



# **ecta RESPONSE**

**TO THE PUBLIC CONSULTATION BY BEREC  
ON THE  
DRAFT BEREC WORK PROGRAMME 2020**

**BOR (19) 183**

**6 NOVEMBER 2019**

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## Introduction

1. **ecta**, the **European Competitive Telecommunications Association**,<sup>1</sup> welcomes the opportunity to comment on draft BEREC Work Programme, BoR (19) 183, which covers workstreams to be delivered by BEREC in 2020 (hereafter ‘draft WP2020’) and possible work for 2021 and beyond.
2. **ecta** appreciates that BEREC is offering stakeholders the possibility to contribute to refining the draft WP2020 prior to its final adoption.
3. **ecta** understands that much of BEREC’s capacity in 2020 will be taken up by the preparation of Guidelines and Opinions, in application of the European Electronic Communications Code<sup>2</sup> (hereafter ‘EECC’ or ‘Code’) and the new requirements resulting from the BEREC Regulation<sup>3</sup>.
4. As already stated in its comments on BEREC’s draft 2019 Work Programme, **ecta** considers that in fulfilling these tasks, BEREC will effectively have to resolve major outstanding policy issues under the EECC. In some cases, this goes well beyond merely technical aspects of implementing the Code, but indeed defines its very scope of application and thus the scope for regulatory market oversight itself.
5. The way in which BEREC will carry out these tasks is liable to significantly impact the structure of electronic communications markets in coming years.
6. In **ecta**’s view, it is therefore particularly **important for BEREC to improve the involvement of stakeholders at all stages** leading up to the adoption of BEREC deliverables and documenting how their inputs have informed these deliverables.
7. Below, **ecta** therefore first sets out some suggestions for BEREC on how to approach stakeholder involvement (chapter 1), before moving on to comment on the background considerations to the Work Programme. In this context, **ecta** sets out its high-level expectations to BEREC in 2020 (chapter 2). Finally, **ecta** addresses a selection of work programme items, organised by BEREC’s strategic priorities, in the third chapter, focussing on providing comments on substance and on consultation modalities (chapter 3).

### 1. A consistent approach to stakeholder engagement

8. Considering the wide range and increasingly diverse number of subject matters that BEREC has engaged and plans to engage with, and notably the requirement for it to elaborate guidance on various interlinked subject matters under the Code that will define the framework for the functioning of electronic communications markets in this new legal setting, **there is clear need for consistent stakeholder involvement** on these matters.

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

<sup>2</sup> Directive (EU) 2018/1972 [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2018.321.01.0036.01.ENG&toc=OJ:L:2018:321:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.321.01.0036.01.ENG&toc=OJ:L:2018:321:TOC)

<sup>3</sup> Regulation (EU) 2018/1971 [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2018.321.01.0001.01.ENG&toc=OJ:L:2018:321:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.321.01.0001.01.ENG&toc=OJ:L:2018:321:TOC)

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9. In this regard, **ecta** believes that **early calls for input**, as they have been practised ahead of some public consultations, **constitute good practice**, and would generally encourage BEREC to further conduct these.
10. In the context of the work on the Code, BEREC and its expert working groups (EWGs) have also organised workshops to receive stakeholder feedback. **ecta considers stakeholder workshops particularly useful and would encourage wider use thereof**, e.g. to take the pulse on multiannual initiatives. For stakeholder workshops **to deliver maximum value, ecta would urge the following considerations to be adhered to:**
- i. Notice of stakeholder workshops should be given at least four weeks ahead of time to allow adequate preparation, which is especially crucial for representative bodies needing to coordinate with their members;
  - ii. Stakeholder workshops should be recorded and remain accessible after the event;
  - iii. A timeframe of no less than two weeks post-workshop should enable stakeholders to still set out additional views and/or refine their arguments in respect of the subject matter dealt with.
11. More generally, **ecta** encourages BEREC to work towards establishing a **single standard for stakeholder involvement and transparency**. This could consist of a sequence of events, to be systematically adhered to, as follows:
- i. Formally notify stakeholders when a new area of enquiry or workstream is initiated internally by BEREC or by one of its Working Groups, and inform on which NRAs/NRA personnel participate in the relevant Working Groups (and if applicable, which external (e.g. academic/consultancy) input may be relied upon).
  - ii. Kick off all workstreams with initial calls for input to stakeholders.
  - iii. Follow up with meetings with EU trade associations.
  - iv. Once a draft deliverable is available, give interested parties at least eight weeks to comment on such draft deliverable.
  - v. Promptly publish the responses BEREC has received, and notify stakeholders thereof.
  - vi. Enable at least two weeks for 'reply comments', whereby stakeholders are able to comment on documents filed by other stakeholders (the 'reply comments' system is well-established in other jurisdictions).
  - vii. Publish a final consultation report at the next Plenary, and notify stakeholders thereof.
12. Finally, **ecta** would encourage the Work Programme process to also **make transparent how overlaps between subject matters will be dealt with**, both in terms of EWG responsibilities, coordination and stakeholder involvement, **to promote consistency of regulatory debate and, ultimately, legal certainty**.

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## 2. Comments on the Work Programme background

13. **ecta** expresses its explicit support for most of BEREC's proposed WP2020, as will be seen in the comments provided throughout this response.
14. The presentation of the background to the Work Programme, in **ecta**'s view, should seek a more balanced approach.
15. As regards **the current Medium-Term Strategy 2018-2020**, which is the framework within which the WP2020 is to be developed, **ecta would insist that the objectives remain specified in accordance therewith**. A reference at this level to 'promoting connectivity across Europe' should therefore be removed so as to not retrospectively amend the current Mid-Term Strategy.
16. **ecta** further confirms its **support for BEREC maintaining all five current Strategic Priorities as the basis for the WP2020**<sup>4</sup>. In **ecta**'s view, these priorities are in accordance – not in conflict – with the EECC, nor do they in conflict with addressing developments of the digital ecosystem and 5G in a pro-competitive manner. If other stakeholders were to allege such conflicts, **ecta** would welcome the opportunity to provide reply comments on such claims.
17. Substantively, BEREC portrays the background to the Work Programme as comprising mandatory requirements under the Code, 5G, net neutrality, consumer empowerment and future trends such as market and economic issues of digital platforms.
18. **ecta** has the following comments on this substantive portrayal of the WP2020 background.
19. **ecta expects BEREC and NRAs to continue to focus on what is truly important to enable and improve competition at the network and service levels of electronic communications markets** for business-to-consumer markets (B2C) and business-to-business markets (B2B), including business-to-business-to-consumer markets (B2B2C) and Internet of Things (IoT). **ecta** recommends these dimensions, which are entirely absent from the background section, to be explicitly mentioned here in view of the significant developments these markets are undergoing and will continue to undergo.
20. The examination of links between electronic communications markets and the wider digital ecosystem, including potential 5G-related challenges must occur in this light: **Where relations to wider ecosystem aspects are examined, this should clearly occur from the vantage point of their relevance to competition in electronic communications markets and the latter's interaction with markets upstream and downstream in the digital value chain**. Their consideration should not distract BEREC and NRAs from fully exercising their statutory duties and implementing actions to fulfil their priorities on electronic communications markets.

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<sup>4</sup> See also **ecta**'s responses to BoR (18) 175 and BoR (17) 176.

21. **ecta expects BEREC and NRAs to actively remove undue administrative burdens on operators**, which may entail serious risks of negatively affecting competition on electronic communications markets.
22. Building on the considerations set out in the three preceding paragraphs, **ecta considers it particularly problematic that the background section abstains from acknowledging the most fundamental legislative change that the Code has brought about, i.e. the widening of the scope of application to over-the-top services**. These services have both a direct and indirect impact on competitive conditions in electronic communications markets and **ecta therefore calls on BEREC to include explicit reference thereto as well as to integrate its systematic consideration throughout**.

### 3. Comments on the Work Programme 2020 and beyond

#### 3.1. Strategic Priority 1: Responding to connectivity challenges and to new conditions for access to high-capacity networks

23. **ecta** notes with satisfaction that BEREC's introduction indicates that BEREC will '*continue its work on identifying competition problems*' [...] '*as high-speed networks are being developed*'.
24. **ecta** believes that BEREC's follow-on statements are well-intended, i.e. to deal with competition problems. However, **ecta** wishes to express its concerns about BEREC's first follow-on statement, which refers to '*legacy networks phased out*', given that there is **extremely little evidence that legacy (copper) networks are being phased out**. **ecta** emphasises that any copper to fibre transition needs to occur on a basis which does not grant the legacy copper network owner any advantage.
25. **ecta** is also worried about BEREC's second follow-on statement in the introduction, which refers to situations '*where markets have become mature*'. Major electronic communications markets in the EU cannot be considered to have become 'mature', given that incumbent telecoms operators tend to control >40% of retail fixed B2C markets (often considerably higher market share), and tend to control >60-70% or more of fixed retail B2B markets, with correspondingly usually higher wholesale market shares. These market shares trigger the prima facie assumption that these operators hold an SMP position. **If BEREC is implicitly indicating that 'mature markets' imply acceptance of single SMP or joint SMP, ecta would disagree**.
26. Section 1.1: '*Carry-over work on Guidelines on very high capacity networks*'. **ecta** appreciates that BEREC will hold a public consultation prior to the adoption of draft guidelines at Plenary 2 2020 (prior to adoption at Plenary 4 2020). **ecta** emphasises that this work is crucial to the interpretation of art. 76 EEC on co-investment and the related potential for substantial deregulation of SMP operators. This precise fact is likely to drive strategic behaviour, notably by SMP operators. An excessively broad definition of VHCN without clear performance metrics, allowing for legacy technologies to also be qualified as VHCN, must therefore be avoided because of its market-structuring implications that may remove NRAs' ability to address genuine competition problems even in the presence of single or

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joint SMP. In this regard, **ecta** is concerned that BEREC's work thus far has not yet provided indications as to where the boundary line will be drawn and at the same time not considered potentially legitimate technological solutions, such as novel generations of fixed wireless access technology.

27. In this context, **ecta** reasserts (see our response to draft WP2019) that **technologies need to be examined with regard to their capabilities at wholesale level**, not only at retail level. **ecta** has consistently emphasised the need to ensure adequate technical features of wholesale products as means to ensure not only momentaneous competition, but also future-proof opportunities for competitive differentiation. For this reason precisely, **ecta** has been critical of the lack of improvement of access product specifications over time. The introduction of virtual access products has aggravated rather than addressed this concern. Claims of 5G networks being allegedly substitutable for fixed networks on a prospective basis need to be treated with utmost caution, for both technical and usage reasons.
28. **ecta** also reiterates its request (see our response to draft WP2019) to BEREC to be attentive to technology developments enabling improved competition and improving end-user interests (wavelength division multiplexing, network virtualisation and network slicing (on wireless networks as well as on fixed networks)). These may provide new opportunities for enabling competition and for supporting end-user interests, if the techno-economic wholesale access conditions are properly defined.
29. Section 1.2: 'Carry-over work on BEREC Study on the determinants of investment in very high capacity networks'. **ecta** is even more worried about this study than it was in 2018 (please refer to our comments in response to the draft WP2019). It is **basically a 'black box' for stakeholders**. Nothing has been published to-date, and BEREC indicates that it may proceed to Phase 2 based on unpublished Phase 1 results. In addition, BEREC now announces that there will also be no public consultations on this study into 2020. **ecta** considers that public consultations are essential for transparency and for sound decision-making. **ecta expresses its serious concerns on potentially one-sided findings, notably where these are due to a lack of representativeness in terms of business models (e.g. B2C, B2B, B2B2C/IoT), and calls on BEREC to ensure that the findings be subject to stakeholder examination and feedback prior to drawing any regulatory conclusions..**
30. Section 1.3: 'Carry-over work on Guidelines on the identification of the network termination point'. **ecta** will comment on this as part of the specific BEREC consultation.
31. Section 1.4: 'Carry-over work on Guidelines on the criteria for a consistent application of Article 61(3)'. **ecta** appreciates that BEREC will hold a public consultation prior to the adoption of draft guidelines at Plenary 2 2020 (prior to adoption at Plenary 4 2020). **ecta** cannot emphasise enough how crucial this topic is to the evolution of the EU regulatory framework for electronic communications, and for its members which might both be providers and/or takers of symmetric access on the basis of Art. 61(3) of the EECC. **The interaction between the symmetric Art. 61(3) regime and the SMP regime is a key issue.** If enduring regulatory uncertainty arises between symmetric and asymmetric

regulation, the EU institutions will have done a disservice to legal certainty, in direct contradiction to one of the key objectives of the European Commission's proposal for an EECC. **ecta** firmly expects to be invited to any BEREC stakeholder workshop on the subject matter.

32. **Section 1.5: 'Carry-over work on Guidelines on the consistent application of the co-investment criteria'**. Having attended a BEREC workshop on this topic, **ecta** has serious concerns on this workstream insofar the draft Work Programme refers to a second workshop having taken place,<sup>5</sup> to which **ecta** has not been invited. **ecta** therefore insists that it is fully involved in any workshops, and expects to be able to participate in a full public consultation on the exact text of proposed Guidelines on this key subject. **Art. 76 EECC is market-shaping, and indeed will shape the role of NRAs going forward**. This is a topic of utmost importance to challenger electronic communications network and services operators.
33. **Section 1.6: 'Opinion on the review of the EC Recommendation on Relevant Markets'**. **ecta** considers the Recommendation on Relevant Markets to be the most market-structuring instrument in EU electronic communications law. Interactions between the European Commission and BEREC (previously ERG) on revisions to this Recommendation have always been bilateral, with BEREC/ERG as the 'junior partner'. **ecta recommends that BEREC enhance its own influence and create productive transparency, by initiating its own public consultation, or at least by publishing BEREC's Opinion well ahead of the European Commission's decision-making deadline**, inviting stakeholder input, thereby encouraging the European Commission itself to seek stakeholder input based on the BEREC Opinion before finalising the review of the Recommendation. **ecta** considers such additional transparency critical, given that the Commission's own consultation was insufficiently clear as to the envisaged nature of the review and the decisional practice since would merit discussion.
34. **Section 1.7: 'Carry-over work on Guidelines for geographical surveys of network deployments'**. Having attended a workshop, **ecta** has serious concerns on this workstream. **ecta** is worried about **potential regulatory over-reach by BEREC and by NRAs (and other competent authorities)**. The proposals presented (phase I) could result in burdening challenger operators with having to make investment plan disclosures (intrinsically complicated regulatory burdens), which in addition might reach SMP operators' 'ears'. This in turn could enable strategic overbuild (announcements or actual overbuild) by SMP operators, damaging challenger operators' investment plans. Also, **if co-investment with the SMP operator (Art. 76 EECC) develops, challenger operators may be compelled to rapidly change their own investment plans, to ensure their survival by entering in a co-investment scheme with the SMP operator in another geographical area** than the one they intended to invest into themselves, thereby changing forecasts they may have previously made in accordance with Art. 22 EECC. **ecta** asks BEREC and NRAs to be attuned to these concerns. Overall, **ecta is seriously concerned that BEREC's work on Article 22 EECC might imply an undue administrative burden on challenger operators, and,**

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<sup>5</sup> BoR(19) 183, at 13.



worse, that it could seriously harm competition. ecta recalls here that the European Commission, when proposing this provision, sought to prevent SMP operators from damaging new entrant's network deployment by threatening or engaging in overbuild. The opposite result cannot be what BEREC's Guidelines result in doing. ecta will respond to the BEREC public consultation.

35. Section 1.8: 'Expert workshop with OECD – QoS'. ecta notes that BEREC/ERG – OECD workshops held previously were open to stakeholders, and were very focused on the Internet ecosystem and notably on interconnection between internet service providers. ecta expects to be invited.
  36. Section 1.9: 'BEREC Report on Access Regulation (including prices) based on EU State Aid'. This appears to be a long-term new work item (not subject to public consultation, and for adoption by the BEREC Plenary 2, 2021). ecta can only express its surprise, even though ecta intrinsically welcomes it being a very relevant work item. Why is this 2021 item in the BEREC WP2020? Why is not subject to a call for input and public consultation on a draft BEREC document? ecta has responded to previous BEREC consultations on assessing the Broadband Cost Reduction Directive and on Mobile infrastructure sharing (BEREC work ecta considered not ready for reaching conclusions) which are relevant to State Aid. Any BEREC work in these areas should be transparent and open to the standards we propose in chapter 1 of this response.
- 3.2. Strategic Priority 2: Monitoring potential bottlenecks in the distribution of digital services
37. ecta agrees that BEREC should *'evaluate and analyse how the various digital markets evolve' [...] 'with a particular focus on how market power is distributed and how the existence of bottlenecks to competition can be addressed by BEREC'*.
  38. ecta emphasises BEREC and NRAs' mandates, which, by law, are to focus on enabling and improving sustainable competition at the network and service levels of electronic communications markets. ecta considers it justified for BEREC to examine the links between electronic communications network/services markets and the digital ecosystem, and potential challenges induced by 5G. However, this must not distract BEREC and NRAs from fully exercising their statutory duties, notably taking all actions necessary to fulfil their duties to promote competition on electronic communications markets (see chapter 2 above).
  39. Sections 2.1-2.2: These are proposed technical updates and reporting (intra-EU communications retail caps), on which ecta has no material comments at this time.
  40. Section 2.3: 'Report on Market & Economic Issues of Digital Platforms'. Whilst ecta considers it justified for BEREC to examine the specific links between electronic communications network/services markets and the digital ecosystem, this must not distract BEREC and NRAs from fully exercising their statutory duties and implementing actions to fulfil their priorities on electronic communications markets. ecta does welcome that this topic will be the subject of a BEREC public consultation in 2020.



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41. Section 2.4: 'Workshop on data collection from Authorised Undertakings and OTTs'. ecta asks to be invited to this workshop to understand BEREC/NRA intentions and projects as well as to ensure competitive equality of opportunity between old and new providers of electronic communications. ecta considers that this subject will be critical to ensuring effectiveness of the new legislative framework for electronic communications, and accordingly welcomes that this topic will be the subject of a BEREC public consultation in 2020. ecta expects BEREC notably to present outline elements of a proportionate data gathering strategy capable of ensuring that compliance burdens be appropriately distributed.

### 3.3. Strategic Priority 3: Enabling 5G and promoting innovation in network technologies

42. Section 3.1: 'Carry-over work on the impact of 5G on regulation'. In accordance with our response to an unforeseen BEREC consultation on the impact of 5G on regulation, **ecta cautions BEREC against treating 5G in any way differently from previous generation networks when addressing competition and end-user interests**. Where BEREC refers to 'a review mechanism to keep up with market development', this can be subject to interpretation. An interpretation that ecta would not support is 'do nothing and wait until competition problems are acute'. ecta considers that all of the EU regulatory framework's provisions and BEREC statutory duties and priorities need to unequivocally apply to 5G, notably including measures to safeguard effective competition. **To the contrary, ecta expects BEREC and its members to conceive of a balanced strategy to ensure that the transition to a 5G-enabled wireless ecosystem does not bear prejudice to still ongoing improvement and calibration of existing networks.**

43. Section 3.2: 'Peer review process'. ecta understands that the EECC implies that the RSPG-led peer review process on radio spectrum assignment will occur in a closed forum. In ecta's view, it is essential for stakeholders to understand how and by whom BEREC may be represented in this context, and what its contributions are likely to be. **If peer reviews on radio spectrum assignment occur in practice (since it is essentially optional) and imply material changes to draft decisions that previously have already been the subject of national consultation, ecta believes that these need to be subject to a new national consultation.**

44. Section 3.3: 'Workshop on infrastructure sharing'. ecta has contributed to BEREC work leading up to the adoption of the 2019 BEREC Common Position on infrastructure sharing. ecta welcomes that BEREC will organise a workshop, but also cautions against BEREC making rapid insufficiently considered changes to its Common Position on account of 5G somehow being different. The text box on page 22 of the consultation document refers to 'whether NRAs could bring benefits to verticals, by providing information and QoS of 5G networks'. If or how this relates to infrastructure sharing needs to be clarified.

45. Section 3.4: 'Report on security issues related to 5G implementation'. ecta generally welcomes that BEREC aims to inform other EU and national institutions dealing with security aspects on the functioning of electronic communications markets. In doing so, ecta expects BEREC to protect competition and choice, at all levels of the ecosystem, to avoid

damage to competition, hence competition and ultimately end-user interests. **ecta regrets that no public consultations are planned, but trusts that it will be invited to the BEREC external workshop proposed for some time in 2020.**

#### 3.4. Strategic Priority 4: Fostering a consistent approach of the open internet principles

46. Sections 4.1 and 4.2: *'Carry-over work on update to the Guidelines on the implementation of the Open Internet Regulation + Reporting'*. **ecta** has no material comments to make on open Internet issues at this time, also noting that a specific BEREC consultation is currently ongoing. **ecta** does note that **transition from IPv4 to IPv6** is included in Section 4.2. **Some ecta members have serious concerns about this transition, in particular as this entails risks to competition**, potentially harming smaller operators focused on delivering services to businesses and public administrations while relying on wholesale inputs from SMP operators. **ecta** notes that BEREC intends to organise a workshop on IPv4 to IPv6 transition. **ecta** expresses its interest in participating in all BEREC work on this topic.
47. Section 4.3: *'Net Neutrality Measurement Tool'*. As expressed previously, e.g. in response to the draft WP2019 consultation and in the specific consultation, **ecta** has doubts about the costs/benefits of imposing BEREC/NRA mandated net neutrality measurement tools. The external deliverables for this workstream (i.e. towards network operators and service providers) are unclear.

#### 3.5. Strategic Priority 5: Exploring new ways to boost consumer empowerment

48. **ecta** notes that BEREC in the introduction of the relevant section of the consultation document states that *'BEREC will work on how to handle third party payment charges on mobile phone bills and NRAs' enforcement powers when it comes to penalties'*. **ecta would welcome the text being revised to clearly indicate that the work on third party billing occurs within the context of Annex VI EEC and will not exceed what is provided for there**, notably to avoid any undue influence on business development opportunities resulting from that work.
49. Section 5.1: *'Carry-over work on Guidelines on common criteria for undertakings other than ECN/ECS to manage numbering resources'*. **ecta considers this work item to be fundamentally misplaced and calls on BEREC to move it under Strategic Priority 2 regarding the monitoring of potential bottlenecks to the distribution of digital services.**
50. Sections 5.2 and 5.3: *'Carry-over work on QoS and adequate broadband internet access service'*. **ecta** notes that these workstreams are at early stages, and **ecta** will consider its position on these as part of examining the specific BEREC consultations. **ecta** asks BEREC to be cognisant of the fact that alternative operators relying on wholesale access to SMP operators' networks (or other operators' networks) do not control the most essential elements of the quality of the service provided. Therefore, **ecta considers it necessary to accompany the legally mandated work under the EEC by explicit workstreams focusing on proving non-discrimination on QoS between wholesale access providers and access takers.** **ecta** is on record as demanding this for many years, including the ability for alternative operators' (certified) technicians to be able to carry out activation and

repair activities on SMP operators' networks. The reality is that this has been achieved to some extent in just a few Member States, but that it remains widely unavailable in most EU jurisdictions.

51. Section 5.4: *'Carry-over work on Guidelines on how to assess the effectiveness of public warning systems transmitted by alternative means to mobile NB-ICS'*. ecta expects BEREC to provide further details on this subject in the context of the public consultation schedules for after P4/19.
52. Section 5.5: *'Report on how to handle third party payment charges on mobile phone bills'*. ecta notes that the proposed work on this subject matter is principally exploratory in nature and that a public consultation will be forthcoming in 2021. ecta is concerned that inclusion of this work item lacks identification of a clear problem analysis justifying the expenditure of scarce administrative resources on this subject at a time when Code implementation is fully ongoing. Also considering that the work item proposes to analyse legal regimes in existence after transposition of the Code into national laws, **ecta suggests that this item be carried forward to the BEREC Work Programme for 2021 and that a stakeholder workshop be organised in the interim to scope the need for action.** ecta would also expect this line of work to be informed by BEREC discussions on numbering misuse and fraud, as they took place in Q3/19, but on which no information has yet been made public. Overall, ecta would emphasise that investigations into this matter should not lead to unduly impairing or otherwise prejudicing electronic communications service providers' ability to offer billing services to third parties, including providers of value-added services.
53. Section 5.6: *'Report on penalties'*. ecta considers that national legislation and rules on penalties, NRA enforcement powers, and NRAs' approaches to imposing penalties for non-compliance are extremely variable between Member States, and would benefit from comparison in a BEREC report. Considering, in particular, that the threat of penalties has not had any visibly dissuasive effect on SMP operators breaching the obligations imposed on them on the basis of ex-ante regulatory obligations, **ecta is of the view that such a report must clearly distinguish between penalties imposed at retail and wholesale level, and examine the basis for applying penalties in either domain.** At least the part related to wholesale analysis should be more appropriately assigned to Strategic Priority 1. The overall objective for this report must be to provide an authoritative overview of enforcement practices and their effectiveness, with a view to identifying potential limitations to effective enforcement by NRAs. **ecta calls on BEREC to guarantee that relevant benchmarking, notably at wholesale level, is conducted on a regularly recurrent basis going forward and that the results thereof be publicized,** as a central measure of the effectiveness of competition. In this light, **ecta considers the plan of adopting a report solely for internal use a lost opportunity.**

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### 3.6. BEREC obligatory work and stakeholder engagement

54. BEREC's obligatory work is a matter of fact, including the new mandatory tasks imposed by the EECC and by the BEREC Regulation. **ecta** therefore has limited comments on these matters, and hereafter makes only selective comments on specific items. With regard to stakeholder engagement, **ecta** refers to the very specific comments set out above in chapter 1.
55. Section 6.1: 'Ad hoc input to the European Commission'. **ecta considers that all BEREC input to the European Commission should be subject to public consultation, or at least be published early**, to enable stakeholders to rely on it in their representations to the European Commission and other EU institutions during the EU decision-making process, especially when BEREC has not made its own contribution subject to such consultation or otherwise offered market participants the opportunity to provide feedback. BEREC has occasionally done this, with positive effect. This is important, notably given the European Commission's track record of not publicly consulting on the actual text of iterations of the Recommendation on Relevant Markets as well as on the Implementing Regulation on Fair Use Policy. BEREC can help to improve transparency and consultation in these and other areas, by consulting market participants and setting out its views publicly early on in EU decision-making processes. **ecta** will, of course, also insist on the European Commission improving its own transparency and consultation practices.
56. Section 6.4 and Section 6.9: 'BEREC input to the setting of single EU-wide maximum fixed/mobile voice termination rates + Termination rates at European level'. **ecta** has participated in all workshops held in Brussels by the European Commission on cost modelling for EU-wide FTRs/MTRs, and regrets that stakeholder input has quasi-systematically been discarded by the European Commission and its consultants. **ecta** has also noted that NRAs have done often short-term and not really public consultations on this topic, raising serious concerns about transparency. From **ecta's** perspective, BEREC, NRAs, and industry stakeholders have often been side-lined in this process. **ecta considers it essential for BEREC to conduct a public consultation on its proposed inputs to the European Commission on wholesale fixed and mobile call termination markets, covering all elements and issues at stake, i.e. not only the per-minute rates, but also the recurring wholesale interconnection port charges**, for meaningful discussion in good time to have effect on the European Commission's ultimate decision-making process. **ecta therefore respectfully insists, contrary to BEREC's proposal, that this work item needs to be subject to public consultation.** To be very clear, this comment mostly reflects **ecta** dissatisfaction with the European Commission's process, and trust that BEREC will help to improve stakeholder input where it matters. **ecta** agrees that BEREC data collection is useful, and should continue, for FTRs, MTRs and for SMS termination rates.
57. Section 6.6: 'International Roaming Benchmark Data Report': **ecta** welcomes that BEREC will produce two benchmark reports on the evolution of prices and volumes. As the forthcoming review of the wholesale roaming charges is an important milestone and the Commission will present a report to the European Parliament and the Council, **ecta** considers that BEREC should attach particular importance to the functioning of the

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wholesale roaming market and publish an analytical report on its functioning that should be subject to a public consultation. Such a report should, in **ecta**'s view, focus on portraying the market structure of roaming markets, capturing the structural differences between MVNOs/service providers, smaller MNOs and multinational MNOs, and consider potential means of addressing these.

58. Section 6.10: 'Article 7/7a Phase II process'. **ecta** considers that BEREC has a key role in assessing cases where the European Commission escalates an NRA notification. Unfortunately, in **ecta**'s experience, the BEREC process on Art. 7/7a cases has been particularly lacking in transparency, without any possibility of engaging on cases that by their nature have had wider relevance beyond the individual market. **ecta** believes that such high-stake cases should benefit from open discussion. During the negotiations on the EECC, **ecta** therefore actively advocated lengthening of Phase II proceedings and other adjustments to increase transparency and re-consultation at national level and re-notification. For these combined reasons, **ecta invites BEREC to organise a stakeholder workshop on the options for procedural reform under the Code.**
59. Furthermore, , **ecta urges BEREC**, in accordance with its observations above, **to ensure stakeholder engagement on any BEREC opinion on a possible review of the Procedural Recommendation.** **ecta** considers especially that the comprehensiveness and quality of information in, and the transparency of, notification forms is unduly inconsistent between NRAs and encourages BEREC to take a proactive role in ensuring notably greater transparency of market analyses.
60. Section 6.12: 'WACC parameters calculation and Report and VHCN Notice Opinion'. The consultation draws **ecta**'s attention to the fact that the European Commission and BEREC seem to discuss '*appropriate ways to remunerate investments in the VHCN (including through the WACC)*', which could lead to a European Commission policy initiative. This is a matter of very serious concern, especially as BEREC foresees no public consultation. In **ecta**'s view, **this appears as an envisaged artificial mechanism to inflate wholesale access charges for access to SMP operators' networks, which is likely to damage competition and ultimately end-user interests.** 'Risk premiums' (WACC uplifts) and discounts for prepayments of rent (erroneously presented as co-investment) have already been approved by NRAs, and then reviewed/reduced by the very same NRAs. **ecta urges BEREC to be very cautious in discussions with the European Commission and avoid participating in such a mechanism, which will not only reduce competition and end-user benefits, but also harm take-up of VHCN connectivity where end-user affordability is at stake.** This is even more applicable where European monetary policy structurally maintains very low interest rates, which in turn result in negative risk-free interest rates on the one, and a massive availability of capital from pension funds looking for returns around 2 or 3% on the other hand. This combination has to be translated into much lower cost of capital, and thus should bar any application of further risk premiums to incentivise investment.

61. Section 6.14: 'Stakeholder Forum'. ecta wishes to express its conviction that BEREC's key stakeholders, those that are fundamentally affected by BEREC's and NRA decision-making practice on a day-to-day basis, should be given far better opportunities to make their point of view clear at BEREC's Stakeholder Forums. In particular, **ecta regrets the profound lack of representation of BEREC's main stakeholders over the last years**. This concerns all operators affected by regulation. Especially for challenger operators, the scope and detail of regulation on electronic communications markets is a life-or-death matter, every day. **In this light, ecta considers the overrepresentation of other stakeholders at this and other BEREC events inappropriate.**
62. Section 6.17: 'Review of BEREC Medium-Term Strategy'. ecta agrees that it is good practice for BEREC to periodically adopt a Medium-Term Strategy, rooting itself in principles and objectives it will adhere to, guiding its own more punctual decision-making, avoiding to be unduly influenced by the technological hype of the day, lobbying, and short-term political pressures **Given that the new European Commission has not yet taken office, ecta would suggest delaying the public consultation on the Medium-Term Strategy 2021-2023 until mid- 2020 and scheduling the final adoption for Plenary 4.**
63. Section 6.21: 'Possible work for 2021 and beyond'. ecta welcomes that BEREC intends to address non-discrimination on QoS and wholesale replicability testing, as well as – in the context of potential copper switch-off – fit-for-purpose wholesale access and sharing solutions relating to fibre networks, and related challenges.<sup>6</sup> ecta calls on BEREC to turn these into real workstreams, not just intentions and to inform stakeholders of the initiation of these workstreams, in accordance with the consultation principles put forward by ecta in chapter 1.

#### 4. Closing observations

64. In closing, ecta wishes to emphasise, without prejudice to the suggestions presented in chapter 1 of this response, that two-stage consultations, consisting of a call for input, and a consultation on precise BEREC text proposals, are clearly required in all cases when BEREC consults stakeholders.

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In case of questions or requests for clarification regarding this contribution, BEREC and NRAs are welcome to contact Mr Oliver Füg, Director of Competition & Regulation at [ecta](#).

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<sup>6</sup> BoR(19) 183, at 43.