



**ECTA RESPONSE TO BEREC PUBLIC CONSULTATION**

**DRAFT BEREC WORK PROGRAMME 2017**

**(BOR (16) 169)**

**2 NOVEMBER 2016**

## I. INTRODUCTION AND KEY ECTA REMARKS

ECTA welcomes the thorough and ambitious draft BEREC Work Programme 2017 (“WP2017”), and the possibility for stakeholders to contribute to its further refinement prior to its finalisation.

We appreciate BEREC’s continued commitment to the development of regulatory best practices amongst NRAs (*Introduction, paragraph 2*), and we salute BEREC’s explicit commitment to contributing to the further development of the internal market for the ultimate benefit of Europe and Europe’s citizens (*Introduction, paragraph 2*). We also agree with BEREC continuing to develop its actions in the light of the three strategic pillars identified in its 2015-2017 Strategy (*Background, paragraph 3*).

In ECTA’s opinion, the development of the internal market and the delivery of end-user benefits is predicated on key unwavering commitments on the part of BEREC itself, national regulatory authorities individually, as well as policy-makers and legislators at EU and at national level. These commitments need to be geared towards: (i) a continued relentless drive to promoting effective competition (and ensuring that effective competition and innovation are not prevented by regulatory action or inaction), and (ii), ensuring that efficient investment is enabled at all economically viable levels of the value chain, by any willing investors, regardless of their market position. Considering the essential role of competitive pressure to achieve end-user benefits and foster innovation, no contributor to competition should be neglected, foreclosed or otherwise prevented from making its valuable contribution.

We broadly agree with the action items and deliverables put forward in the draft BEREC WP2017, and we particularly welcome BEREC’s clear focus on the review of the EU regulatory framework for electronic communications (*Introduction, paragraph 4*). We also note that BEREC will be reviewing its Mid-Term Strategy (*Section III. D. 6*).

We are however very surprised to see that the determination of BEREC’s 2018-2020 strategy appears only in *Section III. D. 6* and is only a *sub-item on page 24/25* of BEREC’s consultation document. The determination of BEREC’s 2018-2020 Mid-Term Strategy is critical for the future of all market participants in the electronic communications sector in Europe. Hence it would deserve much more attention and emphasis. We very much encourage BEREC to conduct a public consultation in the process of determination of BEREC’s 2018-2020 Strategy, to which ECTA would like to contribute.

We note with satisfaction that BEREC intends to put particular attention on specific issues relating to business customers in the relevant work streams (*Background, paragraph 5*). We ask BEREC to identify the business (and public sector) customer concerns, in each and every

relevant work stream for 2017. ECTA is on record with BEREC for well over a decade in asking for specific attention to business markets, and on the need for dedicated market analyses and for fit-for-purpose wholesale inputs. Considerable progress remains necessary and achievable in this area. A breakthrough is needed, and we hope and trust that BEREC will deliver it by making it an area for systematic attention in 2017 and going forward.

ECTA's key request to BEREC at this point in time is for it to place even more emphasis on the review of the EU regulatory framework for electronic communications and on the development of its own 2018-2020 Mid-Term Strategy.

We ask that both these elements of the WP2017 are made the unequivocal top priorities by BEREC, and are approached by BEREC with an explicit view to ensuring that: (i) the existing level of competition does not regress, and (ii) competition in next generation access networks (and relevant associated facilities and backhaul) continues to be effectively promoted. We urge BEREC to make its voice heard loud and clear in order to ensure that evolving EU policy, envisaged EU legislation, and regulatory measures at national level, effectively address and alleviate Significant Market Power ("SMP"), and do no amount to reducing competition notably by simplifying the number of wholesale access products and do not amount to strengthening SMP in practice.

ECTA provides brief specific comments on the draft BEREC WP2017 hereafter.

## II. SPECIFIC COMMENTS

ECTA broadly agrees with the action items and deliverables put forward by BEREC in the draft WP2017. Please find below our comments and recommendations regarding specific work streams.

### A. Promoting Competition and Investment

As mentioned in our introduction, we welcome BEREC's continued commitment to promoting competition and efficient investment. We emphasise that, from ECTA's perspective, promotion of investment needs to concern all economically viable levels of the value chain, by any willing investors prepared to bring competition, regardless of their market position. No competitor should be left behind or foreclosed as the role of small operators and maverick operators putting competitive pressure on large operators has proven to work. Furthermore, in promoting investment regulatory authorities, policy-makers and legislators need to safeguard the free choice of strategic positioning of all players as well as prevent any actions that would force or induce an ill strategic alignment, hence adversely and irrevocably affecting competition.

As stated by BEREC in its 2015-2017 Mid-Term Strategy, competition is the best driver of investment. In ECTA's opinion, safeguarding a competitive environment in next generation access is key. It is worth remembering that as long as the Net Present Value of a project is positive the project creates value for the shareholders<sup>1</sup>. Hence a project does not need to create new positive cash flows to create value for the shareholders.

The level of competition achieved by the existing EU regulatory framework for electronic communications is at risk, as a result of some NRA decisions, as well as on account of developments and proposals at EU level. ECTA would welcome a more pronounced focus and positioning by BEREC, in this section of the WP2017, on enabling and promoting competition at all levels, explicitly including civil infrastructure access and spectrum, emphasising the key importance of physical network access in particular to foster innovation and end-user choice, whilst not neglecting the complementary role of wholesale virtual access/wholesale broadband access, resale where relevant, etc.

*Section III. A. 1.1 (The impact of content markets (incl. premium audiovisual) and devices on fixed and mobile Electronic Communication Services (ECS) markets)* is somewhat removed from the key telecom wholesale access issues which are ECTA's primary concern, as we outlined them in the paragraph above. We also question whether the NRAs that are

---

<sup>1</sup> See Corporate Finance, Brealey & Myers & Allen

constituent of BEREC have powers to act in the areas addressed by item 1.1 (premium audiovisual content and devices).

*Section III. A. 1.2 (Convergence of fixed and mobile networks)* is highly relevant, as fixed and mobile networks are increasingly physically integrating with each-other, giving further advantages to those operators who control a (legacy) capillary fixed network. Backhaul connectivity is not a new area. We agree with BEREC that increased attention in this area is warranted, also in light of the more widespread utilisation of small(er) cells and the development of '5G'.

*Section III. A. 1.3 (Input on implementation of symmetric obligations: description of existing practices and consideration of future challenges)* is a worthwhile area of investigation for BEREC. We support BEREC's intention to catalogue existing practices and to consider future challenges. However, ECTA wishes to emphasise that SMP-based regulation (based on the competition law concept of dominant position) remains (and in our view should remain) at the core of the EU regulatory framework for electronic communications. A solid legal foundation for symmetric regulatory obligations, on objective environmental, technical, economic, etc. grounds is needed. Policy-makers, legislators, and *a fortiori* BEREC, need to make sure that there is a solid legal foundation for regulatory intervention where warranted. It is particularly necessary to ensure that potential future symmetric obligations do not result in strengthening the position of SMP operators, and that competition and the interests of end-users continue to be protected.

*Section III. A. 1.4 (A comprehensive assessment of the need to review the Common Positions relating to Markets 3a, 3b and 4)*. ECTA agrees that these BEREC Common Positions, which date back to November and December 2012, need to be reviewed. In ECTA's opinion, there is a clear need to strengthen these Common Positions, to further ensure pro-competitive regulation at national level by all NRAs. We specifically ask BEREC to add the following items to its work on or relating to the relevant Common Positions:

- (i) Development of a list of KPIs that should as a minimum be required by each NRA (further developing WLA BP27/34/35e, WBA 22/27/28e and WLL BP17/24/25e);
- (ii) Benchmarking of the implementation of Equivalence of Input (EoI) and the 2013 EC Recommendation on non-discrimination and costing methodologies;
- (iii) Assessment of the development of unbundling of line activation and repair (enabling alternative operators to use their own and third-party technicians);
- (iv) Benchmarking of the effectiveness and quality of wholesale operational processes;
- (v) Assessment of the effects of NRA decisions resulting in the phasing-out of SLU/LLU, and NRA decisions on wholesale charges for VULA/vULL. BEREC has already

identified that Layer-2 WAP tiered-by-bandwidth wholesale charges have been introduced in some Member States<sup>2</sup>. ECTA considers that such wholesale charges do not reflect actual costs of provision, and are very likely to harm competition, especially when compared to the competition that has been enabled by physical access. ECTA emphasises that fit-for-purpose physical access is possible and is necessary going forward, on both copper and fibre networks.

ECTA welcomes BEREC's intention to gain insight into its own harmonisation efforts, and (as stated in our introduction above) and BEREC's intention to focus on business market wholesale products. We ask BEREC to strengthen its statements of intent to effectively address these areas.

*Section III. A. 1.5 (New forms of sharing passive optical networks based on wavelength multiplexing).* ECTA is pleased to learn that BEREC will investigate this subject in 2017.

Please allow us to observe that the concept of WDM wholesale access was introduced by Ofcom in the UK as long ago as 2010, pending the development of genuine physical fibre wholesale access, and that this (fibre-related) Ofcom decision also included the original concept of VULA, which was aimed at fibre (not aimed at copper – other NRAs and Ofcom subsequently developed copper VULA).

The European Commission commented on Case UK/2010/1064 (page 9 and footnote 25)<sup>3</sup> among others as follows: *“Furthermore, the Commission invites Ofcom to re-assess the proposed remedies as soon as the technology enabling fibre unbundling (e.g. WDM (footnote 25) is available. In this respect, the Commission would stress that a VULA remedy should be considered as a transitional measure. In the long run, fibre unbundling will allow full and direct control over the end-users (also allowing to offer retail products improved compared to those offered by the access provider through an unbundled fibre line) and provide the next rung on the ladder of investment. Accordingly, the VULA remedy should be replaced by fibre unbundling as soon as it is technically and economically feasible or should possibly continue to be required in addition to full fibre unbundling.*

BEREC's draft WP2017 indicates that it will report on the current state of deployment of NG-PON2 technology (whether it has been employed, and whether access has been provided in case of co-investment projects, access to state-aided deployments, or imposed as a remedy for Market 3(a)) of the 2014 EC Recommendation on Relevant Markets Susceptible to Ex-Ante Regulation).

---

<sup>2</sup> BoR (15) 133: BEREC Report on Common Characteristics of Layer 2 Wholesale Access Products in the European Union, Table 4 and Table 5.

<sup>3</sup> Case UK/2010/1064:  
[https://circabc.europa.eu/sd/a/7af83f0d-fab8-4fca-8045-b6c493797cd5/UK-2010-1064-1065%20Acte\(4\).pdf](https://circabc.europa.eu/sd/a/7af83f0d-fab8-4fca-8045-b6c493797cd5/UK-2010-1064-1065%20Acte(4).pdf)

ECTA considers that these areas of BEREC investigation, whilst evidently worthwhile and which are clearly supported by ECTA, are unduly backward-looking. It is clear at this time that NG-PON2 wholesale access has not been provided to any meaningful extent by SMP operators. BEREC's expected report would therefore merely reflect the fact that access is not being provided by SMP operators on any material scale.

In ECTA's opinion, BEREC should also look forward, and in particular BEREC should reflect on whether its constituent NRAs are utilising their powers to the extent necessary to discharge the mandate given to them by Art. 8 of the Framework Directive and Art. 12 of the Access Directive, with regard to mandating network access. Article 23 of the 2010 EC Recommendation on Regulated Access to Next Generation Access Networks (NGA)<sup>4</sup> makes clear that NRAs should mandate unbundled access to the fibre loop, irrespective of the network architecture and technology.

ECTA calls upon BEREC to conduct a prospective assessment (in addition to retrospective assessment it puts forward in its consultation document) on the imposition of SMP-based wholesale fibre unbundling/WDM access. This should not only cover State Aid cases, and co-investment cases, but also address the justification for NRAs to mandate wholesale access in application of the regulatory framework in conducting their assessment of Market 3(a) of the 2014 EC Recommendation on Relevant Markets Susceptible to Ex-Ante Regulation.

*Section III. A. 2.4 (IP interconnection practices in the context of net neutrality).* ECTA welcomes a factual analysis of developments in this area. The co-operation between the ERG (now BEREC) and the OECD on this issue (joint ERG/OECD workshops in 2011 and 2012) yielded relevant insights into market dynamics for IP-peering and IP-transit. ECTA encourages BEREC to again fully conduct this examination together with the OECD.

## **B. Promoting the Internal Market**

*Section III. B. 1.1 (Inputs to legislative proposals in the context of the EC Regulatory Framework Review).* As mentioned in our introduction including ECTA's key remarks, we ask BEREC to prioritise the review of the EU regulatory framework for electronic communications, and BEREC's own 2018-2020 Mid-Term Priorities.

These two items should, in ECTA's opinion, be BEREC's top priorities in 2017.

Both topics should, in our view, be approached by BEREC with an explicit view to ensuring that: (i) the existing level of competition does not regress, and (ii) competition in next generation access networks (and relevant associated facilities and backhaul) continues to be effectively promoted. We urge BEREC to make its voice heard loud and clear in order to

---

<sup>4</sup> 2010 EC Recommendation:  
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010H0572&from=EN>

ensure that evolving EU policy, envisaged EU legislation, and regulatory measures at national level effectively address and alleviate Significant Market Power (“SMP”), and do not amount to reducing competition and do not amount to strengthening SMP in practice.

*Section III. B. 1.2 (Collaboration with the Commission’s consultant on its study on the review of SMP guidelines).* ECTA encourages BEREC to seek active involvement in the European Commission’s review of the SMP Guidelines. A key necessity in this regard is that the revised SMP guidelines should no longer rely on competition law precedents which are outside the telecommunications sector (as is the case in the 2002 Guidelines). SMP Guidelines for electronic communications networks in the 21<sup>st</sup> century need to clearly distinguish: (i) in-building wiring, (ii) civil infrastructure (ducts and poles etc.), (iii) physical access networks (fixed and wireless), (iv) backhaul, etc. and need to recognise the technical and economic limitations on duplication/multiplication of such physical network elements. With regard to electronic communications services running over networks, and Internet applications, the SMP guidelines should treat these separately from network-related issues. Attention remains required to bottlenecks also at the service and application layers, nota bene relating to numbering and addressing systems, bundling with other items controlled by dominant undertakings, etc.

*Section III. B. 1.3 (Review of Termination Rates (TR) Recommendation).* ECTA is on record as advocating harmonisation of Termination Rates.

### **C. Empowering and Protecting End-Users**

*Section III. C. 1.1 (Current definition and provision of universal service).* ECTA welcomes BEREC’s intention to examine Universal Service policies/practices in EU Member States, and recent experiences in this regard. We ask BEREC to explicitly include an assessment of the effect of universal service measures on competition and on the financial transfers between market participants.

### **D. Quality and Efficiency**

*Section III. D.3 (Business market indicators for the Digital Scoreboard (elaborate a survey and harmonise practices).* ECTA welcomes BEREC’s intention to propose to the European Commission a set of business market indicators that could be used for the Digital Scoreboard publication. However, we think that this is insufficient, and that this is unlikely to result in material progress in the short to medium term (the track record on finding common indicators on consumer markets indicates that this has been fraught with difficulties, and insufficiencies remain). ECTA therefore urges BEREC to take this matter in its own hands, and demonstrate its ability to lead for progress on the analysis of business services and the related requirements for wholesale inputs.



Section III. D. 6 (*Review of the BEREC Mid-Term Strategy 2018-2020*). ECTA is surprised that this key item of BEREC's work appears as a *sub-item on page 24/25* of its consultation document. The determination of BEREC's 2018-2020 Mid-Term Strategy is crucial for the future of all market participants in the electronic communications sector in Europe. This deserves much more attention and emphasis. ECTA, being a stakeholder, is eager to actively participate in the process of the determination of BEREC's 2018-2020 Strategy.