

ETNO Submission to the public consultation on the BEREC Strategy 2021-2025 and early call for input on the BEREC WP 2021

BEREC Strategy 2021-2025

ETNO welcomes the opportunity to provide its comments to the draft BEREC Strategy 2021-2025, as well as its early input on the BEREC Work Programme 2021.

In our earlier submissions, we have encouraged BEREC to focus on subjects that belong to the Body's immediate remit, with special emphasis on facilitating the implementation of the new European Electronic Communication Code (EECC) that must be transposed by the end of the year. We still believe that this task should remain a key cornerstone of BEREC's work after 2020, as the Body should oversee the proper application of the new framework in force by then and ensure a high degree of convergence of the various national approaches.

At the same time, ETNO has argued that National Regulatory Authorities (NRAs) would benefit from a deeper understanding of future market trends in the electronic communications market as part of the broader digital economy, in order to inform their decision-making in competence areas.

We are glad that the draft Strategy's evaluation of "market, technological and policy developments" encapsulates in a succinct manner the main trends that are set to impact the telecommunication industry in the years to come. 5G networks, digital platform ecosystems, big data, artificial intelligence and environmental objectives are all together going to redesign the way our industry operates and positions itself in the broader socioeconomic environment.

Furthermore, the high-level strategic priorities highlighted in the draft Strategy are generally geared both to meet BEREC's core regulatory objectives and to face the challenges brought by digital macro-trends.

Although several issues identified in the Strategy – especially in emerging areas like the platform economy, big data, AI and possibly sustainability – may exceed the current supervisory and regulatory powers of NRAs, we welcome BEREC's effort to look into the broader market as the telecommunications market can no longer be considered separate from the broader digital ecosystem. We sincerely support BEREC's commitment to establish structured institutional cooperation mechanisms with other competent authorities, which we recommended as a priority objective in our contribution to the BEREC Medium Term Strategy 2021-2023.

In this respect, it would be helpful that the final Strategy 2021-2025 provide a more granular mapping of the specific aspects of emerging issues like digital platforms, big data or AI, where

BEREC believes NRAs have regulatory competences and/or where they should supplement other regulators.

Please find below our comments on some more specific points of the draft Strategy.

Market, Technological and Policy Developments

As stated in the draft Strategy, fast-changing nature of the markets and emergence of new technologies have a continuous impact on the evolution of market dynamics and business models in the digital sector. ETNO would like to stress that a thorough analysis of emerging trends is of utmost importance to establish and maintain a balanced and timeproof regulatory framework and to deregulate when competitive conditions are already met. Whereas we subscribe to BEREC's overall analysis, we would like to raise some remarks and clarifications on several items.

- ETNO fully subscribes to the Gigabit Society goals, but telecoms operators continue to face significant and real challenges in their efforts to invest in and roll out new infrastructure. The main factors currently impacting the levels of investment and deployment of new digital networks are related to varying degrees of infrastructure-based competition achieved in the different Member States, spectrum assignment, cost of deployment, network sharing restrictions and public concerns about EMF. The EEC should be implemented across the EU in a way that is harmonised and incentivises investment and any new regulatory initiative should focus on solving the existing challenges. BEREC and NRAs should be aligned with political priorities such as the stimulus of investment in connectivity and the overall aspiration for digital leadership in Europe based on development of European capacities in the digital space. We welcome the indication that in addition to promoting fibre and 5G roll-out, BEREC will contribute, through cooperation with the competent bodies, to ensuring that future network technologies meet the connectivity targets in line with European values and interests.
- We welcome BEREC's recognition that a fully functioning digital society will only be possible with the inclusion of all citizens. For this reason, we believe that in addition to supply side considerations a parallel effort to incentivise demand for 5G and very high capacity networks is necessary to support the uptake of new connectivity services. Measures to incentivise demand should include digital skills initiatives as well as aspirational policy targets for digitalising traditional industries, public sector and SMEs.
- We share BEREC's concerns about dominant digital platforms that may stifle the internet openness and curb competition in the digital economy. ETNO is heavily invested in the ongoing debate around reforming competition policy and possible ex-ante regulatory intervention over dominant platforms. Additionally, we would like to point to other crucial instances of dominance and dependency along the value chain (e.g. operating systems, cloud infrastructure) that are not reflected in the draft document

and possibly not covered by a narrow definition of “platform”. As a general principle, we believe that rules should be consistent all along the digital value chain, so that the same problems be subject to similar solutions. New gatekeeping situations have emerged in various layers of the digital value chain other than connectivity; this calls for a debate over the regulatory principles to apply to major players that exert a bottleneck along the digital stack with a relevant impact on the ability of internet users to access any content and run any application or service of their choice through any device. Large online platforms not only act as intermediaries in two-sided markets, but they also offer their products and services in competition with their own corporate users, with a strong incentive for self-preferencing and anticompetitive discrimination.

- We agree that the use of artificial intelligence will dramatically improve a number of operations such as network maintenance and optimisation, customer relationship management, and product and service development. However, we are perplexed by BEREC’s assertion that telecoms “may employ AI technologies in regulated areas, potentially affecting efforts in net neutrality, end user rights, data protection, competition (in terms of data economy) or security”. We would like to clarify that AI will not negatively affect operators’ efforts to abide by their regulatory obligations and will not offer any compliance loophole. On the contrary, the use of AI technologies in daily operations can help operators meet several regulatory obligations more effectively. Besides this, given that AI-technology will be applied across markets, essentially affecting all areas of life, an isolated assessment or even approach to AI with regard to telecoms would clearly fall short.
- We support the focus on sustainability as an important horizontal principle and high-level priority. ETNO members are closely following the trends in energy consumption and exploring innovative ways in which the telecoms and digital sector at large can help mitigate the impact on climate change. As mentioned in our State of Digital Communications 2020¹ report, by 2019, almost 50% of the energy used by ETNO companies came from renewable resources. This reflects positively on the green performance of the sector, which in 2019 reduced its overall emissions by 8.5% with respect to the previous year. Additionally, ETNO members have significantly increased their energy efficiency and largely compensated the strong increase of traffic in networks resulting from customers’ usage of third parties’ services. ETNO members are committed to continue their efforts within the limits of their possibilities and responsibilities, and to share their experience and good practices with policy makers. Operators are upgrading mobile and fixed networks to increase energy efficiency. BEREC can foster this effort by favouring network sharing agreements that are more energy efficient avoiding duplication of network elements, by reducing any regulatory hurdles to the roll out of energy efficient networks.

We praise the new Green Deal's ambition, and we believe the plan should ultimately pursue a balanced approach concerning any “environmental obligations” for goods and

¹ Downloadable here <https://etno.eu/component/attachments/attachments.html?id=7595>

services. Also, it is of utmost importance to define duties along the whole value chain, including consumers. Imposing obligations primarily on telecoms would be neither effective nor justified.

As also recognized by the European Commission, digital technologies are a critical enabler for pursuing the sustainability goals across different sectors clearly compensating for energy used by digital technologies. ETNO would like to express its willingness to contribute to the debate on environmental sustainability and support BEREC's activity and related sector assessment that needs to be embedded in a holistic approach for the economy.

Strategic priority 1: Promoting full connectivity

ETNO agrees that the successful implementation of the EECC should be a horizontal principle forming an essential part of the work on BEREC's three strategic priorities, including the priority on connectivity. Both timely implementation and monitoring of the impact and effectiveness of the EECC will be important to accelerate investment in very high capacity networks. We recognise the progress made with a number of the future Guidelines so far and appreciate the opportunity given to stakeholders to take part in this process.

We also agree on the increasing importance of infrastructure sharing as a means to accelerate VHCN and 5G roll-out and to bridge any infrastructure gaps, both requiring a very high level of investment. A speedy and broad roll-out of investment on VHC and 5G networks can only be assured if there is more support given to network sharing and if the pro-competitive aspects of network sharing are fully recognised. ETNO is ready to contribute to the discussions on infrastructure sharing to provide further context based on the experience of its members.

ETNO would also encourage BEREC to reflect on potential new measures at EU level to reduce cost of deployment both for VHCN and 5G. Such new measures could include streamlining procedures for local permits and making rights of way and antenna sites on public ground free of charge across the EU. Review of the scope and provisions of the Broadband Cost Reduction Directive may provide an opportunity to address these questions.

In the light of the European Commission's new Digital Strategy, 5G remains a political priority for Europe and BEREC's role in enabling 5G can be an important one in helping to clarify specific aspects related to 5G deployment through stakeholder engagement and studies. However, with reference to BEREC's ongoing work on the impact of 5G on regulation, ETNO believes that 5G does not trigger a general need for additional regulation as many issues such as privacy are typically covered by existing horizontal regulation.

ETNO acknowledges that 5G is important for the European economy and society as a whole, and while it is still early days, the commercial deployment of 5G has begun. We would hence question the somewhat premature suggestion in the BEREC draft Strategy that wholesale access to fibre backhaul connectivity of cell sites may need to be regulated, as it will depend on the

available options in each market and national circumstances. We would urge BEREC to let the 5G ecosystem reach a certain maturity and to then carry out a proper analysis of the backhaul market and other infrastructure elements before concluding on any regulatory action.

ETNO has long supported a European approach to the security of 5G and of its supply chain. A harmonised and sensible implementation of the 5G Cybersecurity Toolbox approach will be conducive to ensuring resilience of 5G networks across Europe and trust in digital services enabled by 5G.

BEREC can play a role in helping the NIS Cooperation Group to facilitate the sharing of practices existing in various Member States, as well as to assess to regulatory gaps to be filled in light of the legal framework in force regarding the security and resilience of telecommunication networks and services. Therefore, ETNO supports the BEREC ad hoc working group on 5G cybersecurity and its efforts to promote a dialogue with industry stakeholders at European level. ETNO would be interested if BEREC continued this stakeholder dialogue, namely on the effectiveness of the Toolbox implementation, past 2020.

Strategic priority 2: Supporting sustainable and open digital markets

ETNO agrees that the identification of potential monopolies and bottlenecks in the distribution of digital services is a crucial topic where BEREC's input to the ongoing policy debate, alongside contributions of other public stakeholders, could add value. Although, as explained in the BEREC "Report on the Digital Economy" (June 2019), the mandate of most NRAs is limited to the scope of the ECS definition in the EECC, we welcome BEREC's effort to gain a deeper knowledge of those markets, how they impact on the digital ecosystem and ECS providers in particular. We encourage BEREC to strengthen cooperation with other competent authorities (e.g. competition, consumer protection, media regulation and data protection) in order to provide useful insights. Besides input from these other competent authorities, we believe that also some of BEREC's experience and knowledge would be particularly valuable as an input to any initiative aimed at addressing competition failures in digital markets. This will be addressed by the Digital Services Act package, which will potentially include asymmetric ex-ante regulation targeted to large platforms with strong network effects and acting as gatekeepers, in order to ensure that digital markets remain fair and contestable for innovators, business and new market entrants.

On the other hand, the revision of EU competition rules could have an impact on the overall digital sector and in particular on the telecoms sector, and consequently, an investigation should be carried out to define to which extent market failures exist following the revision.

We would also welcome a broader approach to gatekeepers along the value chain in consideration of the evolution of digital networks and services, as already mentioned. As new gatekeepers have appeared on several layers of the value chain other than connectivity, BEREC

should study the broader concept of digital neutrality, to ensure the principle of open, fair and non-discriminatory markets along the digital value chain.

Finally, we would welcome more clarity around the assertion that “BEREC may investigate data-centric approaches and data driven regulation principles as to their ability to achieve regulatory targets while empowering end-users”. Such trends are, again, neither telecoms specific nor are telecoms the main driver. Accordingly, a policy approach that focusses on ECS would be misleading.

Strategic priority 3: Empowering end-users

ETNO reiterates its full support to the concept of consumer empowerment, which goes beyond consumer protection strictly speaking. This includes, for example, the further increase of choice and innovative solutions or new digital means that empower consumers in telecoms markets.

Trends that determine ETNO members’ customer relationships are generally not sector specific but apply across digital markets. Accordingly, challenges and solutions also require a horizontal approach, which increasingly requires BEREC to align and coordinate with other competent authorities and decision-makers.

We would welcome a BEREC workshop with its stakeholder community to discuss consumer expectations and empowerment in the evolving electronic communications market, also delving into telecommunication operators’ efforts to deploy omnichannel strategies that enhance customer experience and interaction.

We would also highlight the crucial importance of proportionate and harmonised end-user protection requirements for a healthy European electronic communications market. The EECC will lead to the introduction of many new and partly far reaching protection standards for telecoms, compared to horizontal rules and most other sectors, e.g. concerning transparency. BEREC can play a crucial role in assisting the European Commission in its first revision of end-user rights under the EECC to promote proportionality and a further approximation of consumer protection requirements and practices as well as the need for more consistent application of rules to all ICS.

Stakeholder engagement

ETNO would like to commend BEREC for taking additional steps in increasing transparency and stakeholder engagement. We believe these interactions deserve to be further embedded in the BEREC structures, as they have the potential to contribute towards improved quality of well-informed output and legitimacy of BEREC’s work.

Based on ETNO's cooperation with BEREC in the course of 2019, we find that many BEREC EWGs have increased the level of engagement with stakeholders through calls for early inputs and stakeholder meetings. We welcome the practice of "2-stage consultations", as this provides stakeholders more opportunity to provide inputs and to exchange views with BEREC. We would also welcome the establishment of a Permanent Stakeholder Group (PSG) and encourage BEREC to define the objectives and functioning of this group. We recommend that this group be used as a "sounding board" for consultation on specific topics in order for NRAs to gather inputs and expectations from interested parties that can support BEREC's strategic planning as well as internal work on specific issues.

Particularly, ETNO appreciates that BEREC recognizes "that in order to provide quality responses to BEREC's consultations, stakeholders need sufficient time to respond" and that in this regard, BEREC will strive to afford stakeholders the maximum possible time to provide input to its projects". An improvement in this respect will be welcome.

Finally, we would like to congratulate BEREC for the reviewed format of its stakeholder forum. The planned bilateral exchanges with EWG chairs and the revised agenda promised to make the event more dynamic for all involved. We hope that circumstances will allow BEREC to continue the organisation of the event soon. Additional BEREC events, such as the anniversary conference in Riga, are excellent opportunities to further exchange on topics of mutual interest to the telecoms and digital sectors.

BEREC WP 2021 Outline

ETNO welcomes the opportunity to provide early inputs towards BEREC's Work Programme 2021. To this end, ETNO would like to put forward some proposals based on our views on the outline for BEREC WG 2021:

As mentioned above, we believe that BEREC should in general **focus on the ongoing tasks as mandated by EU legislation**, related to the EECC, the Open Internet Regulation and intra-EU calls, for example.

Concerning the initial list of "**Additional Items**", ETNO will hereby provide some initial views item by item:

- As explained in our comments above relating to BEREC's strategic priority 2: "Supporting sustainable and open digital markets", we believe that BEREC could add value on the ongoing debate concerning the role of platforms in the digital communications market. As the market dynamics are becoming increasingly complex, we welcome BEREC's intention to conduct a study on consumer behaviour and attitudes towards digital platforms; to monitor the effects of the internet value chain, and to carry out economic analysis of digital markets.

- We also believe that some of the planned work items relating to BEREC’s strategic priority 3: “Empowered end-user”, for example the item on compensation in the case of early termination of contracts, would benefit from assessment by BEREC. However, this needs to take into account that the EECC is currently already in the implementation period at national level. BEREC should refrain from making new proposals that risk to hamper required legal stability for operators. Accordingly, a cautious approach should be considered when assessing the need for better transparency, regulation of third-party billing, or migration to new services. Contrary to this, we encourage BEREC’s work on e.g. assessing telecoms’ positive contribution to enabling energy efficiency and to promote a science-based approach on exposure limits for electromagnetic fields and consumers’ health. Concerning BEREC’s considered work on “Compensation in the case of early termination of contracts”, ETNO believes that operators would benefit from guidance that clarifies towards Member States that they should not diverge from the principle of full harmonization and respect the EECC’s foreseen flexibility for telecoms operators concerning compliance with this provision, to support a correct interpretation in all Member States, ensuring a balance of the interests of the parties and ensuring that the value of the contract is respected.
- Regarding the proposed report on regulatory treatment for backhaul, we already raised some concerns in our reflections on BEREC’s midterm strategy above about the suggestion that wholesale access to fibre backhaul connectivity of cell sites may need to be regulated. ETNO is concerned that BEREC states that “*wholesale access to fibre backhaul connectivity of cell sites needs to be ensured (and regulated, if appropriate) to prevent potential problems in terms of lack of coverage and refusal of access to bottleneck facilities*” and proposes to review in the Work Programme 2021 how backhaul is addressed in market analysis by NRAs. We understand that BEREC assumes that backhaul for cell sites is regulated in the EU countries or will need regulation in the coming years. In reality, up to now, except for very few cases, NRAs have not deemed necessary to regulate mobile backhaul, as markets are competitive, also due to the presence of alternatives (mobile operators often use their own infrastructures or radio link) and to the fact that mobile operators usually enjoy a strong countervailing buying power. Any additional regulation in new markets shall be preceded by a thorough analysis demonstrating the absence of competition and the need to address market failures.