



# **ecta RESPONSE**

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

**DRAFT BEREC GUIDELINES ON THE  
MINIMUM CRITERIA FOR A REFERENCE OFFER**

**BoR (19) 95**

**19 JULY 2019**

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## Introduction

1. **ecta**, the **European competitive telecommunications association**,<sup>1</sup> welcomes the opportunity to provide its input to BEREC on this consultation.
2. BEREC presents its draft response to the obligation incumbent on it under the first subparagraph of Article 69(4) of the European Electronic Communications Code (hereinafter: 'EECC'),<sup>2</sup> to publish guidelines on the minimum criteria for a reference offer, which BEREC is due to adopt by 21 December 2019.
3. National regulatory authorities (hereinafter: 'NRAs') usually obligate undertakings that they have designated as holding significant market power ('SMP operators') to publish a reference offer when also imposing non-discrimination obligations.
4. In this context, **ecta** wishes to make two introductory remarks on the relationship between these transparency obligations and non-discrimination obligations.
5. **First**, **ecta** underlines that while routinely imposed in tandem with non-discrimination obligations, obligations of transparency, including the requirement to publish a reference offer, constitute a self-standing class of regulatory obligations and must not be reduced to an ancillary remedy.
6. For this reason, **ecta** considers it to be of critical importance that BEREC ensures that its guidelines clearly embrace the independent nature of transparency obligations and render transparency obligations (incl. the publication of a reference offer) applicable and enforceable on a stand-alone basis. To this end, the guidelines should remind NRAs that the imposition of reference offers will generally always be appropriate where SMP is found and that transparency obligations are not limited to reference offers. Measures to promote transparency are essential to promoting clarity about SMP operators' practices, in order to reduce informational imbalances, promoting regulatory certainty, encouraging market entry and ensuring confidence in the regulatory process. In view of the constitutive role that adequate transparency plays for the promotion of competition in the face of SMP, **ecta** considers not only the confounding of transparency and non-discrimination particularly problematic, but especially instances in which NRAs reduce transparency to a requirement between the SMP operator and themselves.<sup>3</sup> **Transparency inaccessible to market participants is no transparency at all and constitutes an evident breach of the requirements for transparency obligations under currently and prospectively applicable law.**
7. Reference offers as a particular type of transparency obligation must in all their aspects reflect and pursue the abovementioned outcomes to ensure their relevance and usefulness to the competitive process. To achieve this, **ecta** calls on BEREC to pay particular attention to the **unbundled purchasing requirement in Article 69(2) as a**

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<sup>1</sup> <https://www.ectaportal.com/about-ecta>

<sup>2</sup> Directive 2018/1972/EU, (2018) OJ L321/36.

<sup>3</sup> For a recent example, see the proposal by the Italian regulator to limit transparency obligations regarding bitstream services in competitive municipalities, as notified under case IT/2019/2181+2182.

**cornerstone of reference offer design:** failure to ensure full, detailed and verifiable compliance with this requirement will suggest false transparency, create undue economic advantages for SMP operators and associated competitive distortions, block evolution towards effective competition and hurt end-users. It is therefore imperative that both BEREC and NRAs diligently ensure the application of the unbundled purchasing requirement at all times and for all aspects of reference offers, including by regular review and, where appropriate, clearly dissuasive sanctions in case this requirement is not adhered to by the SMP operator.

8. **Secondly**, where transparency obligations are used also to reinforce non-discrimination obligations, their success in doing so critically depends on how non-discrimination obligations are specified and understood. **ecta** has fought for over two decades to promote and refine **a pro-competitive understanding of the concept of non-discrimination as well as of the applicability and scope of reference offers**. Key to **ecta's** efforts has been to establish that non-discrimination must apply not only between third parties, but also between third parties and the SMP operator, so that the SMP operator cannot favour its own operations, subsidiaries, affiliates or partners. In **ecta's** view, development towards effective competition therefore requires **an explicit obligation for the SMP operator's downstream operations to purchase their wholesale inputs on the basis of the same reference offer made available to third parties, and for that obligation to be enforceable by the NRA**.
9. Further **key remaining concerns for challenger operators in respect of non-discrimination and reference offers** in this context that need to be addressed are:
  - i. SMP operators' retail arms not being actively required by NRAs to take wholesale inputs on the basis of the same reference offer as challenger operators, creating concerns about whether non-discrimination is a reality;
  - ii. volume discounts being applied to the effect that only the SMP operators' downstream activities, or maybe these plus only one alternative operator, can benefit from the same conditions;
  - iii. some NRAs not considering themselves empowered to unilaterally modify SMP operators' reference offers, creating concerns that the SMP operator is able to game the system;
  - iv. multi-year delays in NRAs approving reference offers of SMP operators, leading to uncertainty/retroactive changes to wholesale charges;
  - v. restrictive practices by SMP operators in terms of publication of reference offers (e.g. closed portals and information on wholesale charges being subject to prior signature of non-disclosure agreements);
  - vi. contracts not being part of reference offers, creating concerns that discrimination can occur at the contracting stage.

All of these points raise concerns that the wholesale terms and conditions, and wholesale charges that are effectively applied, may effectively be discriminatory and thus favour the

SMP operator's own various business lines. **In specifying its minimum criteria for reference offers, BEREC should therefore test these with regard to the above concerns and provide examples and strategies for reference offer requirements that minimise the risk of discriminatory treatment of access seekers**, whether direct or indirect. If successful, a common articulation around this problem may, in *ecta's* view, become one of the most important practical contributions that the consistent application of transparency obligations can achieve.

### Minimum criteria for a reference offer (Section 3 of BEREC's consultation)

10. Before commenting on the specific minimum criteria proposed in the consultation document, *ecta* wants to provide some general comments about their presentation and relation to prior BEREC work (paragraphs 11 and 12) as well as the necessary thrust that should inform the consolidation of the consultation document into the final set of guidelines (paragraphs 13 and 14).
11. In its discussion of the scope of the minimum criteria it is tasked to develop, BEREC refers to the role of its **Common Positions on Wholesale Local Access, Wholesale Broadband Access and Wholesale Leased Lines** as 'contain[ing] a minimum set of information, which *could* be included in a reference offer.'<sup>4</sup> *ecta* provided substantial written and oral input prior to the adoption of those Common Positions (hereinafter: 'CPs'), a summary of which is available in presentation form.<sup>5</sup> While agreeing that the CPs provide a relevant starting point, *ecta* would have thought it **appropriate to highlight that the minimum criteria now consulted upon principally reproduce those very CPs**. This would not only have clarified that BEREC's conditional formulation in the above quote is somewhat misrepresentative of the intimate link between the CPs and the draft, but, more importantly, have allowed for a more focussed discussion of the changes that BEREC now proposes relative to the CPs.
12. The draft regrettably does not provide sufficient insights about prior BEREC work done to evaluate the list of informational items for reference offers suggested in the CPs, and how this may or may not have affected the proposed revisions relative thereto. Along the same line, the latest assessment of the CPs, which was conducted in the context of the review of the regulatory framework and is cited here, did not provide for any dedicated assessment of the functioning of transparency best practices, including informational obligations for SMP operators in the context of reference offers. The conclusion reached on that occasion that 'only minor changes or clarifications to these CPs may be needed to increase the number of NRAs implementing them'<sup>6</sup> unfortunately remains inconclusive as to the reasons and scope of non-implementation and, more specifically, provides no insight for stakeholders as *ecta* and its members into the functioning of the minimum amount of information requirements that are

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<sup>4</sup> BoR (19) 95, at 5.

<sup>5</sup> [https://berec.europa.eu/doc/berec/presentation\\_ecta.pdf](https://berec.europa.eu/doc/berec/presentation_ecta.pdf).

<sup>6</sup> BoR (19) 95, at 6.

now being proposed as the core of the guidelines to be developed under Article 69(4)(1) EEC. Such insight would, however, have been precisely relevant in view of BEREC's objective to specify circumstances in which each of these options will be appropriate.<sup>7</sup> **ecta therefore encourages BEREC to pay special attention to the specification of the circumstances in which it considers particular options to be appropriate and to regularly evaluate these specifications as part of its monitoring work.**

13. Secondly, the consultation document leaves some uncertainty about how the specification of circumstances discussed in the preceding paragraph, which should presumably be applicable across Member States, is to give NRAs flexibility to accommodate specific national and market circumstances. Therefore, **ecta suggests that the guidelines should be elaborated in line with the principle of ensuring effective use of the network access requested** on the basis of a specific reference offer.
14. Ensuring effective network access use by challenger operators requires a **'boost' of the current draft** towards guaranteeing that challenger operators have both the ability to replicate SMP operators' offers, and also the ability to differentiate and innovate. To this end, the **reference offers must not be modelled on the SMP operators' own retail propositions**. Instead, BEREC and NRAs need to ensure that reference offers are based on access seekers'/takers' demand and guarantee prospects for challenger operators to behave distinctly differently from the SMP operators. **ecta** asks BEREC to clarify that **effective use** in this context should not be limited to the 'market needs' of Article 69(2) EEC, but instead **be understood broadly, in an explicitly pro-competitive manner in accordance with Article 69(4) EEC, to reflect 'the needs of the beneficiaries of access obligations'** and in that context **explicitly confirm the need for differentiation and innovation by challenger operators**.
15. On the basis of the above, **ecta** considers that a harmonised reference offer needs, as a minimum to:
  - i. Be **publicly available** without the access seeker having to sign a non-disclosure agreement or having to disclose its intentions in terms of services to be provided relying (in part) on elements of the reference offer;
  - ii. Cover **all relevant terms and conditions**, including **all one-off and recurring wholesale charges** – and in addition to BEREC's statements at page 6, **all service level guarantees provided** (on a strict non-discrimination basis<sup>8</sup>) and **genuinely dissuasive associated penalties** for not meeting them (i.e. financial penalties that go well beyond mere compensation for non-delivery of services);
  - iii. Include the **contract**, to ensure that: (i) concerns about potential discrimination are removed, (ii) restrictions to the provisions of the reference offer are not introduced

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<sup>7</sup> Ibid.

<sup>8</sup> All levels of service self-provided to the SMP operators' downstream arms need to be available to access takers, and where requested by access seekers/takers, superior levels of service need to be made available. We are aware 'VIP' offers for very important customers (government entities, businesses and individuals) with special priority that SMP operators provide to their retail customers, but not as a wholesale service.

via the contract, and (iii) the NRA has full powers of imposing modifications on the contract and contractual addenda to ensure effective non-discrimination. In this respect, ecta considers that reference offers under the auspices of the Spanish CNMC – notably the *Oferta Mayorista de Acceso a Registros y Conductos (MARCO)* for civil infrastructure access, the *Oferta de Acceso al Bucle de Abonado (OBA)* for copper local access and copper central access, the *Acceso desagregado virtual al bucle de fibra óptica (NEBA Local)* for NGA central access and the *Nuevo servicio Ethernet de Banda Ancha (NEBA)*<sup>9</sup> for VULA – provide examples of potential best practices in terms of scope and contents of the reference offer, inclusive of contractual specification;

- iv. Include a **statement that the SMP operators’ downstream arms trade on the basis of the same reference offer and notably its economic conditions and do not benefit from preferential treatment** (e.g. volume discounts that can only be achieved by the SMP operators’ downstream arms or only where the SMP operator benefits from the same conditions as the largest alternative operator). Such a statement empowers the NRA in ensuring non-discrimination;
- v. Be **sufficiently unbundled** in order to ensure that undertakings are not required to pay for products, services or facilities which are not necessary for the service requested, and cover all elements required to make effective use of the service requested.

### Terms and conditions for the provision of network access (Section 3.1 of BEREC’s consultation)

- 16. ecta has **serious reservations** towards part of BEREC’s proposals in Section 3.1 of the consultation document.
- 17. At bullet point 2, which is one the first BEREC statements on the details of reference offers, BEREC refers to ‘usage restrictions’. **BEREC’s proposed text appears to legitimise ‘usage restrictions’ in reference offers.**
- 18. ecta is **very determined in stating that ‘usage restrictions’ should not be a starting point for determining wholesale access conditions in reference offers, given that ‘usage restrictions’ have clearly proven to be anti-competitive in the past**, and have (very belatedly) been corrected by NRAs. For example, only in 2018 did the French NRA ensure that access to FttH networks can also be used for mobile backhaul<sup>10</sup>, and it took until 2019 for the UK NRA to mandate civil infrastructure access for the provision of services to business customers and mobile network operators for backhaul<sup>11</sup> (civil infrastructure access had been withheld from operators serving others than consumers in the UK until 2019). ecta members have had to combat similar restrictions on copper LLU over the past two decades. Therefore, **a reference to ‘usage restrictions’ in upcoming BEREC guidelines is likely to do more**

<sup>9</sup> <https://www.cnmc.es/ambitos-de-actuacion/telecomunicaciones/concrecion-desarrollo-obligaciones#ofertas-mayoristas-vigentes>

<sup>10</sup> <https://www.arcep.fr/actualites/les-communiqués-de-presse/detail/n/lautorite-precise-dans-le-cadre-dun-reglement-de-differend-les-modalites-de-lacces-de-free-aux.html>

<sup>11</sup> <https://www.ofcom.org.uk/consultations-and-statements/category-1/review-physical-infrastructure-and-business-connectivity-markets>

**harm than good for competition and end-user interests. ecta therefore requests BEREC to avoid referring to ‘usage restrictions’ in its upcoming guidelines.** If BEREC would nevertheless wish to include such a reference, BEREC should distinguish technical usage restrictions (e.g. a list of copper network frequencies that cannot be used to avoid interference, the specifications of xDSL modems) from commercial usage restrictions, which should clearly be outright prohibited. Evidently, it needs to be clear that any restrictions (including those on security grounds) are subject to detailed examination by the NRA prior to approval of the reference offer.

19. At bullet point 3, BEREC refers to the locations at which wholesale access will be provided. **ecta** considers that the 2010 EC Recommendation on Regulated Access to NGA networks<sup>12</sup> remains as relevant as ever, because this EC recommendation sets out clearly, e.g. for fibre terminating segments (point 18), that consultation with potential access seekers on viable access points is needed, to determine where the distribution point of the terminating segment of the access network should be located for the purpose of mandating access. The reference offer needs to be the expression of such consultation. The EC recommendation also remains highly relevant in the sense that it emphasises physical access, which is what is needed to promote true competition. Technological developments, including ‘connector/pluggable fibre’ at all points in the network, and multi-wavelength passive optical networks which will likely become the norm, confirm the **need for BEREC to confirm physical /wavelength wholesale access as essential parts of reference offers.** More generally, **ecta** encourages BEREC and NRAs to continue to examine physical/wavelength solutions, in order to preserve competition and innovation.
  
20. More generally **ecta** considers that reference offers need to include a **procedure by which access seekers/takers can request new wholesale inputs/technical innovations, to be formally taken into consideration by the SMP operator.** Where the SMP operator itself wishes to introduce **technical innovations, these need to be pre-announced** (6 months or more in advance) **to ensure that alternative operators are effectively able to launch services to their customers at the same date as the downstream arms of the SMP operator.** This is in accordance with point 32 of the 2010 EC Recommendation<sup>13</sup>. Such technical innovations need to be introduced in a manner than enables backward compatibility where technically feasible and/or migration processes in order to ensure that access seekers/takers are not put at a competitive disadvantage. Otherwise, the SMP operators can raise rivals’ costs, e.g. forcing alternative operators to invest in new modems, which can provoke significant costs and damage competition.
  
21. **ecta** highly appreciates bullet point 5 on terms and conditions for access to ancillary, supplementary and advanced services (including operational support systems, information systems or databases for pre-ordering, provisioning, ordering, maintenance and repair requests and billing). However, we think that **BEREC should go further in its guidelines,** and include additional specific points to be addressed in reference offers, such as:

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<sup>12</sup> Recommendation 2010/572/EU, (2010) OJ L251/35.

<sup>13</sup> Ibid.

- i. Access to address databases (exact customer locations, detailed to the address, floor, and apartment, and exact locations of access points such as street cabinets). **ecta** members widely consider that address databases are a source of undue advantage to the SMP operator.
- ii. Access to line eligibility databases/line eligibility testing systems, to enable challenger operators to know whether a line is available, and which speeds can be delivered over a line, before contracting with a customer.
- iii. Access to civil infrastructure databases (e.g. available space in ducts, handholes/chambers, poles, etc.), with a strong focus on non-discrimination in this regard, enabling verification of the behaviour of the SMP operator. Some **ecta** members consider that the SMP operator engages in strategic behaviour by filling ducts with their own cables, even where this is not objectively necessary to support the SMP operators' genuine business needs.
- iv. Processes for making and managing appointments between the SMP operator's technicians and the challenger operators' customers (and certified technician processes – discussed in the next section).
- v. Processes to mitigate wrongful repair requests.

### Details of operational processes (Section 3.2 of BEREC's consultation)

22. **ecta** is in broad agreement with BEREC on the contents of Section 3.2. Some of the points made in paragraph 15 above, could have been made in this section, but are not repeated here.
23. One specific additional point is as follows: **ecta** has repeatedly advocated that there is a need for certification processes to enable technicians – employed or contracted by alternative operators – to carry out all activation and repair works on the SMP operator's networks. This has now been achieved – to varying degrees and not always to the full satisfaction of challenger operators – in Belgium, Italy and the Netherlands, and has represented a major step forward in process terms and in reducing the number of customer visits, and notably eliminating visits by the SMP operator to the challenger operators' customers.
24. **ecta** also considers that the NRA should have the power to conduct or commission audits of operational processes of the SMP operator, notably to verify: (i) whether the conditions of the reference offer are respected, including the absence of discrimination between access seekers/takers, (ii) the terms on which the SMP operator self-supplies to its downstream arms, and (iii) generally to police all aspects of the non-discrimination obligation. Such an audit was conducted by the Belgian NRA, and the results were published in 2011<sup>14</sup>.

### Service supply and quality conditions (Section 3.3 of BEREC's consultation)

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<sup>14</sup> <https://www.bipt.be/fr/opérateurs/telecom/marches/large-bande/archives/divers-mise-en-oeuvre/communication-du-8-fevrier-2011-relative-a-l-audit-des-processus-operationnels-chez-belgacom>



25. **ecta** is in broad agreement with BEREC on the contents of Section 3.3. Some of the points made in paragraph 15 above, could have been made in this section, but are not repeated here.
26. With regard to bullet point 3 on service level guarantees, BEREC states that the reference offer must include the amount of compensation payable by one party to another for failure to perform contractual commitments as well as the conditions for eligibility for compensation. **ecta** agrees, yet considers that genuinely dissuasive penalties must be imposed for not meeting contractual commitments and service level guarantees (i.e. financial penalties that go well beyond mere compensation for non-delivery of services).
27. In bullet point 4, BEREC refers to procedures in the event of amendments being proposed to the service offerings, which *may* include a requirement for notification to the NRA. **ecta** considers that BEREC should modify this to state unequivocally that all amendments to reference offers must be subject to consultation with access seekers, and subject to explicit NRA approval. Otherwise, over time, the reference offer will evolve in a way which no longer reflects what the NRA has approved.

#### General terms and conditions of the agreement (Section 3.4 of BEREC's consultation)

28. As regards the contents of Section 3.4, **ecta** is generally in broad agreement with BEREC, and would therefore only reiterate anew that the contract should be part of the reference offer to ensure that: (i) concerns about potential discrimination are removed, (ii) restrictions to the provisions of the reference offer are not introduced via the contract, and (iii) the NRA has full powers of imposing modifications on the contract and contractual addenda to ensure effective non-discrimination.

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In case of questions or requests for clarification, we cordially invite BEREC to contact Mr Oliver Füg, Director of Competition & Regulation at **ecta**, at [ofueg@ectaportal.com](mailto:ofueg@ectaportal.com).