



## Vodafone Group response to public consultation on draft BEREC Report on Access to physical infrastructure in the context of market analysis

We appreciate the opportunity to comment on this consultation and trust that our comments are helpful to BEREC and National Regulatory Authorities (NRAs) as well as to other stakeholders. We remain at your disposal to discuss our submission to the consultation or any other aspect relevant in the context of the latter.

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### Summarising remarks

- Vodafone agrees with BEREC on the importance of access to physical civil engineering infrastructures in order to reduce costs to deploy new very high capacity (VHC) networks and to promote sustainable competition, resulting in a structural change of the market.
- In order for such access to be effective, we appreciate BEREC's effort to analyse the various challenges in its report.
- As stated on earlier, we re-iterate that access under the SMP regime or state aid rules should take precedence over symmetric obligations, such as under the Broadband Cost Reduction Directive (BCRD), which fulfil a complementary role.
- Vodafone would like to underline that any approaches simplifying the task for NRAs to impose civil engineering access should be prioritised.
- In this regard, a standalone market for infrastructure may constitute one but not necessarily the most obvious option, not least given BEREC's own assessment in this report.
- Further analyses should notably account for the impact of the changes brought about by the new Electronic Communications Code (EECC) on facilitating access to civil engineering infrastructures.
- We thus ask BEREC to fully support NRAs with its work in coming up with an approach to facilitate such access by a swift and effective implementation to support the EU's Gigabit targets, maximising competitive investment in Gigabit networks and enabling sustainable competition.



## 1. Importance of effective access to civil engineering infrastructures

Vodafone believes that access to civil engineering infrastructures is important to reduce costs related to the deployment of new VHC networks, which will be essential for the development of European digital services and the completion of the Digital Single Market. Such access – if effective – will promote sustainable competition in the long term and lead to a structural change of the market to the benefit of businesses, consumers and society at large. We warmly welcome BEREC's acknowledgement of this fact in the report:

*"Facilitating a greater use of existing physical infrastructure has also the benefit of promoting competition, as incumbent operators usually own a large portion of the physical infrastructure already in place to deploy networks; therefore, having to replicate such physical infrastructure would create an important barrier to entry in the ECS markets. As such, effective access to the incumbent operators' physical infrastructure is crucial to promote the deployment of high capacity (fixed and mobile) networks, and ultimately connectivity."*

Best practices notably in France, Spain and Portugal<sup>2</sup> have rightly led the European Commission to emphasise infrastructure access in its revised legislative framework: the European Electronic Communications Code (EECC). Given the present deficiencies regarding infrastructure access across European Member States, the BEREC report at hand is thus a welcome contribution to the debate on how to facilitate such access going forward. However, it already points to various challenges that need to be accounted for and is far from a comprehensive assessment.

## 2. Challenges to be accounted for

Out of the six potential approaches to facilitate access to infrastructure,<sup>3</sup> BEREC mainly focuses on the option of a standalone infrastructure market and provides some views on reliance on the BCRD as well as on the status quo.

### 2.1 Challenges under the status quo:

According to BEREC's analysis, "access to physical infrastructure is currently generally regulated as a remedy in most cases under market 3a".<sup>4</sup> We agree with BEREC in its Annex 3 that this bears the risk of removing infrastructure access, when market 3a is deregulated.

### 2.2 Challenges in the relation between SMP and symmetric regulation:

We further fully share BEREC's view in its Annex 4 that the BCRD can only play a complementary role and conclude that NRAs should hence be able to prioritise regulatory options under the SMP regime. As BEREC rightly points out:

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<sup>1</sup> BEREC Draft report, p.3.

<sup>2</sup> WIK Consult (2017), Best practice for passive infrastructure access.

<sup>3</sup> BEREC Draft Report, p. 16.

<sup>4</sup> BEREC Draft Report, p. 15.



*“Given the context of symmetric regulation, the BCRD is not made to deal with problems linked to the vertical integration of incumbent fixed operators, which are both managers of physical infrastructure and electronic communications operators”<sup>5</sup>*

### 2.3 Challenges related to a standalone infrastructure market:

While the option of a standalone infrastructure market provides importance to this preferred form of access, it also poses various challenges.

As BEREC rightly states, given that pure infrastructure markets are currently not part of the Commission’s Recommendation on relevant markets (Recommendation 2014/710/EU), NRAs would have to perform a market analysis including a satisfied three criteria test. The various elements that BEREC elaborates on and that would have to be accounted for could add complexity to the regulatory process delaying the implementation of the most effective form of access.

NRAs might even conclude to deregulate SMP-based access and exclusively rely on symmetric obligations, such as under the BCRD, despite its limitations.<sup>6</sup> The cited cases in Denmark and the Czech Republic exemplify this concern, whereas the Spanish case is different, covering only infrastructures inside buildings.<sup>7</sup>

## 3. Policy requirements

The BEREC report at hand provides a useful contribution to the discussion of how to facilitate access to civil engineering infrastructures. In this vein, we also welcome the references in the report about market outcomes.<sup>8</sup> However, we kindly ask BEREC to share market level data openly to encourage discussion and development of the access to physical infrastructure regulation.

Given the entry into force of the EECC, its impact on facilitating access to civil engineering infrastructures should be analysed. Art. 72(2) EECC provides that:

*“National regulatory authorities may impose obligations on an undertaking to provide access in accordance with this Article, irrespective of whether the assets that are affected by the obligation are part of the relevant market in accordance with the market analysis, provided that the obligation is necessary and proportionate to meet the objectives of Article 3”.*

The role of infrastructure access as ‘cross-market remedy’ can be derived from the best practices in countries where duct access is commonly used.<sup>9</sup> This option is recognised in BEREC’s report but not analysed further.<sup>10</sup> The same holds for lifting potential restrictions for usage and parallel regulation under multiple markets. Given that these options are not mutually exclusive, we therefore ask BEREC to further assess opportunities and risks of options enabling swift and effective access to physical civil engineering infrastructures.

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<sup>5</sup> BEREC Draft Report, p. 35.

<sup>6</sup> BEREC Draft Report, p. 17.

<sup>7</sup> BEREC Draft Report, pp. 13-14.

<sup>8</sup> BEREC Draft Report, p. 12.

<sup>9</sup> WIK Consult (2017), Best practice for passive infrastructure access, p. 4.

<sup>10</sup> BEREC Draft Report, p. 16.