

TITLE III: SPECIFIC PROVISIONS ON VERY HIGH CAPACITY NETWORKS¹

ARTICLE 78C

DEFINITION

(2) 'very high capacity network' means an electronic communications network which either consists wholly of optical fibre elements at least up to the distribution point at the serving location or **any other type of network** which is capable of delivering under usual peak-time conditions **similar** network performance in terms of available down- and uplink bandwidth, resilience, error-related parameters, and latency and its variation. Network performance **shall be assessed on the basis of technical parameters** regardless of whether the end-user experience varies due to the inherently different characteristics of the medium by which the network ultimately connects with the network termination point.

Article 78d

Geographical surveys/forecasts

1. In conducting a geographical survey pursuant to Article 22, national regulatory authorities may include a three-year forecast of the reach of very high capacity networks within their territory, relying on publicly available information.

This forecast may include information on planned deployments by any undertaking or public authority, in particular to include very high capacity networks and significant upgrades or extensions of legacy broadband networks to at least the performance of next-generation access networks.

The information collected should be at an appropriate level of local detail and include sufficient information on the quality of service and parameters thereof.

2. National regulatory authorities may designate a "digital exclusion area" corresponding to an area with clear territorial boundaries where, on the basis of the information gathered pursuant to paragraph 1, it is determined that for the duration of the relevant forecast period, no undertaking or public authority has deployed or is planning to deploy a very high capacity network or has significantly upgraded or extended its network to a performance of at least 100 Mbps download speeds, or is planning to do so. National regulatory authorities shall publish the designated digital exclusion areas.

3. Within a designated digital exclusion area, national regulatory authorities may issue a call open to any undertaking to declare their intention to deploy very high capacity networks over the duration of the relevant forecast period. The national regulatory authority shall specify the information to be included in such submissions, in order to ensure at least a similar level of detail as that taken into consideration in the forecast. It

¹ DR AM 135. Justif: This introduces the new Title III of Part II, focusing on aspects of particular relevance for very high capacity networks. It gathers the elements relevant to very high capacity networks in one accessible Title, and also suggests some additional provisions. All AMs under the new Title are inextricably linked to other admissible AMs.

shall also inform any undertaking expressing its interest whether the designated digital exclusion area is covered or likely to be covered by an NGA network offering download speeds below 100 Mbps on the basis of the information gathered.

4. When national regulatory authorities take measures pursuant to paragraph 3, they shall do so according to an efficient, objective, transparent and non-discriminatory procedure, whereby no undertaking is a priori excluded.²

[Article 78e

Access remedies

1. When considering the appropriateness of imposing any of the possible specific obligations pursuant to this Directive with respect to a very high capacity network, national regulatory authorities shall have particular regard to investments in and risk levels associated with such networks.

2. In determining whether or not price control obligations would be appropriate, national regulatory authorities shall take into account long-term end-user interests related to the deployment and take-up of very high capacity networks.^{3]}

Article 78f

Regulatory treatment of new very high capacity network elements

1. Without prejudice to the assessment by national regulatory authorities of co-investment in other types of networks, a national regulatory authority shall **determine** not to impose obligations as regards new very high capacity networks that are part of the relevant market on which it intends to impose or maintain obligations in accordance with Articles 66 and Articles 67 to 72 and that ~~the~~ **a relevant** operator ~~designated as significant market power on that relevant market~~ has deployed or is planning to deploy, if **it concludes that** the following cumulative conditions are met:

(a) the deployment of the new network elements is open to co-investment **at any point during their lifetime by any operator** offers according to a transparent process and on terms which ~~favour~~ **ensure** sustainable competition in the long term including inter alia fair, reasonable and non-discriminatory terms offered to potential co-investors; flexibility in terms of the value and timing of the commitment provided by each co-investor; possibility to increase such commitment in the future; reciprocal rights awarded by the co-investors after the deployment of the co-invested infrastructure;

(aa) at least one co-investment agreement based on an offer made pursuant to (a) has been concluded and the co-investors are or intend to be service providers, or to host such providers, in the relevant retail market and have a reasonable prospect of competing effectively;

(b) access seekers not participating in the co-investment can benefit from the same quality, speed, conditions and end-user reach as was available before the deployment, either through commercial agreements based on fair and reasonable terms or by

2 DR AM 137

3 DR AM 138

means of regulated access maintained or adapted by the national regulatory authority;

National regulatory authorities shall determine whether the conditions above are met including by consulting with relevant market participants. When assessing co-investment offers, and processes and agreements referred to in point (a) of the first subparagraph, national regulatory authorities shall ensure that those offers, ~~and~~ processes and agreements comply with the criteria set out in Annex IV.⁴

2. When assessing co-investment offers, national regulatory authorities may decide to conduct a market test by consulting potentially interested parties.

3. Where the offer has not been taken up by other operator and the cumulative conditions in point (a) and (b) in the first paragraph are still met, a national regulatory authority may determine not to impose obligations.

Article 78g

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 65 shall inform the national regulatory authority in advance and in a timely manner when they plan to replace parts of the network, which are subject to obligations pursuant to Articles 66 to 77, with a very high capacity network.~~

~~2. The national regulatory authority shall ensure that the decommissioning process includes a transparent timetable and conditions, including inter alia an appropriate period of notice and for transition, and establishes the availability of alternative comparable products providing access to network elements substituting the decommissioned infrastructure if necessary to safeguard competition and the rights of end users.~~

~~With regard to assets which are proposed for decommissioning, the national regulatory authority may withdraw the obligations after having ascertained:~~

~~(a) the access provider has demonstrably established the appropriate conditions for migration, including making available a comparable alternative access product enabling to reach the same end users, as was available using the legacy infrastructure; and~~

~~(b) the access provider has complied with the conditions and process provided to the national regulatory authority in accordance with the present Article.~~

~~Such withdrawal shall be implemented in accordance with the procedures referred to in Articles 23, 32 and 33.⁵⁶~~

4 DR AM 139

5 DR AM 140

6 Agreed wording included in Access CA (pending final placing)

Article 78h

Demand aggregation

Member States shall not impose more onerous provisions, whether with respect to duration, interest rates or otherwise, on operator financing of the deployment of a very high capacity physical connection to the premises of an end-user than they do on financial institutions, including where such operator financing is by way of instalment contract.⁷

Article 78i

Technical regulations on electromagnetic fields

The procedures under Directive 2015/1535 shall apply with respect to any draft Member State measure that would impose more stringent requirements with respect to electromagnetic fields than provided for in Council Recommendation No 1999/519/EC.⁸

Article 78j

BEREC guidelines on very high capacity networks

By [transposition date], BEREC shall, after consulting stakeholders and in close cooperation with the Commission, issue guidelines on the criteria a network has to fulfil in order to be considered a very high capacity network. The national regulatory authorities shall take those guidelines into utmost account. BEREC shall update the guidelines by 31 December 2025, and thereafter every [three years].⁹

⁷ DR AM 141. Justif: This is a version of the proposed Art 98(1) second subparagraph of the Directive, focussed on deployment of very high capacity network connection and ensuring equivalence between financing of the connection by the operator and financial institutions.

⁸ DR AM 142. Justif: This AM aims to ensure, subject to any necessary further technical work, that the well-established process under Directive 2015/1535 (which codified Directive 98/34) on a procedure for the provision of information in the field of technical regulations and of rules on Information Society services would also apply with respect to protection against electromagnetic fields. This provides transparency as MS measures in this respect (which may also constitute an obstacle to trade) are notified to other MS and the Commission, and enables the Commission and other MS to comment. It would thereby also allow an overview at Union level of the implementation of Council Recommendation No 1999/519/EC.

⁹ DR AM 143.