

Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) (Text with EEA relevance)

PART II

NETWORKS

TITLE II

ACCESS

CHAPTER IV

*Access remedies imposed on undertakings with significant market power*

*Article 68*

**Imposition, amendment or withdrawal of obligations**

1 Member States shall ensure that national regulatory authorities are empowered to impose the obligations set out in Articles 69 to 74 and Articles 76 to 81.

2 Where an undertaking is designated as having significant market power on a specific market as a result of a market analysis carried out in accordance with Article 67, national regulatory authorities shall, as appropriate, impose any of the obligations set out in Articles 69 to 74 and Articles 76 and 80. In accordance with the principle of proportionality, a national regulatory authority shall choose the least intrusive way of addressing the problems identified in the market analysis.

3 National regulatory authorities shall impose the obligations set out in Articles 69 to 74 and Articles 76 and 80 only on undertakings that have been designated as having significant market power in accordance with paragraph 2 of this Article, without prejudice to:

- a Articles 61 and 62;
- b Articles 44 and 17 of this Directive, Condition 7 in Part D of Annex I as applied by virtue of Article 13(1) of this Directive, Articles 97 and 106 of this Directive and the relevant provisions of Directive 2002/58/EC containing obligations on undertakings other than those designated as having significant market power; or
- c the need to comply with international commitments.

In exceptional circumstances, where a national regulatory authority intends to impose on undertakings designated as having significant market power obligations for access or interconnection other than those set out in Articles 69 to 74 and Articles 76 and 80, it shall submit a request to the Commission.

The Commission shall, taking utmost account of the opinion of BEREC, adopt decisions by means of implementing acts, authorising or preventing the national regulatory authority from taking such measures.

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Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 118(3).

- 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, where appropriate taking into account the identification of transnational demand pursuant to Article 66;
  - b proportionate, having regard, where possible, to the costs and benefits;
  - c justified in light of the objectives laid down in Article 3; and
  - d imposed following consultation in accordance with Articles 23 and 32.

5 In relation to the need to comply with international commitments referred to in paragraph 3 of this Article, national regulatory authorities shall notify decisions to impose, amend or withdraw obligations on undertakings to the Commission, in accordance with the procedure referred to in Article 32.

6 National regulatory authorities shall consider the impact of new market developments, such as in relation to commercial agreements, including co-investment agreements, influencing competitive dynamics.

If those developments are not sufficiently important to require a new market analysis in accordance with Article 67, the national regulatory authority shall assess without delay whether it is necessary to review the obligations imposed on undertakings designated as having significant market power and amend any previous decision, including by withdrawing obligations or imposing new obligations, in order to ensure that such obligations continue to meet the conditions set out in paragraph 4 of this Article. Such amendments shall be imposed only after consultations in accordance with Articles 23 and 32.

#### *Article 69*

### **Obligation of transparency**

1 National regulatory authorities may, in accordance with Article 68, impose obligations of transparency in relation to interconnection or access, requiring undertakings to make public specific information, such as accounting information, prices, technical specifications, network characteristics and expected developments thereof, as well as terms and conditions for supply and use, including any conditions altering access to or use of services and applications, in particular with regard to migration from legacy infrastructure, where such conditions are allowed by Member States in accordance with Union law.

2 In particular, where an undertaking has obligations of non-discrimination, national regulatory authorities may require that undertaking to publish a reference offer, which shall be sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested. That offer shall contain a description of the relevant offerings broken down into components according to market needs, and the associated terms and conditions, including prices. The national regulatory authority may, inter alia, impose changes to reference offers to give effect to obligations imposed under this Directive.

3 National regulatory authorities may specify the precise information to be made available, the level of detail required and the manner of publication.

4 By 21 December 2019, in order to contribute to the consistent application of transparency obligations, BEREC shall, after consulting stakeholders and in close cooperation

with the Commission, issue guidelines on the minimum criteria for a reference offer and shall review them where necessary in order to adapt them to technological and market developments. In providing such minimum criteria, BEREC shall pursue the objectives in Article 3, and shall have regard to the needs of the beneficiaries of access obligations and of end-users that are active in more than one Member State, as well as to any BEREC guidelines identifying transnational demand in accordance with Article 66 and to any related decision of the Commission.

Notwithstanding paragraph 3 of this Article, where an undertaking has obligations under Article 72 or 73 concerning wholesale access to network infrastructure, national regulatory authorities shall ensure the publication of a reference offer taking utmost account of the BEREC guidelines on the minimum criteria for a reference offer, shall ensure that key performance indicators are specified, where relevant, as well as corresponding service levels, and closely monitor and ensure compliance with them. In addition, national regulatory authorities may, where necessary, predetermine the associated financial penalties in accordance with Union and national law.

#### *Article 70*

### **Obligations of non-discrimination**

1 A national regulatory authority may, in accordance with Article 68, impose obligations of non-discrimination, in relation to interconnection or access.

2 Obligations of non-discrimination shall ensure, in particular, that the undertaking applies equivalent conditions in equivalent circumstances to other providers of equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners. National regulatory authorities may impose on that undertaking obligations to supply access products and services to all undertakings, including to itself, on the same timescales, terms and conditions, including those relating to price and service levels, and by means of the same systems and processes, in order to ensure equivalence of access.

#### *Article 71*

### **Obligation of accounting separation**

1 A national regulatory authority may, in accordance with Article 68, impose obligations for accounting separation in relation to specified activities related to interconnection or access.

In particular, a national regulatory authority may require a vertically integrated undertaking to make transparent its wholesale prices and its internal transfer prices, inter alia to ensure compliance where there is an obligation of non-discrimination under Article 70 or, where necessary, to prevent unfair cross-subsidy. National regulatory authorities may specify the format and accounting methodology to be used.

2 Without prejudice to Article 20, to facilitate the verification of compliance with obligations of transparency and non-discrimination, national regulatory authorities shall have the power to require that accounting records, including data on revenues received from third parties, are provided on request. National regulatory authorities may publish information that would contribute to an open and competitive market, while complying with Union and national rules on commercial confidentiality.

## Article 72

### Access to civil engineering

1 A national regulatory authority may, in accordance with Article 68, impose obligations on undertakings to meet reasonable requests for access to, and use of, civil engineering including, but not limited to, buildings or entries to buildings, building cables, including wiring, antennae, towers and other supporting constructions, poles, masts, ducts, conduits, inspection chambers, manholes, and cabinets, in situations where, having considered the market analysis, the national regulatory authority concludes that denial of access or access given under unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market and would not be in the end-user's interest.

2 National regulatory authorities may impose obligations on an undertaking to provide access in accordance with this Article, irrespective of whether the assets that are affected by the obligation are part of the relevant market in accordance with the market analysis, provided that the obligation is necessary and proportionate to meet the objectives of Article 3.

## Article 73

### Obligations of access to, and use of, specific network elements and associated facilities

1 National regulatory authorities may, in accordance with Article 68, impose obligations on undertakings to meet reasonable requests for access to, and use of, specific network elements and associated facilities, in situations where the national regulatory authorities consider that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, and would not be in the end-user's interest.

National regulatory authorities may require undertakings *inter alia*:

- a to give third parties access to, and use of, specific physical network elements and associated facilities, as appropriate, including unbundled access to the local loop and sub-loop;
- b to give third parties access to specific active or virtual network elements and services;
- c to negotiate in good faith with undertakings requesting access;
- d not to withdraw access to facilities already granted;
- e to provide specific services on a wholesale basis for resale by third parties;
- f to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services;
- g to provide co-location or other forms of associated facilities sharing;
- h to provide specific services needed to ensure interoperability of end-to-end services to users, or roaming on mobile networks;
- i to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services;
- j to interconnect networks or network facilities;
- k to provide access to associated services such as identity, location and presence service.

National regulatory authorities may subject those obligations to conditions covering fairness, reasonableness and timeliness.

2 Where national regulatory authorities consider the appropriateness of imposing any of the possible specific obligations referred to in paragraph 1 of this Article, and in particular where they assess, in accordance with the principle of proportionality, whether and how such obligations are to be imposed, they shall analyse whether other forms of access to wholesale inputs, either on the same or on a related wholesale market, would be sufficient to address the identified problem in the end-user's interest. That assessment shall include commercial access offers, regulated access pursuant to Article 61, or existing or planned regulated access to other wholesale inputs pursuant to this Article. National regulatory authorities shall take account in particular of the following factors:

- a the technical and economic viability of using or installing competing facilities, in light of the rate of market development, taking into account the nature and type of interconnection or access involved, including the viability of other upstream access products, such as access to ducts;
- b the expected technological evolution affecting network design and management;
- c the need to ensure technology neutrality enabling the parties to design and manage their own networks;
- d the feasibility of providing the access offered, in relation to the capacity available;
- e the initial investment by the facility owner, taking account of any public investment made and the risks involved in making the investment, with particular regard to investments in, and risk levels associated with, very high capacity networks;
- f the need to safeguard competition in the long term, with particular attention to economically efficient infrastructure-based competition and innovative business models that support sustainable competition, such as those based on co-investment in networks;
- g where appropriate, any relevant intellectual property rights;
- h the provision of pan-European services.

Where a national regulatory authority considers, in accordance with Article 68, imposing obligations on the basis of Articles 72 or of this Article, it shall examine whether the imposition of obligations in accordance with Article 72 alone would be a proportionate means by which to promote competition and the end-user's interest.

3 When imposing obligations on an undertaking to provide access in accordance with this Article, national regulatory authorities may lay down technical or operational conditions to be met by the provider or the beneficiaries of such access, where necessary to ensure normal operation of the network. Obligations to follow specific technical standards or specifications shall comply with the standards and specifications laid down in accordance with Article 39.

#### *Article 74*

### **Price control and cost accounting obligations**

1 A national regulatory authority may, in accordance with Article 68, impose obligations relating to cost recovery and price control, including obligations for cost orientation of prices and obligations concerning cost-accounting systems, for the provision of specific types of interconnection or access, in situations where a market analysis indicates that a lack of effective competition means that the undertaking concerned may sustain prices at an excessively high level, or may apply a price squeeze, to the detriment of end-users.

In determining whether price control obligations would be appropriate, national regulatory authorities 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

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networks, and in particular of very high capacity networks. In particular, to encourage investments by the undertaking, including in next-generation networks, national regulatory authorities shall take into account the investment made by the undertaking. Where the national regulatory authorities consider price control obligations to be appropriate, they shall allow the undertaking a reasonable rate of return on adequate capital employed, taking into account any risks specific to a particular new investment network project.

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.

When national regulatory authorities consider it appropriate to impose price control obligations on access to existing network elements, they shall also take account of the benefits of predictable and stable wholesale prices in ensuring efficient market entry and sufficient incentives for all undertakings to deploy new and enhanced networks.

2 National regulatory authorities shall ensure that any cost recovery mechanism or pricing methodology that is mandated serves to promote the deployment of new and enhanced networks, efficiency and sustainable competition and maximises sustainable end-user benefits. In this regard, national regulatory authorities may also take account of prices available in comparable competitive markets.

3 Where an undertaking has an obligation regarding the cost orientation of its prices, the burden of proof that charges are derived from costs, including a reasonable rate of return on investment, shall lie with the undertaking concerned. For the purpose of calculating the cost of efficient provision of services, national regulatory authorities may use cost accounting methods independent of those used by the undertaking. National regulatory authorities may require an undertaking to provide full justification for its prices, and may, where appropriate, require prices to be adjusted.

4 National regulatory authorities shall ensure that, where implementation of a cost-accounting system is mandated in order to support price control, a description of the cost-accounting system is made publicly available, showing at least the main categories under which costs are grouped and the rules used for the allocation of costs. A qualified independent body shall verify compliance with the cost-accounting system and shall publish annually a statement concerning compliance.

#### *Article 75*

### **Termination rates**

1 By 31 December 2020, the Commission shall, taking utmost account of the opinion of BEREC, adopt a delegated act in accordance with Article 117 supplementing this Directive by setting a single maximum Union-wide mobile voice termination rate and a single maximum Union-wide fixed voice termination rate (together referred to as ‘the Union-wide voice termination rates’), which are imposed on any provider of mobile voice termination or fixed voice termination services, respectively, in any Member State.

To that end, the Commission shall:

- a comply with the principles, criteria and parameters provided in Annex III;

- b when setting the Union-wide voice termination rates for the first time, take into account the weighted average of efficient costs in fixed and mobile networks established in accordance with the principles provided in Annex III, applied across the Union; the Union-wide voice termination rates in the first delegated act shall not be higher than the highest rate among the rates that were in force six months before the adoption of that delegated act in all Member States, after any necessary adjustment for exceptional national circumstances;
- c take into account the total number of end-users in each Member State, in order to ensure a proper weighting of the maximum termination rates, as well as national circumstances which result in significant differences between Member States when determining the maximum termination rates in the Union;
- d take into account market information provided by BEREC, national regulatory authorities or, directly, by undertakings providing electronic communications networks and services; and
- e consider the need to allow for a transitional period of no longer than 12 months in order to allow adjustments in Member States where this is necessary on the basis of rates previously imposed.

2 Taking utmost account of the opinion of BEREC, the Commission shall review the delegated act adopted pursuant to this Article every five years and shall consider on each such occasion, by applying the criteria listed in Article 67(1), whether setting Union-wide voice termination rates continue to be necessary. Where the Commission decides, following its review in accordance with this paragraph, not to impose a maximum mobile voice termination rate or a maximum fixed voice termination rate, or neither, national regulatory authorities may conduct market analyses of voice termination markets in accordance with Article 67, to assess whether the imposition of regulatory obligations is necessary. If a national regulatory authority imposes, as a result of such analysis, cost-oriented termination rates in a relevant market, it shall follow the principles, criteria and parameters set out in Annex III and its draft measure shall be subject to the procedures referred to in Articles 23, 32 and 33.

3 National regulatory authorities shall closely monitor, and ensure compliance with, the application of the Union-wide voice termination rates by providers of voice termination services. National regulatory authorities may, at any time, require a provider of voice termination services to amend the rate it charges to other undertakings if it does not comply with the delegated act referred to in paragraph 1. National regulatory authorities shall annually report to the Commission and to BEREC with regard to the application of this Article.

#### *Article 76*

### **Regulatory treatment of new very high capacity network elements**

1 Undertakings which have been designated as having significant market power in one or several relevant markets in accordance with Article 67 may offer commitments, in accordance with the procedure set out in Article 79 and subject to the second subparagraph of this paragraph, to open the deployment of a new very high capacity network that consists of optical fibre elements up to the end-user premises or base station to co-investment, for example by offering co-ownership or long-term risk sharing through co-financing or through purchase agreements giving rise to specific rights of a structural character by other providers of electronic communications networks or services.

When the national regulatory authority assesses those commitments, it shall determine, in particular, whether the offer to co-invest complies with all of the following conditions:

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- a it is open at any moment during the lifetime of the network to any provider of electronic communications networks or services;
- b it would allow other co-investors which are providers of electronic communications networks or services to compete effectively and sustainably in the long term in downstream markets in which the undertaking designated as having significant market power is active, on terms which include:
  - (i) fair, reasonable and non-discriminatory terms allowing access to the full capacity of the network to the extent that it is subject to co-investment;
  - (ii) flexibility in terms of the value and timing of the participation of each co-investor;
  - (iii) the possibility to increase such participation in the future; and
  - (iv) reciprocal rights awarded by the co-investors after the deployment of the co-invested infrastructure;
- c it is made public by the undertaking in a timely manner and, if the undertaking does not have the characteristics listed in Article 80(1), at least six months before the start of the deployment of the new network; that period may be prolonged based on national circumstances;
- d access seekers not participating in the co-investment can benefit from the outset from the same quality, speed, conditions and end-user reach as were available before the deployment, accompanied by a mechanism of adaptation over time confirmed by the national regulatory authority in light of developments on the related retail markets, that maintains the incentives to participate in the co-investment; such mechanism shall ensure that access seekers have access to the very high capacity elements of the network at a time, and on the basis of transparent and non-discriminatory terms, which reflect appropriately the degrees of risk incurred by the respective co-investors at different stages of the deployment and take into account the competitive situation in retail markets;
- e it complies at a minimum with the criteria set out in Annex IV and is made in good faith.

2 If the national regulatory authority concludes, taking into account the results of the market test conducted in accordance with Article 79(2), that the co-investment commitment offered complies with the conditions set out in paragraph 1 of this Article, it shall make that commitment binding pursuant to Article 79(3), and shall not impose any additional obligations pursuant to Article 68 as regards the elements of the new very high capacity network that are subject to the commitments, if at least one potential co-investor has entered into a co-investment agreement with the undertaking designated as having significant market power.

The first subparagraph shall be without prejudice to the regulatory treatment of circumstances that do not comply with the conditions set out in paragraph 1 of this Article, taking into account the results of any market test conducted in accordance with Article 79(2), but that have an impact on competition and are taken into account for the purposes of Articles 67 and 68.

By way of derogation from the first subparagraph of this paragraph, a national regulatory authority may, in duly justified circumstances, impose, maintain or adapt remedies in accordance with Articles 68 to 74 as regards new very high capacity networks in order to address significant competition problems on specific markets, where the national regulatory authority establishes that, given the specific characteristics of these markets, those competition problems would not otherwise be addressed.



3 National regulatory authorities shall, on an ongoing basis, monitor compliance with the conditions set out in paragraph 1 and may require the undertaking designated as having significant market power to provide it with annual compliance statements.

This Article shall be without prejudice to the power of a national regulatory authority to take decisions pursuant to Article 26(1) in the event of a dispute arising between undertakings in connection with a co-investment agreement considered by it to comply with the conditions set out in paragraph 1 of this Article.

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.

### *Article 77*

#### **Functional separation**

1 Where the national regulatory authority concludes that the appropriate obligations imposed under Articles 69 to 74 have failed to achieve effective competition and that there are important and persisting competition problems or market failures identified in relation to the wholesale provision of certain access product markets, it may, on an exceptional basis, in accordance with the second subparagraph of Article 68(3), impose an obligation on vertically integrated undertakings to place activities related to the wholesale provision of relevant access products in a business entity operating independently.

That business entity shall supply access products and services to all undertakings, including to other business entities within the parent company, on the same timescales, terms and conditions, including those relating to price and service levels, and by means of the same systems and processes.

2 When a national regulatory authority intends to impose an obligation of functional separation, it shall submit a request to the Commission that includes:

- a evidence justifying the conclusions of the national regulatory authority as referred to in paragraph 1;
- b a reasoned assessment concluding that there is no or little prospect of effective and sustainable infrastructure-based competition within a reasonable time-frame;
- c an analysis of the expected impact on the national regulatory authority, on the undertaking, in particular on the workforce of the separated undertaking, and on the electronic communications sector as a whole, and on incentives to invest therein, in particular with regard to the need to ensure social and territorial cohesion, and on other stakeholders including, in particular, the expected impact on competition and any potential resulting effects on consumers;
- d an analysis of the reasons justifying that this obligation would be the most efficient means to enforce remedies aimed at addressing the competition problems or the markets failures identified.

3 The draft measure shall include the following elements:

- a the precise nature and level of separation, specifying in particular the legal status of the separate business entity;
- b an identification of the assets of the separate business entity, and the products or services to be supplied by that entity;
- c the governance arrangements to ensure the independence of the staff employed by the separate business entity, and the corresponding incentive structure;

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- d rules for ensuring compliance with the obligations;
- e rules for ensuring transparency of operational procedures, in particular towards other stakeholders;
- f a monitoring programme to ensure compliance, including the publication of an annual report.

Following the Commission's decision taken in accordance with Article 68(3) on that draft measure, the national regulatory authority shall conduct a coordinated analysis of the different markets related to the access network in accordance with the procedure set out in Article 67. On the basis of that analysis, the national regulatory authority shall impose, maintain, amend or withdraw obligations, in accordance with the procedures set out in Articles 23 and 32.

4 An undertaking on which functional separation has been imposed may be subject to any of the obligations referred to in Articles 69 to 74 in any specific market where it has been designated as having significant market power in accordance with Article 67, or any other obligations authorised by the Commission pursuant to Article 68(3).

#### *Article 78*

### **Voluntary separation by a vertically integrated undertaking**

1 Undertakings which have been designated as having significant market power in one or several relevant markets in accordance with Article 67 shall inform the national regulatory authority at least three months before any intended transfer of their local access network assets or a substantial part thereof to a separate legal entity under different ownership, or establishment of a separate business entity in order to provide all retail providers, including its own retail divisions, with fully equivalent access products.

Those undertakings shall also inform the national regulatory authority of any change of that intent, as well as the final outcome of the process of separation.

Such undertakings may also offer commitments regarding access conditions that are to apply to their network during an implementation period after the proposed form of separation is implemented, with a view to ensuring effective and non-discriminatory access by third parties. The offer of commitments shall include sufficient details, including in terms of timing of implementation and duration, in order to allow the national regulatory authority to conduct its tasks in accordance with paragraph 2 of this Article. Such commitments may extend beyond the maximum period for market reviews set out in Article 67(5).

2 The national regulatory authority shall assess the effect of the intended transaction, together with the commitments offered, where applicable, on existing regulatory obligations under this Directive.

For that purpose, the national regulatory authority shall conduct an analysis of the different markets related to the access network in accordance with the procedure set out in Article 67.

The national regulatory authority shall take into account any commitments offered by the undertaking, having regard in particular to the objectives set out in Article 3. In so doing, the national regulatory authority shall consult third parties in accordance with Article 23, and shall address, in particular, those third parties which are directly affected by the intended transaction.

On the basis of its analysis, the national regulatory authority shall impose, maintain, amend or withdraw obligations, in accordance with the procedures set out in Articles 23 and 32, applying, if appropriate, Article 80. In its decision, the national regulatory authority may make the commitments binding, wholly or in part. By way of derogation from Article 67(5), the national regulatory authority may make the commitments binding, wholly or in part, for the entire period for which they are offered.

3 Without prejudice to Article 80, the legally or operationally separate business entity that has been designated as having significant market power in any specific market in accordance with Article 67 may be subject, as appropriate, to any of the obligations referred to in Articles 69 to 74 or any other obligations authorised by the Commission pursuant to Article 68(3), where any commitments offered are insufficient to meet the objectives set out in Article 3.

4 The national regulatory authority shall monitor the implementation of the commitments offered by the undertakings that it has made binding in accordance with paragraph 2 and shall consider their extension when the period for which they are initially offered has expired.

#### *Article 79*

### **Commitments procedure**

1 Undertakings designated as having significant market power may offer to the national regulatory authority commitments regarding conditions for access, co-investment, or both, applicable to their networks in relation, inter alia, to:

- a cooperative arrangements relevant to the assessment of appropriate and proportionate obligations pursuant to Article 68;
- b co-investment in very high capacity networks pursuant to Article 76; or
- c effective and non-discriminatory access by third parties pursuant to Article 78, both during an implementation period of voluntary separation by a vertically integrated undertaking and after the proposed form of separation is implemented.

The offer for commitments shall be sufficiently detailed including as to the timing and scope of their implementation and their duration, to allow the national regulatory authority to undertake its assessment pursuant to paragraph 2 of this Article. Such commitments may extend beyond the periods for carrying out market analysis provided in Article 67(5).

2 In order to assess any commitments offered by an undertaking pursuant to paragraph 1 of this Article, the national regulatory authority shall, except where such commitments clearly do not fulfil one or more relevant conditions or criteria, perform a market test, in particular on the offered terms, by conducting a public consultation of interested parties, in particular third parties which are directly affected. Potential co-investors or access seekers may provide views on the compliance of the commitments offered with the conditions provided, as applicable, in Article 68, 76 or 78 and may propose changes.

As regards the commitments offered under this Article, the national regulatory authority shall, when assessing obligations pursuant to Article 68(4), have particular regard to:

- a evidence regarding the fair and reasonable character of the commitments offered;
- b the openness of the commitments to all market participants;
- c the timely availability of access under fair, reasonable and non-discriminatory conditions, including to very high capacity networks, before the launch of related retail services; and

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- d the overall adequacy of the commitments offered to enable sustainable competition on downstream markets and to facilitate cooperative deployment and take-up of very high capacity networks in the interest of end-users.

Taking into account all the views expressed in the consultation, and the extent to which such views are representative of different stakeholders, the national regulatory authority shall communicate to the undertaking designated as having significant market power its preliminary conclusions whether the commitments offered comply with the objectives, criteria and procedures set out in this Article and, as applicable, in Article 68, 76 or 78, and under which conditions it may consider making the commitments binding. The undertaking may revise its initial offer to take account of the preliminary conclusions of the national regulatory authority and with a view to satisfying the criteria set out in this Article and, as applicable, in Article 68, 76 or 78.

3 Without prejudice to first subparagraph of Article 76(2), the national regulatory authority may issue a decision to make the commitments binding, wholly or in part.

By way of derogation from Article 67(5), the national regulatory authority may make some or all commitments binding for a specific period, which may be the entire period for which they are offered, and in the case of co-investment commitments made binding pursuant to first subparagraph of Article 76(2), it shall make them binding for a period of minimum seven years.

Subject to Article 76, this Article is without prejudice to the application of the market analysis procedure pursuant to Article 67 and the imposition of obligations pursuant to Article 68.

Where the national regulatory authority makes commitments binding pursuant to this Article, it shall assess under Article 68 the consequences of that decision for market development and the appropriateness of any obligation that it has imposed or would, absent those commitments, have considered imposing pursuant to that Article or Articles 69 to 74. When notifying the relevant draft measure under Article 68 in accordance with Article 32, the national regulatory authority shall accompany the notified draft measure with the commitments decision.

4 The national regulatory authority shall monitor, supervise and ensure compliance with the commitments that it has made binding in accordance with paragraph 3 of this Article in the same way in which it monitors, supervises and ensures compliance with obligations imposed under Article 68 and shall consider the extension of the period for which they have been made binding when the initial period expires. If the national regulatory authority concludes that an undertaking has not complied with the commitments that have been made binding in accordance with paragraph 3 of this Article, it may impose penalties on such undertaking in accordance with Article 29. Without prejudice to the procedure for ensuring compliance of specific obligations under Article 30, the national regulatory authority may reassess the obligations imposed in accordance with Article 68(6).

## *Article 80*

### **Wholesale-only undertakings**

1 A national regulatory authority that designates an undertaking which is absent from any retail markets for electronic communications services as having significant market power in one or several wholesale markets in accordance with Article 67 shall consider whether that undertaking has the following characteristics:

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- a all companies and business units within the undertaking, all companies that are controlled but not necessarily wholly owned by the same ultimate owner, and any shareholder capable of exercising control over the undertaking, only have activities, current and planned for the future, in wholesale markets for electronic communications services and therefore do not have activities in any retail market for electronic communications services provided to end-users in the Union;
- b the undertaking is not bound to deal with a single and separate undertaking operating downstream that is active in any retail market for electronic communications services provided to end-users, because of an exclusive agreement, or an agreement which de facto amounts to an exclusive agreement.

2 If the national regulatory authority concludes that the conditions laid down in paragraph 1 of this Article are fulfilled, it may impose on that undertaking only obligations pursuant to Articles 70 and 73 or relative to fair and reasonable pricing if justified on the basis of a market analysis including a prospective assessment of the likely behaviour of the undertaking designated as having significant market power.

3 The national regulatory authority shall review obligations imposed on the undertaking in accordance with this Article at any time if it concludes that the conditions laid down in paragraph 1 of this Article are no longer met and it shall, as appropriate, apply Articles 67 to 74. The undertakings shall, without undue delay, inform the national regulatory authority of any change of circumstance relevant to points (a) and (b) of paragraph 1 of this Article.

4 The national regulatory authority shall also review obligations imposed on the undertaking in accordance with this Article if on the basis of evidence of terms and conditions offered by the undertaking to its downstream customers, the authority concludes that competition problems have arisen or are likely to arise to the detriment of end-users which require the imposition of one or more obligations provided in Article 69, 71, 72 or 74, or the amendment of the obligations imposed in accordance with paragraph 2 of this Article.

5 The imposition of obligations and their review in accordance with this Article shall be implemented in accordance with the procedures referred to in Articles 23, 32 and 33.

#### *Article 81*

### **Migration from legacy infrastructure**

1 Undertakings which have been designated as having significant market power in one or several relevant markets in accordance with Article 67 shall notify the national regulatory authority in advance and in a timely manner when they plan to decommission or replace with a new infrastructure parts of the network, including legacy infrastructure necessary to operate a copper network, which are subject to obligations pursuant to Articles 68 to 80.

2 The national regulatory authority shall ensure that the decommissioning or replacement process includes a transparent timetable and conditions, including an appropriate notice period for transition, and establishes the availability of alternative products of at least comparable quality providing access to the upgraded network infrastructure substituting the replaced elements if necessary to safeguard competition and the rights of end-users.

With regard to assets which are proposed for decommissioning or replacement, the national regulatory authority may withdraw the obligations after having ascertained that the access provider:

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*Status: EU Directives are being published on this site to aid cross referencing from UK legislation. After IP completion day (31 December 2020 11pm) no further amendments will be applied to this version.*

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- a has established the appropriate conditions for migration, including making available an alternative access product of at least comparable quality as was available using the legacy infrastructure enabling the access seekers to reach the same end-users; and
- b has complied with the conditions and process notified to the national regulatory authority in accordance with this Article.

Such withdrawal shall be implemented in accordance with the procedures referred to in Articles 23, 32 and 33.

3 This Article shall be without prejudice to the availability of regulated products imposed by the national regulatory authority on the upgraded network infrastructure in accordance with the procedures set out in Articles 67 and 68.

#### *Article 82*

#### **BEREC guidelines on very high capacity networks**

By 21 December 2020, BEREC shall, after consulting stakeholders and in close cooperation with the Commission, issue guidelines on the criteria that a network is to fulfil in order to be considered a very high capacity network, in particular in terms of down- and uplink bandwidth, resilience, error-related parameters, and latency and its variation. The national regulatory authorities shall take those guidelines into utmost account. BEREC shall update the guidelines by 31 December 2025, and regularly thereafter.