



Bundesnetzagentur

Connectivity Package 2018: EECC (Code):

- **Market regulation**
 - **SMP regime: market analysis**
 - **SMP regime: remedies**

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Comparative Perspectives on Broadband Regulation + Access

Toronto/Virtual – 18th October 2023



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- I. Connectivity Package 2018
- II. Main Topics
 - Remit of the EECC – inclusion of OTT-1 services
 - Role of NRAs (Art. 5)
 - Objectives (Art. 3) and market regulation (principles)
 - Art. 61 – symmetric regulation
 - Art. 63, 64, 67 – market definition, analysis, finding of SMP
 - Art. 68, 69 – 74, 76 – 81 – SMP remedies
 - Art. 74 – price control and cost accounting obligation
 - Art. 76 – co-investment (and Art. 79)
 - Art. 77, 78, 80, 81 – functional/voluntary separation, wholesale-only, migration from legacy infrastructure
 - Art. 75 – EU-wide termination rates (“Eurorates”)
 - BEREC and BEREC Tasks – Guidelines
- III. Conclusions

Evolution of telecommunications regulation in the EU

- Starting with full market liberalisation in 1998, the regulatory framework was changed in 2002 (updated in 2009) introducing the SMP regulation as a
- Concept of **pro-competitive regulation** focuses on promoting competition with a regulatory approach based on competition law principles and carries out a market analysis as in competition law
- Identifying the relevant markets susceptible to ex ante regulation with the **3-criteria test**: Recommendation on relevant markets susceptible to ex ante regulation by the European Commission
- Carrying out a **market analysis** taking into account the SMP Guidelines
- In case an operator is found to have significant market power (SMP), i.e. is dominant and the market not effectively competitive regulatory obligations („remedies“) are to be imposed in order to solve the competition problem identified in the market analysis
- The regulatory obligations are to be taken from the „**remedies toolbox**“ and regulators can tailor them to their specific national situation, i.e. regulators have the **flexibility** to choose the most appropriate set of remedies which is important to intervene timely in rapidly evolving markets
- When imposing remedies, regulators have to follow the principle of **proportionality** and the remedies are based on the nature of the problem and justified in the light of the objectives



Where are we coming from

ECNS Framework 2002/2009

Access Directive
(2002/19/EC)

Authorisation
Directive
(2002/20/EC)

Framework
Directive
(2002/21/EC)

Universal Service
Directive
(2002/22/EC)

European Electronic Communications
Code (EECC), Dir. 2018/1972/EU

Regulation (EC) No **1211/2009**
of the European Parliament and of
the Council
of 25 November 2009
establishing the **Body of
European Regulators for
Electronic Communications
(BEREC) and the Office**

Regulation (EU) **2018/1971** of the
European Parliament and of the Council
of 11 December 2018
establishing the **Body of European
Regulators for Electronic
Communications (BEREC) and the
Agency for Support for BEREC (BEREC
Office)**, amending Regulation (EU)
2015/2120 and repealing
Regulation (EC) No 1211/2009



- The set of independent NRAs' tasks:
 - *ex ante* market regulation, including the imposition of access and interconnection obligations
 - resolution of disputes between undertakings
 - radio-spectrum management and/or decisions or - when such tasks are assigned to other competent authorities - advice on market-shaping and competition aspects of national processes related to rights of use for ECS spectrum
 - Contribution to end-user rights protection, where relevant in cooperation with other competent authorities
 - Assessing and monitoring mkt shaping and competition issues regarding open internet access
 - ensuring number portability between providers



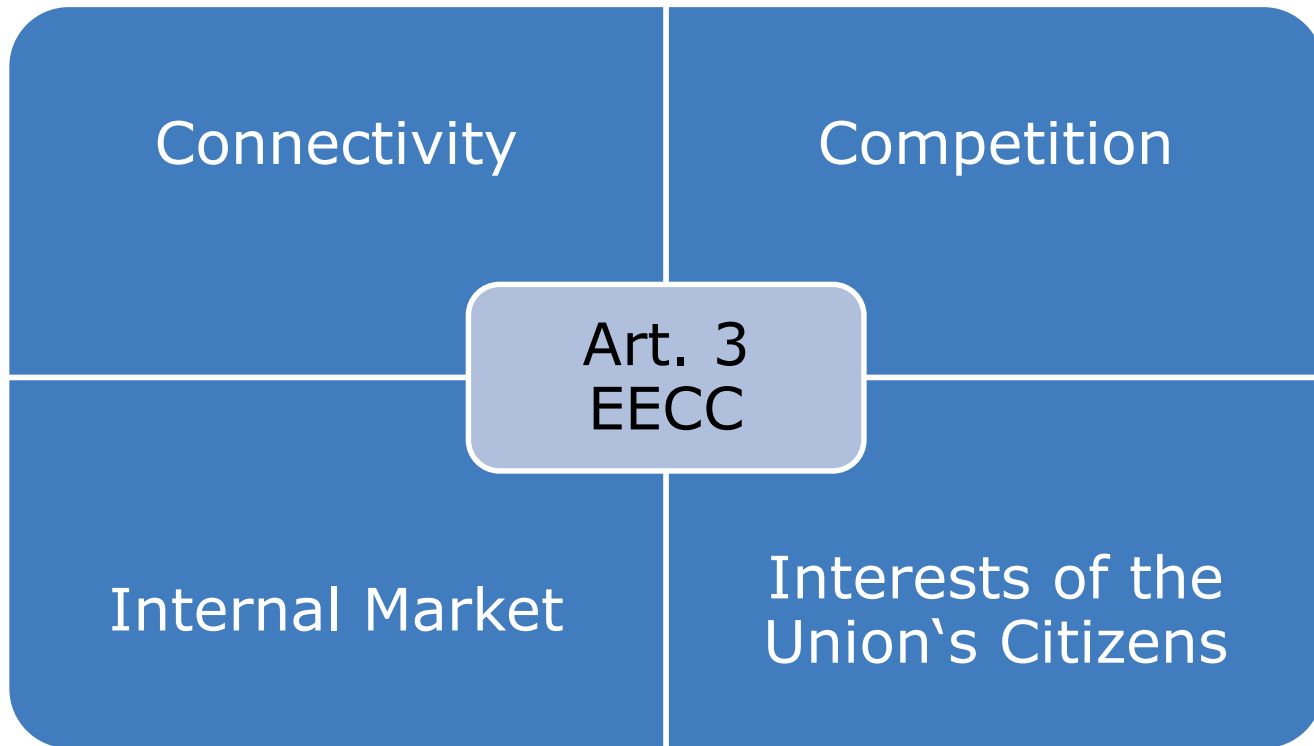
- New reference to Member State chance to assign to NRAs other tasks, particularly those relating to market competition and market entry, such as General Authorisation; if such tasks are assigned to other competent authorities, these latter shall seek to consult NRAs before making decisions.
- Member States to promote stability of NRAs' competences when transposing the Code with regard to tasks as in the 2009 framework
- Member States shall guarantee the **independence** of the NRA (Art. 6 - 9)
- NRAs shall participate in BEREC to ensure a consistent application of the Code (Art. 10)



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- Market Regulation
 - Objectives (Art. 3) and market regulation (principles)
 - Art. 61 – symmetric regulation
 - Art. 63, 64, 67 – relevant market definition a. analysis, finding of SMP
 - SMP Remedies (Art. 68, 69 – 74, 76 – 81) on the wholesale level:
 - Art. 68 – imposition, amendment or withdrawal of obligat.
 - Art. 69 – transparency
 - Art. 70 – non-discrimination (EoI)
 - Art. 71 – accounting separation
 - Art. 72/73 – access to civil engineering + to networks
 - Art. 74 – price control and cost accounting obligation
 - Art. 76 – co-investment (and Art. 79)
 - Art. 77, 78, 80, 81 – functional/voluntary separation, wholesale-only operators, migration from legacy infrastructure
 - Art. 75 – termination rates (Eurorates)
 - Art. 82 – BEREC GL on VHCCN
 - Art. 83 – Regulatory control of retail services (retail level)





Part II – Networks (Art. 42-83)/Title II – Access (Art. 59-83)
Access + interconnection (Art. 59-62) Market analysis + SMP (Art. 63-83)

Sym. rem.
(Art. 61.3)

Spectrum
(Art. 45-58)

Internal
Market
Procedures
(Art. 32-39)

Connectivity

Competition

Art. 3
EECC

Internal Market

Interests of the
Union's Citizens

SMP remedies
(Art. 68-80)
Art. 81 Migration
Art. 82 VHCN-GL

Art. 83 Retail cont.

Part III – Services
USO (Art. 84-97)
End-user Rights
(Art. 98-116)

Part I/Chapter III, Art. 20 – 22 (Geographical surveys)

EECC remedies provisions



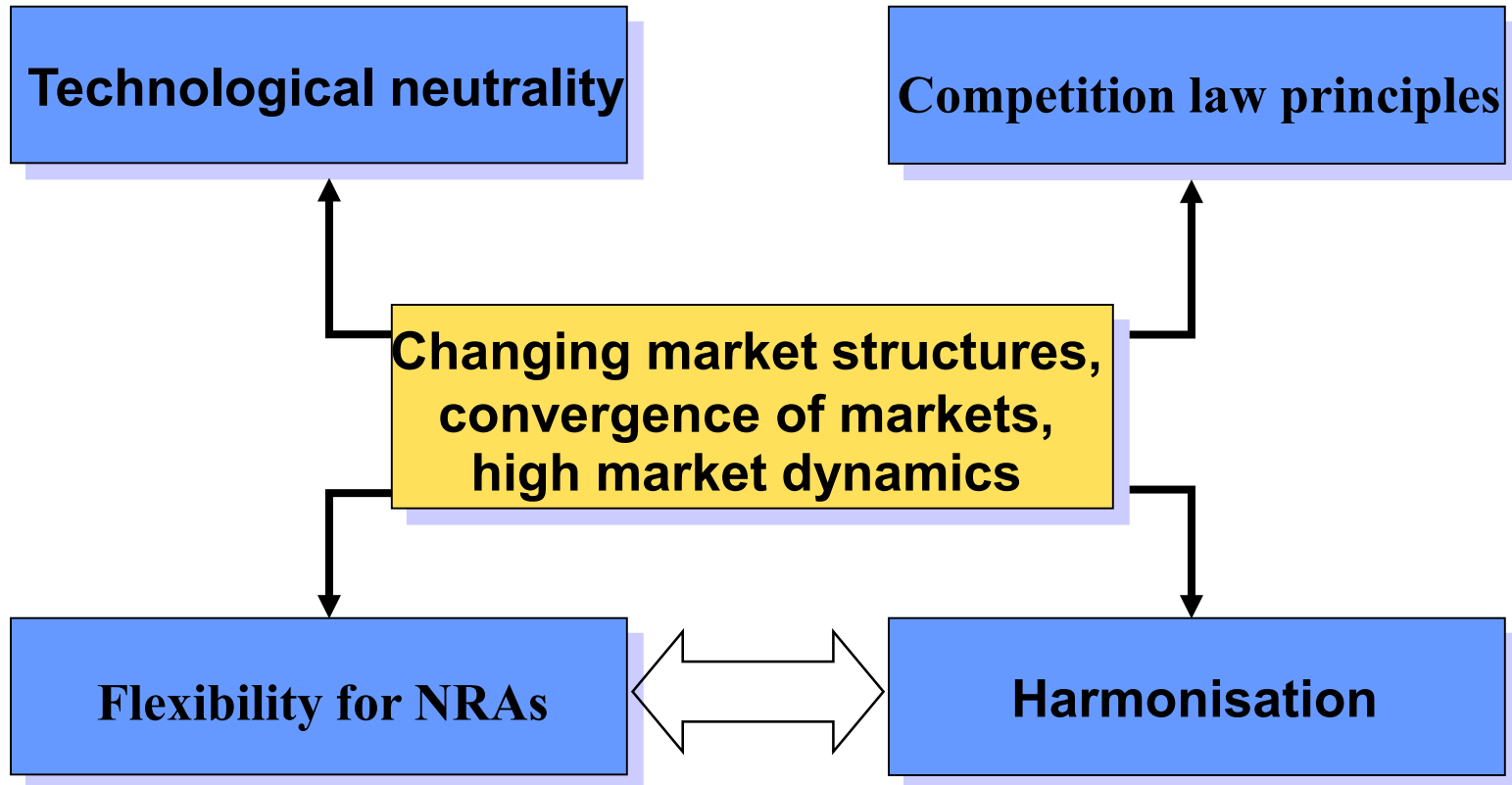
- New objective in Art. 3 EEC: **connectivity**, access to, and take-up of VHCN, i.e. more emphasis on incentives to invest in very high capacity networks (VHCN), which means a preference for fibre networks
- Promote **competition**, including efficient infrastructure-based competition
- Contribute to the development of the **internal market** by removing remaining obstacles to, and facilitating convergent conditions for **investment** in, and the provision of ECNS
- Promote the **interests of the citizens** of the Union, by ensuring **connectivity** and the **widespread availability and take-up of VHCN**
- 2009 ECNS Framework objectives acc. to Art. 8 FD:
 - safeguarding competition for the benefit of consumers,
 - Promoting efficient investment in enhanced infrastructure₁₁



- Enlarged toolbox: SMP regulation (asymmetric regulation) including new instruments to promote investment in VHCN, and symmetric regulation
- **SMP-Regulation** (Art. 63 ff.) stays in principle, **but** for certain constellations NRAs shall abstain from imposing regulatory obligations („*forebearance*“), e.g. Art. 76 - co-investment
- The toolbox is enlarged by adding **symmetric regulation** (Art. 61.3)
- In both cases (Art. 61.3 and Art. 76.2) the decisions are in the discretion of the NRA and are subject to the so-called „*double lock veto*“ (Art. 33), but no general „veto on remedies“
- Enlarged toolbox takes account of market evolution, different players, but is at the same time limited by Art. 33
- BEREC **Guidelines** for Art. 61 and Art. 76 (see below)



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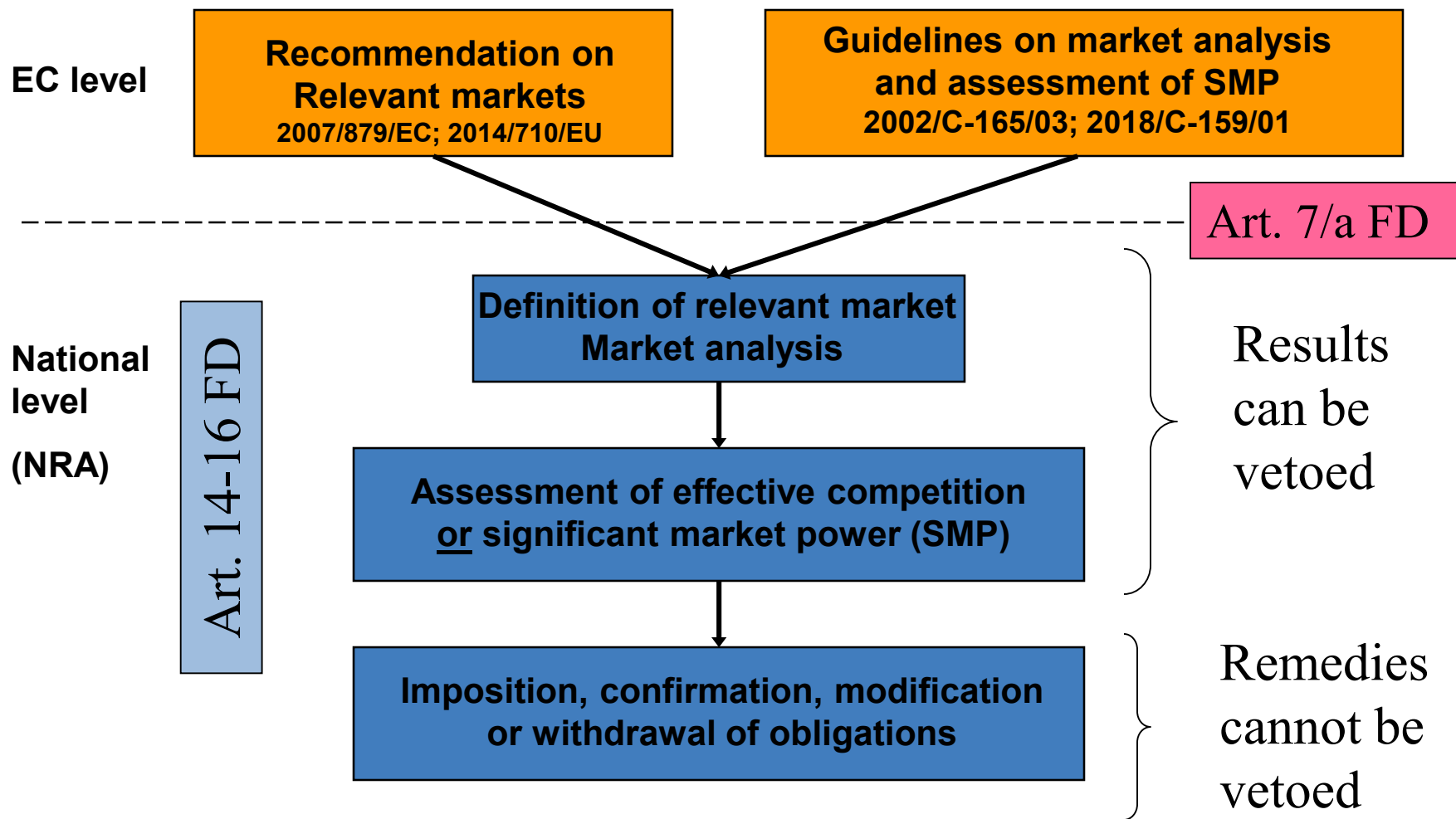


⑩ 3 Stages:

- market definition: relevant market (list of 7 markets; 2014: 5 markets)
- market analysis: designation of SMP operator(s)
- choice of remedy: imposition of regulatory obligation(s)

⑩ Rec. on relevant markets susceptible to ex-ante regulation: **3 criteria test**

- ⑩ If an operator is found to be dominant (either individually or jointly), at least one specific regulatory obligation must be imposed, which must be **proportionate** to remedy the problem, justified in the light of the Art. 8 FD objectives and **based on the nature of the problem** (Art. 8 AD)
- ⑩ Instead of the former automatism, NRAs are now given the **flexibility** (*discretion*) to choose the **appropriate** remedy: **increased role** for NRAs
- ⑩ Remedies must be **effective**: solve the competition
- ⑩ Remedies are to be chosen from the list in the AD/UD ("*toolbox*")
- ⑩ Remedies on the retail level to be applied only in case wholesale obligations do not work (concept of the **priority** of strict wholesale reg.)
- ⑩ Notification (consolidation/co-regulation) procedure acc. to Art. 7/a FD: **Veto power** on stages 1 + 2 (market definition + SMP), but **no veto power** on the application of remedies (stage 3), only comments and the recommendation addressed to the NRA which have to be taken into *utmost account* by the NRAs when adopting the final measures



➔ Remedy should be effective → solve the competition problem
 Important role of NRAs to choose the appropriate remedy



**Pro-competitive regulation
effectively implemented, relying
on competition law principles**

Flexibility for
remedies

NRAs

**Effective
Competition**

Art. 8 FD
objectives

Art.7-veto for
market analysis

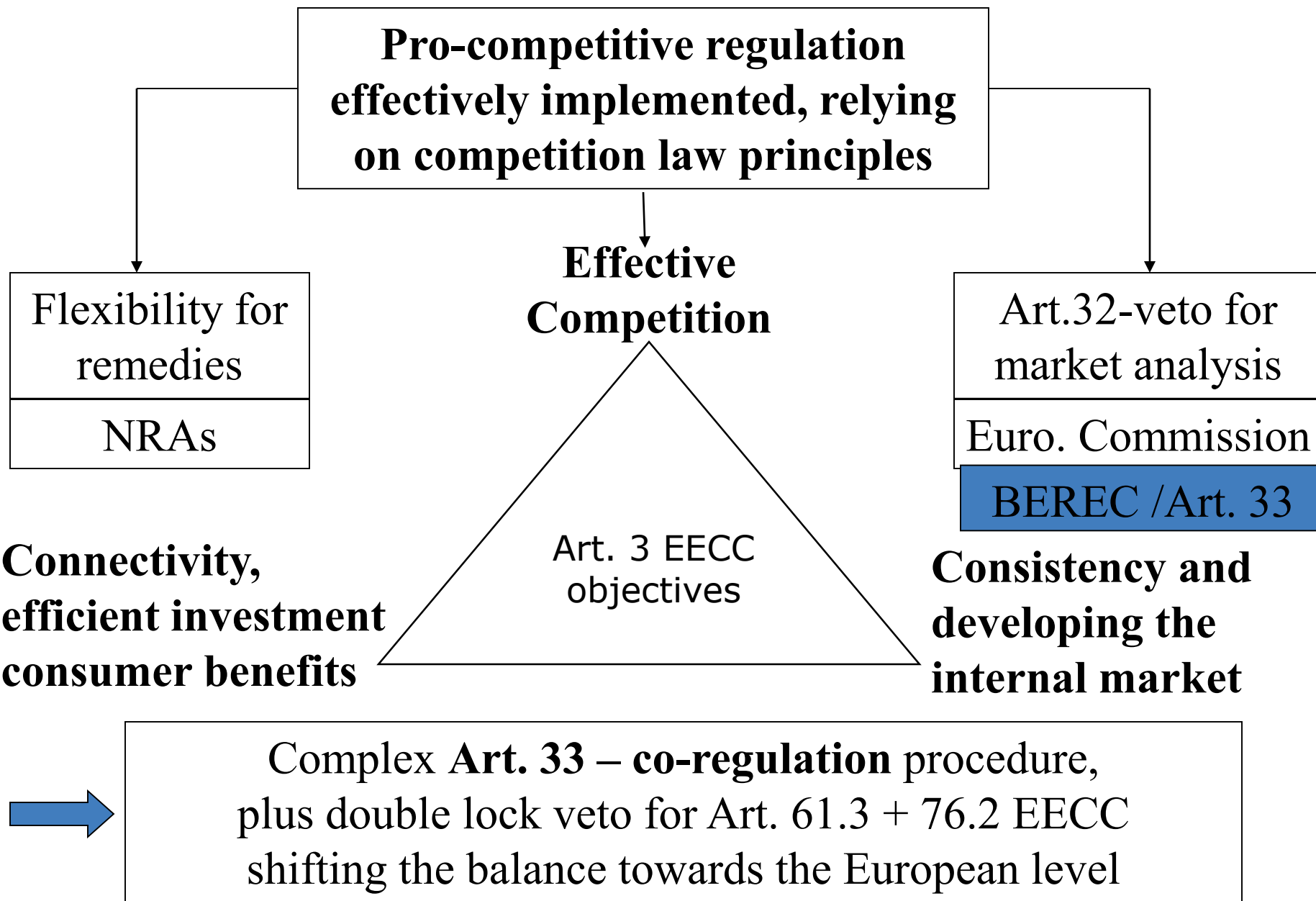
Euro. Commission

BEREC /Art.7a

**Efficient
investment and
consumer benefits**

**Consistency and
developing the
internal market**

→ No veto on remedies,
but a complex **Art. 7a – co-regulation** procedure
shifting the balance towards the European level





Recourse to double-lock veto, originally proposed for all NRAs' draft remedies, now confined to specific, although extremely relevant, remedies

- Original EC's proposal to introduce a general double-lock veto power on all NRAs' proposed remedies (art. 33) excluded
- Art. 33 procedure stays similar to the current one except that:
 1. After EC's serious doubts and subsequent BEREC Opinion, when the 3 month period ends, EC can anyway adopt a Recommendation, and not only when BEREC does not share its doubts or does not adopt any Opinion or where the NRA amends or maintains its draft measure
 2. Double-lock system eventually introduced only for NRAs' proposed remedies as in art. 61.3 and 76.2 (EC can ask the NRA to withdraw such proposed remedies if BEREC shares the EC's serious doubts)
- So the balance is mixed: on the one side the toolbox is enlarged (plus symmetric regulation), on the other side the flexibility of NRAs is limited by the double lock veto



3 Criteria Test to identify relevant markets susceptible to ex-ante regulation

- High and non-transitory entry barriers over the time horizon considered
- Market structure such that the market is unlikely to tend towards effective competition over the time horizon considered
- Evaluation of benefits of ex-ante versus ex-post regulation – is competition law sufficient?
- All 3 criteria must be cumulatively fulfilled
- Commission run the 3 CT to identify the relevant markets for the recommendations that NRAs have to take into utmost account when defining relevant markets



- Market 1: Wholesale call termination on individual public telephone networks provided at a fixed location
- Market 2: Wholesale voice call termination on individual mobile networks
- Market 3:
 - (a) Wholesale local access provided at a fixed location
 - (b) Wholesale central access provided at a fixed location for mass-market products
- Market 4: Wholesale high-quality access provided at a fixed location



- Generally the market analysis follows **competition law principles**
- **SMP** is defined as a position equivalent to **dominance**, i.e. a position of economic strength uncontrolled by competitors and/or users allowing the SMP operator to behave anti-competitively, e.g. apply a margin squeeze, excessively high prices, predatorily low prices or discriminatory prices (undue bundling/tying etc.)
- After a public consultation the Commission published a revised version of the **SMP Guidelines** a. an explanatory note
- The Commission took into account the latest ECJ case law, in particular on joint dominance facilitating the finding of joint dominance which gets more relevant, e.g. in wholesale broadband markets
- BEREC Opinion published on 19 March 2018, overall in favor of the revised SMP Guidelines
- Commission approved the revised version of the SMP Guidelines on 25 April 2018 and it was published in the OJ on 7 May 2018 (2018/C-159/01)



➤ Single SMP Criteria

○ Market share:

- Above 50%: In itself a strong preliminary evidence of a dominant position
- Below 50%: NRA should rely more on other key structural market features
- Below 40%: Dominance not likely, besides cases where competitors are not in position to effectively constraint behaviour of undertaking concerned
- In all instances market shares should be interpreted within the context of the market and due to development over time
- Greenfield-approach: How would market shares likely develop absent regulatory intervention?

○ Possible other criteria:

- Barriers to entry, barriers to expansion, absolute and relative size of undertaking, technological/commercial advantages, access to financial sources, product diversification (e.g. bundled TV or mobile, business and mass-market, etc.), economies of scale/scope, network effects, vertical integration, advantages in sales and distribution, contractual relations that could lead to market foreclosure, absence of potential competition, etc.
- Competitive pressure from existing competitors?
- Competitive pressure from potential competitors?

➤ No mechanical approach, the assessment of market shares has to be interpreted in the light of market conditions (rebuttable presumption)



- Joint SMP Criteria
 - Resembling jurisprudence of the Court of Justice of the EU (e.g. Airtours, Impala II)
 - Collective dominant position
 - Each member aware of common interests?
 - Economically efficient to adopt on a lasting basis a common policy with the aim of selling above competitive prices?
 - 1. Transparency (is behaviour/ policy observable?)
 - 2. Sustainability (incentive to not depart from common policy? Retaliation?)
 - 3. No external constraints (foreseeable reaction of current or future competitors or consumers?)
 - Hypothetical coordination mechanism/ plausible theory?
 - Any empirical evidence (e.g. market structure; symmetry; price development; changes in behaviour)?
 - Is market already regulated (e.g. single SMP) or not?
- SWD: Interdependency/ links between retail- and wholesale-level (does common policy on wholesale level affect retail outcome? Retaliation mechanisms on different levels?)
- Market shares? Still important, but in itself probably less indicative compared to single SMP
- Again, no mechanical application, the overall context has to be taken into account when assessing whether or not joint dominance exists



- The **3 criteria test** is now included in the EECC which gives it more weight (Art. 67)
- The cycle for the market reviews is extended from **3 to 5 years**, starting as of the day of the market analysis decision
- The *Geographical Survey* acc. to Art. 22 should be used where relevant
- Art. 63 – Undertakings with significant market power (SMP find.)
- Art. 64 – Market definition a. review of the Rec. on rel. markets
- Art. 67 – Market analysis:
 - take into account all market developments affecting the likelihood of the relevant market tending towards effective competition;
 - all relevant constraints on wholesale and retail level;
 - other types of regulation imposed in acc. with Art. 44, 60, a. 61;
 - regulation imposed on other relevant markets on the basis of Art. 67
- Art. 65/66 – Transnational markets and demand



BACKGROUND

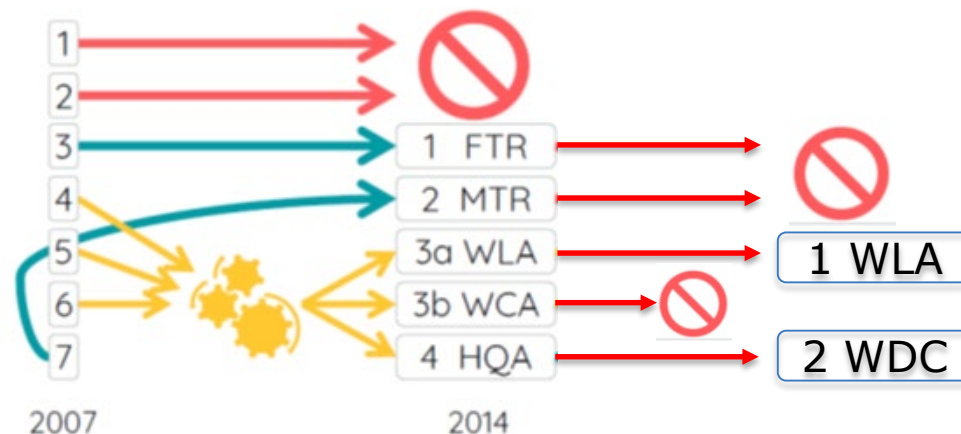
❑ Article 64(1) EECC:

*After public consultation including with national regulatory authorities and **taking the utmost account of the opinion of BEREC**, the Commission shall adopt a Recommendation on Relevant Product and Service Markets ('the Recommendation') (...) The Commission shall review the Recommendation **by 21 December 2020** and regularly thereafter”.*

- ❑ Public consultation launched by the EC February 2019. Answered by BEREC in June 2019 (BoR (19) 107)
- ❑ WIK report “Future electronic communications product and service markets subject to ex-ante regulation” (end-June)
- ❑ Draft recommendation sent by EC on 4 August (deadline Opinion: 15 October)
- ❑ BEREC submitted the Opinion on the draft recommendation on 16 Oct. 2020 and published it on its website (BoR (20) 174).

MAIN LINES OF THE 2020/2245/EU RECOMMENDATION

- ❑ Removal of Termination Markets (M1-2/2014) in relation to the Eurorates Delegated Act. Guidance on application of other provisions in the EECC for non-price issues
- ❑ Market 3a: **Wholesale Local Access** (maintained in the list (now market 1/2020))
- ❑ Market 3b: Wholesale Central Access – removed based on technological trends
- ❑ Market 4: Wholesale High Quality Access - in the list: Changed to **Wholesale Dedicated Capacity** (now market 2/2020)
- ❑ Market on Physical Infrastructure Access (PIA): Not in the list, but guidance provided





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- Acc. to **Art. 68**, NRAs shall impose on an SMP operator remedies acc. to Art. 69 – 74, 76 – 81 as **appropriate**.
- In line with the principle of **proportionality**, NRAs shall use the least intrusive instrument
- Obligations shall be
 - based on the nature of the problem identified;
 - justified in the light of the objectives of Art. 3 EECC
- Obligations shall be notified acc. to Art. 32/33 EECC
- NRAs shall consider new market developments and the influence of commercial agreements (e.g. a co-investm. agreement) on the competitive dynamics
- Art. 69 – Transparency obligation (RO shall contain KPIs and SLAs)
- Art. 70 – Non-discrimination obligation (now explicitly: EoI)
- Art. 71 – Accounting separation

Overview + Comparison of remedies acc. to: ECNS 2009 – EECC 2018



Obligation	ECNS 2009	EECC 2018
SMP remedies regulation	Art. 8 AD	Art. 68 EECC
Transparency	Art. 9 AD	Art. 69 EECC
Non-discrimination	Art. 10 AD	Art. 70 EECC
Accounting separation	Art. 11 AD	Art. 71 EECC
Access (to CEI; networks)	Art. 12 AD	Art. 72-73 EECC
Price control + cost accounting	Art. 13 AD	Art. 74; Art. 75 TR
Functional separation	Art. 13a AD	Art. 77 EECC
Voluntary separation	Art. 13b AD	Art. 78 EECC
Retail regulatory controls	Art. 17 UD	Art. 83 EECC
Co-investment commitments		Art. 76, Art. 79
Wholesale-only undertakings		Art. 80 EECC
Migration f. legacy infrastruct.		Art. 81 EECC
Symmetric regulation		Art. 61.3 EECC

Obligation (Art. EECC)	Recommendations	BEREC-Guidelines (GL)
SMP remedies regulation		
Transparency (Art. 69)		GL on minimum criteria f. RO
Non-discrimination (Art. 70)	NDCM Rec. (2013)	
Accounting separation (Art. 71)		
Access (Art. 72-73)	NGA Rec. (2010)	
Price control + CA (Art. 74)	NDCM Rec. (2013) WACC Notice (2019)	WACC parameters Report
EU-wide TR (Art. 75)	DA on EU-wide TR (2020)	
Functional separat. (Art. 77)		
Voluntary separat. (Art. 78)		
Retail regulat. controls (Art. 83)		
Co-investment (Art. 76)		GL on co-investment
Wholesale-only undert. (Art. 80)		
Migration legacy infrastr. (Art. 81)	NGA Rec. (2010)	
Symmetric regulation (Art. 61.3)		GL on Art. 61.3



- Art. 72 – Access to civil engineering, access to passive infrastructure as a stand-alone remedy
- Art. 73 – Access to, and use of, specific network facilities, i.e. physical and virtual access to network elements; no hierarchy of passive over active remedies, i.e. an obligation according to Art. 73 can also be imposed after an assessment of the effect of an obligation of Art. 72
- Art. 74 – Price control and cost accounting obligations: may impose, take into account need to promote competition and long-term end-user interests, added need to deploy in particular VHCN. Granting a reasonable rate of return on capital employed, taking into account any risks specific to the investment;
- NRAs shall consider not to impose a price control obligation where a demonstrable retail price constraint can be established, in which case they should use the ERT (originally included in the 2013 Recommendation)



- The **Recommendation** on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (**2013/466/EU**) of 11 Sept. 2013 foresees in **Recommend 56** the economic replicability obligation as an alternative to the imposition of regulated wholesale access prices acc. to Art. 13 AD on active NGA wholesale inputs.
- Thus the **ERT** is an **ex-ante margin squeeze test** which the NRA can impose if certain conditions are met as a „softer“ obligation compared to the imposition of a price control obligation. The idea is that this provides more **pricing flexibility** („*room to breathe*“) to the SMP operator allowing for a better business case when rolling-out NGA infrastructure.
- **Recommend 56** spells out the details when imposing an ERT: to specify at least the following parameters (which are included in **Annex II**):
 - the relevant downstream costs taken into account;
 - the relevant cost standard (LRIC+);
 - the relevant regulated wholesale inputs concerned and the relevant reference prices;
 - the relevant retail products, and
 - the relevant time period for running the test;
- To describe the procedure that the NRA will follow to conduct an ex-ante ERT;
- The remedy it will adopt when the ERT is not passed.
- In Annex II the Rec. foresees an EEO test, but NRAs can make adjustments of scale.



- In 2014 BEREC published a **Guidance document** on the regulatory accounting approach to the ERT as foreseen in the Recommendation 2013/466/EU.
- The BEREC Guidance document is analysing the economic replicability test (ERT) included as an ex-ante (sector specific) margin squeeze test to safeguard competition in the *“Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment 2013/466/EU”* from a regulatory accounting perspective.
- It looks in particular at Recommend 56 + Annex II of the Rec.
- As the Recommendation it focuses on ex-ante margin squeeze tests conducted in Market 4 and Market 5 of the Recommendation on relevant markets susceptible to ex-ante regulation 2007/879/EC (Market 3a and 3b of 2014/710/EU).
- ERT is a lighter test than the ex-ante MS tests used by NRAs, it is without prejudice of an ex-post competition law MS test
- So far NRAs use the ERT complementarily rather than alternatively to a (cost-oriented) price control obligation



- Art. 74 EECC dealing with price control and cost accounting obligations (formerly Art. 13 AD) includes now also the ERT providing price flexibility to the SMP operator:

“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.”
- Thus the importance of the ERT increases as it is now „upgraded“ as an instrument in the Directive instead of in the Recommendation on non-discrimination obligations and costing methodologies 2013/466/EU.
- Art. 75 – Price cap for MTRs and FTRs by a delegated act of the Commission replaces TR regulation of NRAs



■ **Background**

- The Commission started on 16 July 2020 a Targeted consultation on the revision of the Commission's access recommendations:
 - 2010 NGA Recommendation (2010/572/EU);
 - 2013 Non-discrimination obligations and costing methodologies (2013/466/EU)

- The consultation questionnaire comprises 42 questions in 10 sections:
 - 1) Non-discrimination obligation (Q1 - Q8);
 - 2) Economic replicability test (Q9 - Q10);
 - 3) Conditions under which price control obligations may or may not be appropriate (Q11 - Q14);
 - 4) Promoting pro-investment a. pro-competition approaches in relation to price control obligations (Q15 - Q19);
 - 5) Cost methodology (Q20 - Q22);
 - 6) Regulation of civil engineering infrastructure (SMP regulation) (Q23 - Q27);
 - 7) Commercial agreements, cooperative arrangements and commitments (Q28 - Q33);
 - 8) Migration (Q34 - Q37);
 - 9) Geographic differentiation of remedies (Q38 - Q41);
 - 10) Closing section – possibility to identify other issues (Q42).

- The deadline of the consultation is 7th Oct., therefore the response was approved at Plenary 3, submitted to the Commission and published on the BEREC website (BoR (20) 169)



- Both access recommendations that are currently in force build on the 2009 Framework (Art. 9 – 13 AD) and pursue the goal of fostering the internal market as well as promoting investment in NGA as well as promoting effective competition and innovation. The 2013 NDCM Rec. shifts the focus more on investment in newly deployed NGA networks.
- Thus the main motivation of the review is to update the access recommendations in light of the EECC as well as to update to the 2014 Rec. on relevant markets (2014/710/EU) currently under revision.
- BEREC agrees with the update and streamlining the access rec., but considers it necessary to respect the limits of the EECC (no „rewriting“ of the Code), leaving the margin of discretion provided for in the EECC to NRAs as well as not overlapping with BEREC Guidelines (or CPs) aiming already at ensuring a consistent application of the 2018 Framework by NRAs.
- Overall BEREC therefore cautions against too detailed recommendations, given also that a number of provisions of the NDCM Rec. are already in the Directive (Art. 70 + Art. 74 EECC), the number of recommendations may be reduced (as they are becoming obsolete)



- All recommendations must follow the provisions of the EECC, i.e. apply to all relevant markets susceptible to ex-ante regulation (and not only some of them).
- Moreover, the EECC sets out that NRAs shall take 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. Thus, the scope of a future access recommendation comprises the deployment of *new and enhanced networks, in particular VHCN*, but is not limited to the latter.
- A future access recommendation should be fully in line with the BEREC Guidelines on VHCN acc. to Art. 82 EECC (BoR (20) 165).
- More generally, BEREC urges the Commission to refer to existing BEREC guidance documents in a new access recommendation.
- In the answers to the individual questions BEREC sets out in more detail which parts of the two recommendations may be transferred to a new access recommendation.

The Draft Gigabit Recommendation publ. February 2023

	Draft gigabit recommendation (Feb. 2023)
To replace	<p>The access recommendations:</p> <ul style="list-style-type: none"> • 2010 Next Generation Access (NGA) • 2013 recommendation on non-discrimination and cost accounting methodologies (NDCM)
To provide	<p>Guidance to NRAs:</p> <ul style="list-style-type: none"> • on the regulation of telecoms providers with significant market power (SMP) • on the wholesale market for local broadband access • connected to the market analysis process defined by the European Electronic Communications Code
Issues covered	<ul style="list-style-type: none"> • Application of specific SMP remedies available under the EECC (non-discrimination, civil engineering access, network access and price control) • Commercial access, including co-investment and wholesale access commitments • Conditions for copper decommissioning and migration to VHCN
Legal instrument	Non-binding recommendation
Adoption	Adoption by the Commission, taking “utmost account” of the opinion of BEREC

Source: adapted by Cullen

5th May: Berec Opinion follows the chapters of the Draft Gigabit Recommendation (DGR)

Chapter titles	Recitals	Recommendations (pp. 16)
Aims and Scope	1 – 11	1 – 13
Non-discriminat. obligations	12 – 17	14 – 30 (plus Annex I)
Access to CEI (incl. monitoring)	18 – 23	31 – 38 (plus Annex II)
Pricing flexibility (incl. ERT)	24 – 38	39 – 44 (plus Annex III)
Price control + costing methodologies	39 – 58	45 – 60
Long-term pricing + volume discounts	59	61 (plus Annex IV)
Adequately rewarding the investment risk (WACC)	60 – 67	62 – 74
Migration from Copper to Fiber	68 – 74	75 – 81

GENERAL COMMENTS:

- The Gigabit Recommendation should foresee an **appropriate transitional period** before its full application.
- the highly detailed and prescriptive provisions of the Draft Gigabit Recommendation risk to unduly limit the discretion given to NRAs by the Code, which should prevail.



- The non-binding **Notice** of the Commission on the calculation of the **cost of capital** for **legacy infrastructure** in the context of the Commission’s review of national notifications in the EU electronic communications sector and the Commission Staff Working Document (SWD) OJ 2019/C 375/01 of 7th Nov. 2019 is applied by the Commission as of **1st July 2020** to assess notifications of NRAs.
- The Notice aims to ensure a **consistent** calculation of the WACC by NRAs thereby contributing to the development of the internal electronic communications market. The cost of capital is the core element of any regulatory pricing decision NRAs take.
- The **BEREC WACC parameters Report 2020** contains for each of the WACC parameters the results of BEREC’s calculations following the Notice as closely as possible. NRAs are assumed to take into account those parameter values in their own calculations.
- BEREC worked carefully and cross-checked all results describing in detail the calculation steps so that NRAs can replicate the results and can be confident that they are based on reliable data, robust and derived using state-of-the art professional standards. The following slides give an overview of the structure of the report, the main points of the calculations, the results and how “tricky” issues were solved.
- The **2020 Report** is the first report and may be improved in the future yearly update. In order to allow NRAs to reference it, it was published before 1st July 2020.



- In order to get robust results and enable all NRAs to replicate the estimations BEREC follows 3 general principles:
 1. Follow the Notice as closely as possible, which mainly refers to the methodologies to be used for the estimations;
 2. Be transparent, using public data where possible or using data which is widely accepted, which refers to the data sources to be used for the estimations;
 3. Explain every step of the calculation and proceed in a straightforward manner, which refers to the calculations as such.
- For each of the parameters calculated BEREC explains the following:
 - the application of the methodologies according to the WACC Notice,
 - the assumptions and choices made,
 - the data and data sources used,
 - the steps of the calculations,
 - the results.



The structure of the report follows the WACC formula and explains how each parameter is calculated:

- Chapter 1 General introduction
- Chapter 2 explains the estimation of the **RFR** (risk free rate).
- Chapter 3 sets out the **peer group** and provides criteria that NRAs can use to remove peer group members to take account of national specificities.
- Chapter 4 explains the estimation of the **debt premium** and the **cost of debt** for each member of the peer group.
- Chapter 5 explains the estimation of the **beta** and **gearing** for each member of the peer group.
- Chapter 6 contains the calculation of the single **EU-wide ERP** which is a key parameter and certainly the most difficult to calculate. Therefore it is put at the end of the Report.
- Chapter 7 summarizes all results in an overview table for easy reference. Furthermore this chapter also touches upon taxes and inflation (section 6 of the Notice) and contains a short section on possible future effects of the corona crisis.



Chapter	Parameter	Results	Reference (Table)
Chapter 1	Introduction WACC formula		
Chapter 2	RFR	RFR for each EU member state	Table 2
Chapter 3	Peer group	BEREC Peer Group 2020 comprising 14 companies	Table 3
Chapter 4	Debt premium, Cost of debt	Debt premium, Cost of debt for each of the 14 companies of the BEREC Peer Group	Table 4
Chapter 5	Equity beta, Gearing, Asset beta	Equity beta, Gearing, Asset beta for each of the 14 companies of the BEREC Peer Group	Table 6
Chapter 6	ERP	EU-wide ERP	Table 10 + 11
Chapter 7	Summary	All WACC parameters as calculated by BEREC	Table 12 + 10



- **BEREC Peer group 2020**
 - How to ensure it is representative for the whole EU?
Solution: starting from the illustrative table and applying the adjusted criteria plus looking at the STOXX Total Market Telecommunications index – BEREC’s peer group 2020 represents ar. **80% by market capitalisation** of this index
- **Equity Risk Premium (ERP)**
 - How to estimate a single EU-wide ERP?
 - How to „merge” long time series for 13 EU MS (from Morningstar) with short time series for 15 EU MS (calculated bottom-up)? Solution: „**Available years weighting**”
 - How to explain the resulting margin of 4.18% (GM) – 5.31% (AM)?
- BEREC considers that the single **EU-wide ERP** is in the margin of **4.18% (GM) – 5.31% (AM)**. In BEREC’s view this fulfills the purpose of the Notice as it unifies the ERP estimation of NRAs. Furthermore it reflects the fact that the EU capital market is not yet fully completed .
- Given that the margin is so narrow, it also implies that national ERPs will **converge** more when NRAs start applying the EU-wide ERP compared to the current situation with the standard deviation expected to go down considerably.
- Recognizing that the Notice favours the AM, NRAs not using the AM would need to provide an explanation justifying their result, although within the margin.
- Commission started to apply the Notice as of 1st July 2020, 1-year transitional period for NRAs



On the treatment of new VHCN elements, NRAs' discretionary role preserved too:

- Art. 76 introduces chance for SMP operators to offer commitments pursuant to art. 79 to deploy very high capacity networks via co-investment that shall meet several criteria (openness to any ECNS provider at any point during the lifetime of the network; chance for co-investors that are ECNS providers to compete in downstream markets effectively and sustainably; timely publicity, at least 6 months before deployment if operator is not wholesale-only; access to same conditions as before deployment for access-seekers that are not part in the co-investment)
- NRA, in line with art. 79, to check if criteria are all met; if so, it shall make the commitments binding and decide not to impose further obligations on the network parts subject to commitments



- NRAs still able to impose, maintain or adapt remedies on very high capacity networks in duly justified circumstances to address competition problems that cannot otherwise be addressed
- BEREC to adopt Guidelines on the consistent application by NRAs of criteria to evaluate commitments
- Acc. to Art. 80 if certain criteria are met, the NRA may only impose regulatory obligations acc. to Art. 70 and 73 or relative to fair and reasonable pricing on so-called «**wholesale-only**» operators.



- **Substantial provisions** in Art. 76, **procedural provisions** in 79
- **Regulatory forbearance of SMP operators under certain conditions:**
- **Offer** to open new VHCN (optical fibre to premises or base station) for co-investment (e.g. Co-Ownership/LongTerm Risk sharing (purchase agreements))
- **Cumulative conditions:**
 - Co-investment must be open to all co-investors for the whole duration of the network elements;
 - Co-investor is able to efficiently and sustainably compete on the basis of fair, reasonable, non-discriminatory terms
 - Offer must be timely published, i.e. at least six months before the roll-out starts.
 - Non-participant access seekers are offered the same quality, speed etc. as before, but adjustment procedure (confirmed by NRA)
 - Detailed provisions in Annex IV



- In case the NRA considers that the criteria are met:
 - The NRA shall declare the offer binding;
 - **Impose no further regulatory obligations**
 - **In case at least 1 co-investment agreement** is concluded with the SMP-Betreiber
- Supervision and monitoring by NRA (yearly Compliance Statements)
- Dispute Resolution possible
- In exceptional cases the NRA can impose regulatory obligations, in case **significant competition problems occur** and the specific characteristics of the market justify the intervention.
- **Double-Lock-Veto** for making an agreement binding and the imposition of regulatory obligations
- **BEREC-Guidelines** for criteria



- Subject to the procedure are planned
 - Co-operation agreements
 - Co-Investment agreements
 - Access agreements
 - The plans must be **sufficiently detailed** (time, remit, duration etc.)
 - **Market test**, i.e. a public consultation of participating and interested parties, which opens the possibility for proposals to change clauses etc. by potential co-investors as well as access seekers.
 - NRA informs the SMP operator of its preliminary **conclusions** (which may include conditions for making the offer binding).
 - SMP can **improve** the offer.
 - NRA then takes a decision to make the offer fully or partially binding, in exceptional cases for a fixed duration, which is a minimum of **7 years** for co-investment.
 - In case of non-compliance the NRA can sanction the SMP operator and investigate whether regulatory obligations are required.
- The procedure is very complex!



Article 76 EECC: Regulatory treatment of new VHCN

- VHCN in Art 76: optical fibre elements up to the end-user premises or base station
- SMP can make a co-investment offer to deploy new VHCN

Paragraph 1: Conditions for NRAs to assess the commitments offered by the SMP in order to not impose any additional obligations pursuant to Article 68 as regards the elements of the new VHCN

Annex IV EECC: Minimum criteria that the commitments should meet

Article 79 EECC: Procedure to assess the commitments

Article 76(4) BEREC, after consulting stakeholders and in close cooperation with the Commission, shall publish guidelines to foster the consistent application by national regulatory authorities of the conditions set out in paragraph 1, and the criteria set out in Annex IV.



KEY POINTS ADDRESSED IN THE GUIDELINES

- ❑ What is a new VHCN, timing for making an offer, type of investments and co-investments models qualifying for Article 76
- ❑ How to assess the openness of offers under the different models (joint-venture, reciprocal access, one way access, mixed models) and lifetime of the network
- ❑ How to assess the fair, reasonable and non discriminatory terms under each model
- ❑ Flexibility on the participation of co-investors
- ❑ Possibility to increase participation and reciprocal rights
- ❑ Information to be published in advance by SMP operator proposing co-investments



NEXT STEPS

- Open to public consultation. All stakeholders are invited to submit their inputs on the draft Guidelines.

- Extended deadline: 4 September 2020

- Internal discussion among drafters on feedback received

- To be approved at P4 (December, Latvia)

- A summary of all contributions received will be published on BEREC website, taking into account requests for confidentiality

=> The Guidelines will enter in force in December 2020



- Art. 77 – Functional separation obligation
- Art. 78 – Voluntary separation
- Art. 80 – Wholesale-only undertakings: if certain conditions are met, NRAs may only impose obligations acc. to Art. 70 + 73 or relative to **fair and reasonable** pricing.
- Art. 81 – **Migration** from legacy infrastructure, obligation of a transparent decommissioning or replacement process; availability of comparable access products to safeguard competition
- Art. 82 – BEREC **Guidelines on VHCHN** published in Oct. 2020 (BoR (20) 165) + recently updated (BoR (23) 164)
- Art. 83 – **Retail** regulatory controls (only in case wholesale obligations do not work)



- The Commission will set a cap for MTRs and FTRs (“Euro rates”) via a delegated act (DA) until 31st Dec. 2020.
- The cap shall not be higher than the highest price existing in the EU six months before the adoption of the DA.
- BEREC must be consulted before the adoption of the DA, BEREC submitted its Opinion on the draft DA on 16 Oct. 2019.
- Different to the original EECC proposal, no absolute value will be set, cost model was developed by Axon for t. Com.
- However, setting an EU price cap takes away the flexibility of NRAs, incompatible with Art. 68
- Intra-EU-calls: Price cap for end users: 0.19 €/min for calls and 0.06 €/SMS as of 15th May 2019 (identical to the Roaming-Retail-Cap)
- BEREC Guidelines for intra-EU-calls publ. March 2019, updated in October 2020 (BoR (20) 155)



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- II. Main Topics
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 - Role of NRAs (Art. 5)
 - Objectives (Art. 3) and market regulation (principles)
 - Art. 61 – symmetric regulation
 - Art. 63, 64, 67 – relevant market definition, analysis, SMP fi.
 - Art. 68, 69 – 74, 76 – 81 (SMP remedies)
 - Art. 74 – price control and cost accounting obligation
 - Art. 76 – co-investment (and Art. 79)
 - Art. 77, 78, 80, 81 – functional/voluntary separation, wholesale-only, migration from legacy infrastructure
 - Art. 75 – EU-wide termination rates (“Eurorates”)
 - **BEREC and BEREC Tasks – Guidelines**
- III. Conclusions



- 2-tier structure preserved:
 - no Agency,
 - no decision-making power, hence:
 - no EU legal personality to BEREC,
 - no establishment of a Board of Appeal
- No binding decision-making tasks entrusted to BEREC, in line with its advisory nature
- Besides NRAs so called „competent authorities“ (Art. 5) are mentioned, which could complicate procedures
- BEREC has a number of new responsibilities, in particular the development of Guidelines
- Guidelines shall clarify definitions and ensure a consistent regulatory approach, i.e. NRAs need to take utmost account of Guidelines



Guidelines

- **Guidelines** on a template for **General Authorisation** notifications and **establishment of an EU database** of notifications [Code: Article 12]
- **Guidelines on geographical surveys** [Code: Art 22.7]
- **Guidelines on the identification of the point beyond the first concentration point** at which interconnection would be commercially viable for access seekers and on the **location of the network termination point** in different network topologies and other aspects of Article 61 (Art. 61.3 and 61.7)
- **Guidelines on minimum criteria for a reference offer**, to contribute to consistent application of transparency obligations [Code: Art 69]
- **Guidelines** on the application of criteria related to co-investment offers and voluntary access agreements (possibly starting with a report on the features and market impact of existing voluntary access agreements and co-investment agreements) [Code: Art 76]
- **Guidelines** on very high capacity networks [Code: Art 82]
- **Guidelines** on common criteria for the assessment of the ability of undertakings other than providers of ECS or ECN to manage numbering resources and the risk of exhaustion of numbering resources in [Code: Article 93]
- **Guidelines on assessing sustainability of intra-EU call charges** for specific operators [BEREC Regulation Art 50 amending Regulation 2015/2120]
- **Guidelines** on quality of service parameters and measurement methods for internet access services and interpersonal communications services [Code: Article 104.2]
- **Guidelines on assessment of effectiveness of public warnings** [Art 110.2]
- Guidelines on identification of transnational demand (Art. 66.2)



Opinions

- **Opinion on maximum fixed and mobile termination rates** [Art 75.2]
- **Opinion** on contract summary template as input to the Commission's implementing act [Code: Art 102.3]
- **Opinion on various matters related to emergency calling** [Art 109]

Databases

- **Database on numbers with extraterritorial rights of use** [Art 93]
- **Database of E.164 numbers of European emergency services** [Art 109.8]

Reports

- **Best practice report on defining adequate broadband internet access service in the context of universal service obligations** [Art 84.3]
- BEREC started the work on Guidelines etc. fully with WP 2019
- All BEREC documents are published on www.berec.europa.eu



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 - Art. 75 – termination rates
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- The revised framework takes account of market developments such as **OTT-1 services** by including these services into the definition of ECS and subjecting them to a number (not all) of obligations: enlarged scope allows NRAs to cover all electronic communications services and create a level playing field
- New objective „*connectivity*“ is included putting emphasis on the roll-out of very high capacity networks (VHCN)
- **Market regulation:** besides the SMP regime the toolbox is enlarged with „symmetric regulation“ and new instruments such as co-investment schemes, again emphasis is put on investment in VHCN, acc. to Art. 82 BEREC to draft Guidelines on VHCN
- NRAs have an enlarged toolbox, but very complicated procedures and limitations by the double lock veto in 2 cases
- NRAs competencies are broadened, but competent authorities
- BEREC remains a 2-tier-body and gets new tasks, in particular issuing Guidelines to ensure a consistent application of the EECC
- Regulatory processes get more complicated reflecting the more complex landscape with different market players



- Formal adoption by the Council on 4th Dec. 2018
- Formal adoption by the EP-Plenary 14th Nov. 2018
- Publication in the OJ on 17th Dec. 2018:
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018L1972>
- 2018/1972/EU European Electronic Communications Code
- 2018/1971/EU BEREC Regulation
- Following this the 24-months transposition period started, the Code has to be transposed until 21st Dec. 2020, i.e. the new framework transposed into national law is to be applied as of 2021
- New Rec. on relevant markets susceptible to ex-ante regulation published on 21 Dec. 2020
- Delegated Act on EU-wide Termination rates (2020)
- Gigabit Recommendation – pending (exp. Oct. 2023)



Questions?
Thank you for your attention!



A N N E X



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 - Governance of NRAs (Art. 6-8) and (Art. 9-11)
 - Right of Appeal (Art. 31)
 - Request of information (Art. 20)
 - Consumer protection and Universal Service (Art. 84-92)
 - End user rights provisions (Art. 98–123)
 - **General authorisation (Art. 12-19)**
 - Spectrum provisions
 - Market regulation (overview)
 - BEREC and BEREC Tasks – Guidelines
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- General stipulation on GA – art. 12(1) EECC:

Member States shall ensure the **freedom to provide electronic communications networks and services**, subject to the conditions set out in this Directive. To this end, **Member States shall not prevent an undertaking from providing** electronic communications networks or services, except where this is necessary for the reasons set out in Article 52(1) TFEU.

1. Any notification that a MS might consider appropriate to envisage for undertakings falling within GA regime, shall be submitted to the NRA or other competent authority;
2. Notification to have specific features;
3. BEREC to publish Guidelines on notification template and keep a database of notifications transmitted to the competent authorities.



- Content of the notification – art. 12(4) EECC:

The notification shall not entail more than a declaration by a natural or legal person to the national regulatory or other competent authority of the intention to start the provision of electronic communications networks or services and **the submission of the minimal information** which is required to allow BEREC and that authority to keep a register or list of providers of electronic communications networks and services.

BEREC shall publish guidelines for the notification template **and maintain a Union database** of the notifications transmitted to the competent authorities.



■ Content of the notification – art. 12(4) EECC:

That information shall be limited to:

- (a) the **name** of the provider;
- (b) the provider's **legal status**, form and registration number, where the provider is registered in a trade or other similar public register in the Union;
- (c) the **geographical address** of the provider's main establishment in the Union, if any, and, where applicable, any secondary branch in a Member State;
- (d) the **provider's website address**, where applicable, associated with the provision of electronic communications networks or services;
- (e) a **contact person** and contact details;
- (f) a **short description** of the networks or services intended to be provided;
- (g) the **Member States concerned**; and
- (h) an estimated **date for starting** the activity.



- The BEREC GL were published in Dec. 2019 (BoR (19) 259)
- The **notification template** is comprised of 4 tables:
- **Table 1** – Purpose of the notification:
 - *[Commencement of new activity of provision of networks and/or services, changes to the networks/services already notified, change to provider identification data, change to the commencement date..]*
- **Table 2** – Identification data:
 - *[Name of the provider, geographical address of the provider, provider's website address..]*
- **Table 3** – Contact person and contact details:
 - *[Full name of the Contact Person, Telephone No, Email Address..]*
- **Table 4** – Short description of the network(s) or service(s):
 - *[Fixed IAS, Mobile IAS, Fixed NB-ICS, Mobile NB-ICS..]*
- BEREC is now working on the **GA data base**



- **ICS** covering traditional “number-based” services (NB-ICS) + online “number-independent” services (NI-ICS) – relative widening of scope:

- Art. 12(2) EECC:

The provision of electronic communications networks or **services, other than number-independent interpersonal communications services, may**, without prejudice to the specific obligations referred to in Art. 13(2) or rights of use referred to in Articles 46 and 94, **be subject only to a general authorisation.**

- Notification requirement – art. 12(3) EECC:

Where a **Member State considers that a notification requirement is justified** for undertakings subject to a general authorisation, that Member State may require such undertakings **only to submit a notification** to the national regulatory or other competent authority. The **Member State shall not require such undertakings to obtain an explicit decision or any other administrative act (...)**

Upon notification, when required, an undertaking may start the activity (...)

On GA regime, **NI-ICS excluded from GA regime**



NRAs' wider info collection capacity: **Art. 20** applies to **all ECS (including NI-ICS)**, as well as to undertakings in adjacent sectors but:

- No info collection powers as in art. 21 (linked to GA)
- Heterogeneous application of end user protection provisions to NIICS.
- Information requests to undertakings – **art. 20 EECC**:

General rule:

Member States shall ensure that **undertakings** providing electronic communications networks and services, associated facilities, or associated services, **provide all the information, including financial information, necessary for national regulatory authorities, other competent authorities and BEREC** to ensure conformity with the provisions of, or decisions or opinions adopted in accordance with the EECC and the BEREC Regulation.

Information gathering from OTTs:

Where the information collected in accordance with the first subparagraph **is insufficient** for national regulatory authorities, other competent authorities and BEREC to carry out their regulatory tasks under Union law, **such information may be inquired from other relevant undertakings active in the electronic communications or closely related sectors.**



Light touch regulation on end user-related obligations:

- NI-ICS excluded from GA regime, but subject to data collection powers
- New digital players are explicitly exempted from most end user rights regulation
- Several provisions of the EECC will also apply to those players on the basis of their own individual business models (e.g., nature of contracts; QoS; billing), as well as on specific needs.

Possible future obligation for interoperability - art. 61(1)

EECC

- To ensure interoperability of ICS where end-to-end connectivity between end-users is endangered.
- However, any action by Member States can only be based on Commission decision outlining what measures can be taken.
- It would only apply to major providers with a “critical mass” in terms of geographic coverage and users.



- **Legal basis**
- Section 6 of the Telecommunications Act (TKG) provides the legal basis for the notification requirement:
- "Any person operating a public telecommunications network on a commercial basis or providing a publicly available telecommunications service on a profit-oriented basis shall notify the Bundesnetzagentur without undue delay of beginning to provide, of providing with differences or of ceasing to provide his activity and of any changes in his undertaking. Such notification requires written form."



- Registration is obligatory, but does not constitute by itself rights and obligations which stem from the law.
- The registration has only informational purpose
- BNetzA publishes a list of all telecommunications networks and service providers
- The application template is available on-line:
<https://www.bundesnetzagentur.de/EN/Areas/Telecommunications/Companies/Notification/NotificationRequirement-node.html>
- The registration has to be done in German as the official language



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 - **Enforcement powers and provisions**
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- With one exception – in the area of general competition law acc. to Art. 101/102 and (partly) Art. 108 TFEU, the European Commission has no enforcement powers
- As enforcement is an EU member state responsibility, the directives and regulations can only foresee that member states ensure that NRAs have the necessary powers (enforcement/sanctioning), but EU legislation cannot prescribe details (so far only one exception exists in financial market regulation), but avoid „forum shopping“ of market players by too divergent sanctioning powers
- As NRAs intervene „ex ante“, the logic of enforcement is different to areas of „ex post“ intervention as e.g. the case in general competition law where a fine for a breach of competition law rules by a dominant op. follows afterwards
- In ex ante regulation the idea is to impose sector specific obligations on an SMP operator to prevent the abuse of its market power a. incentivise a change of behavior



- Thus the regulatory obligation replaces the (missing) competitive pressure to promote competition and set the market *forces* on the right track
- It should therefore be imposed in such a way that the SMP operator has an **interest in complying** (e.g. because he can keep the profit of an incentive regulation)
- Thus the obligations should be imposed in an **incentive compatible way**, not as a „repressive“ instrument in order to ensure the objective of promoting a competitive market is reached in which case the market (competitors and consumers/users) will „enforce“ the compliance, e.g. becoming more efficient (competitors) and better offers (value for money) for consumers/users as they would switch otherwise, so a well-functioning competitive market is the best „enforcement“ measure
- Of course NRAs must have the power to **monitor**, i.e. request information (data collection power)



- NRAs must also be given the powers to **sanction** misbehavior (non compliance) as otherwise they cannot „threaten“ the operator **credibly and effectively**
- NRAs have to make use of their enforcement powers **consequently**, i.e. not hesitating in case of non-compliance
- The sanctions/fines to be imposed should have a **deterrent effect**, e.g. skimming of an extra profit from a misbehavior or sufficiently high, including a damage of reputation of the operator (e.g. by a „name & shame“ exercise of a non-compliant operator)
- In some cases non-financial sanctions are more effective (see above „name & shame“), e.g. in case the SMP operator does not provide the cost accounting information needed to set the price of an access product the NRA can use alternative ways of calculation (e.g. cost modelling where the outcome might be less welcome by the SMP operator)



- Art. 16 – Administrative charges
 - Allows to include also the cost of enforcement in administrative charges
- Art. 30 – Compliance with the conditions of GA, rights of use for radio spectrum and for numbering resources and compliance with specific obligations (plus Recitals 122, 246, 248)
 - Provides that MS shall empower the competent authorities to impose dissuasive financial penalties and to order the termination of the offer
- Art. 41 – Implementation and enforcement of Art. 40 – Security of networks and services
- Art. 49 – Duration of rights
- Art. 93 – Numbering resources
- Recital 281: provides that MS should ensure smooth switching processes for users to facilitate switching



- BNetzA published on 9th July 2020 a press release stating that Telefonica did so far not comply with coverage obligation for spectrum assigned in 2015 and threatened to impose a fine of 600,000 €.
- A deadline was set to comply (or explain) why Telefónica is in non-compliance. After assessment by BNetzA, BNetzA confirmed on 10th Aug. that Telefónica had complied by operating 3,040 LTE stations
- In a case against Deutsche Telekom related to a zero-rated offer sanctions were imposed for non-compliance with the Net Neutrality a. Roaming Reg. 2015/2120: it implied terminating the offer and if not imposed fines. A similar proceeding was opened against Vodafone.
- Both went to court, but so far the court confirmed BNetzA's decision, but also transferred the case to the ECJ with certain questions regarding the interpretation of the Net Neutrality Reg. 2015/2120
- Update: in a landmark decision in 2 HU cases, the ECJ ruled on 15/09/2020 that indeed zero-rating impedes end user rights acc. to Art. 3.2 Reg. 2015/2120, i.e. decided in favour of the Hungarian NRA (NMHH) forbidding such behavior (Cases: C-807/18 C-39/19)
- Case against Google for not complying with the obligation to register with BNetzA (see next slides)



- In 2011 BNetzA requested Google to register as acc. to our analysis Google provides a telecommunications service: Gmail
- 2 features:
 - conveyance of signals: Google has contracts with the operator of telecommunications networks and is as such „responsible“
 - Even though the service is for free, the user is paying with its data, i.e. the service is provided for remuneration
- Google rejected this interpretation and did not register
- In 2014 BNetzA sent a formal letter to Google repeating the request to register which Google did not do and appealed our decision
- In 2015 the Administrative Court in Cologne decided in our favour, so Google appealed the decision of the Court at the Higher Administrative Court in Muenster



- The Higher Administrative Court suspended the case after the oral hearing on 26 February 2018 by asking the following questions to the ECJ:
 - Does the criterion „conveyance of signal“ include services such as e-mails (incl. which technical elements must be provided by the provider)?
 - In case the provider also has a communications network, how should this be taken into account?
 - What does „service for remuneration“ mean?
- Meanwhile the EECC entered into force changing the legal basis.
- The ECJ has informed the Higher Administrative Court that the oral hearing takes place on 9th June 2019.
- Finally, the ECJ rejected the BNetzA case (C-193/2018 on 13/06/2019), so Google did not have to register with BNetzA)



■ Agreement in trilogue on 1st March 2018

■ Minimum licence duration (Art. 49)

- Member States will be obliged to license spectrum use for at least 15 years
- The initial licence can be prolonged to 20 years
- Criteria for prolongation include efficient spectrum use and technological evolution

■ Peer review (Art. 35)

- **Voluntary** peer review process for national spectrum assignments, led by the RSPG (EP and the Commission wanted an obligatory procedure headed by BEREC)
- Member States can request a meeting of the *Peer Review Forum* organised by RSPG
- No specific automatic triggers that would set the process in motion



■ **5G Spectrum**

- 31 December 2020: deadline for Member States to allow the use of spectrum in the 3.4-3.8 GHz and 24.25-27.5 GHz (26 GHz band) for 5G
- Possibility to delay for up to 2.5 years
- The originally foreseen large number of Implementing Acts was deleted.

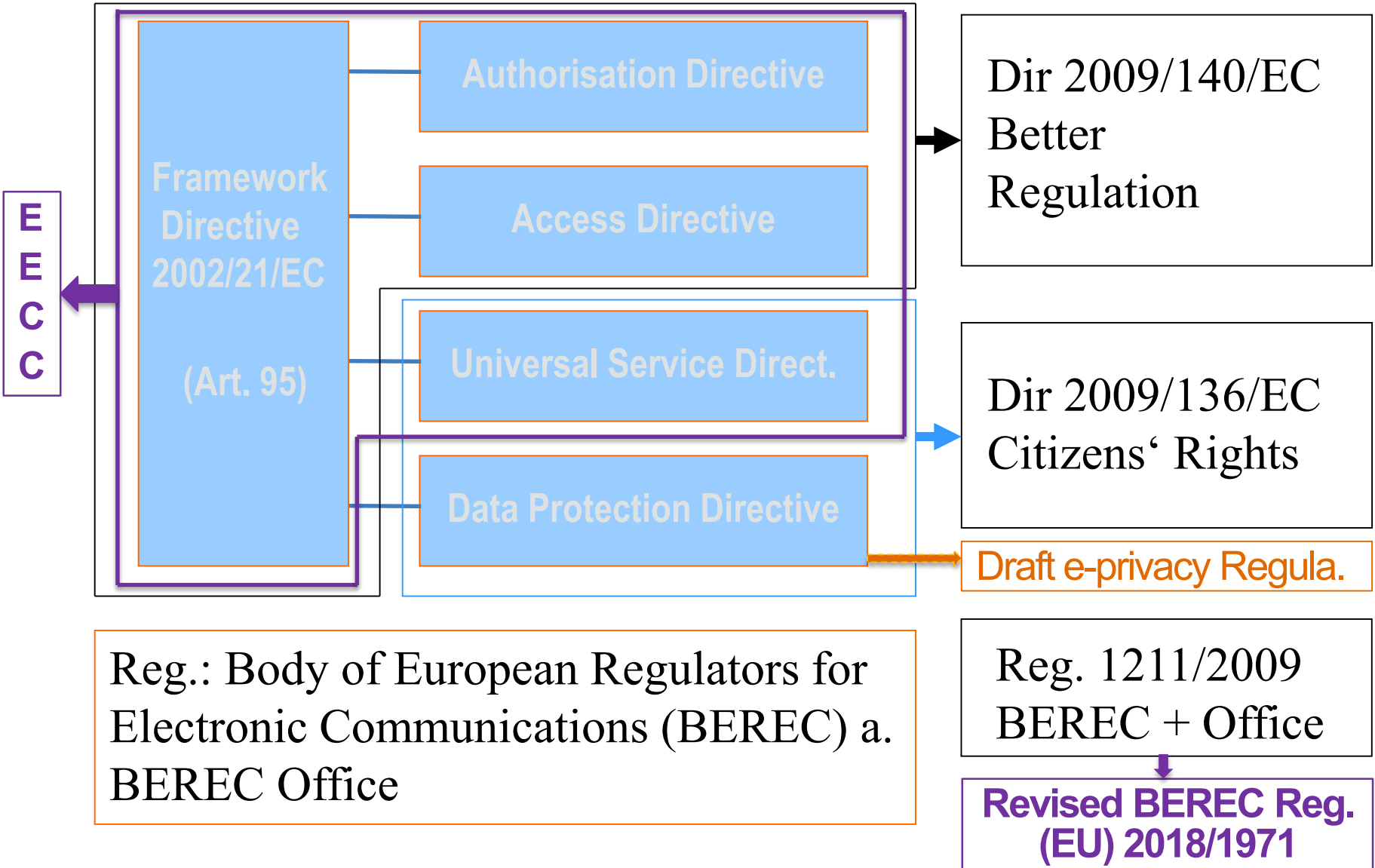


■ The **Connectivity package** was published on 14 Sept. 2016 and comprises the following legal acts:

- Electronic Communications **Code** = Recast Directive consolidating the existing Framework Directive and three special Directives of the 2002/2009 Framework, and containing a number of changes
- **BEREC Regulation** suggesting to transform BEREC into an EU Agency
- Initiative "*WiFi4EU*" (Draft Regulation), EU provides 120 Mio € for WiFi-Hotspots for 6000 - 8000 local communities (upon application)
- Action plan 5G (Communication)
- **Major changes:**
 - The main change is that an additional objective – **connectivity** – and a more "investment friendly" market regulation was included shifting the focus more towards investment in Very High Capacity Networks (VHCN)
 - Also the scope of the framework was extended to also include the so-called „**OTT-1 services**“, i.e. services provided over the top competing with traditional communications services
 - There were also a number of proposals with regard to **spectrum** to achieve a more efficient use of spectrum
 - New provisions with reg. to **consumer protection + Universal Serv.**



Connectivity Package 2018



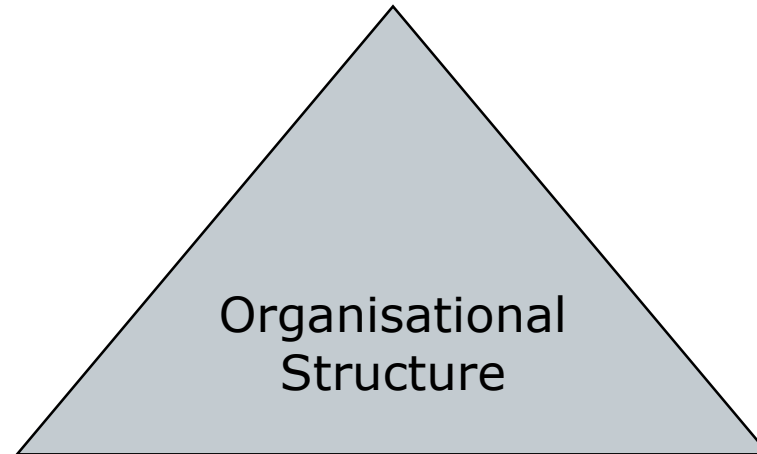


Delegation of power to a professional **independent** body



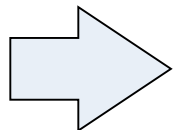
Institutional design

Accountability
→ External control

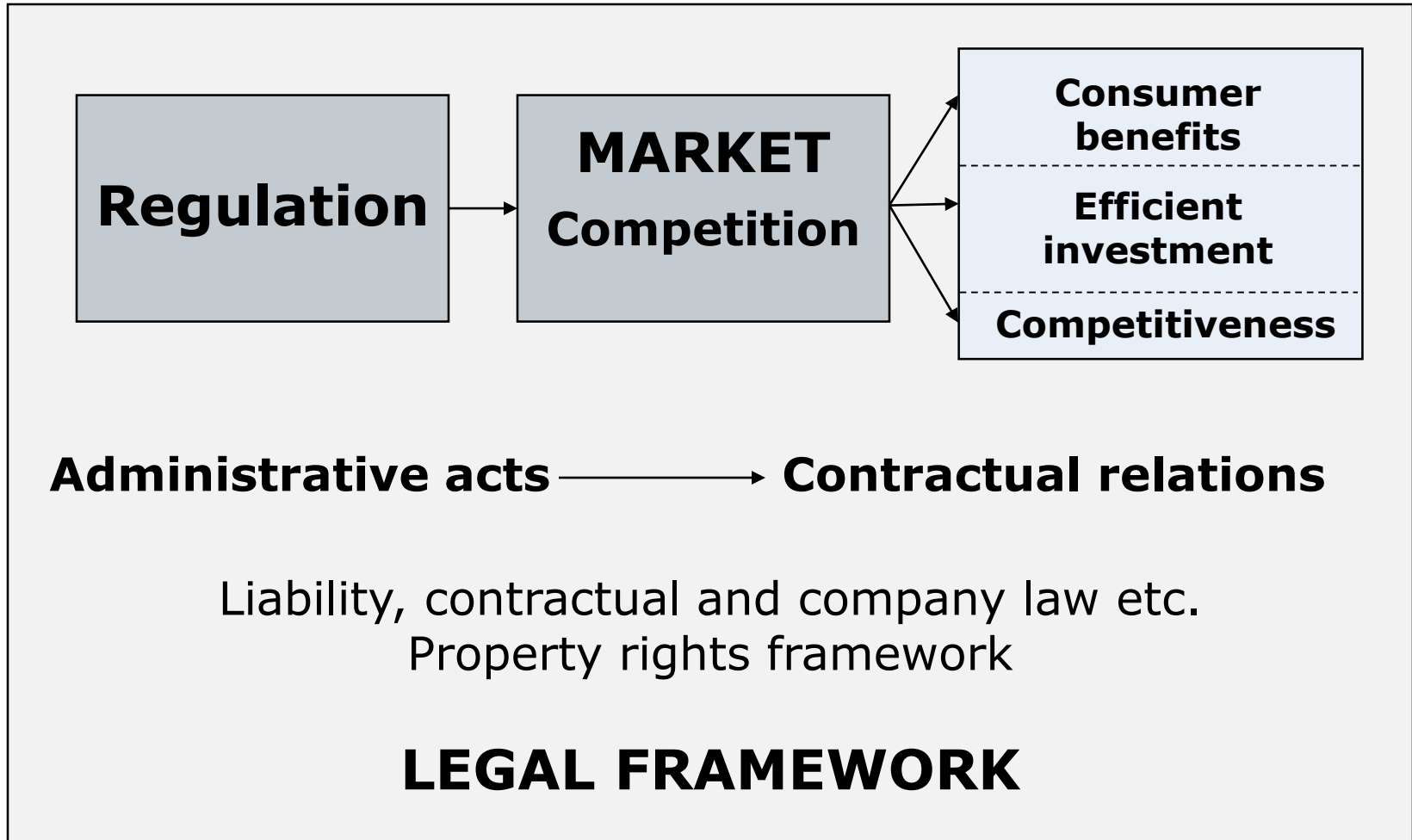


Judicial review
→ Judicial control

Governance rules
→ Internal control



Ensure that powers are used in line with the law and **regulation** is implemented **effectively**



➔ **Pro-competitive** regulation setting incentives to behave according to economic rationality is in conformity with market mechanisms



- Alternative operators often depend on wholesale services of operators with significant market power (SMP). By setting either wholesale or retail prices (or both), the SMP-operator which are in principle vertically integrated firms, can define the space (**margin**) between the wholesale and the retail price level. By setting the margin too small, the SMP operator could potentially squeeze other operators out of the market. A margin squeeze test is a means to identify such a situation. Thus a margin squeeze test defines a minimum distance between a retail price and a wholesale price (or between two wholesale prices at different stages of the value chain respectively).

Two basic settings (situations) can be identified:

- The retail price is linked to a given (i.e. cost oriented) wholesale price: Here the margin squeeze test ensures that the retail price does not fall below a certain (anti-competitive) level.
- The wholesale price is linked to a given (i.e. competitive) retail price: The margin squeeze test guarantees that the wholesale price does not exceed a level that does not allow replicability or that other operators are discriminated by being charged other prices than the SMP operator charges internally.

The ex-ante economic replicability test (**ERT**) assesses whether the SMP operator's retail price (RP_{smp}) of the 'flagship product(s)' or the products considered relevant by the NRA covers the regulated wholesale costs (WC_{reg}), non-regulated input costs (incl. own network costs; $WC_{non-reg}$) and retail costs (LRIC+; RC).

Formula:

$$RP_{smp} \geq WC_{reg} + WC_{non-reg} + RC.$$



Two tests can be distinguished: EEO vs. REO

- The first test (**Equally Efficient Operator test, EEO**) involves assessing whether the SMP firm's downstream operations could trade profitably if it had to pay an upstream price that was equivalent to that charged to rival competitors.
- The second test (**Reasonably Efficient Operator test, REO**) involves examining whether the difference between the vertically integrated firm's retail and input prices is sufficient for a "reasonably efficient" downstream competitor to make a "normal" profit.
- ⇒ In **competition law** the **EEO** approach is applied (ex-post), and the SMP operator must be able to conclusively assess the abusiveness of its behaviour (see cases on next slide).
- ⇒ In **ex-ante regulation**, however, the MS test is intended to take effect before any distortion of competition can occur and is an instrument to promote competition, thus the **REO** approach is preferred.



- ECJ ruling C-280/08 of 14 October 2010 confirmed the Commission's MS decision against DTAG applying a margin squeeze in fixed telephony markets, the ECJ confirmed the **EEO** test used by the Cion in its 2003 decision, the ECJ also confirmed that Art. 102 (ex Art. 82) is applicable in regulated sectors if the operator is dominant and has a room for action
- Along the same line the ECJ ruling C-52/09 of 17 February 2011 (TeliaSonera)
- Court of 1st Instance confirmed fine of Telefónica for the application of a MS in the Spanish broadband market in its rulings T-336/07 and T-398/07 (March 2012); confirmed finally by ECJ ruling C-295/12 P of 10 July 2014
- Court of 1st Instance confirmed fine for Slovak Telekom/DT in its rulings T-851/14 and T-827/14 of 13 Dec. 2018 in a refusal to provide LLU/margin squeeze case (Commission deci. of 2014), but reduced the fine. Both Slovak Telekom and DT appealed the decision before the ECJ; on 9th Sept. 2020 the AG gave its opinion confirming the Commission's decisions; on 25th March 2021 the ECJ dismissed the appeals in their entirety upholding the rulings of the Court of 1st Instance (Case No. C-152/19 P and C-165/19 P).



- Section 1 (Non-discrimination):
 - Art. 70 EECC now also foresees explicitly EoI, thus BEREC thinks the relevant provisions in an access rec. can be shorter than in the NDCM Rec.
 - BEREC agrees that EoI is also preferable for access to civil engineering structure (as stated in Annex II of the NGA Rec).
 - BEREC highlights the importance of KPIs/SLA/SLGs for monitoring of compliance and refers to the BEREC GL on minimum criteria for a RO

- Section 2 (ERT):
 - ERT now included in Art. 74, thus only Annex II of the NDCM Rec. would need to be transferred to a new access recommendation
 - BEREC suggests to not rank EEO and Scale-adjusted EEO/REO, but deal with them on an equal level

- Section 3 (Conditions on the appropriateness of price control obl.):
 - In principle price flexibility can set incentives for investment, but it is not the only factor in investment decisions
 - The conditions for allowing price flexibility as set out in the NDCM Rec. are comprehensive and can be transferred to a new access recommendation.



- Section 4 (Pro-investment and pro-competition approaches to price control obligations):
 - BEREC agrees that the principle of predictability is crucial for long term investment decisions
 - BEREC considers that the guidance related to risk assessment/reward provided in Annex I, pt. 3 and 6 of the NGA Rec. is still relevant and can be transferred to a new access recommendation allowing setting a risk premium where justified and quantifiable
 - With regard to the principle of „fair + reasonable“ (known from the BCRD) BEREC thinks that it is a broad concept and not linked to a specific price mechanism, it also depends on the context; for consistency with with SMP price control obligations it is important to leave flexibility to NRAs to define it appropriately
 - BEREC does not see a room to apply a „fair-bet“ principle given that the CAPM values all risks from the perspective of an efficient investor

- Section 5 (Cost methodology):
 - BEREC thinks that the costing principles (BU LRIC+ cost modelling of a modern efficient network at current costs) of the NDCM Rec. are still relevant and can be transferred to a new access recommendation
 - The principles should be applied irrespective of the technologies used which is in line with the principle of technological neutrality



- Section 6 (Reg. of civil engineering infrastructure):
 - BEREC sees SMP regulation of civil engineering structure as an important instrument, which however needs to be adapted to the characteristics of the existing civil engineering infrastructure varying considerably across countries
 - BEREC considers that there are no new issues related to access to civil engineering infrastructure for the deployment of new and enhanced networks, in particular VHCHN
 - BEREC thinks that indeed the principles for access to civil engineering infrastructure as set out in Annex II of the NGA Rec. are still relevant and can be transferred to a new access recommendation
 - Where new civil engineering infrastructure is rolled out NRAs should have the flexibility of Art. 74 regarding pricing obligations
 - In BEREC's view an Art. 72 stand alone obligation can be sufficient when certain conditions are met, but Art. 73 obligations might also be necessary

- Section 7 (Commercial agreements, cooperative arrangements etc.):
 - Commercial agreements etc. should in principle trigger a new market analysis if they have a relevant impact on the market
 - A review of remedies without a market analysis is only conceivable when the agreement is of a temporary nature



- Section 8 (Migration):
 - BEREC members have gained a lot of experiences related to managing migration processes so that the trade off between a fast migration and the necessity to allow also access seekers to migrate on the wholesale level as well as customers on the retail level can be overcome
 - BEREC refers to several of its CPs, Reports as well as to the GL on the minimum criteria for a RO as guidance which a new access recommendation can reference
 - BEREC shows that involvement of all operators improves the smoothness of the process, but ultimately the threat of hard deadlines and penalties may be needed to push towards a shutdown.

- Section 9 (Geographic differentiation of remedies):
 - BEREC acknowledges that the Code sees geographic differentiation of remedies as a more important means given that the market review cycle is now 5 years, but considers that the possibility should be handled with care given the practical implementation issues as well as the principle still holds that regulatory obligations are imposed after a market analysis and SMP finding
 - To ensure the link between the market analysis and the remedies BEREC suggests that the indicators that trigger an adjustment of remedies are already laid down in the market analysis decision
 - BEREC also recalls that it is up to NRAs to assess the need for such a review bearing in mind the principle of proportionality
 - BEREC thinks that it is very difficult to draw the line between the necessity of a new market analysis and an adjustment of remedies given that the criteria are the same (acc. to the explanatory memo of the draft new rec. on relevant markets)