



ecta RESPONSE

TO THE PUBLIC CONSULTATION BY BEREC

ON THE

OUTLINE BEREC

WORK PROGRAMME 2021

BoR (20) 09

14 APRIL 2020ⁱ

Introduction

1. **ecta**, the **European competitive telecommunications association**,¹ welcomes the opportunity to comment on the Outline BEREC Work Programme, BoR (20) 09, which covers work items to be delivered by BEREC in 2021 (hereinafter 'Outline WP2021') and beyond.
2. **ecta** appreciates that BEREC is offering stakeholders the possibility to provide early input. This reflects requests made by **ecta** in 2019 and 2020.
3. **ecta** understands that a portion of BEREC's capacity in 2021 will be taken up by the preparation of Guidelines and Opinions it has to elaborate under the European Electronic Communications Code² (hereinafter 'EECC' or 'Code'), the new requirements resulting from the BEREC Regulation³ and possibly new legislative action by the European Commission.
4. As already stated in its comments on the drafts of the BEREC's Work Programmes for 2019 and 2020, **ecta** considers that in fulfilling these tasks, BEREC will effectively have to resolve major outstanding policy issues under the EECC. In some cases, this goes well beyond merely technical aspects of implementing the Code, but indeed defines its very scope of application and thus the scope for regulatory market oversight itself.
5. The way in which BEREC will carry out these tasks is liable to significantly impact the structure of electronic communications markets in coming years.
6. In **ecta**'s view, it is therefore particularly **important for BEREC to continue improving the involvement of stakeholders at all stages** leading up to the adoption of BEREC deliverables and documenting how their inputs have informed these deliverables.
7. Below, **ecta** comments on the background considerations to the Outline WP2021 and sets out its related high-level expectations to BEREC (chapter 1). Thereafter, **ecta** addresses a selection of proposed Outline WP2021 items (chapter 2), and provides concluding remarks including points addressing the COVID-19 crisis (chapter 3).

1. Comments on the background of the Outline WP2021

8. **ecta** expresses its explicit support for most of BEREC's proposed Outline WP2021, as will be seen in the comments provided throughout this response.
9. The presentation of the background should, in **ecta**'s view, be further elaborated, and, most importantly, should be legally precise. Indeed, when referring to the four objectives of the Code in art. 3(2) EECC, **BEREC inexplicably omits the take-up dimension of very high capacity networks**. **ecta** trusts that this omission is accidental and **asks BEREC to correct this point**.⁴

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

² OJ L321/36, 17.12.2018.

³ OJ L321/1, 17.12.2018.

⁴ BoR (20) 09, at 4; **ecta** notes the same omission in the draft BEREC Strategy 2021-2025.

10. As regards **the future High-Level Strategic Priorities**, ecta will discuss these in its response to BoR (20) 43.
11. ecta highlights here that **in describing Strategic Priority 2 (Thriving sustainable and open digital markets), BEREC does not refer to electronic communications markets, and uses an imprecise notion of ‘digital markets’ instead** (page 5). ecta asks BEREC to re-assess this proposal, and asks for written reassurance from BEREC, by way of a **textual change**, that BEREC continues to focus on the specific regulatory issues characterising electronic communications markets.
12. Where it comes to **Strategic Priority 3 (Empowered end-users)** (page 5), ecta asks BEREC to explicitly **refer not only to consumers, but to end-users in their entirety, including notably also business and public sector users**.
13. ecta expects BEREC and national regulatory authorities (hereinafter ‘NRAs’) to **continue to focus on what is truly important to enable and improve competition at the network and service levels of electronic communications markets** for business-to-consumer markets (B2C) and business-to-business markets (B2B), including business-to-business-to-consumer markets (B2B2C) and Internet of Things (IoT). ecta recommends that these dimensions, which are entirely absent from the background section, to be explicitly mentioned in view of the significant developments these markets are undergoing and will continue to undergo.
14. ecta considers that the examination of links between electronic communications markets and the wider digital ecosystem should occur in this light. Accordingly, **relations to wider ecosystem aspects should be examined from the vantage point of their relevance to competition in electronic communications markets and the latter’s interaction with markets upstream and downstream in the digital value chain**. Their consideration should not distract BEREC and NRAs from fully exercising their statutory duties and implementing actions to fulfil pro-competitive priorities on electronic communications markets.
15. ecta expects BEREC and NRAs to **actively remove undue administrative burdens on operators**, that may negatively affect competition in electronic communications markets.
16. Building on the considerations set out in the preceding paragraphs, ecta considers it **particularly problematic that the background section abstains from acknowledging the most fundamental legislative change that the Code has brought about, i.e. the widening of the scope of application to over-the-top services**. These services have both a direct and indirect impact on competitive conditions in electronic communications markets and ecta therefore calls on BEREC to **include explicit reference thereto as well as to integrate its systematic consideration throughout**.

2. Comments on selected specific items of the Outline WP2021

2.1. BEREC tasks in line with EU legislation

17. Market Review Phase II cases (page 7): ecta appreciates the importance of this BEREC task, and the frequently pro-competitive Opinions issued by BEREC. However, this continues to be a largely closed process, where stakeholder input is not welcomed. ecta requests BEREC to explore solutions proffering greater openness despite tight timeframes, because Phase II cases always have direct impact on the business interests of industry stakeholders, notably the challenger operators that ecta represents.
18. BEREC Guidelines to assist NRAs on the consistent application of geographical surveys (page 7): ecta wishes to flag that it has grave concerns that this work could result in unwanted reduction rather than enhancement of both competition and investment, and ultimately harm end-user interests. This is the case because it could result in unduly high administrative burdens, the disclosure of strategically important competitively sensitive information of challenger investors on their investment plans, and possible ignorance or denigration of challengers' offers. ecta thus urges BEREC and its Working Groups to be particularly attentive to ensuring that industry stakeholders are fully heard, and can see that their comments are genuinely taken into full account.
19. Peer review process (page 8): ecta welcomes BEREC's intended involvement in spectrum peer review processes. However, there are serious concerns that this will be a closed process. At the very least, industry stakeholders should be able to receive information about BEREC's policy line when entering a peer review process and reports on the positions taken by BEREC in peer reviews and their outcomes.
20. Mobile roaming (5G) (page 9): ecta appreciates BEREC's benchmarking, transparency and comparability work conducted to-date, as well as its two Opinions in the context of the review of the Roaming Regulation. This work needs to continue in full (i.e. no scaling back of any data gathering). An issue that ecta would like to see added, certainly from 2021, is the state of 5G mobile roaming (including cross-network network slicing), or the (relative) lack thereof. Collecting data and benchmarking is important to understand competition dynamics and identify concerns early on. Clearly, a possible 2022 renewal of the Roaming Regulation will have to encompass 5G, with specific attention to industrial and public sector use cases, and the Internet of Things.

2.2. Quality and efficiency

21. ecta appreciates the elements contained in this section, and has no comments, other than to note that it has comments on the Phase II process (page 10) which are already covered above.

2.3. Communication and cooperation

22. Stakeholder involvement during COVID-19 crisis: ecta understands that BEREC's work has been severely affected by the COVID-19 crisis (as has been the case for everyone). This has resulted in the cancellation of meetings, turning the Stakeholder Forum into a webinar

and the workshop on the Guidelines on very high capacity networks into a conference call. These remote participation formats made it difficult for stakeholders, including **ecta**, to participate and interact effectively. **ecta** therefore asks BEREC to consider setting up a working group with interested key stakeholders to reflect on how best to work for as long as physical meetings are restricted. **ecta** is interested to participate in such a working group and any other mechanisms to maintain productive exchange with BEREC and its members during the crisis situation.

23. In the midst of this unprecedented pandemic, **ecta** wishes to emphasize that its members are all hands on deck working around the clock watching out for the networks, services, and their users. It is their dedication and determination that preserves network resilience and redundancy to assure service continuity for citizens and enterprises, large and small, as well as durable connectivity for data centres and health actors on the frontline.
24. Faced with very high expectations and additional pressure to shape, and respond to, ad hoc crisis interventions, our members must prioritise the activities required for Europe to function, while paying particular attention to the safety of their employees and workers. With these operational challenges, the lockdown also makes it more challenging for **ecta** to coordinate with its members. As these challenges apply to the sector in its entirety, and with special weight on smaller and challenger operators, **ecta would welcome BEREC extending or otherwise providing a certain flexibility with its consultation deadlines as a positive contribution to the collective effort in the fight against this pandemic.**
25. In the following two subsections, **ecta** selectively addresses a number of items identified as additional (subsection 2.4.) and as possible future work (subsection 2.5.). Non-inclusion of any one item does not indicate that the item would be considered irrelevant or that **ecta** would not have any views on the subject, but that solely that **it has not been possible to agree a final view within the given timeline.**

2.4. Additional items

26. Report on access regulation (including prices) based on EU State Aid: In view of an increasingly wide range of instruments to facilitate wholesale or wholesale-like access regulation, **ecta** sees value in exploring the relationship between sector-specific rules and obligations imposed under State aid law. However, **ecta** believes that the report's objectives requires clearer definition in such comparative terms in order not to replicate work conducted by DG Competition. **ecta** invites BEREC to engage in dialogue with industry and its associations about how this best can be achieved, notably to ensure that the interaction between sectoral regulation and State aid law is properly analysed.
27. Work on the impact of 5G on regulation: **ecta** considers this welcome, but is concerned that this work will be done without adequate stakeholder involvement. **ecta** therefore asks BEREC to consult stakeholders early, not just on a report, but on the elements to be contained in the report, and how the report will be developed.
28. Report on how to handle third-party payment changes on mobile phone bills: To precisely scope the need for action, **ecta** suggests that a stakeholder workshop be organised. **ecta** would also expect this line of work to be informed by BEREC discussions on numbering

misuse and fraud, as they took place in Q3/19, and would invite BEREC to actively involve industry at all stages of the process going forward. **ecta** would emphasise that investigations into this matter should not lead to unduly impairing or otherwise prejudicing electronic communications providers' ability to offer billing services to third parties, including providers of value-added services.

2.5. Possible work for 2021 and beyond

29. Satcom solutions for 5G: It is **ecta**'s understanding that this work item is synonymous to a research project having received funding under the European Union's Horizon 2020 programme. **ecta** believes that BEREC should clearly identify the specific regulatory concerns it intends to consider before further engaging with the subject matter, and, more generally, to treat this point in the context of its work on the impact of 5G on regulation.
30. Non-discrimination on quality of service (QoS): **ecta** is pleased that the topic of the quality of wholesale access has been included in BEREC's Outline WP2021, reflecting its comments on the WP2020. This should be 'upgraded' from being designated as an interesting topic, and become a fully-fledged BEREC WP2021 item.
31. Monitoring and encouraging the transition to IPv6: **ecta** agrees that this is a highly relevant work item. **ecta** asks BEREC to extend the description, so as to include the competition dimension – specifically to verify that the transition (exhaustion of IPv4, compatibility with wholesale access arrangements/regulation) occurs on a competitively neutral basis.
32. A consistent approach to migration & copper switch-off: **ecta** agrees that this is an essential topic, and insists that the work on copper switch-off must include all relevant industry stakeholders. **ecta** considers that no-one can be left behind, and that NRAs and BEREC have a duty to proactively ensure that copper switch-off is implemented in this sense.
33. Report on key elements of the functioning of the EECC: **ecta** considers that monitoring and evaluating the impact of the EECC is generally of crucial importance and therefore welcomes BEREC's explicit mention of both articles 122 and 123. As the Code rightly links positive outcomes for end-users to enhanced competition, **ecta** urges BEREC to clearly include this aspect in its evaluation of goal fulfilment under the Code, paying particular attention to possible market distortions and end-user harm resulting therefrom. The assessment of the impact on competition and end-users of all types, including consumers, businesses and public entities, should explicitly address whether the situation for end-users is improving, whether competition is increasing or decreasing and/or changing in nature, how existing challenger operators are affected, whether and what new types of operators are appearing, etc. Notably the assessment of the last two dimensions should be clearly linked to market composition and structure in view of the general authorisation regime. For purposes of considering the effectiveness and impact of the Code overall, **ecta** would welcome the establishment of a cooperation group between BEREC and market participants, for which it would volunteer its participation, to ensure an approach that is both comprehensive and consistent.

34. Workshops on wholesale replicability test, NRA experiences with 5G, IP peering: With these subject matters, BEREC has identified matters of key regulatory concern. ecta especially welcomes the proposals for workshops on replicability testing and IP peering, and would encourage BEREC to involve stakeholders in a more precise scoping of a possible workshop on 5G experiences. Importantly, ecta considers that all these workstreams and workshops should be open to ecta's participation. Prior workshops with the OECD on IP peering and interconnection were of particular interest and any follow-up workshops should be open to industry participation. Having experienced in the recent past that BEREC organised closed workshops or selectively chose third parties to attend its workshops, ecta invites BEREC to ensure full representation of the industry's competitive forces on future occasions.

3. Concluding remarks and points on the COVID-19 crisis

31. ecta reiterates its requests to **BEREC to be attentive to technological developments enabling improved competition while serving end-user interests** (e.g. wavelength division multiplexing, network virtualisation and network slicing (on wireless networks as well as on fixed networks)). These may provide new opportunities for enabling competition and for supporting end-user interests, if the techno-economic wholesale access conditions are properly defined. ecta requests **BEREC to initiate a specific workstream on this topic in 2021**, with a target for completion of a BEREC Report by the end of 2021. Evidently, ecta would expect to be involved at the earliest opportunity as a key stakeholder.
32. ecta re-emphasises that it considers it justified for BEREC to examine the links between electronic communications network/services markets and the **digital ecosystem**. However, this **must not distract BEREC and NRAs from fully exercising their statutory duties, notably taking all actions necessary to fulfil their duties to promote competition on electronic communications markets** (see chapter 1 above).
33. ecta wishes to emphasise again that **two-stage consultations**, consisting of a call for input, and a consultation on precise BEREC text proposals, are clearly required in all cases when BEREC consults stakeholders.
34. ecta considers that **all BEREC input to the European Commission should be subject to public consultation, or at least be published in a manner allowing stakeholders to rely on it** in their representations to the European Commission and other EU institutions during the EU decision-making process, especially when BEREC has not consulted or otherwise offered market participants the opportunity to provide feedback. ecta recalls here that BEREC precedent, with positive effects, exists. This is important, especially in view of the European Commission's track record of not publicly consulting on the actual text of iterations of the Recommendation on Relevant Markets as well as on the Implementing Regulation on Fair Use Policy.
35. ecta has observed that the **COVID-19 crisis** has in some Member States led to the **adoption of measures harmful to competition and to end-user interests** (e.g. unduly restricting number portability and operator switching where no human intervention is required, postponing margin-squeeze control) **and/or failure to act against anticompetitive operator practices** (e.g. increasing retail data bundles but not extending this to their wholesale customers).

ecta calls upon BEREC to closely monitor these developments, to exchange internally and with stakeholders and include these developments in its reporting activities so as **to stop anticompetitive practices in a time of need and prevent adoption of measures with similar effects** that run counter to BEREC's mission statement and strategic priorities.

36. In closing, **ecta and its members extend their best wishes to all BEREC, BEREC Office and NRA staff and their close ones in the trying circumstances of the COVID-19 crisis, trusting that good co-operation will remain the norm.**

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In case of questions or requests for clarification regarding this contribution, BEREC and NRAs are welcome to contact Mr Oliver Füg, Director of Competition & Regulation at [ecta](#).

ⁱ This response is filed on 14 April 2020 as the submission deadline of 13 April 2020 fell on an institutional holiday.