



Brussels  
CNECT.B.2.002/PP

## **Attachment**

### **Answers to questions regarding EECC access provisions**

**(1) What EECC instrument can be used to remove restrictions that prevent undertakings from negotiating reciprocal technical and commercial terms of access or interconnection in accordance with Union law in the case of a negotiation failure, including in the light of recital 144, which states that National regulatory authorities should have the power to secure, where commercial negotiation fails, adequate access and interconnection and interoperability of services in the interest of end-users?**

Recital 144 is a non-operative provision and should always be read consistently with the substantive provisions of the Directive, which is a maximum-harmonisation instrument.

Article 61 EECC provides for a detailed array of specific circumstances in which NRAs would be entitled to impose access obligations on undertakings. It is this provision that NRAs should keep in mind where imposing access obligations outside measures that may be taken regarding undertakings having either individually or jointly with others, significant market power. These provisions are to be applied on a case-by-case basis and should not be understood to allow Member State authorities to impose general access obligations falling outside the scope of EECC. In DG CNECT view, Section 57(1) of the Slovak Electronic Communications Act does indeed fall outside of the scope of the EECC.

If undertakings having either individually or jointly with others SMP are concerned, the provisions of Article 68 EECC apply. Any imposition of access obligations should in this case be preceded by a market analysis as per Article 67 EECC.

Beyond these provisions, the NRAs may also have recourse to the imposition of obligations, including for national roaming, via rights of use for radio spectrum, in accordance with Article 47 EECC. Moreover, Article 32(10) EECC allows the NRAs, in exceptional circumstances, where the NRA considers that there is an urgent need to act in

order to safeguard competition and protect the interests of users, to immediately adopt proportionate and provisional measures, in accordance with the procedural stipulations of Article 32(10) in relation to measures that may be taken regarding undertakings having either individually or jointly with others, significant market power. Any such measure would need to be justified on an overriding reason of public interest (e.g. the protection of unfettered competition or consumer protection), which requires sufficient and convincing reasoning (including evidence, as the case may be); it would also need to be proportionate, compliant with legal certainty and with the fundamental rights enshrined in the EU's Charter of Fundamental Rights.

**(2) The NRA considers that if the EECC aims to legitimately address a situation where any undertaking requesting access from another undertaking to supply its services is unable to negotiate adequate access, interconnection or interoperability (i.e. the access provider does not apply the condition in good faith), there must be an institute/process by which the national regulatory authority exercises its power referred to in recital 144 EECC.**

Without prejudice to paragraphs (1) and (2), Art 61(4) EECC harmonizes conditions for imposition of wholesale access with a view that such access is to be imposed only where this possibility is clearly provided for when granting the rights of use for radio spectrum and where justified on the grounds that, in the area subject to such obligations, the market-driven deployment of infrastructure for the provision of networks or services which rely on the use of radio spectrum is subject to insurmountable economic or physical obstacles and therefore access to networks or services by end-users is severely deficient or absent. This provision was provided in order to cover the cases in extreme cases in rural areas, but not for provision of national roaming for a portion of the country's territory.

**(3) What provision of the EECC or of Union law prevents a Member State, while aiming to secure adequate access and interconnection, from implementing an obligation to provide access (in compliance with the general objectives of the EECC as a condition for such decision on access)?**

Please see the answer to questions 1 and 2. There is no general obligation in the EECC for the operators to provide access to their network or facilities, other than those specific obligations discussed above, in particular as per Article 60(1) EECC. To infer such a general obligation from the provisions of the Directive would be in contradiction to one of its fundamental objectives, which is the promotion of competition (see, *inter alia*, Recital 23).

**(4) Under which provision of EECC or Union law the access may not be the subject of dispute settlement between undertakings (Article 26 EECC), in particular in the case if general objectives are met and if negotiations failed, or if negotiations cannot be classified as in good faith? Based on case law on access and principles, the NRA considers that that neither the form nor the exhaustive (even negative) way of dealing with the failure of the negotiations on access is specified, nor the form and manner in which the Member State exercises its power to secure adequate access.**

Disputes under Art 26 EECC may be launched and resolved if that dispute arises in connection with existing obligations under the EECC between providers of electronic communications networks or services in a Member State, or between such undertakings and other undertakings in the Member State benefiting from obligations of access or interconnection or between providers of electronic communications networks or services in a Member State and providers of associated facilities. If the dispute deals with obligations under Article 61 EECC, the specific provisions of the Article should be respected.

**(5) How does the European Commission interpret the definition of access, which in itself includes access to fixed and mobile networks, in particular access to roaming? Where specifically EECC narrows the definition to a specific form of roaming such as e.g. international roaming only, which is regulated by separate EP and Council regulations? The NRA concludes that the definition of "access" cannot be narrowed and the NRA cannot subsume under the term of "access" only selected forms of access, with respect to the very broad definition of "access" and aiming to develop competition (see the definition in Article 2 (27) EECC).**

‘Access’ is defined in Article 2(27) EECC. While access to fixed and mobile networks, including wholesale mobile origination (i.e. ‘national roaming’), falls under scope of ‘access’, not all rights and obligations of undertakings relative to ‘access’ can be interpreted as a straightforward right and obligation to provide wholesale mobile origination without having carried out market analysis process by the NRA.