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ETNO Comments on the BEREC report on the impact of premium content on ECS markets and the effect of devices on the open use of the Internet

BEREC approved for public consultation the [Draft BEREC Report on the impact of premium content on ECS markets and the effect of devices on the open use of the Internet](#). ETNO welcomes the opportunity to engage with BEREC on this important work stream.

ETNO's response mainly focuses on Section 2 of BEREC's report, namely the discussion of the impact of premium content on ECS markets. However, many of these views are equally valid for the role of devices. ETNO confirms the growing importance of premium content and additional services for ECS providers in their total offer to consumers, including the benefits of bundles for our consumers. Content and premium content offers are nowadays important areas for investment by ECS operators. Therefore ETNO generally supports BEREC's ambition to gain a greater insight into this area and its implications for ECS markets. However, the relevance of this report for BEREC's future work in this area is not entirely clear. In this context, it is crucial to take into account that market trends such as bundling of services, content and devices, is not specific for ECS markets but is reflected across the digital market. Accordingly, this potential task goes beyond BEREC's mandate.

The report's main purpose seems to be to highlight the growing importance of bundling of electronic communications services (ECS) with premium content and devices, and its possible impact on competition and consumers in ECS markets. Apart from providing context and overview and confirming that NRAs are allowed to address aspects of content sold in bundles with ECS in assessments of the markets, in 3a, 3b and 4 specifically to "avoid margin squeeze situations", the report does not recommend any further actions or analysis on this topic.

Bundling per se has many advantages for customers. Bundling eases and accelerates the customer search for a solution, simplifies their sourcing process through 'one-stop shopping', and provides a single point of contact. In addition, it might lead to lower prices for the customer, due to the fact that the supplier/operator passes its internal costs savings – which occur from the bundling – to the consumer. Thus, bundling is *per se* positive as long as there is sufficient competition between bundled offers and/or individual elements of the bundle.

To the extent that this report should become the basis for future BEREC recommendations, e.g. on market assessments in the context of ECS ex ante regulation, ETNO is concerned that the **complexity of this topic goes far beyond any potential issues in ECS markets that BEREC portrayed in its draft report**. While BEREC correctly recognized that ECS markets are increasingly interlinked with content, devices and other related services, its exposition of the potential issues this may raise for the effective competitiveness of ECS markets is overly simplistic and one-sided. A comprehensive assessment that provides robust insights and is

future-proof would require a significant amount of further analysis that provides a balanced assessment of the issues at hand.

Most worryingly for ETNO, the report considers scenarios where ECS incumbents could use bundling with premium content to distort competition in ECS markets. However, it does not consider scenarios in which strong players in content markets (traditional broadcasters or on-demand providers) could leverage their market power in these markets into ECS markets. Also, the variety of available networks are not considered, including also satellite, free-to-air services, or TV-cable providers. Neither does it consider the possibility that the bundling may in fact lessen the market power of ECS incumbents as the increasingly diversifying landscape of bundled ECS and content services (which is discussed below) creates more vibrant competition in which consumers face much broader choices between different types of providers and modes of service provision. Finally BEREC does not consider to which extent regulation of ECS markets may in fact risk inadvertently distorting related markets, for example where it reduces an ECS incumbent's ability to enter the content market as a new challenger. ETNO would expect these aspects would be fully addressed by any further BEREC reports, to provide an objective and balanced view of the issues. These questions related to the necessary level playing field for all the actors present on these markets should be then managed by the competent authorities, which could be NRAs as far as electronic communications are concerned or competition law authorities as appropriate.

BEREC's draft report also fails to recognize that ECS retail markets have been largely deregulated, given effective competition is now present in most countries' retail residential ECS markets. As a consequence the EU recommendation on relevant markets susceptible to ex ante regulation no longer includes any retail level markets. As bundling of content services with ECS happens at the retail level, it is unclear then whether BEREC is concerned that increased bundling could lead to a re-emergence of a level of retail-level market power that warrants regulatory intervention. The cases referenced concern solely cases with upstream SMP where the bundled retail services are included in replicability/margin squeeze tests. ETNO would invite BEREC to confirm that it is less concerned about the re-emergence of retail-level market power but that its primary interest is in the context of economic replicability tests.

Furthermore, while the most valuable content (premium sports content) is usually available on an exclusive basis, with no obligations on the content owners to make it available to competitors, access to ECS incumbents' (copper and fibre) networks is highly regulated and open to competitors. In other words, it is significantly simpler for a content provider to start offering ECS than it is for an ECS provider to start offering exclusive premium content. This asymmetry and its implications for market entry barriers are not further explored in BEREC's report. Any such potential problems related to premium content need to be solved via adjustment of rules in the respective content market, which goes beyond regulation of ECS.

Finally, the market for content includes **very different kinds of available content**. Free TV services can be received by nearly every access technology. This is also valid for most of the Pay-TV services (except for some exclusive premium content which is discussed below). Accordingly,

such content can be offered by every ECS provider and is unlikely to cause competition issues in ECS markets, unless it is deliberately withheld from some providers or technologies by a content provider. However, some premium content services, particularly premium sports content such as national football leagues, are often awarded exclusively to individual providers, often through auctions. This content tends to be highly valued by consumers who are willing to pay high premiums to access such content, often via pay-TV subscriptions. In the case of national football rights, the EU has previously implemented the so-called “no single buyer rule” that stipulates rights have to be awarded to at least two different content providers. Where exclusive content is bundled with ECS and the exclusive content is a significant driver of consumers’ choice, holding the majority of highly valued premium content may well impact on competitive dynamics. With regard to premium content, the AVMS Directive provides a general benchmark to assess the importance of outstanding events, specified by Member States. Even though such exclusive offers are usually limited to a specific period of time, other providers may face barriers to compete for premium content, e.g. challengers trying to win the next auction. This is likely to vary with the specific circumstances in each country, and the impact on the ECS markets would have to be assessed on a case-by-case basis. In any case, such auctions already fall under media regulation and are subject to competition law. Any identified issues should thus be addressed with the available regulatory tools.

A more recent development is the emergence of OTT **platforms offering bundles** consisting of some or all of various content services (movies, TV-series, music, e-books), devices and other retail and services (e.g. Amazon Prime subscriptions give access to a large range of content services as well as preferential online retailing services. In addition customers can buy Amazon’s Fire Stick, e-reader and Alexa system). Large platforms often benefit from network effects, which have the potential to impose switching barriers to consumers. Such bundles are offered via the internet and are accessible independently from the ECS. Though the market for platforms is very heterogeneous, a few platforms have outstanding market positions and prominently offer exclusive content alongside non-exclusive content, devices, and other services. Access to exclusive content could lead to additional switching barriers.

While most of these platforms currently tend not to offer services captured by the ECS definition, many of them are starting to offer such services, directly competing with ECS providers and which increasingly affects the competitive dynamics of ECS markets. Such ECS, usually number-independent Interpersonal Communication Services, will most likely not be covered by any sector-specific rules that are supposed to address potential switching barriers. At the same time, rules addressing switching barriers of more traditional ECS will most likely become significantly tightened by the upcoming European Electronic Communications Code. As consumers’ decisions are often primarily driven by the premium content offered rather than the associated ECS, market power in such scenarios could transfer to players that currently are not defined as ECS providers.

More generally, as a result of extensive consumer and/or access regulatory obligations— ECS platforms are today not in an advantageous competitive situation compared to other content

providers such as OTT platform services and broadcasters. It is crucial that in increasingly converging markets ECS providers are not put at a competitive disadvantage to new types of competitors by virtue of an uneven regulatory playing field. This is essential for attracting investment in critical digital infrastructure and ensuring that consumers continue to benefit from the positive outcomes of effectively competitive retail markets. Given their increasing relevance, if the impact of bundling is further assessed, policy makers and regulators should take an active interest in ensuring that content markets and access to premium content in particular are competitive and work in consumers' interests.

Regarding Section 3 of the draft report, in particular, on the effect of devices on the open use of the Internet, ETNO welcomes BEREC's efforts to address the potential issues through further assessment. As already highlighted by the Industry during the definition of rules on internet access services (i.e. Net Neutrality rules), the openness of the internet should be ensured across the value chain for the benefit of the consumers, to address needs. This should, include all actors that connect the end user to content offered online information and applications. Such actors must not restrict in any discriminatory way the ability of customers to access content, information and applications of their choice by misusing their crucial role as gatekeepers.

Accordingly, BEREC's conclusion that the vast majority of limitations related to the OS of devices are objectively justified and do not raise concerns, would require further reflection. In fact, BEREC's initial findings seem to be not in line with the European Commission's Statement of Objection for breach of competition law to the undertaking producing the most popular OS among smartphones and tablets, after a detailed in-depth analysis which precisely appears to reveal the reverse of BEREC statement.

In conclusion, whilst the report touches upon some of the main issues in relation to the bundling of ECS with content services, the well-established trend of convergence means that the markets for classical telephony services, accessing content, applications, etc... are no longer offered separately and by separate entities over separate systems and networks, but that all players/platforms are competing for the same consumers and similar service bundles though starting from a different but evolving technological footprint. Accordingly, if any further assessment is considered, this needs to encompass the whole digital market and should be evidence based.



ETNO (European Telecommunications Network Operators' Association) represents Europe's telecommunications network operators and is the principal policy group for European e-communications network operators. ETNO's primary purpose is to promote a positive policy environment allowing the EU telecommunications sector to deliver best quality services to consumers and businesses.

For questions and clarifications regarding this position paper, please contact Paolo Grassia, grassia@etno.eu