



EUROPEAN COMMISSION

Directorate-General for Communications Networks, Content and Technology

Electronic communications, networks and services

DRAFT PUBLIC QUESTIONNAIRE

Consultation on the proposed Recommendation for Internal Market Procedures under the European Electronic Communications Code

Introduction

- Background

On 21 December 2020, the [European Electronic Communications Code](#) (the Code) will replace the [current framework](#) for the regulation of electronic communications networks and services. This change in regulation necessitates an update of the procedures in place to reflect the new provisions which will start to apply with the entry into application of the Code.

The present initiative for a '*Recommendation for Internal Market Procedures under the Code*' (the *Recommendation*) aims to update the existing [Procedural Recommendation](#), issued in 2008. The initiative seeks to provide National Regulatory Authorities (NRAs) with updated and clear guidance on the form, content, time limits and level of detail of the notifications and related procedures under the Code and based on past experience from the Commission and the NRAs.

Under Articles 32 and 33 of the Code (currently under Articles 7 and 7a of the Framework Directive), NRAs are required to notify the Commission, the Body of European Regulators for Electronic Communications (BEREC) and the NRAs in other Member States of their draft measures. The internal market procedures defined by these provisions aim to ensure that the regulation of electronic communications markets is consistent across the Union. The Recommendation will provide NRAs procedural certainty in their dealings with the Commission, BEREC and each other to ensure efficient and timely collaboration, as required by the Code and the fast-paced electronic communications industry.

The Commission services seek stakeholders' feedback on their experience with implementation aspects of the existing Procedural Recommendation, as well as views and suggestions concerning the need for any clarification of procedural issues related to both existing provisions and new provisions introduced by the Code.

Due to the technical nature, this consultation is largely aimed at NRAs and BEREC but everybody is welcome to take part in the consultation.

Thank you for your contribution.

- The proposed initiative

The Commission services' preliminary assessment suggests that the proposed update exercise could encompass the following possible changes to the existing Procedural Recommendation:

Substance-related changes:

- i. Clarify the form, content and level of detail to be given in the notifications and when Standard Form Notifications are required, in particular with reference to:
 - a. **new procedural aspects introduced by the Code**, i.e. in particular draft measures notified under Articles 61 and 76 of the Code (symmetric access obligations and co-investment offers) and under Articles 80 and 81 (wholesale-only undertakings, migration from legacy infrastructure). Further, the initiative aims to generally cover other provisions and procedures introduced by the Code, such as the so-called double-lock veto in Article 33(5)(c) and the new 5-year market analysis time-frame in Article 67(5)(a);
 - b. **measures adopted under other provisions** (for example under Article 97 of the Code in conjunction with Article 61 of the Code);
- ii. Explain the notification and related procedures (under Article 68(3), Code) for the imposition on operators designated as having SMP of obligations (in exceptional circumstances) others than those access remedies already indicated in Articles 69 to 74, 76 and 80 of the Code.
- iii. Emphasise the importance of the holistic approach to the assessment of the draft measures and recommend that remedies are included in the same draft measure concerning the market analysis, or at least notified at the same time.

Technical changes:

- iv. Clarify procedural aspects related to the withdrawal of notified draft measures by NRAs in the light of Article 32(11) of the Code.
- v. Encourage and provide further guidance on informal pre-notification meetings with the Commission services.
- vi. Specify the cases where a standard notification or a short notification form is recommended as well as those circumstances (if any) where a notification would not be required, in line with Article 34 of the Code.
- vii. Update the set of Notification Forms (templates) for both Standard and Short Form Notifications.
- viii. Update and increase transparency on publication of documents and protection of confidential information.
- ix. Reflect the new numbering and cross-referencing of provisions in the Code and in other relevant instruments, i.e. amended Commission Recommendation on relevant markets.

About you

1) * Language of my contribution
[Single Choice][Select Box]

2) * I am giving my contribution as

- **National Regulatory Authority (NRA)**
- Electronic communications network or service provider
- Other public authority
- Industry association
- Consultancy
- Think tank
- Law firm
- Consumer association
- Citizen
- Other

La Comisión Nacional de los Mercados y la Competencia (CNMC) agradece la oportunidad de participar en la consulta pública sobre la Recomendación de Procedimientos de Mercado Interior conforme al Código Europeo de las Comunicaciones Electrónicas (Recomendación de Procedimientos), que reemplazará a la Recomendación 2008/850/CE, de 15 de octubre de 2008, sobre las notificaciones, los plazos y las consultas previstos en el artículo 7 de la Directiva 2002/21/CE del Parlamento Europeo y del Consejo, relativa a un marco regulador común de las redes y los servicios de comunicaciones electrónicas.

En su contribución, la CNMC centrará sus comentarios en las cuestiones que abordan los aspectos que han sido objeto de consideración por la CNMC en el pasado, a la luz de su experiencia en el marco de los procedimientos de consulta y cooperación establecidos conforme a los artículos 6 y 7 de la Directiva 2002/21/CE, de 7 de marzo de 2002, relativa a un marco regulador común de las redes y los servicios de comunicaciones electrónicas (Directiva marco).

De manera adicional, se efectúan una serie de consideraciones puntuales en relación con las posibles adaptaciones que pueda ser necesario efectuar a la Recomendación de Procedimientos, a la luz de la Directiva (UE) 2018/1972 de 11 de diciembre de 2018 por la que se establece el Código Europeo de las Comunicaciones Electrónicas (Cuestiones 12-19).

3) * **First name**
[Free Text]

4) * **Surname**
[Free Text]

5) * **Email** (this won't be published)
[Free Text]

6) ↑ Transparency register number
Check if your organisation is on the [transparency register](#). It is a voluntary database for Organisations seeking to influence EU decision-making.
[Free Text]

7) * **Country of origin**
Please add your country of origin, or that of your organisation.
[Single Choice][Select Box]

8) * Publication privacy settings

The Commission will publish the responses to this consultation. You can choose whether you would like your details to be made public or to remain anonymous.

O Anonymous

Only your type of respondent, country of origin and contribution will be published. All other personal details (name, organisation name and size, transparency register number) will not be published

O Public

Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

9) ☐ I agree with the personal data protection provision.

Consultation Questions

I. Feedback on the 2008 Procedural Recommendation and current practices

The electronic notifications of draft measures by national regulatory authorities (NRAs) takes place in the context of Articles 7 and 7a of the Framework Directive, which will be replaced by Article 32 and 33 of the Code (also referred to as “the internal market procedures” in the context of this document). Procedural aspects of the internal market procedures are governed by the Procedural Recommendation, issued in 2008. The questions in this section refer mostly to the experience with the 2008 Procedural Recommendation and aim at understanding what kind of improvements in the procedure are needed based on the past experience.

1) Means of transmission of the notification

Article 32(3) of the Code, provides that: *“Except where otherwise provided in recommendations or guidelines adopted pursuant to Article 34 upon completion of the public consultation, if required under Article 23, where a national regulatory authority intends to take a measure which:*

(a) falls within the scope of Article 61, 64, 67, 68 or 83; and

(b) would affect trade between Member States,

it shall publish the draft measure and communicate it to the Commission, to BEREC, and to the national regulatory authorities in other Member States, at the same time, stating the reasons for the measure...”

The current Procedural Recommendation provides, in point 2, that national draft measures by NRAs should be notified by electronic mail with a request for acknowledgement of receipt. In the meanwhile, the CIRCABC platform has been introduced by the Commission and is used for, amongst other things, the notification of draft measures and for facilitating the exchange of information between the NRAs, the Commission and BEREC.

Question 1.1 Based on your experience, do you have any remark on the functioning and efficiency of the CIRCABC platform, and more broadly on the technical aspects of communication with the Commission, BEREC and other NRAs?

☒ Yes

☐ No

Please explain.

De acuerdo con la experiencia de la CNMC, el funcionamiento de la plataforma es adecuado y cumple con las condiciones técnicas necesarias para realizar las notificaciones a la CE y facilitar el intercambio de información entre las ANRs, la CE y BEREC.

Question 1.2 Based on your answer above, would you support that the notifications of draft measures can be done solely by uploading draft measures to CIRCABC platform and not by email?

☒ Yes

☐ No

Please explain.

2) Short Notification Forms

Recital 84 of the Code indicates that: *“Having regard to the short time-limits in the consultation mechanism at Union level, powers should be conferred on the Commission to adopt recommendations or guidelines to simplify the procedures for exchanging information between the Commission and national regulatory authorities, for example in cases concerning stable markets, or involving only minor changes to previously notified measures”*.

The current Procedural Recommendation describes, in point 6, the categories of draft measures that should be made available to the Commission by means of a short notification form and a template form is contained in Annex II to the Recommendation. Currently the following draft measures should be notified by means of a short notification form:

- (a) draft measures concerning markets, not listed in the Recommendation on relevant markets, where the market is found to be competitive by the NRA, or where the NRA considers that based on the “three-criteria test” these markets are no longer susceptible to *ex ante* regulation;
- (b) draft measures concerning markets which, while included in the Recommendation on relevant markets, had been found to be competitive in a previous market review, and remain competitive;
- (c) draft measures that change the technical details of previously imposed regulatory remedies and do not have an appreciable impact on the market (e.g. annual updates of costs and estimates of accounting models, reporting times, delivery times); and
- (d) draft measures concerning a relevant market that has already been analysed and notified in relation to other undertakings, where the NRA imposes similar remedies on other undertakings, without materially changing the principles applied in the previous notification.

Question 2.1 Do you have any experience in using a short notification form?

☒ Yes

☐ No

If yes, please provide any relevant feedback on your experience and describe any question or issues encountered in relation to short notification forms.

La CNMC ha hecho uso del formulario de notificación abreviado, en aquellas instancias en que los proyectos de medida comunicados a la Comisión Europea encajaban en los supuestos contemplados en el apartado 6 de la Recomendación 2008/850/CE.

Question 2.2 In your view, would it be appropriate to continue use of a short notification form in cases specified instead of the standard notification form?

☒ Yes

☐ No

Please explain.

El formulario de notificación abreviado es un instrumento útil, cuyo empleo podría sin embargo reforzarse. En particular, resulta evidente que el uso de uno u otro formulario de notificación (estándar o abreviado) no tiene un impacto significativo en la forma y plazos en que se tramitan los procedimientos contemplados por los artículos 6 y 7 de la Directiva marco, desde el momento en que el plazo de un mes para que la Comisión Europea, el Organismo de Reguladores Europeos de las Comunicaciones Electrónicas (ORECE) y las Autoridades Nacionales de Reglamentación (ANR) se pronuncien sigue resultando de aplicación, y la Comisión Europea en la práctica ha venido formulando comentarios a los proyectos de medida comunicados a través del formulario de

notificación abreviado. En este contexto, resulta pertinente valorar posibles cauces que maximicen la eficacia y utilidad del procedimiento de notificación abreviado.

Question 2.3 Should the category of cases to be notified by way of Short Notification Form be expanded and, if yes, to which types of measures?

☐ Yes

☐ No

Please explain.

En opinión de la CNMC, las categorías de proyectos de medida que, según el apartado 6 de la Recomendación 2008/850/CE, pueden ser objeto de notificación conforme al formulario abreviado siguen resultando pertinentes. En todo caso, podría considerarse la extensión de la categoría contemplada en el apartado c) del apartado 6 ("proyectos de medidas que modifiquen los detalles técnicos de medidas regulatorias impuestas anteriormente y no tengan un impacto apreciable en el mercado"), de tal forma que con carácter general pudieran ser objeto de notificación conforme al formulario abreviado los proyectos de medida cuyo objeto sea exclusivamente la modificación o concreción de medidas regulatorias impuestas previamente que no tengan un impacto apreciable en el mercado (esto es, con independencia de que se modifiquen exclusivamente detalles técnicos u otro tipo de aspectos).

En definitiva, se propone revisar el sistema actual de notificaciones, de tal manera que para los proyectos de medida cuyo objeto sea exclusivamente la modificación o concreción de medidas regulatorias impuestas previamente que no tengan un impacto apreciable en el mercado, la regla general sea el uso del formulario de notificación abreviado.

En la sección 4 ("Circunstancias en las que no se requeriría notificación") se hacen una serie de consideraciones adicionales en relación con esta cuestión.

Question 2.4 Do you have any suggestions concerning possible further simplification of the treatment of those cases to be notified under short form by the Commission?

☐ Yes

☐ No

Please explain.

La reducción de los plazos en que la Comisión Europea puede formular observaciones a los proyectos de medida comunicados según el formulario de notificación abreviado podría resultar de utilidad, y dotaría de mayor sentido a dicho procedimiento.

En particular, la Comisión Europea podría señalar en su Recomendación que los proyectos de medida notificados conforme al procedimiento abreviado en principio no darán lugar a comentarios por parte de la Comisión Europea (tal y como ya estipula el Considerando (16) de la Recomendación 2008/850/CE) y de ser posible serán evaluados en un plazo inferior al plazo de un mes fijado por defecto. Todo ello lógicamente sin perjuicio de la posibilidad de que la Comisión Europea se pudiese apartar de dichos principios generales de actuación, en casos que revistan una mayor complejidad o requieran de un pronunciamiento expreso por parte de este organismo.

3) Standard Notification Forms

The current Procedural Recommendation indicates, in point 8, that draft measures (other than those subject to the short notification form) should be made available via the standard notification form set in Annex I. This point further indicates which categories of information should be included in the notified draft measure.

While it may be necessary to consider the additional information which would be relevant in light of the new provisions of the Code (see questions 12 to 16 in particular), this section focuses on the feedback that national regulatory authorities and other stakeholders may want to provide based on their experience under the current framework.

Question 3 Based on your experience in using the standard notification form, or in consulting on a notified draft measure on CIRCABC, do you have suggestions regarding the categories of information that should/should not be provided by the NRA when notifying a draft measure under the standard notification form?

☒ Yes

☐ No

Please explain

La información mínima contemplada en el apartado 8 y en el Anexo I de la Recomendación 2008/850/CE resulta en principio razonable, delimitando de manera equilibrada la información que resulta necesaria para poder entender el contenido de la notificación sin, por otra parte, suponer una carga desproporcionada para la ANR encargada de la notificación. Procede señalar que el formulario de notificación estándar constituye en muchos casos una herramienta útil de entrada para que el resto de ANR puedan estar informadas del contenido y alcance de las medidas regulatorias planteadas por la ANR notificante.

En todo caso, dada su importancia y el carácter particular de los supuestos allí contemplados (imposición de obligaciones de acceso más allá del primer punto de concentración o distribución; tratamiento normativo de los nuevos elementos de las redes de muy alta capacidad), se propone desarrollar en Anexo un nuevo formulario de notificación que contemple específicamente los casos en que la Comisión Europea y el ORECE dispondrán de manera conjunta de un derecho de veto (artículos 61(3) apartado 2º y artículo 76(2) del Código).

4) Circumstances in which no notification would be required

Articles 32(3) and 34 of the Code provide that the Commission may lay down circumstances in which notifications would not be required. Recital 84 indicates that “Powers should also be conferred on the Commission in order to allow for the introduction of a notification exemption in order to streamline procedures in certain cases.” This possibility, which exists under the current framework, has not been used.

Question 4 Do you identify any circumstances where you consider that it would be appropriate to lay down an exemption to the notification requirement?

☒ Yes

☐ No

If yes, please specify such circumstances and explain how, in your view, they should be defined in order to avoid creating legal uncertainty.

El mecanismo de exención de la obligación de notificación contemplado en el Considerando (84) del Código podría configurarse como una herramienta útil para permitir concentrar los recursos disponibles en las notificaciones que realmente pueden tener un impacto en el mercado interior.

A estos efectos, la Recomendación de Procedimientos podría establecer una serie de criterios generales, conforme a los cuales cabría concluir que una medida regulatoria está exenta de la obligación de notificación. Entre dichos criterios, podría hacerse referencia a (i) el limitado impacto esperado de la medida en el mercado; (ii) la ausencia de modificación sustancial de una medida previamente adoptada por la ANR (p.ej., cuando la medida consiste simplemente en la actualización periódica de determinados valores); (iii) la naturaleza puramente instrumental o accesoria de la medida planteada respecto de las obligaciones principales impuestas al operador con poder significativo de mercado.

5) Timing and substance of the notification of draft measures under Articles 64, 67 and 68

Article 64 of the Code describes the procedure for the identification and definition of markets, which is the basis for the market analysis procedure set out in Article 67 and the imposition, amendment or withdrawal of obligations pursuant to Article 68. All such steps are subject to the internal market procedures referred to in Articles 32 and 33. The Commission has repeatedly stressed the importance of a coordinated national consultation and notification to the Commission of all relevant steps of the market analysis and assessment of remedies. This is important for the Commission to carry out a proper assessment of the NRAs' draft measures.

This is without prejudice to the obligation for NRAs set in Article 68(6) to consider the impact of new market developments and the necessity to review the remedies imposed on the undertaking found to have significant market power (SMP) in order to ensure their continued appropriateness.

Question 5.1 In your view, is there a need for guidance from the Commission on the links, as regards the timing and content of notifications, between the three-criteria test (where relevant), the market definition, the assessment of significant market power and the analysis of regulatory obligations?

☐ Yes

☒ No

If yes, please explain and provide any relevant suggestions.

Question 5.2 Should the Commission recommend that all those analyses have to be notified at the same time, in order to be able to comprehensively assess the proposed measures and their impact on the market?

☐ Yes

☒ No

If yes, please explain and provide any relevant suggestions.

6) Requests for information

The current Procedural Recommendation indicates, in point 13, that the Commission may seek further information or clarification from the NRA concerned. This point further clarifies that the NRA should endeavour to provide the information requested within three working days, where this is readily available.

Question 6.1 In your experience, did you encounter any issues in relation to Commission requests for information?

☒ Yes

☐ No

If yes, please describe the issues and provide any relevant suggestions that could in your view help address them.

El establecimiento de un plazo de tres días para la remisión de la información solicitada por la Comisión Europea resulta en principio razonable, tomando en consideración los estrictos plazos de tiempo a los que debe conformarse dicho organismo (valoración del proyecto de medida notificado en el plazo máximo de un mes).

Podría en todo caso valorarse recoger en la Recomendación lo que constituye una práctica habitual de la Comisión Europea en el caso de requerimientos de información muy detallados o que precisan de un elevado esfuerzo por parte de las ANR, permitir que la información se remita por fases (una primera parte de la información, y en particular información que puede considerarse fundamental, se remite al cabo de 3 días; una segunda parte de la información se remite 1 ó 2 días después, etc...).

Los plazos y formato en que se remitirá la información deberían poder en todo caso ser objeto de valoración conjunta por parte de la Comisión Europea y la ANR competente, atendiendo a las circunstancias de cada caso concreto.

Question 6.2 Do you identify information, other than those provided under standard notification form and discussed in section 3 of the present questionnaire, which could be better provided systematically at the initial notification stage?

☐ Yes

☒ No

If yes, please explain.

7) Treatment of confidential information

The current Procedural Recommendation refers, in points 15 to 17, to the publication and communication of the Commission's comments. This publication/communication may raise questions about the treatment of information, the confidentiality of which may be protected under EU or national law. In addition, handling of the notified confidential measures by the Commission and sharing them with BEREC and other NRAs needs to be carefully assessed.

Article 32(3) of the Code provides that, in those cases where an NRA is obliged to communicate draft measures under the notifications mechanism, it shall do so *"to the Commission, to BEREC, and to the national regulatory authorities in other Member States, at the same time, stating the reasons for the measure"*. Under Article 20(3) of the Code, the Commission, national authorities and BEREC should ensure the confidentiality of information transmitted to them for the application of the Code. Confidentiality should not prevent the sharing of information between these entities in a timely manner.

The requirement of simultaneous notification set in Article 32(3) implies that the documents shared with the Commission would, in principle, be shared with NRAs and BEREC. Such sharing of information would be relevant for the different steps of the internal market procedure (including initial notification and, possibly, the replies to the requests for information) given that the possibility to comment on draft measures is not limited to the Commission but extends to NRAs and BEREC. It would moreover be of particular importance in view of the enhanced role of BEREC under the Code (see question 13). It is therefore essential to ensure a secure process that keeps all involved parties (BEREC, NRAs) equally informed, while fully respecting the principles of confidentiality.

Question 7.1 In your experience, have you observed any issues in the treatment of confidential information concerning draft measures notified under Article 7 of the Framework Directive?

☐ Yes

☐ **No**

If yes, please explain.

Question 7.2 Do you have any suggestions concerning additional safeguards that the Commission should adopt, or should recommend to NRAs or BEREC in relation to the treatment of confidential information in the context of the procedure now laid down in Articles 23, 32 and 33 of the Code?

☐ Yes

☒ **No**

If yes, please explain.

Question 7.3 Do you have any suggestions concerning specifically the treatment of confidential information in the relevant exchanges between the Commission, the relevant NRA and BEREC during so-called “Phase II investigations” carried out by the Commission pursuant to Articles 32 or 33 of the Code, which require the opinion of BEREC?

☐ Yes

☒ **No**

If yes, please explain.

Question 7.4 In your opinion, can CIRCABC platform be used to share simultaneously draft measures (including confidential information), under Article 7 of the Framework Directive (Article 32 of the Code), with BEREC and the NRAs?

☐ Yes

☐ **No**

Please explain and, if yes, explain what kind of confidentiality safeguards would be needed to allow for the simultaneous exchange of the draft measures (including confidential information) with BEREC and the NRAs.

Compartir de manera sistemática la información confidencial de todas las notificaciones resulta desproporcionado. Los reguladores ya tienen acceso a la información no confidencial de las notificaciones. Esta información es suficiente para que puedan valorar el caso y solicitar acceso a la versión confidencial si lo consideran necesario para emitir comentarios a la propuesta de medida.

8) Notification of draft decisions imposing exceptional remedies under Article 68(3) of the Code

Under Article 68(3) of the Code, where a NRA intends to impose on undertakings designated as having SMP obligations for access or interconnection other than the remedies contained in the regulatory toolbox specified in the Code (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. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 118(3). This procedure, which currently exist but has never been used, would for instance be applicable in the situation where an NRA intends to impose a functional separation obligation under Article 75 of the Code.

The current Procedural Recommendation indicates, in point 18, that the Commission will normally take a decision authorising or preventing the national regulatory authority from adopting the proposed draft measure within a period not exceeding three months, but that it may decide to extend this period for a further two months in view of difficulties raised.

Question 8 Do you have any remarks on the guidance provided in point 18 of the current Procedural Recommendation and do you identify other aspects of this procedure on which additional guidance would, in your view, be useful?

☐ Yes

☒ No

If yes, please explain and describe the issues and provide any relevant suggestions that could in your view help address them.

9) Requirements concerning communication of final measures

The current Procedural Recommendation indicates, in point 20, that where a NRA adopts the draft measure after receiving comments from the Commission or another NRA made in accordance with Article 7(3) of Directive 2002/21/EC, it shall communicate to the Commission and other NRAs about the manner in which it took the utmost account of the comments made.

However, in practice, this communication to the Commission and to other NRAs varies from one Member States to another.

Question 9 Do you consider that it would be appropriate to provide additional guidance on how to communicate the manner in which an NRA took utmost account of comments made by the Commission, BEREC or other NRAs?

☐ Yes

☒ No

Please explain and, if yes, describe what kind of additional guidance you would consider to be useful.

10) Pre-Notification Meetings with the Commission Services

Point 21 of the current Procedural Recommendation mentions informal discussions of a draft measure between the Commission and an NRA prior to notification. Such pre-notification contacts usually take place in the form of meetings (physical meeting and/or telephone or video conferences) and represent an established practice, although at present they do not systematically occur before every notification.

Question 10.1 In your experience, do you find such pre-notification exchanges between the Commission and NRAs useful?

☒ Yes

☐ No

Please explain, provide views on your experience with pre-notification exchanges and describe any specific issues encountered.

Las reuniones de pre-notificación con la Comisión Europea han demostrado ser una herramienta particularmente útil, gracias a la cual las principales cuestiones que pueden tener un impacto en el desarrollo de los mercados sometidos a regulación ex ante pueden ser analizadas con carácter previo a la notificación del proyecto de medida correspondiente. Las reuniones de pre-notificación permiten a la ANR notificante explicar con anterioridad a la notificación los motivos por los que opta por la adopción de determinadas medidas regulatorias frente a otras medidas posibles, clarificando las dudas que se le puedan plantear a la Comisión Europea, y de esta manera en cierta medida reduciendo los riesgos de apertura de una Fase II o la emisión de requerimientos de información extensos en el marco del procedimiento de cooperación previsto en los artículos 32 y 33 del Código. De la misma manera, la ANR notificante se beneficia de la extensa experiencia de la Comisión Europea

en este tipo de procedimientos, en tanto organismo encargado de velar por la aplicación uniforme de la normativa sectorial de telecomunicaciones en los Estados miembros.

En cierta medida, el éxito de las reuniones de pre-notificación está asociado al carácter informal de las mismas, lo que permite que puedan abordarse distintas cuestiones dependiendo del tipo de medida planteado. Se sugiere por consiguiente que la Recomendación de Procedimientos no proceda a reglar en un elevado grado de detalle el contenido y estructura que podrían tener dichas reuniones, más allá de la inclusión de alguna consideración general como por ejemplo la referencia al momento temporal en que la Comisión Europea considera que debería celebrarse la reunión de pre-notificación, en relación con la ulterior notificación del proyecto de medida correspondiente. En este sentido, el momento más adecuado para realizar la reunión de pre-notificación sería una vez finalizada la consulta pública de forma que se cuente con todos los elementos necesarios para valorar el caso en la reunión de pre-notificación y, posteriormente, para adoptar la decisión final.

Question 10.2 Should the Commission adopt more detailed recommendations concerning the timing, form and substance of pre-notification contacts with the NRAs?

☐ Yes

☒ No

Please explain and, if yes, provide any concrete suggestions, for example regarding the cases in which prior notification exchanges are particularly useful.

Como se explica en la respuesta a la pregunta anterior, no se considera necesario determinar de manera detallada el procedimiento.

11) Calculation of time-period

Article 32(3)(b) of the Code provides that in those cases where the NRAs are obliged to notify draft measures, NRAs, BEREC and the Commission may comment on that draft measure within one month. The one-month period shall not be extended.

During this one-month period the Commission services must assess the notified draft measure and conclude if they need to raise a comment or not or else if they need to launch a more in-depth assessment of the draft measure under a Phase II investigation (Article 32(4)) if it has serious doubts as to its compatibility with Union law.

Point 22 of the current Procedural Recommendation provides guidance on the calculation of time-limits under the internal market procedures by referring to the relevant rules set in Regulation (EEC, Euratom) No 1182/71.

Question 11.1 Do you have remarks on the guidance provided in the current Procedural Recommendation?

☐ Yes

☐ No

If yes, please explain.

Question 11.2 Do you identify other aspects in relation with time limits on which additional guidance would, in your view, be useful?

☐ Yes

☐ No

If yes, please explain.

II. Possible adaptations of the Procedural Recommendation in light of the new provisions in the Code and other possible improvements

12) General provisions of the Code falling under Article 32 and 33

The internal market procedures defined in Articles 32 and 33 of the Code will remain largely unchanged compared to the one currently in place under Article 7 and 7a of the Framework Directive.

In relation to the main provisions which apply to the procedure for identification and definition of markets (Article 64), the market analysis procedure (Article 67) and the imposition, amendment and withdrawal of obligations (Article 68) the principles set in the current framework will continue to apply. However, the Code contains certain changes, in particular through the codification of the three-criteria test (Article 67(1)) and in relation to the assessment of appropriate remedies (see Article 68(6) which provides that NRAs shall “*consider the impact of new market developments, such as in relation to commercial agreements, including co-investment agreements, influencing competitive dynamics*” and accordingly conduct a new market analysis or consider the necessity to review the remedies imposed to the undertaking found to have significant market power (SMP) in order to ensure their continued appropriateness.

Question 12 In your opinion would the revised provisions under the above-mentioned articles have an impact on the content of notifications and, if so, are any adaptations in the procedures applied so far necessary?

☒ Yes

☐ No

Please explain

Ver respuesta a la pregunta 3.

13) Specific provisions of the Code, including the reinforced role of the Commission and BEREC regarding specific draft measures, in particular the “double-lock veto”

In particular, the Code has, under the so called “**double-lock veto**” procedure, reinforced the role of the Commission and BEREC in certain specific situations where the EU legislator considered it particularly important to enhance the consistency of regulatory practices across the Union. More specifically, Article 33(5)(c) provides that, where BEREC agrees with the serious doubts expressed by the Commission, the Commission will have the power to take a decision requiring the NRA concerned to withdraw a draft measure:

- falling under the second subparagraph of Article 61(3) (draft measure imposing, outside of the frame of a market analysis, access obligations to wiring and cables beyond the first concentration or distribution point);
- or

- falling under Article 76(2) (draft measure by which an NRA, after having concluded that the co-investment commitments proposed by the SMP operator meet the condition set out in Art. 76(1), makes the commitments binding on this operator and lifts all other regulatory obligations imposed on this operator, or, by way of derogation, decides to impose, maintain or adapt remedies in order to address significant competition problems on specific markets pursuant to Article 76(2), third subparagraph).

In such situation, under the provisions of Article 32(7), which apply *mutatis mutandis*, the NRA would have to amend or withdraw its draft measure within 6 months of the date of the Commission's decision.

Question 13.1 In your view, what categories of information should be included in the notification of draft measures issued under Article 61(3) and Article 76(2) in order for the Commission, the NRAs and BEREC to be able to assess it?

Question 13.2 Do you identify the need for procedural guidance on the implementation of the provisions subject to the new "double-lock veto" procedure, and if so on which aspects?

☐ Yes

☐ No

Please explain. In particular, please describe how you see the sequence of the "double-lock veto" procedure and indicate whether you consider that the practice currently followed by BEREC (when it issues an opinion on the Commission's serious doubts letter) is fit for purpose in this context.

In the specific case of co-investment schemes falling under Article 76, recital 201 indicates that: *"In the interest of efficiency, a national regulatory authority should be able to submit a single notification to the Commission of a draft measure that relates to a co-investment scheme that meets the relevant conditions. Where the Commission does not exercise its powers to require the withdrawal of the draft measure, it would be disproportionate for subsequent simplified notifications of individual draft decisions of the national regulatory authority on the basis of the same scheme, including in addition evidence of actual conclusion of an agreement with at least one co-investor, to be subject to a decision requiring withdrawal in the absence of a change in circumstances."*

Question 13.3 In the light of Recital 201, for which subsequent draft measure would you consider that a short notification form would be appropriate?

☐ Yes

☐ No

Please explain

14) Notification of draft measures imposing obligations under Article 61 (symmetrical regulation), paragraphs 1 to 4 of the Code

In relation to access and interconnection obligations and conditions, which can be imposed on undertakings that have not been found to have SMP pursuant to Article 61 (so-called 'symmetrical' obligations), paragraphs 1 to 4, Article 61(5) of the Code provides that:

- the draft measures shall, where applicable, be subject to the procedures set out in Articles 23, 32 and 33; and
- the national authorities which have imposed such obligations and conditions shall assess the results thereof *"by five years after the adoption of the previous measure adopted in relation to the same undertakings and assess whether it would be appropriate to withdraw or amend them"*

in light of evolving conditions"; the outcome of this assessment shall be notified in accordance with the procedures referred to in Articles 23, 32 and 33.

Question 14.1 In your view, what categories of information should be included in the notification of draft measures issued under Article 61(1) to 61(4) in order for the Commission, the NRAs and BEREC to be able to assess it?

Question 14.2 Would it be useful to provide guidance in the new Procedural Recommendation on other procedural aspects linked to these new provisions, in particular on the content and form of the outcome of the assessments undertaken by national authorities under Article 61(5) of the Code?

Los artículos 61.2 b) y c) y 61.4 del Código contemplan la posibilidad, en función de la transposición que se realice por los Estados Miembros, de que sean otras autoridades competentes las que impongan dichas obligaciones en materia de acceso e interconexión en lugar de las autoridades nacionales de reglamentación. Estas obligaciones, tal y como se establece en el artículo 61.5 del Código, se impondrán de conformidad con los procedimientos de mercado interior (arts. 32 y 33). No obstante, las obligaciones y competencias establecidas en el procedimiento de los artículos 32 y 33 se refieren únicamente a la ANRs, sin realizar referencia alguna a las otras autoridades competentes. En este sentido, sería útil contar con directrices sobre el procedimiento en los casos en los que la autoridad competente para adoptar este tipo de decisiones no sea la ANR.

15) Commitments procedure

Article 79 defines the procedure that the NRA has to follow where an undertaking found to have SMP offers 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 remedies by the NRA; (b) co-investment in very high capacity networks pursuant to Article 76; or (c) effective and non-discriminatory access by third parties in relation to a voluntary separation by a vertically integrated undertaking.

Where these commitments relate to a co-investment offer that fulfils the conditions set in Article 76(1), the NRA shall make these commitments binding pursuant to Article 79(3) and refrain from imposing other remedies as regards the Very High Capacity (VHC) network elements subject to co-investment. For other commitments offered under Article 79, the NRA may decide to make the commitments binding, wholly or in part. In that case, it shall assess under Article 68 the consequences of that decision on the appropriateness of remedies that it has imposed or would have, absent these commitments, considered imposing.

In relation to the internal market procedures, Article 76(3) provides that: "*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.*" It therefore appears that the NRA is not required to notify the commitment decision as such, but that such decision should be communicated together with the notification of the draft measure imposing the appropriate remedies under Article 68.

Question 15.1 In your view, what categories of information should be included in the notification of draft commitment measures issued under Articles 79 and 76 in order for the Commission, the NRAs and BEREC to be able to assess it?

Question 15.2:In your opinion, would it be appropriate for the Procedural Recommendation to provide guidance on procedural aspects linked to this new commitment procedure?

☐ Yes

☐ No

Please explain.

El último párrafo del artículo 79(3) del Código estipula que “cuando la autoridad nacional de reglamentación otorgue carácter vinculante a los compromisos de conformidad con lo dispuesto en el presente artículo, evaluará, con arreglo al artículo 68, las consecuencias de tal decisión en el desarrollo del mercado y la idoneidad de las obligaciones que haya impuesto o, en ausencia de tales compromisos, hubiera pretendido imponer con arreglo al citado artículo o a los artículos 69 a 74. Al notificar el proyecto de medida pertinente con arreglo al artículo 68 de conformidad con lo dispuesto en el artículo 32, la autoridad nacional de reglamentación adjuntará al proyecto de medida notificado la decisión relativa a los compromisos”.

Como señala la Comisión Europea en su consulta pública, el artículo 79(3) permite presuponer que los proyectos de decisión relativos a los compromisos no son medidas que deban quedar sometidas al procedimiento de notificación, siendo suficiente con que la decisión de compromisos definitiva acompañe a los proyectos de medida notificados por la ANR a raíz de la adopción de dicha decisión de compromisos, en virtud de los artículos 32 y 68 del Código. Este proceder puede sin embargo tener implicaciones relevantes, en particular en relación con la adopción de compromisos en materia de co-inversión de conformidad con el artículo 76 del Código (“*Tratamiento normativo de los nuevos elementos de las redes de muy alta capacidad*”), donde en cierta medida los compromisos adoptados pueden estar estrechamente vinculados con el levantamiento o imposición de obligaciones que la ANR pueda establecer a resultas de la existencia de dichos compromisos.

La importancia de esta cuestión, y el posible tratamiento conjunto o separado (según determine la ANR en cada caso) de las decisiones de compromisos y los proyectos de medida relacionados con la adopción de los citados compromisos, justifica en opinión de la CNMC que dichos aspectos sean objeto de valoración en la Recomendación de Procedimientos.

16) Procedural aspects in relation with other relevant provisions of the Code

The application of other provisions of the Code would be subject to the internal market procedures under Articles 32 and 33. In particular:

- Article 80 of the Code prescribes a different (lighter) regulatory regime for “wholesale-only” undertakings found to have SMP. The characteristics that an undertaking should have in order to be subject to this regulatory regime are defined in Article 80(1), letters (a) and (b). For the purposes of this article, NRAs may have to collect the relevant information, in particular from the concerned undertaking, in order to determine whether undertakings which are found to have SMP meet these criteria.
- Article 81 of the Code defines under which conditions an undertaking found to have SMP can decide to decommission or replace parts of its network (in particular legacy infrastructure) with a new network.

Question 16.1In your view, what type of information should the NRA provide when notifying a draft measure which falls under Article 80?

Question 16.2 In your view, what type of information should the NRA provide when notifying a draft measure which falls under Article 81?

Question 16.3 In your opinion, would it be appropriate for the Procedural Recommendation to provide guidance on other procedural aspects with regard to the above-mentioned new provisions contained in the Code?

☐ Yes

☐ No

Please explain.

17) Interactions between the Commission and BEREC in the internal market procedures

BEREC plays an important role in the internal market procedures, and its role will be reinforced under the Code. However, its participation in the internal market procedures is not mentioned in the current Procedural Recommendation, which predates the creation of BEREC.

Question 17 Would it be appropriate to provide guidance in the context of the Procedural Recommendation on how the NRAs, the Commission and BEREC interact in the context of the internal market procedures and define more precisely their respective roles in the process?

☐ Yes

☒ No

Please explain.

Los roles y tareas de cada institución están suficientemente definidas en el Código. Asimismo, las cuestiones de coordinación y aplicación práctica de estas disposiciones se abordan de manera satisfactoria en las directrices de BEREC.

18) Draft measures based on other provisions

The Court of Justice has recently held (judgments in case C-397/14 and case C-85/14) that “NRAs may, under [Article 97 of the Code], impose tariff obligations comparable to those referred to in [Article 74(1) of the Code] on an operator which does not have SMP but which controls access to end-users, if such an obligation constitutes a necessary and proportionate measure to ensure that end-users can access services using non-geographic numbers in the European Union”.

Question 18: In your view, should the Commission amend the Recommendation to take into account the procedural implications of these judgments?

☐ Yes

☐ No

Please explain.

19) Any other issues

You can raise any other issues that you consider important for the review of the Procedural Recommendation and provide or upload a document relating to the subject of the consultation.

Final comments

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