

Ms Renate Nikolay,
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European Commission
Rue de la Loi 200

B-1049 Brussels

The Consumer Voice in Europe

By Email

Ref.: BEUC-X-2023-066

30 May 2023

Subject: BEUC's views on the Commission's draft Gigabit Recommendation

Dear Ms Nikolay, Dear Renate,

On behalf of BEUC – The European Consumer Organisation, I would like to share our concerns regarding the European Commission's proposed Recommendation on the Regulatory Promotion of Gigabit Connectivity.¹

Although the proposed recommendation is not a binding instrument for Member States, we consider that the draft Gigabit Recommendation contains several problematic provisions that risk undermining the effective application of the European Electronic Communications Code (EECC) and could contradict or limit its interpretation. Consequently, the Recommendation could ultimately have negative consequences for consumers. If not amended, the draft Recommendation could:

- **Encourage deregulation & limit discretionary powers of NRAs:**² points 39-41 of the draft Recommendation go beyond article 74(1) of the EECC, as national regulatory authorities (NRAs) are asked to refrain from adopting wholesale price control obligations on telecom operators with 'Significant Market Power' (SMP operators). Point 33 could also restrict which type of remedies NRAs can impose on SMP operators, preventing the imposition of further measures under article 73 EECC if remedies have already been imposed under article 72 EECC.
- **Oblige NRAs to go beyond the EECC:**³ recital 15 of the draft Recommendation reverses the logic of article 79 of the EECC. While the EECC states that SMP operators may present commitments to NRAs, the draft Recommendation would oblige NRAs to "encourage" these operators to propose voluntary commitments, incentivising their acceptance of such commitments instead of imposing the regulatory obligations which are already foreseen in the EECC.

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¹ <https://digital-strategy.ec.europa.eu/en/library/gigabit-connectivity-recommendation>

² Concerns reflected as well in BEREC's Opinion on the Draft Gigabit Connectivity Recommendation, pages 18-26. Document available at: https://www.berec.europa.eu/system/files/2023-05/BoR%20%2823%29%2083%20Draft%20BEREC%20Opinion%20on%20the%20draft%20Gigabit%20Recommendation_final_post%20BoR%20comments_clean_pdf

³ *Ibid*, page 9.

- **Raise prices and barriers to access:**⁴ points 76-81 of the draft Recommendation would provide a wrong incentive to SMP operators to raise the wholesale prices for access to legacy copper networks for alternative operators during the phasing-out period, and to 'Very High-Capacity Networks' (VHCN) without sufficient justification or appropriate safeguards for competition and rights of end-users.

BEUC shares the concerns recently reflected in the expert opinion by the Body of European Regulators of Electronic Communications (BEREC), of 5 May 2023.⁵ BEREC considers that the abovementioned provisions of the draft Recommendation "do not seem to be entirely in line with the provisions of the Code", which either "go beyond" or are "incompatible" with the EECC.

As BEREC rightly points out⁶, the deployment of network infrastructure to achieve a better and high-quality connectivity for all consumers must go together with promoting competition and consumer protection. However, the current wording of the draft Recommendation assumes that incentives for network deployment can only be achieved by indirectly supporting SMP operators, either via market deregulation or flexibility in the pricing of access to their fixed networks. In doing so, the potential negative impact of such measures on consumers, for example rising prices in a context of high inflation and cost-of-living crisis, are not taken into account. The draft Recommendation does not consider other possible alternatives, such as available public funding, as well as the role of competition as the main driver of the network investment.

Similarly, alternative operators have also stated that the draft recommendation "infringes the provisions and principles in the EECC"⁷ and could constitute a potential license for incumbents to move away from cost-based wholesale access, which has been a success story of the EU's telecoms policy for two decades.

We urge the European Commission to change the draft recommendation. Otherwise, the consequences for consumers could be dire. The draft Recommendation would likely discourage NRAs from adopting competitive, consumer-friendly measures whenever they depart from the Commission's interpretation, given that such ad hoc measures are subject to the scrutiny (and possible rejection) of the Commission under the control procedure of articles 32 and 33 of the EECC. If not changed, the draft Recommendation could significantly impact the contestability of markets by reinforcing the market positions of incumbent telecom operators, without the assurance that such measures will translate into substantial increases of network infrastructure investments. Ultimately, deregulating price controls would translate into higher prices for consumers.

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⁴ *Ibid*, pages 41-45.

⁵ BEREC's Opinion on the Draft Gigabit Connectivity Recommendation, available at: https://www.berec.europa.eu/system/files/2023-05/BoR%20%2823%29%2083%20Draft%20BEREC%20Opinion%20on%20the%20draft%20Gigabit%20Recommendation_final_post%20BoR%20comments_clean_0.pdf

⁶ BEREC Opinion on the Draft Gigabit Connectivity Recommendation, page 2.

⁷ https://www.ectaportal.com/images/Press_Releases/ECTA_-_Analysis_of_Draft_Gigabit_Connectivity_Recommendation_-_26.04.2023_final.pdf

We trust the European Commission will take the opinion of BEREC into account in line with article 38(1) of the EECC and thank you in advance for considering our recommendations.

We remain at your disposal for any question or comment you may have.

Yours sincerely,

Ursula Pahl
Deputy Director General

Cc:

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