



**ECTA RESPONSE TO THE PUBLIC CONSULTATIONS ON THE DRAFT BEREC
STRATEGY 2015-2017 & BEREC WORK PROGRAMME 2015**

OCTOBER 2014

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EXECUTIVE SUMMARY

ECTA recognises and **fully supports the role played by BEREC** in ensuring the consistent application of the EU Regulatory Framework and its contribution to the development of the internal market for electronic communications, in particular by ensuring that competition is promoted and that innovation is fostered.

ECTA broadly agrees with the 3 key strategic priorities defined by BEREC in its draft Strategy¹ and the deliverables put forward in the draft BEREC Work Programme 2015. ECTA particularly **welcomes the continued prevalence of and focus on promoting competition and investment in the sector** (Strategic Priority 1).

ECTA fully shares BEREC's views that effective and sustainable competition *"is what drives efficient investment"* and *"serves the interests of European end-users, as it provides for maximum benefit in terms of choice, price and quality."* ECTA similarly welcomes BEREC's belief that competition is a building-block for the completion of the internal market.

Europe is today a leader in broadband performance and such leadership is rooted on a well-functioning pro-competitive regulatory model. It is therefore by **nurturing competition**, and not by prematurely deregulating and reducing the competitive pressure in the European national markets, that Europe will achieve a single market in telecoms. We must think global and act local – it is local competition which drives a connected, globally competitive society and economy, ensures the take-up of services and a virtuous cycle of investments.

As BEREC rightly stated in its Work Programme 2014, experience has taught NRAs that *"the hypothesis that '2 is not enough for competition' continues to hold"*. We must ensure that consumers and businesses have real choice when it comes to the provision of electronic communications services.

ECTA also strongly believes that in the transition to NGA, the right policies must be put in place which **favour investments by all players** – and not only the incumbents. New entrants have been in the 'drivers' seat' when it comes to NGA roll-out, yet replication of the last mile is not economically sustainable or desirable in all cases and therefore the availability of **harmonised and fit-for-purpose wholesale products**, at prices which allow a return on investments for all parties involved, is key, notably in the transition to NGA. Regulation of fixed infrastructure remains an essential competition enabler in an NGA environment.

Network sharing arrangements and forms of separation must be revisited in this regard. Indeed, the role of co-investments in spurring NGA investment, addressed in the 2009 amendments to the EU regulatory framework and in the 2010 EC Recommendation on Next

¹ I.e. (1) promoting competition and investment, (2) promoting the internal market, (3) and empowering and protecting end-users.

Generation Access, seems to have fallen to the wayside. The question also arises as to whether persistent discrimination by incumbents needs to be further addressed by NetCo separation or other options.

With regard to the upcoming review of the Regulatory Framework, ECTA fully supports BEREC's commitment to "***protect the underlying principles of the current Framework, which have been broadly successful in promoting the effective competition based on a conviction (supported by the evidence) that end-users benefit from competitive markets, and that innovation and efficient investment (both critical to Europe's global competitiveness) are spurred by that competition.***" ² An evolutionary approach on which the 2009 review was based must indeed be retained.

ECTA welcomes actions aimed at **completing the internal market in telecoms**, notably those focused on developing consistent regulatory practice and addressing cross-border issues. The consistent availability of key wholesale access products at EU level, in particular those enabling the provision of services to business customers, is key in this regard.

Finally ECTA welcomes the recognition of the **intertwining relationship between competition, transparency, effective switching and end-user empowerment**.

ECTA's concrete proposals *vis-à-vis* the BEREC draft Work Programme 2015 can be found in the sections hereunder.

² Draft BEREC Strategy 2015-2017, Section 5, Strategic Priority 1 (c).

INTRODUCTION

ECTA recognises and fully supports the role played by BEREC in ensuring the consistent application of the EU Regulatory Framework and its contribution to the development of the internal market for electronic communications, in particular by ensuring that competition is promoted and that innovation is fostered.

ECTA very much welcomes the thorough and ambitious draft BEREC Strategy 2015-2017 (BEREC Strategy) and Work Programme 2015 (WP2015) and the possibility to contribute to its further refinement and improvement. ECTA broadly agrees with the 3 key strategic priorities defined by BEREC in its draft Strategy³ and the deliverables put forward in the BEREC WP. ECTA particularly welcomes the continued prevalence of and focus on promoting competition and investment in the sector (Strategic Priority 1).

ECTA would like to reinforce a few key points and put forward concrete recommendations with regard to the BEREC WP 2015. Below, we provide comments on both draft documents, including proposals on new deliverables for the BEREC WP, which are listed in Annex I to this response. Annex II contains a proposal on the BEREC WP which is supported only by ECTA members with MVNO interests.

³ I.e. (1) promoting competition and investment, (2) promoting the internal market, (3) and empowering and protecting end-users.

STRATEGIC PILLAR/PRIORITY 1 – PROMOTING COMPETITION AND INVESTMENT

1. NURTURING COMPETITION IS KEY TO ENSURE EUROPE’S GLOBAL LEADERSHIP AND COMPETITIVENESS

The EU electronic communications sector is at a key stage of development, with the transition to next generation access networks (NGA) gathering momentum. Building on the current EU pro-competitive framework and thus promoting competition and ensuring regulatory predictability in an NGA environment is essential if we want to ensure that efficient investments in NGA are made and that European end-users (consumers and businesses) continue being able to choose from innovative products at affordable prices.

BEREC’s continued focus on promoting competition and investment (Strategic Pillar & Priority 1) is therefore most welcomed. As recognised by BEREC, effective and sustainable competition *“is what drives efficient investment”* and *“serves the interests of European end-users, as it provides for maximum benefit in terms of choice, price and quality.”*⁴ We note that competition has been, is, and will continue being, the key to satisfying explicit demand and discovering latent demand from customers (consumers and businesses), including the price points at which large-scale adoption of services takes off, thereby driving take-up of services, achieving broad socio-economic benefits, and generating economic rewards for those companies which best satisfy evolving customer demand and are best able to industrialise the satisfaction of such customer demand. Competitive pressure is, has been and will also continue being, in an NGA environment, the trigger for innovation and investments by telecoms companies. Genuine competition is what leads companies to upgrade their networks, invest and innovate.

Competition is also a building-block and pre-requisite for the completion of the internal market. In ECTA’s view, global competitiveness springs from local competition. As acknowledged by BEREC in its draft Strategy, achieving effective competition at national level can spur the completion of the telecoms single market and boost Europe’s global competitiveness, which in turn will lead to growth and job creation (*“effective competition at the national level fuels the development of the internal market – Europe’s global competitiveness relies on competitive European (national) market. A competitive European telecoms sector in turn contributes to a vibrant European economy”*⁵).

⁴ Draft BEREC Strategy 2015-2017, Section 3, Strategic Pillar 1.

⁵ Draft BEREC Strategy 2015-2017, Strategic Pillar 1, Section 3 (a).

It is by nurturing competition, and not by prematurely deregulating and reducing the competitive pressure in the European national markets, that Europe will achieve a single market in telecoms and remain globally competitive *vis-à-vis* other parts of the world. We must think global and act local – it is local competition which drives a connected, globally competitive society and economy.

Note that despite claims that Europe would be lagging behind other regions of the world, notably the US, in terms of broadband performance and fibre deployments and that this would stem from our pro-competitive regulatory model, the fact is that today **Europe is a leader on broadband performance** and this is largely due to a well-functioning framework delivering competition. Evidence of Europe's leadership is provided in numerous studies and reports.⁶

According to the latest figures released by the ITU on 21 September 2014, **European countries are the world leaders both in fixed broadband penetration and actual Internet usage**. All countries in the top 10 for fixed broadband penetration are European except for Korea (ranking 6th). The US only ranks 24th (down from 20th the previous year), Japan is 23rd (down from 21st the previous year) and China is 59th (down from 55th the previous year). All countries in the top 20 for fixed broadband penetration are European, except for Korea, Canada and Hong-Kong. All countries in the top 10 for actual Internet usage are European. It is therefore highly doubtful that Europe should take example from other regions of the world.⁷

When it comes to genuine **fibre coverage and take-up** (FTTB+FTTH) the EU28 and the US are broadly on par. The EU28 has approximately 35 million homes passed, corresponding to 16.3% of households⁸, and has 7.8 million actual subscribers (and is experiencing high growth in FTTB+FTTH)⁹. The US has approximately 20 million homes passed, corresponding to 18% of households¹⁰, and has 8.7 million actual subscribers (and is not experiencing high growth in FTTB+FTTH)¹¹. According to OECD data on actual FTTB+FTTH subscribers¹², 8 EU Member States rank above the US, with Norway and Iceland (which implement the EU regulatory framework as part of their EEA commitments) also ranking above the US. For the avoidance

⁶ E.g. *The State of Broadband 2014: Broadband for all*, by the Broadband Commission; *Quality of Broadband Services in the EU*, October 2013, study by SamKnows commissioned by the European Commission; *Akamai State of the Internet report for Q1 2014: The Future of Regulation*, February 2014, by Webb Henderson/ SPC Network.

⁷ See the ITU press release at http://www.itu.int/net/pressoffice/press_releases/2014/46.aspx#.VCQ-. See also page 96 of the report at <http://www.broadbandcommission.org/Documents/reports/bb-annualreport2014.pdf>

⁸ Percentage derived from Eurostat data, which indicates that there are just under 214 million households in the EU28.

⁹ FttH Council Europe, February 2014, Slides 9, 11 and 17: http://www.ftthcouncil.eu/documents/Reports/2014/Market_Data_December_2013.pdf

¹⁰ Estimate from visual chart of FTTH Council North America.

¹¹ FttH Council Americas, 2014: <http://www.ftthcouncil.org/d/do/21>

¹² OECD December 2013: <http://www.oecd.org/sti/broadband/1l-PctFibreToTotalBroadband-2013-12.xls>

of doubt, the data presented above does not include cable and (vector) DSL2 deployed from street cabinets, which is the incremental upgrade being deployed on a wide scale by Europe's incumbent telecommunications operators to achieve speeds above 30 Mbit/s (which is growing much faster than genuine fibre coverage, and for which incumbents control over 90% of the lines, as per COCOM data¹³).

Instead of looking at other parts of the world (including regions that have put a lot of public money into fibre rollout, which is unlikely to be the case in Europe) Europe should examine more carefully its own 'best practices' such as Sweden (over 38% actual FTTB+FTTH subscribers as a proportion of all fixed broadband subscribers according to OECD data) and there should be a wide policy debate about what investments Europe would like to see precisely and what are the realistic models to finance such investments.

We also note that **average broadband speeds in Europe are well ahead of those in other advanced economies**. A recent report commissioned by the European Commission and carried out by SamKnows shows that European consumers receive higher speeds than American consumers for example (and the same is true for Asia) on all fixed technologies. The study found that xDSL download speeds averaged 8.13 Mbit/s (up from 7.20 Mbit/s the previous year) in Europe compared to 5.30 Mbit/s in the US. Cable download speeds averaged 52.21 Mbit/s (up from 33.10 Mbit/s the previous year) in Europe compared to 17.00 Mbit/s in the US. The same pattern was found for FTTx services too, with Europe averaging 47.74 Mbit/s (up from 41.02 Mbit/s the previous year) compared to the US achieving 30.20 Mbit/s.¹⁴

The Akamai State of the Internet report for Q1 2014¹⁵ similarly shows that, in terms of average broadband Internet connection speeds, 6 EU Member States rank above the US¹⁶. The Netherlands ranks 5th (12.4 Mbit/s), Sweden ranks 7th (11.6 Mbit/s), the Czech Republic (11.2 Mbit/s), Finland (10.7 Mbit/s), Ireland (10.7 Mbit/s), and Denmark (10.5 Mbit/s) rank 8th through 11th – all ahead of the US ranking 12th (10.5 Mbit/s)¹⁷. Three more EU Member States, and Norway, are within 1 percentage point just behind the US, and most other EU Member States are in the top-40, whilst China ranks 79th (3.2 Mbit/s)¹⁸.

In order to ensure that Europe keeps its leadership on broadband and avoid a new digital divide in the transition to NGA, ECTA therefore emphasises the need to **safeguard a strongly pro-competitive environment**.

¹³ Page 10 and page 25 of SamKnows October 2013 study for the European Commission:
http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=4590

¹⁴ http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=4996

¹⁵ Akamai Q1 2014:
http://www.akamai.com/dl/akamai/akamai-soti-q114.pdf?WT.mc_id=soti_Q114

¹⁶ Akamai Q1 2014, Figure 34.

¹⁷ Akamai Q1 2014, Figure 24.

¹⁸ Akamai Q1 2014, Figure 29.

At times of technological transition, it is recurrent that dominant companies attempt to squeeze out competition by abusing and leveraging their market power. In the transition from dial-up Internet access to basic broadband, many former monopolist telecommunications operators were found to have abused their dominant positions, with very negative consequences for the level of competition in the markets and consumer welfare. In the transition to NGA, it is of utmost relevant that abuse and end-user harm are prevented.

As BEREC rightly stated in its Work Programme 2014, experience has taught NRAs that “*the hypothesis that ‘2 is not enough for competition’ continues to hold*”. We need real choices for consumers and businesses. It is competition that gets everyone connected and ensures the take-up of services and a virtuous cycle of investments.

ECTA welcomes BEREC’s endeavour to address the challenges brought by network and service oligopolies and monitor the evolution of service bundling.¹⁹ With the increasing demand for bundles, it is essential that wholesale access products are made available which allow all operators to offer bundled offers and effectively compete and innovate at the retail level.

2. FOSTERING INVESTMENTS FROM ALL PLAYERS AND MAKING FIT-FOR-PURPOSE WHOLESALE INPUTS AVAILABLE IS ESSENTIAL

BEREC mentions in the Strategy that “*despite continued access investment by competing operators (e.g. through local loop unbundling) there has not been the degree of infrastructure replication (and competition) in the last mile across all EU countries as might once have been expected.*”²⁰

ECTA notes that since liberalisation, alternative operators have been investing heavily in local loop unbundling and most recently in fibre networks, whenever economically feasible.²¹ As indicated in a 2013 study commissioned by the ITRE Committee, entrants are not “cream skimming” without making significant investments of their own but are indeed significant actors in the roll-out of FTTH technologies.²² Recently, there has also been significant take-up of sub-loop unbundling, specifically in Italy and Germany. ‘*The small think and act big*’ and investment is in a ‘challenger’s DNA, with challenger operators having been the first fibre investors pushing the large operators to follow.

¹⁹ Draft BEREC Strategy 2015-2017, Section 5, Strategic Priority 1.

²⁰ Draft BEREC Strategy 2015-2017, Major trends and developments, Section 4 (a).

²¹ Local loop unbundling and shared access account for 83% of new entrants DSL subscriptions. New entrants (including cable) today hold 75% of NGA lines at EU level (Digital Agenda Scoreboard 2014).

²² [Entertainment x.0 to Boost Broadband Deployment](#), 2013.

Replication of the last mile is however not economically sustainable or desirable in all cases and therefore the availability of harmonised and fit-for-purpose wholesale products, at prices which allow a return on investments for all parties involved, is key, notably in the transition to NGA. Regulation of fixed infrastructure remains an essential competition enabler in an NGA environment.

Policies which favour investments and NGA deployments by incumbents only – and not by all operators – are contributing to declining competitive intensity in the last mile in some countries. Only by ensuring that all operators are given the proper incentives to invest, and that wholesale access products are made fit-for-purpose and offered at prices which allow not more than a fair and risk-appropriate return on investments, will competition at retail level be nurtured. An analysis of the challenges to competition in an NGA environment, including an assessment of best practices and how to incentivise standardisation of pro-competitive technology solutions such as multi-operator vectoring and WDM-PON, is needed. BEREC's activities must specifically reflect the need to ensure investment by all market players and the effective availability of fit-for-purpose wholesale access products.

ECTA welcomes BEREC's continued *"focus on promoting competition and creating a favourable climate for investment (e.g. removing possible barriers) and innovation through effective, predictable and consistent regulation of national wholesale markets (and in particular, the broadband markets)"*.²³

3. NETWORK SHARING ARRANGEMENTS AND FORMS OF SEPARATION MUST BE REVISITED

ECTA strongly agrees with BEREC's consideration that *"Among other initiatives, facilitating different types of network sharing arrangements (including co-investments between private operators and/or public/private arrangements) could help stimulate investment further."*²⁴

Indeed, the role of co-investments in spurring NGA investment, addressed in the 2009 amendments to the EU regulatory framework and in the 2010 EC Recommendation on Next Generation Access, seems to have fallen to the wayside. ECTA posits that the generalised failure (with partial exceptions) of incumbent/altnet co-investment negotiations, may be attributable to: (i) incumbents insisting on maintaining total decision-making control, (ii) incumbents preventing the altnets from owning their infrastructure (in the long run), (iii) incumbents insisting on mandatory buy-back/buy-out clauses of altnet infrastructure, (iv) a recent focus on consolidation, and (v) political reversals.

²³ Draft BEREC Strategy 2015-2017, Section 5, Strategic Priority 1.

²⁴ Draft BEREC Strategy 2015-2017, Section 5, Strategic Priority 1 (b).

Various solutions deserve further study. The question also arises as to whether persistent discrimination by incumbents needs to be further addressed by NetCo separation or whether additional options, such as permitting third parties (independent contractors appointed by altnets or altnets' own personnel) to perform activation and maintenance on the SMP operators' infrastructure, are required. A reinvigorated focus on network sharing arrangements and forms of separation is warranted.

ECTA would also like to dismiss the arguments, sustained by some, that market consolidation is necessary to enable investment in network roll-out in Europe. There is no clear and demonstrable link between the size of telecommunications companies, their profitability and the level of NGA investments. As recognised by the report commissioned by the European Parliament/ITRE Committee²⁵, the level of NGA deployments is most notably related to infrastructure competition and population density.

ECTA welcomes BEREC's continued attention to mergers and consolidation (service and infrastructure) with a view to ensuring that effective competition is maintained.²⁶

4. RETAIN AN EVOLUTIONARY APPROACH: REGULATORY FRAMEWORK TO REMAIN PRO-COMPETITIVE

The review of the regulatory framework is indeed the most significant upcoming regulatory development for the sector. ECTA strongly welcomes BEREC's consideration that the evolutionary approach on which the 2009 review was based must be retained.²⁷ At the time of the previous review, the European Commission and the co-legislators recognised the marked contribution of the founding principles of competition law to the level of growth and innovation in the sector, ultimately deciding to continue building on these principles. As in 2009, competition today continues to play a fundamental role in ensuring that companies invest and innovate and that the highest levels of consumer welfare are generated.

Unfounded claims to the effect that (i) Europe would be lagging behind other regions in terms of broadband performance, (ii) excessive competition and *ex ante* regulation would be to blame and (iii) an overhaul of the regulatory and legislative framework would be required, must continue being disregarded and rebutted by BEREC. Solid evidence from countless reports

²⁵ [Entertainment x.0 to Boost Broadband Deployment](#), 2013.

²⁶ Draft BEREC Strategy 2015-2017, Section 5, Strategic Priority 1 (a).

²⁷ Draft BEREC Strategy 2015-2017, Section 4 (b) and Section 5, Strategic Priority 1 (c).

and studies²⁸ and BEREC's own statements on the TSM proposal²⁹ contradict these assertions and show that the EU pro-competitive regulatory framework has effectively delivered and that promoting competition must remain at the core of any policy initiatives in the sector.

ECTA therefore fully supports BEREC's commitment to *"protect the underlying principles of the current Framework, which have been broadly successful in promoting the effective competition based on a conviction (supported by the evidence) that end-users benefit from competitive markets, and that innovation and efficient investment (both critical to Europe's global competitiveness) are spurred by that competition."*³⁰ In fact, *"An environment where investment in high-speed networks can flourish depends on market players being able to rely on a stable regulatory framework enabling effective competition in downstream markets."*³¹

STRATEGIC PILLAR/PRIORITY 2 – PROMOTING THE INTERNAL MARKET

ECTA welcomes BEREC's commitment to achieving an internal market, notably the actions aimed at developing consistent regulatory practice and addressing cross-border issues. The focus must be put in removing the obstacles which prevent operators from providing domestic and cross-border communications services and thus entering into new markets, expanding, innovating and investing in the roll out of NGA and in new services. Therefore, the areas of focus should be broader than those mentioned in the BEREC Strategy (e.g. dispute resolution) and also specifically encompass the availability of the wholesale access inputs needed to support *inter alia* the cross-border or pan-European business services.

There are clear and tangible benefits associated with establishing a true internal market for electronic communications, notably by improving the way in which the requirements of business customers are met. Granting European businesses access to more competitive and innovative communications services could have the EU reaping benefits of almost 800 billion euros over a 15 year period.

ECTA calls on BEREC to ensure that the true obstacles to achieving a single market in telecoms are tackled by e.g.: simplifying administrative procedures, including authorisation procedures, and ensuring the consistent availability of key wholesale access products – both

²⁸ E.g. [The State of Broadband 2014: Broadband for all](#), by the Broadband Commission; [Quality of Broadband Services in the EU](#), October 2013, study by SamKnows commissioned by the European Commission; [Akamai State of the Internet report for Q1 2014](#); [The Future of Regulation](#), February 2014, by Webb Henderson/ SPC Network.

²⁹ [BEREC statement on the publication of a European Commission proposal for a Regulation on the European single market](#), BoR (13) 104, September 16, 2013; [BEREC views on the proposal for a Regulation "laying down measures to complete the European single market for electronic communications and to achieve a Connected Continent"](#), BoR (13) 142, October 17, 2013.

³⁰ Draft BEREC Strategy 2015-2017, Section 5, Strategic Priority 1 (c).

³¹ Draft BEREC Strategy 2015-2017, Section 5, Strategic Priority 1 (b).

physical and virtual – at EU level, which would enable new investments by market entrants and cross-border service provision both to European businesses and consumers.

STRATEGIC PILLAR/PRIORITY 3 – EMPOWERING AND PROTECTING END-USERS

PROMOTING END-USER CHOICE, ACCESSIBILITY AND AFFORDABILITY

ECTA welcomes and supports BEREC's statements that *"appropriate levels of information transparency and ease of switching are necessary to enable end-users to find the offer that meets their needs and to oil the wheels of competition"*³², with the recognition that *"Improving the welfare of European end-users has always been at the core of BEREC's mission. As mentioned above, it is a virtuous cycle – a high level of competition empowers end-users, and end-users empowerment further fuels competition"*.³³

Transparency is indeed key to ensure real choice and boost the offer of competitive services, and ECTA therefore welcomes BEREC's continued focus on ensuring that end-users can pick the services of their choice, at appropriate levels of price and quality. The recognition of the intertwining relationship between competition, transparency, effective switching and end-user empowerment is particularly welcomed.

ECTA would like to take this opportunity to reiterate, however, that when empowering and protecting end-users, it is necessary to acknowledge and differentiate consumer and business customers' needs. In fact, legislation and rules aimed at protecting consumers' rights often extend the scope of specific obligations to business operators when such extension is not required. Imposing rules whenever strict arrangements with business customers (of potentially any type or size) are already in place through contract negotiations (e.g. high level of quality of service provision, dedicated helpdesk, SLAs with very strict penalties in case of non-compliance) can add administrative burden or create disproportionate obligations on operators serving business customers, resulting in additional costs in service provision and potentially preventing business operators from providing innovative and future-proof services to business customers. This could be avoided by clearly defining the scope of application of the consumers protection rules e.g. by consistently using appropriate wording (i.e. "user", "consumers" or "mass market"). This issue should also be considered at the time of the upcoming review of the EU Regulatory Framework.

³² Draft BEREC Strategy 2015-2017, Section 5, Strategic Priority 1 (a).

³³ Draft BEREC Strategy 2015-2017, Section 3, Strategic Pillar 3.

ECTA COMMENTS ON THE DRAFT BEREC PROGRAMME 2015

ECTA broadly agrees with the comprehensive and thorough actions put forward by BEREC in the draft WP 2015. Please find below recommendations regarding specific work streams:

➤ **Wholesale Products (3.1.1.)**

BEREC should reinforce actions aimed at ensuring the **consistent availability of key wholesale access products** at EU level.

The fact that standards for Layer 2 Ethernet (including the Metro Ethernet Forum's 'carrier grade 2.0' Ethernet certification) are now established, and that standardisation for G.Fast, FttDP and WDM-PON is underway, and that tangible work is being conducted on multi-operator vectoring, shows that the current timeframe is particularly favourable for bold actions on harmonisation and the development of pro-competitive standards.

BEREC should include in its WP2015 a deliverable on the obligations of access to key wholesale access inputs imposed in the 28 EU Member States which would go beyond the best-practice tables which currently exist. BEREC should **define harmonised characteristics and specifications for key wholesale access products – not only virtual access products and terminating segments of leased lines but also physical unbundling products**. This work stream would be linked to the monitoring of the implementation of the BEREC Common Positions on Wholesale Products and the report on Virtual Access Products (chapters 3.1.1. (a) and (b) of the BEREC draft WP2015). BEREC should consider and look closely into the work which the European Commission will be undertaking on these issues in order to avoid overlaps, ensure coordination and provide technical advice whenever necessary/required.

ECTA's proposal is in line with BEREC's views on the EC draft Single Market Regulation proposal that *"where demand for a harmonised wholesale product is clearly manifested to address the needs of European electronic communications providers, the specifications of such a product should be developed by BEREC"*³⁴.

A detailed reasoned consideration of the alleged substitutability of physical unbundling products and virtual access products – an alleged substitutability which ECTA strongly rejects – is also needed.

Yet irrespective of the position on substitutability, we believe that there are merits in pursuing further consistency of the technical characteristics and economic regulation of virtual access products notably to avert damaging innovation and competition. In this regard, BEREC should ensure that the harmonised VULA products are defined in such a way so as maximise the ability of the access taker to define its own downstream (retail or wholesale) service

³⁴ *Ibid* footnote 4.

characteristics and pricing. In particular, wholesale charges for the harmonised VULA products should be usage independent and the product should allow, as much as possible, for innovation and the provision of bundled retail services. Standardisation should also ensure that any limitations in terms of the performance of the VULA products are based on objective technical limitations rather than on particular business decisions of incumbent operators.

An assessment of best-practices and how to incentivise the standardisation of pro-competitive technology solutions, such as multi-operator vectoring and WDM-PON, is also warranted.

The conclusions should be included in a dedicated report.

Proposed deliverable:

- *Report on the definition of common specifications for key wholesale access products*
- **Implementation of the Recommendation on Relevant Markets and Common position on Geographical Segmentation (3.1.2.)**

ECTA very much welcomes the planned BEREC Workshop on the implementation of the Recommendation on Relevant Markets and Common Position on Geographical Segmentation, which should be open to participation and contributions by all stakeholders.

ECTA would like to restate that, like BEREC, it considers that the removal of the fixed voice markets (former markets 1 and 2) from the list of Relevant Markets was premature. In fact, evidence from the NRAs' market analyses shows that the fixed voice markets, and in particular the wholesale fixed call origination market (former market 2), still fulfil the three criteria test and remain uncompetitive in almost all the EU Member States, regardless of the on-going transition to NGA.

ECTA would therefore caution BEREC and the NRAs against premature deregulation of markets which remain uncompetitive. ECTA would urge NRAs, in their forthcoming market analyses, to continue imposing, where SMP is found, the wholesale remedies available in former markets 1 and 2 – i.e. carrier selection, carrier pre-selection and wholesale line rental, and, where appropriate, all-IP-based equivalents³⁵. ECTA would urge NRAs, in this regard, to consider adopting a redefined single market for wholesale fixed access and call origination.

- **Challenges and drivers of NGA roll-out and infrastructure competition (3.1.3.)**

BEREC should ensure that **investment models, Equivalence of Input, infrastructure sharing and forms of separation** are specifically addressed in this work stream.

³⁵ Note that wholesale line rental plays a particularly important role in ensuring competition outside LLU areas.

This work stream should look into topics such as (i) the costs, risks and key characteristics (e.g. network capacity, future proofing, upgradability, impact on innovation and competition) of the different NGA technologies (vectorized VDSL2, G.Fast, FttDP, PON FTTH, P2P FTTH), (ii) the realistic investment models for their respective profiles and the actual investment made by incumbents (compared with assumed/announced investments). In this context, co-investment models, separation models as well as new forms of financing should be explored. It is essential *inter alia* to: (i) assess to which extent separation models could play a role in making investments in NGA fit with the risk profiles of infrastructure funds; (ii) explore which investment models should be advocated, which would at the same time meet the objectives of ensuring competition and efficient investment; (iii) correctly characterise separation models, in particular with regard to these models meeting the conditions set by Article 13a of Directive 2002/19/EC, and in terms of their effective ability to prevent discrimination.

Moreover, the reasons behind the total lack of progress in incumbent network separation, and the generalised failure (with partial exceptions) of incumbent/altnet co-investment negotiations must be looked into. BEREC should assess whether persistent discrimination by incumbents needs to be further addressed by NetCo separation or whether additional options, such as permitting third parties (independent contractors appointed by altnets or altnets' own personnel) to perform activation and maintenance on the SMP operators' infrastructure, would be required.

Proposed deliverable:

- *Report on challenges and drivers of NGA roll-out and infrastructure competition to explore investment models, Equivalence of Input, infrastructure sharing and forms of separation*

➤ **Preparing migration to 'all-IP networks' (3.1.4.)**

Maintaining competition in the transition to all-IP should be made a key priority in this work stream. Indeed, in the transition to all-IP, it is of paramount importance that access seekers continue being able to avail themselves of the wholesale products needed to compete at retail level. In case of migration to all-IP, wholesale demand for access products will not change but will also 'migrate' to an all-IP context because the all-IP networks will be predominantly controlled by the same (SMP) operators who owned the PSTN network. The fact that both networks are in most cases controlled by the same operator will lead to the operator being able to leverage its retail and wholesale dominance on PSTN to its all-IP network. Hence the need to make the safeguarding of competition a clear element and priority of this work stream.

A recent speech by the FCC Chairman Tom Wheeler specifically addressed the need to ensure that competition is maintained in the transition to all-IP. Please find below some excerpts:

"(...) I'd like to visit about competition tomorrow. Key to this is how we can promote and enhance competition during and after the transition to all-IP networks.

Our basic approach is simple, and by now familiar. Technology transitions are good and they should be encouraged. But advances in technology will never justify abandonment of our values – including that constellation of values I call the "Network Compact." The Network Compact includes those expectations that users – both consumers and businesses – bring to the relationships with network providers. They include access, interconnection, public safety, consumer protection, and national security. They must be protected. (...)

Let me be clear: transitions to IP are not a license to limit competition.

So let's concentrate this morning on three keys to preserving network competition: access to last-mile facilities, the future of copper networks, and VoIP interconnection. (...)

In September, I made a point that is worth repeating. Communications policy has always agreed on one important concept: the exercise of uncontrolled last-mile power is not in the public interest. This has not changed as a result of new technology." ³⁶

Proposed deliverable:

- *Make the safeguard of competition in the transition to 'all-IP' an explicit element and key priority of this work stream.*

➤ **Oligopoly analysis and regulation (3.1.5.)**

BEREC should ensure that a **fact-finding exercise on the most recent merger and acquisition processes and regulatory remedies at EU level** is effectively included in this work stream (and not made dependent on the resources available), with the results included in a report. A **report on market developments post-merger**, which would notably analyse the effects on consumer welfare, should be made a priority.

BEREC should also ensure that a work stream dedicated to the analysis of how best to assess **joint dominance** in the electronic communications sector, particularly in the context of *ex ante* regulation, is set-up (Article 14 and Annex II of the Framework Directive³⁷).

BEREC has recently asked the Commission for guidance on how NRAs should treat joint dominance when assessing SMP within the relevant markets³⁸, recognising that the development of duopolistic/oligopolistic non-competitive market structures, which would

³⁶ See the FCC Chairman speech at <http://www.fcc.gov/document/chairman-wheeler-comptel-fall-convention-expo-dallas-tx>.

³⁷ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, as amended by Directive 2009/140/EC.

³⁸ See Chapter 3.2.1 of the BEREC Opinion on the review of the Recommendation on Relevant Markets.

not support efficient and sustainable competition, are likely to become more frequent going forward, bringing along big challenges for NRAs when assessing market power.

The assessment of joint dominance is all the more critical in light of the upcoming review of the regulatory framework and the on-going debate about whether competition between only two fixed networks might be sufficient to warrant the finding of no SMP and the deregulation of fixed wholesale access markets. Fit-for-purpose wholesale access is vital to ensure effective competition (it being characterised *inter alia* not only by network upgrades but also by effective choice of providers and competitive offers, product innovation by alternative operators, affordable end-user prices, increased broadband speeds provided by alternative operators and, as a consequence of vibrant competition, increased take-up of enhanced services by end-users). This work stream should focus on how to tackle the often alleged impossibility of applying the legal concept of “joint dominance” in practice.

Proposed deliverables:

- *Report on recent merger and acquisition processes, applicable regulatory remedies at EU level and market developments post-merger*
- *Report on the finding of joint dominance within the framework of ex ante regulation in the electronic communications sector*

➤ **Preparation of the next framework review (3.2.3. b)**

This work stream should include a BEREC assessment of: (i) **the overall performance of the EU electronic communications sector**, and (ii) the **functioning of the EU pro-competitive framework** and the extent to which the framework’ key policy objectives and regulatory principles of promoting competition, contributing to the development of the internal market and promoting the interests of the citizens have been properly catered for. This analysis should put into perspective unfounded calls for deregulation, the overhaul of the regulatory framework and the shifting away from today’s pro-competitive regulatory policy.

The **independent assessment of the overall performance of the sector** would expand on BEREC’s consideration regarding the draft Telecoms Single Market Regulation, which is shared by ECTA, that “*the state of the sector in Europe is not quite as bleak as has been suggested*”³⁹.

Proposed deliverables:

- *Report on the overall performance of the electronic communications sector and the functioning of the EU pro-competitive framework*

³⁹ BEREC statement on the publication of a European Commission proposal for a Regulation on the European Single Market, BoR (13) 104, available [here](#).

➤ **Initiatives to facilitate operator switching by non-residential customers (3.3.3.)**

ECTA would encourage BEREC to achieve **tangible progress with regard to business markets (SMEs as well as large Corporates⁴⁰)**. The proposed workshops should focus on the wholesale markets which serve as an input to the provision of (cross-border) retail services to business customers in order to ensure that access seekers are provided with the right inputs to offer pan-EU/cross-border business grade services. The workshops should yield a concrete list of action points for BEREC, to be reflected in the forthcoming BEREC work programmes. This work should be prioritised as a key contribution to the completion of the internal market.

In fact, the completion of the internal market in telecoms, in particular for business communications services, could bring to the EU tangible economic benefits (EUR 90 billion per year). However, the retail markets for the provision of business services continue to be insufficiently competitive, with the underlying wholesale inputs remaining unavailable or unsuitable.

One of the key challenges in the regulation of the markets for the provision of business grade services is the differing geographic scope of the related retail and wholesale markets, with the retail provision of services to business customers involving cross border activities yet the underlying wholesale inputs being offered at national level. Enhanced commitment to work on this topic is needed.

Proposed deliverable:

- *BEREC Workshops (internal AND with stakeholders) and related initiatives to focus on the underlying wholesale markets and yield a list of action points to be reflected in BEREC's forthcoming Work Programmes*

➤ **Quality of BEREC's output and operational efficiency (Chapter 4)**

It is mentioned in this work stream that *"BEREC will also identify potential new indicators or benchmarking requirements, in particular considering the massive development of multiple-play services and the impact of OTT services. The increasing importance of bundled products and OTTs will thus deserve BEREC attention, particularly by analysing their impact on the wholesale market and its regulation."*

⁴⁰ Note that while ECTA welcomes the Commission and BEREC's increased focus on the needs of SMEs, the needs of large corporates also need to be catered for.

With regard to the impact of OTT services on the wholesale markets, notably on the provision of fixed voice services, ECTA would like to reinforce the point that based on their key characteristics in terms of reliability, quality etc. and the usage patterns by end-users, it does not appear that unmanaged VoIP/OTT services constitute a substitute and effective competitive constraint to fixed voice. Whilst unmanaged VoIP services are increasingly being used by residential consumers, a substitution trend cannot be clearly identified which could justify deregulation at the wholesale level. Fixed voice subscriptions are not being given up by consumers – the percentage of households with a fixed subscription has been stable over the last few years – and there is evidence suggesting that unmanaged VoIP is used as a complementary service to traditional fixed voice.⁴¹

With regard to bundles, ECTA would like to mention that in the absence of the appropriate wholesale products, alternative operators are not able to provide bundled products at the retail level and thus effectively compete.

ECTA asks BEREC to reflect these points in this section of the WP2015.

⁴¹ Only 36% of European households with Internet access use the Internet to make calls over the Internet. 30% of households with Internet access make use of VoIP to make free calls to individuals who have subscribed to the same Internet phone service. Only 4% of households use a VoIP service to make calls to landlines or mobile numbers. See the [Special Eurobarometer 414 - E-communications and telecom single market household survey](#), March 2014.

ANNEX I

PROPOSED DELIVERABLES & RECOMMENDATIONS REGARDING THE BEREC WP

2015

Issue	Deliverables	Timing	Public consultation
Wholesale products (Chapter 3.1.1)	<u>New deliverable:</u> Report on the definition of common specifications for key wholesale access products	Q3/2015	Yes
Challenges and drivers of NGA roll-out and infrastructure competition (Chapter 3.1.3)	Report on challenges and drivers of NGA roll-out and infrastructure competition to explore investment models, Equivalence of Input, infrastructure sharing and forms of separation	Q4/2015	Yes
Preparing migration to ‘all IP networks’ (Chapter 3.1.4.)	Make the safeguard of competition in the transition to ‘all-IP’ an explicit element and key priority of this work stream.	-	-
Oligopoly analysis and regulation (Chapter 3.1.5.)	<ul style="list-style-type: none"> ▪ <u>New deliverable:</u> Report on recent merger and acquisition processes, applicable regulatory remedies at EU level and market developments post-merger ▪ <u>New deliverable:</u> Report on the finding of joint dominance within the framework of ex ante regulation in the electronic communications sector 	Q2/2015	Yes

Preparation of the next framework review (Chapter 3.2.3. b)	<ul style="list-style-type: none"> ▪ <u>New deliverable:</u> Report on the overall performance of the electronic communications sector and the functioning of the EU pro-competitive framework 	Q3/2015	Yes
Initiatives to facilitate operator switching by non-residential customers (Chapter 3.3.3)	BEREC Workshops (Internal AND with Stakeholders) and related initiatives to focus on the underlying wholesale markets and yield a list of action points to be reflected in BEREC's forthcoming Work Programmes	Q2/2015	No

ANNEX II

PROPOSAL SUPPORTED ONLY BY ECTA MEMBERS WITH MVNO INTERESTS

➤ **New proposed work stream on consolidation in the mobile sector**

ECTA members with MVNO interests would encourage BEREC to carry out an extended analysis of the recent trends regarding consolidation in the mobile sector.

In fact, European mobile markets are facing a wave of consolidation, notably from 4 to 3 players. Mergers took place recently in Austria, Germany and Ireland, with similar developments being discussed and expected in other countries. BEREC should seize the opportunity to assess and report on whether the competitive landscape in the mobile markets post-consolidation remains adequate for consumers, businesses and MVNOs alike, with a clear focus on the ensuing trends in pricing and innovation. BEREC should also assess whether the voluntary commitments offered by the resulting merged mobile entities, including the offering of MVNO access within specific conditions, were properly devised, implemented and successful or whether competition has in any way been hindered.

Proposed deliverable:

- *Report on consolidation in the mobile sector*