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Investments for Very High Capacity Networks – The new EECC provisions to facilitate VHCNs investment

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Very High Capacity and 5G Networks:
from the EU code to the EU market

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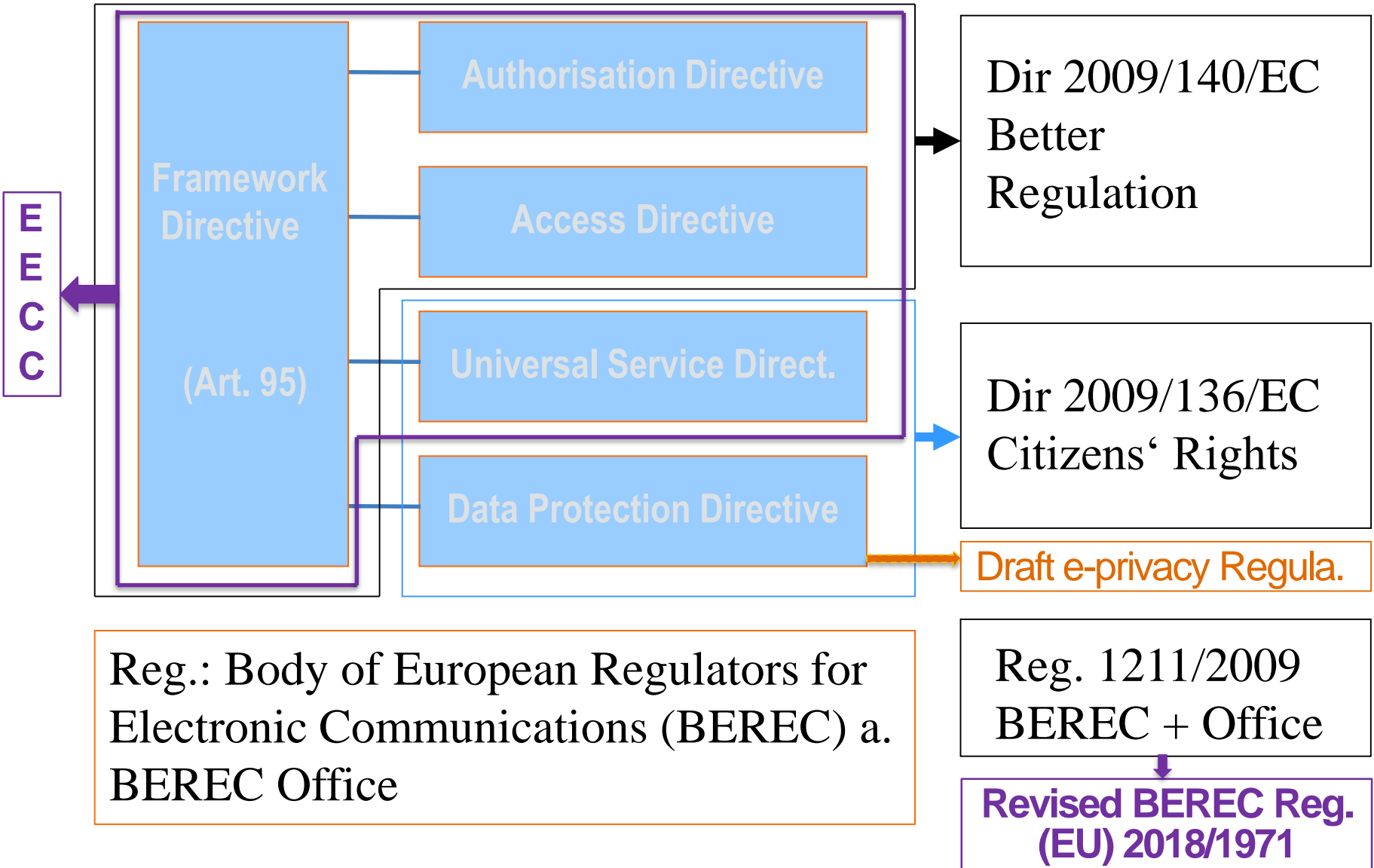
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- I. Connectivity Package 2018
- II. Main Topics
 - Objectives (Art. 3) and market regulation (remedies)
 - Art. 61 – symmetric regulation
 - Art. 63, 64, 67 – market definition and analysis
 - Art. 68, 69 – 74, 76 – 81 – SMP remedies
 - Art. 74 –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



Connectivity Package 2018





- 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 infrastruct.⁴



- Enlarged toolbox: SMP regulation including new instruments to promote investment in VHCN, and symmetric regulation
- **SMP-Regulation** (Art. 63 ff.) stays in principle, **but** for certain constellation 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)



NRAs' role preserved in assessing most appropriate regulatory treatment:

- NRAs to be able to impose on ECN and not ECN providers, upon reasonable request, symmetric remedies up to the first concentration point as determined by the NRA itself;
- Where the NRA concludes that such symmetric remedies do not address high and non-transitory economic and physical barriers to replication, the NRA can extend such access remedies beyond the first concentration point to a point that the NRA determines to be the closest to the end user
- NRAs not to impose symmetric remedies beyond the first concentration point when they determine that:
 - a) The provider is active at a wholesale-only level and makes available a viable and similar alternative means of access to end-users to any undertaking on fair, non-discriminatory and reasonable terms and conditions to a very high capacity network. NRAs empowered to extend exemption to other providers offering, on fair, non-discriminatory and reasonable terms and conditions, access to a very high capacity network; NRAs able though impose obligations on such ECN providers where the network is publicly funded
 - b) Obligations would hinder economic/financial viability of new network deployment, particularly by smaller local projects
- BEREC role in defining Guidelines for a consistent application of art. 61.3



- The 3 criteria test is now included in the EECC which gives it more weight
- 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. 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;
 - Regulation imposed on other relevant markets on the basis of Art. 60, 61, 67



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	Art. 12 AD	Art. 72-73 EECC
Price control + CA	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		Art. 76, Art. 79
Wholesale-only undertaki.		Art. 80 EECC
Migration f. legacy infrastr.		Art. 81 EECC
Symmetric regulation		Art. 61.3 EECC



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 and 76.3 (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 (symmetric regulation), on the other side the flexibility of NRAs is limited by the double lock veto



- 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 (EoI)
- Art. 71 – Accounting separation



- According to Article 69(4) of the EECC, Guidelines should be issued by BEREC by 21 December 2019
- The **minimum criteria** for a reference offer should cover wholesale services regulated by NRAs, according to the EECC and the EC Recommendation on ex ante relevant markets. BEREC took account of the **Common Positions** on wholesale broadband access products
- Proposed minimum criteria set covers the following **core elements**:
 - Terms and conditions for the provision of network access
 - Details of operational processes
 - Service supply and quality conditions
 - General terms and conditions of the agreement
- NRAs are free to add other criteria, but only the core elements as listed above are obligatory.
- The consultation runs from 19 June – 19 July and stakeholders are asked to provide feedback on the general approach as well as on the suggested elements
- https://berec.europa.eu/eng/news_consultations/ongoing_public_consultations/5605-public-consultation-on-the-draft-berec-guidelines-on-the-minimum-criteria-for-a-reference-offer



- 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. 71 can also be imposed after an assessment of the effect of an obligation of Art. 70.
- 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 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 Commission will set a cap for MTRs and FTRs via a delegated act until 31st December 2020.
- The cap shall not be higher than the highest price existing in the EU six months before the adoption of the delegated act.
- BEREC must be consulted before the adoption of the delegated act.
- Different to the original EECC proposal, no absolute value will be set.
- 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 May 2019 (identical to the Roaming-Retail-Cap)
- BEREC Guidelines for intra-EU-calls publ. March 2019



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
- Also, if certain criteria are met, the NRA may only impose regulatory obligations acc. to Art. 68 – 71 or relative to fair and reasonable pricing on so-called «wholesale-only» operators (acc. to Art. 80).



- **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!



- Art. 75 – Functional separation obligation
- Art. 76 – 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 for VHCCN



- 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



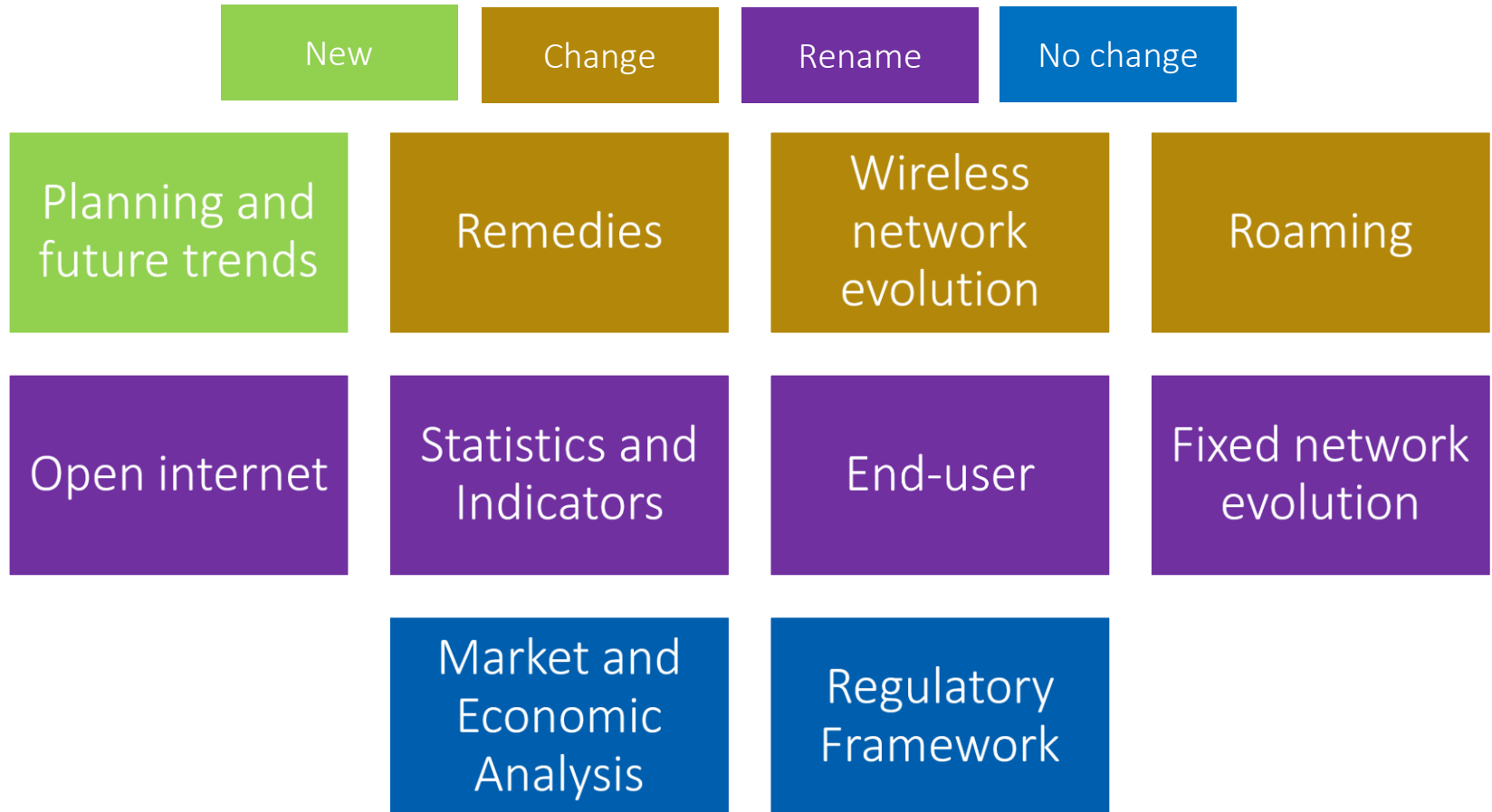
- 2-tier structure preserved:
 - no Agency,
 - no decision-making power, hence:
 - no EU legal personality to BEREC,
 - no establishment of a Board of Appeal
- No binding decision-making tasks entrusted to BEREC, in line with its advisory nature
- Besides NRAs so called „competent authorities“ (Art. 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 approach 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)

BEREC EWG Structure 2019





- Work on Guidelines starts fully 2019, but first work done in 2018
- First a so-called „*Scoping document*“ will be drafted defining the level of harmonisation aimed at, partly it will be publicly consulted
- Guidelines on intra-EU-calls: Workshop on 29th January, as these Guidelines have to be ready in May 2019 (P1/2019)
- Guidelines on the identification of the NTP: scoping document work already started (FNE EWG); Consultation: P3/2019
- Guidelines on the concentration point (Art. 61.3), Consultation: P2/2020; final approval: P4/2020
- Guidelines on the Reference offer criteria: Work started on 15th Jan., cons. P2/2019, final approval: P4/2019
- Guidelines on VHCN: Consultation Q2/2019, Guidelines Consultation P2/2020, final approval: P4/2020
- Guidelines on Art. 76: Consultation P1/2020, final approval: Guidelines: P4/2020
- Guidelines on GA notific.: Cons. P2/2019, final: P4/2019



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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



- 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
- 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 very high capacity networks
- NRAs have an enlarged toolbox, but very complicated procedures and limitations by the double lock veto in 2 cases
- NRAs competencies are strengthened
- 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



Questions?
Thank you for your attention!



A N N E X



- Definitions in Art. 2 broadened:
New definition of the **Electronic Communications Service**
functional approach and against payment (incl. with data)
 - **Internet Access Service**
 - **Interpersonal Communication Service**
 - Services consisting wholly or mainly
in the **Conveyance Of Signals**
- On GA regime: NIICS excluded from GA regime and no one-stop shop system:
Any notification that a MS might consider appropriate to envisage for undertakings falling within the GA regime, shall be submitted to the NRA or other competent authority
- Functional approach implies the **extension to OTT-1 services** taking account of reality which is positive
- Including the financing via data is generally positive as well, but difficult to handle, however the inclusion now allows to **collect data**



- The consumer protection provisions were reviewed and adjusted with other EU consumer protection legislation.
- OTT-1 services are now also subject to certain consumer protection rules, but not to all.
- Maximum harmonisation approach, but transition period and flexibility for MS where national provisions go beyond the EU legislation.
- Product information and transparency provisions (incl. an independent price comparison tool).
- The universal service is modernised and new provisions with regard to affordability.
- BB-Internet access: MS shall define minimal bandwidth according to what the majority of consumers enjoys in order to ensure participation.
- Both ways of financing (funds and tax-financing) is possible.



- 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)
- The main change is that an additional objective – **connectivity** – and a more “investment friendly” regulation was proposed shifting the focus to investment
- 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



- ✓ After a **1st Trilogue (25 Oct.)** (mostly **exploratory**)
- ✓ **2nd Trilogue (6 Dec.)** and **3rd Trilogue (1st Feb.)** specifically dedicated to end-users' rights exclusive remit of the **IMCO Trilogue (28 Feb.)**
- ✓ **4th Code Trilogue** occurred on **1st March** finalised the agreement on the Spectrum part of the Code.
- ✓ **5th (20 March)** and **6th Trilogue (25 Apr.)** explored the access part not very successfully but agreed on NRAs competences (Art.5)
- ✓ **7th Code Trilogue** occurred on **22 May** reached important breakthrough re. access part & associated governance (double lock)
- ✓ **8th Code Trilogue** occurred on **5 June (Intra EU-calls and BEREC Regulation)** and political agreement



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

National regulatory authorities shall not impose or maintain 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 67 to 71, including in particular any economic replicability test imposed in accordance with Article 68 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 (see below)



■ Agreement in trilogue on 1st March 2018

■ Minimum licence duration

- 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

- **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.



- Consolidation of the texts in all language versions
- 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>
- Following this the 24-months transposition period started
- I.e. the new framework transposed into national law will likely be applied as of 2021