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CONTRIBUTION

From:	General Secretariat of the Council
To:	Delegations
Subject:	CODE ACCESS - GR comments

Delegations will find in annex the GR comments on access.

Comments on Access provisions – Greece

General comments on Access (Title II – art 57-78)

The access regulation proposal does not revolutionize the existing regime. Rather, it introduces a subtle shift in the emphasis from the promotion of competition to the promotion of investments. Furthermore, the availability and take up of very high connectivity are now elevated to a core objective of the EU regulatory framework for the telecoms sector, next to more traditional objectives such as promoting competition and consumer protection, whilst the review period for ex ante market analysis is extended from three to five years.

1. Access and interconnection (art 59)

We explicitly support the delegation of the relevant tasks to the national regulatory authorities and not to other competent authorities.

Therefore, we support the Presidency proposal on Art. 59, set out in document 7721/17, retaining this provision.

2. Procedure for identification of transnational markets (art 63)

We fail to see the justification for empowering BEREC to “*adopt a Decision identifying transnational markets in accordance with the principles of competition law and taking utmost account of the Recommendation and SMP Guidelines adopted in accordance with Article 62*”. In our view, the SMP guidelines is a more appropriate instrument to address issues regarding potential transnational markets.

Therefore, we support the amendments proposed by the Presidency in document 7721/17, which empowers the Commission rather than BEREC to adopt Decisions regarding transnational markets.

3. Procedure for identification of transnational demand (art 64)

We have reservations on the potential implications of the provision that invites BEREC to conduct analysis of transnational demand “*if it receives a reasoned request from market participants providing sufficient supporting evidence and considers there is a serious demand problem to be addressed*”. Market participants have ample opportunities to provide comments and suggestions to the BEREC work program in the framework of the relevant public consultation.

Therefore, we would propose deleting the entire Article 64 and not only paragraph 64.2 (as it is the case in the Presidency proposal set out in document 7721/17).

This is the approach taken by the ITRE Rapporteur in her draft report and we find it justified.

4. Market analysis procedures (art 65)

The proposal clarifies that SMP can only be found in wholesale markets, if market failure has already been identified in the associated retail market (article 65, par. 2(b), see also recital 155). This necessary link and ‘negative prerequisite’ introduced between SMP in wholesale and retail does not exist in the current framework. Indeed the Commission has explicitly accepted in many cases that such a linkage is not indispensable when approving proposals for wholesale regulation. This amendment represents therefore a raising of the bar for NRA’s seeking to regulate oligopolistic

markets (like Greece) and it remains to be seen how this provision might be offset by revisions to the SMP Guidelines.

Fixed markets (especially in the case of Greece) may evolve from single dominance to oligopolistic or –in absence of regulation- duopolistic market structures. When telecommunication markets evolve from monopolies to oligopolies there might no longer be a case of (collective) SMP. In such a case, it is not clear whether NRAs will still be able to impose remedies under the current framework. However, competition might be distorted in cases where two or more undertakings have a position of unilateral market power (consumer welfare might be harmed in the long term in the form of higher prices, lower quality, restricted choice and lack of innovation). It might be critical therefore to slightly adjust provisions on SMP so as to cover such situations and give NRAs explicit power to intervene ex ante to non-competitive duopoly / oligopoly situations.

On this basis, while we appreciate the amendment proposed by the Presidency in document 7721/17, we believe that Article 65 still introduces unnecessary restrictions to the regulatory process. We would therefore propose amending Article 65, so as to retain the market review provisions as in the current Framework Directive, taking also into consideration the Commission SMP Guidelines.

5. Imposition of access remedies (art 66)

We are concerned that Article 66 significantly restricts the regulatory process, particularly concerning the imposition of national, specific remedies by demanding that remedies take into account the nature of the problem identified “in particular at retail level” (Art 66.4(a)). It is already clear that SMP obligations imposed must be based on the nature of the problem identified, with the ultimate aim always being optimizing retail outcomes in the long term. The qualification proposed in the Code goes significantly beyond this and would risk complicating the process of imposing SMP remedies to address competition problems in relevant wholesale markets, which cannot necessarily be easily demonstrated to offer a proportionate contribution to competition in the relevant downstream retail markets.

In addition we see no reason for explicitly imposing a cost benefit test, for the purpose of qualifying the proportionality requirement (Art 66.4(b)).

On this basis we propose amending subparagraphs 66.4(a)-(b), as presented hereafter, using the same formatting as in the Presidency proposal set out in document 7721/17.

Article 66, paragraph 4

4. Obligations imposed in accordance with this Article shall be:
 - a) based on the nature of the problem identified **by a national regulatory authority in its market analysis**, ~~in particular at retail level and where appropriate taking into account the identification of transnational demand pursuant to Article 64;~~
 - b) ~~They shall be proportionate, having regard to the costs and benefits;~~ and

6. Access to and use of specific network facilities (art 70)

We are concerned that Article 70 would unnecessarily limit the parameters of a proportionality assessment, by proposing that national regulatory authorities should only be able to impose access remedies where access to civil engineering (described in Article 70) “would not on their own” lead to the achievement of the relevant objectives.

On this basis we can support the Presidency proposal for amending Article 70, as set out in document 7721/17.

7. Regulatory treatment of new network elements (Art. 74)

We have reservations on the provisions of Art. 74. We are concerned that they could offer a wide scope for tactical gaming and eventually promote continued or new monopolistic and oligopolistic market structures.

We believe that the Presidency proposal set out in document 7721/17, giving national regulatory authorities the flexibility to decide on imposing obligations or not on new network developments, ameliorates such problems while retaining the overall message for encouraging co-investments in new, high speed networks.

We are also ready to support a more aggressive approach, which would call for deleting Article 74 in its entirety.

8. Vertically separated undertakings (art 77)

The Commission's proposal on Article 77 provides a limitation on NRAs to impose other remedies than access to civil engineering and access to specific network facilities on SMPs which are absent to retail markets ('wholesale only' networks) and which hold no exclusive agreements with downstream undertakings. An exception is established however if an NRA actually finds, on the basis of existing wholesale offers, that competition problems have arisen damaging end user in that particular market. On this proposal, we are of the view that Article 77 as stands currently, requires proof of actual damage to end-users as a precondition for price regulation. This stands contrary however to the principles of ex ante (SMP) regulation pursuant to which the very potential abuse of market power is cause for regulation. In addition the approach adopted, i.e. where the imposition of price obligations requires pre-investigation in every single case, poses an undue regulatory burden on NRAs and considerable regulatory uncertainty which might end up at the detriment of consumer welfare (given that NRAs will be able to regulate only after time consuming information gathering in every single occasion and relevant analysis and thus being unable to swiftly remediate for example for monopoly pricing).

On this basis, while we appreciate the amendment proposed by the Presidency in document 7721/17, we do not see any value in Article 77. Should other member States share this view, we would propose deleting it in its entirety.