

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 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;

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- 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
- 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).