be a proportionate means by which to promote competition and the end-user's interest*." (Art. 73(2) EECC). This wording and the rationale behind the Council's amendments show that access to civil engineering infrastructure cannot be "*the only remedy*" available. NRAs can, and in fact do, impose additional and/or other access obligations on SMP operators if market conditions so require. In this respect, the Council referred to an "*order of preference for the imposition of access obligations*".[26] The Council's amendment correspondingly "*clarifies that national regulatory authorities, when considering what obligations to impose, should prioritise interventions in the following order: civil engineering, passive network elements, active network elements. This should not limit the flexibility of national regulatory authorities to determine the most appropriate course*

---

23 Art. 71(1) of the Commission Proposal of 12 October 2016 for the EECC, COM(2016) 590 final/2, p. 205.

24 Impact Assessment of 14 September 2016 accompanying the Commission Proposal for the EECC, COM(2016) 303 final, part 1/3, p. 72.

25 Note of 31 March 2017 of the Presidency to Delegations on Commission Proposal, Document ST 7721/17 INIt, Interinstitutional File 2016/0288 (COD), para. 28.

26 Note of 16 May 2017 of the Presidency to Delegations on Commission Proposal, Document ST 7721/17 INIT, 9325/17, para. 18.

of action taking account of their national circumstances."*(emphasis added)* [27] In summary:

> *"Many Member States wanted to make clear that national regulatory authorities were not constrained as to what access obligations could be imposed. However, there was also a recognition that, in principle, there should be a preference for minimising the impact of such interventions, and therefore that the order of preference for intervention is civil engineering, passive access and active access. The Presidency proposal seeks to make clear this principle of priority, while ensuring national regulatory authorities are able to impose the measures they deem appropriate." (emphasis added)*[28]

34. Recital 20 of the Draft Recommendation is also an attempt to improperly circumvent this obligation under the EECC. By indicating that access to civil engineering infrastructure alone is likely proportionate to promote competition and end-users' rights where it enables the deployment of end-to-end infrastructure-based competition, this Recital 20 seeks to unduly restrict the discretion of NRAs to assess these criteria. Indeed, access to the civil engineering infrastructure held by the SMP operator would, paradoxically almost always enable end-to-end infrastructure competition, which in practice is not the case.

35. Civil engineering infrastructure is not the "only access remedy". Our view is confirmed by the EECC recitals. According to Recital 171 EECC, NRAs should assess whether regulation of wholesale markets is necessary, "*starting with remedies for access to civil infrastructure, as such remedies are usually conducive to more sustainable competition including infrastructure competition, and thereafter analysing any wholesale markets considered susceptible to ex ante regulation in order of their likely suitability to address identified competition problems at retail level*" *(emphasis added)*. Recital 187 EECC further states that it is necessary to ensure that "*access to [civil engineering] assets can be used as a self-standing remedy for the improvement of competitive and deployment dynamics in any downstream market, to be considered before assessing the need to impose any other potential remedies, and not just as an ancillary remedy to other wholesale products or services or as a remedy limited to undertakings availing themselves of such other wholesale products or services*" *(emphasis added)*.

36. Thus, the EECC does not provide that access to civil engineering infrastructure must be the "*only access remedy*". Articles 72, 73 and Recital 171 EECC simply urge NRAs to first consider access to civil engineering infrastructure, before turning to other access remedies. Indeed, access to civil engineering infrastructure alone may not suffice to remedy competition problems and to generate a sufficient degree of infrastructure-based competition. For example, the Commission itself acknowledged in the impact assessment accompanying the Proposal for the EECC that access to civil engineering of SMP operators may not always be adequate:"*[t]he implementation of basic competition safeguards which could help climb the ladder of investment (e.g., access to civil engineering of SMP operators) can be made difficult if access to civil engineering as a remedy is made ineffective by lack of information (mapping) or unclear or uncertain*

---

27 Note of 5 May 2017 of the Presidency to Delegations on Commission Proposal, Document ST 8751/17 INIT, para. 21.

28 Note of 22 May 2017 of the Presidency to Coreper, Document ST 9355/17 INIT, para. 37.

conditions".[29] In such situation (among others), the NRA must examine the need to impose more appropriate remedies.

37. In fact, where some countries have mandated access to civil engineering infrastructure, NRAs still typically always impose an array of other access obligations.[30] By the same token, the Commission considered that the (symmetric) access obligations adopted in implementation of the Broadband Cost Reduction Directive[31] were insufficient and therefore asked the NRA, where appropriate, to impose a cost-orientation obligation for access to the SMP operator's passive infrastructure.

38. Access to civil engineering infrastructure is not a panacea, as reflected in particular by the EECC. Depending on the exact circumstances at national level, it may be necessary to impose other access obligations on SMP operators. In these situations, NRAs must conduct a more granular assessment of national barriers to deployment and of areas more prone to infrastructure-based competition.

Improper regulatory holidays. As stated above, the Commission cannot grant regulatory holidays to SMP operators. However, the wording of Recital 20 of the Draft Recommendation is akin to a form of regulatory holidays in that it provides that access to civil engineering alone is likely proportionate where it potentially enables the deployment of end-to-end infrastructure-based competition. Indeed, this would almost always be the case. In addition, paragraph 33 of the Draft Recommendation suggests that access remedies other than access to civil engineering infrastructure may be removed when "*there is a viable and realistic prospect that a sufficient degree of infrastructure-based competition will have emerged during the review cycle*". In effect, this would mean that access regulation to network elements and associated facilities could already be removed before any competitor has been able to deploy its network to compete with the incumbent operator. This in effect creates a regulatory holiday, contrary to the case-law cited above which prevents foreseeing a general principle of non-regulation, as the regulatory framework "*confers on the NRAs, and not on the national legislature, the task of determining the need for regulation of the markets"*[32]. Such case-law also makes clear that the weighting of the different objectives "*is a matter for the NRA when carrying out the regulatory tasks assigned to it*" and cannot be pre-empted by a measure of general application, such as a national law[33].

39. Impeding the ladder of investments. The primacy of civil engineering infrastructure under the Draft Recommendation also contradicts the principle of the **ladder of investments,** which has underpinned the *ex ante* regulatory framework since its inception[34]. Indeed, this principle requires designing access remedies that allow for

---

29 Impact Assessment of 14 September 2016 accompanying the Commission Proposal for the EECC, COM(2016) 303 final, part 3/3, p. 347.

30 Cases FR/2020/2277-2278-2279-2280.

31 Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks, OJ L 155, 23.5.2014, p. 1 ("**BCRD**").

32 CJEU Judgment of 3 December 2009, Commission v Germany (Regulatory holidays), C 424/07, EU:C:2009:749, para. 74.

33 *Ibid.*, Para. 93.

34 The "ladder of investments" has notably been endorsed as a guiding regulatory principle by EU regulators, i.e. the Commission (Commission Recommendation of 18 December 2020 on relevant markets within the

gradual investments by new entrants, in proportion with the increase of their customer base.[35] By limiting remedies to solely access to civil engineering infrastructure, and abandoning other SMP obligations, this will prevent new entrants from benefitting from access remedies to passive and active network elements that would allow them to gradually climb the rungs of the investment ladder. The combined effect of the excessive predominance of access to civil engineering infrastructure and wholesale pricing flexibility in the Draft Recommendation is likely to constrain access seekers'ability to determine the most suitable access method in view of their market positioning. In fact, other access obligations relating to passive and active network elements must remain available, as these will be necessary to safeguard downstream competition when infrastructure competition is not viable.

40. **Conclusion**. In its misguided attempt to impose access to civil engineering infrastructure as "*the only access remedy*", the Draft Recommendation wrongly restricts the discretion of NRAs to impose remedies additional to, or other than, access to civil engineering infrastructure, creates improper regulatory holidays, and wrongly dismantles the ladder of investments principle.

C. <u>The non-imposition of price control obligations in low-populated areas</u>

41. **Paras. 41 and 70 of the Draft Recommendation**. According to para. 41 of the Draft Recommendation, the imposition of regulated wholesale access prices by NRAs would be unwarranted under the EECC where "*the business case to deploy a VHC network would be marginally viable even in the absence of any regulation in that area, for instance in areas of lower population density*". Specifically, under para. 70 of the Draft Recommendation, NRAs should purportedly consider "*not imposing price control obligations*" "*in cases where expected profitability in the absence of price controls is already marginal […] at least until a significant part of the associated uncertainty is resolved*".

42. It is clear from this wording of the Draft Recommendation that the Commission believes that price control is not justified where the profitability of an investment of an SMP operator into the deployment of a VHCN in a specific area is either (a) marginally viable or (b) significantly uncertain. In doing so, the Draft Recommendation strongly

---

electronic communication sector susceptible to *ex ante* regulation, recitals 30-31; Explanatory Note of 18 December 2020 accompanying the 2020 Recommendation on relevant markets, pp 55-57 and 85), NRAs (Case HR/2018/2056; Case DE/2017/2000; Case AT/2017/1987; Case IT/2015/1777-1778-1779; Case CZ/2015/1753-1754-1755, p. 6; Case SK/2015/1738; Case PL/2014/1632; Case ES/2011/1192-1193-1194; Case SE/2010/1061-1062; Case CY/2010/1076; Cases BE/2009/0949-0950, pp. 3-4; Case LV/2009/0960; Case FR/2009/0914) and BEREC (BEREC Common Position on best practices in remedies as a consequence of a SMP position in the relevant markets for wholesale leased lines, BoR (12) 126; BEREC Common Position on geographic aspects of market analysis, BoR (14) 73, para. 41 and 56; BEREC Report on monitoring implementation of the BEREC Common Positions on Wholesale Local Access (WLA), Wholesale Central Access (WCA) and Wholesale High Quality Access at a Fixed Location (WHQAFL) Phase 3, BoR (16) 219, p 5.)

35 According to this principle, the objective of SMP regulation is to achieve sustainable infrastructure-based competition where feasible. Competitors will "climb the ladder of investments" by installing progressively less replicable assets (e.g. resale, bitstream, unbundled local loop, and ultimately their own fibre infrastructure). Access seekers will benefit from access opportunities which are appropriately calibrated over time to encourage the twin objectives of promoting competition and investment (Martin Cave (2006), "*Encouraging infrastructure competition via the ladder of investment*", Telecommunications Policy).

discourages NRAs from imposing price control obligations where there is an alleged doubt concerning the profitability of a specific investment.

43. **Why paras. 41 and 70 infringe the EECC**. The suggested deregulation of wholesale prices of SMP operators for low-populated areas (i) unjustifiably removes the discretion that NRAs enjoy under the EECC to apply pricing remedies provided for pursuant to Article 74 EECC, and (ii) is at odds with the principle of geographic segmentation and the State aid guidelines.

44. Improperly removing the discretionary power of NRAs. As mentioned above, Article 74(1), paragraph 3, EECC provides that NRAs "*shall consider not imposing or maintaining [price control] obligations pursuant to this Article, where they establish that a demonstrable retail price constraint is present and that any obligations imposed in accordance with Articles 69 to 73 [i.e. obligations of transparency, non-discrimination, accounting separation, access to civil engineering, and access to specific network elements and associated facilities] including, in particular, any economic replicability test imposed in accordance with Article 70, ensures effective and non-discriminatory access*". Thus, two different competitive safeguards are required before lifting wholesale price control (i.e. creating wholesale price flexibility for SMP operators), as further discussed below: (1) the presence of a demonstrable retail price constraint, stemming from infrastructure competition or from a regulated anchor, and (2) other obligations are imposed, including an economic replicability test, which ensure effective and non-discriminatory access.

45. This is confirmed by Recital 193 EECC, which recalls that wholesale price flexibility is conditional on the existence of a demonstrable retail price constraint and the imposition of other SMP obligations guaranteeing effective and non-discriminatory access:

> *"[T]o prevent excessive prices in markets where there are undertakings designated as having significant market power, pricing flexibility should be accompanied by additional safeguards to protect competition and end-user interests, such as strict non-discrimination obligations, measures to ensure technical and economic replicability of downstream products, and a demonstrable retail price constraint resulting from infrastructure competition or a price anchor stemming from other regulated access products, or both. Those competitive safeguards do not prejudice the identification by national regulatory authorities of other circumstances under which it would be appropriate not to impose regulated access prices for certain wholesale inputs, such as where high price elasticity of end-user demand makes it unprofitable for the undertaking designated as having significant market power to charge prices appreciably above the competitive level or where lower population density reduces the incentives for the development of very high capacity networks* ***and*** *the national regulatory authority establishes that effective and non-discriminatory access is ensured through obligations imposed in accordance with this Directive."(emphasis added)*

46. *With regard to the first competitive safeguard* (i.e. the existence of a demonstrable retail price constraint), the NRA must ensure that the prospect of wholesale price flexibility will not give rise to potential anticompetitive foreclosure effects on markets already weakened by the existence of an SMP operator. However, the Draft Recommendation gives unfounded and considerable leeway to SMP operators to escape price control and

thereby significantly restricts the discretion of NRAs to justify price control in low-populated areas. In fact, SMP operators could likely easily factor in conservative assumptions in their financial model sent to the NRAs (either decreasing the IRR or raising the WACC), so as to cast doubt on the profitability of their planned deployment of VHCNs in a given area. This especially holds true for low-populated areas, where the business case for deployment is almost always uncertain, as the Commission itself acknowledges in the Explanatory Note accompanying the Draft Recommendation[36].

47. In addition, the Draft Recommendation departs from the boundaries of wholesale pricing flexibility within the EECC by encouraging NRAs to take into account the probability of future deployment of VHCNs in a given area. Indeed, according to Recital 28 of the Draft Recommendation, "*emerging or prospective infrastructure-based competition could also be found to sufficiently constrain the SMP operators' ability to raise prices. Where VHCNs deployment has not yet started within the area, NRAs should assess the likelihood and viability of future VHCN deployment*". Such approach is contrary to both Article 74(1), paragraph 3 EECC and Recital 193 EECC, which make wholesale pricing flexibility subject to, *inter alia,* the existence of sufficient competition safeguards, such as a "*demonstrable retail price constraint*". By definition, the future deployment of a competing VHCN by an alternative operator in the same geographic area is difficult (if not impossible) to demonstrate. In particular, the geographical surveys of network deployments carried out by the national authorities are often incomplete, and the declaration of operators' intentions to deploy VHCNs is merely optional.[37]

48. Therefore, the Commission has **shifted the burden of proof to facilitate the deregulation of wholesale markets**. The Draft Recommendation makes it easier for SMP operators to argue that alternative operators will likely deploy VHCNs in a given area (based on supposed evidence of potential competition from alternative operators). The Draft Recommendation simultaneously makes it harder for NRAs to rebut the arguments based on likely potential competition. In this respect, the EECC notably requires NRAs to demonstrate the existence of a retail price constraint before reaching a finding that they can deregulate. And contrary to what the Draft Recommendation suggests, the EECC does not require NRAs to rebut a presumption that alternative operators will likely deploy VHCNs and exert sufficiently constrain, before they can regulate.

49. Wholesale price flexibility is inappropriate to encourage investment in VHCN. Quite the opposite, granting wholesale price flexibility to SMP operators on wholesale offers would discourage the incentives of alternative operators to invest in VHCNs on markets already weakened by the existence of an SMP operator. Wholesale price flexibility will

---

36 Explanatory Note, p. 13. "*This substantial increase in [VHCN] coverage has however left a significant gap between urban and rural regions. In rural areas, growth was slower, but still substantial, from 4% to 28% over the same time period. This gap is due to higher costs of deployment and lower economies of scale in these regions that are more isolated and less densely populated. The business case of VHCN deployment is therefore less evident for private investors and can even be clearly unprofitable in some cases. The large gap between total and rural VHCN coverage shows the regional disparities in digital opportunities and confirms that, in order to meet the Digital Decade connectivity targets, more investment is needed in rural areas in order to catch up. It is expected that deployment in rural areas will gain importance in the future years as urban areas approach ubiquitous coverage. However, parallel deployment of new VHCN infrastructure in rural areas would in general remain relatively limited*." (emphasis added)

37 Art. 22(3) EECC provides that the relevant authorities "*may invite*" undertakings and public authorities to declare their intention to deploy VHCNs over the duration of the relevant forecast period.

not automatically incentivize SMP operators to agree on more market-based solutions concerning VHCNs, such as more co-investment projects or more commercial access agreements. On the contrary, in such situation, SMP operators are less likely to propose co-investment for VHCN under Article 76 EECC.

50. *With regard to the second competitive safeguard* (i.e., the imposition of SMP obligations ensuring effective and non-discriminatory access), the Draft Recommendation does not refer to such conditions, and instead indicates that imposing regulated wholesale access prices would be unwarranted under the EECC where "*the business case to deploy a VHC network would be marginally viable even*[38] *in the absence of any regulation in that area, for instance in areas of lower population density*". The wording of the Draft Recommendation should thus be reviewed to reflect the two conditions required in the EECC.

51. Contravening principle of geographic segmentation and State aid guidelines. Contrary to its own Explanatory Note, which clearly foresees the possibility of price control in rural areas[39], the Draft Recommendation seeks to unjustifiably pave the way to differentiated wholesale access pricing in urban and rural areas, leading to higher access prices in less densely populated areas.

52. The proposed pricing deregulation via a differentiation of local areas where the deployment of VHCN would be marginally viable (and thus where only no more than one VHCN is likely to be deployed) is at odds with the regulatory principle of geographic segmentation.[40] Article 64 (3) EECC states that "*National regulatory authorities shall, taking the utmost account of the Recommendation and the SMP guidelines, define relevant markets appropriate to national circumstances, in particular relevant geographic markets within their territory by taking into account, inter alia, the degree of infrastructure competition in those areas, in accordance with the principles of competition law.*"(emphasis added) This principle has led to the application of differentiated (less stringent) remedies in areas where several network have been deployed, based on the local deployment of several parallel network in certain geographic areas (typically urban areas). The geographic segmentation is based on the principle of deregulation (markets or remedies) in the local geographic areas where there is sufficient infrastructure competition, but not where no infrastructure competition could develop. Over the years, NRAs and the Commission have increasingly relied on the existence of

---

38 The drafting of para 41 and para 70 is furthermore inconsistent. The use of the word "even" in para. 41 is not included in para. 70. Furthermore, article 41 refer to the absence of "any regulation", while art. 70 refers to the absence of "price control".

39 *Ibid*., p. 121. *"[T]he largest investment gap to persist in the future years will most likely be in rural areas where overall risk of deployment is likely to remain high for still some time, as explained in chapter 2. Especially in such areas, the use of a risk premium in cases of price-control application could prove useful to reduce this investment gap and generally reduce the digital divide between rural and urban areas*."

40 See recital 9 of the Draft Recommendation ("*Where separate geographic markets have been identified, NRAs should ensure that regulation is withdrawn in geographic markets that are found to be effectively competitive in the absence of regulation. However, if such differences are either not stable enough or are insufficient to determine that there are separate geographic markets, NRAs should apply geographically segmented remedies if necessary to solve, in a proportionate way, the competition problems identified in the various areas defined. The segmentation should be based on objective criteria, similar in nature to the ones used for geographic market segmentation. These objective criteria include: (i) the number and characteristics of competing networks, (ii) the distribution of and trends in market shares, (iii) prices and (iv) behavioural patterns.*"). See BEREC Common Position on geographical aspects of market analysis (definition and remedies), 4 June 2014, BoR (14) 73.

several access networks in certain local geographic areas to deregulate wholesale central access (and in a small number of cases wholesale local access) in these areas. Indeed, as recognized in Recital 90 EECC, "*In markets where an increased number of access networks can be expected on a forward-looking basis, end-users are more likely to benefit from improvements in network quality, by virtue of infrastructure-based competition, compared to markets where only one network persists. The adequacy of competition on other parameters, such as price and choice, is likely to depend on the national and local competitive circumstances".* The deregulation of areas where only one VHCN could be deployed defies such principle.

53. The need for retaining access remedies in low-populated areas is also in line with the logic of the State aid Broadband Guidelines. The Guidelines further make a distinction between white areas (no fixed ultrafast network is present or planned), grey areas (only one fixed ultrafast network is present or planned), and black areas (at least two fixed ultrafast networks are present or planned).[41]

54. In 2016, the Commission itself also stated explicitly in the impact assessment accompanying the Proposal for the EECC that SMP regulation will remain necessary in areas where infrastructure competition is insufficient:

> *"a model which favours infrastructure-based competition for VHC networks may not be easy to export in the short term in all countries, especially where there are fewer competitors with a sufficient scale to ensure critical mass. In cases such as these, traditional access-based regulation may continue to play a greater role." (emphasis added)* [42]

55. Furthermore, deregulating price control in less densely populated areas would affect the ability of alternative operators to offer their services on a national basis, to the extent they may be unable to access these less-densely populated areas at regulated wholesale prices. The inability to service customers in low densely populated areas will then impact the ability of alternative operators to invest in VHCN in these areas (without a proper ladder of investments), as well as in more densely populated areas (where their ability to invest will be affected by the lower revenues from less populated areas that they cannot serve).

56. **Conclusion.** In light of the above, removing price control in low densely populated areas far exceeds what is necessary to achieve the objective of promoting connectivity, access to, and take-up of VHCNs by all EU citizens and businesses pursuant to Article 3(2)(a) EECC. This objective was introduced by the EECC in 2018 alongside the existing ones of promoting competition, contributing to the internal market and promoting the interests of citizens. Attaining this objective requires the promotion of "*take-up of VHCNs*", which arguably entails ensuring a minimum coverage of VHCN before deregulating in specific areas. It also affects the other objectives of Article 3, such as the promotion of competition and the maximum advantages in terms of choices, prices and quality. It is inappropriate and disproportionate to promote deregulation in low-populated areas where VCHN take-up is low and is expected to remain so.

---

41 Guidelines on State aid for broadband networks, paras. 99-108 (OJEU 2023, C 36, p. 1).

42 Impact Assessment of 14 September 2016 accompanying the Commission Proposal for the EECC, COM(2016) 303 final, part 1/3, p. 80.

D. The increased prices for wholesale copper access

57. **Para. 81 of the Draft Recommendation** indicates that once the SMP operator's decommissioning plan complies with Article 81(2), first subparagraph, EECC, "*NRAs may consider a progressive relaxation of the price control obligation, by allowing the SMP operator to progressively increase wholesale prices for access to copper networks. Such a price increase should only be applicable in areas where the notice period for the copper switch-off has started*".

58. The alleged objective of the Draft Recommendation is to enable the SMP operator to increase wholesale prices for copper access in areas where customers "*effectively*" have the possibility to migrate to a VHCN, with a view to incentivizing a swift decommissioning process of the copper network and incentivizing end-users and access seekers to migrate to VHCNs[43]. The duration of the wholesale price increase is transitory in nature, and the NRA should ensure that the application of the price increase is not prolonged by any undue delay in the implementation of the switch-off plan.[44]

59. According to the Draft Recommendation, the increase of wholesale copper prices should be accompanied by sufficient competitive safeguards, including the following cumulative conditions: (a) the setting of the modalities of the price increase in advance in order to ensure certainty and predictability for operators, (b) the decommissioning plan is transparent, the notice period of 2-3 years maximum has begun and alternative products of a comparable quality are available, (c) the price increase should not lead to excessive retail prices, it should be non-discriminatory and not allow for margin squeeze, and (d) the SMP operator should make a binding and enforceable commitment as to the end date of the provision of services over the copper network.[45]

60. **Why para. 81 infringes the EECC.** Pursuant to Article 81(2), first subparagraph, EECC, NRAs must ensure that the SMP operators' decommissioning plan of copper networks "*includes transparent timetable and conditions, including an appropriate notice period for transition, and establishes the availability of alternative products of at least comparable quality providing access to the upgraded network infrastructure substituting the replaced elements if necessary to safeguard competition and the rights of end-users*".

61. Pursuant to Article 81(2), second subparagraph, EECC, the NRA may lift access obligations previously imposed on the SMP operator in relation to the decommissioned assets if the following conditions are met: the SMP operator "*(a) has established the appropriate conditions for migration, including making available an alternative access product of at least comparable quality as was available using the legacy infrastructure enabling the access seekers to reach the same end-users; and (b) has complied with the conditions and process notified to the national regulatory authority in accordance with this Article*".

62. However, the Draft Recommendation contradicts the above EECC provisions to the extent that it (i) limits NRA discretion, (ii) allows price increases of cost-oriented tariffs without any demonstrated increase of the underlying costs, and (iii) may affect regulatory predictability.

---

43 Draft Recommendation, recital 73.

44 Draft Recommendation, recitals 73-74.

45 Draft Recommendation, para. 81; Explanatory Note, p. 143.

63. Undermining NRA discretion. At the outset, it is striking that no provision in the EECC foresees the imposition of such a price increase. Again, by encouraging NRAs to apply a wholesale price increase for access to copper networks, the Draft Recommendation limits the ability of NRAs to assess which of the obligations adopted under Articled 68 to 80 EECC, should be removed and in what form and timeframe. As such, Article 81 (2) EECC does not allow for the Draft Recommendation's so-called "progressive relaxation" of the obligations, but only provides for the removal of the obligations. The Draft Recommendation's para. 81 thus forces NRAs to go further in deregulation than what Article 81 (2) EECC foresees for the migration from legacy infrastructure.

64. In any event, the Draft Recommendation should make clear that the price increase can only occur in conformity with Articles 23, 32 and 33 EECC, as required in Article 81 (2) EECC. An increase in wholesale prices will necessarily impact the retail market, which must be assessed as well, as required by the case-law: "*it is essential that [the] interests [of end-users and consumers] can be taken into account and evaluated in the context of the review of the effect that the tariff obligation imposed by the NRA on a wholesale market is intended to produce on the retail market*". (emphasis added) [46] Thus, the Draft Recommendation must also foresee that NRAs will need to assess the impact on the market for customers of such price increase.

65. Contravening principle of cost-orientation for legacy networks. A wholesale tariff subject to cost-orientation obligation cannot be increased for reasons other than an increase in costs. These costs must relate to the infrastructure to which access is given (copper), and they cannot relate to another infrastructure (fiber). In this case, it appears that the Commission seeks to base a cost increase related to the deployment of the fiber network (and the related migration) on the access price for copper network.

66. The Draft Recommendation indirectly acknowledges that increasing the prices of cost-oriented tariffs must be justified by an increase of the underlying costs since its Recital 73 states that the increase is meant to "*take into account the inflationary effect of the migration of customers from copper to VHCNs on the costs of the copper network".* However, this justification under Recital 73 will need to be verified by NRAs on a case-by-case basis as it may not withstand scrutiny:

- First, the customer migration costs are retail costs, supported by the relevant suppliers. Thus access seekers support these migration costs as much as the access providers, each for their own customers. Such retail costs should not be integrated in wholesale tariffs.

- Second, the (stranded) costs of the copper network may not necessarily change with customer migration to VHCN. On the contrary, the decommissioning of the cooper network may e.g., generate substantial revenues from the recycling of the raw material (copper).

67. The Draft Recommendation's other purported reasons for increasing prices are not justified in so far as they justify price increases on other reasons than increases of underlying costs and are in any event flawed:

- Recital 73 alleges that the price increase would "*incentivise the SMP operator of the*

46 Case C-28/15, *KPN v. ACM*, EU:C:2016:692, para. 54.

legacy network to present a decommissioning plan and effectively proceed to decommissioning as soon as possible". At the outset, it is questionable whether the speedy switch off of copper networks can be promoted under the EECC, as such switch-off will necessarily restrict infrastructure-based competition, and would show a technological bias against copper that is contrary to the principle of technological neutrality. In any event, a price increase will most likely not accelerate the decommissioning of the copper network, but would rather constitute an incentive for the network owner to keep these increased revenues (and thus its copper network).

- Recital 73 also alleges that the wholesale price increase would incentivize end-users and access seekers to migrate to the VHCN before the switch-off of services on the legacy network. However, this would only be the case if there is at least (i) an effective alternative and (ii) the switch could be done <u>at the same pricing conditions</u>, which is not guaranteed by the EECC (only equivalent quality is guaranteed).

68. In any event, even if there is an increase in the underlying costs of the SMP operator, there may be other reasons and objectives (including competition and regulatory predictability) that could justify maintaining the wholesale tariffs stable. As stated by the CJUE, the "*obligation for cost orientation of prices', having regard to the usual meaning of those terms, refers to an obligation in regard 'cost orientation' of prices, <u>not an obligation 'to recover' all costs incurred</u>. Thus, it is appropriate to disregard the interpretation of that provision which suggests an obligation to set prices at a level enabling the operator concerned to recover all the costs which it has incurred with a view to providing the service in question*" (emphasis added)[47].

69. <u>Damaging regulatory predictability</u>. The Draft Recommendation acknowledges that "*Predictability is a key factor in ensuring a favourable framework for investment in VHCN rollout*". However, increasing the wholesale prices for access to copper networks during a market review period could likely infringe such principle. Indeed, the principle of regulatory predictability requires that NRAs ensure a consistent regulatory approach, especially by promoting stable wholesale access prices over several review periods.[48] Significant price fluctuations within one review period are typically considered neither stable nor predictable.[49] The case-law does allow NRAs to impose on SMP operators an obligation "*to set its prices annually on the basis of the most up-to-date data*", but requires that this is justified and proportionate in view of the objectives of the EU regulatory framework.[50] It is preferable that NRAs do not update their proposed measures as new data becomes available,[51] and instead that NRAs notify all changes as part of the same package within the same review period, in order to place alternative operators in a position to assess fully the technical functionality and price of the access product.[52]

70. In view of this, the imposition by NRAs of review clauses which trigger wholesale price increases over the same review period must be subject to clear conditions. For example, any price increase of wholesale copper access should be conditioned on effective VHCN

47 Case C-277/16, Polkomtel, ECLI:EU:C:2017:989, para. 31.

48 Articles 3(4) and 74(1), fourth subparagraph, EECC. See also Draft Recommendation, para. 59.

49 NDCM Recommendation, paras. 38 and 46.

50 CJEU Judgment of 20 December 2017, *Polkomtel*, C-277/16, EU:C:2017:989, para. 47.

51 Case ES/2015/1818-1820, p. 11.

52 Case DE/2016/1934, p. 11.

availability to access seekers in the specific area and limited to that area. If the price increase were to be set beyond the specific area, for example at the national level, this would risk undermining competition in the most densely populated areas where VHCN deployment is high, and at the same time create a rent to the benefit of SMP operators in less densely populated areas. Similarly, it is essential to maintain a margin squeeze test in place for the whole duration of the notice period. This would prevent SMP operators from setting excessively high prices to the detriment of alternative operators. In the same spirit, NRAs should ensure that SMP operators do not discriminately degrade the quality of service of wholesale access to the copper network for alternative operators before the complete decommissioning of the legacy network.[53] In doing so, deregulation would deter alternative operators from investing in VHCN deployment.

71. **Conclusion**. In light of the above, increasing wholesale prices for copper network infringes the EECC by contradicting the above-referred EECC provisions to the extent that these (i) limit NRA discretion, (ii) allow price increases of cost-oriented tariffs without any demonstrated increase of the underlying costs, and (iii) may harm regulatory predictability.

72. In terms of proportionality, the Draft Recommendation's para. 81 also appears to go well beyond what is necessary to achieve the objective of promoting connectivity, access to, and take-up of, VHCNs pursuant to Article 3(2)(a) EECC, and fails to sufficiently account for the objectives of promoting competition and customer choice.

3. Procedural Issues

73. The release of the Draft Recommendation was also impacted by several procedural issues, such as (**A**) making the Recommendation *de facto* legally binding, (**B**) failing to hold a public consultation and to undertake an impact assessment, and (**C**) ignoring the fact that there was no need for updating the Access Recommendations.

A. The erroneous *de facto* binding character of the Draft Recommendation

74. **The Treaty and the EECC.** Article 288, fifth paragraph, TFEU provides that recommendations shall have no binding force. Still, even though they are not intended to produce binding effects and are not capable of creating rights on which individuals may rely before a national court (i.e. they have no direct effect), recommendations are not deprived of legal effects. It is settled case-law that national courts must take recommendations into consideration in order to decide disputes submitted to them and in order to interpret national measures in light of binding provisions of EU law.[54]

75. In the electronic communications sector, Article 38(2) EECC provides that NRAs must "*take the utmost account of the recommendations*" adopted by the Commission to ensure a harmonized application of the EECC.

---

53 See ARCEP Decision No. 2018-1596-RDPI of 18 December 2018, Article 3. Annex B specifies QoS indicators concerning the production of access and after-sales services.

54 CJEU Judgment of 26 January 2021, *Dietrich and Häring*, C-422/19, EU:C:2021:63, para. 48; CJEU Judgment of 24 April 2008, *Arcor*, C-55/06, EU:C:2008:244, para. 94; Judgment of 13 December 1989, *Grimaldi*, C-322/88, EU:C:1989:646, paragraphs 7, 16 and 18.

76. In practice, the combined effect of the notification obligation of NRAs and the guidance in the Draft Recommendation significantly constrain NRA discretion, so as to make the Draft Recommendation *de facto* binding.

77. In effect, pursuant to Article 32(3) EECC (former Article 7 procedure), NRAs must notify to the Commission any measures which would affect trade between Member States and which concern access or interconnection (Article 61 EECC), the definition of the relevant markets (Article 64), the market analysis, and in particular the decision whether or not a market is susceptible to *ex ante* regulation (Article 67 EECC), the imposition of regulatory obligations on SMP operators (Article 68 EECC), and the regulatory control of retail services (Article 83 EECC). The Commission has the power to veto the draft market analyses of NRAs on the definition of the relevant market and on the designation of SMP operators, where these create a barrier to the internal market or if they raise serious doubts as to their compatibility with EU law and in particular the objectives of the EU regulatory framework.[55] In exercising this veto, the Commission asks the NRA to withdraw the draft market analysis.[56] As a result of the veto, NRAs may not adopt certain draft measures.[57]

78. However, the Commission has no veto power concerning remedies. In theory, NRAs can still adopt remedies despite a serious doubts letter from the Commission,[58] the opinion of BEREC sharing these serious doubts,[59] and the recommendation of the Commission to amend or withdraw the draft measure.[60] However, if the NRA persists in imposing draft remedies despite the negative opinions from the Commission and BEREC, then the NRA has a duty to provide reasons pursuant to Article 33(7) EECC.

79. In any event, according to Article 38(2) EECC, if an NRA chooses to depart from the guidance on access provided in the final Gigabit Recommendation, it will have a dual duty to inform the Commission and provide reasons again.

80. In practice, it is extremely unlikely that NRAs would impose the originally proposed regulatory measures following a serious doubts letter from the Commission and the recommendation to withdraw the draft measure (at least without substantial changes to them). Indeed, if the NRA went ahead and adopted a controversial measure, there would be a high risk of litigation before national courts. In case of litigation, national courts must take into account Commission recommendations in disputes pending before them, in order to interpret national law in light of EU law, as is clear from the case-law mentioned above. Under these circumstances, considering the persistently high number of national disputes arising every year in the field of electronic communications regulation, NRAs are understandably reluctant to adopt regulatory obligations contrary to the Commission's recommendations or serious doubts letters. By promoting deregulation, there is thus no doubt that the Draft Recommendation will, in fact, curtail the regulatory inclinations of NRAs.

---

55 Art. 32(4) EECC.

56 Art. 32(6)(a) EECC.

57 Art. 32(8) EECC.

58 Art. 33(1) EECC.

59 Art. 33(4) EECC.

60 Art. 33(5)(a) EECC.

81. Hence, the combined effect of the current wording in the Draft Recommendation and the NRAs' notification obligation confer a *de facto* binding effect on the Draft Recommendation, contrary to Article 288, fifth paragraph, TFEU.

B. The improper lack of a public consultation and impact assessment

82. Pursuant to Article 11(3) TEU, the Commission must carry out broad consultations with stakeholders in order to ensure that the EU's actions are coherent and transparent. Pursuant to the principle of transparency enshrined in Article 15(1) TFEU, in order to promote good governance and ensure the participation of civil society, the Commission must conduct its work as openly as possible. In practice, the Commission makes use of two particular tools to ensure consistency and transparency of EU policymaking: impact assessments and public consultation.

83. An impact assessment consists of gathering and analyzing evidence to support policymaking, by verifying the existence of a problem, identifying the underlying causes, assessing whether EU action is needed, and analyzing the advantages and disadvantages of available solutions.[61]

84. A public consultation implies the collection of information and views from stakeholders about the Commission's policies, including environmental and digital aspects where relevant.[62] There are essentially two consultation methods:

    i. "*public consultations*" of the broadest audience possible, without limiting the number of respondents, who are self-selecting and thus not representative;

    ii. "*targeted consultations*" of a limited selection of respondents, allowing for a more focused and efficient dialogue, in particular when dealing with a very specific or technical subject. For very technical initiatives of limited interest for the general public, a targeted consultation of stakeholders is a more suitable means of collecting the necessary evidence.[63]

85. As a rule, stakeholder consultation is required when preparing an initiative accompanied by an impact assessment.[64] There is thus a clear link between an impact assessment and a consultation, which are both required under the same circumstances. Therefore, as a matter of principle, the Commission must conduct both an impact assessment and a consultation "*for Commission initiatives that are likely to have significant economic, environmental or social impacts or which entail significant spending, and where the Commission has a choice of policy options*".[65]

86. For the Draft Recommendation, the Commission organized a targeted consultation between 16 July and 7 October 2020 on the revision of the Access Recommendations.[66]

---

61 Commission Better Regulation Guidelines of 2 November 2021, SWD(2021) 305 final, p. 30.

62 Commission Better Regulation Guidelines, p. 13.

63 *Ibid*., pp. 15 and 19.

64 *Ibid*., p. 15.

65 *Ibid*., p. 30.

66 https://digital-strategy.ec.europa.eu/en/consultations/targeted-consultation-revision-commissions-access-recommendations

Contributions were provided by 24 respondents (including BEREC, ETNO, ECTA, FttH Council and individual operators).

87. However, this was not a full-fledged consultation. The targeted consultation only sought to collect the views and experience of stakeholders regarding the application of the Access Recommendations and the need for any updates concerning access obligations. Items such as increasing wholesale prices for access to copper network, and wholesale price deregulation in low populated areas were not covered. The targeted consultation also focused on other regulatory aspects to ensure a consistent implementation of the EU regulatory framework and foster the deployment of VHCN. The emphasis was put on the role of NRAs which "*should determine whether price control obligations would be appropriate, by taking into account the need to promote competition and long-term end-user interests related to the deployment and take-up of next- generation networks, and in particular of very high capacity networks*"[67]. Stakeholders did not provide any feedback on a draft text of a recommendation changing current access obligations. The Commission's targeted consultation was therefore incomplete and dated, since it was carried out more than 2.5 years ago.

88. Additionally, although the Commission did carry out a targeted consultation, it failed to produce an impact assessment, whereas the Commission must make use of these joint policy tools under the same circumstances.[68] While the Commission admits that an impact assessment and a public consultation are generally not necessary for "*policy recommendations*",[69] it could not properly organize a targeted consultation without conducting an impact assessment.

89. First, the Draft Recommendation will have a significant economic impact on the electronic communications sector, to the extent that it widens the scope of deregulation of SMP operators, and thereby favors SMP operators over alternative operators. The Draft Recommendation's impacts are easily identifiable, as SMP operators will be given largely free rein to deter wholesale access by alternative operators and prevent alternative operators from investing in their own networks. As a whole, an impact assessment of the Draft Regulation would have shed much-needed light on its potential consequences on retail prices for end-users as well as on appropriate financial incentives for investment for all operators.

90. Second, the Commission also made an important policy choice in pushing for deregulation of access to VHCNs, contrary to the significant history of imposing regulatory obligations on SMP operators in the EU since 2002. An impact assessment would have usefully underpinned the policy choices available to the Commission with consistent evidence-based analysis. In this respect, the impact assessment accompanying the Commission Proposal for the EECC about 7 years ago is, in itself, insufficient to justify the policy shift from the Commission in favor of deregulation of SMP operators.

91. As a result, the necessary pre-conditions were met concerning "significant impact" and "choice of policy options" for an impact assessment, such that the Commission should have conducted an impact assessment before releasing the Draft Recommendation. The Commission should have also held a consultation based on the draft version of the Draft

---

67 *Ibid.,* p.7.

68 *Ibid*., p. 15.

69 Better Regulation Toolbox, November 2021, pp. 45-46.

Recommendation. The public release of the draft text simultaneous to its communication to BEREC is insufficient to constitute a complete and timely consultation.

C. The lack of reasons for replacing the Access Recommendations

92. The 2010 and 2013 Access Recommendations have no expiry date, and there is no obligation to update them. They do not provide for a specific deadline for automatically triggering a revision process.

93. It is not sufficient to argue that the Access Recommendations required an update for the mere reason that the EECC entered into force in 2018 and became fully applicable on 21 December 2020. It is equally insufficient to argue that the introduction of a new objective in Article 3(2(a) EECC in the form of promoting connectivity, access to and take-up of VHCN, alongside promoting competition, the development of the internal market and the interests of EU citizens, justifies the adoption of a new recommendation. The NRAs could have continued their regulatory practice, and the Commission could have continued providing comments pursuant to the unchanged Article 32 procedure (formerly Article 7 procedure), given the absence of any need to revise the Access Recommendations.

94. The Commission has not adduced sufficient evidence to justify the need to update the Access Recommendations based on a change in market circumstances. Historic telecom incumbents retain a high degree of market power and largely still designated as SMP operators by NRAs. The need to invest in VHCN deployment, including replacement of the copper local loop by fibre, does not affect this current context. Incumbents have a special responsibility not to leverage their historic market position to take advantage of other operators in terms of fibre deployment, pursuant to the principle of technology neutrality. Promoting deregulation, without reasoned foundation, raises a risk of abusive anticompetitive conduct by SMP operators. There was no demonstrated need to revise the Access Recommendations.

4. Conclusion

95. Besides the procedural issues identified in section 3 above, the following provisions of the Draft Recommendation create issues with regards to the following EECC articles:

Draft Recommendation	EECC
Para. 39: Price flexibility	Article 74 (1): price control Recital 185: EoI Article 3: objectives
Para. 33: Access to civil engineering infrastructure as “the only remedy” Recital 20: proportionality	Article 72: civil engineering obligations Article 73: access obligations Recital 171 & 187

Para. 41 & 70: non-imposition of wholesale price control in low populated areas	Article 74 (1) (3): price control Article 64 (3): geographic segmentation Article 3: objectives Recital 193 & 90
Para. 81. Wholesale price increase for in the context of copper switch-off	Article 81 (2): Migration from legacy infrastructure Article 3: objectives

*

* *