



# **ecta RESPONSE**

**TO THE PUBLIC CONSULTATION BY BEREC  
ON THE  
DRAFT BEREC WORK PROGRAMME 2022**

**BOR (21) 133**

**5 NOVEMBER 2021**

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## 1. Introduction

1. **ecta**, the **European Competitive Telecommunications Association**,<sup>1</sup> welcomes the opportunity to comment on the draft BEREC Work Programme, BoR (21) 133, which covers workstreams to be delivered by BEREC in 2022 (hereafter ‘draft WP2022’) and potential work for 2023 and beyond.
2. **ecta** appreciates that BEREC is offering stakeholders the possibility to contribute to refining the draft WP2022 prior to its final adoption.

## 2. Important comments on the draft WP2022 introduction and background

3. **ecta** expresses its **explicit support for most of BEREC’s draft WP2022**. In this response, **ecta** provides **constructive suggestions** for improvement of the WP2022. **ecta also wishes to express its sincere thanks to BEREC for including Section 1.9 entitled “Business Services”, and in particular to the planned BEREC Report on the regulatory treatment of business services**. This meets a long-standing **ecta** request for BEREC to attach more attention to Business-to-Business (B2B) markets, which in most EU Member States remain characterised by Significant Market Power in the hands of the incumbent telecommunications operator, often with market shares exceeding 60 or even 70%, i.e. far above the prima-facie threshold for Significant Market Power, and this more than two decades after the introduction of full competition. It is high time for this situation to be addressed determinedly.
4. **ecta** appreciates BEREC’s aims to foster and promote independent, consistent and high-quality regulation, and its plan to support the further implementation of the EECC in national practices (*page 4, paragraphs 1 and 5*).
5. **BEREC does not always reflect the full balance of objectives contained in the EECC**. This is a **transversal issue**, occurring in the introduction and background sections, and throughout the draft WP2022. For instance, BEREC states in its introduction that: *“Closing the digital divide entails more than just the roll-out of Very High Capacity Networks. It also requires that end users have access that fits their needs. BEREC will empower end users by further enhancing transparency and (work on) equivalence of access for disabled end users”* (*page 5, paragraph 1*). **ecta** evidently agrees with this statement, but notes that BEREC’s WP2022 generally **omits the take-up and competition dimensions**, which are contained in Article 3 (2) (a) and (b) EECC. **ecta’s concern is that affordability, which is enabled by competition and which drives take-up of network access and services, is seemingly absent from BEREC’s main considerations. ecta asks BEREC to review and modify its draft WP2022 systematically, to ensure that it contains no shortcuts that would, by omission, encourage BEREC or National Regulatory Authorities (hereafter ‘NRAs’) to move away from acting in accordance with the full balance of objectives of the EECC. The ‘take-up’ and ‘competition’ dimensions of Article 3 (2) (a) and (b) must systematically be reflected in each of BEREC’s relevant workstreams.**

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

6. **For two successive years, BEREC’s presentation of its Work Programmes appears to indicate a pivot away from adopting Guidelines and Common Positions** which steer the work of NRAs. Indeed, in the WP2022, BEREC indicates that it will mostly produce Reports. As experience shows, BEREC Reports do not necessarily result in tangible guidance or agreed common approaches. **A clear subject for a BEREC Common Position is the migration from copper to fibre, and the eventual shut-down of copper networks.** At **point 1.1**, *“Report on a consistent approach to migration and copper switch-off (carry-over)”*, **BEREC misses the opportunity, and indeed the window of opportunity, to come forward with a concrete and timely Common Position on one of the most pressing subjects in the electronic communications sector: copper switch-off. BEREC plans to merely issue a Report.** The likely consequence is that it will be the European Commission that will make key regulatory determinations on copper to fibre migration. At **point 5.3.6**, BEREC indicates that it *“[...] will assess the relevance of maintaining BEREC Common Positions on best practice remedies (WLA, WBA, WLL) in their current shape and scope”*. This is a point of **serious concern for ecta** given that it **suggests that BEREC may no longer have a Common Position in the future, or may water down the substantive contents of a long-standing Common Position on the key remedies intended to address Significant Market Power.** This cannot be the path that BEREC is embarking on. **ecta asks BEREC to review and modify its draft WP2022, to work towards more best practices, and more Common Positions, not less.** More broadly, **ecta** considers that BEREC’s mandate is not to stand back and monitor and report, but to act to improve the functioning of electronic communications markets and bring them to effective competition. Improvements should not be focused mainly on end user rights, but especially on the wholesale access obligations resulting from findings of Significant Market Power. Indeed, it is as critical as ever for NRAs to ensure that markets for electronic communications networks and services progress towards effective competition, and to take decisive regulatory intervention where necessary to make effective competition happen in reality. **Keeping the status-quo on electronic communications markets, or even diminishing BEREC and NRA attention to core electronic communications markets and shifting attention and resources to digital markets more broadly, entails the risk of accepting continued Significant Market Power on electronic communications markets.**
7. **ecta** expects to play an active role as a stakeholder in the context of the review of European Commission’s 2010 and 2013 recommendations, the review of the Broadband Cost Reduction Directive, the review of the Broadband State Aid Guidelines, and other legislative proposals expected from the European Commission in late 2021 and during 2022. In this context, **ecta reiterates its demand for BEREC Opinions to be subject to (pre)consultations with stakeholders.**
8. Overall, **ecta** expects BEREC and 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).

### 3. Comments on Chapter III: BEREC Work in 2022

#### 3.1. Strategic Priority 1: Promoting full connectivity

9. **ecta** recognises that BEREC’s introductory reference to “*ensuring a smooth transition from legacy infrastructures*” is well-intended, but asks for it to be boosted for more positive effect, i.e. **the text could usefully be revised to ‘a smooth transition to VHCN networks, which is pro-competitive, non-discriminatory, and is mindful of end user interests’**. This is important to ensure that operators with Significant Market Power are not able to exploit their market power in the transition to VHCN to damage competition, including by: (i) denying access to new resources, and (ii) continuing self-supplying resources whilst denying continued access to them to third parties. **ecta** is on record in stating publicly that **no-one can be left behind**, and that **shutdown of copper must mean shutdown of copper for everyone, including self-supply by operators with Significant Market Power**.
10. Section 1.1: Report on a consistent approach to migration and copper switch-off (carry-over). **ecta** appreciates that BEREC will open a public consultation at Plenary 4 2021 prior to adoption of a Report at Plenary 2 2022, but **ecta is concerned that this is coming very late, and only in the form of a Report. Indeed, without prejudice to ecta expecting to be given the opportunity to formulate its detailed comments on a future document, ecta asks BEREC to ‘upgrade’ this workstream to result in the delivery of BEREC Guidelines or a BEREC Common Position. This should be done by Plenary 2 2022 in order for it to be timely and to not miss the window of opportunity to provide a framework that materially and appropriately structures the copper to fibre migration in a harmonized pro-competitive manner.**

**Alternative operators represented by ecta are committed to transitioning to fibre networks, and to rapid properly organized copper switch-off**, so as to avoid unnecessary parallel running of copper and fibre networks and provide the benefits of VHCN to as many end users as possible. Evidently, it is important for **ecta** members relying on wholesale copper access to continue to serve their customers in the transition to VHCN, onto the network of the same operator with Significant Market Power or onto their own or another third-party network.

**ecta considers BEREC’s scope of attention (merely 5 paragraphs on pages 7 and 8) insufficient in terms of safeguarding a pro-competitive and non-discriminatory transition to VHCN.** Elements that need to be urgently and explicitly addressed in BEREC’s output, preferably in the form of Guidelines or a Common Position, include the following:

- i. Definition of the architecture and especially the wholesale access/hand-over points of the VHCN network of the operator with Significant Market Power, jointly with wholesale access takers migrating to it (in particular in accordance with points 18, 23 and 39 of the European Commission’s 2010 NGA Recommendation<sup>2</sup>).

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<sup>2</sup> 2010/572/EU: Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA): <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010H0572>

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- ii. Active involvement of wholesale access takers in the definition of the transition/migration arrangements of the operator with Significant Market Power, related timetables (not just start and end dates, but all steps of the timetable, where necessary on a geographically distinct basis).
  - iii. Definition, monitoring and enforcement of Key Performance Indicators (KPIs) and Service Level Guarantees (SLGs) for the transition/migration arrangements, with specific attention to covering all types of network usage (B2C, B2B, wholesale, backhaul, etc.) that need to be covered by the transition/migration.
  - iv. Imposition of a strict non-discrimination obligation on the operator with Significant Market Power and active supervision thereof by the NRA, to ensure that wholesale access takers benefit from the same transition arrangements, timing, and conditions (incl. technical and economic conditions) as all (corresponding) activities of the operator with Significant Market Power, whether retail, wholesale, or their own subsidiaries or partners, internal, etc.
  - v. Guidance to the effect that NRAs seek signed commitments from operators with Significant Market Power that ALL copper lines will be adequately addressed in the transition/migration, notably to ensure that the operator with Significant Market Power cannot continue self-supplying resources whilst denying continued access to them to third parties. This is particularly relevant for copper lines that may be used to supply 5G small cells, for backhaul, for backup (of fibre lines), industrial control systems, and internal usage by the operator with Significant Market Power, for which the copper network may have residual usefulness.
  - vi. Reference Offers, subject to explicit approval and modification powers by National Regulatory Authorities, covering all elements of the transition/migration arrangements of the operator with Significant Market Power. [ecta](#) notes in this context that the BEREC Guidelines on the minimum criteria for a reference offer relating to obligations of transparency - BoR (19) 238 do not address copper migration and switch-off. These BEREC Guidelines could therefore also usefully be revised, to ensure that NRAs are enjoined to require reference offers with adequate contents.
  - vii. Stability of wholesale charges for copper-based network access. [ecta](#) is aware that some operators with Significant Market Power exert pressure on NRAs, and lobby the European Commission, to loosen or remove wholesale copper price controls as part of the transition to VHCN. These arguments appear to be partially echoed in the Visionary Analytics study performed for the European Commission. [ecta](#) asks BEREC to reject arguments to the effect that raising the wholesale charges for copper-based services would facilitate the switch from legacy to VHCN-based services. This will only lead to unjustified discrimination, benefiting the operator with Significant Market Power for whom the price of copper access is an internal transfer, while the cost for alternative operator relying on copper-based wholesale services is a very real external cost. [ecta](#) points out that what drives the switch from

legacy to VHCN-based services is not the wholesale or retail prices for copper-based services, but other elements such as the availability of infrastructure, the superior quality of service and user experience offered by VHCN, the digital readiness of the end users, and active promotion of VHCN-based services (including operators' own initiatives and discounts, as well as government-led schemes such as voucher schemes for certain categories of citizens and/or small businesses).

ecta emphasises in this context that **KPIs and SLGs for the new network of the operator with Significant Market Power need to be established, and must be expected to be better than those of the legacy network.** This comment is made because situations have already emerged in some Member States where the repair-time SLG for the new network is inferior to that of copper local loop unbundling, including where it concerns the premium SLGs. This is really not the direction of travel that can reasonably be expected. Fibre cuts are a known reality, Operational Support System IT problems are a reality, but ambitious VHCN quality levels (for initial provisioning and for uptime and repairs), and best practices and incentives for improvement must be made mandatory where it concerns the regulated wholesale access inputs of operators with Significant Market Power.

ecta notes that BEREC indicates that: *"Based on detailed data collected from the respective NRAs which will include the stakeholders' view on migration and their involvement at national level, the aim of the Report is to identify a consistent approach to migration and copper switch-off."*(page 8, paragraph 2). ecta respectfully comments that **nothing replaces interactive discussion between BEREC and stakeholders,** and that it is important for BEREC to directly hear and understand the points made by stakeholders, including in response to one-another's arguments. Therefore, **ecta recommends that a workshop (e.g. with representative trade associations) be held urgently (preferably still in 2021), similar to the workshops that were held in the run-up to the BEREC Guidelines on Article 76 EEC.**

11. Section 1.2: Report on regulatory treatment for fixed and mobile backhaul (carry-over). ecta appreciates that BEREC has opened a public consultation on this topic. Please refer to the ecta response to it. With regard to the text contained in the draft WP2022, **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.
12. Section 1.3: Report on the 5G Value Chain (+additional Report on supply-chain diversification and the anticipated pace of innovation – carry-over). ecta appreciates that BEREC will hold public consultations on both these planned reports. It is clearly relevant

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for BEREC to address the 5G ecosystem and value chain in the wide sense (e.g. both supply and demand, retail and wholesale, the role of verticals and private local networks, etc.).

A concern, however, is that **BEREC positions itself as an observer, rather than as an enabler and as a problem solver**. More concrete work on 5G could be envisaged. **ecta** would like to suggest that **BEREC should specifically consider giving clear guidance on: (i) network sharing in the context of 5G – including a revision of the BEREC Common position on infrastructure sharing (BoR (19) 110), and (ii) network slicing and the interoperability of network slices across borders**. In addition, BEREC could usefully **engage more concretely on mobile B2B markets**, relationships between 5G operators and industry verticals and give more consideration to IoT, and its development locally, nationally, and on a multi-country/pan-EU basis.

Section 1.4: Report on wholesale mobile access connectivity. **ecta** counts both Mobile Network Operators (MNOs) and Mobile Virtual Network Operators (MVNOs) among its members. It is **not very clear at this stage what to expect from this BEREC workstream**, and in particular whether it will be a ‘status quaestionis’ on wholesale mobile network access, or whether a more prospective look at possible 5G wholesale relationships is foreseen. **ecta** is interested in learning what BEREC intends to come up with where it states that *“Factual investigations of the competitive dynamics are therefore important and may also affect choices available to end users of new businesses in terms of connectivity providers (MNOs, MVNOs, other micro operators e.g. using a network slice).”* (page 10, paragraph 4). An important **aspect that is missing, from ecta’s perspective, is IoT, and its development locally, nationally, and on a multi-country/pan-EU basis**. We realize that the comment made here as is the same as on Section 1.3, but it is important for BEREC to assess and address multiple aspects of IoT, for BEREC and NRAs to understand the multi-country, pan-EU, and indeed global dimensions of important IoT market segments.

13. Section 1.5: Workshop on Open RAN. **ecta** supports BEREC in engaging with the topic of Open RAN, taking the neutral perspective of a body bringing together independent national regulatory authorities, that have mandates specified by the EECC. Please allow us to request that the planned workshop be open to all stakeholders.
14. Section 1.7: Workshop to share experience on the implementation of Article 22 EECC. **ecta** recognizes that it is important and relevant for authorities to learn from each-other, through an experience-sharing forum. However, it is clearly also relevant for network operators and service providers to inform BEREC and NRAs, and to exchange views in public among one-another, on their experience with information requests they receive in application of Article 22 EECC, how the information they provide is treated by authorities, and what the impact ultimately is where measures are taken that relate to network roll-out, public funding, and their impact on competition. **ecta requests BEREC to also organize a workshop with industry stakeholders, attended by NRAs and other relevant authorities**.
15. Section 1.8: BEREC Report on competition amongst multiple operators of NGA-networks in the same geographical region. **ecta** wishes to register its **serious concerns about the**

**wording** “The networks of different operators may for example partly overlap or could be very close to each other and could easily be expanded. Also network operators may use different business strategies – to differentiate (or not) prices across their networks dependent on presence of other operators [...]” (page 13, paragraph 2). This wording is softer than that which was employed in the draft WP2021, but it remains highly suggestive that the existence of local/regional competitors, and the commercial reaction to their existence by the operator with Significant Market Power, may in future be invoked to inappropriately define separate geographic markets, and inappropriately deregulate a dominant undertaking on account of it engaging in strategic behaviour and possible regulatory gaming. **ecta questions whether this workstream is appropriate and will lead to welfare-enhancing outcomes, and urges BEREC to be very cautious in not triggering NRAs into proceeding to misinformed premature deregulation of operators with Significant Market Power, leaving them free to seriously damage the businesses of emerging competitors. ecta also urges BEREC to caution NRAs against declaring fledgling new entrant operators as holding Significant Market Power in sub-national markets, e.g. where they have led the development of fibre networks and provide fit-for-purpose wholesale access in response to demand. Finally, ecta asks BEREC to be mindful of situations where two fully-fledged parallel infrastructures exist (e.g. the incumbent operator and a HFC cable operator) and where the retail market does not deliver the benefits to end users that would be expected in a competitive market and/or fit-for-purpose wholesale access is not delivered without the imposition of regulatory obligations (“two is not enough”<sup>3</sup>).**

16. Section 1.9: Business Services. BEREC Report the regulatory treatment of business services + External study on the evolution of business services. As is stated in paragraph 3 above, **ecta is thankful to BEREC for including Section 1.9.** This meets a long-standing **ecta** request for BEREC to attach more attention to Business-to-Business (B2B) markets, which in most EU Member States remain characterised by Significant Market Power in the hands of the incumbent telecommunications operator, often with market shares exceeding 60 or even 70%, i.e. far above the prima-facie threshold for Significant Market Power, and this more than two decades after the introduction of full competition. It is high time for this situation to be addressed determinedly.

**ecta wishes to add that the retail B2B market needs to be analysed carefully, for instance examining the needs of business customers (and public administrations and other socio-economic drivers having similar needs) that are local, regional, national, and multi-country, distinguishing entities that have one site from entities that are**

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<sup>3</sup> In 2008, the NRA of The Netherlands (OPTA at the time) introduced its broadband market analyses with reference to the premise that “two is not enough”, which was discussed in extenso in a 2006 OPTA Economic Analysis Team paper entitled “Is two enough?”:

[https://www.acm.nl/sites/default/files/old\\_publication/publicaties/9555\\_Presentatie%20marktanalyses%20websitesite.pdf](https://www.acm.nl/sites/default/files/old_publication/publicaties/9555_Presentatie%20marktanalyses%20websitesite.pdf)

<https://www.acm.nl/en/publications/publication/9102/Economic-Policy-Note-6-Is-two-enough>

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multi-site, e.g. distinguishing the large central locations such as headquarters, from smaller and satellite offices, factories, dealerships, etc. The growing trend of working from home and the resulting needs must also be taken into consideration. Account also needs to be taken that some very small businesses can have very high bandwidth and/or QoS requirements, whereas some large businesses can have more modest requirements at some locations, including sites that could be served with asymmetric connections, with or without enhanced QoS. Repair times for all B2B connections are clearly a very important theme, as are backup solutions. Wholesale markets also need full attention, in particular to verify whether fit-for-wholesale products are made available commercially, and whether there is a need for regulatory intervention, and where geographically. Relevant dimensions include suitability of wholesale access to the purpose, in particular QoS, and related SLAs and SLGs, as well as applicable one-off and recurring pricing. Here again, especially where regulation is concerned, the repair times are absolutely crucial, as they make or break sustainable access-based competition.


ecta considers that alternative operators must be deeply involved in BEREC's work, for instance by adding a Workshop, as well as one or more Workshops associated with the planned external study (similar to how the European Commission proceeds when commissioning external studies). A public consultation before finalization of the Report is also warranted.

Finally, ecta urges BEREC to exercise particular caution when selecting a contractor for the external study mentioned in Section 1.9.2. The contractor should be very familiar not only with the B2B market, but also demonstrate a substantial track record of work relating to the ex-ante regulation of operators with Significant Market Power in the electronic communications sector.

### 3.2. Strategic Priority 2: Thriving sustainable and open digital markets

17. ecta reiterates a point that it has made on several previous occasions, which is that **BEREC's and NRAs' interest in digital markets/wider digital ecosystems (and now Artificial Intelligence) should not result in diminished attention and shifting resources away from dealing with the very real competition problems that continue to characterise electronic communications network and services markets.** BEREC and NRAs must continue to fully exercise their statutory duties, notably taking all actions necessary to fulfil their duties to promote competition on electronic communications markets. That being said, ecta considers it justified for BEREC to examine the links between electronic communications network/services markets and the digital ecosystem.
18. Section 2.1: Report on the Internet Ecosystem (carry-over, before named: Report on the Internet Value Chain). ecta notes that BEREC indicates that the public consultation will now be started after Plenary 2 2022 (previously Plenary 1 2022), prior to adoption of the Report at Plenary 4 2022 (previously Plenary 3 2022). This seems incredibly late, and even later

than previously planned. Whilst **ecta** broadly agrees with the scope of the work envisaged, **two critical remarks** need to be made:

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- ii. BEREC states that it organized (will organize) a Heads Workshop at the end of 2021 where key actors will be invited to participate. Workshops and in-depth meetings with relevant actors are also mentioned (*page 17, paragraph 4*). **ecta** sees a risk that these interactions will be very selective, and that particular actors from particular sectors will be preselected, perhaps not including **ecta** and its challenger operator members. **ecta hereby formally states that it considers itself and its members to be eminently relevant stakeholders in the Internet value chain**, notably on account of being access network providers (fixed and mobile), facilitating a large part of local/regional/national/global internet connectivity and operating email, cloud and identity services. As such, **ecta expects to be able to participate in this work at the same level as any others to be invited**. Also, after a Heads Workshop is held, which clearly will influence decision-making, it would be appropriate to report to stakeholders on what has been presented by whom, and which topics were discussed.

In addition, the workstream on **IPv6**, which was part of the earlier planned Report, seems to have disappeared. Has work been conducted? (the draft WP2022 refers to two workshops held in Q3/4 2020 on IPv6 and traffic identification (*page 16, paragraph 5*)). Has the work been finalized? What have been the outcomes? Given the importance of IPv6 transition for several of our members, **ecta** insists on being able to participate in full in any work on the topic, and to be informed on its outcomes.

19. Section 2.2: BEREC Report(s) for an effective enforcement of the regulatory intervention on digital gatekeepers. **ecta** looks forward to one or several reports that will provide a comprehensive view of the internet ecosystem, but **disagrees that it should concern only those aspects that are beyond the network layers and the ECSs supporting internet**

access. On the contrary, **ecta** considers that the network and internet access service layers need to be described, as well as their inter-relationship with the higher layers, which need to be clearly explained, including for policy-makers and legislators to gain a full understanding of these fundamental inter-relations. **ecta** notes that whilst the title and text of the workstream refer to report(s), the concluding text box does not indicate what the deliverables will be. This questions the purpose of the report(s) and should be clarified in the final BEREC WP2022. **ecta** has no objection to BEREC involvement in work relating to digital gatekeepers, but stresses that this cannot be to the detriment of BEREC fully carrying out its duties as per its mandate, and NRAs fully carrying out their duties as regulatory authorities in charge of electronic communications markets.

20. Section 2.3: Report on challenges and benefits of Artificial Intelligence (AI) solutions in the telecommunications sector (including use cases). **ecta** welcomes this workstream, as it could provide interesting insights for market participants. It is notable that the description that BEREC provides (*page 19*) is more geared towards BEREC involvement in the EU procedure to adopt the Artificial Intelligence Act, and possible implementation thereof.
21. Section 2.4: Open Internet. **ecta** has no particular comments to make on the various workstreams mentioned, other than simply reiterating a point it has made more than once since 2017, which is that a **cost-benefit analysis is needed before imposing administrative burdens and costs on operators (e.g. for Net Neutrality Measurement Tools and Regulatory Assessments), with particular regard for smaller challenger operators and new entrants which may not have the scale and resources to adjust to constantly changing requirements**. Separate from this, please also refer to paragraph 37 below, where a connection is introduced between Open Internet and environmental sustainability.

### 3.3. Strategic Priority 3: Empowering end-users

22. **ecta** observes that this part of the draft WP2022 quasi equates end users with consumers. This is an error. As digitalisation of society and the economy increases, the role of electronic communications in a Business-to-Business (B2B) environment (businesses as end users) and Business-to-Business-to-consumer (B2B2C) environment increases radically. This is expected to receive a further boost with developments of services for industry verticals as intermediaries serving end users. Similarly, as home and remote working, e-education, e-health, e-government increase, which is also clearly the case in the current circumstances, the role of business-grade communications for the public sector as an end user or intermediary increases, at large central sites, but also on a decentralised basis. **ecta** therefore **calls upon BEREC to thoroughly review all work items part of Strategic Priority 3, to adjust them to clearly separate the B2C from the B2B and public administration dimensions. Please note that, in several instances, this means that it is justified to exclude B2B services from protections that are evidently intended only for consumers (or for narrowly defined categories of business users and NGOs that apply explicitly to benefit from the protections offered to consumers)**.

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23. Section 3.1: Workshop on the application of rights of end users in the EECC. **ecta** welcomes this workstream, being aware that BEREC is required by Article 123 of the EECC to provide an Opinion, which will serve as input to the European Commission to publish a Report and potentially submit a legislative proposal to amend Title III of Part III of the EECC, potentially boosting consumer protection and possibly enhancing other end user rights. BEREC makes reference to emergency services and number-independent interpersonal communications services in this context (*page 23, paragraph 1*). **Overall, given the delays in many Member States in transposing the EECC, it seems doubtful that sufficient experience has been gained to give serious consideration to modifying the EECC. The focus should rather be on effectively applying its provisions in a manner which is non-disruptive.** **ecta** also notes the reference made by BEREC to a potential joint BEREC-BEUC workshop. As **ecta** has remarked on previous occasions, **a bilateral workshop solely involving BEUC is inappropriate; it should be open to all interested stakeholders. ecta considers itself and its members to be eminently relevant stakeholders.** As such, **ecta expects to be able to participate in this work at the same level as BEUC.**
24. Section 3.2: Report on best practices for ensuring equivalence of access and choice for disabled end users. **ecta** appreciates that this workstream will be subject to public consultation. It will be important to ensure that disabled end users can benefit from up-to-date solutions, many of which are available on the internet, and to exercise restraint, such as avoiding generalizing old-fashioned specific services which are in place in a very small number of Member States.
25. Section 3.3: Workshop on the digital divide. **ecta** has seen the presentation made at the Stakeholder Forum of 28 October 2021 on this topic, and BEREC has published the study. It is unclear what the Heads Workshop on the digital divide, which is closed to stakeholders, will lead to. **ecta calls on BEREC to conduct any activities on the digital divide in public.**

#### 4. Comments on Chapter 4: Cooperation with EU institutions and institutional groups

26. **ecta** simply wishes to comment that it can be observed, from BEREC's frequent Chair and Vice-Chair statements at BEREC debriefings and stakeholder events in the past few years, that BEREC appears to be seeking to extend its areas of activity well beyond electronic communications, and potentially beyond its own capabilities and resources, including on the international stage. This may result in unjustified de-prioritisation of the activities that are core to BEREC and NRA mandates under the applicable EU legislation, and is therefore of concern to **ecta**, which represents the interest of challenger operators in electronic communications markets.

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## 5. Comments on Chapter 5: BEREC obligatory work

27. [ecta](#) provides selective but important substantial comments and suggestions below.
28. Section 5.1.2: Update of criterion four of the BEREC Guidelines on Very High Capacity Networks. BEREC indicates that it will initiate work based on data collected from mobile network operators on 5G (*page 28, paragraph 4*). [ecta](#) agrees that this will become relevant at some future time, but cautions against prematurely updating criterion four on too prospective a basis, which could result in unexpected consequences, and possible undue distortions, in various policy areas.
29. Section 5.1.3: BEREC Input to the European Commission regarding the evaluation and potential review of the EU State Aid Guidelines (carry-over). **[ecta](#) strongly supports BEREC involvement in the review of the Broadband State Aid Guidelines. In particular, it would be most valuable if BEREC could prepare a Report giving an overview of which operators received State Aid over the past 10 years or more, for which purpose, the associated active and passive access obligations that were imposed on the beneficiaries of the state aid, and what has been the result of the projects that benefited from State Aid not only in terms of deployment but also in terms of wholesale and retail take-up ratios.** This would provide substantive input to the European Commission, and to the sector at large, and could help to draw lessons on what works and what does not, on whether some categories of operators benefit disproportionately, the effects on competition, etc. **It is self-evident that such a BEREC Report, and in fact any input BEREC provides on State Aid Guidelines, should be a matter of public record, and open to stakeholder input and review.**
30. Section 5.1.4: BEREC Opinion on the review of the Access Recommendations (carry-over). This is a topic of fundamental importance to [ecta](#) and its members. **[ecta](#) thanks BEREC for having hosted a discussion on the topic at the Stakeholder Forum of 28 October 2021.** More stakeholder involvement is essential, given that – as expressed at the Stakeholder Forum – [ecta](#) has very serious objections to the contents of the Visionary Analytics study prepared for the European Commission. Now that there is more time than previously expected, **[ecta](#) expects BEREC to exercise intellectual leadership on the topic, by adopting Guidelines or a Common position on copper to fibre migration and copper shut-down, and by taking a firm stance on the need for NRAs to be able to conduct market analyses without undue new constraints going beyond the EECC.** It needs to be ensured that the forthcoming European Commission recommendation implements the EECC rather than extending an agenda focused on granting regulatory relief to operators with Significant Market Power in the hope that this will trigger them to invest in fibre. Investment in VHCN is not subject to the risks which were perceived in 2010 and 2013; operators are rolling-out; management teams have gained experience and a good understanding of the techno-economic situation; solvable demand is unquestionably present (and strengthened by the COVID-19 pandemic) and here to stay; financial investors (old and new) have integrated the economic picture in their assessments and forecasts. Co-

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investments are possible and are happening without the need for regulatory concessions to dominant operators, risk premia over and above the WACC, or granting other ‘upside benefits’, ‘fair bet’ or other regulatory concessions to operators with Significant Market Power. Alternative operators are investing massively in fibre, fixed-wireless access and 5G; they are the competitive engine; the dominant operators are racing to catch-up, with some still holding out for regulatory relief because it has been put on the table. It is time to take regulatory relief for operators with Significant Market Power off the table, because it is not justified. As always, **ecta is keen for BEREC to consult on its Opinions, and very particularly the key forthcoming Opinion on the review of the 2010 and 2013 EC Recommendations.**

31. Section 5.1.5: Peer review process. The RSPG-led peer review process on radio spectrum assignment has continued to occur only very occasionally, when Member States ask for it, and if/when it did happen, it was in a closed forum. As a matter of fact, it is not even known whether peer reviews were conducted in 2021 and whether BEREC participated. **This is a matter of elementary transparency.** *ecta* notes in this regard that BEREC states that *“BEREC’s participation in the Peer Review Forum contributes to the objective of promoting full connectivity by enabling relevant exchanges with the RSPG on the market-shaping aspects of spectrum assignment.” (page 30, last paragraph).* This **causes ecta to reiterate previously expressed very serious concerns:** has BEREC not addressed the access and take-up dimensions of Article 3 (2) (a) EEC – which also applies to networks relying on radio spectrum? Has BEREC not addressed Article 5 of the Radio Spectrum Policy Programme, which enables pro-competitive conditions (e.g. spectrum set-asides for new entrants/operators with a structural spectrum deficit, national roaming, wholesale access) to be included in spectrum assignment proceedings? **It is essential for stakeholders to understand which general policy line is taken by BEREC in peer review processes, and for BEREC to report at least ex-post on the nature of its intervention, and on the outcome of its intervention, if any.**
32. Section 5.1.6: Ad hoc work relating to network security and cybersecurity. *ecta* takes good note of what BEREC describes in this regard (*pages 31 and 32*). In addition, *ecta* considers that **BEREC should systematically bring much-needed technical objectivity to the security discussions, i.e. any cybersecurity measures, including the determination of high-risk suppliers, should be subject to objective assessments and justifications based solely on the objective facts.** One question is whether the title of Section 5.1.6 and the planned deliverable, a *“BEREC Internal Report on multivendor strategies and national resilience”*, which will not be made public, actually correspond exactly to one-another. More transparency would be most welcome, even though this is understandably a sensitive topic. It needs to be noted in this regard that **adopting multi-vendor strategies may be possible for large groups, but is less evident, and thus much more burdensome and costly, for smaller and challenger operators that do not have the resources (human, financial, etc.) of the large groups.**

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33. Section 5.2.1: BEREC Opinion on Article 123. As already stated in paragraph 23 above, [ecta](#) welcomes this workstream, being aware that BEREC is required by Article 123 of the EECC to provide an Opinion, which will serve as input to the European Commission to publish a Report and potentially submit a legislative proposal to amend Title III of Part III of the EECC, potentially boosting consumer protection and possibly enhancing other end user rights. **Overall, given the delays in many Member States in transposing the EECC, it seems doubtful that sufficient experience has been gained to give serious consideration to modifying the EECC, so soon after its adoption, and in some cases only shortly after its implementation in the Member States. The focus should rather be on effectively applying its provisions in a manner which is non-disruptive.**

More generally, [ecta](#) asks BEREC to emphasise in its future Opinion that: (i) **competition is the best guarantor of end user rights**, (ii) the **ability to switch providers easily is an end user right of utmost importance**, and (iii) lack of information may hold back end users from exercising their rights, but needs to be appropriately balanced with imposing heavy administrative burdens on operators.

34. Section 5.2.2: Delegated act(s) concerning emergency communications. [ecta](#) is aware of this topic, including the legal requirement for a BEREC Opinion in 2022 prior to the European Commission adopting implementing measures. Implication of industry stakeholders is essential, in particular to avoid that burdensome, and possibly unrealistic, 'solutions' are imposed on industry across the board. The concern in this regard is very real, given the contents of the Roadmap published by the European Commission for consultation. [ecta](#) has responded to that Roadmap consultation. The position of challenger and smaller operators, B2B focused operators, multi-country operators, and niche players needs to be taken into account, to avoid unexpected consequences, undue cost and technical burdens, and possible distortions of competition.

35. Section 5.2.3: International roaming benchmark data Report and Sections 5.2.6, 5.2.7, 5.2.8 and 5.2.9 affected by the review of the EU Roaming Regulation. [ecta](#) requests that the scope of the recurring BEREC report be extended to cover IoT, permanent roaming for IoT, 5G, roaming for industry verticals, and for network slices if applicable. Clearly, once the revision of the EU Roaming Regulation will be adopted, BEREC will have to update its retail and wholesale roaming guidelines, and conduct new work on databases. [ecta](#) looks forward to open stakeholder consultation and cooperation on these topics, including on the technical aspects thereof.

36. Section 5.3.1: Implementation of the EECC and the BEREC Regulation. [ecta](#) asks BEREC to involve stakeholders in this workstream, and thanks BEREC in advance for indicating (*page 37, paragraph 1*) that it intends to organize a workshop to exchange views with all interested stakeholders, meeting an [ecta](#) request made last year.

37. Section 5.3.2: Developing BEREC's basic knowledge about the different aspects of sustainability in the digital sector (carry-over) + Section 5.3.3 Indicators to measure environmental impact of ECNs. [ecta](#) welcomes these BEREC workstreams, and believes that BEREC is well-placed to give public recognition to the genuinely substantial efforts

engaged by the telecommunications industry, and notably many **ecta** members which have already committed to meeting science-based environmental sustainability targets. A BEREC knowledge base, be it preliminary, will be useful, not so much for awareness-raising (the awareness is clearly there, and actions are being undertaken by the industry) but to help communicate to policy-makers and legislators what is already done, what is in the pipeline, and what remains to be done, within the telecommunications industry. **ecta** also expresses the hope that:

- i. BEREC will help with communicating the message that the telecommunications industry's exceptional position to help other sectors improve their environmental performance is an important factor to take into account, and
- ii. The BEREC workstream will not be used to seek to justify sector-specific obligations for electronic communications network operators and service providers.

In this light, we inform BEREC that on 31 August 2021, **ecta** responded to the RSPG consultation on the draft RSPG Opinion on the role of radio spectrum policy to help combat climate change – RSPG21-027 FINAL. This included an **ecta** expression of concern on the way in which the draft RSPG Opinion was formulated, which could lead to imposing an additional layer of administrative burden specific to Mobile Network Operators and Fixed Wireless Access Operators, potentially extending obligations on such operators over and above horizontal measures that may be adopted for all industries. **ecta** trusts that BEREC will also be aware of the concern that the telecommunications industry, and perhaps the wireless part of the industry specifically, could be singled out inappropriately, and be made subject to an additional layer of administrative burden.

Another point to be raised in the context of environmental sustainability is the role of terminal equipment and other equipment located at end user premises. Such equipment is responsible for the bulk of greenhouse gas emissions of digital technology, compared to much more modest numbers for networks and data centers.

According to a 2020 Report of the French Senate (information mission on the environmental footprint of digital technology<sup>4</sup>), terminal equipment accounts for 81% of the greenhouse gas emissions from digital technology at this time, whereas networks (fixed and wireless) account for 5%, and data centres account for 14%. The Report usefully clarifies that the environmental impact of *producing terminal equipment* is far greater than that of the *use of terminal equipment*.

Nevertheless, the *use of terminal equipment* is relevant in its own right. Some equipment located at end user premises (e.g. set-top boxes, printers) is configured to avoid fully powering off, or by internalizing the power supply or power cord. This should change to allow the easy unplugging overnight or the installation of a timer on the electrical outlet.

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<sup>4</sup> Rapport d'information n° 555 (2019-2020) de MM. Guillaume CHEVROLLIER et Jean-Michel HOULLEGATTE, fait au nom de la commission de l'aménagement du territoire et du développement durable, déposé le 24 juin 2020: [http://www.senat.fr/rap/r19-555/r19-555\\_mono.html](http://www.senat.fr/rap/r19-555/r19-555_mono.html)



Furthermore, a connection may be made between the sustainability topic and the Open Internet Regulation, where it concerns terminal equipment, which is a major direct source and indirect generator of carbon emissions. Enabling and encouraging end users to voluntarily restrict the data consumption of handheld and other devices could be a relevant means to combat climate change. This is particularly relevant for video streaming at 4K and 8K resolution to handheld and other small devices, which do not improve the user experience in practice compared to FHD resolution. What it does is causing far greater bandwidth consumption, forcing operators to dimension their networks to a larger scale (larger dimensioning of core network and RAN equipment, more equipment at more locations), and thus potentially leading to a larger than needed environmental impact.

38. Section 5.3.5: Article 32/33 Phase II Process. ecta reiterates its earlier request for BEREC to involve stakeholders in this workstream. Experience has shown that the Phase II process leading to a BEREC Opinion is a black box for stakeholders, with BEREC actively resisting stakeholder input. A moment of self-reflection by BEREC, and taking input from stakeholders, is appropriate as the EECC is transposed into national law, and notifications are effectively be made in application thereof. In addition, ecta expects that BEREC's guidelines on how it works on Phase II cases should not be internal and confidential, but instead be public and open to comments from interested stakeholders.
  
39. Section 5.3.6: Internal workshop on relevance of maintaining BEREC Common Positions on best practice remedies (WLA, WBA, WLL). As already expressed forcefully in paragraph 6 above, BEREC indicates that it "[...]will assess the relevance of maintaining BEREC Common Positions on best practice remedies (WLA, WBA, WLL) in their current shape and scope" (page 40, paragraph 1). This is a point of **serious concern for ecta** given that it **suggests that BEREC may no longer have a Common Position in the future, or may water down the substantive contents of a long-standing Common Position on the key remedies intended to address Significant Market Power. This cannot be the path that BEREC is embarking on.** ecta asks BEREC to review and modify its draft WP2022, to work towards more best practices, and more Common Positions, not less. The widespread transition to end-to-end fibre networks represents an opportunity to unburden NRAs from technical legacies, for BEREC and NRAs to unequivocally specify what is the right thing to do on WLA, WBA and WLL (which remain relevant descriptions for wholesale inputs), and to take the historic opportunity to lay down a common approach to the right remedies for Significant Market Power. Clearly, this should not only be an internal exercise, but open to full stakeholder input and consultation. **The time to act on this is now.**
  
40. Section 5.3.7: Report on Regulatory Accounting in Practice. ecta appreciates the value of this recurring report. It should definitely continue to be published annually, and continue to be improved. ecta also wishes to express its **specific comments on three aspects** in this section of the draft WP2022.
  - i. BEREC states that: "[...]it will be checked in how far the Report will continue to collect data on the methodology and input parameters used to calculate the rate of return on

capital employed and look into the impact of both on the result". (page 40, last paragraph, and page 41, first paragraph). The rate of return on capital employed and the WACC are two entirely different items, and this should be reflected correctly.

- ii. BEREC states that "BEREC will evaluate how the 2022 Report will provide evidence for WACC calculation practices among NRAs given the applicability of the WACC Notice". (page 41, paragraph 5). This is most peculiar. ecta would expect NRAs to apply the WACC Notice, and this not to have to be a matter of discretion. However, we have learned a few days ago how the European Commission commented on a German notification that involved a longer (10 years instead of 5) averaging period for the calculation of the Risk Free Rate, which justifies such BEREC reporting to make public the lack of harmonized approach.
  - iii. Most critically, **ecta wishes to express its strong disagreement with BEREC's statement:** "It will include data regarding if and how NRAs account for the higher risk of investing in very high capacity networks (for example through the application of a risk premium which is added to the calculated WACC)." (page 41, paragraph 5). **This wording should be removed from the final BEREC WP2022, because it inappropriately contains prejudice in favour of the existence of risk, and in favour of WACC uplifts.** ecta considers that there is no ground, certainly not in 2021, for any risk premium added to the calculated WACC of an operator with Significant Market Power investing in a fibre network. For further elements in support of this ecta position, please refer to paragraph 30 above.
41. Section 5.3.8: Weighted Average Cost of Capital (WACC) parameters' calculation according to the European Commission Notice. **ecta considers that it is absolutely imperative that this Report becomes subject to public consultation. This is the case because BEREC will make choices, for instance in selecting peer countries. Such choices will affect the outcomes of WACC calculations in Member States, and thus should be open to contradictory debate.**
  42. Section 5.3.9: Report on monitoring of the termination rates for mobile and fixed voice calls. ecta considers that publishing this periodic report will retain its value, and as such this should continue to be done on an annual basis. This is the case notably because the Delegated Regulation entails the possibility that operators in some countries are able to increase wholesale call termination rates. Monitoring SMS TRs has shown its value, notably to expose that – in a deregulated environment – rates differ by orders of magnitude, without relationship with cost. Smaller operators may have to rely on BEREC's reporting to become aware of potential discrimination, e.g. the largest operators charging them at the level of the caps, while exchanging traffic below the Eurorate caps with other large operators.

## 6. Comments on Potential BEREC work for 2023 and beyond

43. **ecta** thanks BEREC for identifying work with a longer-term horizon, and would advocate the addition of a further item: active monitoring of IoT markets, including the pan-EU dimension of parts thereof, and the identification of problems that impede pan-EU development of IoT.
44. **ecta** also wishes to express its disappointment that the item on non-discrimination on quality of service, which was pushed back in two consecutive BEREC Work Programmes to the potential work for the subsequent year, now seems to have been removed altogether. This is a serious cause for concern as it seems that **BEREC absolutely underestimates the importance of non-discrimination on wholesale services by operators with Significant Market Power. This should be a priority item. It should be restored, and it should be an actionable workstream for 2022.** The same applies for the workshop on the wholesale replicability test, which also seems absent from the draft WP2022, whereas it was included in previous BEREC (draft) Work Programmes. Has this workshop been held? If so, what was the outcome?
45. Section 7.1: Update of the report on third-party payment charges. **ecta** has responded to the BEREC public consultation on this topic, clearly expressing doubts that further BEREC work would be justified. This was after already expressing doubts in response to WP2020 and WP2021 consultations. **ecta** is puzzled as to why BEREC keeps pushing this workstream. This **is not a priority, and it is not an area readily suitable for harmonization given the very different national situations and market trajectories.**
46. Sections 7.2, 7.3 and 7.6: Report on key elements of the functioning of the EECC, Experience-sharing on the Implementation of Guidelines, and Stock-taking on national experiences of the implementation of the EECC. These themes are eminently relevant for stakeholders such as **ecta**, and therefore **ecta** requests to be involved in the workstreams and in any workshops foreseen. Workshops on these topics should not be limited to NRAs.
- i. The Report on key elements of the functioning of the EECC and the stock-taking exercise on national experiences of the implementation of the EECC should not only assess whether the EECC provisions have been put into effect, but also what the effect thereof has been with regard to the achievement of the objectives of the EECC. In particular, **ecta advocates that there should be an assessment as to whether the EECC provisions have increased or decreased competition, in which direction end user prices and quality have evolved, what the impact has been on take-up (affordability), etc.** This assessment should start immediately even if not all Member States effectively implemented the EECC, because any precious information will be immediately useful and relevant to design the further policy indications and to refine the regulatory measures.
  - ii. As regards the functioning of the BEREC Guidelines, it is important from **ecta's** perspective that the BEREC Guidelines are evaluated not only from an institutional (BEREC/NRA/competent authority) perspective, but **also from the perspective of industry stakeholders affected by BEREC Guidelines. Evaluation is needed in**

**particular of whether the said Guidelines have been implemented efficiently by the NRAs, and whether the Guidelines effectively contribute to regulatory certainty for stakeholders.**

## 7. Closing observations

47. In closing, [ecta](#) wishes to emphasise, as done on previous occasions, that two-stage consultations, consisting of a call for input, and a consultation on precise BEREC text proposals, are a suitable format for BEREC consulting stakeholders.
48. Finally, please allow [ecta](#) to make a plea on the timing of BEREC consultations: adequate time – at least 6 weeks – is the minimum needed for associations representing multiple stakeholders to respond to public consultations with good substantive content. In particular for consultations initiated in Q4 of the year, adequate time should be granted to cover time off for stakeholders during the periods leading up to Christmas and including end-of-year holidays.

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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.