

BoR PC11 (18) 14



ecta RESPONSE

**TO THE PUBLIC CONSULTATION BY BEREC
ON THE**

**COMMON POSITION ON
MOBILE INFRASTRUCTURE SHARING**

BoR (18) 236

18 JANUARY 2018

I. Introduction

1. **ecta**, the **European Competitive Telecommunications Association**, representing over 100 challenger telecoms operators and digital solutions providers, appreciates the opportunity to comment on BEREC's draft of a Common Position on Mobile Infrastructure Sharing ('draft CP').
2. **ecta** agrees with BEREC that the role of mobile infrastructure sharing is likely to further gain in importance as 5G deployment is picking up and operators have to consider cost implications and how to manage the transition process. This may imply revisions to existing as well as the adoption of new sharing agreements.
3. In view of these developments, **ecta** also supports the creation of a shared analytical framework among NRAs for the assessment of such agreements on a case-by-case basis.
4. The need for case-by-case assessment implies that any discussion of benefits and drawbacks must occur against the specific details of a concrete infrastructure sharing agreement. While not part of the three common positions set out in the draft CP, the list of potential benefits and drawbacks feed into the common positions and will form part of the finally adopted document. **ecta** therefore considers it appropriate to preface their presentation by a remark recognising their non-exhaustive nature and a clearer emphasis on the need for context-specific assessment.
5. Before setting out its views on the individual common positions of the draft CP, **ecta** wishes to underline that the practical usefulness of such a framework depends decisively on the institutional setting in which it is applied. As BEREC has previously identified dispute resolution proceedings as the main source of NRA involvement in the assessment of infrastructure sharing arrangements,¹ **ecta** encourages NRAs to ensure that applicable rules for these proceedings are widely publicized and regularly assess market actors' awareness thereof. Importantly, according to the type of agreement, this may also extend to third parties if they are among its beneficiaries.
6. All competent authorities should equally discharge this facilitating role in respect of available dispute settlement procedures. **ecta** considers that legal context is of paramount importance here, as the authorities charged with the administration of dispute resolution proceedings under Article 26 of the European Electronic Communications Code (EECC, or the Code) are not necessarily the same as those in charge of dispute resolution under the Cost Reduction Directive (CRD). BEREC itself has documented these differences,² but unfortunately neither in its preparatory work to the Common Position, nor here distinguishes between NRAs and national dispute settlement bodies. As a result, the commonalities of competence for NRAs in dispute resolution matters³ may be overstated in the draft CP. Since the objectives pursued by either under their respective regimes differ, it is important for the finally adopted CP to explicitly

¹ BoR (18) 116.

² BoR (17) 245, pp 4, 7, 22.

³ BoR (18) 116, p 4.

recognise that the rules of the EECC prevail over those of the CRD.⁴ For detailed comments on the objectives proposed for the analytical framework, see paragraphs 21 et seq. below.

7. **ecta** further places emphasis on these differences among the legal regimes for dispute resolution for the variation in terms of procedural specification and in process duration.
8. As regards procedural standards, **ecta** observes that only the Code seeks to ensure that binding decisions to resolve disputes be rendered ‘on the basis of clear and efficient procedures.’⁵ These requirements, essential to the successful functioning of dispute resolution, do not form part of the CRD. This difference reinforces the urgency to recognise the primacy of the EECC. On the basis of its experiences with dispute resolution under the CRD, **ecta** would further call on BEREC to make the review of the functioning of dispute resolution procedures across these legal bases a recurrent feature of its work. The application of this Common Position should feature prominently among the sources for such monitoring.
9. As regards process duration, which is of critical importance for providers as well as for other undertakings benefitting from access or interconnection obligations, the provisions of the EECC further underline its focus on achieving timely resolution by (i) not requiring any minimum period of non-resolution for a request to launch proceedings to be admissible,⁶ and by (ii) allowing for reliance on other mechanisms where these are more likely to yield rapid resolution.⁷ Also such considerations of procedural efficacy point to the need to properly differentiate the relevant contexts of dispute resolution under the two instruments.
10. Finally among these preliminary considerations regarding dispute resolution modalities, **ecta** would also underline that applicability of the dispute resolution mechanism of the EECC is not excluded by the specificity of the CRD. Further developments in market regulation under the EECC could thus also lead to the mandating of obligations that would be functionally comparable to voluntary sharing envisaged by commercial negotiations ending in dispute. This could be the case, for example, in respect of disputes regarding passive sharing if a separate infrastructure market, as currently considered by BEREC,⁸ would be defined.
11. A further preliminary consideration attaches to the scope of the report. While BEREC’s own preparatory report and the draft CP equate mobile and wireless infrastructure sharing, **ecta** considers that the more appropriate term in view of ongoing technological developments would be ‘wireless infrastructure sharing’ to reflect that infrastructure sharing arrangements in a 5G environment will not necessarily be limited to MNOs. This is relevant notably in view of developments regarding the highest of the EU’s spectrum

⁴ Article 1(4) CRD.

⁵ Art 26(1) EECC.

⁶ Ibid.

⁷ Art 26(2) EECC.

⁸ BoR (18) 228, 6.12.2018.

pioneer bands for 5G deployment, which already today is considered for use in settings that differ from traditional mobile networks in scope [coverage], usage purpose [applications] or usage mode [fixed / mobile].

12. In conclusion to these introductory remarks, **ecta** stresses the need for the finally adopted CP to integrate the considerations set out in paragraphs 4 to 11 above, to achieve both maximum clarity and effectiveness from the Common Position. This request should be read together with the detailed comments on the body of the Common Position in the following section.

II. Comments

13. **ecta** finds the draft CP to provide a reasonably comprehensive framework to be considered when assessing infrastructure sharing agreements, and agrees with the need to ensure that assessments are sensitive to market context and to the fullest extent possible evidence-driven.
14. As an introduction to its comments on the individual common positions, **ecta** wishes to offer a number of observations on the conceptual framework for assessing the benefits and drawbacks of sharing agreements beyond the recognition of their non-exhaustive character (see paragraph 4 above).
15. While BEREC in its preparatory report and other prior work has analysed existing sharing arrangements, the draft CP lacks clarity and transparency in translating these empirical findings, and their limitations, into the proposed text. As a result, BEREC may underestimate the benefits and overestimate the drawbacks of sharing agreements. This, in turn, may have negative consequences for the assessment of cases in which the circumstances differ materially from past experiences, and especially for the deployment of 5G, for which examples of completed deployment and taking into operation are missing. **ecta** therefore proposes to explicitly acknowledge these limitations in the final CP.
16. Specifically, **ecta** observes on the proposed specification of benefits and drawbacks that:
 - It is important to not conflate cost efficiencies and cost reduction, as increased efficiencies may legitimately be leveraged to achieve faster and/or wider deployment for the same amount of investment, additional network upgrades, or additional investment in service development. In **ecta**'s view, competent authorities should therefore focus on the overall investment logic associated with the realisation of cost efficiencies when assessing individual agreements with regard to their overall impact;
 - As regards potentially reduced incentives to invest or reduced ability to compete as a result of especially active forms of sharing, it needs to be considered that:
 - Operators will retain an incentive to ensure that networks can meet market demand and compete with other infrastructures when sharing. Even where prospective demand is uncertain, competent authorities therefore need to carefully assess investment incentives in this wider framework and

examine sharing agreements for indications (e.g. specific clauses) that participants have taken measures to avoid these incentives being compromised;

- Operators' ability to differentiate themselves on key competitive factors is to a large extent determined at core network layer, and may also be preserved by purchase of service components at different quality grades, so that RAN sharing does not *per se* already reduce the ability to compete (for comments on the suggested RAN sharing typology, see paragraph 19f below);
- Overall, operators' incentives to invest and ability to compete have to be evaluated as part of a comprehensive assessment that recognises that infrastructure-based competition between operators may not be equally feasible everywhere at all stages of market development.

17. The comments in the following sections address in turn aspects of CP1 (paragraphs 18 to 20), CP2 (paragraphs 21 to 0) and CP3 (paragraphs 28 to 35).

II.1. Comments on the proposed typology of infrastructure sharing

18. With CP1, the draft CP offers a generally useful overview of infrastructure sharing types.

19. While **ecta** welcomes the typological effort to make sense of the range of conceivable sharing opportunities, it finds the proposed text not to be sufficiently clear in respect of the following aspects regarding active sharing scenarios:

- RAN sharing being defined as joint use of 'the same access network equipment', it is unclear what differentiates 'Multi-Operator Radio Access Network (MORAN)' defined as 'RAN sharing where only equipment is shared' therefrom. This leads to every form of RAN sharing being MORAN sharing, leaving doubts about the economy of the proposed typology.
- Secondly, the term 'Multi-Operator Core Network (MOCN), by its designation, does not fit the definition of RAN sharing, as it excludes network sharing at the core layer (as, by that definition, '[e]ach operator uses its own network').
- Thirdly, the relation between the definitions of MORAN, MOCN and spectrum sharing is ambiguous: either the distinction between MORAN and MOCN turns on the inclusion of spectrum under MOCN, making the term 'spectrum sharing' as such redundant, or it turns on the inclusion of passive elements under MOCN, thus contradicting the qualification as active sharing more generally.

20. **ecta** suggests for these underlying conceptual questions to be resolved prior to adoption of the draft CP. In that same context, BEREC should also clarify the reasons why the above typology appears to have been limited to sharing arrangements within the access part of the network. **ecta** considers this of significant importance, as problems of competitive differentiation appear most fully where sharing extends beyond the access part.

Accordingly, the final CP should reflect the differentiated impact that sharing at different network layers is likely to have.

II.2. Comments on the objectives to be considered when assessing infrastructure sharing

21. In addition to the parameters to be considered and an accurate classification of infrastructure sharing agreements, their assessment needs notably to account for the appropriate objectives. Competent authorities must thus be clear as to the legal framework they apply when assessing infrastructure sharing agreements, as these may pursue different objectives (see paragraph 6 above). These differences may, in turn, lead authorities to reach different compatibility assessments and envisage different possible solutions to observed difficulties.
22. **ecta** generally agrees to the objectives identified in CP2, but would caution that the text, as currently drafted, appears to place disproportionate emphasis on the role of infrastructure-based competition (infrastructure-based competition) in the EECC. In particular, the reference to infrastructure-based competition as being explicitly mentioned in the Code suggests that this form of competition would be endowed with a special form of legitimacy when compared to service-based competition. However, Article 3(2)(b) of the Code refers to *efficient* infrastructure-based competition only as one example of types of competition that NRAs and other addressees are to promote in the provision of electronic communications networks and associated facilities. The implication should therefore be avoided that investment to win over competitors' customers would be limited to infrastructure-based competition. In fact, infrastructure sharing agreements will for a significant part be driven by the impossibility of having multiple parallel infrastructures on economic terms, thus reflecting the efficiency criterion invoked in the Code. Where service-based competition is an appropriate means to promote competition in a given setting, for example to facilitate market entry by a new provider, it should be made clear that this naturally also entails investments. In **ecta's** view, it is decisive that infrastructure sharing agreements be assessed with regard to their long-term impact on effective competition, and notably whether and how they impact operators' incentives to engage in infrastructure-based competition, assuming this to be efficiently possible in terms of the domestic context in which the infrastructure sharing agreement operates.
23. As regards the objective of promoting better connectivity, **ecta** would encourage BEREK to explicitly situate this in the context of the Code as well. Article 3(2)(a) speaks explicitly of promoting 'connectivity and access to, and take-up of, very high capacity networks'. The wording of this objective underlines, first, that the promotion of connectivity in line with the Code can be attained only where the activities in question do effectively contribute to the attainment of VHC class connectivity. **ecta** believes that this means that NRAs should be comparatively more demanding of infrastructure sharing agreements in this regard, requiring them to noticeably contribute to attaining this level of connectivity, while taking account of the associated economic realities. Where infrastructure sharing agreements concern different technology generations, this aspect needs to be adequately

reflected in making determinations. While it will not be appropriate to retrospectively apply this requirement to existing infrastructure sharing agreements, their impact in the context of 5G deployments will have to be carefully considered, especially when existing infrastructure sharing agreements are revised to accommodate these. Secondly, this wording also suggests that attainment of this objective needs to be assessed in a multi-dimensional manner, which considers improved connectivity together with access thereto and take-up thereof.

24. As regards the three subpoints listed under the better connectivity objective of (a) service improvements in terms of coverage or quality, (b) service and technology development and transition management, and (c) reduction of deployment costs for passive infrastructure, **ecta** is of the opinion that they require appropriate contextualization in view of the preceding remarks.
25. This means notably that reduced deployment costs should also be seen in the wider perspective of promoting competition, and not be taken to imply preferential or exclusive jurisdiction under the CRD. While deployment under the CRD can be conceived as an important element towards achieving the objectives of the Code, it does not substitute for or displace these. The emphasis on the efficiency of new deployments under the CRD in this sense mirrors the efficiency dimension of the Code when referring to infrastructure-based competition (see paragraph 22 above), but it does not incorporate the same finality as the latter. Considering that infrastructure sharing agreements generally are not driven solely by the purpose of infrastructure build-out, but by participating parties' intention to participate in the competitive process for the provisioning of electronic communications delivered via a wireless communications network, whether at wholesale or retail level, it is, however, of foremost importance to remain mindful of this finality. Thus, the reduction of costs needs to be linked both to a comparative efficiency assessment and to the impact on competition in electronic communications markets downstream as well as in a potential market for physical infrastructure. Analysis of the competitive impact needs further to appropriately differentiate between the implications of infrastructure sharing agreements for capital and operational expenditures to arrive at an appropriate assessment (on this distinction, see paragraph 30 below). A counterfactual in which the alternative would simply be no deployment should trigger the question whether the fact that the infrastructure sharing agreement allows deployment to occur reflects the fact that costs become comparatively more bearable, or that they indeed become more efficient. More generally, this reinforces the need for clear separation between analyses of infrastructure sharing agreements governing joint exploitation of already existing and those governing joint deployment of new infrastructures. To reflect the foregoing considerations, **ecta** proposes to redraft the relevant wording in the Common Position as 'improved joint use of or deployment efficiency for (very) high capacity electronic communications networks used for the provisioning of wireless electronic communications services'.

26. Following what has been said under paragraph 25, **ecta** believes that considerations regarding service improvements and service and technology development and transition management should be similarly contextualised, bearing in mind the technology-neutral nature of EU communications law.
27. **ecta** attaches no specific comments to the objective of ensuring efficient spectrum use, but agrees to its inclusion.

II.3. Comments on the parameters to be considered when assessing infrastructure sharing

28. As regards the parameters to be considered when assessing infrastructure sharing agreements specified in CP3, **ecta** generally agrees with the proposed list. It wishes, however, to attach four transversal (paragraphs 29 to 32) and a number of specific comments (paragraph 33) thereto, before closing with two suggestions as regards the relation with competition law (paragraph 34 et seq.).
29. At a general level, **ecta** would have found a greater degree of specification on the operational assessment of the various parameters, building on previous BEREC work useful to ensure that the assessments to be carried out also methodologically are rooted in a shared understanding. It suggests to achieve such consolidation by inserting appropriate cross-references in the CP during the finalisation process. Given the complexity of the subject, the final CP should state clearly that it does not, by itself, provide a sufficient basis for conducting assessments of specific infrastructure sharing agreements.
30. Furthermore, **ecta** believes that the finally adopted CP should include mention of the critical distinction between capital and operating expenditures. Infrastructure sharing agreements and their associated efficiencies need to be assessed from both of these vantage points to gauge their likely competitive outcomes. At a given overall level of competitive pressure, where efficiency gains from infrastructure sharing agreements relate to fixed infrastructure assets, i.e. capital expenditure, these are unlikely to be passed on to end-users by way of price reductions, whilst this is much less likely to obtain for reductions in operating expenditures. BEREC has recognised such considerations in its preparatory work⁹ and **ecta** would welcome these to be carried over into the final CP.
31. It also seems important to further clarify the status of the parameter ‘geographic scope’, which is subsequently expanded upon under the heading of ‘Feasible level of competition’. **ecta** wishes to highlight the following four points:
- As the discussion on feasibility suggests, the economic case for infrastructure sharing is shaped by the confluence of population density and geographic factors. **ecta** considers that the practical relevance of the CP could be improved, first, through a more careful statement of their interrelationship to distinguish economies of density, which are a function of population distribution within a

⁹ BoR (18) 116, p 16.

given geographical unit, from cost-shaping topological features within the same unit, which do not have to be correlated with population density.

- Secondly, the CP should underline that, conceptually, the considerations on the feasible level of competition specifically concern the level of efficient infrastructure-based competition feasible in a given territory, and that this analysis must always be related to an overall appraisal of the geographic scope of the infrastructure sharing agreement, since sharing agreements may not be limited to areas directly problematic in terms of their economics of density. In **ecta's** view, such emphasis could appropriately address the concern about the wider competitive impact in relation to the objective of promoting competition.
 - Building on this, the CP should encourage competent authorities to practically assess geographically limited forms of collaboration in such a wider perspective where the overall infrastructure sharing agreement extends beyond the geographic scope of the concrete instance of collaboration.
 - Due to the overall relevance of geographic considerations to how competent authorities will approach their analysis, **ecta** also suggests to either begin the list with or preface it by the presentation of this parameter.
32. **ecta** would further suggest that the final CP explicitly state that its adoption is without prejudice to existing agreements and thus does not necessitate a reassessment. This, however, need not apply where the terms of an ongoing agreement are subsequently modified, notably where amendments to rights of use to radio spectrum are concerned.
33. Additionally, **ecta** wishes to attach the following observations on specific elements of drafting in their order of appearance sub CP3:
- Technologies involved: **ecta** would welcome for the final CP to underline that infrastructure sharing agreements need to be assessed in an integrated manner when spanning multiple technologies, and that the differences between 5G and preceding technology generations (see paragraph 11 above) are highlighted in this context. This aspect needs to be given particular attention where existing infrastructure sharing agreements are extended across different technologies (see paragraph 23). Furthermore, the possible pro-competitive implications of certain technologies underpinning sharing types such as MOCN (which allows operators benefitting from roaming agreements to more easily transition to operating their own RAN) should be recognised. Similarly, potential competition problems deriving from a lack of interoperability between technology choices should be recognised;
 - Feasible level of competition: Point a) should clarify that profitability in high-density areas derives from the ability to profitably recover expenditures with a lower level of the overall population in that area than what is the case in sparsely populated areas. In other words, there is a bigger part of aggregate demand within the geographic unit. At the same time, it should also be mentioned that even under

these preconditions, independent deployment may not always be possible (see immediately below);

- Non-replicable sites or deployments: The final CP should make clear that the ‘specific situations’ of non-replicability referred to can also include urban settings, in which parallel deployments may not be possible due to site shortage, radiation limits or other considerations (such as zoning and other town planning restrictions). According to the precise circumstances, this may justify active sharing in situations where population density alone would suggest the feasibility of efficient infrastructure-based competition;
- Types of sharing: As highlighted under the previous point, other forms than passive sharing may be the only feasible option in certain circumstances. **ecta** suggests making this point explicit by including reference to non-replicability considerations under this heading. It would also be appropriate to recognise potential pro-competitive uses of roaming agreements in this context;
- Reversibility and contractual implementation: **ecta** proposes to make the rigidity of the infrastructure sharing agreement more readily assessable by specifying that it (i) must appropriately reflect the difficulty that the agreement is supposed to overcome and what is needed in view thereof to secure participants’ legitimate expectations, and (ii) must not disincentivise efficient infrastructure-based competition by any of the participants where this may become reasonably possible during the duration of the agreement.

34. **ecta** further suggests to include the list of competitive concerns linked to infrastructure sharing agreements from the preparatory report¹⁰ into the final CP to ensure appropriately comprehensive consideration of the likely competitive prejudice that agreements might give rise to, absent discussion and clarification in the course of the assessment. According to the specific situation, competent authorities conducting the assessment should be able to use their powers to require voluntary commitments or impose binding obligations, as appropriate, to address such competitive concerns. This will notably be relevant where the infrastructure sharing agreement due to its form does not come within the remit of *ex ante* competition scrutiny prior to implementation.¹¹

35. Ultimately, in **ecta**’s view, the final CP should further clarify the relationship with competition law in two respects. First, nothing in this Common Position should be taken to prejudice the assessment of infrastructure sharing agreements under competition law. Secondly, NRAs should remain mindful of the fact that infrastructure sharing agreements operated through joint ventures are susceptible to assessment in terms of whether they significantly impede effective competition, and accordingly engage in interagency collaboration as appropriate.

¹⁰ BoR (18) 116, p 14.

¹¹ Cf. the examples in BoR (18) 116, p 11.

III. Conclusion

36. In the preceding sections, **ecta** has set out its observations on the proposed positions of the draft CP. While the overall thrust of the Common Position is welcome, the draft contains a number of issues that may inhibit it from achieving the greatest possible practical applicability. By identifying these and offering proposals on how to further clarify and develop the draft, **ecta** has sought to help make the finalisation of this document yield the most practically useful tool for competent authorities when assessing infrastructure sharing agreements. **ecta** would particularly welcome inclusion of additional elements of the underlying report to provide a fuller framework of assessment.
37. As infrastructure sharing becomes increasingly important in the 5G context, **ecta** believes that application of the adopted CP should be closely monitored and lessons from it be fed into a timely review of the document. To the extent that economic considerations make sharing arrangements justifiably more pressing for operators, competent authorities should keep in focus their welfare implications, recognising that competitors' ability to innovate must not be unduly limited.
38. In closing, **ecta** re-emphasizes the need to ensure that the proposed analytical framework achieves the greatest possible degree of effectiveness. To this end, it invites BEREC to fully recognise the differences in dispute resolution procedures as well as other application settings, and to ensure that the final CP is brought to the attention of all competent authorities likely to be involved in its application and the assessment of infrastructure sharing agreements in general.

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In case of questions or requests for clarification, we cordially invite BEREC or individual NRAs to contact Mr Oliver Füg, Senior Regulatory Affairs Manager at **ecta**, at ofueg@ectaportal.com.