



ecta RESPONSE

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

**DRAFT REPORT ON ACCESS TO PHYSICAL
INFRASTRUCTURE IN THE CONTEXT OF MARKET ANALYSES**

BoR (18) 228

23 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 report on the treatment of physical infrastructure access in the context of market analyses ('draft CP').
2. **ecta** welcomes the opportunity that this report presents to discuss a topic that is among the key enablers for reducing impediments to network deployment.
3. As already remarked elsewhere,¹ **ecta** appreciates the draft report for the data it contains and their presentation. In this sense, the draft delineates what BEREC should generally strive to attain to ensure that the results of its work make an impactful contribution to informed policy discussion.
4. **ecta** also recognises that the report has been drafted on the cusp of a change in legal regime, as the European Electronic Communications Code (EECC, or the Code) was awaiting adoption.
5. Given its critical timing in respect of the transition between regulatory practice under the old and the new legal framework for electronic communications in the EU, BEREC could either have chosen to restrict the report to the status quo or to attempt a comprehensive analysis of the subject matter in view of the legal changes about to materialise.
6. BEREC has chosen the second of these approaches, seeking to provide an analysis of both existing and forthcoming legislation. In **ecta's** view, this chosen scope of analysis has two immediate implications: first, the draft report will have to be brought up-to-date prior to adoption to reflect the EECC as it has entered into force, and, secondly, it must be held to a higher standard of scrutiny as regards its legal accuracy than if it had remained limited to the law applicable to the regulatory practice that it describes.
7. Overall, **ecta** finds the report to be characterised by a number of important legal mistakes, which call into doubt its usefulness as a reference document for evolving regulatory practice. At the same time, the report remains somewhat tenuous in its problem analysis. **ecta** therefore urges comprehensive revision of the draft prior to its potential adoption, in line with the comments in the following section. For the reasons set out there, and further elaborated in the conclusion (paragraphs 50ff), **ecta** does not find there to be cause to consider defining separate markets for physical infrastructure access and instead urges national regulatory authorities (NRAs) to guarantee such access via remedies in fixed access markets, notably of local access, complemented, where appropriate, by symmetrical obligations.

¹ Cf. **ecta** Response to the Public Consultation by BEREC on the Draft BEREC Report on Terminating Contracts and Switching Provider BoR (18) 229, 18.1.2019, p2.

II. Comments

8. **ecta** structures its comments as follows: A first subsection contours the role of alternative infrastructures from the perspective of electronic communications regulation to highlight in which regards the draft report would benefit from revision (II.1). This is followed by an analysis of physical infrastructure access as a remedy (II.2) that clarifies points both under the prior regulatory framework and the Code. The third subsection (II.3) comments on the proposal for the definition of a separate physical infrastructure access market.

II.1. Fundamentals: The role of alternative infrastructures

9. A key consideration when assessing physical infrastructure access in the wider context of the development of electronic communications markets towards effective competition, and the role of market analysis in this context, is the availability of alternative infrastructures. While this aspect is given some recognition,² the draft does not examine in how far regulatory approaches differ between countries according to whether such alternatives exist or not.
10. **ecta** underlines here that even where alternative electronic communications networks do exist, market analysis must retain in view penetration and coverage density as well as topological features in assessing substitutability between them. If a market for physical infrastructure access were to be defined, **ecta** considers that a lack of topological replicability of the SMP operator's network should be reason to maintain an SMP finding at infrastructure level to ensure that efficient competitive investment is promoted.
11. **ecta** agrees that the Cost Reduction Directive (CRD) has been designed to widen the range of opportunities for access to physical infrastructure to include infrastructures controlled by network operators outside the electronic communications sector.³ Yet not only, as a matter of fact, can these alternative infrastructures often not be used to install electronic communications networks (e.g., due to technical reasons), but their operators remain legally outside the remit of NRAs' supervisory competence for electronic communications markets.⁴
12. This illustrates the more general concern that the draft report does not clearly delineate the relationship between the rules applicable only to electronic communications, whether under the regulatory framework or the Code, and the rules applicable to network operators under the CRD. As **ecta** has recently argued elsewhere,⁵ the two legal regimes are characterised by important differences in terms of their objectives, institutional architectures, material rules and procedures.
13. **ecta** recalls that the definition of 'physical infrastructure', which BEREC has chosen as the focal concept for its report,⁶ is exclusive to the CRD. While this concept can be interpreted

² BoR (18) 228, pp20, 32.

³ BoR (18) 228, p18.

⁴ BoR (18) 228, p32.

⁵ Cf. **ecta** Response to the Public Consultation by BEREC on the Draft BEREC Common Position on Mobile Infrastructure Sharing BoR (18) 236, 18.1.2019.

⁶ BoR (18) 228, p7.

in conformity with the definitions of the regulatory framework and the Code, Article 1(4) CRD clearly states that conflicts of interpretation must be resolved in favour of the specific rules for electronic communications.

14. The mere fact that the CRD establishes a right for providers of public communications networks to request access to the physical infrastructure of other network operators,⁷ does not automatically bring the latter within the remit of these specific rules.
15. Similarly, the CRD does not have as its purpose to alter the logic of market analysis under the rules specific to electronic communications. Access to the physical infrastructure of network operators from outside electronic communications serves to facilitate the deployment of electronic communications networks on a project-by-project basis. It does this by way of a generalised obligation that can be understood in loose analogy with symmetric obligations in the electronic communications sector. This, in **ecta's** view, clearly illustrates that this access regime cannot be assimilated to the sector-specific regulation of electronic communications and that, for the same reason, there prima facie is no basis for defining an infrastructure market including other network operators.
16. Accordingly, **ecta** calls on BEREC to clarify the legal basis for its analysis to ensure a legally sound and consistent foundation for the final report for the benefit of all stakeholders.

II.2. The role of physical infrastructure access as a remedy

17. According to BEREC's draft report, NRAs in 20 Member States impose physical infrastructure obligations on undertakings with significant market power (SMP), specifically as regards ducts or pipes,⁸ while the remaining eight NRAs either rely on other legal instruments or do not take any measures to facilitate access to physical infrastructure.
18. **ecta** notes that BEREC does not identify the 'other remedies/legal instruments' that NRAs rely on. In line with its remarks above on the relation between the rules specific to electronic communications and the CRD (see paragraph 12), **ecta** notes that the possibility for requesting access remains, irrespective of whether markets in which physical infrastructure access had previously been imposed has been deregulated or not. **ecta** accordingly asks BEREC to clarify this point in the final report as well as to specify non-CRD mechanisms of physical infrastructure access, where these exist.
19. BEREC's report further finds that where physical infrastructure access is imposed it is so in the overwhelming majority of cases in market 3a. Imposition in other markets is always complementary thereto.⁹
20. **ecta** regrets the absence of discussion in the report of how NRAs regulating physical infrastructure access in different markets have done so.

⁷ Art 3(2) CRD.

⁸ BoR (18) 228, p7.

⁹ BoR (18) 228, p8. **ecta** notes that Table 2 does not include the Swiss duct access market.

21. More generally, this highlights that the report has not seized the opportunity to develop further the role of physical infrastructure access across markets in assisting electronic communications to develop towards sustainable competition. **ecta** would welcome follow-up work to examine and analyse the interplay of physical infrastructure remedies across different markets, notably as regards their effectiveness in attaining the objectives of sectoral regulation.
22. As regards BEREC's description of the new legal regime of Article 72(2) EECC,¹⁰ **ecta** is concerned that this places excessive emphasis on the possibility of physical infrastructure access as a standalone remedy.
23. First, the Code allows imposing access to civil engineering on assets that do not form part of the relevant market only where such an obligation is both necessary and proportionate to achieving its objectives. This implies, first, that the imposition of such a remedy must be needed to achieve all of the objectives of the Code, and not simply the promotion of connectivity. This is a pertinent point for regulatory practice that the final report should state explicitly. Secondly, the specific proportionality assessment requires that no other measure could attain the same objective at lower regulatory intensity. Far from being self-evident, this underlines that such out-of-market imposition (which amounts to imposition in markets 3b and 4 under the current Recommendation), under this provision is an exception to paragraph 1 of that article. Thirdly, Article 73(2)(2) EECC¹¹ requires NRAs who consider imposing physical infrastructure access to assess whether this would be a proportionate means to promoting competition and the end-user's interest without mandating access to specific network elements and associated facilities. To impose a standalone remedy, this requires a particularly high burden of proof, which **ecta** considers unlikely to be met without substantial corroboration by the NRA. It is also in this respect that closer analysis of existing regulatory practice, which is missing in the report (see paragraph 20 above), could have given useful indications.
24. Secondly, and more important still, not only is physical infrastructure access unlikely to be effective as the sole physical access remedy, but it will regularly be even more inappropriate as the sole obligation overall. This finding, which ensues logically from what precedes, unfortunately features nowhere in the draft report. **ecta** therefore asks BEREC to clarify that physical infrastructure access as a 'standalone' remedy is neither likely to be appropriate in the context of out-of-market imposition (see paragraph 23), nor in the context of an overall remedy mix. Article 68(1) EECC specifically empowers NRAs to impose '*any of the obligations set out in Articles 69 to 74 and Articles 76 and 80*' to address the problems identified in their market analyses. While such imposition must conform to the principle of proportionality, it also must ensure that the problems identified are effectively addressed.

¹⁰ BoR (18) 228, p6.

¹¹ 'Where a national regulatory authority considers, in accordance with Article 68, imposing obligations on the basis of Articles 72 or of this Article, it shall examine whether the imposition of obligations in accordance with Article 72 alone would be a proportionate means by which to promote competition and the end-user's interest.'

25. This means that notably transparency and non-discrimination obligations will have to remain part of the range of obligations imposed on SMP operators for competition to evolve in a sustainable manner, notably to safeguard challenger operators' ability to compete on infrastructure and to keep transaction costs manageable. Until the occurrence of significant pro-competitive developments within electronic communications markets with regard to physical infrastructure, price control obligations will similarly have to persist, as illustrated by the fact of them being the most widely imposed in respect of physical infrastructure access.¹² In **ecta's** assessment, access obligations to specific network elements and associated facilities will be equally quintessential to promote market development in this direction.
26. **ecta** further suggests in this regard that BEREC clarify the cross-market interaction of remedies. Under the current list of recommended markets, it is clear that the NRAs will need to maintain a physical infrastructure access remedy in market 3a. In respect of the analysis set out in Annex 3,¹³ **ecta** considers that the problem BEREC identifies based on the distinction between a currently competitive, but prospectively non-competitive situation in that market at the time of market analysis is a non-problem in the following sense. BEREC argues that deregulation of market 3a may allow the SMP operator to discriminate against competitors who have previously obtained access, including physical infrastructure access, from him and thereby drive them out of the retail market.¹⁴ However, it remains unclear how market 3a could be found to be currently competitive, but prospectively non-competitive, while maintaining effective competition at retail level. If the regulator identifies discrimination as likely to arise upon withdrawal of the regulatory obligations, it is arguably even questionable to what extent the market can be considered effectively competitive in the absence of regulation at the time of analysis. It will here be necessary to assess the market situation and establish the competitive effects of deregulation at wholesale level in light of experiences throughout the ongoing regulatory cycle, the duration of extant access agreements and the incentive effects for the SMP operator. This should include regard to physical infrastructure access remedies having been imposed in other wholesale markets. Where the perceived effectiveness builds primarily on the latter's physical infrastructure access offer, and there are no indications of a viable alternative arising ex post deregulation within a time span allowing competitive pressure [at wholesale and retail level] to be maintained, access at a fixed location should not be considered currently competitive. In view of this concern, **ecta** invites BEREC to conduct a detailed study of the effects of deregulation in markets 3a, 3b and 4 on the availability of physical infrastructure access and market developments more generally.
27. The imposition of remedies, as discussed in the preceding paragraphs, remains dependent on an SMP determination by the NRA. This is consistent with the nationwide coverage of SMP operators' networks, which include physical infrastructure assets. This remains

¹² BoR (18) 228, p9 (with regard to 'ducts, pipes').

¹³ BoR (18) 228, p34.

¹⁴ Ibid.

unchanged under the EECC compared to the regulatory framework that preceded it. **ecta** therefore urges BEREC to further stress the traditional dependence of physical infrastructure access obligations on significant market power by correcting the presentation of the regulatory framework,¹⁵ which suggests that Article 12 of the Framework Directive constituted a ‘potential response to a concern about market power’, when, in fact, that provision relied on concerns of public policy or efficiency applicable to all authorised providers of electronic communications to justify intervention.

28. In sum, **ecta** requests BEREC to present a more nuanced reading of physical infrastructure access as a standalone remedy under the Code, clarifying the limitations to what it calls the ‘more pronounced role’ for this remedy and the associated need for flanking measures, as well as to clarify its primary historical basis in SMP analysis. Furthermore, **ecta** asks BEREC to take appropriate steps towards creating a cross-market framework for physical infrastructure access analysis, notably by analysing the interaction of remedy design across fixed access markets and carefully reviewing deregulation experiences.

II.3. Defining a market for physical infrastructure access

29. The conceptual emphasis of the report is on the possibility of defining a market for physical infrastructure access. Although BEREC notes that no NRA in the EU thus far has attempted such an analysis, it identifies two NRAs in the EFTA countries who have done so.¹⁶ Without prejudice to the arguments set out below, **ecta** regrets that the draft report provides no additional insights as to how this has been done and what results were achieved.
30. The report thus elaborates its considerations on a possible market for physical infrastructure access without benefitting from possible real-life examples. In terms of presentation, it does this in a bifurcated manner through a summary statement in a section of the body of the draft report (section 5.2) and a separate annex (Annex 2).
31. Although the body of the report announces this split presentation in a manner suggesting that the annex merely elaborates upon the ‘reflections’ that it contains,¹⁷ even a cursory review demonstrates that the information in the body of the report follows no clearly established relationship of correspondence to the contents of the annex. Depending on the subject matter, this relationship ranges from the body of the report copying and pasting entire subsections¹⁸ from the annex to not even featuring the core elements that a subsection should contain according to its title;¹⁹ accordingly, the body presents an at times disjointed rendition of the contents of Annex 2. Together with the lack of appropriate

¹⁵ BoR (18) 228, p4.

¹⁶ BoR (18) 228, p8.

¹⁷ BoR (18) 228, p17.

¹⁸ Subsection 5.2.1, at p17, is a verbatim copy of section 1 of Annex 2, at p24.

¹⁹ Subsection 5.3.2 on the three-criteria test thus discusses but the first criterion, whilst section 3 of Annex 2, at p30f, provides for coverage of all three criteria. For in-depth comments on the latter section, see paragraphs 41 to 44 below.

cross-referencing between the two parts, this makes using what arguably constitutes the core section in the body of the report inconvenient and uninformative.

32. Overall, **ecta** finds the body of the report severely lacking in its presentation of the analytical considerations that could inform the identification of a separate market for physical infrastructure access. The editing of this part of the report in its own right should, in **ecta**'s view, bar adoption of the report without serious and thorough structural revisions. Considering the significant shortcomings of the body of the report, **ecta** concentrates the remainder of its comments on the full outline analysis presented in Annex 2 and uses these to provide indications of the elements that should be integrated into the body.
33. Taking the overview of relevant issues to identifying a separate market for physical infrastructure access set out in Annex 2 as a starting point, **ecta** notes first that large parts of the annex amount to guidance that is a direct reproduction, in wording and/or in content, of the Commission's 2018 SMP Guidelines,²⁰ the Recommendation on Relevant Markets and its accompanying Explanatory Note,²¹ as well as BEREC guidance. While these provide appropriate background, **ecta** sees no reason for extensively citing from well-established guidance, notably when the general considerations set out therein are not brought to bear on the hypothetical market for physical infrastructure access, the possible analysis of which the annex is to illustrate.
34. From a legal perspective, **ecta** observes that the annex, when explaining the need for market definition and analysis to be based on competition law methodologies, suggests that in this regard, the CJEU's jurisprudence and Commission administrative practices, 'for example as reflected in the 1997 Market Definition Notice, *can* be taken into account.'²² Without detailed discussion, **ecta** wishes to simply stress that the Court's adjudication must be considered to the extent relevant, whilst reliance on the 1997 Market Definition Notice, although an internal Commission document, has been the reference point for market analysis under the regulatory framework since the adoption of the first version of the SMP Guidelines in 2002.²³ The final revision of the report should incorporate these considerations.
35. As a further legal consideration, the annex repeats the interlacing of definitions under the CRD with those of the specific rules for electronic communications, the problems of which have already been referred to above in section II.1 (see notably paragraph 12ff). However, the annex aggravates the concerns raised there by defining the notion of 'telecommunications physical infrastructure' as

²⁰ SMP Guidelines 2018 (2018) OJ C159/1.

²¹ Commission Recommendation on Relevant Product and Service Markets Within the Electronic Communications Sector Susceptible to Ex Ante Regulation (2014) OJ L295/79.

²² BoR (18) 228, p24; italics added.

²³ SMP Guidelines 2002 (2002) OJ C165/6 (8).

all physical infrastructures – as defined in the BCRD – that have been primarily made available or could be made available for the purpose of deploying a telecommunications network, and that will typically be owned (or at least, operated) by telecommunications operators.²⁴

While this definition may at first glance occur convincing when viewed in tandem with the notion of non-telecommunications physical infrastructure introduced for purposes of discussing demand-side substitution,²⁵ it introduces important additional problems of interpretation, which make it legally disputable and thus unsound. These concern, other than the reference to ‘telecommunications’, which as a term no longer forms part of the rules applicable to electronic communications, the following points:

- *Inconsistency with legal basis:* The definition of physical infrastructure in the CRD neither foresees differentiation of infrastructure according to ownership or operational arrangements, nor qualification of infrastructures in terms of their current primary use. Indeed, nor to link these two dimensions. The CRD, seeking to extend the scope of physical infrastructures beyond those associated with traditional electronic communications networks, purposively remains infrastructure-agnostic towards other physical infrastructures beyond the requirement for them to be attributable to one of the other five sectors it recognises. Instead, the proposed definition of telecommunications physical infrastructure implies that physical infrastructures under the control of other network operators, but primarily used for electronic communications, would be characterised as a novel category overlapping, to varying extent, with the concepts of electronic communications networks and associated facilities in the rules specific to electronic communications;
- *Legal uncertainty:* The multiplicity of assessments necessary to determine whether or not a physical infrastructure would qualify for consideration as an infrastructure specific to electronic communications implies significant uncertainty about the scope of the market and the likelihood of an SMP finding. As drafted, [ecta](#) believes that notably the requirement of primary use is likely to create significant problems both in terms of administrability and in terms of the unequal treatment between current and prospective use. The wording of the primary allotment requirement for current use cases perplexingly excludes infrastructures that currently are being used, if only not primarily, for hosting electronic communications networks, while the same type of infrastructure could be included in a purely prospective assessment. This negates both the relevance of existing use to actual market functioning and tends to overestimate the market on account of hypothetical uses of physical infrastructures from other industries, which effectively may never become available for hosting electronic communications networks. Most

²⁴ BoR (18) 228, p26.

²⁵ BoR (18) 228, p27.

important, however, it appears to veil the fact that electronic communications physical infrastructure properly conceived is 100% percent dedicated to hosting electronic communications networks, as only purpose-built infrastructure is designed to accommodate their specific deployment requirements;

- *Non-exclusiveness*: The definition of telecommunications physical infrastructure, as proposed, does not allow for a clear demarcation vis-à-vis the concept of ‘non-telecommunications physical infrastructure’, which is defined as ‘physical infrastructure that was in principle not available for the purpose of deploying a telecommunications network’.²⁶ This follows immediately from the fact that irrespective of the point in time that the verb ‘was’ here refers to, it in no case precludes the possibility of it being made available for the deployment of electronic communications networks. Hence, physical infrastructures provided by other network operators also meeting the additional requirements of the definition of telecommunications physical infrastructure above could conceivably constitute a subset of both telecommunications and non-telecommunications physical infrastructure at the same time. This interpretation is corroborated by the draft report itself referring to the CRD as obliging ‘a whole range of “network operators” other than telecommunications operators ... to negotiate in good faith access to their physical infrastructure’.²⁷ While the additional criterion ‘in principle’ renders interpretation more uncertain still – and thus increases the likelihood of determinations on this basis being challenged – it cannot avoid the definitional overlap.

In conclusion, the proposed conceptual underpinning for approaching the issue of demand-side substitutability remains porous and unconvincing on its own terms: why use the definitions of the CRD as a basis for identifying a market for physical infrastructure access starting from telecommunications physical infrastructure when that market under the CRD by definition contains both infrastructures operated by electronic communications and by other network operators?

36. For the combined reasons stated in paragraph 35, **ecta** cannot support the proposed definition of ‘telecommunications physical infrastructure’ as part of the focal point for defining a separate product market for physical infrastructure access. The significant problems internal to that concept as well as to its relation with its counterpart of non-telecommunications physical infrastructure undermine its validity as well as its suitability for market definition purposes.

²⁶ Ibid.

²⁷ Ibid.

37. More fundamentally, **ecta** questions the appropriateness of BEREC's conceptual approach rooted in the CRD, which, in analytical terms, removes the proposal from the context of market regulation, rather than bringing it closer thereto. In addition to the problems outlined above, this approach also fails to consider the potential role of operators of private electronic communications networks that might choose to make infrastructure assets available in a market for physical infrastructure access – a consideration conspicuously absent from the report's discussion of supply-side substitutability.²⁸
38. Principally and most important, the proposed approach appears to encourage conceptual disregard for the physical infrastructure of the SMP operator at a moment in overall market development when that infrastructure can provide a decisive competitive edge in rolling out very high capacity networks. **ecta** is of the opinion that any such effects must be avoided, especially if an NRA were to consider identifying a physical infrastructure access market. Neither regard to the construction of multi-purpose networks (what BEREC calls '[converging] network functions'),²⁹ nor to 5G technology³⁰ provides a cogent reason to move the SMP operator's network outside the focal point. On account of the usually nationwide coverage of SMP operators' networks and associated physical infrastructures, **ecta** also considers that the focal point usually should remain broadly defined.
39. In interim conclusion, **ecta** requests the section on product market definition to be thoroughly revised, drawing on the above comments in paragraphs 35 to 38. When subsequently integrating the key elements into the body of the text, **ecta** would encourage BEREC to also include the factors for possibly excluding alternative physical infrastructure access from the scope of the product market,³¹ which it supports.
40. As regards geographic market definition,³² **ecta** restricts its remarks to underlining that the draft currently does not sufficiently underline that the analytical starting point must be the SMP operator's infrastructure where it exists and that, specifically, even where alternative operators dispose of own physical infrastructure assets, this alone does not provide adequate grounds for restraining the geographic scope of a possible market for physical infrastructure access. Where alternative physical infrastructure access can be obtained from other network operators, this needs to be appropriately considered in this context, notably where these are capable of offering access at national scale. These considerations should similarly be included in the body of the text, which, as currently worded, inappropriately suggests alternative operators' localised presences to make for an appropriate point of departure.

²⁸ BoR (18) 228, p28.

²⁹ Ibid.

³⁰ Ibid.

³¹ BoR (18) 228, p27 (technical and operational constraints, lack of infrastructure capillarity, lack of demand from electronic communications providers).

³² BoR (18) 228, p28ff.

41. With regard to applying the three-criteria test to a physical infrastructure access market potentially resulting from the analysis of product and geographic aspects,³³ **ecta** considers it appropriate for the text to underscore the now legally binding nature of the test under the EECC.
42. In respect of the criterion of high and non-transitory entry barriers, **ecta** generally agrees that this is likely to be met, but would invite BEREC to choose different illustrations than quotations from the BCRD referring to efficiency considerations, when the underlying point is one of non-replicability. This could appropriately include reference to the inherent limits to infrastructure-based competition, which from a demand-side perspective will significantly shape the demand for self-standing physical infrastructure access.
43. The presentation and discussion of the second and third criterion should be developed further. Concerning the second criterion of a market structure not tending towards effective competition over a relevant time horizon, **ecta** finds the draft neither to contain an elaboration of its content, nor any guidance on how it would be applicable to a market for physical infrastructure access,³⁴ and would therefore call on BEREC to develop both of these elements. For the third criterion concerning the insufficiency of competition law of successfully addressing the competitive problems identified, **ecta** considers that the guidance in respect of the physical infrastructure access market is too concise.³⁵ In particular, the inadequacy of competition law proceedings for operators to ensure timely infrastructure access is not mentioned, even though challenger operators have repeatedly been forced to leave markets or abstain from entering because legal proceedings regarding abuses at levels further down the value chain lasted too long. **ecta** would further stress the critical importance of persistent legal certainty in the most upstream of all electronic communications markets as well as the need for continuous and detailed oversight to ensure that infrastructure-based competition based on physical infrastructure access can evolve.
44. In further interim conclusion, **ecta** requests also the section on the three-criteria test to be thoroughly revised, drawing on the above comments in paragraphs 41 to 43, before going on to integrate key elements into the body of the report.
45. As finally concerns the dimension of SMP assessment in a potential physical infrastructure access market,³⁶ **ecta** finds the discussion here to turn too quickly towards operational concerns of data collection, without discussion of indicators specific to market power assessment. This should notably include explicit recognition of the far smaller number of providers likely to provide physical infrastructure access at national, or similarly extended geographical scale. **ecta** further suggests that the key competitive parameters of network topology, coverage and capillarity be discussed in more depth and

³³ BoR (18) 228, p30f.

³⁴ Ibid.

³⁵ BoR (18) 228, p31.

³⁶ BoR (18) 228, p31ff.

linked to other available guidance and technical expertise that can aid in the assessment thereof. Contrary to what BEREC appears to suggest,³⁷ ecta believes that topological features not only need to be scrutinised in terms of their state at the time of conducting a potential market analysis, but also in light of possible future developments, which may have important implications for access seekers, and should therefore be considered in remedy design. Once developed, together with the notions of countervailing buying power and potential entry,³⁸ the key elements should be integrated into the body of the text.

46. With regard to data gathering, NRAs should, in any case, already as part of their analysis of the product and geographical dimensions of a potentially identifiable market for physical infrastructure access not only identify appropriate data sources, but also probe data collection via cooperative relations with other authorities in charge of providers not under their immediate supervision. BEREC should ensure that a discussion of information powers under the Code, including new powers such as the conduct of geographical surveys of network deployments,³⁹ and their scope in respect of market identification and definition forms part of the final report at an appropriate earlier stage, to which the present section can refer. The distinction between telecommunications and non-telecommunications physical infrastructure as referred to here,⁴⁰ which ecta has scrutinised and rejected in its proposed form (see paragraph 35f above), could then be treated in that context, if its maintenance is deemed necessary.
47. In final interim conclusion, ecta asks BEREC to revise the section on SMP assessment considering the comments at paragraphs 45 above, and to integrate key elements into the body of the report. For matters of data collection, ecta suggests including a separate discussion thereof at an earlier stage in the report (for example, in the introduction to the market definition section) and referring back to this here.
48. Summarising its in-depth review of BEREC's proposed approach to the definition of a separate market for physical infrastructure access, ecta has found the exposition thereof lacking, in both presentational and substantive aspects. Accordingly, ecta has first narrowed the scope of its analysis (see paragraph 33), and subsequently provided interim conclusions on the different dimensions of the proposed guidance (see paragraphs 36 (product market definition), 37 (geographical market definition), 41 (three-criteria test) and 44 (SMP assessment)), which it requests BEREC to consider in revising the report.
49. In conclusion, ecta underlines that, notwithstanding its comprehensive comments, it does not find the draft report in its present form to either have persuasively established the case for the need to identify a market for physical infrastructure access or to have outlined a sound overall framework for doing so. The proposed approach in many places remains at best indicative, without the requisite discussion of substantive elements and without engagement with the particularities of a pure infrastructure market, including its

³⁷ Ibid.

³⁸ BoR (18) 228, p33.

³⁹ Art 22 EECC.

⁴⁰ BoR (18) 228, p32.

likely competitive dynamics. **ecta** notes here that BEREC itself apparently is dubious about the prospects for a separate market when commenting that consideration of physical infrastructure access as the transversal basis for a full range of products and services could 'be more appropriately dealt with in the remedy design than in the market definition'.⁴¹ In the final chapter of this submission, **ecta** therefore turns to a review of the underlying problem drivers and the relation between the definition of a separate market and other possible responses.

III. Conclusion

50. **ecta** welcomes initiatives by BEREC and its members to respond to new issues affecting electronic communications markets and their regulation. With its draft report on the treatment of access to physical infrastructure in the context of market analysis, BEREC investigates whether the framework for identifying markets susceptible to *ex ante* recommendation could potentially be used to identify a separate market for physical infrastructure access instead of it being defined as a submarket to or imposed as a remedy within wider fixed access markets.
51. **ecta** has set out its observations on three key analytical dimensions of the report in sections II.1 (the role of alternative infrastructures), II.2 (the role of physical infrastructure access as a remedy) and II.3 (possibility of defining a market for physical infrastructure access) above and summarised its requests to BEREC in the concluding paragraphs of each section (paragraphs 16, 28 and 48f).
52. Its analysis having raised a number of important concerns over the contents of the draft, **ecta** invites BEREC to consider these in the process of finalising the report.
53. **ecta** considers it critical that if reflections of potentially far-reaching regulatory implications are to be adopted by BEREC in the form of a report supported by all EU regulators, that report must conform to the highest standards of quality. This is all the more applicable where the report is likely to feed into the upcoming review of the Recommendation on Relevant Markets, which has already been announced by the European Commission.
54. By way of conclusion, **ecta** wants to focus on the possible underlying causes identified by BEREC for considering the definition of a physical infrastructure access market and possible alternatives for addressing these.
55. The report identifies four potential challenges to 'existing regulatory structures',⁴² which could be addressed, inter alia, by defining a separate market for physical infrastructure access, as follows:⁴³

⁴¹ BoR (18) 228, note 46, p26.

⁴² BoR (18) 228, p15.

⁴³ BoR (18) 228, p16.

- (a) Technological change leading to increasing overlaps between fixed access markets, or between fixed and wireless services;
 - (b) Growing infrastructure-based competition in fixed access markets for local and high-quality access that would require continued physical infrastructure access to be established on the basis of a modified Greenfield approach;
 - (c) Newly emerging offers of physical infrastructure access from alternative operators that would lead to the significant market power of the currently designated operator(s) being called into question with regard to physical infrastructure access;
 - (d) Recognition that the competitive concerns to be addressed by physical infrastructure access are wider than the concerns identified by the NRA as part of its market review.
56. **ecta** considers, first, the term ‘existing regulatory structures’ to be exceptionally imprecise. It thus remains unclear what specifically BEREK sees challenged by the four aforementioned factors; why these challenges would call for some type of reaction with regard to said regulatory structures; and what end such a reaction should pursue.
57. Furthermore, **ecta** also considers the four potential challenges themselves, even if somewhat more tangible, to remain loosely specified. From what is apparent, in the absence of corroborating evidence or concrete examples, **ecta** observes in relation to the challenges set out in paragraph 55 that:
- (a) ‘Technological change’ *per se* does not necessitate any changes to market analysis, much less market definition, unless it is clear specifically what element of market reality is affected by that change, and how the supply and demand sides of the market(s) concerned react thereto;
 - (b) The developments envisaged with regard to physical infrastructure access resulting from increased infrastructure-based competition in fixed access markets, such as the local access market discussed in Annex 3, concern, to begin with, a remedy imposition and the prospect of upholding it in a forthcoming review period. As argued above (see paragraph 26), it is not clear that this necessarily requires the definition of a separate market;
 - (c) Like point (b), the emergence of additional wholesale offers provided by alternative operators constitutes an in-market development and also here it is not evident why this would require the definition of a separate market;
 - (d) This point is phrased in such abstract terms that it is difficult to fathom. **ecta** considers, however, that to the extent such awareness is achieved, it must be the NRA itself achieving it, and thus be able to cast these competitive concerns in terms of the established methodology of market identification and definition, if indeed the ‘width’ of these concerns refers to developments potentially leading towards a market for physical infrastructure access.

58. Specifically as regards the role of offers by alternative operators, **ecta** would emphasize that despite the leading role that challengers have played, and continue to play, in deploying electronic communications networks, especially of very high capacity, this has thus far never, in **ecta**'s knowledge, been the root cause of fixed access markets being deregulated. In any case, their emergence has until now prompted no NRA to define a separate market for physical infrastructure access, as illustrated by BEREC's own findings.
59. Irrespective of the thus largely indeterminate character of the four potential challenges identified, the report concentrates on considering the possibility of approaching these by constructing a separate market for physical infrastructure access.⁴⁴ At the same time, it does identify five alternative approaches,⁴⁵ without, however, assessing them.
60. Despite the lack of such a comparative assessment, notably of possible responses within the existing market analysis framework under the current Recommendation, the conclusion goes on to identify the definition of a separate physical infrastructure access market as a possible means of responding to the potential challenges set out above, while reaffirming that physical infrastructure access today is a remedy concentrated in market 3a and that the majority of NRAs considers the current Recommendation sufficient for regulating physical infrastructure access.⁴⁶ It further goes on hold that the latter elements are specifically consistent with the possibility to impose physical infrastructure access as a standalone remedy further to the EECC.
61. In view of this **ecta** considers that the conclusion to the report (i) overstates the link between existing regulatory practice and the EECC, especially since it explicitly abstains from assessing the latter's impact on the former;⁴⁷ (ii) unduly emphasizes the possibility of defining a separate physical infrastructure access market; and, despite professing not to have a preference for this approach,⁴⁸ fails (iii) to appropriately put into focus available alternatives and (iv) clearly underline NRAs' freedom to choose among these.
62. Overall, while welcoming initiatives by BEREC and its members to respond to new issues affecting electronic communications markets and their regulation, **ecta** does not find the current draft to have advanced any compelling arguments for why a separate market for physical infrastructure access should be defined.
63. Indeed, **ecta** considers that, for as long as there are no clear supply- or demand-side developments attesting to the potential for an autonomous infrastructure market, NRAs should continue to regulate access to physical infrastructure through existing fixed access markets. Accordingly, **ecta** also believes that the proposed conclusion⁴⁹ and other parts of the report⁵⁰ needs to be amended to no longer characterise the potential challenges (as

⁴⁴ BoR (18) 228, p16.

⁴⁵ Ibid.

⁴⁶ BoR (18) 228, p21.

⁴⁷ BoR (18) 228, p16.

⁴⁸ BoR (18) 228, p17.

⁴⁹ BoR (18) 228, p21.

⁵⁰ BoR (18) 228, p17.

discussed above at paragraph 55ff) as ‘trends’ when they have been given no empirical backing.

64. In follow-up to the present report, **ecta** therefore encourages BEREC to:

- (a) clarify the meaning, scope and measurability of the potential challenges identified, and substantiate them empirically;
- (b) conduct a comparative assessment of how alternative means of addressing these challenges would be likely to work in terms of effectiveness and integration with existing regulatory practice;
- (c) develop a framework for assessing physical infrastructure access remedy interaction across markets,
- (d) scrutinise the implications of deregulation already having occurred in fixed access markets, and
- (e) identify appropriate tools to reliably monitor possible market tendencies towards the coming into being of a separate physical infrastructure access market.

65. In conclusion, **ecta** emphasizes that notably points (a) and (b) in paragraph 64 must be undertaken before further consideration is given to the possibility of defining a separate market for physical infrastructure access. The regulatory framework that the EECC has recently replaced, created a stable regulatory environment with appropriate investment incentives for both SMP operators and competitors. Considering the need for regulatory practice now to adjust to the new provisions of the Code, **ecta** advises against creating additional regulatory friction by introducing a new phantom market without empirical support and without due and full consideration of whether alternative approaches would not allow less costly and more proportionate means of adjustment in view of evolving market realities.

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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.