ecta RESPONSE

TO THE PUBLIC CONSULTATION BY BEREC

ON THE

DRAFT BEREC REPORT ON THE REGULATORY TREATMENT FOR FIXED AND MOBILE BACKHAUL

BOR (21) 129

5 NOVEMBER 2021

1. Introductory comments and key ecta considerations

1. ecta, the european competitive telecommunications association,[1] welcomes the opportunity to comment on the draft BEREC Report on the regulatory treatment for fixed and mobile backhaul, BoR (21) 129.

2. ecta represents those alternative operators who, relying on the pro-competitive EU legal framework that has created a free market for electronic communications, have helped overcome national monopolies to give EU citizens, businesses and public administrations quality and choice at affordable prices. ecta represents at large those operators who are driving the development of an accessible Gigabit society, who represent significant investments in fixed, mobile and fixed wireless access networks that qualify as Very High Capacity Networks and who demonstrate unique innovation capabilities. ecta counts Fixed Network Operators, Mobile Network Operators, Fixed Wireless Access operators as well as Mobile Virtual Network Operators among its members.

3. ecta **members include companies that purchase fixed and mobile backhaul, as well as companies that provide fixed and mobile backhaul, and companies that are both purchasers and providers of backhaul**.

4. The draft BEREC Report shows that there is considerable demand from alternative fixed and mobile operators for *regulated* fixed and mobile backhaul, and for regulation where it is currently absent and for fit-for-purpose regulation where it is currently insufficient. The demand for *regulated* backhaul (as well as expected future demand) is focused in particular on fit-for-purpose access to civil engineering infrastructure and access to dark fibre, among other types of wholesale access. This is the case even though BEREC has found that the share of use of *regulated* backhaul is relatively low in proportion to total backhaul requirements. ecta agrees with these BEREC findings.

5. The draft BEREC Report also shows that whilst there have been considerable differences between the approaches taken by NRAs so far, a large number of NRAs has determined that regulation is required to protect and promote competition. ecta adds that, importantly, the NRA decisions have stood the tests of European Commission scrutiny in application of Article 7/7a of the 2002-2009 Framework Directive and the successive editions of the European Commission's Recommendation on Relevant Markets Susceptible to Ex-Ante Regulation, and – where applicable – scrutiny by national appeals bodies.

6. ecta wishes to comment on the point where BEREC states that NRAs should avoid not only false positive (Type 1) errors which might lead to excessive regulation or insufficient deregulation, but also avoid false negative (Type 2) errors *(page 53, paragraph 3)*. In ecta's view, continuing existing regulation of operators with Significant Market Power represents a far lesser risk (= maintaining the status quo) than inappropriately deregulating markets (= disruption), where regulation is actually needed to ensure competition and protect end user interests. Therefore, in case of uncertainty, NRAs should always regulate one cycle more rather than deregulate one (or more) cycle too soon.

[1] https://www.ectaportal.com/about-ecta

7. The draft BEREC Report touches upon, but does not provide clear conclusions, on how backhaul (especially mobile backhaul) can be addressed by regulation where necessary in application of the 2020 edition of the EC Recommendation on Relevant Markets Susceptible to Ex-Ante Regulation, and the accompanying Explanatory Note. This is a key challenge going forward, and a key area for further work.

8. ecta respectfully suggests that, beyond the market definition issues, another key challenge going forward is for BEREC and NRAs to find the right way to structure regulatory intervention. This should occur in a manner which enables progress towards diversified and competitive supply of both fixed and mobile backhaul by alternative providers (thus enabling progress towards achieving effective competition), while at the same time imposing regulatory obligations on operators with Significant Market Power where necessary to ensure that fixed and mobile retail markets benefit from sustainable competition, supported by wholesale access regulation where needed.

9. In this light, ecta suggests that BEREC and NRAs give consideration to the structure and details of regulatory intervention, for instance by focusing on preventing that operators with Significant Market Power (which typically have nation-wide presence) use pricing mechanisms designed to crush fledgling competitors whose geographic reach is more limited, and whose fibre business models rely on revenue from backhaul provision. Preventing predatory pricing would ensure that adequate margins remain available for challenger backhaul providers to succeed where they are present or where they can be expected to expand within a relevant time horizon. In concreto, operators with Significant Market Power could be required to supply backhaul at prices that have a demonstrable relationship with underlying costs (cost-based) and be required to notify the NRA of the pricing mechanisms they propose to employ when making available fixed and mobile backhaul, and in particular any discount structures they propose to apply, for prior approval by the NRA. This is relevant especially to avoid volume and coverage discount structures aimed at tying access seekers to the operator with Significant Market Power for the entire national territory, and thus taking the wind out of the sails of alternative backhaul suppliers. The attraction of this approach is that it would avoid operators relying on backhaul from overpaying for supply of fixed or mobile backhaul, since they would benefit from competition to the greatest extent possible, and at the same time avoid that alternative suppliers of backhaul are pushed out of the market by practices of operators with Significant Market Power aimed at foreclosing competition.

10. ecta welcomes that BEREC commits to continue monitoring backhaul markets and backhaul regulation as practiced by NRAs, with a special focus on backhaul needs and use for 5G deployment *(page 53, paragraph 4)*. However, ecta asks BEREC to refrain from overly focusing on backhaul for 5G and for the deployment of VHCN in non-densely populated areas. A wider perspective is necessary. It may well be the case that there are needs for regulated backhaul in other circumstances, and in other geographic areas. Examples could be in the context of the deployment of small cells (on public lighting infrastructure, bus stops etc.), where the infrastructure (including legacy civil engineering

infrastructure and copper network) of the operator with Significant Market Power may grant it a strong comparative advantage that cannot be matched by alternative operators.

11. ecta also welcomes that BEREC indicates that it may consider the preparation of a Common Position *(page 53, paragraph 5)* – after NRA market analyses addressing backhaul are conducted in application of Article 32 of the EECC and the 2020 edition of the EC Recommendation on Relevant Markets Susceptible to Ex-Ante Regulation. As ecta has stated in its response to the consultation on the draft BEREC Work Programme 2022, it encourages BEREC to work towards more Guidelines and more Common Positions, not mere Reports that may not produce tangible results.

12. In the sections below, ecta indicates that it explicitly endorses statements made by BEREC in the draft Report, which should certainly not be removed from when making the Report final, and ecta provides a set of brief specific remarks, which are mainly aimed at suggesting improvements to the draft BEREC Report prior to its finalization.

2. Statements in BEREC's draft Report that ecta wishes to explicitly endorse

13. BEREC makes a number of statements in the draft Report which are very welcome from ecta's perspective, and which should be maintained in the final BEREC Report. These include the following:

14. *"Additionally, NRAs should also analyse markets that are not contained in the 2020 Recommendation on Relevant Markets if they have sufficient grounds to consider that the three-criteria test is fulfilled" (page 10, paragraph 1, which makes reference to EECC Recital (165)).* ecta strongly agrees that the EECC provides NRAs with this possibility, and that it is a relevant possibility if backhaul (fixed and/or mobile) is/are potentially to be treated as (a) market(s) in its/their own right.

15. *"The remedies imposed in these markets may in turn be made available for different uses, including fixed and/or mobile backhaul, provided that the competition problem(s) identified in the corresponding retail markets can be addressed by regulation of the same relevant wholesale market. In this regard, mandating access to regulated services such as ducts, dark fibre or leased lines for the backhaul segment, could solve or at least alleviate the competition problems that might have been identified by the NRA" (page 11, paragraph 3).* ecta wholeheartedly agrees. Indeed, in a situation where only two wholesale markets remain in the 2020 edition of the EC Recommendation on Relevant Markets Susceptible to Ex-Ante Regulation, it would be ill-advised to consider that usage restrictions might legitimately or necessarily apply on remedies. As a matter of fact, NRAs would be well-advised to specify explicitly in their future market analysis decisions that there are NO usage restrictions on the remedies they impose, since remedies relating to wholesale local access and wholesale dedicated capacity should be generic inputs, that should be available for any use, to promote competition, innovation, and ultimately end user interests. This includes possible ancillary remedies such as wholesale access to civil engineering infrastructure (best to be mandated in both Market 1/2020 and Market 2/2020) and potential backhaul remedies (also best to

be mandated in both Market 1/2020 and Market 2/2020, to unequivocally cover passive wholesale access (which is essential to enable innovation, as the beneficiary can install its own transmission equipment), and active wholesale access where appropriate).

16. *[…] "the BCRD and SMP regulation seek to achieve two objectives that are related but nevertheless differ significantly. The former is targeted at facilitating and incentivizing the roll-out of high-speed electronic communications networks by promoting the joint use of existing physical infrastructure. The latter is concerned with safeguarding the conditions of competition in a given market via the imposition of regulatory obligations to the operator that holds SMP" (page 13, para 4).* ecta agrees that this is an elegant and short way of stating what ecta has always advocated, including recently in the context of the consultations in the context of the review of the BCRD, i.e. that SMP regulation continues to have a crucial role, and that the existence of the BCRD does not justify removing the specific (more detailed, and logically stricter) asymmetric regulatory obligations designed to address market power.

17. ecta also agrees in principle with BEREC that *"Where upstream wholesale products for use in the different retail markets are substitutable, fixed and/or mobile backhaul may be part of the same wholesale market; backhaul may also be a segment of the wholesale market. However, the outcome may vary, depending on national circumstances" (page 8, paragraph 3)*. Unfortunately, the BEREC draft Report does not contain clear elements to support this statement. If relevant NRA decisions provide reasoned support for this statement, it would be very useful to include them in BEREC's final Report. This could also be done as part of the suggestion ecta makes in Section 3.1 below, for the inclusion in the final Report of structured descriptions of NRA decisions relating to backhaul which are in effect today.

18. Finally, ecta very much welcomes that BEREC's draft Report emphasizes that backhaul contributes to ensure the effectiveness of the main remedies in Market 1/2020 (Market 3a/2014) and Market 3b/2014 and/or to facilitate the deployment of mobile networks *(page 53, paragraph 2)*.

3. Specific ecta remarks and suggested improvements to the BEREC draft Report

3.1. Regulatory treatment of fixed and mobile backhaul by NRAs (Chapter 5 of BEREC's draft Report)

19. ecta considers that the draft BEREC Report provides a good start of a benchmarking exercise on existing NRA decision-making practices on the regulation of backhaul, and notes that a large number of NRAs has determined that regulation is required to protect and promote competition, and has consequently adopted regulation that is in effect today.

20. However, Chapter 5 is very short *(pages 38 to 48 of the draft Report)*. More detail is needed for the Report to provide NRAs (for instance those that have not regulated backhaul, or have considered it difficult to regulate backhaul) and parties that are interested in the topic, with a full understanding of how each NRA has proceeded.

21. ecta recommends that the final BEREC Report could usefully describe precisely on which basis both fixed and mobile backhaul have been regulated by each NRA that has done so, e.g. in the form of a structured +/- two-page description and/or flow chart per country, containing information distinguishing the market definition stage, the SMP assessment stage, and the remedies stage (with particular focus on explaining whether backhaul is a core remedy or an ancillary remedy). It is important to make clear exactly at which process stage the essential structuring decisions were taken by NRAs with regard to backhaul, for instance by describing:

  i. The product market definition (e.g. Market 3a/2014, Market 4/2014, other) – and in particular exactly what the (retail market) starting point of the analysis is.

  ii. Whether backhaul was considered part of the wholesale local access or wholesale high quality access market in general, or a specifically identified segment of one such market, and on which grounds.

  iii. Whether potential product market segmentation in terms of product characteristics (interface, speed, type of usage, other) led to the inclusion or exclusion of backhaul.

  iv. Whether fixed and mobile backhaul are considered separately or not at the market definition stage, and on which grounds.

  v. Geographic market definition.

  vi. SMP assessment (indicating whether SMP differs for any segmented markets if applicable).

  vii. Whether the remedies are core remedies to the market, or whether backhaul (fixed and/or mobile) is imposed specifically as an ancillary remedy, and if so, on which grounds.

  viii. Whether there are usage restrictions on remedies if applicable, and if so on which grounds.

22. In addition, the final BEREC Report would benefit from inclusion of direct and explicit answers to the following questions which arise for the reader which does not have in-depth knowledge of the details of each individual NRA market analysis:

  i. Why NRAs that did not regulate (fixed and/or mobile) backhaul decided not to. Did they deem something impossible that other NRAs have considered possible and necessary?

  ii. Why NRAs that did not find access to civil engineering assets (ducts and poles) important for fixed and mobile backhaul said so in the context of the preparation of BEREC's draft Report. Is it because there are no or few relevant ducts in the country concerned or for other reasons? *(page 39, paragraph 4).*

  iii. Why NRAs included or excluded dark fibre in/from Market 4/2014 (and any other market) if applicable specifically when considering backhaul *(page 44, last paragraph).*

iv. Why NRAs decided to include backhaul in Market 4/2014 (and any other market) or exclude it from it *(page 45, paragraph 3).*

3.2. Stakeholders' input on backhaul (Chapter 4 of BEREC's draft Report)

23. ecta has serious questions on the stakeholder interview sample used by BEREC when preparing the draft Report. BEREC itself recognizes that the distribution of interviewees is uneven, and states that the results of the survey should be interpreted with caution *(page 14, paragraph 3)*. However, the problems go beyond that, and beyond the obvious issue of over-representation of companies from some EU Member States and the under-representation of companies from other EU Member States.

24. ecta finds it inexplicable that subsidiaries of operators with Significant Market Power were interviewed (and possibly treated erroneously as alternative operators), and that resellers were interviewed (which a priori do not act as either purchasers or sellers of backhaul). In addition, where Hybrid-Fibre-Coax operators are concerned, some are integrated with a Mobile Network Operator, and may have a very strong position on the national market, meaning that the way they are categorized by BEREC is very important. Also, a satellite operator was interviewed, but it is not clear how BEREC has categorized its response. Overall, ecta has concerns that those interviewees which spoke out against regulation *(e.g. the 14 alternative operators mentioned in footnote 52 on page 37)* may not all readily qualify for consideration as challengers, and some may hold market positions that are more representative of fixed-mobile integration with high retail market share, or may simply not be overly concerned by whether or how backhaul markets are regulated.

25. On the basis of the above, ecta would recommend that:

    i. It is probably worthwhile for BEREC to be less binary (less focused on a divide between incumbent fixed-mobile integrated operators versus any other type of company) in its depiction of stakeholder views, and to create more categories and report on these with more granularity.

    ii. BEREC seeks validation or re-runs some of the interviews on which ecta expresses concerns hereabove, and BEREC then re-computes stakeholders' input on backhaul, to ensure that non-representative elements are set aside, and categorizations and representations of stakeholders' views are correct.

4. Final ecta remarks

26. ecta asks BEREC to be mindful of situations in which lack of availability of backhaul, or lack of availability of backhaul on fit-for-purpose and competitive terms, in any geographic area (i.e. not only rural or remote areas, but even for urban or suburban VHCN, or for 5G small cells on lamp posts, bus stops, etc.) could have major consequences on markets.

27. BEREC and NRAs seem to have mostly examined market(s) for fixed and mobile backhaul from a nation-wide perspective. The supply of backhaul may well be sufficient and

competitive in some areas in some EU Member States today, but certainly not on a nation-wide basis throughout each Member State in the EU.

28. BEREC and NRAs should not proceed from the assumption that mobile retail markets are competitive on a sui generis basis. A modified greenfield approach always needs to be taken, examining markets properly. This could in future lead to findings that fixed-mobile integrated retail markets, or even stand-alone mobile retail markets, do not, or no longer, tend towards effective competition, for instance due to a dearth of relevant fit-for-purpose backhaul provided on a competitive basis to the existing and new locations where backhaul is required.

29. ecta considers that it is therefore entirely justified for BEREC to continue this workstream on the regulatory treatment of fixed and mobile backhaul, and for BEREC to assist NRAs that may experience difficulties in finding the right balance and arguments to address the real-world market situations they are assessing, enabling them to take intelligent regulatory action where it is justified to address a lack of effective competition, whilst continuing to promote progress towards effective competition.

30. ecta's position, in summary, is that regulation of backhaul is likely to be necessary in certain circumstances, but that regulation of an operator with Significant Market Power does not have to mean action to push down its wholesale prices; it can also be action to prevent operators with Significant Market Power from undermining the businesses of emerging competitors, for whom backhaul is an important part of their business case. Competitors should have a fair chance to bring competition to backhaul markets, bringing markets closer to the ultimate goal of achieving effective competition across more and more markets.

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In case of questions or requests for clarification regarding this contribution, BEREC and NRAs are welcome to contact Mr Luc Hindryckx, ecta Director General.