



ecta RESPONSE

**TO THE PUBLIC CONSULTATION BY BEREC
ON THE
DRAFT BEREC WORK PROGRAMME 2021**

BoR (20) 163

5 NOVEMBER 2020

1. Introduction

1. **ecta**, the **European competitive telecommunications association**,¹ welcomes the opportunity to comment on the draft BEREC Work Programme, BoR (20) 163, which covers workstreams to be delivered by BEREC in 2021 (hereafter ‘draft WP2021’) and possible work for 2022 and beyond.
2. **ecta** appreciates that BEREC is offering stakeholders the possibility to contribute to refining the draft WP2021 prior to its final adoption.

2. Comments on the draft WP2021 introduction and background

3. **ecta** expresses **support for most of BEREC’s draft WP2021, sharing its commitment to the European green and digital transitions**. Hereafter, **ecta** provides suggestions for how to constructively improve the draft WP2021.
4. Unfortunately the draft **does not always reflect the full balance of objectives contained in the EECC**. This is a **transversal issue**, occurring in the introduction and background sections, and throughout the draft WP2021. For instance, BEREC states in the introduction that: ‘*A key policy objective is to ensure that very high capacity networks and 5G services are available timely. In this respect, BEREC will continue to promote the roll-out of fibre and 5G.*’ (page 3, paragraph 3). **ecta** notes that this **omits the access and take-up dimensions, as well as the reference to citizens and businesses**, which all are contained in art. 3(2)(a) EECC. It is also noteworthy that BEREC singles out fibre and 5G, which is neither fully compatible with the definition of VHCN in art. 2(2) EECC, nor with BEREC’s own VHCN Guidelines (BoR (20) 165). In the background section, BEREC presents its four objectives as including: ‘*promoting connectivity and access to very high capacity networks*’. This omits the take-up dimension (page 5, paragraph 1).
5. Accordingly, **ecta asks BEREC to review and modify its draft WP2021 systematically, to ensure that it contains no shortcuts – or indeed short circuits – that would allow or encourage BEREC or national regulatory authorities (hereafter ‘NRAs’) to move away from acting in accordance with the full balance of objectives of the EECC**. The ‘access to’ and ‘take-up’ dimensions of art. 3(2)(a) must systematically be reflected in each of BEREC’s relevant workstreams.
6. **ecta** further notes that **the Work Programme places significantly less emphasis on Guidelines and Common Positions which steer the work of national regulatory authorities**. Indeed, the text suggests that BEREC might limit its activities in 2021 to mostly intangible deliverables such as ‘*monitoring the impact of the EECC*’ and ‘*assessing future technological and market developments, related to end-user provisions [...]*’ (page 3, paragraph 5), besides reporting. **ecta** considers that BEREC’s mandate should principally focus on improving the functioning of electronic communications markets and bring them to effective competition. Monitoring should be coupled with tangible enforcement, and enforcement should not be focused mainly on end-user rights, but especially on the

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

wholesale access obligations resulting from findings of significant market power, without which end-user rights cannot be guaranteed. Indeed, it is as critical as ever for BEREC to ensure that electronic communications markets progress towards effective competition, and to take decisive regulatory intervention where necessary to make effective competition happen in reality. **Keeping the status-quo on electronic communications markets, or even diminishing BEREC and NRA attention thereto for the benefit of digital markets more broadly, including a shift in resources and enforcement, risks accepting continued significant market power on electronic communications markets.** This is not what the regulatory framework for electronic communications, including BEREC's mandate, is designed for. The framework is about taking the necessary regulatory measures to achieve effective and sustainable competition.

7. **ecta** welcomes BEREC playing a role in the context of the **ongoing COVID-19 pandemic**, and **especially welcomes BEREC's acknowledgement that European telecommunications networks have stood their ground** (page 3, paragraph 6). Indeed, **ecta's** members are **proud contributors to 24/7 resilient electronic communications on competitive terms**, at all levels of fixed and mobile networks (access, backhaul, core, international), as well as in terms of service provision. However, also given that (quasi)lockdowns are re-occurring, **ecta** wishes to emphasize that **certain executive and regulatory practices from the first lockdown should not be repeated, because they have had anticompetitive effects and harmed consumers and business users, and therefore should actively be discouraged by BEREC.** Reference is made in particular to **unjustified suspension of number portability** where no or limited human interaction is involved, and to **unjustified suspension of margin-squeeze testing.**
8. In addition, **ecta** is **surprised** to see BEREC suggesting that it will *'identify the steps needed to strengthen Europe's digital capabilities and increase the resilience of the electronic communications market for dealing with situations such as the COVID-19 crisis'* (page 3, paragraph 6). **BEREC provides no justification for additional action and does not explain which type(s) of action it envisages** and indeed, BEREC's statement seems to stand at odds with its own findings of resiliency. **ecta** and its members stand ready to cooperate with BEREC and NRAs to ensure well-functioning networks and services during the COVID-19 pandemic. However, BEREC and NRAs need to ensure that (regulatory or de-regulatory) action does not result in strengthening positions of significant market power in electronic communications, and/or impose unjustified costs on operators, which they will only be able to recover through price increases.
9. The above brings **ecta** to formulating a **suggestion to BEREC.** The COVID-19 pandemic has starkly underlined the importance of both fixed and mobile connectivity for work, education, health, and socio-economic and personal development. **Reducing the digital divide has therefore become a higher priority than it was before.** While **ecta** and its members stand ready to contribute to extending fixed and mobile connectivity, this can only be achieved with a mix of technologies and solutions. Fast roll-outs (fixed and wireless) are of the essence. There is therefore an **excellent case for BEREC and NRAs to make their voice heard with national, regional and local governments to**

emphasize the importance of furthering healthy competition in electronic communications as the key vector for progress in communications and connectivity-based markets, while contributing to **improve the conditions for permit granting and the operation of electromagnetic fields**.

10. **ecta** will play an active role in the context of the **review of the Broadband Cost Reduction Directive, and other legislative proposals** expected from the European Commission in late 2020 and during 2021. The same is true for the files on which the European Commission is expected to ask BEREC for an opinion, including recommendations. **Given that the European Commission involves BEREC actively in its work beyond publicly available information, BEREC has ample time to reflect on its (potential) opinions**, to be delivered on request of the European Commission, or on BEREC's own initiative. Consequently, **ecta considers that there is no reason for BEREC to continue its approach of not consulting stakeholders on BEREC Opinions on key dossiers of EU policy and regulation**. Given that these are precisely the most impactful work items for BEREC as an organisation, **ecta reiterates its demand for BEREC to formally (pre)consult stakeholders on its opinions**.
11. As regards the **impact of the Code to network deployment, BEREC states its expectations** as follows: *'The EECC will improve regulatory conditions to incentivise private investments for the deployment and take-up of very high capacity networks'* (page 25, paragraph 3). **ecta asks BEREC to revise this expression to underline its presumptive nature and commit explicitly to a careful and thorough assessment of the Code's impact**, including in terms of deployment, competition, access, take-up and ultimately benefits or detriment to end-user interests.
12. Overall, **ecta expects BEREC and NRAs to continue to focus on what is truly important to enable and improve effective 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 introduction and background section, to be explicitly mentioned in view of the significant developments these markets are undergoing and will continue to undergo.
13. **Where relations to the wider digital 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.

3. Comments on Chapter III: BEREC Work in 2021

3.1. Strategic Priority 1: Promoting full connectivity

14. **ecta** notes with concern that BEREC's introduction utilises the words *'the expansion and take-up of secure, competitive and reliable high-capacity networks [...]'*, thereby omitting the 'access to networks' dimension contained in art. 3(2)(a) EECC. **The access dimension should explicitly be added** in order to ensure that BEREC's and NRAs' work fully reflects the balance of objectives contained in the EECC.

15. **ecta** recognises that BEREC's reference to *'ensuring a smooth transition from legacy infrastructures'* is well-intended, but asks for it to be boosted for more positive effect, i.e. the **text could usefully be revised to 'a smooth transition to VHCN networks, which is pro-competitive, non-discriminatory, and is mindful of end-user interests'**. This is important to ensure that operators with significant market power are not able to exploit their market power in the transition to damage competition, including by: (i) denying access to new resources, and (ii) continuing self-supplying resources whilst denying continued access to them to third parties. **ecta** is on record in stating publicly that no-one can be left behind. This statement is informed by the fact that previous technology transitions (e.g. dial-up to ADSL, ADSL to VDSL, VDSL to vectored VDSL2) have been characterised by discriminatory practices, and lack of regulatory action, or belated regulatory action, which benefited operators holding significant market power, and structurally damaged competition. **ecta** emphasises that any copper to fibre transition needs to occur on a basis which does not grant the owner (in fact the inheritor) of the legacy copper network any advantage.

16. Section 1.1: Report on a consistent approach to migration and copper switch-off. **ecta** appreciates that BEREC will open a public consultation at Plenary 4 2021 and prior to adoption of the Report at Plenary 2 2022, although this seems to be quite a lengthy timeframe given the importance of the subject. **ecta** emphasises that the copper network remains an important vector of competition – hosting largest proportion of broadband customer connections in the EU in July 2019². Alternative operators relying on wholesale copper access continue to need to serve their customers even as they are or will be progressively migrated to VHCN, onto the network of the same operator with significant market power or onto their own or another third-party network. **ecta considers BEREC's scope of attention (page 6, paragraph 5) insufficient in terms of safeguarding a pro-competitive and non-discriminatory transition to VHCN**. Elements that need to be explicitly addressed (already in the WP2021 to ensure that BEREC's Working Group is properly instructed) include the following:

² DESI – Connectivity 2020, page 15, figure 18, based on COCOM data:
https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=67079

- i. Definition of the architecture and especially the wholesale access/hand-over points of the VHCN network jointly with wholesale access takers migrating to it (in particular in accordance with points 18, 23 and 39 of the EC's NGA Recommendation³).
- ii. Active involvement of wholesale access takers in the definition of the transition/migration arrangements, related timetables (not just start and end dates, but all steps of the timetable, where necessary on a geographically distinct basis).
- iii. Definition, monitoring and enforcement of key performance indicators (KPIs) and service level guarantees (SLGs) for the transition/migration arrangements, with specific attention to covering all types of network usage (B2C, B2B, wholesale, backhaul, etc.) that need to be covered by the transition/migration.
- iv. Imposition of a strict non-discrimination obligation on the operator with significant market power and active supervision thereof by the NRA, to ensure that wholesale access takers benefit from the same transition arrangements, timing, and conditions (incl. technical and economic conditions) as all (corresponding) activities of the operator with significant market power, be they retail, wholesale, of their own subsidiaries or partners, internal, etc.
- v. Guidance to the effect that NRAs seek signed commitments from operators with significant market power that all copper lines will be adequately addressed in the transition/migration, notably to ensure that the operator with significant market power cannot continue self-supplying resources whilst denying continued access to them to third parties. This is particularly relevant for copper lines that may be used for backup (of fibre lines), backhaul, industrial control systems, and internal usage by the operator with significant market power, for which the copper network will have residual usefulness.
- vi. Reference Offers, subject to explicit approval and modification powers by national regulatory authorities, covering all elements of the transition/migration arrangements. [ecta](#) notes in this context that the BEREC Guidelines on the minimum criteria for a reference offer relating to obligations of transparency - BoR (19) 238 do not address copper migration and switch-off. These BEREC Guidelines could therefore also usefully be revised, to ensure that NRAs are enjoined to require reference offers with adequate contents.
- vii. Rejection of arguments to the effect that raising the wholesale charges for copper-based services are necessary to facilitate the switch from legacy to NGA/VHCN-based services. This will only lead to unjustified discrimination, benefiting the SMP operator for whom the price of copper access is an internal transfer, while the cost for alternative operator relying on copper-based wholesale services is a real

³ Commission Recommendation 2010/572/EU of 20 September 2010 on regulated access to Next Generation Access Networks (NGA): <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010H0572>

external cost. [ecta](#) points out that what drives the switch from legacy to NGA/VHCN-based services is not the wholesale or retail prices for copper-based services, but other elements such as the availability of NGA infrastructure, the digital readiness of the end-users, and active promotion of NGA/VHCN-based services (including operators' own initiatives and discounts, as well as government-led schemes such as voucher schemes for certain categories of citizens and/or small businesses).

17. [ecta](#) emphasises in this context that **KPIs and SLGs for the new network of the operator with significant market power need to be established, and must be expected to be better than those of the legacy network**. This comment is made because situations have already emerged in some Member States where the repair-time SLG for the new network is inferior to that of copper local loop unbundling, including where it concerns the premium SLGs. This is really not the direction of travel that can reasonably be expected. Fibre cuts are a known reality, Operational Support System IT problems are a reality, but ambitious VHCN quality levels (for initial provisioning and for uptime and repairs), best practices and incentives for improvement must be made mandatory where it concerns the regulated wholesale access inputs of operators with significant market power.
18. [ecta](#) notes that BEREC indicates that: *'Based on detailed data collected from the respective NRAs which will include the stakeholders' view on migration and their involvement at national level, the aim of the Report is to identify a consistent approach to migration and copper switch-off'* (page 7, paragraph 2). [ecta](#) respectfully comments that nothing replaces interactive discussion between BEREC and stakeholders, and that it is important for BEREC to directly hear and understand the points made by stakeholders, including in response to one-another's arguments. Therefore, [ecta](#) recommends that a workshop (e.g. with representative trade associations) be held, similar to the workshops that were held in the run-up to the BEREC Guidelines on art. 76 EECC
19. Section 1.2: Report on regulatory treatment of backhaul. [ecta](#) appreciates that BEREC will open a public consultation at Plenary 2 2021, prior to adoption of the Report at Plenary 1 2022. [ecta](#) asks BEREC to **explicitly examine in its Report, any and all restrictions imposed by operators with significant market power the use of regulated wholesale access products for the purposes of backhaul** (including fixed and mobile backhaul). [ecta](#) also asks BEREC to explicitly examine whether such restrictions, if any, have been explicitly or tacitly approved by the National Regulatory Authority (e.g. as part of deciding to allow such restrictions in a reference offer, or not having modified a reference offer containing such restrictions). It would also be of considerable interest for the Report to reflect how the regulation of backhaul has evolved over time, and how changes were effected (e.g. remedy flowing from a market analysis decision, exceptional access obligation, dispute-resolution decision, etc.).
20. Section 1.3: Work on the impact of 5G on regulation (carry-over). [ecta](#) appreciates that BEREC will hold a public workshop in Q1/Q2 2021, prior to adoption of the Report at Plenary 2 2021. However, the description of this workstream (which has been going on for

about two years) can only be characterised as aloof, i.e. **BEREC positions itself as an observer, rather than as an enabler and as a problem solver**, and therefore it seems that little will come from this workstream in terms of Common Positions, Guidelines or other elements driving the work of NRAs. As a consequence, it is likely that (inevitable) competition problems will basically be allowed to emerge, and that these might only be addressed once damage to competition and/or end-user interests has occurred. This would then be similar to what has occurred in previous technology transitions, including in the fixed sector (see paragraph 15 above) and in the 3G to 4G transition, with regulators remaining inactive, or acting belatedly. [ecta](#) would like to suggest that **BEREC should specifically consider giving clear guidance on: (i) network sharing in the context of 5G – inclusion in/revision of the BEREC Common position on infrastructure sharing (BoR (19) 110, and (ii) network slicing and the interoperability of network slices across borders**. In addition, BEREC could usefully engage in **specific monitoring of potential issues on B2B markets, relationships between 5G operators and industry ‘verticals’**. For further comments, please refer to [ecta’s](#) 2020 response to the BEREC consultation on the BEREC 5G Radar.

21. Section 1.4: Workshop on NRA experiences with 5G. [ecta](#) simply wishes to ask for all stakeholders to be involved in this workshop, not just national regulatory authorities and Other Competent Authorities. Alternatively, an additional workshop could be held with industry representatives. Interactive discussion between BEREC and stakeholders, where BEREC can directly hear and understand the points made by stakeholders, including in response to one-another’s arguments, is always valuable.
22. Section 1.5: Workshop on EMF. Electromagnetic Field Exposure limits are an important subject, and [ecta](#) supports BEREC contributing to science-based information being made available. However, given that BEREC admits that it is not an expert in health matters and in public relations, [ecta](#) respectfully submits that this work should not distract BEREC from carrying out its duties in accordance with its mandate established by EU law.
23. Section 1.6: Report to enable comparable national broadband coverage indicators throughout Europe. There are concerns that well-established existing national indicators may have to be changed as a result of BEREC work to harmonise indicators, causing administrative burdens for operators, with no clear advantages for operators and for consumers, which are not able to shop for broadband outside their home countries. Nevertheless, [ecta](#) acknowledges that harmonisation by BEREC could lead to unified collection of operator’s coverage data by the different national authorities in the Member States (i.e. not only the NRAs but also other authorities collecting such data). This would have the benefit of obliging all authorities to adopt the same definitions and methodologies for the collection of data, and thus reduce the administrative burdens on operators that are required to provide data to a number of different national authorities and to European bodies.

3.2. Strategic Priority 2: Thriving sustainable and open digital markets

24. **ecta** reiterates a point that it has made on several previous occasions, which is that **BEREC's and NRAs' interest in digital markets/wider digital ecosystems should not result in diminished attention to, and shifting resources away from, the substantive competition problems that continue to characterise electronic communications markets**. BEREC and NRAs must continue to fully exercise their statutory duties, notably taking all actions necessary to fulfil their duties to promote competition on electronic communications markets. That being said, **ecta** considers it justified for BEREC to examine the links between electronic communications network/services markets and the digital ecosystem.
25. Section 2.1: Report on digital platforms – market and economic analysis (carry-over). **ecta** appreciates that BEREC will open a public consultation at Plenary 1 2021, prior to adoption of the Report at Plenary 3 2021, although this seems quite late in view of the legislative agenda of the EU institutions on this topic (European Commission legislative proposals expected on 2 December 2020).
26. Section 2.2: Report on the harmonised collection of data regarding OTT services relevant to electronic communications markets (carry-over). **ecta** appreciates that BEREC will open a public consultation at Plenary 1 2021, prior to adoption of the Report at Plenary 3 2021. It is **important that all stakeholders (not just providers of OTT services) are able to participate** in any work, notably to ensure equality of opportunity and administrative burden between traditional ECS providers and NI-ICS providers and video streaming providers.
27. Section 2.3.1: Report on the Internet Value Chain. **ecta** appreciates that BEREC will open a public consultation at Plenary 1 2022, prior to adoption of the Report at Plenary 3 2022. However, this seems incredibly late, to the extent that one wonders whether this is not a 'bug' in BEREC's draft WP2021. Whilst **ecta** broadly agrees with the scope of the work envisaged, **three critical remarks** need to be made:
- i. Reference is made to two workshops on **IPv6** (page 17, paragraph 3) in Q3/4 2020. **ecta** is not aware of these having already occurred, and has not been invited to date. Given the importance of IPv6 transition for several of our members, **ecta** insists on being able to participate in full in this work, including in the form of a delegation made up of technical and regulatory experts.
 - ii. BEREC indicates that it wishes to involve **think-tanks (e.g. CERRE) and academia** (page 17, paragraph 8). Whilst at face value this may sound reasonable, it is not always the case. CERRE's reports are typically financed by operators holding significant market power, and their content clearly reflects their interests and positions, often directly calling for the removal of regulation that is essential to maintain open and competitive electronic communications markets. An entity such as CERRE clearly lacks the independence to be treated as a privileged interlocutor by BEREC. In general terms, where academics are concerned, extreme caution is also needed, notably examining the sources of funding for academic research, the

department of the academic institution or think-tank concerned, and any funding - including donations - made directly or indirectly to it or to authors of academic papers.

- iii. BEREC indicates that it will organise a Heads Workshop at the end of 2021 where key actors will be invited. Reference is also made to questionnaires to be sent to different relevant actors in the Internet value chain. **ecta** sees a risk of selectivity in these invitations. **ecta therefore recalls the crucial importance of its members to the Internet value chain** as providers of access network, facilitators of Internet connectivity at local, regional, national and global levels, and as providers of email, cloud and identity services and data centres, **and accordingly expects to be able to participate and represent competitive interests in this work at the same level as other invitees.**

28. Section 2.3.2: Implementation of the Open Internet Regulation. **ecta** notes that BEREC foresees that *'a forum will be held to (informally) discuss national cases and questions relating to the consistent application of the OI Regulation'* (page 18, paragraph 6) **ecta** believes that it would be worthwhile to invite stakeholders such as **ecta** to this forum, or to a separate workshop, because information and exchanges of views on this topic are clearly informative and relevant. It will be recalled in this context that the so-called "Town Hall Meeting" on the Open Internet regulation, held on 29 May 2019 with pre-timed 5-minute speaking slots, enabled a useful exchange of views. Such a format could usefully be used again.

29. Section 2.4: Collaboration on the Net Neutrality measurement tools and evolution of the regulatory assessment methodology. **ecta** simply wishes to reiterate a point it already made in 2017, at the time of the first development of an assessment methodology. A **cost-benefit analysis is needed before imposing administrative burdens and costs on operators, with particular regard for smaller challenger operators and new entrants** which may not have the scale and resources to adjust to constantly changing requirements.

3.3. Strategic Priority 3: Empowering end-users

30. **ecta observes that this part of the draft WP2021 quasi equates end-users with consumers. This is an error.** As digitalisation of society and the economy increases, the role of electronic communications in a **Business-to-Business (B2B) environment (businesses as end-users) and Business-to-Business-to-consumer (B2B2C) environment** increases radically. This is expected to receive a further boost with developments of services for **industry 'verticals' as intermediaries serving end-users.** Similarly, as e-education, e-health, e-government increase, which is also clearly the case in the current circumstances, the role of business-grade communications for the **public sector as an end-user or intermediary** increases, at large central sites, but also on a decentralised basis. **ecta therefore calls upon BEREC to thoroughly review all work items part of Strategic Priority 3, to adjust them to also include the B2B and B2B2C and public administration dimensions.**

31. Section 3.2: Report on how to handle third-party payment charges on mobile phone bills (carry-over). ecta is puzzled as to what the genuine origin of this workstream is, given that the EECC does not seem to require harmonization. Also, there is a real question on what BEREC might expect to achieve in practice. This **does not appear to be a priority**, also because much work already occurs at national level, and it is an area which is not readily suitable for harmonization given the diverse national situations and market trajectories.

4. Comments on Chapter 4: Cooperation with EU institutions and institutional groups

32. ecta welcomes that BEREC intends to strengthen institutional and international cooperation (pages 23-24). There is merit in: (i) focusing inter-institutional cooperation on institutions that work on directly adjoining topics (e.g. RSPG for radio spectrum, EPDB for data protection, ERGA for audio-visual regulation, ENISA for cybersecurity and the ECN for competition law enforcement), and (ii) not over-extending international cooperation, given that this has so-far occurred with limited transparency and without tangible benefits for European stakeholders. Where BEREC states: *'BEREC will investigate ways of exchanging views about practical issues of platform regulation with other regulatory institutions that have complementary expertise'* (page 23, paragraph 4), ecta cannot but wonder what the 'practical issues' concerned are, and what this may really entail in practice in the future. **ecta therefore asks BEREC to be much more precise in the final Work Programme 2021 in this regard**. More generally, there are **concerns** to be had about **BEREC seeking to extend its areas of activity potentially beyond its own capabilities and resources, which may result in unjustified de-prioritisation of the activities that are core to BEREC and NRA mandates under the applicable EU legislation**.

5. Comments on Chapter 5: BEREC obligatory work

33. ecta provides selective and brief comments and suggestions below.
34. Section 5.1.2: BEREC Opinion on the Review of the Broadband Cost Reduction Directive. BEREC indicates that it will provide an Opinion (to the European Commission) (page 25, paragraph 5). ecta wishes to observe that the Broadband Cost Reduction Directive does not provide for a BEREC Opinion on its review (or otherwise) and that presumably the European Commission has not so far asked BEREC for an Opinion. Therefore, **it appears that this is BEREC's own initiative. This could usefully be made explicit** by BEREC. In addition, **given that BEREC already announced that it intends to develop an Opinion, clearly nothing prevents BEREC from consulting stakeholders on it, by way of call for input and thereafter in the form of a public consultation on a draft Opinion. ecta therefore invites BEREC to initiate a public consultation**.
35. Section 5.1.3: Input to the evaluation and potential review of the EU State Aid Guidelines. BEREC indicates that it will respond to the targeted public consultation launched by the European Commission (page 26, paragraph 3). **Given that BEREC already announced that it intends to respond, and that the deadline is 5 January 2021, there is time for**

BEREC to consult stakeholders. ecta therefore invites BEREC to initiate a public consultation.

36. Section 5.1.4: BEREC Opinion on the review of the Access Recommendation. This is a topic of fundamental importance to ecta and its members. ecta asks BEREC to encourage the European Commission to publish the draft text of (a) proposed new Recommendation(s), and – if this were not to occur – for BEREC to publish the draft itself when it is requested to provide an Opinion, so as to enable input from stakeholders.
37. Section 5.1.5: Peer review process. The RSPG-led peer review process on radio spectrum assignment has so far occurred in a closed forum. ecta nevertheless understands that BEREC has participated to some extent (page 28, paragraph 3). **This is an important matter of ensuring transparency.** ecta notes in this regard that BEREC states that *'BEREC's participation in the Peer Review Forum contributes to the objective of promoting full connectivity by enabling relevant exchanges with the RSPG on the market-shaping aspects of spectrum assignment'* (page 28, paragraph 2). This **invites concerns about whether and how BEREC has addressed the access and take-up dimensions** under art. 3(2)(a) EEC (also applicable to networks relying on radio spectrum), **and the promotion of competition** in line with applicable law, and notably art. 5 of the Radio Spectrum Policy Programme enabling pro-competitive conditions to be included in spectrum assignments (e.g. spectrum set-asides for new entrants/operators with a structural spectrum deficit, national roaming, wholesale access). **It is essential for stakeholders to understand which general policy line BEREC is taking in peer review processes, and for BEREC to report at least ex-post on the nature of its intervention, and on the outcome thereof, if any.**
38. Section 5.1.6: Ad hoc work relating to network security and cybersecurity. ecta takes good note of what BEREC describes in this regard (pages 28-29) and **expresses its agreement.** In addition, ecta considers that **BEREC should systematically bring much-needed technical objectivity to the security discussions, i.e. any cybersecurity measures, including the determination of high-risk suppliers, should be subject to objective assessments and justifications based solely on the objective facts.**
39. Section 5.1.7: Ad hoc work relating to the Recommendation on Connectivity. ecta notes the recency of the European Commission's Recommendation as well as it having been adopted without appropriate stakeholder consultation. **ecta welcomes BEREC's supportive disposition and is available to contribute to improving legislation and regulation,** including on the six points from the Recommendation. **ecta considers that work on and under the Recommendation needs to fully maintain a pro-competitive approach and ensure non-discrimination, while maximising access and take-up of VHCN.**
40. Section 5.2.1.1: Review on end-user rights – BEREC Opinion. ecta takes note that BEREC will be taking-on this workstream, and asks BEREC to emphasise in its future Opinion that: (i) **competition is the best guarantor of end-user rights,** (ii) **the ability to switch providers easily is an end-user right of utmost importance,** and (iii) lack of

information may hold back end-users from exercising their rights, but needs to be appropriately balanced with imposing administrative burdens on operators (see also the position taken by [ecta](#) on the Contract Summary Template). A **point of concern** is that BEREC states that *'In order to complete this BEREC Opinion, studies, workshops and bilateral exchanges with other European bodies and relevant stakeholders could be envisaged where relevant'* (page 31, paragraph 2). **ecta wishes to formally state in this context that it considers itself and its members to be eminently relevant stakeholders.** As such, [ecta](#) expects to be able to participate in this work at the same level as any others with whom BEREC intends to engage discussions. **Public consultation in this area is not envisaged by BEREC; [ecta](#) respectfully disagrees. Stakeholders such as the association representing challenger operators must be included in this work.**

41. Section 5.2.1.3: BEREC Guidelines to assist NRAs on the consistent application of geographical surveys of network deployments (carry-over). [ecta](#) is providing a response to BEREC's consultation on this topic, on the same day as this response.
42. Section 5.2.2.1: International roaming benchmark data Report and Section 5.2.2.3 Inputs to any legislative proposals of the European Commission. [ecta](#) requests that the scope of the recurring BEREC report be extended to cover Internet of Things (IoT), permanent roaming for IoT, 5G, roaming for industry 'verticals', and for network slices if applicable. As regards BEREC's input to the forthcoming EC legislative proposal, this should also cover these same topics.
43. Section 5.3.1: Report on COVID-19 crisis – lessons learned regarding communication networks for a resilient society. **Please refer to paragraph 6 in the introduction of this response, which addresses COVID-19-related measures in detail.** In addition, [ecta](#) asks that **BEREC be particularly mindful of being pro-competitive in any actions or measures BEREC may in future put forward**, and to ensure that the COVID-19-related workstream is not used as a vehicle for pushing policies or obligations that are not objectively related to the pandemic.
44. Section 5.3.2: Stock-taking on the national experiences of the implementation of the EECC. [ecta](#) asks BEREC to involve stakeholders in this workstream, including in the workshop foreseen, or to organise an additional workshop with stakeholders.
45. Sections 5.3.3 and 5.3.4: Article 7/7a Phase II cases and future 32/33 EECC procedures. [ecta](#) asks BEREC to involve stakeholders in these workstreams. Experience has shown that the Phase II process leading to a BEREC Opinion is a black box for stakeholders, with BEREC actively resisting stakeholder input. A moment of self-reflection by BEREC, and taking input from stakeholders, is appropriate as the EECC is transposed into national law, and notifications will effectively be made in application thereof.
46. Section 5.3.5: Report on Regulatory Accounting in Practice. [ecta](#) appreciates the value of this recurring report. It should definitely continue to be published annually, and continue to be improved. One point on which it can be improved is transparency on which decisions are taken by which NRAs. At present, the report contains several sections stating that X

NRAs have adopted accounting practice Y and X other NRAs have adopted practice Z. There is no need to conceal which NRAs have done what. **ecta** also wishes to express its **disagreement with the contents of one aspect** in this section of the draft WP2021. BEREC states that: *‘The report will include data on whether and how NRAs account for the higher risk of investing in very high capacity networks (for example, through the application of a risk premium which is added to the calculated WACC).’* (page 39, paragraph 4). **ecta** is on record in stating that the WACC already covers the cost of capital including profits of operators with significant market power. There is therefore **no justification for uplifts over and above the WACC**. In addition, **ecta** increasingly wonders how high WACC values, including some reaching into double digits, can continue to be determined by NRAs, whilst Europe has been experiencing a low and indeed zero interest rate environment for years, and many major operators have substantially refinanced their debts.

47. Section 5.3.7: Termination rates at European level. **ecta** considers that publishing this periodic report will retain its value, even after the Eurorates based on Article 75 will enter into effect. This is the case notably because there are expected to be differentiated rates, and – as the draft Delegated Regulation currently stands – there is a possibility that some operators might increase wholesale call termination rates. Monitoring SMS TRs has shown its value, notably to expose that – in a deregulated environment – rates differ by orders of magnitude, without relationship with cost. Smaller operators may have to rely on BEREC’s reporting to become aware of potential discrimination occurring on a bilateral basis, e.g. the largest operators charging them at the level of the caps, while exchanging traffic below the Eurorate caps with other large operators.

6. Comments on potential BEREC work for 2022 and beyond

48. **ecta thanks BEREC for including an item on non-discrimination on quality of service (page 46, paragraph 7) that ecta has recurrently suggested.** At the same time, **ecta** and its members are concerned that **placing it on a longer-term horizon risks perpetuating existing competition problems**. This is critical at a moment at which market regulation is becoming more discretionary and regulators will have to both showcase more initiative to address such problems and provide even closer analysis of discrimination in recommended markets. **ecta** does not believe that non-discrimination on wholesale services by SMP has been resolved, and therefore believes that **this should be a priority item, actionable as a workstream in 2021. The same applies for the workshop on the wholesale replicability test** (page 47, paragraph 8).
49. BEREC suggests that it may initiate a **workstream** consisting of *‘a factual investigation of the level of competition between multiple VHCN/NGA regional operators.’* (page 46, paragraph 2). **ecta** wishes to register its **serious concerns about the wording** at page 46, paragraph 3: *‘[...] they could still be very close to each other (within the same region, area, city, neighbourhood) and could more easily start to cover each-other’s coverage area’* and *‘Operators might use different business strategies – to differentiate prices across their networks dependent on presence of other operators [...]’*. This wording is suggestive that the existence of local/regional competitors and new entrants, and the commercial reaction to

their existence by the operator with significant market power, may in future be invoked to inappropriately define separate geographic markets, and inappropriately deregulate a dominant undertaking on account of it engaging in strategic behaviour and possible regulatory gaming. **ecta** urges **BEREC to be prudent and avoid triggering premature deregulation of operators with significant market power, giving them room to encumber and exclude competitors and stifle competitive dynamics**. This danger also needs to be seen against the European Commission's proposed 2020 revision of the Recommendation on Relevant Markets Susceptible to Ex-Ante Regulation and its Explanatory Note.

50. BEREC suggests that it may initiate a **workstream entitled: 'Compensation in the case of early termination of contracts.'** (page 46, paragraph 5). **ecta** is not aware of the origin of this possible BEREC workstream, and observes that BEREC gives no indications on its intentions at all. Is this expected to be a purely descriptive report (of operators' practices and/or of possible legal or regulatory treatment of early termination of contracts under sector-specific regulation on consumer protection rules), is there an intention to propose harmonisation, to regulate certain practices? What is of key importance is that impacts on competition are always carefully considered, and that a pro-competitive approach is taken.
51. BEREC rekindles an earlier proposal to hold a workshop with BEUC on end-user provisions. As **ecta** has remarked on a previous occasion, a bilateral workshop solely involving BEUC is inappropriate; it should be open to all interested stakeholders. **ecta considers itself and its members to be eminently relevant stakeholders**. As such, **ecta expects to be able to participate in this work at the same level as BEUC**.
52. BEREC discusses a '*Report on key elements of the functioning of the EECC*' and '*Experience-sharing on the Implementation of Guidelines*' (page 47, paragraphs 2 and 3). This is eminently relevant for stakeholders such as **ecta**, and therefore **ecta** requests to be involved in the workstreams and in any workshops foreseen. Workshops on these topics should not be limited to NRAs. It is important from the perspective of **ecta** and its members to evaluate, from the perspective of industry stakeholders affected by BEREC Guidelines, whether the said Guidelines have been implemented efficiently by the NRAs, and whether the Guidelines effectively contribute to regulatory certainty for stakeholders.
53. BEREC proposes to address the '*State of mobile roaming: 5G including cross network slicing*' (page 47, paragraph 6). This is clearly relevant, but in 2022, it risks coming too late, with the consequent risk that if regulatory intervention is needed, it may not occur at the critical time at which it is needed, with concomitant negative effects for competition. Please also refer to paragraphs 15 and 37 above.

7. Closing observations

54. In closing, **ecta** wishes to emphasise, as done on previous occasions, that two-stage consultations, consisting of a call for input, and a consultation on precise BEREC text proposals, are a suitable format for BEREC consulting 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**, at ofueg@ectaportla.com.