

**BEREC Report on the outcome of the public
consultation on
Access to physical infrastructure in the context
of market analyses**

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Introduction

This report summarises the responses to the public consultation on the draft BEREK Report on Access to physical infrastructure in the context of market analysis, which was open from December 12th 2018 to January 23rd 2019. The objectives of the report were, firstly, to provide an insight into how NRAs have chosen to address access to physical infrastructures in their market reviews, by setting out the different approaches taken regarding the regulation of access to physical infrastructure, and, secondly, to identify the issues which it would be necessary to take into account, if an NRA were potentially to analyse access to physical infrastructure as a separate market.

Europe need significant investment in next generation access (NGA) networks that are capable of supporting a wide range of services in order to meet the needs of end-users (both residential and business consumers). Physical infrastructure (such as ducts and poles used to deploy networks) represents a significant proportion of the investment in NGA networks. Civil engineering works are lengthy and costly processes, due, inter alia, to the need to acquire the necessary permissions and the intensive use of human resources. Moreover, replicating existing physical infrastructure is sometimes not technically feasible and, in many cases, is not economically profitable. Measures aimed at facilitating greater use of existing physical infrastructure can reduce the civil engineering works required to deploy new networks, significantly lowering costs.

In this context, most NRAs in the EEA currently regulate access to physical infrastructure in the market for wholesale local access provided at a fixed location (market 3a). Some NRAs also regulate access to physical infrastructure in market 3b or market 4.

This report summarises responses provided by the stakeholders in their submissions to BEREK's public consultation regarding the draft report on access to physical infrastructure in the context of market analyses..

Nine respondents made submissions to the consultation, namely:

1. Danish Energy
2. Deutsche Telekom AG
3. DNA Plc (Finland)
4. ECTA
5. ETNO
6. Liberty Global
7. Open Fiber SpA (Italy)
8. Vodafone Group
9. One confidential contribution

The stakeholders welcomed the opportunity to provide inputs based on their market-related experience with respect to access to physical infrastructure, and to provide their views on how NRAs could act to encourage/incentivise the provision of such access. The following sections

provide further comments, observations and recommendations expressed in the submissions made to the public consultation.

1. General issues

DNA Plc highly appreciates the opportunity to provide comments on the particularly relevant topic of access to physical infrastructure, while sharing NRAs' experiences and practices is seen as an important pillar in determining a more efficient approach to access regulation. Moreover, **DNA** fully supports the fact that, in many instances, the replication of existing physical infrastructure for access purposes is not feasible. Finally, the respondent indicates its full availability to further discuss with BEREC various possibilities to "*facilitate access via regulation*", with focus on the rollout of 5G networks.

Open Fiber SpA welcomes BEREC's initiative, stressing that fiber deployment is inherently linked to the possibility to have fair and transparent access to existing physical infrastructures on reasonable terms. The respondent considers that policy makers should be focused on strengthening the application of the relevant regulatory measures in these markets.

All nine respondents mentioned that they are in favour of BEREC's initiative and welcome the opportunity to provide their point of view on the highly relevant topic of access to physical infrastructure as a means to deploy and develop fast, reliable fiber networks. Some respondent also provided observations/comments on topics where their perspective departs from BEREC's approach.

ECTA recognises that the draft report was prepared at a time when the legal regime applicable to electronic communications was in transition, but considers that BEREC had two main options in approaching access to physical infrastructure regulation: one was to limit itself to the currently-applicable regulatory framework,¹ and the other was to conduct a comprehensive analysis of the topic in the context of the new legislative prerogatives under the EECC. In **ECTA's** view, BEREC took the second option. **ECTA** considers that the draft report will need to be carefully updated to reflect the adoption of the EECC. Generally speaking, **ECTA** questions the adequacy of the report as a reference document for evolving regulatory practices under the EECC.

BEREC's response:

Regarding the issues raised by **ECTA**, BEREC considers that the possibility of analysing a separate market for access to physical infrastructure is applicable both in the existing regulatory framework, and also under the new EECC. In this respect, BEREC notes that the EC has recently opened a public consultation on the evolution of the recommendation on relevant markets,² which considers the issue of adding a new relevant market for access to physical infrastructure.

¹ From an NRA's standpoint – 2 years.

² See <https://ec.europa.eu/digital-single-market/en/news/consultation-revision-recommendation-relevant-markets>

Some stakeholders raised various issues regarding the potential implications of imposing access to physical infrastructure as a standalone SMP obligation, and removing other remedies on access to active elements.

ECTA stresses the limitations of imposing access to physical infrastructure as a standalone remedy, and highlights that the primary basis for the imposition of remedies arises from the SMP analysis. Moreover, **ECTA** states that *“access obligations to specific network elements and associated facilities will be equally quintessential to promote market development in this direction”*.

Offering a different view, a **confidential stakeholder** explains that, as the information presented by BEREC shows, access to physical infrastructure has been widely used as a remedy, and NRAs have managed to put in place regulatory obligations that best fitted the specific conditions in the markets under consideration. Thus, so far, this stakeholder considered that there was no need for an additional market for access to physical infrastructure in order to attain the regulatory aims.

BEREC’s response:

BEREC notes that this report does not draw any conclusions on whether obligations potentially associated with a market for physical infrastructure would suffice to address competition issues on the related retail markets. So far, remedies imposing obligations requiring access to physical infrastructure have been used by NRAs in combination with other remedies. The combination of remedies in different markets, or the use of access to physical infrastructure as a standalone remedy depends (and would also depend in the case of defining a separate market for access to physical infrastructure) on the specific situation for each national or subnational markets.

Liberty Global explains that BEREC’s concern that deregulation will negatively impact on infrastructure competition (issue which could not be tackled under BCRD provisions), is premature at this stage. The impact of the adoption and application of the EECC must first be taken into account and assessed before drawing any conclusions or making any judgements about the outcome of deregulation in markets 3a, 3b and/or 4.

In relation to the application of the BCRD provisions, **Deutsche Telekom AG** (hereafter, **DT**) considers that BEREC should also analyse the efficiency of symmetric obligations imposed under the provisions of the BCRD (including remedies imposed on other network operators that own physical infrastructure suitable for the use of telecom operators) and their interplay with market review processes and approaches. Moreover, DT states that there is no mention in BEREC’s draft report of the fact that, under the EECC, NRAs *“explicitly have to take into account symmetric remedies already in place when carrying out the three-criteria-test and the SMP-assessment”*. In this vein, **DT** disagrees with the information presented by BEREC in Annex 4. **DT** also states that it might be too early (due to the late transposition in some Member States) to assess the limits of BCRD implementation. Furthermore, should such limits exist, they are to be addressed, according to **DT**, by improving the relevant legal provisions rather than by *ex-ante* regulation.

BEREC’s response:

BEREC agrees that it is too early to assess the limits of the BCRD implementation, as transposition has occurred too recently to have fully bedded in. For that reason, as explained in Annex 4, the BCDR cannot, at this stage, be considered as a safety net sufficient to replace, in all circumstances, any SMP-based remedy designed to facilitate access to physical infrastructure. It is, in any case, clear that NRAs must take into account the impact of BCRD provisions when assessing SMP in any market (including a potential new market for access to physical infrastructure) under a modified Greenfield approach.

ECTA “does not find the draft report in its present form to either have persuasively established the case for the need to identify a market for physical infrastructure access or to have outlined a sound overall framework for doing so.” **ECTA** considers that it is unclear that the four potential challenges to the current regulatory approaches identified by BEREC³ would necessarily imply a shift in the regulatory perspective. Thus, the respondent needs a more convincing argument, based on evidence and concrete examples, in order to support the contention that defining a separate market for physical infrastructure access would be an acceptable solution. Furthermore, **ECTA** draws the attention to the fact that BEREC also provided five potential responses to these challenges, but it does not go into detail about the implied approaches.

Liberty Global concurs that defining a separate market for the purposes of *ex ante* regulation comprising of access to physical infrastructure (due to deregulation of markets 3a, 3b and/or 4) is premature. The respondent mentions that, based on NRAs’ regulatory experience/practices, there is no fact-based evidence pointing to the need to define a separate market, either currently, or in the near-future.

DT also stresses that the findings of the BEREC draft Report should not be considered as supportive of defining a new, separate market for access to physical infrastructure.

BEREC’s response:

BEREC does not take a position in the report on whether it is appropriate to define a separate market for physical infrastructure currently or in the near future, but simply analyses how this market might look, and refers to issues to take into consideration when defining such a market. BEREC recognises that other solutions could also be considered, and lists these options in section 5. However, further analysis of these options is beyond the scope of the report set out in the BEREC work programme for 2019. The intent of the report has accordingly been clarified to avoid further misunderstanding.

2. Introduction and objectives of the BEREC report

Vodafone Group values BEREC’s statement that effective access to existing physical infrastructure “will promote sustainable competition in the long term and lead to a structural change of the market to the benefit of businesses, consumers and society at large”,

³ BoR (18)228, p 16.

considering the draft BEREC report “*a welcome contribution to the debate on how to facilitate such access going forward*”.

A confidential contributor expresses its appreciation of BEREC’s initiative of setting out an overview of the potential future challenges with which regulators might be faced in the context of emerging trends related to access to physical infrastructure. However, this **confidential contributor** also highlights that expressing an opinion in this area is premature and bears certain risks stemming from unpredictable technical evolution, deployment of 5G networks etc. Nevertheless, the respondent is of the opinion that the current regulatory framework and the EECC provide the right tools to address effective access to physical infrastructure.

BEREC’s response:

BEREC stresses, as expressed in previous section, that the report does not express any opinion about the need for a separate market for access to physical infrastructure.

3. The regulatory framework

ECTA suggests that BEREC should stress, in its presentation of the regulatory framework, that, in both the EECC and the prior regulatory framework, the imposition of *ex ante* remedies is dependent on a finding of SMP (i.e. physical infrastructure access obligations are to be imposed as a consequence of SMP finding). Therefore, BEREC should revisit its correlation/link between the provisions of Article 12 of the Framework Directive – Co-location and facility sharing and “*a potential response to a concern about market power*”⁴ in view of the fact that Article 12 is applicable to all authorised providers of electronic communications on public policy or efficiency grounds.

BEREC’s response:

BEREC acknowledges ECTA’s comment and amends the report accordingly, to avoid misinterpretation of the mention of market power in the context of Article 12.

4. Regulatory practice applied by NRAs

DT raises the point that, besides information on regulatory practices with respect to access to physical infrastructure, BEREC should carry out a further analysis of:

- the efficiency of the remedies imposed by NRAs,
- the trend of demand for physical access products/services;
- comparable competition and investment-related indicators.

⁴ BoR (18)228, p 4.

BEREC's response:

BEREC acknowledges **DT's** comment regarding the possibility of carrying out a more detailed analysis. However, BEREC notes that, in accordance with the scope of the Project Requirement Document (PRD), it is not the purpose of this report to gather and analyse such data. This section of the report is solely of a descriptive nature, aiming to collect information on the regulatory practices applied by NRAs and describing the different approaches taken regarding the regulation (i.e. different remedies, including access, transparency, non-discrimination, price control) of physical infrastructure. Moreover, in section 5, the draft BEREC report discusses developments that may lead NRAs to consider defining a separate wholesale physical infrastructure market in the future. This section also discusses which issues might be taken into account, should such a wholesale market be defined.

Although **DT's** suggestions are beyond the scope of this report, BEREC note their interest, and reserves the right to take these suggestions into account in future BEREC projects.

With reference to section 4.4 of the draft BEREC Report, "*Relation between SMP and symmetric regulation of physical infrastructures (BCRD)*", **DNA** draws attention to the fact that, in its view, the perspective taken by BEREC with respect to BCRD as being a solution for access problems is potentially over-optimistic.⁵

BEREC's response:

BEREC recognises **DNA's** suggestion, but stresses that section 4 of the draft report was based on the responses given by 34 NRAs and is purely descriptive. Section 4 does not attempt to discuss the BCRD as a potential solution for access problems and carried out no such assessment, optimistic or otherwise. Annex 4 discusses the limits of the BCRD as a safety net which shows that BEREC is aware of potential limits of the BCRD.

On a general note, **ECTA** indicates that, when assessing access to physical infrastructure availability and regulation, it is essential to take into account the potential availability of alternative infrastructures. In this vein, the draft report does not cover the differences between regulatory approaches in countries where alternative infrastructures are available and in countries where such alternatives are not present. Furthermore, parameters of existing infrastructures including penetration, coverage, and network topological features are to be analysed in the context of substitutability.

With reference to the BCRD provisions, **ECTA** recalls that the *ex-ante* regulatory regime and the symmetric regulation regime have significantly different "*objectives, institutional architectures, material rules and procedures*". Furthermore, as practice shows, several of the alternative infrastructures cannot be readily used for the provision of electronic communications services (for example, due to technical reasons), while the owners of these infrastructures do not, typically, fall under the regulatory scope of the NRAs. Thus, **ECTA** highlights that the draft report does not clearly delineate between the provisions applicable to electronic communications providers (the regulatory framework, the EECC) and those

⁵ Reference is not made to Annex 4 of the draft Report, where BEREC explains the limits to the application of the BCRD.

applicable to actors owning physical infrastructure that could be used for deploying telecommunication networks (BCRD).

As set out above, **ECTA** points out that the definition of physical infrastructure used by BEREC in its draft report⁶ has as its source the BCRD. In ECTA's view, the access regime under the BCRD cannot be incorporated into the electronic communications sector-specific regulation and, therefore, there are no grounds for including the alternative infrastructures of non-telecom operators in the *ex ante* regulatory scope. **ECTA** urges BEREC to clarify the legal basis of its assessment in the final report.

ECTA requests BEREC to clarify in its final report whether the option to request access to physical infrastructure is independent of whether such access is regulated or not under the market analysis procedure. That is to say that the possibility to request access stays even if a certain market susceptible to *ex ante* regulation has been deregulated at some point in time. Additionally, **ECTA** asks BEREC to clearly state which mechanisms of access to physical infrastructure are not related to BCRD provisions (where they exist), given that, in the draft report, the '*other remedies/legal instruments*' the NRAs rely on for monitoring access to physical infrastructures are not explicitly mentioned.⁷

Another point in the report which **ECTA** considers that the BEREC report should also include a detailed discussion of how access to physical infrastructure has been regulated in markets other than 3a. In this vein, the respondent would appreciate an assessment of the cross-effects on different markets of the imposition of access to physical infrastructure, including their effectiveness in attaining the sectoral-specific objectives.

BEREC's response:

As with an earlier suggestion made by **DT**, **ECTA's** suggestion that BEREC gather additional data on the various existing infrastructures (e.g. parameters including penetration, coverage, network topological features) are of note, but beyond the scope of this report. As such, BEREC reserves the right to take these suggestions into account when planning future reports and analyses. Regarding the differences between regulatory approaches in countries where alternative infrastructures are available, and in countries where such alternatives are not present, BEREC discussed these issues in its report "*Challenges and Drivers of NGA-rollout and Infrastructure Competition*".⁸

BEREC also clarifies that the scope of this report is limited to analysing country cases and NRAs' approaches regarding access to the physical infrastructure in the context of market analyses. In that vein, the BCRD was only mentioned to define the concept of physical infrastructure. In the questionnaire, and hence also in report, "*physical infrastructure*" refers to civil engineering infrastructure capable of accommodating electronic communications networks, such as ducts, chambers, manholes and poles, in line with the definition used in the BCRD. As a consequence, dark fibre and the unbundling of fibre or copper lines are not

⁶ BoR (18)228, p 7.

⁷ BoR (18)228, p 7.

⁸ BoR (16) 171, see https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/6488-berec-report-challenges-and-drivers-of-nga-rollout-and-infrastructure-competition.

included in the scope of physical infrastructure. The questionnaire also included questions on the regulation of dark fibre, the answers to which can be found in Annex 1.

BEREC does not agree with **ECTA**'s statement that the draft report elaborates only on access to physical infrastructure on market 3a, and fails to discuss how access to physical infrastructure has been regulated in markets other than 3a. Section 4 of the report (for instance Tables 4, 5, and 6) describe NRAs' approaches to access to physical infrastructure on markets 3b and 4. From this information it is apparent that regulation of access to physical infrastructure on markets 3b and 4 is the exception rather than the rule and, therefore, an analysis of any "cross-effects", based on a very low number of cases, does not seem to be appropriate.

Regarding the alleged inconsistencies in the legal basis invoked by **ECTA**, resulting from the consideration in the market definition of entities that do not belong to the electronic communications sector, BEREC clarifies that both regimes (SMP and BCRD) should not be confounded and mixed in their scope.

In addition, as expressed in a previous section, BEREC does not consider access to physical infrastructure as the only remedy needed and clarifies that the potential definition of a separate market of physical infrastructures does not necessarily imply the deregulation of other relevant downstream markets.

Open Fiber explains that both BCRD and SMP remedies application have resulted in outcomes that *"are far from being considered successful"*. For example, in the respondent's experience, some SMP operators still make use of means to restrict access, by imposing costly, burdensome and inefficient procedures, or by putting in place limitations on the effective use of the available infrastructures. Accordingly, **Open Fiber** calls on NRAs to update and reinforce regulations in respect of access to physical infrastructure in terms of services provided by the SMP operators, and the corresponding pricing, procedures and processes.

In terms of pricing remedies imposed for access to physical infrastructure, **Open Fiber** advises NRAs to carefully set pricing in close relation to the demand for access, which is to be thoroughly assessed. Open Fiber considers that NRAs might underestimate actual demand and, as a consequence, set prices for access to an SMP operator's infrastructure at an unjustifiably high level. The price reduction to be considered can take the form of volume discounts, discounts for additional elements purchased within the same landline route etc.

BEREC's response:

BEREC notes **Open Fiber**'s comments regarding the wider discussion of regulatory strategies applied by NRA's and their efficiency, but not as a remark pertaining specifically to this report.

Vodafone appreciates the issues related to the market outcomes presented in the draft report,⁹ but calls for open sharing of market data in order to support discussion and promote regulation of access to physical infrastructure.

⁹ Page 12 of the draft report.

BEREC's response:

In general, BEREC is in favour of data sharing wherever possible. However, with regard to market outcomes, BEREC only obtained qualitative information, and not quantitative data.

ETNO stresses that the insights presented in the draft report support the conclusion that NRAs already have the necessary tools to regulate access to physical infrastructure, taking into account national circumstances, under the current regulatory framework. However, the respondent considers that an analysis of the effectiveness of the imposed physical infrastructure access regulation and its impact on regulation of the corresponding downstream market is missing. Additionally, **ETNO** considers that insights on symmetrical access obligations imposed under the BCRD, especially when referring to the physical infrastructure owned by non-telecom operators, would have brought added value to the draft report.

BEREC's response:

BEREC notes the similarities between this suggestion, and those of **DT** and **ECTA**. BEREC accordingly reiterates that analyses of the effectiveness of the imposed physical infrastructure access regulation and its impact on the corresponding downstream markets' regulation are beyond the scope of this report. As mentioned above, these issues are beyond the scope of the current report, but BEREC reserves the right to take such issues into considered in future projects.

Another point made by **ETNO** is that the draft report seems to imply that regulating access to physical infrastructure always results in competitive effects on the markets concerned, which is not the case since these effects are mainly determined by actual demand and the effective take-up.

BEREC's response:

BEREC agrees and refers to p. 12, where the Market Outcomes section states that "*However, there are also some countries where remedies related to access to physical infrastructure have not been taken up or have a low level of take-up (partly because they have only recently been introduced).*"

5. Physical infrastructure as a separate market

5.1 Emerging trends related to access to physical infrastructure

DT argues that defining a separate market for access to physical infrastructure is not consistent with the current Recommendation on relevant markets (2014/710/EU), and that it is only appropriate to raise this issue as part of the scheduled review of the Recommendation on relevant markets. This view is shared by **ETNO**, which argues that the discussion on whether to identify a separate market for access to physical infrastructure susceptible to ex

ante regulation is appropriate solely in the context of the upcoming revision of the EC Recommendation on relevant markets.

Liberty Global argues that even considering such a market at this time is premature. **Liberty Global** explains that, based on NRAs' regulatory experience/practices, there is no evidence pointing to the need to define a separate market, either currently, or in the near future. Similarly, some respondents, including **ETNO**, raise concerns about over-generalisation of the trends that may lead to a requirement for SMP intervention at the level of physical infrastructure and question the focus on this route as a means of resolving these trends, in preference to the other alternatives mentioned.

ECTA points out that the draft BEREC report seems to be conceptually focused on the option of defining a separate market for access to physical infrastructure. Nevertheless, **ECTA** notes that, since no NRAs in the EU followed such an approach, and only two NRAs (in Switzerland and Liechtenstein) in the EFTA space did, BEREC should have provided insights on the manner in which this was done, and the market results attained.

ETNO is of the view that the primary route for access should be BCRD regulation. SMP regulation should only be used where an NRA, having fully considered the existence of alternative networks, concludes that the competitive constraints arising from such networks are insufficient to promote effective competition. **ETNO** considers that, if there are concerns about the functioning of the BCRD's legal provisions, (concerns considered as premature by **ETNO**), the first means to remedy the situation should be through adapting the corresponding legislation accordingly. In addition, **ETNO** argues that, given the BCRD provisions, which imply both demand and supply substitutability of the infrastructures of telecom and non-telecom operators, it does not seem appropriate to seriously question the risk of access refusal in the context of *"legally imposed general obligations to negotiate access combined with a competent authority in place to enforce possible violations"*.

In a similar vein, **Danish Energy** notes that Denmark is one of the few EU member states where the NRA does not regulate access to physical infrastructure in the context of its *ex ante* reviews of the relevant markets, based on the fact either that the relevant markets have been deregulated over time, or that other remedies or legal instruments are deemed adequate. In particular, asymmetrical SMP duct access obligations in Denmark have been withdrawn as a consequence of the adoption of the BCRD provisions. **Danish Energy** is thus of the opinion that BCRD regulation is sufficient to solve potential competition problems with respect to physical infrastructure access in conjunction with the electronic regulatory framework in place, and does not support a separate market for access to physical infrastructure.

Vodafone comments on the future challenges for the various approaches to promoting effective access to physical infrastructure which were presented by BEREC in its draft report. **Vodafone** fully agrees that, under the current regime, if Market 3a is deregulated, there is an inherent risk that prior access to infrastructure would be removed (as presented in more detail by BEREC in Annex 3). Secondly, with respect to reliance on the BCRD regime for solving competition-related physical infrastructure access issues, **Vodafone** believes that symmetric regulation plays a complementary role to the SMP regime, while NRAs should be able to prioritize their options accordingly (thus, it shares fully the views expressed in Annex 4).

Vodafone notes that, if NRAs deregulate SMP-based access services and solely rely on symmetric access, this may mean that fundamental competition problems are not sufficiently addressed. However, the physical infrastructure market is not included in the EC Recommendation and its review process would be significantly more complex.

DT notes that imposing regulation on a separate market for access to physical infrastructure results requires a reassessment of the need to impose regulation in any corresponding downstream market. Moreover, if a market is deemed competitive (due to the remedies imposed on an upstream market), deregulation needs to follow. **DT** argues that there is no justification for adding *“further layers of regulation to the ones existing today”*.

Vodafone asks BEREC to further analyse the advantages and disadvantages of some of the potential responses to the challenges mentioned in the draft report, including, but not limited to, infrastructure access as a ‘cross-market remedy’ and/or removing potential usage restrictions and *“parallel regulation under multiple markets”*.

Finally, **ETNO** considers that another safety net in addressing potential challenges concerning the market for access to physical infrastructure lies with the provisions of Article 72 of the EECC. According to ETNO, these provisions broaden the scope for remedies to be imposed, extending it beyond the boundaries of the defined relevant market(s), where *“the obligation is necessary and proportionate to meet the objectives”* of the EECC. Further, it observes that Article 44 – *Co-location and sharing of network elements and associated facilities for providers of electronic communications networks* and Article 61 – *Powers and responsibilities of the national regulatory and other competent authorities regarding access and interconnection* of the EECC might prove useful tools for making use of symmetric regulation when necessary.

BEREC’s response:

BEREC is aware that reviewing possible approaches to the definition of a physical infrastructure market means considering a market outside the current list of recommended relevant markets, as noted by **ETNO** and **DT**. This central purpose of this report is to consider the potential viability and justification for such a market, in order to better inform the next review (now underway) of the list of recommended relevant markets. This report does not make a specific recommendation as to whether the physical infrastructure market should, in future, be part of the recommended list.

Accordingly, BEREC does not agree that this review is premature, as suggested by **Liberty Global**, as it allows BEREC to consider the potential for defining such a market, and some of the implications thereof, in advance of the new Commission review. The review is also timely, given the recent market determinations by Switzerland and Lichtenstein and the current live consultation on such a market by Ofcom (see Annex 5 of the report, which summarises the purpose of Ofcom’s consultation, and its proposals). In response to **ECTA**’s concern, BEREC notes that all recent market analyses in this area were taken into account in drafting this report.

BEREC agrees with **ETNO** and **Danish Energy** that, where an NRA is considering the intervention in a physical infrastructure market due to the presence of SMP, it should also consider the effectiveness of the BCRD provisions in the member state in question. The need

to take into account existing commercial constraints and opportunities is a required element in any competition assessment. But, as many NRAs have found and the Commission itself has noted, there can be limitations to the application of the BCRD which, combined with the specific circumstances of a member state, can mean that reliance on the BCRD alone may not be sufficient to address the competition concerns – as identified by **Vodafone**.

BEREC fully agrees with **DT** that, in the event that a NRA does define a separate physical infrastructure market, and imposes regulation on that market, it should reconsider, as soon as practicable, the market determinations and remedies in the downstream markets to determine whether they remain appropriate.

BEREC notes **Vodafone**'s suggestion to examine in greater detail alternative options to the physical infrastructure market. However, BEREC notes that the objective of the report was to specifically consider the potential for a separate market for physical infrastructure. As such, to the degree that the report currently reviews other potential options that could also be considered, it goes already slightly beyond the specific scope of the report according to the BEREC work programme for 2019. BEREC considers that elaborating further on those alternative solutions could represent a full separate work stream, which is a matter for future BEREC work programmes.

BEREC notes that **ETNO** has pointed to Article 72 EEC as an alternative to a stand-alone infrastructure market. BEREC observes that this option still relies on an SMP determination in a downstream market, and does not avoid the consideration noted in the report (and also noted by **Vodafone**) about sustaining regulation of access to physical infrastructure in the event that the market otherwise becomes competitive. Finally, BEREC agrees with **ETNO**'s point that other Articles of the EEC (specifically, Articles 44 and 61) offer additional tools to assist NRAs in promoting infrastructure roll-out or an alternative route to the imposition of physical infrastructure access. However, it appears from Article 72 EEC that the framework does not consider them an appropriate substitute.

5.2. Overview of the relevant issues to consider when access to physical infrastructure is a separate market

5.2.1. Product market definition

According to **ECTA**, the distinction that BEREC's draft report draws, for the purposes of product market definition, between "telecommunications physical infrastructure" and "non-telecommunications physical infrastructure" introduces important problems of interpretation. **ECTA** considers that the reference to two categories of physical infrastructure is inconsistent with the regulatory framework, particularly with the definition of physical infrastructure contained in the BCRD, which makes no distinction due to ownership or operational arrangements between infrastructures. According to **ECTA**, separate consideration of "*telecommunications physical infrastructure*" and "*non-telecommunications physical infrastructure*" along the lines contained in BEREC's draft report would increase legal uncertainty, as physical infrastructure that is currently being used for the deployment of

telecommunications networks could however remain outside the scope of market definition. **ECTA** gave the example, for instance, of such deployment of telecommunications networks not being the primary reason for building the physical infrastructure in the first place.

More generally, **ECTA** is of the opinion that basing the definition of physical infrastructure on the definition contained in the BCRD implies significant uncertainty about the scope of the market and the likelihood of an SMP finding.

On the other hand, **ETNO** considers that the scope of any potential product market definition exercise should include the physical infrastructure considered in the BCRD, given that it imposes access on all (telecom and non-telecom) physical infrastructures that are deemed capable of being used for the purposes of deploying telecommunications networks. According to **ETNO**, the BCRD at least implicitly establishes demand and supply-substitution between the different types of physical infrastructure, this substitution is being sufficient for the purposes of market definition to conclude that other physical infrastructures largely serve a similar function (provision of fixed telecommunications services) to infrastructure owned or managed by telecommunications operators.

DT notes that, if a separate market for physical infrastructure access were to be defined, such a market should be delineated beyond pure telecommunications infrastructure and include all potentially usable infrastructures, such as that of utilities and public transport services. When performing a market analysis, NRAs should, in particular, be required to analyse the extent to which wholesale access to non-telecommunications physical infrastructure imposes a direct or indirect constraint on telecommunications physical infrastructure.

BEREC's response:

On the issue of product market definition, BEREC's draft report provides some general indications on the way in which such exercise might be performed, in the event an NRA wants to assess whether access to physical infrastructure constitutes a separate market.

It must be emphasized that BEREC's draft report contains no final conclusion on the way in which a (potential) physical infrastructure access market should be defined, but simply refers to the existence of some legislative instruments (such as the BCRD) and precedents that may be of assistance to NRAs when starting to delve into this issue.

For the avoidance of doubt, it is, in particular, worth reiterating that BEREC's report should not be read as implying that the definition of physical infrastructure contained in the BCRD is the only possible reference point when determining the scope of the product market; or that all types of physical infrastructure listed in the BCRD should (or should not) be deemed to be part of the same product market. These are assessments that would have to be performed by NRAs individually, on the basis of the demand and supply-substitution considerations and characteristics on their national markets that are routinely used in *ex ante* review processes.

In order to accommodate the concerns raised by ECTA, BEREC will adjust the description of "telecommunications physical infrastructure" in Annex 2 of the report, along the following lines:

"Telecommunications physical infrastructure would thus be described as all physical infrastructures –as defined in the BCRD- that have been deployed for the purposes of

supporting a telecommunications network, and that will typically be owned (or at least, operated) by telecommunications operators”.

This makes clear that the primary reason for deploying the physical infrastructure is not the decisive element when determining whether said infrastructure is a “telecommunications physical infrastructure”.

Finally, regarding the SMP operator’s physical infrastructure, BEREC assumes that the infrastructure of the incumbent fixed telecommunications operator will normally be deemed to be part of a (potential) physical infrastructure access market. It will then be up to each NRA to decide whether the relevant product market should be further enlarged by including the physical infrastructure of other (telecommunications and/or non-telecommunications) operators.

5.2.2. Geographic market definition

As regards geographic market definition, **ECTA** considers that BEREC’s draft report does not sufficiently underline that the analytical starting point will normally be the SMP operator’s infrastructure, where that infrastructure is present. According to **ECTA**, even where alternative operators dispose of their own physical infrastructure assets, this alone may not provide adequate grounds for reducing the geographic scope of the market, in particular if access to the physical infrastructure of alternative operators cannot be provided at a national scale.

BEREC’s response:

As noted above, the discussion contained in Section 5.2 of the draft report, as well as in Annex 2, should not be understood as a final statement of BEREC’s position on these issues, but simply as guidelines that may be of assistance to NRAs and stakeholders in the event that they want to assess whether access to physical infrastructure constitutes a separate market.

In this context, the potential need, as raised by **ECTA**, that alternative telecommunications operators may have ubiquitous (nationwide) physical infrastructure access would be one of the factors to be assessed by NRAs on a case-by-case basis, when performing their own market reviews.

5.2.3. Application of the three-criteria test

Regarding the three criteria test, **ECTA** proposes that reference should be made to the fact that this test is now legally binding, as it has been explicitly included in the European Electronic Communications Code (EECC).

In addition, **ECTA** mentions that discussion on the application of the second and third criteria should be further developed. In particular, according to **ECTA**, reference could be made to the fact that (entrant operators have been forced to exit the markets or abstain from entering them because the legal proceedings regarding alleged abuses by the SMP operator lasted too long. This would be evidence of the need for continuous and detailed oversight of the market, to

ensure that infrastructure-based competition based on physical infrastructure access can evolve.

Regarding the three criteria test, **ETNO** considers that the BCRD provides for ample forward-looking competitive dynamics behind potential access barriers. In particular, the existence of a legally imposed general obligation to negotiate access under the supervision of a competent authority excludes by definition the risk of an undue refusal for access.

BEREC's response:

As indicated by **ECTA**, BEREC notes that fulfilment of the three criteria test is now enshrined as a legal obligation that NRAs must comply with when conducting their market reviews for markets not already identified as a relevant market by the Commission (see Article 67 of the EECC). It is, in any event, worth noting that, to date, NRAs have been systematically performing the three criteria test when proposing to subject to *ex ante* regulation markets that are not expressly included in the Commission Recommendation on Relevant Markets.

Factors mentioned by different stakeholders, such as the competitive dynamics brought about by the BCRD and its impact on the persistence of entry barriers, or the existence of past instances of market exit as a result of anticompetitive conduct are factual elements that will have to be analysed by each NRA when reviewing, as the case may be, the physical infrastructure access market.

5.2.4. SMP assessment

On the issue of SMP, **ECTA** considers that BEREC's report should explicitly acknowledge that the number of alternative providers likely to supply physical infrastructure access at a national or a similarly extensive geographic scale is probably small.

Regarding the references made to data collection, **ECTA** considers that NRAs should not only identify appropriate data sources, but also probe data collection via cooperative relations with other authorities in charge of providers not under their immediate supervision. **ECTA** also indicates that BEREC's final report should include a more detailed discussion of the information powers granted to NRAs under the EECC, including new powers such as the elaboration of geographical surveys of network deployments.

Open Fiber notes that wholesale-only operators do not, by definition, compete at the retail level with the incumbent operator. In this context, the SMP assessment, as well as the determination of any potential remedies imposed on the SMP operator, should be undertaken taking into account exclusively market dynamics prevailing at the wholesale level.

BEREC's response:

As requested by **ECTA**, BEREC notes that the EECC contains a number of specific provisions regarding the data that NRAs may gather from third parties, including the submission of information requests (Article 20 of the EECC) or the conducting of geographical surveys of network deployments (Article 22 of the EECC). This is without prejudice to the fact that – as already noted in the draft report – the gathering of meaningful data on physical infrastructure

access may prove difficult in practice. This might be particularly the case for small telecommunications operators, as well as players active in other industries that may not have the level of detailed information that may be required by NRAs for the purposes of conducting their market reviews.

Regarding the interrelation between the wholesale and retail level in the presence of wholesale-only operators, this is a question that would need to be addressed by each NRA on the basis of the specific circumstances of the case under review.

6. Other issues

Regarding the considerations set out in **Annex 3: Sustaining regulation through the modified Greenfield approach**,¹⁰ ECTA explains that the problem stemming from the distinction of “a currently competitive, but prospectively non-competitive situation” in market 3a is false in that, if (the assumption of) effective competition at retail level is maintained, it is not clear how market 3a could potentially be considered to be competitive currently, but non-competitive on a forward-looking basis. Moreover, if the risk of discriminatory conduct is identified as a consequence of deregulation, ECTA considers it questionable “to what extent the market can be considered effectively competitive in the absence of regulation at the time of the analysis”. Therefore, ECTA calls on BEREC to analyse in detail the impact and effect of deregulation of either market 3a, 3b or 4 on the availability of access to physical infrastructure and, more generally, on future market developments.

BEREC’s response:

BEREC has taken note of ECTA’s comment and clarified the corresponding Annex accordingly.

¹⁰ BoR (18)228, p 34.