

BEREC Report on the Public Consultation on the “Report on OTT services”

January 2015

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1 Introduction

BEREC published on its website the draft BEREC Report “Report on OTT services” (hereafter the report) on 5 October 2015 for public consultation. Stakeholders were invited to send their views on the consultation document until the 2nd of November 2015. In total BEREC received 19 contributions from the following stakeholders (in alphabetic order):

- BEUC
- C²
- ECTA
- EDIMA
- EENA
- ETNO
- GSMA
- Mr. Schütze (JUCONOMY)
- ORANGE
- QSC AG
- SIPGATE
- TDC
- TELECOM AUSTRIA
- TELEFONICA
- TELIA SONERA
- TI
- UGT
- VERIZON

One contribution is confidential and therefore not listed above, and its comments will be referred to as a **CONFIDENTIAL** contribution.

BEREC welcomes all contributions and thanks all stakeholders for their submissions. The contributions received from stakeholders will be published on the BEREC website except for the one that is confidential.

This report has the objective to provide an overview of the received contributions and to present BEREC’s view on them with regard to the need to change or not the consultation document. The report is structured according to the main topics covered by the contributions.

2 General comments

BEUC urges BEREC to identify the shortcomings of the existing telecoms regulatory framework and analyse the interplay with horizontal legislation like the consumer law and the eCommerce Directive, and how these rules apply to the new services in digital markets.

C² states that the report starts with definitions and taxonomy rather than defining the problem that needs to be solved, if any. C² says the review of the telecoms framework offers an opportunity to sector specific regulation to ensure it is targeted and achieves key objectives, such as ensuring a competitive environment that benefits consumers. Therefore, C² recommends a methodology based on such an analysis, rather than one that looks solely at Internet 'value chains'.

ETNO and **Telefónica** state the report is focussed too much on the current definition of ECS – too much ECS-centric – without addressing the broader picture of the digital market. In the future, the telecom market will not exist as such, as it will be diluted in the digital environment. In a digital world the application of general horizontal (generic) consumer protection rules across the whole range of digital services should prevail, specific rules to communication services should be applied only in selected areas when necessary and proportionate and independently from the nature of the provider or the method of provision.

ETNO and **TI** encourage BEREC to take a more forward looking perspective to re-think the future regulatory regime. According to ETNO a rough fix of a fully outdated concept is not what is required to build the future framework on solid grounds.

Telefónica argues that the report is missing an analysis of the impact of OTT services in the digital market, beyond the voice and SMS services. It is also missing a proper analysis of the special features of the competitive dynamics created by OTT providers. Telefónica believes that the existing regulatory framework (and definitions) should be replaced by a new, consumer-centric and technology-agnostic one, consistent with the goal of achieving the same horizontal consumer protection rules.

BEREC notes some respondents say the report is too much focused on ECS, while it should be more focused on the problems and/or more future looking. However, in BEREC's view in order to assess the proportional future rules one has to understand the situation and problems in the past and present. This is what BEREC has done by looking at the current definition of ECS, concluding that this definition is not sufficiently clear. Therefore the definition should be clarified and reconsidered in order to ensure that it keeps pace with the current technological developments, that it is future proof and to consider if it is still the correct foundation that determines which services are regulated under the ECN/S framework. This conclusion is highly supported by the stakeholders in its contributions as it is seen in section 3.1.

Where respondents gave their own view regarding a future looking analysis of the digital markets, they mostly pleaded for decreased regulation or at least equal regulation of digital services (creating a level playing field). BEREC thinks such conclusions can only be based on a rule by rule assessment of the proportional scope of individual rules. This assessment is beyond the scope of this report that is limited to the description of the current state of play and problems identified. Section 4.4 of the report provides relevant elements of such an assessment. In 2016 BEREC will conduct further analysis on how to improve the scope of the regulatory framework. Regarding the outcome of such an assessment, BEREC has not concluded that the future scope of regulation should be based on a rough fix of the ECS concept, like ETNO suggests.

Regarding the suggested analysis of the impact of OTT-2 services, BEREC considers these are not the main focus of this report. OTT services have all kinds of interesting and important effects including, for instance, net neutrality related issues, which are dealt with in different BEREC reports. A very important one is also the value they create for users, which in turn drives the increased volume of data on ECS networks and increases the value of ECS services. However, this report is mainly focused on OTT-1 services and, therefore, they seem more relevant in the debate about the level playing field. BEREC further notes that respondents are not specific on the kind of relevant impacts that BEREC missed in its analysis.

BEREC agrees it is useful to analyse the interplay with horizontal legislation like the consumer law and the eCommerce Directive, and how these rules apply to the new services in digital markets. BEREC will take this into account in the follow-up project on OTT for 2016.

3 Definitions and scope of regulation

3.1 Current ECS definition

ETNO, GSMA, ORANGE, Telefónica and TI agree with BEREC that the current ECS definition has become outdated and they urge to develop a new approach to enable legislation to keep pace with the current technological developments.

Mr Schütze stresses that in his view the application of the existing ECS framework in Germany could cover relevant OTT services, e.g. with regard to data protection. In his view the providers of OTT services are not the ones factually providing conveyance of signals but the conveyance can be attributed to them.

BEREC clarifies that the aim of the OTT report is not to provide a new definition for ECS services. Without prejudice to further discussions, BEREC notes that the current definition of ECS, based on the conveyance of signals, could result in a different treatment of similar services provided to end users depending on the possible interpretations given by the NRAs as no EU guidelines were given on how to apply this criterion.

In BEREC's view the contribution of Mr Schütze further illustrates the different possible interpretations regarding the current definition of ECS. This is also illustrated by the ruling of the Administrative Court of Cologne of 11 November 2015. The court decided that even if Google uses no telecommunication infrastructure of its own for the signal transfer, but rather the existing infrastructure of the "open internet", the signals necessary for the transfer of emails via Gmail has to be, over all, attributed to the email service of Google. The Court therefore classified the OTT communication service Gmail as "telecommunication service" in the sense of the German Telecommunication Act.¹ However, the ruling has been appealed and therefore

¹ See for example: <http://www.elexica.com/en/legal-topics/data-protection-and-privacy/26-german-court-gmail-to-be-registered-with-the-german-federal-network-agency>.

there is no final judgment yet. Given the importance of these questions and for the sake of harmonization it is useful that this is also addressed by the ECJ. A reference to this ruling is included in section 4.2.2 of the OTT report.

3.2 Definition of the future

ECTA stresses out the need to differentiate the network and service layers and to specify the grounds on which regulation of NGA infrastructure needs to be kept. It supports the evidence that differentiates traditional ECS and OTT-1 and OTT-2, including the study “Special Eurobarometer 4142, as of January 2014”.

TI suggests a new ECS definition, being: “digital communications services are services which enable communication using voice, messages or videos in real time or near real time among two or more individuals”.

Telekom Austria argues for a holistic definition and it suggests using the category of “electronic services” that encompasses all actors (information society services and electronic communications services according to the “old” definition).

A **CONFIDENTIAL** contribution states that the new ECS definition should be able to include all operators providing personal communication services to the end users, regardless of the level of responsibility in the conveyance of signals across the underlying network used. They suggest to move towards the definition of a logical/platform layer that makes personal communication work above the communications networks.

BEREC takes note of these proposals for defining new concepts to determine the scope of regulation. However, as mentioned above, the aim of this report is not to go that far already. In BEREC’s view it would be appropriate to first assess the proportional scope of individual rules on a rule by rule basis. As a result of that assessment, legal concepts should be drafted to reflect the scope identified in this analysis. Of course more than one concept could be needed because different rules may have different proportional scopes.

3.3 Taxonomy

BEUC believes a taxonomy should only serve the purposes of this analysis, and never beyond such purposes, for example be used as a basis to legally categorise services in the reformed framework. BEUC indicates one of the shortcomings of BEREC’s proposed taxonomy is that there are many online services that overlap several categories, most notably OTT-2 and OTT-1. For example, online platforms such as Facebook, Gmail/Hangout, Twitter, or Airbnb, all have OTT-2 and OTT-1 elements.

EDIMA questions the separation of OTT-1 from OTT-2 services, as this line will grow increasingly difficult to draw as innovative services are placed on the market.

C² argues against classification of OTT into the suggested taxonomy, proposing instead to redefine ECS in the next regulatory framework review. More in detail, they argue OTT-1 definition is unclear (the term “potentially”), and leaves too much room for subjective interpretation of the NRAs, creating disproportionate burden for the companies.

Telekom Austria considers impossible to categorise OTT services into the three groups mentioned by the report, as the boundaries between OTT-0, OTT-1 and OTT-2 are blurred.

GSMA, ORANGE and **ETNO** predict that the distinction between OTT-1 and OTT-2 will become more and more blurred as communication functions are routinely included into digital services in general (on-line gaming, social networks, e-commerce, CRM, e-administration to mention a few already include messaging, voice or video services).

Telefonica states that the differentiation between OTT-0 and OTT-1 services does not reflect either the current market situation or the consumer perspective because users do not expect fundamentally different service experience when they use so called OTT-0 and OTT-1 type of services.

TDC agrees with the suggested taxonomy for OTT services.

Mr Schütze uses a similar taxonomy in his contribution. He makes a distinction between OTT communication services (similar to OTT-1) and OTT content services (similar to OTT-2).

BEREC recognizes that there is a need for a clarification and/or redefinition of ECS (see part 4.3 of the report). It therefore understands that any taxonomy based on this definition may appear as blurry. BEREC, also is aware that - when looking at a more detailed level – some OTT services consist of elements that qualify as OTT-1 while other elements of this service qualify as OTT-2. However, BEREC emphasizes the taxonomy is not intended as a legal concept that for example would define the scope of future regulation as applying to ECS (including OTT-0) and OTT-1 services. To define the scope of regulation clear legal concepts are required. BEREC will indicate this more clearly in the report. However, the proposed taxonomy appears useful in order to analyse the current situation, frame the debate and build an even more robust definition. For instance:

- identifying services that are provided over the Internet but also qualify as ECS (OTT-0) is important as it highlights the fact that ECS and OTT qualifications are not incompatible but may indeed both apply to a given service.

- distinguishing an OTT-1 category of services, defined as “services that are not ECS but potentially compete with ECS” or “communication services that are not ECS” (see Figure 1) is also important in order to focus the debate on the level playing field to the services that do potentially compete and make clear OTT-2 services are not part of this debate.

3.4 Future scope of regulation

Several respondents plead for lighter regulation meaning OTT services should not be regulated and/or sector specific regulation of ECS should be decreased. These responses are summarized hereafter.

EDiMA states BEREC needs to assess the need for regulation of all services in the light of the changing landscape, and not stand in the way of innovation.

Sipgate does not see the need for the creation of a level playing field and states OTT (including OTT-0) providers should not be subject to the same regulatory remedies as the traditional network operators.

ECTA states that before considering of broadening the scope of electronic communications framework, BEREC needs to consider the goals, justification, form of regulatory intervention, and the pros and cons. It urges BEREC to consider whether retail ECS could be released from being governed by the non-market analysis related aspects of the traditional electronic communications framework.

Verizon argues for lighter regulation for all services, both OTT services and ECS. Verizon believes that sector specific regulation should not stifle innovative services such as those launched by OTT providers. Accordingly, any regulation should be proportionate, technology neutral and be enacted only when generic regulation, such as competition law, proves insufficient to tackle market failure or harm to consumers. Moving away from sector specific regulation would be consistent with increased cross-sector competition which characterizes the OTT sector.

Telekom Austria underlines that certain sector specific obligations have to remain but should be only applicable to Electronic Access Services.

TeliaSonera, Telefónica and **TDC** state that OTT-0/1 services should be seen as substitutes for ECS, and with an increased level of competition from OTT-0/1 and technological equality for providing voice and message services, regulation in areas such as retail markets for fixed telephony, access at fixed location market, wholesale markets for fixed calls origination and fixed and mobile call termination, are unnecessary. Telefónica also considers that regulatory burdens imposed on ECS providers should be lowered in order to achieve a level playing field.

Other respondents plead for equal regulatory treatment of digital services.

BEUC says maintaining a set of sector-specific rules to protect consumers is very important. In particular, these sector-specific rules should be strengthened to tackle important switching barriers such as those presented by bundled contracts.

BEREC takes note of these views and stresses that the report does not express a position on whether regulation should be increased or decreased. Instead the report sets out the procedure to assess the scope of rules in section 4.4, indicating that this should be done looking at the proportionality of individual rules. An exemption to this is BEREC's view that the NRAs should be granted the competence to request all information necessary from all relevant parties. The latter subject is dealt with separately in this consultation report (see section 6.1 of this report).

BEREC will address the views on equal regulatory treatment in the section on the level playing field.

3.5 Level playing field

Under the heading "level playing field" stakeholders have provided answers to the question if a level playing field is needed in the area of electronic communications. They also addressed the (potential) content structure and implementation of a level playing field. Some OTT providers do not see the need for a level playing field and criticise it as a vague and not yet sufficiently defined concept. The services in question (ESC and OTT) would not be comparable. A high number of ECS providers highlighted that ECSs are facing fierce competition by substitutable OTT services and that the level playing field plays an important role in the forthcoming framework review. They stress that applying the same regulatory regime is crucial.

Concerning the scope of a level playing field, answers vary and show different preferences with regard to the applicable obligations required. Most stakeholders seem to prefer an approach which would reduce the burden of regulatory obligations in the forthcoming review for all players. End-users interests should be in the centre of attention, irrespective of the category of the service provider. In this context, the contributions considering a level playing field are closely linked with those answers focussing on the current and future ECN/S framework and its interplay with horizontal legislation, which are separately highlighted in this report. From both sets of answers it becomes clear that further assessment is needed in order to ensure the right level of regulation in the future.

BEUC agrees with BEREC that establishing a regulatory level playing field should not be an end in itself, but rather represents a specific criterion to evaluate whether regulatory change is needed. When evaluating whether certain changes are needed to the different legislative and regulatory instruments, one of the guiding objectives should always be to maximise consumer protection across markets. In this regard, BEUC says that establishing a level playing field in any given case should never represent a decrease in rights or protective measures for consumers.

C² questions the basis of the complaints by telecoms operators regarding the lack of level playing field that exists between them and OTT providers and criticize the use of the level playing field rhetoric without defining the concrete distortions.

Sipgate does not see the need for the creation of a level playing field; one should rather limit the scope of regulatory remedies (the OTT-players in the defined OTT-0 group should not be subject to the same regulatory remedies as the traditional network operators).

UGT regards a level playing field between traditional operators and OTT providers as a must in order to allow a sustainable, fair and equitable growth for the creation of quality jobs. Therefore, the EU institutions should urgently take need for a level playing field into account when reviewing the current policy and regulatory models.

ETNO and **ORANGE** criticise the proportionality assessment introduced in the report as insufficient and carrying the danger of creating an uneven level playing field. In the context of a proportionality assessment it would be important to define what obligations should be attached to a particular service based on the proportionality criteria. In a second step, those should be imposed on all actors providing those services.

ETNO and **ORANGE** stress a strong need for a level playing field in line with the European Commission's statement in the public consultation that "one of the main challenges the reform has to respond to is that online services are increasingly seen by end-users as substitutes for traditional electronic communication services such as voice telephony, but are not subject to the same regulatory regime". In this context, they regret BEREC's conclusion that a different regulatory treatment could be based on a proportionality assessment. They also believe that BEREC's proportionality criteria are so imprecise that it would allow for a broad margin of discretionary application.

ETNO states that proportionality should not only be considered when introducing rules for new players and that the current definition of ECS must not serve as a justification to continuously regulate these services. ETNO also says that the report ignores that the social benefits of regulation would be de facto undermined by an unlevel playing field.

ORANGE, ETNO and **GSMA** maintain that all ECS and OTT services should be subject to the same horizontal consumer protection rules.

TeliaSonera calls for a level playing field with regard to transparency requirements; considering that the regulatory need for transparency obligations should be considered equal regardless of how a service is defined.

Telefónica agrees with BEREC that the aim of generating a level playing field should only be one of the many elements regarding the regulatory treatment of ECS and OTT services.

Summarized BEUC and OTT providers support BEREC's view that the level playing field is only one of the elements to consider when identifying the proportional scope of rules, while ECS providers criticize BEREC's view and give a higher weight to the level playing field or even seem to say that the playing field should always necessarily be levelled.

BEREC does not agree with ETNO that proportionality would allow for a broad margin of discretionary application of rules. It is the legislator who has to clearly define the proportional scope of rules, so this does not increase the discretionary room for regulators.

BEREC agrees with ETNO that proportionality should not only be considered when introducing rules for new players. The proportionality of rules regarding both currently regulated services and currently not regulated services (like OTT-1 services) should be considered in the same way. BEREC has not said otherwise in the report, but apparently this was unclear. BEREC will therefore clarify this in the report.

BEREC does not agree with ETNO that the report ignores that the social benefits of regulation would be de facto undermined by an unlevel playing field. BEREC acknowledges the level playing field is an element to consider precisely because an unlevel playing field ultimately also has an effect on social benefits, i.e. consumers. The point BEREC makes in the report is that the level playing field is only one of the elements to consider, meaning the playing field should not be levelled at all costs.

4 Substitutability

BEUC and **TI** indicate it is important to consider substitutability from a consumers point of view (OTT services require Internet connection, newer equipment, skills, and OTT services are typically non-interoperable). BEUC says the substitutability of one service for the other is not self-evident. Taking into account the important differences BEUC states OTT voice services are not a natural substitute of traditional voice services. BEUC also argues that instant messaging services are not a natural substitute of SMS. That said, BUEC indicates one type of service can surely have a competitive impact on another type of service, and it is thus reasonable and important to understand these competitive dynamics.

TeliaSonera and **TI** stated that BEREC describes well why NRAs today are not considering OTT-0/1 to be substitutes to traditional ECSs. That is why the current legislation must be altered in order to include those services when carrying out SMP analysis.

ORANGE and **ETNO** oppose that BEREC bases its substitution analysis on the current ECS definition, instead of taking a forward looking approach and analysing the real substitutability from a consumer point of view. They say that a good example of this is the concept of substitutability developed on pages 18 and 19. ECS and OTT services are analysed through the prism of their fitting in relation to the current ECS definition. From that perspective a voice service offered by WhatsApp would not be competing in the same arena with a voice service offered by an operator. ORANGE and ETNO consider that this conclusion is misled.

QSC stresses that when analysing any substitution effect between ECS and OTT, it is important to note that some OTT services can be accessed from fixed and mobile internet connections, while some others can only be used from mobile Internet access. Neither can OTT-0 services be classified as ECS nor can they compete with ECS, due to limitations in voice service. Furthermore, privacy, data protection and other consumer rights are usually waived by users in the service agreement.

BEREC agrees with BEUC that the consumers' point of view is important for the assessment of substitutability.

BEREC does not agree with TeliaSonera and TI reasoning regarding the relation between the ECS definition and SMP analysis. An appropriate assessment of substitutability should have no connection with the definition of ECS. Services that are a substitute of the ECS services should already be part of the market independent whether they qualify as ECS or not.

BEREC does not agree either with ORANGE's and ETNO's statement that BEREC bases its substitution analysis on the current ECS definition. This is not what BEREC meant in any case. Features like non-interoperability of some OTT voice services may contribute to this service not being a substitute of traditional voice services. But this is not the same as declaring that a service is not a substitute because it is not an ECS. The analysis is purely based in substitutability as described in the SMP guidelines and inspired in competition law practice (the so called, SSNIP test).

BEREC agrees a relevant element in a substitution analysis is whether OTT services can be accessed from fixed and mobile internet connections, although an OTT service only available on mobile does also not exclude that such a service can be a substitute for a fixed ECS services. The other features (e.g. different privacy levels) that QSC mentions are also relevant in a substitution analysis. Although also here different features do not necessarily mean a service is not a substitute.

5 ECS and OTT partnerships

Telefónica agrees that commercial partnerships between ECS and OTT providers so far seem to have no or little effect on competition. Telefónica says new business models should not be questioned nor restrained unless there is a clear issue that needs to be addressed. Telefónica does not agree with BEREC's statement that OTT services are in general offered under competitive conditions. Telefónica's wonders which viable alternatives there are for Google, the app store of Apple and Facebook. In Telefónica's view there are many conditions for which OTT services are not competitive and where OTT providers can abuse their market power, e.g. through closed ecosystems, large network effects, economies of scale and scope, lack of interoperability, vertical integration, etc.

Verizon agrees with the report stating it is premature to assess the effect that ECS and OTT partnerships might have on competition and consumers and welcomes BEREC's light touch approach in this respect.

A **CONFIDENTIAL** contribution supports the view of the BEREC that it's definitely still too soon to draw conclusions on the partnerships between OTT and ECS. However, the EU should encourage their analysis under the ex-post regulation, rather than regulate them under the ex-ante regulation.

BEREC does not exclude the possibility that competitive advantages and market power may exist in the provision of OTT services. This is reflected in BEREC's statement that says "OTT services are *in general* offered under competitive conditions." Indeed in some cases there might be dominance. BEREC also mentions the risk of this in section 5 of the report on OTT-2 where BEREC states "some big players have the capacity to structure the market and exclude other players." However, there is scant evidence that the provision of OTT services in general suffers from conditions that would normally raise competitive concerns, such as high barriers to entry. Hence, BEREC stands by the statement that OTT services are *in general* offered under competitive conditions.

6 Other issues

6.1 Information gathering

GSMA, ORANGE, TELEFONICA, QSC, TI and **ETNO** welcome BEREC's proposal to extend the scope of information gathering to grant NRAs the power to request information from "all relevant parties", including OTT providers.

Verizon does not support an extension of the competencies of NRAs to collect information from all relevant parties, instead it proposes to make use of sources of information already available such as reports and studies.

BEREC appreciates the comments that support the idea to extend the scope of information gathering for NRAs.

BEREC disagrees with Verizon that the information found in sources of information already available, such as reports and studies, is sufficient. E.g. information on the usage of OTT services that can be substitutes of ECS is usually not available or suited for purpose and is difficult to estimate through consumer surveys

6.2 Enforcement

ETNO and **ORANGE** state that a major problem, ineffective enforcement of current rules, is not mentioned in the BEREC report. OTT-0 services have already been considered as ECS by the former ERG in 2007, although with no real consequences. They add that since the entry of OTT services on the market, NRAs struggle to obtain OTT providers notifications for those OTT services that according to BEREC are ECS. They provide practical examples of the latter from France and Belgium regarding Skype.

BEREC is of the opinion that the main obstacle when NRAs try to enforce the current rules on OTT-0 providers lies in the interpretation of the ECS definition. The enforcement issues that ETNO and ORANGE point out support BEREC's conclusion that the definition of ECS should be clarified or reconsidered.

6.3 Emergency calling

C² argue against requirement for the provision of access to emergency services for OTT providers due to technical limitations, given that OTT providers do not control the quality or reliability of the network. In cases where it is not technically feasible to provide a high expectation of successful delivery of a request for emergency assistance, it seems unwise to impose this anyway, in order to avoid giving a false sense of security and creating unrealistic expectations among customers. Another issue is identification of the calling party, which can sometimes only be done by ISP and not OTT provider.

EENA refers to emergency calling options from the report; rejecting options 1 and 2 and supporting the option 3 (which limits the obligation to providers of ECS that provide national calls to a number or numbers in a national numbering plan). In their view option 4 should only be considered when the OTT providers' customer base has reached a critical mass in order to avoid a disproportionate obligation on small providers. In this respect, BEREC should set out clear guidelines to the NRAs as how to decide where the critical mass point is and allow NRAs to decide accordingly.

GSMA agrees that the provision of an emergency service locating a customer may not be proportionate for a provider not using telephone numbers. However, GSMA would suggest that given the rapid transition to an all IP communications world the consequential impact on emergency services should be anticipated. Services allowing communication functions (including BEREC OTT-1 services terminology) who do not provide emergency services should (1) inform the end user (2) ensure that they do not do anything to restrict the end user from accessing a service which provides an emergency calling facility.

TDC states these obligations should remain associated with allocation of E.164 numbers also in the future. Thereby end users can be confident when taking a voice service associated with E.164 numbers that this service includes the capability to call emergency services.

TeliaSonera states that the emergency calling obligation should not be extended to OTT providers but remain with network operators in the future, in order to guarantee the functioning of the service at all times and to be able to provide location data to the 112-emergency centres.

From the consultation reactions, BEREC understands that there is an overall preference that the obligation to guarantee access to emergency services rests with operators having been allocated telephone numbers in the national numbering schemes in order to keep a reliable service to access the emergency services and which also provides location data of the calling party to the emergency services.

BEREC shares the view that the provision of the location of the calling party for an emergency call remains an important issue. However, BEREC stresses that the new framework should take into account possible new developments in the market in order to ensure that mandating this obligation remains future proof.

BEREC would like to reiterate that it will not express itself in favor of one of the different options proposed in this report, which should be seen as a first BEREC contribution to this debate on the revision of the existing legislative framework.

Regarding EENA's advice to issue BEREC guidelines on when it would be appropriate to broaden the obligation to all OTT voice providers, BEREC's view is that the scope of this obligation should be clearly defined in the law.

BEREC is well aware of the fact that at this point in time more analysis is needed on the possibility of all kinds of providers of communications services to allow the provision of location data.

6.4 Specialized services

BEUC is of opinion that BEREC should expand its scope to include other specialised services provided over broadband, and not just those offered over the Internet (IPTV and IP telephony). BEUC also encourages BEREC to make the data collection publicly available so that other stakeholders such as national consumer organisations can provide well-informed input.

This report intends to assess OTT services – content, services or applications provided to the end user over the public Internet – and to analyse such services in relation to the current regulatory framework. In BEREC's view the report would lack focus if it also addressed services not provided over the Internet. Issues related to specialised services will be considered in connection with the development of BEREC's guidelines on net neutrality under the TSM-regulation.

With regards to the comment about making data collection publicly available BEREC notes that it contains confidential information from several agencies. Therefore, BEREC is unable to make these publicly available.

6.5 Public versus open Internet

Verizon brought forward that services provided over private IP networks, like those sold by Verizon itself to business clients, should not qualify as OTT. As a result, Verizon recommends adopting the term “public Internet” instead of “open Internet, in line with footnote 1, page 3.

BEREC agrees that “public Internet” – as proposed by Verizon - causes less ambiguity. After all, the term “open” seems to be a vital part of the on-going net-neutrality debate, where it has the meaning of “neutral”. In order to distinguish from this debate and to present a more practical and precise understanding, BEREC finds it appropriate to use the term “public Internet” throughout the report. The report is changed to reflect this.

6.6 Diverse issues

EDiMA suggests defining more narrowly services in the OTT-0 category since they share elements of traditional ECS. EDiMA also brings to attention new communications services which make use of hardware innovations to create their own ad-hoc networks. These are communications apps, but do not use internet connectivity as their basis (FireChat, FlashChat).

BEREC notes it is not clear which refinement of the OTT-0 taxonomy EDiMA proposes and what use this refinement would have. BEREC takes note of the mentioned communication apps that do not use internet connectivity.

ORANGES puts forward that BEREC’s report does not address the economic impact of the expanding OTT services market share over the other actors along the internet value chain. According to a Boston Consulting Group (BCG) study the combined revenues of Europe’s telecommunications providers are expected to shrink by 1 percent annually between 2015 and 2019 while the revenue of OTT providers will increase at an annual rate of 13 percent. As a result telecommunications providers’ share of the overall ecosystem will drop from 41 to 34 percent while OTT’s share rises from 19 to 30 percent, between 2015 and 2019.

The objective of this report was not to fully assess the future economic impact of OTT services, but to point out some of the challenges that the growth of these services creates within the current regulatory framework. An economic impact assessment of OTT services in relation to ECS services could be part of further work for BEREC.

BEUC criticised that the report would seem to accept zero rating (“data sponsoring”) as an acceptable practice under certain conditions and therefore urges BEREC to ensure these problematic practices are no longer used by operators and OTT providers.

In the report BEREC takes no view regarding whether zero-rating is acceptable under the current regulatory regime or not. The report documents that the different NRAs have taken different views. In BEREC's view this question has to be considered under the TSM Regulation recently adopted and in the guidelines of BEREC on the net neutrality part of this regulation.