

**BEREC Opinion on the European
Commission's Draft Recommendation on
relevant product and service markets
susceptible to ex-ante regulation**

16 October, 2020

Contents

Contents	1
Executive Summary.....	2
Introduction	5
1. The removal of the markets for wholesale call termination on fixed and mobile networks from the list (Markets 1 & 2/2014)	6
2. Wholesale local access provided at a fixed location (Market 1/2020).....	11
3. The removal of the market for wholesale central access provided at a fixed location for mass-market products from the list (Market 3b/2014)	15
4. Wholesale dedicated capacity (Market 2/2020)	21
5. Physical infrastructure access	26
6. Transition to the new Recommendation.....	28
7. Use of geographic surveys of networks in geographic market definitions	30

Executive Summary

This document is the BEREC opinion on the European Commission's (EC) Draft Recommendation on relevant product and service markets susceptible to ex-ante regulation, which was published in August 2020. BEREC provided its input to the public consultation launched by the EC in February 2019. It has collaborated in the organisation of a workshop with the EC to share NRAs' views, and has also provided data and maintained meetings with WIK Consult, who was responsible for preparing the report "*Future electronic communications product and service markets subject to ex-ante regulation*", commissioned by the EC. BEREC would like to stress its willingness to collaborate with the EC throughout the review process until the Recommendation finally comes into force.

Concerning the **termination markets 1&2/2014**, BEREC is not opposed to the removal of these markets from the list of the Draft 2020 Recommendation on relevant markets given the upcoming adoption of the Eurorates Delegated Act. However, concerns remain about the possible implications of this removal. In BEREC's view the Draft Recommendation does not appear to sufficiently take into account the particular circumstances which pertain in many Member States and which justify maintaining the non-price related obligations. For this reason, BEREC asks for an explicit acknowledgement in the text of the Recommendation of a situation which could lead many NRAs - due to national circumstances - to continue applying SMP regulation in the termination markets.

Furthermore, BEREC recognises and appreciates that the EC acknowledges the possibility for NRAs to also address the non-price related issues through Article 61 of European Electronic Communications Code (EECC), using such symmetric regulations to remedy anticompetitive non-price-related conducts in the markets for termination services. In this regard, to both highlight the importance of this issue and to ensure regulatory certainty, BEREC asks the EC to specify in the text of the Recommendation itself that addressing relevant competition issues in the termination markets could be one of the justifications for applying Article 61(2) EECC, as indicated in the Draft Explanatory Note. The monopolistic nature of such markets implies that these markets continue to fulfil the three criteria test in many Member States and continue to require non-price regulation. Therefore, BEREC does not share the EC rationale supporting the removal of these markets from the list.

In relation to the new **market 1/2020 (former market 3a/2014)**, BEREC agrees with the EC on the importance of maintaining this market in the list of relevant markets, as a forward-looking analysis shows that high and non-transitory entry barriers will be observed in the majority of Member States. BEREC also agrees on the need for a geographical analysis, which can lead to more targeted regulation of this wholesale market (and not necessarily complete deregulation). In this opinion, BEREC highlights the need for a case-by-case analysis regarding the substitution between local and central wholesale access and also notes that there is not a general trend for national cable footprints. Furthermore, BEREC highlights the potential evolution to oligopolistic market structures in some countries.

Regarding the removal of **market 3b/2014** from the list of the Draft 2020 Recommendation on relevant markets, BEREC is of the opinion that the EC's view regarding the Union-wide competitiveness of the wholesale central access (WCA) market is premature and does not reflect the current situation and foreseeable future developments in the majority of Member

States. Therefore, BEREC calls upon the EC to reconsider its assessment and to maintain market 3b/2014 in the list of markets susceptible to ex-ante regulation.

NRAs' experience shows that alternative operators (including cable operators) have in general focused their deployments in more densely populated areas, state aid programmes are limited and fragmented, and it is premature to assess the future impact of 5G-based wireless fixed access. This is borne out by the fact that WCA products are regulated or planned to be regulated in 24 out of 27 Member States. For these reasons, BEREC considers that fixed WCA products have and will continue to have an essential role for enabling retail broadband competition. As such, BEREC considers that this market should be maintained in the list of relevant markets.

Moreover, BEREC is of the view that instead of entirely deregulating market 3b/2014 at EU level, a more proportionate regulatory approach would be to engage in a detailed geographic analysis of the WCA market which, depending on the national circumstances, could lead to a geographic segmentation of markets or remedies and to a regulatory intervention limited to specific sub-national geographic markets where the three criteria test is met.

BEREC agrees with the EC that former **market 4/2014, now market 2/2020** should be maintained in the list of relevant markets as it stated in its submission to the initial consultation. BEREC also agrees that dark fibre may be a potential substitute for high-quality access, but is of the view that conclusions regarding the inclusion in the relevant market may differ across countries. BEREC also considers business-grade bitstream services may be part of the product market and this should be reflected in the Explanatory Note. Further to this, BEREC suggests to maintain the definition of this market as a "high-quality wholesale access" market.

BEREC also raises some issues regarding the proposed definition of the terminating segment. These include avoiding or clarifying references to "separate Ethernet continuity", not making reference to upgradeability to terabit speeds, and making an explicit reference to traditional leased lines. Furthermore, on mobile backhaul, BEREC considers that the Explanatory Note should acknowledge the need for regulated services in some countries, especially in the light of the expected deployment of 5G networks. BEREC also stresses the need to take into account the specificities of multi-site demand when dealing with both product and geographical market segmentation, when applicable.

Regarding the **potential new market for wholesale access to physical infrastructure**, BEREC agrees on the approach taken by the EC and welcomes the detailed guidance provided in the Draft Explanatory Note, which will be useful for those NRAs considering, now or in the future, whether this market should be regulated separately.

On **transitional issues** BEREC shares the views of the EC regarding the transition to the new Recommendation and is highly supportive of the reinforcement of the regulatory predictability principle. BEREC however considers, among other issues, that it should be stated in a clear way that the adoption of the new Recommendation is no reason to review existing market analyses ahead of time. Moreover, BEREC also suggests that recital 21 of the Draft 2020 Recommendation should be aligned with the wording used in the EECC with regard to the assessment of markets no longer listed in the Market Recommendation (cf. recital 165 and Article 67 (1) EECC).

Finally, BEREC also raises a suggestion concerning the use of geographic surveys of networks in geographic market definitions to align recital 36 in the Draft Recommendation with Article 22 EEC.

Introduction

The Recommendation on relevant markets was last reviewed in 2014.¹ As stated under Article 64(1) EECC, the EC shall adopt by December 2020 a new revised Recommendation on relevant product and service markets.² As stated in the EECC, when preparing the new Recommendation, the EC shall take utmost account of the opinion of BEREC.

The EC started the review process opening a consultation on the review of the Recommendation on relevant markets in February 2019.³ BEREC provided its input in June 2019.⁴

BEREC has also collaborated with the EC in the organization of joint meetings and the provision of input and data to WIK Consult for the preparation of the EC commissioned report “*Future electronic communications product and service markets subject to ex-ante regulation*” which was published in June 2020.⁵ BEREC also participated in a workshop organised with the EC to discuss NRAs’ views in January 2020.

The Draft Recommendation on relevant product and service markets was published in August 2020⁶ and this document sets BEREC’s opinion on this draft recommendation. It’s starting point is the markets listed in the recommendation currently in force (2014 Recommendation).

BEREC looks forward continuing its collaboration with the EC throughout the review process until the Recommendation finally comes into force.

¹ “Commission Recommendation of 9.10.2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services”. See: <https://ec.europa.eu/digital-single-market/en/news/commission-recommendation-relevant-product-and-service-markets-within-electronic-communications>

² “After public consultation including with national regulatory authorities and taking the utmost account of the opinion of BEREC, the Commission shall adopt a Recommendation on Relevant Product and Service Markets (‘the Recommendation’). The Recommendation shall identify those product and service markets within the electronic communications sector the characteristics of which may be such as to justify the imposition of regulatory obligations set out in this Directive, without prejudice to markets that may be defined in specific cases under competition law. The Commission shall define markets in accordance with the principles of competition law. The Commission shall include product and service markets in the Recommendation where, after observing overall trends in the Union, it finds that each of the three criteria listed in Article 67(1) is met. The Commission shall review the Recommendation by 21 December 2020 and regularly thereafter”.

³ See <https://ec.europa.eu/digital-single-market/en/news/consultation-revision-recommendation-relevant-markets>

⁴ BoR (19) 107 “BEREC response to the EC public consultation on the review of the Recommendation on relevant markets”. BoR (19) 107. June 2019. See

https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/8603-berec-response-to-the-ec-public-consultation-on-the-review-of-the-recommendation-on-relevant-markets

⁵ See <https://ec.europa.eu/digital-single-market/en/news/study-future-electronic-communications-product-and-service-markets-subject-ex-ante-regulation>

⁶ See <https://ec.europa.eu/digital-single-market/en/news/recommendation-relevant-markets>

1. The removal of the markets for wholesale call termination on fixed and mobile networks from the list (Markets 1 & 2/2014)

The Draft Recommendation on relevant markets delists the termination markets, i.e. the markets for *wholesale call termination on individual public telephone networks provided at a fixed location* (market 1) and *wholesale voice call termination on individual mobile networks* (market 2) of the 2014 Recommendation.

The main reasoning behind this is as follows:

- The European Commission (EC) considers that these markets no longer fulfil the three criteria test at Union level, as the application of the Union-wide voice termination rates on the basis of the Delegated Act (“Eurorates”, Art. 75 EEC) which will enter into force in December 2020 will limit the ability of mobile and fixed operators to set excessive termination rates.
- Specifically, with regard to second of the three criteria test, the EC considers that the Eurorates implementation will solve the problem of excessive termination rates, which is considered “*the most serious threat to competition on these markets*”. The EC therefore concludes that “*termination markets would no longer meet the three criteria test*”.
- Nevertheless, in the Draft Explanatory Note, the EC recognises that also non-price related remedies are of particular relevance to prevent anti-competitive conducts and specifies that “*the likelihood of terminating operators systematically refusing access, interconnection or imposing discriminatory and non-transparent conditions has to be seen in light of the threat of re-regulation*”. The EC considers that these anti-competitive risks are less likely to occur than the charging of excessive termination rates and that they could be addressed either by competition law or by other type of regulatory intervention.

As set out in the BEREC response to the public consultation on the review of relevant markets of June 2019⁷, BEREC would not oppose to the removal of termination markets (markets 1 and 2/2014) from the list of relevant markets as long as -, and to the extent that - sufficient guidance is provided by the EC on how to address any remaining competition problems such as denial of access, as well as non-transparent and discriminatory access conditions.

Current NRAs’ practices in markets 1 and 2 lead to a full set of both price and non-price remedies. The Delegated Act focuses on a single maximum Union-wide mobile and fixed voice termination rate, and it is therefore only aimed at addressing possible pricing abuse of an SMP operator.

⁷ BEREC response to the EC public consultation on the review of the Recommendation on relevant markets, (June 2019). BoR (19) 107, June 2019, See https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/8603-berec-response-to-the-ec-public-consultation-on-the-review-of-the-recommendation-on-relevant-markets

BEREC considers that the removal of market 1 or 2/2014 from the list should not necessarily lead to a withdrawal of important non-price remedies which are currently implemented by several NRAs in the EU. Indeed, non-price remedies whether imposed through symmetric or asymmetric regulations (especially access, transparency and non-discrimination) could still be, in many cases, necessary to ensure effective competition in markets downstream of the termination markets.

BEREC notes that this is the first time that the EC intends to remove a market from the list of markets susceptible to ex-ante regulation where, to date, SMP has been found in every Member State due to the monopolistic structure of such markets. It is therefore essential for NRAs to be able to easily and effectively tackle non-pricing issues that may affect competition and investment, as the Delegated Act addresses only possible pricing abuses.

Draft Explanatory Note – p. 67-70 – Three criteria test

With regard to application of the three criteria test, BEREC does not completely agree with the EC's assessment of the second criterion. Indeed, by their very nature, these two markets are characterized by monopolistic market structures (where each network is equivalent to one market) whereby the three criteria test is in practice currently always satisfied. The rationale for the removal of these markets is that price regulation which tackles the threat of monopolistic pricing is now addressed by another regulatory tool, i.e. the Delegated Eurorates Act. BEREC is of the view that this could be clarified in recital 39.

Furthermore, BEREC's view is that the EC assessment does not sufficiently take into account the competitive situation observed in many Member States whereby non-pricing competition concerns remain which could justify regulatory intervention. This fact should be addressed between the text of the upcoming Eurorates Delegated Act and non-price remedies.

Considering that the market structure of the termination markets will not change, operators in general may have the incentives to engage in anti-competitive conducts, such as to refuse access to their termination services (also by means of delays in the provision of the service or other conducts) or/and to provide such access under discriminatory or non-transparent conditions (especially when these services are supplied to small/new operators). Similar issues can arise regarding the provision of the ancillary services (i.e. co-location, interconnection ports).⁸ Such behaviours are likely to harm both existing competitors, new entrants and ultimately consumers. For all new operators entering the market it is of utmost importance that their customers can reach and can be reached from all other networks for their business to start and to work. Therefore, their demand for termination services must be met without any delay. Any delays in provisioning of termination services or refusal to interconnect would cause harm and distort competition. The Eurorates Delegated Act does not address these potential problems, nor do they make them less likely to occur.

⁸ Regarding the possibility for SMP operators to set excessive prices for ancillary services, the issue should be solved by the Eurorates Delegated Act where the EC proposes to consider the price of such services be included in the Eurorates. If the final version of the Eurorates Delegated Act will not include this provision, the problem of the excessive prices of such services should be considered by EC in context of the review of the Recommendation of Relevant Markets.

In many Member States, these competitive problems are considered very relevant by NRAs, they have been identified in every market analysis and ex-ante obligations have always been imposed together with the cost orientation remedy. Asymmetric negotiations between larger operators and smaller players that have ended up in dispute settlements have been experienced by NRAs. It is important to note that even in the current context where SMP regulation is always present, some NRAs have received complaints from operators that were denied interconnection or have experienced delays in provisioning of necessary ancillary services to termination.

Consequently, as already set out in the BEREC response to the public consultation on the review of relevant markets (BoR (19) 107), BEREC remains concerned by the implications of the removal of the termination markets from the list of the revised Draft Recommendation on relevant markets if the potential for negative side effects is not correctly and effectively addressed. The side effects mentioned in the BEREC response refer to any possible anti-competitive market conduct or market outcome, which NRAs would have to counter – even in presence of the Eurorates – with imposing non-price remedies also related to the ancillary services (such as co-location or interconnection ports).

In BEREC's view, the likelihood for operators to engage in the aforementioned non-pricing anti-competitive conducts – even in presence of Eurorates – is still very high in many Member States and the threat of re-regulation is unlikely to constitute an effective deterrent, given the time needed to reimpose regulation. Thus, ex-ante asymmetric SMP regulation to address non-price issues may continue to be justified in termination markets

In light of this, BEREC asks the EC to consider the concerns of many NRAs and to expressly acknowledge in the 2020 Recommendation that the competitive situation in many Member States could lead to the fulfilment of the three criteria test and thus justify the maintaining of the non-price related obligations and/or obligations concerning ancillary services.

In this line, if the EC remains with its decision to delete markets 1 and 2/2014 from the list of markets susceptible to ex-ante regulation, the EC should at least consider including an explicit reference in the 2020 Recommendation that, due to national circumstances, NRAs may decide to continue imposing non-price-related obligations via SMP regulation in these markets.

Such an approach could be similar to the approach with regard to deregulating the former retail and wholesale markets for call origination provided at a fixed location origination markets (former markets 1 and 2 of the 2007 Recommendation)⁹.

⁹ Cf. recital 25 of the EC 2014 Recommendation on relevant markets stating "... The markets listed in the Annex to the Recommendation no longer include two markets that were listed in Recommendation 2007/879/EC (markets 1 and 2) as they no longer fulfil the three-criteria test. As there may be a degree of variation across Member States in the pace of the expected or foreseeable market developments which underlie this finding at Union level, specific national circumstances may justify that a national regulatory authority could find that market 1 of Recommendation 2007/879/EC or other retail markets related to market 2 of Recommendation 2007/879/EC are not yet effectively competitive from a forward-looking perspective absent appropriate and proportionate wholesale remedies. National regulatory authorities could thus justify continuing ex ante regulatory intervention at wholesale level provided that the three-criteria test is satisfied in the national circumstances for the subsequent review period."

Draft Explanatory Note – p. 70-71 - Alternatives to SMP ex-ante regulation suggested by the EC in case of removal of termination markets from the list

In the BEREC response to the public consultation on the review of relevant markets (BoR (19) 107), BEREC pointed out that the provisions of the EECC, other than the articles related to SMP regulation, could be useful tools in order to prevent any such aforementioned competition problems from materialising (i.e. Article 61(1) and 61(2) on symmetric obligations related to interconnection). In particular, BEREC highlighted that *“if the Commission intends to withdraw these markets from the list, it would be indispensable that the Explanatory Note to the Recommendation contains some reflections on the way in which such non-SMP based provisions could be applied in order to ensure that, if deemed necessary, non-price related obligations applicable to termination may remain in place”* and concluded that *“to the extent that sufficient guidance is provided by the Commission on how to avoid the above-mentioned side effects, BEREC would not oppose the deletion of Markets 1 and 2 from the list of relevant markets.”*

Overall, BEREC appreciates that the EC explicitly delineates in the Draft Explanatory Note the possible alternative means that NRAs can use for imposing non-price-related obligations on operators in case the termination markets are removed from the list and the three criteria test is not found to be met.

In particular, in the Draft Explanatory Note, the EC clarifies that

“If NRAs consider it necessary to impose ex-ante obligations in specific circumstances where there is a likelihood that specific operators would adopt anticompetitive conducts on the market, they may consider addressing any such problems by imposing obligations under Article 61(2) of the Code ensuring access, interconnection and interoperability of services.

Transparency and non-discrimination obligations could also be imposed under this provision given that operators requesting interconnection would require non-discrimination vis-à-vis other retail providers, including the termination provider’s retail arm, in order to be competitive. In this regard, the Commission acknowledged in its Article 7 practice that Article 5 of the Access Directive (corresponding to Article 61 of the Code) could be the legal basis to impose obligations of transparency and non-discrimination”.

BEREC recognises and appreciates that the EC in the Draft Explanatory Note acknowledges the possibility for NRAs to address these issues through Article 61 EECC, justifying the use of such rules with the aim to remedy abusive non-price behaviour in the markets for termination services (*“where there is a likelihood that specific operators would adopt anticompetitive conducts on the markets”*). Considering the importance of such point, and to ensure regulatory certainty BEREC asks the EC to specify in the text of the Recommendation itself that assuring competition in the markets could be one of the “justified cases” to address these issues applying Article 61(2) EECC as indicated in the Draft Explanatory Note.

BEREC acknowledges that for some NRAs the instrument provided by Article 61 (1), (2) EECC may be sufficient to remedy anti-competitive non-pricing behaviour. However, for other NRAs, this tool may not be efficient enough to address an anti-competitive behaviour to prevent market entry of new operators in a timely manner. Hence, it is essential that NRAs have the flexibility to use whichever regulatory tool fits best to remedy any competition problems

identified according to national circumstances. In some instances, this might be SMP regulation, in other instances an intervention based on Art. 61 (1), (2) and in some instances no such intervention might be necessary as issues may be resolved via other instruments, such as dispute resolution.

Finally, in relation to dispute resolution, as already indicated in BEREC's response to the EC public consultation (BoR (19) 107), BEREC believes that dispute settlement provisions contained in Article 26 may only be an *additional* tool (to the ex-ante regulation) at the disposal of NRAs to limit negative effects arising from the deregulation of the termination markets. However, a dispute resolution procedure may be too slow for those cases where necessary services are being denied or delayed or provided with insufficient quality. Therefore, BEREC agrees with the EC that "*applications for dispute settlement would signal that the market might not function effectively. In such cases, SMP-based ex ante regulation may be the more appropriate way to address persistent problems*". (see page 71 Draft Explanatory Note).

Draft Explanatory Note – p. 65-66 - Numbering ranges other than fixed geographic and mobile

BEREC considers that certain non-geographic services should not be treated as fixed termination services (page 66, Draft Explanatory Note). The Draft Explanatory Note explains why the competition dynamics for terminating voice calls in some of these numbering ranges differs from "traditional" CPP-based termination. In BEREC's view, there is no justification for a price cap in these cases as there is no risk of excessive pricing. BEREC develops this argument and explains the potential negative side effects of treating value-added service (VAS) services as fixed termination services in its response to the Draft Delegated Act setting single maximum Union-wide voice fixed and mobile termination rates.

Conclusion

As set out above, BEREC remains concerned by the possible implications of the removal of the termination markets 1&2/2014 from the list of the Draft 2020 Recommendation on relevant markets. Indeed, in BEREC's view the Draft Recommendation does not appear to take account the competitive situation which can be observed in many Member States and which could likely justify the maintaining of the non-price related obligations. For that reason, BEREC asks for an explicit acknowledgement in the text of the Recommendation of particular circumstances which could lead many NRAs to continue applying SMP regulation in the termination markets.

Finally, BEREC recognises and appreciates the acknowledgement of the EC of the possibility for NRAs to also address any non-price related issues through Article 61 of EEC, in the markets for termination services. As such, given the importance of these points and to ensure regulatory certainty, BEREC asks the EC to specify in the text of the Recommendation itself that assuring competition in the markets could be one of the "justified cases" for the application of Article 61(2) EEC as indicated in the Draft Explanatory Note.

2. Wholesale local access provided at a fixed location (Market 1/2020)

BEREC welcome the fact that the EC proposes keeping Market 3a (wholesale local access provided at fixed location (WLA), of the 2014 Recommendation in the list of the 2020 Draft Recommendation.

Below, BEREC provides feedback on particular aspects of the Draft Guidelines text.

Draft 2020 Recommendation - p6; paragraph 28

“Wholesale broadband access can be provided at central or local level with comparable quality of service from both the access seeker and the end user perspectives. Despite the observed increase of infrastructure-based competition, local access is still characterised by high entry barriers and regulated in the majority of Member States”.

As expressed in BEREC’s response to the EC public consultation (BoR (19) 107), BEREC concurs with the view that on a forward-looking basis, high and non-transitory entry barriers will still be observed in the WLA market in almost all Member States¹⁰ and, for this reason, BEREC agrees with the EC that the WLA market should remain in the list of markets susceptible to ex-ante regulation in the 2020 Recommendation.

However, BEREC reiterates its view that virtual access products and physical unbundled products may exhibit common functionalities and may be part of the same product market. However, this may not always be the case as there are many variables that must be taken into account in determining the observed characteristics of both VULA and physical unbundling as part of the product market definition exercise. Examples of this may include network configuration and the location of active equipment. As such, NRAs require flexibility in defining the scope of the WLA product market, given particular National circumstances.

Draft 2020 Recommendation – p6; paragraph 31

“The increased capabilities of electronic communications networks providing mass-market products may satisfy the connectivity needs even of certain business customers. However, an important segment of the business market, as well as the new demand emerging from digitization of industry and from socio-economic drivers such as public services e.g. hospitals and schools, will require also dedicated connections.”

BEREC acknowledges that NGA networks can be capable of supporting higher capacity broadband and that technical developments have made it possible for operators to supply more advanced broadband solutions to certain businesses. Nevertheless, BEREC also sets out that certain businesses still require products with characteristics that are distinct to products under Markets 3a. See the discussion on Market 4 below.

Draft 2020 Recommendation – p8; paragraph 42

¹⁰ Only two NRAs have completely deregulated market 3a to date, namely Bulgaria and Romania.

“The remaining markets of the 2014 Recommendation [...] still warrant ex-ante regulation as they meet the three criteria test at Union level. National regulatory authorities should take into account their national circumstances when delineating these markets, in particular as regards their geographic dimension.”

BEREC concurs with the argument on the relevance of national circumstances when delineating geographic markets, given the varying degrees of competition that are observed across different EU Members States, and in certain instances within different geographic areas of these same countries.¹¹ This also explains why some NRA¹² have delineated sub-national geographical markets when it comes to market 3a of the 2014 Recommendation. However, the majority of NRAs still has found market 3a to be of national scope.

Draft Explanatory Note – p. 38 - Coverage of NGA and upgrade of coaxial based networks

The Draft Explanatory Note takes into account the increasing coverage of NGA technologies and the increasing role played by cable-based networks in providing broadband access and connectivity services. In addition, the Draft Explanatory Note refers to the presence of cable at retail level which indirectly constrains the ability of fixed incumbents to act independently at the wholesale level and as a result, continued wholesale SMP regulation may not be justified, at least in some geographic areas due to the indirect constraints at the retail level from cable. The Draft Explanatory Note also mentions that;

“in Member States where fixed electronic communications markets have evolved away from single market dominance towards more oligopolistic market structures, there is a need to analyse the economic impact of cable companies' indirect retail constraints on the WLA market”.

BEREC concurs with the Draft Explanatory Note that deregulation of the WLA market may happen on the basis of infrastructure competition, and/or indirect retail constraints from cable and other technologies. However, BEREC is also cognisant of the fact that there could be circumstances where oligopolistic market structures may shift from single market dominance to either joint dominance (as defined in competition law) or more generally to a very significant market power enjoyed by two players. In such instances, deregulating the wholesale market may lead to a significant loss of existing competition at the retail level, to the detriment of end-users.

Therefore, BEREC recommends that NRA's take a case-by-case approach.

Draft Explanatory Note – p. 40 - Need for re-assessing the product characteristics and boundaries of the wholesale broadband access markets

¹¹ This is also in line with “BEREC Common Position on geographical aspects of market analysis (definition and remedies)”. BoR (14) 73. June, 2014. See https://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/common_approaches_positions/4439-berec-common-position-on-geographic-aspects-of-market-analysis-definition-and-remedies

¹² The NRAs in Finland, Hungary, Italy, Poland, cf. EC, Draft Explanatory Note, p. 14. Moreover, in Finland and Hungary, subnational markets were assumed because different incumbent operators are active in different parts in the country.

The Draft Explanatory Note provides additional guidance on the circumstances in which a broader wholesale broadband connectivity market, encompassing both WLA and WCA, may be defined. In this regard, the Draft Explanatory Note outlines the possibility of WLA and WCA offering similar product characteristics for access seekers and could therefore be considered as substitutes.

Furthermore, according to the Draft Explanatory Note, other factors may lead to the conclusion of a broad or narrow wholesale market, such as the technical characteristics and topography of the network infrastructure(s) (e.g. localisation of the point of handover) and geographic considerations. Significantly, the Draft Explanatory Note adds that “*The question as to whether the market should be defined narrowly (local) or more broadly (local and central) is mainly relevant in the presence of cable networks*” and that the assessment of “*indirect constraints stemming from cable retail offers and wholesale central offers (potential or actual)*” can lead to the inclusion of cable in the WLA market.

In their assessment of these issues, the EC calls for NRAs to identify clear evidence of substitution in order to support a broad wholesale market definition comprising local and central access.

In this regard, BEREC reiterates its support for a case-by-case approach when it comes to the individual NRAs’ substitutability analysis for WLA and WCA and the definition of the respective markets. On a general level, BEREC observes no clear common tendency at EU level for the definition of a broad (WLA and WCA) wholesale broadband access market. Hence, BEREC considers that it is likely that the assessment of the boundaries of WLA and WCA by NRAs still needs to be undertaken in the context of separate markets

Additionally, BEREC observes no common tendency at EU level when it comes to cable investment and the presence/coverage of cable operators. As such, in BEREC’s opinion, the Draft Explanatory Note focuses too much on cable as the main factor to broaden the market. Therefore, BEREC suggests the following minor amendment to the text: “*The question as to whether the market should be defined narrowly (local) or more broadly (local and central) may also arise and be relevant in the presence of cable networks*” (New proposed text is underlined).

BEREC considers that the question as to whether the market should be defined narrowly (local) or more broadly (local and central) should be based on number of factors such as a proper evaluation of the degree of virtualisation of wholesale access products, the technical specifications of WLA and WCA products, the observed patterns of wholesale and retail demand substitution, as well as the extent of indirect constraints.

Furthermore, the features of wholesale access products, which in a copper network will require local presence, might be obtained in a fibre network through a centrally accessed product. This could mean that, under certain circumstances, it could be relevant for some NRAs to put less weight on handover points and more focus on the product features. BEREC therefore invites the EC to take these considerations into account. This would grant appropriate flexibility to NRAs in their definition and assessment of the markets.

Draft Explanatory Note - p. 43 – Relevant Product Market

The Draft Explanatory Note considers access products “*which functionally replicate the key features of physical unbundling*”, should be included in the WLA market. Access to FTTH is

deemed to be “*functionally equivalent to traditional copper LLU when unbundling is feasible*”, although a break in the substitution could be identified in instances where ‘*FTTH/FTTB has overtaken copper as the dominant technology*’. The Draft Explanatory Note also says that NRAs need to take into account the “*constraints stemming from cable and other platforms (e.g. LTE)*”, whilst it foresees that a VULA-equivalent DOCSIS-based access would be “*technically feasible once DOCSIS 4.0 is implemented by operators*”.

On the relevant product market for the provision of WLA, BEREC concurs with the considerations made by the Draft Explanatory Note with respect to FTTH/FTTB and copper. In BEREC’s opinion, however, it remains to be seen what the full impact of cable might be throughout the EU, considering the differences observed in terms of investment by cable operators across several countries and their respective network coverage and competitive impacts. Notably, DOCSIS 4.0 is not foreseen to be widely deployed during the period of this Recommendation. Furthermore, up to now, cable operators have been found to only have a national footprint in the Netherlands and Malta (although cable operators do collectively have national coverage in Belgium as well). However, in most EU countries cable operators are characterised by a more limited geographic footprint.

Draft Explanatory Note - p. 44 – Three Criteria Test

The Draft Explanatory Note comes to the conclusion that, overall, the WLA markets meets the three criteria for inclusion in the list of markets featuring in the revised Recommendation.

Based on observations across the EU, the Draft Explanatory Note concludes that “*it is not expected that effective retail competition will be ensured in the absence of wholesale regulation at the wholesale local market*”.

BEREC concurs with the main considerations and conclusions of the three-criteria assessment for the WLA market. Indeed, BEREC’s position is based on actual country experiences, whereby most EU NRAs found entry barriers in this market to be high and non-transitory given (i) the high sunk costs; and (ii) the amount of time needed for any potential entrant to replicate the infrastructure of a ubiquitous access network. In addition, given the small number and often limited geographical reach of competitors operating their own alternative infrastructure, BEREC does not foresee that competitive dynamics in this market will change significantly on a national scale in the short or medium term at European level without continued regulatory intervention.

In light of the above and to ensure consistency, BEREC is proposing another slight change in the text on page 46, dealing with the section on “*Sufficiency of competition law alone to adequately address the identified market failure(s)*”. The proposal is to change the text for the sentence “*Throughout the Union, access-based competition still plays an important role on the wholesale local access market.*” BEREC considers that access-based competition is especially important for the retail broadband competition dynamics, hence the sentence should read “*Throughout the Union, access-based competition still plays an important role on the competition dynamics for the retail fixed broadband market.*” (New proposed text is underlined).

Draft Explanatory Note – p. 46 – Potential geographic market differentiation

The Draft Explanatory Note states that its conclusions on the three-criteria test for the WLA are without prejudice to the conclusions that can be reached on a sub-national level by NRAs, basing their assessment on national circumstances.

BEREC concurs with the considerations regarding potential geographic differentiation of WLA markets. BEREC notes that, according to the Draft Explanatory Note, sub-national markets should in particular be assessed where the degree of inter-platform competition is high or “*penetration of alternative infrastructures is high*”. By defining such separate sub-national markets NRAs need to consider whether ex-ante regulation is “*still needed*” or “*could be lifted*”. BEREC would like to point out that the finding of sub-national relevant geographic markets would not necessarily result in deregulation. First, NRAs may deem it more appropriate to apply differentiated remedies on the basis of the specific competitive conditions prevailing in identified sub-national markets or in different areas of a national market. Second, in particular where the incumbent’s copper network is no longer considered to be part of the same relevant product market as fibre networks, the result could be network-based geographic markets whereby a number of operators are found to have SMP in distinct geographic markets which should therefore be subject to regulation. For example, non-overlapping networks deployed by operators with a local presence could result in a large number of network-based relevant geographic markets with different operators enjoying SMP. BEREC would welcome if such consequences of sub-national relevant geographic markets could also be considered in the Draft Explanatory Note.

Conclusion

On new market 1/2020 (former market 3a/2014), BEREC agrees with the EC on the importance of maintaining this market in the list of relevant markets, as a forward-looking view shows that high and non-transitory entry barriers will be observed in the majority of Member States. BEREC also agrees on the need for a geographical analysis, which can lead to more targeted regulation of this wholesale market (but not necessarily deregulation). BEREC would like to highlight the need for a case-by-case analysis regarding substitution between local and central wholesale access and also notes that there is not a general trend for national cable footprints across Member States. Furthermore, the potential for the emergence of oligopolistic market structures in some Member States is a concern for BEREC.

3. The removal of the market for wholesale central access provided at a fixed location for mass-market products from the list (Market 3b/2014)

The draft Market Recommendation does not re-list market 3b, i.e. wholesale central access (WCA) provided at a fixed location, of the 2014 Recommendation, which means that the EC does not consider this market as warranting ex-ante regulation at EU level any longer.

In this respect, the EC puts forward the following arguments:

- Alternative operators have increasingly developed their infrastructure up to the local access point. Therefore, they are able to provide central access products on their own and are also able to constrain the incumbents’ services.

- Wholesale central services can also be provided by upgraded cable infrastructure (DOCSIS 3.x). Thus, according to the EC, cable should generally be included in the product market which leads to increased competition at the central level.
- The development of fixed wireless technologies in the broadband market creates indirect competitive constraints at the wholesale level.

In its response to the EC public consultation on the review of the Recommendation on relevant markets (BoR (19) 107), BEREC has already expressed its view that market 3b/2014 should remain on the list of markets susceptible to ex-ante regulation in the 2020 Recommendation since, looking forward, high and non-transitory entry barriers will still be observed in most Member States.¹³ While BEREC agrees with certain aspects of the EC's view set forth in the Draft Explanatory Note concerning the WCA market, BEREC calls upon the EC to reconsider its assessment that the WCA market is no longer susceptible for ex-ante regulation. A robust forward-looking Union-wide statement concerning the deregulation of the WCA market is not yet possible. Depending on national circumstances, NRAs should have flexibility with regard to the specific definition of the product and geographical market, as well as with regard to the three-criteria test. Therefore, in BEREC's opinion, the WCA market must remain on the list of markets susceptible to ex-ante regulation.

Draft Explanatory Note - p. 47-48 – bitstream products based on copper, fibre and cable

Concerning the market definition, BEREC is of the opinion that cable can be included in the WCA market and also that a chain of substitution between copper DSL-based and fibre-based bitstream is likely to exist in most Member States. Nonetheless, in some countries the development of demand patterns suggests that a break of the substitution chain may occur between copper and fibre based bitstream products. (and e.g. a separate market for fibre and/or for cable might be considered¹⁴). NRA's should determine the relevant product market based on national circumstances and on the outcome of the substitutability analysis.

This flexibility – which is granted to NRAs by the SMP Guidelines – is questioned by the generalization made on p. 48 where the EC points out that “where cable is present [...], it is typically considered part of the relevant market”. BEREC suggests replacing this sentence by the following one: “Where *it* is present and relatively widespread, *cable may, depending on the circumstances, be considered part of the relevant market(s) [...].*” (New proposed text is underlined). Such a change would be in keeping with other statements in the Draft Explanatory Note.¹⁵

Draft Explanatory Note - p. 47, 3rd paragraph – development of alternative operators'

¹³ BEREC response to the EC public consultation on the review of the Recommendation on relevant markets, BoR (19) 107, p. 3, 11, 12

¹⁴ This is the case e.g. in Sweden and Denmark where fibre/cable and copper are separate markets. In Belgium, the market for cable and for fibre/copper were separated.

¹⁵ See EU Commission, Draft Explanatory Note, pp. 47-48: “Whether the WCA market includes all broadband technologies [...] depends on the degree of constraints on switching at the wholesale level. In order to determine whether different wholesale platforms such as copper, fibre and cable should be included in a single wholesale market the SSNIP test should be applied. [...]”

infrastructure

BEREC does not share the EC's view that alternative operators have developed their infrastructure "to a large degree" up to the local access point.¹⁶ As described below in BEREC's comments on a possible geographic market segmentation this may be true for some areas with high population density. However, in other less densely populated areas, WCA products are still essential for enabling retail competition.¹⁷ This is acknowledged in the Draft Explanatory Note where the EC states that "[r]eliance on regional bitstream has however persisted to a significant extent to serve the end users that depend on copper connections in particular in rural areas".¹⁸

Draft Explanatory Note - p. 47, 4th paragraph – development in rural areas

The EC's assumption that "commercial network upgrades and state aid programmes are likely to reduce the reliance on copper in rural areas"¹⁹ cannot be confirmed by BEREC at a Union-wide level. Even if those trends exist, they have led only to limited and fragmented alternative infrastructure in rural areas. To date, from the NRAs' experiences it cannot be taken for granted that commercial or state-funded deployment will lead to comprehensive alternative networks in rural areas during the review period.

Regarding fixed wireless access, these broadband connections can only impose an indirect constraint on the WCA market if substitutability between fixed and wireless technologies on the corresponding retail market(s) has been found. However, such substitution was only determined in a few Member States.²⁰ In fact, in those countries where the substitutability was not found, fixed wireless technologies were considered to only have a minor competitive impact and are therefore unable to impose a sufficient indirect competitive constraint on an SMP operator in the WCA market.

Although this lack of substitutability may lessen in the future, at present BEREC is of the opinion that it is premature to consider fixed wireless technologies as an effective indirect constraint. This is due to the heterogeneous relative importance of fixed wireless access in the different Member States, whereby no EU wide trend towards greater substitutability can

¹⁶ The EU Commission justifies its statement by citing WIK data stating that regional bitstream accounted for around 10% of total lines by alternative operators in 2018 (see EU Commission, Draft Explanatory Note, p. 47 with fn. 142). This is supposed to suggest that wholesale central access plays a minor role for competitors. However, regional bitstream is not clearly defined in the WIK study. Therefore, it is not clear whether it can be equalized with the WCA market as in some Member States market 3b does not only include layer 3 bitstream but also products based on layer 2 bitstream. Moreover, the percentage only displays an average of the regional bitstream share of the alternative operators' lines in the different member states. It varies significantly across the Member States such that in certain member states regional bitstream plays an even more fundamental role. Besides, even if market 3b accounted for 'only' 10 % of competitors' lines on average, these 10% can make up for a large geographical area if population or connection density is low. Furthermore, it should be mentioned that the importance of regional bitstream has increased during the last years (see WIK study, p. 171).

¹⁷ It should be noted that in some Member States, e.g. in Denmark, there are no areas which can be regarded as "urban areas" in this context, as the economic conditions (size and population density in city areas) do not support the development of alternative infrastructure up to the local point.

¹⁸ Commission, draft Explanatory Note, p. 47.

¹⁹ See EU Commission, Draft Explanatory Note, p. 47.

²⁰ Substitution between fixed and fixed wireless technologies has been found e.g. in Italy, Hungary, Romania, Belgium (only on the retail level) or the Czech Republic, whereas in other countries Finland, Cyprus, Portugal, Ireland, Sweden, Lithuania or Germany the substitution has not been determined.

be discerned.

Retail market concerning business customers

WCA products not only serve mass-market demand of private households, but are also used to offer retail products to business customers. Business customers, including multi-site business customers, demand both individualised high-quality solutions, which require market 4/2014 input products, as well as complementary best-effort internet services, based on WLA/WCA products. As such, operators competing at the retail level often use WCA products in combination with high-quality products in market 4 to serve multi-site retail business customers (see section on this market regarding high-quality products). Such operators specialised in the business market that have not built their own network up to the local exchange strongly depend on WCA offers in order to satisfy such retail demand. Consequently, the unavailability of regulated WCA products may impact competition for high value multisite retail business customers.

Draft Explanatory Note - p. 48-49 - Three criteria test

The Draft Explanatory Note states (p. 49) that: *“The three criteria test is therefore not met for the WCA mass-market, as barriers to entry into the market in many Member States [147] can no longer be considered to be high and non-transitory and the market is tending towards effective competition at Union level.”* And footnote 147 on the same page states: *“WCA is already completely deregulated in some Member States, e.g. Bulgaria, Romania, Malta, the Netherlands and Sweden. Further, WCA is only partly regulated at least in Italy, Lithuania, Poland, Portugal, Germany and Ireland.”*

However, contrary to what the EC states,²¹ in the vast majority of Member States the three criteria test is fulfilled, as 24 out of 27 Member States still regulate market 3b/2014 or intend to do so²² (thereof, 14 Member States with current or future nation-wide regulation and 10 with a partial geographic regulation). Only three Member States²³ found effective (retail) competition nationwide and therefore do not regulate the (entire) WCA market to date.

BEREC also has concerns surrounding the assertion that the WCA market no longer fulfils the three criteria test, firstly in relation to the implications for the availability of Layer 2 and Layer 3 bitstream products and also in relation to geographic differences in competitive conditions.

²¹ See EU Commission, Draft Explanatory Note, p. 49 with fn. 147: “The three criteria test is therefore not met for the WCA mass-market, as barriers to entry into the market in many Member States [147] can no longer be considered to be high and non-transitory and the market is tending towards effective competition at Union level.” Footnote 147: “WCA is already completely deregulated in some Member States, e.g. Bulgaria, Romania, Malta, the Netherlands and Sweden. Further, WCA is only partly regulated at least in Italy, Lithuania, Poland, Portugal, Germany and Ireland.”

²² Market 3b is regulated in national scope in 12 Member States (AT, BE, CY, CZ, DK, EE, EL, HR, LU, LV, SI, SK) and partially regulated in 10 Member States (DE, ES, FI, FR, HU, IE, IT, LT, PL, PT). In Malta, the NRA has deregulated WCA in 2013 but intends to regulate it again in the upcoming notification. In the Netherlands, the NRA has assumed a combined market 3a/3b, although this decision was annulled by the Courts.

²³ Bulgaria, Romania (WCA was never regulated) and Sweden. In the cases of Bulgaria and Romania, not only WCA, but also WLA is not regulated, so their cases do not support the Commission’s standpoint (which is largely based on the assumption that the sufficient availability of WLA inputs are relevant in deregulating the WCA market). With regard to Malta and the Netherlands, cf. previous footnote.

Deregulation of bitstream products

Firstly, the removal of the WCA market from the list of relevant markets susceptible to ex-ante regulation implies that relevant Layer 3 bitstream products would no longer be regulated in most Member States as they are typically found to be part of the WCA Market.. Furthermore, the removal of regulation from WCA could also impact Layer 2 bitstream products, as they are only considered as WLA products if they fulfil the relevant VULA criteria.²⁴ In countries where NRAs have assessed that layer 2 bitstream products do not fulfil the VULA criteria and hence Layer 2 bitstream products only belong to the WCA market, a lack of regulation of the WCA market could result in neither Layer 2 nor Layer 3 bitstream products being available on a regulated basis anywhere in the country.

Hence, deregulating the WCA market underlies the assumption that, without the regulation of both Layer 2 and Layer 3 bitstream, the retail market would be competitive in all areas nationwide. In those countries where Layer 2 bitstream does not fulfil the VULA criteria (i.e., it is in the WCA market), local loop unbundling would be the only regulated wholesale access product (aside from high-quality access). Since the barriers to develop own infrastructures up to the local handover points are very high, maintaining effective competition on the retail broadband market would be questionable in such circumstances.

In this context, it is in particular unclear how to handle the access to cable infrastructures in case of the suggested removal of WCA in countries which currently regulate cable access or might do so in the future, as with current DOCSIS 3.x technology only a WCA product (L3-BSA) is technically and economically viable to date.

Possible geographic market segmentation

BEREC considers that a geographic analysis of this market is a more proportionate approach than a complete deregulation of the WCA market for most of the Member States. On a Union-wide level, the WCA market is still an important wholesale market for ensuring competition on the retail level. Although, depending on the national circumstances, regulation of the WCA market may still be required on a nationwide scale, it is likely that a geographic analysis lead to the finding of sub-National geographic markets. Furthermore, this may lead to the deregulation of the WCA market in regions where no SMP is found. BEREC is concerned that in many Member States, a complete deregulation of the WCA market would lead to competition problems at the retail level, especially in rural areas. In larger Member States and/or Member States with major cities, the competitive conditions differ significantly between urban and rural areas. While it may be profitable for operators to invest in own networks up to the incumbent's WLA points in urban areas, rural areas do not exhibit sufficient economies of scale and density which makes such investment less profitable. In the latter areas, the take-up of WLA is typically rather low and cable infrastructure is often not available.²⁵ Consequently, applying the Greenfield approach, the incumbents' market shares in areas with a lower

²⁴ This has been assumed recently e.g. in Hungary and Germany. The latter was due to the fact that the features of the layer 2 bitstream product have been improved.

²⁵ Average rural cable coverage in the EU28 was just 11.2 percent in 2018. The figures also show substantial heterogeneity across the Member States ranging from full rural coverage in Malta to no coverage in five Member States. See EU Commission, *Broadband Coverage in Europe 2018*, p. 23 and p. 37.

population density are high in comparison with densely populated areas. This indicates that without WCA regulation there is no effective competition at the retail level in such areas with a lower population density. As the economies of scale and density in rural areas are not expected to change fundamentally in the short and/or medium term, the incumbents' Greenfield market shares are likely to remain above the level at which effective competition could be assumed.

Moreover, barriers to market entry are found to be high and non-transitory in most rural areas. Despite the increasing WLA take-up, WLA-based WCA offers are not expected to play a significant role in the short to medium term in these rural areas. In particular, the Draft Explanatory Note provides no evidence that, in less densely populated areas, commercial offers regarding alternative WCA products or trunk capacity for the connection of local and central handover points are available in the market. Entering the WCA market using cable infrastructure is also unlikely, due to the generally low presence of cable infrastructure in rural areas. Furthermore, even in those regions where cable is present, commercial cable based WCA offers are only observed in a few countries to date. Considering these aspects, BEREC is of the opinion that the competitive constraints on the WCA market are insufficient and therefore a tendency towards competition cannot be observed in the timeframe of the new Recommendation.

In line with this, the WIK study also concludes that as long as customers depend on copper based central access – which is often the case particularly in rural areas – maintaining the regulation on bitstream access is still justified.²⁶ Also, the EC concedes that *“those markets are not fully competitive”* to date.²⁷

Even in markets where copper is not a substitute, a central access product could very well be the most proportionate remedy to ensure competition. As there are few incentives to duplicate a ubiquitous fibre network, access regulation will

still be required. To BEREC's knowledge, Layer 2 and Layer 3 bitstream access products might often serve as an appropriate access product to a fibre network, as physical unbundling might sometimes not be economically viable or technically feasible. Further Layer 3 fibre-based bitstream access products could possibly be designed in a way that they display similar product features as Layer 2 bitstream products, even though the handover point differs.²⁸

Hence, it is not clear that the demand for bitstream products, including WCA products, will

²⁶ See WIK study, chapter 5.2.6.5, p. 217.

²⁷ See EU Commission, Draft Explanatory Note, p. 49.

²⁸ Reference is made to the BEREC response to the EC public consultation on the review of the Recommendation on Relevant Markets, BoR (19) 107, p. 13: *“In this regard, BEREC refers to the importance of both the point of handover and functional characteristics of the respective products when assessing whether (i) physical and virtual unbundled access products can be considered as substitutes within the market for WLA, and (ii) the markets for WLA and WCA should be merged into a single market. It has to be pointed out that products with similar characteristics might be established at very different points of handover in the network architecture. In certain specific cases, those services might be regarded as substitutes if the product characteristics are largely similar, even though the point of handover may differ significantly. Conversely, even where handover for two access products might occur at the same location or at a similar location, the functional differences of those products, with regard to the flexibility of product differentiation, transparency of transmission and Quality of Service (QoS), may be deemed not adequately substitutable by access seekers.”*

decrease with the migration from copper to FTTx. This is also acknowledged in the WIK study which states that *“it is possible that regional bitstream on FTTC and FTTH may become more prevalent as these technologies are installed in rural areas”*.²⁹ Moreover, although the migration from copper to FTTx may result in more aggregated local access points, it cannot yet be foreseen whether this will improve the profitability of WLA to a level which would make it a real alternative to WCA, particularly in rural areas.

In conclusion, BEREC does consider that the three criteria test is fulfilled at the EU level, and that significant competition concerns will continue to arise in the absence of regulated WCA access where it is appropriate, since i) high and non-transitory entry barriers are also still observed in the majority of Member States, ii) a general tendency towards competition is neither observed, nor expected in the envisaged timeframe and, in consequence iii) competition law will generally be insufficient to address the competition problems observed.

Conclusion

Overall, BEREC is of the opinion that the EC's view regarding the Union-wide competitiveness of the WCA market is premature and does not reflect the current situation and foreseeable future developments in the majority of Member States. Therefore, BEREC calls upon the EC to reconsider its assessment and to maintain market 3b/2014 in the list of markets susceptible to ex-ante regulation. Moreover, instead of entirely deregulating market 3b/2014, a more proportionate regulatory approach would be to engage in a detailed geographic analysis of the WCA market which, depending on the national circumstances, could lead to a geographic segmentation of markets or remedies and to a regulatory intervention limited to geographical areas where it is considered necessary.

4. Wholesale dedicated capacity (Market 2/2020)

The name and the scope of the market

In general, the distinction between *“High-Quality Access”* as described in the list of the 2014 Recommendation and *“Dedicated Capacity”* is unclear. Most NRA's and market players have been using the term *“High-Quality Access”* over the last years without any issues surrounding the clarity of the terminology. In general, BEREC considers the current definition of Wholesale High-Quality Access allows for sufficient flexibility for NRA's to include all products in the relevant market, where appropriate given national circumstances.

It should be noted that the second paragraph of page 50 of the Draft Explanatory Note states:

“The precise definition of the market should however be determined by the characteristics of the service delivered rather than by technological details. [...] [The] physical link may not be “dedicated” across the whole path, but may still be distinguished from residential offers, when the service provider is offering ‘guaranteed bandwidth’, with very stringent quality of service parameters and service level guarantees”.

²⁹ See WIK final report “Future electronic communications product and service markets subject to ex-ante regulation” (2020), chapter 5.2.4.1, p. 172.

Moreover, in contrast to the discussion on the retail market for High Quality Access on page 31 (Draft Explanatory Note) where it is acknowledged that “...some NRAs also included business-grade bitstream as substitute for dedicated business-grade products in a number of markets.”, Section 4.1.5 does not include any discussion on the substitutability of business services provided over bitstream/VULA when describing the characteristics of the products in this market. However, when analysing the retail market, NRAs should consider retail demand which arises from multi-site customers, where each sites’ needs can be different. Bitstream/VULA services that offer SLA’s, quality assurance and that are priced similarly to those of symmetric Ethernet services (i.e. business-grade bitstream) have been found to be part of this market by some NRAs. BEREC considers it important that there is an acknowledgement that such services may form part of the relevant wholesale market.

BEREC notes that the Draft Explanatory Note makes no explicit mention of leased lines with traditional interfaces. The only reference is in paragraph 4 of page 51 where it is stated that “*it may be justified to identify a market for high quality dedicated connectivity encompassing terminating segments of leased lines (with a focus on fibre-based lines) and dark fibre*”. Since leased lines with traditional interfaces still are important wholesale products in several Member States, BEREC would welcome that the EC makes more explicit references to these products.

As such, in order to include all the various products that form part of a high value services portfolio, BEREC considers High-Quality Access to be a more appropriate label so that NRA’s have the flexibility to define the product and geographic scope of the market to reflect heterogenous national circumstances. For the same reasons, BEREC is in favour of keeping statements from the 2014 Explanatory Note where the different types of M4/2014 products were set out (See 2014 Explanatory Note, p. 50, 2nd paragraph).

Regarding dark fibre, BEREC agrees with the Commission’s position that dark fibre potentially is an important product that can be used to provide terminating segments of “Leased Lines”. So far, however, only few NRAs included dark fibre in the relevant product market. Therefore, it would be useful to have an acknowledgement that in future NRAs may come to different conclusions on whether dark fibre is a sufficiently close substitute to include it in the market as discussed on page 51 of the Draft Explanatory Note.

Draft Explanatory Note - p. 50, 1st paragraph – definition of the terminating segment

The Draft Explanatory Note states that “*The terminating segment can be defined as the portion of the PtP line service between the end-user site and the closest exchange*”. While this definition has been applied by some NRAs, other NRAs applied a wider definition where the terminating segment goes beyond the closest exchange. In particular, in less densely populated areas typically no or only very few access seekers are present at the closest exchange of the incumbent operator. The boundary between trunk and terminating segments does not necessarily lend itself to technical definitions or criteria and other significant issues may need to be evaluated in order to appropriately define these markets. In BEREC’s view, the definition of the terminating segment should reflect national circumstances (respectively regional circumstances at the sub-national level) and needs to be determined on a case-by-case basis.

Finally, BEREC is also in favour of keeping the statement in the 2014 Explanatory Note stating that trunk segments are replicable on a national scale, but that *“this assumption does not exclude, however, that individual NRAs might find that certain trunk routes fulfil the three criteria and thus warrant ex-ante regulation”* (p. 50, 1st paragraph).

Draft Explanatory Note - p. 50, 3rd paragraph, bandwidths of Ethernet services

BEREC would like to highlight that 1 Gbps Ethernet interfaces and 10 Gbps Ethernet interfaces are widely used and 40 Gbps and 100 Gbps Ethernet interfaces have been available for many years. In many countries, high-quality access using a 10 Gbps Ethernet interface is available and in use. Therefore, the statement *“Ethernet (layer 2) is likely to be the prevailing interface for terminating segments of leased lines for bandwidths of up to 1Gbit/s”* is not correct, as Ethernet interfaces are available also for higher bandwidths. Furthermore, WDM is a technology to increase bandwidth in the network, but the services provided are Ethernet services (or wavelength services) and not *“WDM leased lines”*. Therefore, the paragraph might be shortened to *“Ethernet (layer 2) is likely to be the prevailing interface for terminating segments of leased lines.”* (New proposed text is underlined). Furthermore, in BEREC's view, a distinction between Ethernet and WDM is not necessary.

Draft Explanatory Note - p. 50, 4th paragraph, upgrade to terabit, “separate Ethernet continuity”

The Draft Explanatory Note mentions *“symmetrical speeds upgradeable to terabit”* as distinguishing product characteristics of leased lines. BEREC wants to point out in this context that most high-quality services today may not be upgradeable to terabit speeds and the market definition could unnecessarily be narrowed by this requirement. Also, the demand for terabit speeds does not seem to represent the needs of the majority of customers in the high-quality market, even from a forward-looking perspective. Therefore, BEREC suggests removing the criterion *‘upgradeable to terabit’* from the distinguishing product characteristics.

Furthermore, the term *“separate Ethernet continuity”*, which is already used in the Draft Explanatory Note accompanying the 2014 market recommendation, is unclear. In the BEREC report *“Layer 2 Wholesale Access Products excluding Ethernet-based Leased Lines on Market 4”*,³⁰ criteria (i) to (iv) were examined and there was consensus that the term *“separate Ethernet continuity”* is unclear. BEREC therefore proposes to either provide further clarification on the term or to remove the reference to it.

Draft Explanatory Note - p. 51, 4th paragraph – mobile backhaul

The Explanatory Note states that

“However, with a view to delineating the boundaries of the market for dedicated capacity and other business access products NRAs should ensure that the relevant wholesale products correspond to the retail market problem identified. In particular, because currently retail mobile markets are competitive at EU level absent wholesale regulation of access and call origination,

³⁰ *“Layer 2 Wholesale Access Products excluding Ethernet-based Leased Lines on Market 4”*. BoR (18) 120. June, 2018. See https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/8161-layer-2-wholesale-access-products-excluding-ethernet-based-leased-lines-on-market-4.

it is not generally justified to mandate regulated wholesale access to dedicated capacity for mobile backhaul."

BEREC is of the view that this consideration is not necessarily correct in all cases. Several countries currently regulate access to leased lines/Ethernet services for the purposes of mobile backhaul. Therefore, the conclusion that mobile retail markets are competitive may depend on the condition that regulated mobile backhaul services are supplied. In BEREC's view it would go contrary to the (modified) Greenfield approach to consider wholesale high-quality access for the purposes of mobile backhaul is outside the scope of the relevant market.

Including mobile backhaul in market 2 of the Draft 2020 Recommendation can be particularly important in view of the 5G roll-out. In several countries, the fixed incumbent operator has the largest and most ubiquitous fibre network and is also active as mobile network operator. Without access to high capacity fixed backhaul connections, other mobile operators lacking a fixed network with national geographic scope may have significant disadvantages compared to the fixed incumbent operator, which in the medium to long run may lead to competition problems in the mobile retail market.

This is also recognised in other statements in the Draft Explanatory Note:

p. 52, 3rd paragraph: *"Moreover, wireless technologies are unlikely to be able to replicate dedicated fibre connections because business users do not consider wireless technologies as a substitute but as a complementary service. This complementarity is further reinforced by the fact that the dedicated fibre connections will be increasingly essential for the deployment of wireless technologies to be able to meet the required quality of service".*

p. 52, 4th paragraph: *"As incumbents are strongly placed in dedicated infrastructure outside more densely populated areas, they can leverage their wider coverage to gain multi-site contracts and obtain an advantage in the speed of provisioning of 5G and the quality of the broadband connection. Incumbents, in order to protect their strong market position, would also have limited incentive to offer a wholesale access on commercial bases."*

Moreover, BEREC emphasizes that the need for fibre connections will rise in the coming years as 5G requires backhaul capacity of several Gbit/s. This is particularly the case if several base stations are linked in a frequently built chain or ring structure. Microwave connections (wireless point to point connections) are unlikely to provide sufficient capacity for these purposes. In this context, NRAs should analyse whether access to dedicated capacity and/or dark fibre is necessary to ensure investment and effective competition in retail mobile markets.

In the 2014 Explanatory Note the Commission outlined that *"NRAs may however consider and analyse whether the provision of wholesale leased lines or equivalent inputs in the wholesale high-quality market is able to provide, for instance in remote areas, a connection to mobile stations and between the co-located equipment and the accessing operator's core network"*.³¹ The developments mentioned above (in particular the expected massive 5G roll-out) reinforce the necessity to continue analysing connections to mobile base stations.

³¹ See EU Commission, Explanatory Note 2014, p. 51.

BEREC also wants to point out that in several Member States exactly the same wholesale product is used to connect business users and mobile bases stations or other network elements, and a restriction on use (preventing the use for mobile backhaul) may not be appropriate.

BEREC therefore suggests to delete the last sentence of p. 51, 4th paragraph or else amend it to clarify that in many cases there might be no distinction between capacity used for fixed retail services, fixed network inputs or mobile network inputs.

Burden of proof

P. 50 4th paragraph of the Draft Explanatory Note mentions cross-price elasticities as factor to be taken into account when delineating the boundaries of the market. Furthermore, the 4th paragraph on p. 51 states: “*Where NRAs determine based on a SSNIP test that dark fibre and active dedicated connections belong to the same market ...*”.

BEREC would like to point out that it is practically very difficult, if not impossible, to estimate cross-price elasticities or to implement the SSNIP test empirically on this market. Prices on this market are usually negotiated individually, are not transparent, and products for individual customers are difficult to compare (e.g. a 100 Mbit/s link in a city compared to 500 1 Gbit/s connections in a rural area). Prices may also include services other than connectivity, such as IT equipment, back-up lines, etc. BEREC is not aware of any empirical implementation of the SSNIP test or the estimation of cross-price elasticities on this market.

BEREC therefore strongly suggests not to require particular empirical tests. They should only be mentioned as a framework or as possible means to measure substitutability.

Draft Explanatory Note - p. 53, Potential geographic market definition

Regarding a potential geographic market definition, BEREC wants to point out multi-site demand as a particular feature of the high-quality access market. Many business users demand a connection of multiple sites by the same operator in the same contract. Operators with no own network or only partial coverage of the country therefore need wholesale access in order to be able to compete with the incumbent for such contracts connecting multiple sites. Therefore, it is essential that wholesale products are still available in the deregulated areas so that there are sufficient retail offers which connect different business sites. In analyzing the geographical scope for business markets, the conclusion reached by NRAs may differ from the retail mass-market, where different operators may compete for customers in different areas. This should also be pointed out in the Explanatory Note.

Furthermore, BEREC believes that the Explanatory Note should acknowledge that – depending on national circumstances – in some cases a more detailed geographic analysis may be necessary than in other cases.

Also, in the context of geographic market definition, the 4th paragraph on p. 53 outlines that the specificities of the network presence should be taken into account when choosing the geographic units. The Draft Explanatory Note then specifies that a network can be considered as present when it is relatively close to the customer premises and refers to a 50 m. distance in the footnote. The EC should be aware of the fact that such a detailed analysis comes close

to a micro-analysis. Thus, BEREC asks the EC to rephrase this paragraph as well as the reference by saying that this approach is possible, but does not necessarily have to be chosen and the criteria used should be specific to national circumstances

Conclusion

BEREC agrees with the EC that former market 4/2014, now market 2/2020 should be maintained in the list of relevant markets as BEREC put forward in its submission to the initial consultation. BEREC also agrees that dark fibre is a potential substitute for high-quality access but is of the view that conclusions regarding the inclusion in the relevant market may differ across countries. BEREC also considers business-grade bitstream services as potential substitute which should be mentioned in the Explanatory Note. In this line, BEREC suggests to maintain the definition of this market as a “high-quality wholesale access” market. BEREC also raises some issues regarding the definition of the terminating segment, avoiding or clarifying references to “separate Ethernet continuity”, not making reference to upgradeability to terabit speeds, and making an explicit reference to traditional leased lines. On mobile backhaul, BEREC considers that the Explanatory Note should acknowledge the need for regulated services in some countries, especially in the light of the expected massive deployment of 5G networks. BEREC also stresses the need to take into account the specificities of multi-site demand when dealing with geographical segmentation, when applicable.

5. Physical infrastructure access

BEREC recognises that access to physical infrastructure of the incumbent is key to the development of competition in many EU ECS markets. Indeed, physical infrastructure (such as ducts and poles used to deploy networks) represents a significant proportion of investment in NGA networks. Measures aimed at facilitating greater use of existing physical infrastructure can reduce the civil engineering works required to deploy new networks, thereby significantly lowering costs.

This being said, BEREC recognises that NRAs’ practices regarding physical infrastructure access (PIA) may significantly differ among Member States, given the differences in national network topologies, availability of ubiquitous ducts, level of demand for access to ducts and poles, and so on.

In order to take account of the heterogeneity of national markets, BEREC welcomes i) the position of the EC both in relation to its decision of not including PIA in the list of markets susceptible to ex-ante regulation at Union level, ii) its acknowledgment that given recent trends in some Member States, it may be appropriate or even necessary for some NRAs to consider defining and notifying an additional separate market for wholesale access to physical infrastructure, as well as iii) the guidance provided in the Draft Explanatory Note for the definition and the analysis of such a market.

The non-inclusion of a separate market for PIA

As highlighted in BEREC’s response to the EC public consultation on the review of the Recommendation on Relevant Markets (BoR (19) 107), most NRAs have not considered that

there was a need for a specific market analysis at the level of physical infrastructure in order to maintain any regulation on the infrastructure that was necessary to support competition in the related downstream markets. Most NRAs are of the opinion that they can maintain the respective obligations within Markets 3a, 3b and 4. It is also worth indicating that there are a few countries where there is no or limited duct availability controlled by the incumbent that could be used for alternative telecommunications networks.

It is acknowledged that the fact that the incumbent does not own or manage an extensive duct network does not mean by itself that there are no relevant physical infrastructures in those countries. However, for these countries, it would be very difficult to define and analyse a market for access to physical infrastructure. Further, there are also some NRAs which currently do not regulate access to physical infrastructure as an SMP obligation at all, either because the relevant markets are deregulated, or because other remedies/legal instruments are deemed to be sufficient or more appropriate.

In light of this situation, BEREC supports the position of the EC to not include the wholesale market for access to physical infrastructure in the revised list of recommended markets, as this would oblige all NRAs to undertake an analysis that would, in many cases, offer little, if any, material benefit.

The acknowledgment of the possibility of defining a separate wholesale market for PIA

BEREC welcomes the EC acknowledgement of the *“recent developments in Member States’ regulatory practice, which strongly signal the increasing importance of access to physical infrastructure in the next 5 to 10 years, in particular in those Member States where ubiquitous physical infrastructure is available”* (Draft Explanatory Note, p. 62). BEREC recognises that there will be national circumstances where the definition of a separate wholesale market for PIA would satisfy the three criteria test. The definition of a separate market for PIA could be particularly relevant in Member States where one single operator owns a physical infrastructure network which is sufficiently ubiquitous (it has national coverage and allows reaching all households in the national territory) and economically and technically suitable for the deployment of alternative fibre networks. In such cases, the regulation of such a market may be an adequate and long-term alternative to address the regulation of access physical infrastructure, as the French and British cases show. To the degree that physical infrastructure further promotes downstream competition, this wholesale market could allow the potential for NRAs to deregulate more extensively downstream, subject to the effectiveness of the remedies in the PIA market.

Concerning the EC guidance in defining such PIA markets, BEREC welcomes the EC’s further indications on how the PIA market could be defined in its product and geographic market dimensions. The guidance provided by the EC in its Draft Explanatory Note can serve as a good starting point for the future definition of PIA markets, together with additional guidance

provided by BEREC in its “*BEREC Report on Access to physical infrastructure in the context of market analysis*”³², which is consistent with the EC guidance on this issue.

Finally, BEREC will closely monitor experiences by NRAs on defining, analysing and regulating such a market for access to physical infrastructure. Once a relevant base of experiences will be accumulated, BEREC will consider the preparation of a common position to assist NRAs on the application of principles expressed in the Draft Explanatory Note.

6. Transition to the new Recommendation

BEREC welcomes that the Draft Recommendation³³, as well as the Draft Explanatory Note deal with the transition to the new Recommendation, largely following the 2014 Explanatory Note. In particular, in the draft texts submitted by the EC, the following issues are addressed:

1. Reference is made to the general principle that, until the point in time when a new market analysis is performed, existing market definitions, results of market analyses and remedies imposed on the basis of earlier market reviews remain fully applicable.
2. The correspondence between the markets identified in the Draft 2020 Recommendation and the markets listed in the 2014 Recommendation, as well as the implications of this correspondence for the timing of the NRAs’ notification obligations in light of article 67(5) of the EECR are established³⁴.
3. For on-going market reviews, it is clarified that in case an NRA still intends to regulate (a) market(s) that is (are) no longer included in the 2020 Recommendation, the notified draft decision shall outline and justify why the three criteria are satisfied.
4. On the other hand, it is noted that if the NRA is considering departing from a market definition as set out in the 2020 Recommendation, its notified measure should contain a reasoned explanation of why this is appropriate considering the national circumstances.
5. Lastly, the Draft Explanatory Note indicates that if an NRA notifies to the EC a draft measure that reflects the market definition(s) as set out in the 2020 Recommendation, having already conducted a public consultation on the basis of the market definition(s) as set out in the 2014 Recommendation, the mere adoption of the new Recommendation shall not *per se* imply that the NRA has to conduct a new public consultation.

As a minor novelty, the Draft Explanatory Note now contains a reference to the flexibility that the EECR provides to NRAs in reviewing remedies from time to time, in order to take into

³² BEREC Report on Access to physical infrastructure in the context of market analysis, BoR (19) 94. June, 2019. See https://bereg.europa.eu/eng/document_register/subject_matter/bereg/reports/8597-bereg-report-on-access-to-physical-infrastructure-in-the-context-of-market-analysis

³³ Cf. section 4.

³⁴ In particular, it is indicated that, for the purposes of assessing the expiry of the five-year market review period as provided by the Code, the new market 1 corresponds to market 3a of the 2014 Recommendation, while market 2 corresponds to market 4 of the 2014 Recommendation.

account the increasing rapidity of change in some of ECS markets. Additionally, the references to the need for NRAs to provide an appropriate notice period when withdrawing remedies³⁵, as well as to the absence of an obligation for the NRAs to further review a market which is not listed in the Recommendation anymore and where no SMP is found, are no longer included.

BEREC, in general, shares the views of the EC regarding the transition to the new Recommendation and is highly supportive of the reinforcement of the regulatory predictability principle.

With regard to the deletion of the references indicated above, BEREC's view is that the EC has put forward a sensible approach, as these principles are already enshrined in the EECC or can be inferred from the nature of the *ex-ante* market analyses proceedings.

As relevant items, and for the avoidance of doubt, BEREC expresses the view that the Recommendation and/or the Explanatory Note could however be more explicit on a few issues, mentioned below.

Firstly, it should be stated even more clearly that the adoption of the 2020 Market Recommendation is no reason to review existing market definitions, results of market analyses and remedies adopted prior to the entry into force of the 2020 Recommendation. The Draft Explanatory Note states that the "underlying principle is that remedies that have been imposed should stay in place until a new market analysis is undertaken". However, neither the Draft Recommendation nor the Draft Explanatory Note answer the question whether NRAs should start reviewing the existing markets definitions, analyses and remedies immediately after the adoption of the 2020 Recommendation. The Draft Explanatory Note remains vague on that issue. On the one hand, it says that "*NRAs should prepare in time for the new round of market analyses following the adoption of the revised Recommendation*" (cf. p. 71). On the other hand, the EC refers to the regular review period of five years under Article 67 EECC (cf. p. 72). Therefore, BEREC would welcome a clarification that, if the mentioned decisions have been adopted under the 2014 Recommendation, the next review should be carried out after the regular review period (of five years), unless there are reasons for an extraordinary review.

Secondly, for on-going market reviews, whereby a new consultation procedure is not *per se* necessary when an NRA has already conducted a public consultation regarding a market included in the 2014 Recommendation, that indicates an intention to regulate it, but that is no longer included in the new Recommendation (i.e., market 3b, as well as the termination markets, as the draft texts currently stand) NRAs should have to justify why the three criteria are still met in their draft measures/notification to the European Commission³⁶. However, this does not imply *per se* that a new national consultation procedure explicitly addressing this issue is required.

Furthermore, with respect to the particular case of termination markets, and in view of the upcoming approval of the Delegated Act, setting single maximum Union-wide voice call termination rates, BEREC considers that it should be explicitly stated in the Explanatory Note

³⁵ As an outcome of the market analyses procedure.

³⁶ As mentioned at point c) above.

that the new Recommendation does not have an impact on the validity of past decisions in what regards the non-pricing remedies imposed, until a new market analysis is performed.

Lastly, with regard to the markets not listed in the new Recommendation, recital 21 of the draft market recommendation is relevant. In this respect, it is suggested to reword recital 21 to bring it in line with the provisions of the Code, namely recital 165 and Article 67(1) EECC. BEREC would welcome a phrasing as proposed: *“The national regulatory authority (NRA) should also analyse markets that are not contained in this Recommendation, but that are regulated within the territory of their jurisdiction on the basis of previous market analyses, or other markets, if they have sufficient grounds to consider that the three criteria test is met. Hence, the national regulatory authority can also define other relevant product and services markets, not listed in this Recommendation, if they can prove that in their national context, the markets meet the three criteria test.”* (New proposed text is underlined).

7. Use of geographic surveys of networks in geographic market definitions

BEREC understands that the recommendation (recital 36) mandates NRAs to take account of the geographic survey of networks. Such an approach is not covered by Article 22 EECC and does not match, in BEREC view, the intentions of that Article. The recital can only refer to Article 64 (3) EECC, where it is established that *“NRAs shall, where relevant, also take into account the results of the geographical survey conducted in accordance with Article 22(1)”*. In order to be consistent with the legal provisions and the BEREC Guidelines on Article 22 EECC³⁷, BEREC asks the EC to align the wording of the last sentence in recital 36 to match the wording in Article 64 (3) EECC, by inserting *“where relevant”* (New proposed text is underlined).

³⁷ BEREC Guidelines to assist NRAs on the consistent application of Geographical surveys of network deployments. BoR (20) 42. March, 2020. See: https://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/9027-berec-guidelines-to-assist-nras-on-the-consistent-application-of-geographical-surveys-of-network-deployments