

BEREC Report on the outcome of the public consultation on the draft BEREC Report on competition amongst multiple operators of NGA networks in the same geographical region

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1 Executive Summary

BEREC published the draft BEREC Report on competition amongst multiple operators of NGA networks in the same geographical region ('the draft Report') on 13 December 2022. At the same time, a public consultation was opened, running until 27 January 2023. BEREC received from the following seven stakeholders responses to the public consultation:

- Three network operators
 - 1&1 Versatel
 - Deutsche Glasfaser
 - Vodafone Group
- One association of network operators at national level:
 - BREKO (The German Broadband Association)
- Three associations of network operators at European level
 - Ecta (European Competitive Telecommunications Association)
 - ETNO (European Telecommunications Network Operators' Association)
 - FTTH Council Europe

This report provides an overview of the responses BEREC received during the public consultation and the BEREC response to each topic addressed by stakeholders in particular with regard to the need to adapt the draft Report. It is structured similarly to the draft Report, as follows:

- General aspects
- Multiple NGA networks in the same geographical area
- Outcome of the geographical analysis

In addition, BEREC published all non-confidential stakeholder responses received.¹

2 General aspects

Stakeholder responses

Topic is highly relevant and BREKO generally agrees with the considerations

BREKO considers the topic of the draft Report to be highly relevant and generally agrees with the considerations regarding this topic and the comprehensive comparison and overview of different approaches by NRAs. The BEREC report demonstrates that discussions on geographical market segmentation are gaining importance even in countries where there is

¹ See <https://www.berec.europa.eu/en/public-consultations/closed-public-consultations-and-calls-for-inputs/public-consultation-on-the-draft-berec-report-on-competition-amongst-multiple-operators-of-nga-networks-in-the-same-geographical-region>



still one single national market, and that the regulation varies strongly between markets and NRAs.

BEREC's examination of multiple NGA networks and the impact on competition is timely and useful

The FTTH Council Europe considers that the review of BEREC into the extent of multiple NGA networks operating in the same geographical area and the impact on competition is timely and useful. The results are interesting to the FTTH Council Europe, as they highlight how quickly these markets are evolving (in terms of network availability).

There is no "one size fits all" solution for market segmentation

BREKO welcomes the comprehensive data laid out in sections 2 and 3 of the draft Report that highlights the differences between the surveyed countries. The differences in data are pointing to the crucial fact that there is no "one size fits all" solution for market segmentation. On the contrary, as we see in section 2, each of the 31 investigated markets has inherent properties and particularities that require solutions tailored to the specific needs of individual Member States by the respective NRAs. These differences underline the significance of differentiated, well-balanced approaches that consider national circumstances and ensure fair conditions for all market players, especially alternative network operators. Section 3.1 shows that even in countries that already implemented geographical market segmentation, there are significant differences in the implementation. The cases of Sweden and Denmark demonstrate that even in well-developed markets with fibre deployment numbers close to 90% or higher, regional segmentation proves to be a highly complex issue. This complexity not only results in phase II procedures by the European Commission, but also in the need for different approaches for each country. Despite the similarities between Sweden and Denmark, the (regional) regulation of their markets differs strongly. Tailor-made solutions are needed that take into account factors like the size of the market and the deployment status, as well as the status of already deployed infrastructures, which builds the base of market shares.

Regulation aimed at tackling anti-competitive behaviour needs to be tailored to the circumstances in each market

Vodafone Group is of the opinion that EU electronic communications markets are diverse not only in terms of the level of retail and wholesale competition but also e.g. network deployment and overlap and homogeneity of competitive conditions. Regulation aimed at tackling anti-competitive behavior needs to be tailored to the circumstances in each market.

BEREC should include best practices and update the BEREC Common Position on geographical aspects of market analysis

Ecta is of the view, that BEREC should focus on fully exercising its statutory duties relating to ECN/ECS markets (established in the EECC and in the BEREC Regulation), which include



the pursuit of the objectives of Article 3 of the EEC, and an explicit duty for BEREC to aim to ensure the consistent implementation of the regulatory framework for electronic communications. This means that BEREC should actively develop regulatory best practices and promote their adoption by NRAs. The best way of achieving this is by adopting Common Positions, that NRAs can only depart from by providing explicit adequate justification. This will foster regulatory certainty for all stakeholders involved. Geographic segmentation and geographic differentiation of remedies are crucial regulatory subjects today and will remain relevant for the foreseeable future. Adopting Common Positions is what BEREC did regularly and successfully in the past. BEREC can and must do it again.

Ecta therefore suggests that BEREC includes a strategic dimension and a set of recommended best practices, fostering a harmonized application of the EU regulatory framework for electronic communications, notably best practices on:

- the types of geographical units for NRAs to rely on.
- the approach to and grouping of homogenous areas.
- the types of networks and the thresholds for proceeding to geographic segmentation and/or geographic differentiation of remedies in a VHCN context.

Ecta also proposes that BEREC updates the BEREC Common Position on geographical aspects of market analysis (for both market definition and remedies) which Ecta considers to be one of the most useful BEREC outputs for industry stakeholders.

BEREC should include a section on whether and how it will utilise the main draft Report findings

1&1 Versatel states that the Report is missing information on BEREC's subsequent course of action in connection with the main findings of this Report. Should BEREC intend to use these findings to prepare BEREC Guidelines to harmonise and further a geographically differentiated market analysis and remedies, the collected data may not be sufficient in achieving these objectives.

BEREC should report separately on EU, EEA and non-EU countries

Ecta points out that BEREC's draft Report combines experience and NRA decisions from 31 countries, which include EU Member States that are fully subject to the EU regulatory framework, the EEA countries, and non-EU Member States. Whilst the countries are identified by acronyms in the tables of this draft Report, which is useful, it remains difficult for the reader to understand important aggregations made in the draft Report that mix EU Member States and other countries, especially where non-EU Member States represent an important proportion of a category. Ecta therefore asks BEREC to report separately on EU, EEA and non-EU countries.



BEREC response

BEREC welcomes that BREKO considers the topic of the draft Report to be highly relevant and that BREKO generally agrees with the consideration of this topic and the comprehensive comparison and overview of different approaches by NRAs. BEREC also welcomes that the FTTH Council Europe considers the review of BEREC into the extent of multiple NGA networks and the impact on competition to be timely and useful.

BEREC agrees with BREKO and Vodafone Group that there is no “one size fits all” solution for market segmentation and that each of the examined markets has inherent properties and particularities that require solutions tailored to the specific needs of individual Member States by the respective NRAs.

BEREC does not agree with Ecta that the final Report should include best practices. Already in 2014, BEREC published a Common Position on geographical aspects of market analysis.² This Common Position defines how the geographical analysis in a market analysis needs to be carried out by the NRAs. This approach has been applied by the NRAs since then and it is still appropriate and flexible enough to enable NRAs accommodate market developments and to take country-specific circumstances sufficiently into account. As pointed out by BREKO and Vodafone Group (see above), the EU electronic communications markets are diverse not only in terms of the level of retail and wholesale competition but also e.g. network deployment and overlap and homogeneity of competitive conditions. Due to these inherent properties and particularities of each market, solutions tailored to the specific needs of each Member States are needed. Therefore, a “best practice” of one Member State is typically not applicable and appropriate in all other Member States. However, according to Art. 4(4) of the BEREC Regulation³, NRAs have to take utmost account of any best practices adopted by BEREC. For these reasons, it is neither appropriate nor possible to include best practices in the final Report.

BEREC agrees with Ecta that Common Positions are a key tool to foster regulatory certainty. However, BEREC does not agree with Ecta’s suggestion that BEREC should update the Common Position on geographical aspects of market analysis, because BEREC considers this Common Position still valid and the approach for carrying out a geographical analysis within a market analysis defined in this Common Position is still appropriate. Moreover, Ecta did not point to a specific topic covered by the Common Position that would require substantive changes. As soon as BEREC sees a need to update this Common Position, BEREC will consider this in the preparation of the BEREC Work Programme.

² BoR (14) 73

³ Regulation (EU) 2018/1971 of the European Parliament and the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009.



Concerning 1&1 Versatel's comment that BEREC should include a section on whether and how it will utilise the main draft Report findings, BEREC wants to clarify that BEREC already published a Common Position on geographical aspects of market analysis in 2014², a report on the application of this Common Position in 2018⁴ and in 2023 the final version of the consulted draft Report. BEREC will decide on further activities when it sets the annual BEREC Work Programme.

With regard to Ecta's suggestion that the final Report should report separately on EU, EEA and non-EU countries, BEREC wants to point out that almost all tables in the Report include, together with the data, also the information to which country these data apply to. Therefore, for the reader it is clear how a table would change if, for example, the non-EU countries are not considered. On the other hand, if the final Report would include separate tables for EU, EEA and non-EU, instead of one table, this would decrease the readability of the Report significantly. Therefore, BEREC does not consider it appropriate to adapt the final Report as suggested by Ecta.

3 Multiple NGA networks in the same geographical area

Stakeholder responses

NGA vs. VHCN and the number of NGA/VHCN networks present in a particular geography

Ecta considers that BEREC should, before finalizing the Report, introduce a systematic distinction between findings reported as applicable to NGA, and findings reported as applicable to VHCN, and in particular end-to-end fibre networks. This is essential, because the concept of NGA encompasses incremental upgrades to copper networks and because G.fast has not been deployed on any meaningful scale by SMP operators. Ecta is of the view that the content of this draft Report cannot be considered to have forward-looking validity, and that it should not be excluded that areas/operators that have been fully or partially deregulated, including based on geography-related considerations, might have to be regulated again in the future. A future NRA market analysis could have substantially different outcomes (including in terms of geographic market definition and in terms of geographic differentiation of remedies) depending on whether it concerns NGA or VHCN.

⁴ BoR (18) 213



A distinction needs to be made between whether a single SMP operator practices differentiated retail prices on a sub-national geographic basis, or multiple non-overlapping SMP operators have different retail prices

Ecta asks BEREC to distinguish in sections 2.2 and 2.4, and in the related points contained in the executive summary as well as in the conclusions, the following two scenarios: Scenario 1 in which a single SMP operator practices different retail prices in different geographic areas; and Scenario 2 in which multiple non-overlapping SMP operators practice different retail prices.

For example, in case of Denmark, it is unclear whether the retail price differences discussed are due to the incumbent TDC practicing differentiated retail prices in different geographic areas (as a response to competitive pressure) or (also) due to the retail prices of other SMP operators (Table 5).

If BEREC intends to state that there is a case/there are cases in which the (incumbent) SMP operator has differentiated its retail prices, clearly/explicitly as a response to infrastructure-based competition, Ecta invites BEREC to make that statement in plain and clear terms. Conversely, if BEREC has not identified such circumstances, Ecta equally invites BEREC to make that statement in plain and clear terms. Not doing so can cause confusion, or, worse, form a basis for misinformation.

BEREC should provide more clarity and transparency with respect to definition of networks

ETNO asks whether BEREC includes cases of co-financing in the number of "networks", if non-regulated wholesale agreements are considered and if and how wholesale only operators and networks deployed with public subsidies (with access obligations in force) are considered. As the subject of the report is competition amongst multiple operators, ETNO believes these cases should be integrated and specified, having an influence on the number of networks since co-financing multiplies them in reality.

Statement that NGA networks do not yet have significant effect on competition needs to be amended

Ecta was disconcerted to read the following statement on page 5 of the draft Report: "*NGA networks may only have been built rather recently and, therefore, not yet have a significant effect on competition. If wholesale price regulation is uniform over the national market, this may also be a reason why retail prices do not differ between geographical areas.*" Ecta is of the opinion that from the perspective of the challengers of fixed network operators and service providers, there cannot be any doubt that NGA (and now VHCN) networks have had a major impact, and that the conditions of competition have changed in major ways, including as a result of often misguided deregulatory initiatives and decisions. Ecta kindly asks BEREC not



to include the statement cited above in the final Report, or to amend and nuance it substantially.

BEREC's considerations as to why retail pricing conditions may not differ between areas despite multiple NGA networks being present seem plausible

Vodafone Group agrees with BEREC's considerations as to why retail pricing conditions may not differ between areas despite multiple NGA networks being present. The lack of differentiation does not contradict the relevance of infrastructure-based competition.

Geographical segmentation despite nationwide retail prices requires extraordinary justification

The FTTH Council Europe notes that according to BEREC results, retail prices seem to be almost always the same at national level; in such cases, geographical segmentation would appear to be odd and require extraordinary justification.

The inclusion of outdated data in the draft Report provides an underestimated and distorted overview

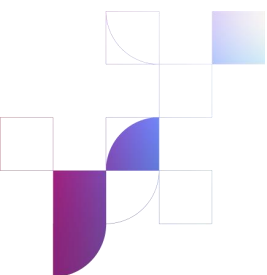
ETNO deems that the summary tables provided in the draft Report may be misleading due to the fact that they merge together data that refer to different periods, depending on the date of the last market analysis in the different countries, whereas in some cases the last market analysis also dates back to 2016/17. The inclusion of outdated data in the report provides an underestimated and distorted overview of the current state of infrastructure competition reached at geographical level in EU countries.

In addition, the showed figures, being not updated for all the countries, are not consistent with the last Commission's update. For example: in the Czech Republic, where the last market analysis dates to 2017, BEREC Table 37 reports no NGA networks for 11-25% of homes passed, while the Broadband Coverage in Europe 2021 (BCE) shows that the NGA coverage reached 92.6%, in Greece (last market analysis in 2016) BEREC Table 53 reports no NGA network for 11-25% homes passed, while BCE shows an NGA coverage of 91.7%.

Finally, according Table 91, in Slovakia more than 3 NGA networks are present in an area up to 75% of homes passed which is high percentage. Maybe FWA and possibly even WiFi networks are included. ETNO suggests BEREC to provide more insights into the methodology used.

NGA and VHCN deployments in Europe are advancing quickly, BEREC's data is already out of date

The FTTH Council Europe points out that NGA and VHCN deployments in Europe are advancing quickly, already BEREC's data which refers to recent market analyses is out of date. Based on its own 2021 data, the FTTH Council Europe can see that already there are a



little over 50% of European households passed with FTTH/B (or 107m units) but that approximately 280m lines have been deployed, or on average just under 2.5 lines per home passed. Therefore, the existence of multiple NGA networks in the same geographic region is much more prevalent today, and based on the EECC and other instruments, these investments are accelerating.

The comparison of market analyses from various Member States is only of limited value.

1&1 Versatel is of the opinion that the comparison of market analyses from various Member States is only of limited value. Firstly, electronic communications markets are characterised by innovation and fast-paced changes. Secondly, the five-year time intervals for conducting market analyses are out of sync – rather than concurrent – amongst Member States: Germany has finished its last market 3a analysis in October 2019, Greece in December 2016, France in December in 2020, Portugal in March 2017 and so forth. Hence a comparison of the respective geographic segmentations of the markets and remedies (if any) is only partially conclusive. Coupled with different historic developments and national peculiarities, BEREC might run the risk of “comparing apples with oranges”.

The problem of outdated survey answers is particularly evident in regard to regionally varied retail prices. In particular, BNetzA’s answers to BEREC’s questionnaire regarding different retail prices and product characteristics (Table 50) are not based on most recent market data. Instead, they are based on the market analysis carried out almost three and half years ago.

BNetzA’s survey answers do not fully reflect current and imminent market dynamics

1&1 Versatel confirms that BNetzA finished the last analysis of market 3a/2014 in October 2019 and has not yet undertaken an analysis of market 1/2020. However, BNetzA has adopted its corresponding remedy decision – meant to address the competition problems identified back in 2019 – only in July 2022, i.e. almost three years after its market review 3a/2014. But remedies should be tailored, proportionate and justified in the present market environment and based on the most recent data. 1&1 considers that the German regulatory outcome is fundamentally flawed in this respect: In Germany, remedies meant to address market failures observed in 2019 will only be implemented in 2024, when the next market 1/2020 analysis is due to commence. Accordingly, BNetzA’s answers in the questionnaire are partially overhauled and do not provide an up to date and accurate reflection of the competitive dynamics in Germany.

Regional differences in wholesale prices should also be examined

1&1 Versatel is of the view that the draft Report has only considered the presence and extent of regional differences in retail prices, without a reference to wholesale prices. BEREC should also extend the scope of this Report to differences in wholesale prices between geographic areas to better appreciate the risks of margin squeeze, in particular if retail prices are uniform,



and the risk of regional retail price variations in Germany. In Germany, such examination must be based on most recent market data, particularly new market developments since 2019.

BEREC response

With respect to Ecta's comment on NGA versus VHCN, BEREC wants to clarify that section 3 "Outcome of the geographical analysis" examines the outcome of the geographical analysis in the last analysis of market 1/2020 resp. market 3a/2014. This examination is neither based on the term "NGA" nor on the term "VHCN". Therefore, this analysis is valid in any case and does not depend on these terms. For example, several reasons for the geographic differentiation are considered (see Table 7), however, the one main reason which refers to networks is "geographical differences in coverage of alternative networks (e.g. cable or fibre)". Similarly, several reasons for selecting the type of geographical unit are considered and the one which refers to networks is "the presence of alternative networks" (see Table 10). The criteria for grouping the geographical units (see Table 11), refer to "competitors" or "competitors with an individual infrastructure coverage above a certain threshold" or "competitors with an individual market share above a certain threshold." However, in all these cases neither the term "NGA" nor "VHCN" is used. Section 2 uses the term "NGA" because in the last analysis of the market for wholesale local access many NRAs did not yet use the term "VHCN", because the legal basis of the term "VHCN" entered into force at national level only from 2021 or even later, depending on the national transposition of the EECC. However, the use of the term "NGA" in section 2 has no impact on the geographical analysis in the last analysis of market 1/2020 resp. market 3a/2014 examined in section 3. For all these reasons, BEREC sees no need to adapt the draft Report as suggested by Ecta.

BEREC's response to Ecta's proposal that a distinction needs to be made between whether a single SMP operator practices differentiated retail prices on a sub-national geographic basis, or multiple non-overlapping SMP operators have different retail prices is as follows. BEREC agrees that these two cases may differ, however, section 2 of the draft Report shows that only three of 18 countries observed differences in retail prices and in two of these three countries, the retail prices differ only in a few areas slightly or to some degree. Therefore, in these 17 countries the distinction proposed by Ecta is not relevant. Only in one country (DK), the retail prices differ in many areas significantly. However, this country is analysed in detail in a country case study (section 3.1.6) which describes also in detail the retail prices considered. Therefore, BEREC sees no need to further develop on the distinction proposed by Ecta.

Regarding ETNO's suggestion that BEREC should provide more clarity and transparency with respect to definition of networks, BEREC wants to clarify the following. For section 3, ETNO's proposal is not relevant because this section examines the outcome of the geographical analysis in the last analysis of market 1/2020 resp. market 3a/2014. Section 2.1 informs on the presence of multiple NGA networks (not on multiple NGA operators) in the same geographical area. Therefore, the number of NGA networks includes all NGA networks, independent of the question whether the NGA network has been built based on state aid or



co-financing, or is operated by a wholesale only operator etc. In BEREC's view, this is fully clear and no further clarification is needed.

BEREC agrees with Ecta that the statement that NGA networks do not yet have significant effect on competition has potential to be misunderstood. The statement has been adapted in the final Report as follows: "In some countries, alternative fibre networks (e.g. FTTB/H) may have only recently been deployed and, therefore, may not yet have fully developed a significant effect on competition."

BEREC welcomes that Vodafone Group agrees with BEREC's considerations as to why retail pricing conditions may not differ between areas despite multiple NGA networks being present.

BEREC does not share the FTTH Council Europe's view that geographical segmentation despite nationwide retail prices requires extraordinary justification, as retail prices may not differ between geographical areas for several reasons described in section 2.2 in the draft Report, although multiple NGA networks are present, which has also been confirmed by Vodafone Group (see paragraph above). Section 3 of the draft Report (section 3) also shows that the NRAs already considered many different aspects (see e.g. Table 7 and Table 11) in their decision on whether or not to differentiate market definition and/or remedies.

Regarding ETNO's, FTTH Council Europe's and 1&1 Versatel's comment on outdated data, BEREC wants to clarify the following. The Report examines the outcome of the geographical analysis in the last analysis of the market for wholesale local access provided at a fixed location. Therefore, the last analysis of this market needs to be considered irrespective of whether the NRA finished it recently or already some years ago. It would not be useful to compare the result of a certain market analysis with current data if the analysis already was made some years ago. For this reason, it is unavoidable that the data used for this examination (annex 3 of the draft Report) refer to different times as well as to times somewhat in the past. From this perspective, the tables mentioned by ETNO are correct and do not need to be changed. These tables also clearly state that their data refer to the last analysis of market 1/2020 resp. market 3a/2014.

With respect to 1&1 Versatel's view that BNetzA's survey answers do not fully reflect current and imminent market dynamics, BEREC wants to clarify that ex ante regulation is always a balancing exercise between providing regulatory certainty which is a prerequisite for long term investment and the need to update regulation periodically as well as in light of important changes in the market. In that regard, BEREC notes that the regular timeframe between market reviews has been expanded to five years under the EECC. Moreover, the current report does not assess the appropriateness of the regulation in any given Member State but provides an overview of the current regulatory landscape.

Concerning 1&1 Versatel's proposal that regional differences in wholesale prices should also be examined, BEREC wants to point out that this has been done in the draft Report. Table 7 shows the main reasons why the NRAs geographically differentiated the market definition



and/or remedies. As can be seen, each of the following reasons was a main reason in many countries: geographical differences in coverage of alternative networks (e.g. cable or fibre), geographical differences in retail market shares of the incumbent, geographical differences in wholesale market shares of the incumbent, population density (economies of scale). The NRAs were explicitly asked whether geographical differences of wholesale prices of the incumbent operator and/or alternative operators were a main reason for the geographical differentiation. However, this was not a main reason in any country.

4 Outcome of the geographical analysis

Stakeholder responses

The impressions should be avoided that recent sub-national geographic developments drive deregulation in countries

Ecta points out that the NRAs in Austria, Bulgaria and Romania proceeded to deregulation but this did not (or not necessarily) rely on an analysis of geographic markets. In fact, Ecta understands that the Romanian NRA decided not to apply copper local loop unbundling as a regulatory obligation many years ago without conducting the type of geographical analysis discussed in the draft Report. In the recent case of Austria, it is clear to Ecta that the deregulation of Market 1/2020 relies fundamentally on the existence of commercial agreements / a commercial offer from the incumbent operator (now ex-SMP operator) and is not based on a geographic market segmentation. Ecta therefore asks BEREC to reflect on the exact situation in the final Report, and to avoid creating the impression that recent sub-national geographic developments drive deregulation in countries where this is not in fact the basis for deregulation. In particular, the statement on page 30 on the market no longer being, or never being regulated, due to geographic analysis should exclude all the countries that have deregulated the market on a nation-wide basis.

A distinction should be made between geographic segmentation of markets and geographic differentiation of remedies

Ecta is of the opinion that the final Report should systematically distinguish between geographic segmentation of markets and geographic differentiation of remedies. As a minimum, this distinction should be done much more clearly in Table 3, and sub-titles throughout each section of the final Report should be used to make the distinction clear to all readers.

Finland and Hungary should be treated entirely separately throughout the report

Ecta stresses that Finland and Hungary are EU Member States that have had multiple geographically non-overlapping incumbent operators for many decades. Ecta asks BEREC to highlight this explicitly in the final Report, and to treat these countries entirely separately



throughout the report (and in particular in tables 1 and 6). BEREC needs to avoid creating the impression that the NRAs in these Member States proceeded to geographic segmentation (solely) on account of recent market developments and increased infrastructure-based competition.

The final Report should include all EU Member States

Ecta points out that Poland, an EU Member State, was one of the very earliest to apply geographic segmentation of markets, and geographic differentiation of remedies in 2014 (and subsequently in the next round of market analyses in 2019), however, Poland is not examined in the draft Report. Ecta asks BEREC to include Poland in the final Report or, if this would not be possible, Ecta asks BEREC to explain why Poland is not included in the final Report, so that all readers are adequately informed that the Report is incomplete as regards the EU Member States.

Data of Slovakian NRA does not seem to be correct

ETNO noted that on page 81, the draft Report cites that the Slovakian NRA as imposing „geographic differentiation of remedies in a national market“ while there are actually no geographically differentiated remedies in Slovakia on M1/2020.

The definition of relevant market should primarily take into consideration the market shares at wholesale and retail level

The FTTH Council Europe suggests that the definition of relevant markets (national or subnational) should primarily take into consideration the market shares at wholesale and retail level. The presence of homogeneous retail offers at national level is a strong hint of a single national wholesale market. The actual and prospective coverage of alternative operators' networks can be useful for the subsequent assessment of the incumbent market power, but it is not relevant for the market definition.

In the assessment of the homogeneity of competitive conditions, diverse criteria must be considered

Vodafone Group acknowledges the draft Report's finding that more geographic market segmentation is happening as competing network roll-out is carried out. NRAs should continue taking a careful approach when defining separate geographic markets or applying differentiated remedies. In the assessment of the homogeneity of competitive conditions, diverse criteria must be considered e.g. not only the level of network overbuild/number of networks deployed in a specific geographic area but also the SMP market share in the wholesale and retail markets, whether the operators present in a given are vertically integrated or wholesale only.



The issue of the coherence and consistency across the EU of the criteria used by NRAs to identify competitive areas should be addressed

ETNO is of the opinion that the final Report should also address the issue of the coherence and consistency across the EU of the criteria used by NRAs to identify competitive areas and the consequent regulatory relief applied. Divergent approaches are applied by NRAs (as shown in Table 7) without an evident justification. For example: (i) Different numbers of NGA networks are considered sufficient: 3 or 2. (ii) Different coverage thresholds are applied, for example: 20% in Spain, 30% in Ireland (for market 3b), 50% in Portugal (markets 3b and 4/2014) and 60% (coverage of each network) and 75% (cumulative coverage of the NGA networks present) in Italy. (iii) Most EU countries consider the home passed, Italy “ready to service” homes, in UK “potential”/forward-looking coverage is considered. (iv) Some countries set a threshold for the incumbent’s retail market share, also in this case with different values across countries, for example: 50% is considered in Spain and Hungary markets (3a and 3b/2014), in Ireland (market 3b/2014) and Portugal (markets 3b and 4/2014); only in Italy, Poland and Slovenia (this latter for market 3b) a lower threshold of 40% is used.

Besides the application of divergent criteria, also the impact on the market/remedy segmentation varies significantly among EU countries, with less stringent criteria leading to complete deregulation and more stringent criteria allowing only a limited regulatory relief, without evident justification based on different national circumstances.

The relevant criteria for grouping geographical units into homogeneous submarkets and/or areas with different remedies reveals a non-harmonised approach amongst NRAs

1&1 Versatel argues that the relevant criteria for grouping geographical units into homogeneous submarkets and/or areas with different remedies illustrated in Table 11 of the draft Report reveals a non-harmonised approach amongst NRAs. In its conclusions, however, BEREC neither comments on why various Member States regard certain criteria more conclusive than others, nor does it propose any action to harmonise these criteria.

The determination of a working infrastructure competition is only acceptable in countries and regions where fibre coverage is fully achieved

Deutsche Glasfaser is of the opinion that the determination of a working infrastructure competition is only acceptable in countries and regions, where fibre coverage is fully achieved. Before full fibre coverage is reached, BEREC should not imply a working infrastructure competition in terms of fibre. It is even more important to determine the market conditions under terms of a working deployment competition, which means that different network operators compete to be the first mover to serve fibre networks in urban and rural areas. The given examples for Sweden and Denmark do not display the right conditions for most European countries, because both countries are close to reach full fibre coverage. Therefore, it is necessary to raise the fact that regulatory authorities do not engage in a working



deployment competition by implementing remedies for several network operators. If such an approach is pursued, it must be assumed that investors will not continue to invest, and further fibre broadband deployments will not happen. A further reason is that in the draft Report the market power of the incumbent is not considered accurately. From a German point of view the incumbent has the resources, both in terms of finances and capacity, to intervene in each regional market if he wants to do so. Therefore, Deutsche Glasfaser poses the question, how one could think about market segmentations in case incumbents have still the opportunity to overwhelm an alternative operator? On this account, Deutsche Glasfaser urges BEREC not to abandon the consideration to regulate on national level. The relevant criteria should not be only the kind of competition and number of competitors. It is the degree of deployment competition together with the achievement of full fibre coverage and working service competition.

Competitive spill overs between geographical areas should be highlighted

ETNO points out that section 2 of the draft Report provides evidence of relevant competitive spill-over effects between areas with different numbers of competing NGA networks: around half of the NRAs do not find differences in the prices or characteristics of the retail products across geographical areas. As a result, consumer welfare in areas where there are fewer competing networks benefits from the protection of the more intense competition in the areas where more operators are present.

ETNO believes the competitive spill overs between geographical areas should be highlighted in the report. These effects are an important factor NRAs must carefully take into consideration when conducting a market analysis and deciding on the remedies to impose in non-competitive areas.

Defining regional markets too early may deny consumers in less competitive areas the benefits of competition that spill over from more competitive areas

The FTTH Council Europe is of the opinion that there is a risk that a rush to defining regional markets within a Member State may deny consumers in less competitive areas the benefits of competition that spill over from more competitive areas where the potentially dominant entity operates on a national basis. Identifying regional markets may by itself fragment the market. However, the FTTH Council Europe notes BEREC's finding that traditional incumbent operators are themselves ceasing to operate nationwide networks in all instances.

Caution should be exercised with respect to the scope of potential competition and more consideration should be given to remedy variations within national markets

The FTTH Council Europe notes that the geographic scope of FTTH/B networks is not known and that therefore the scope of potential competition cannot be known. By its nature, the boundaries of this network deployment are not stable over time because (a) deployment models and deployment technologies can change and (b) business models such as



Infrastructure-focused or Wholesale-Only can change the cost of capital. Therefore, there should be caution exercised with respect to the scope of potential competition and more consideration should be given to remedy variations within national markets.

The extent to which NRAs ensure sustainable competition when their sub-national market segmentation has been accompanied by deregulation measures should be examined

1&1 Versatel proposes to widen the scope of the Report with an examination to what extent NRAs safeguard sustainable competition insofar as their sub-national market segmentation was accompanied by deregulation measures. Likewise, BEREC should assess whether and how the respective NRAs have adopted a transitional phase whenever there was a shift from national to sub-national market delineation. In particular, how were the existing commercial interests of access seekers subsequently protected when the NRA concluded that deregulation of access rights was adequate in a specific sub-national market? Were access seekers protected by virtue of a transitional phase in which they could continue obtaining pre-existing regulated access?

An example of premature deregulation is evident in Germany

1&1 Versatel argues that in its most recent market analysis 3b, BNetzA has delineated a sub-national wholesale market for Layer3-Bitstream Access (BSA) in cities with populations greater than 60,000 people. In applying the Three-Criteria-Test, BNetzA has, inter alia, concluded that because of the competitive constraints, Deutsche Telekom was compelled to provide voluntary access even in the absence of regulatory remedies. Since the relevant subnational market thus tended towards effective competition, the Three-Criteria-Test was not fulfilled, and the relevant (subnational) market was deregulated.

However, BNetzA's assumption that regulated L2-BSA served as a price anchor for Deutsche Telekom's commercial L3-BSA is flawed because L2-BSA is not subject to ex ante cost-oriented price regulation. Instead, wholesale prices for L2-BSA are merely subject to ex post control based on ex post standards. As such, L2-BSA does not lend itself as a proper price anchor to exert sufficient supply-side competition in the realm of L3-BSA. In other words, BNetzA has overestimated the competitive constraint emanating from competitors whose access is based on L2-BSA, since they are not sufficiently protected against abusive pricing in regard to Deutsche Telekom's L2-BSA wholesale prices. As such, BNetzA's decision to deregulate the relevant subnational market for L3-BSA was premature.

BEREC should encourage NRAs to update the geographical analysis more often

ETNO is of the view that the delay in updating the geographical analysis and in the consistent adjustment of remedies is an important issue. In order to avoid an underestimation of the current state of competition across the national territory in each Member State, NRAs should carry out a new market analysis without delay where a significant change in the competitive



conditions is observed and at maximum within 5 years from the previous review, as provided for by the EECC. This is necessary in order to remove or lessen ex ante remedies imposed on historical SMP operators where they are no longer justified in the light of the presence of parallel competitive networks. At least, in these competitive areas the price control remedy should be removed if the conditions (currently being revised) provided for in the Recommendation on non-discrimination and costing methodologies are satisfied. ETNO suggests that BEREC should encourage NRAs to update the geographical analysis more often and in any case, more frequently than markets are analysed, and also to run a prospective analysis.

BEREC response

BEREC agrees with Ecta that the impressions should be avoided that recent sub-national geographic developments drive deregulation in countries. The final Report has been adapted accordingly (see changes on pp. iii, iv, 2, 7, 30).

With respect to Ecta's view that a distinction should be made between geographic segmentation of markets and geographic differentiation of remedies, BEREC wants to clarify the following. Table 6 clearly shows which countries have geographically differentiated the market definition and which countries have geographically differentiated the remedies. All other tables also provide information on which countries the information in the table refers to. Therefore, for the reader it should be clear, which information in the Report refers to geographic differentiation of market definition and which information to geographic differentiation of remedies. If all tables would be duplicated, one table for geographic differentiation of market definition and the other table for geographic differentiation of remedies, the readability of the report would decrease significantly. For all these reasons, BEREC sees no need to adapt the Report in this respect.

BEREC does not share Ecta's view that Finland and Hungary should be treated entirely separately throughout the report. A main outcome of the draft Report (Table 1 and Table 6) is the information which countries geographically differentiated market definition and/or remedies and which not. There is no reason, to exclude any country from this tabular overview or to treat it separately, which also applies to Finland and Hungary. In addition, the draft Report (Table 7) informs in detail on the reasons why countries differentiated market definition and/or remedies and includes a country case study on Finland (section 3.1.9). Therefore, for the reader it should be completely clear why Finland and Hungary geographically differentiated market definition.

Concerning Ecta's comment that the final Report should include all EU Member States, BEREC wants to clarify that data were collected by means of a questionnaire which was sent



to all NRAs represented in BEREC and 31 NRAs completed the questionnaire, however, not Poland. The final Report has been adapted in order to make this clear.

Regarding ETNO's comment that data of Slovakian NRA does not seem to be correct, BEREC wants to clarify that it is correct that the Slovakian NRA finished the last analysis of market 3a/2014 in 2016 and has not yet undertaken an analysis of market 1/2020. However, in this market analysis, the Slovakian NRA did neither geographically differentiate market definition nor remedies and, therefore, the information in the draft Report that the Slovakian NRA geographically differentiated remedies in a national market is not correct, which has been corrected in the final Report (section 3 and Table 93).

BEREC notes the following opposing views. On the one hand, the Vodafone Group is of the opinion that in the assessment of the homogeneity of competitive conditions, diverse criteria must be considered and on the other hand, the FTTH Council Europe considers that the definition of relevant market should primarily take into consideration the market shares at wholesale and retail level and ETNO and 1&1 Versatel are of the view that the Report should address the issue of coherence and consistency in the criteria used by NRAs to identify competitive areas. BEREC wants to clarify that a thorough geographical analysis needs to consider many criteria, however, whether a certain criterium and which threshold of a criterium is relevant depends on the national circumstances. The country case studies included in the draft Report reveal that the situation differs significantly between countries (e.g. between DK, FI, SE). For example, different threshold values are appropriate in case of different trends, whether or not the market share of the SMP operator declines and whether or not alternative operators rapidly roll out new fibre infrastructure. For all these reasons, BEREC is of the opinion that the selection of the criteria and threshold values is case-specific and, therefore, needs to be left to the Member States.

With respect to Deutsche Glasfaser's view that the determination of a working infrastructure competition is only acceptable in countries and regions where fibre coverage is fully achieved, BEREC wants to point out that the NRAs considered many different criteria in the geographical analysis and infrastructure competition is only one of them (see e.g. Tables 7 and 11 in the draft Report). BEREC also wants to stress that the NRAs have to carry out the market analysis in accordance with the EECC and, therefore, investment incentives have to be taken into account.

Concerning ETNO's and the FTTH Council Europe's comments on the competitive spill overs between geographical areas, BEREC wants to point out that the NRAs considered many different criteria in the geographical analysis and retail prices is only one of them (see e.g. Tables 7 and 11 in the draft Report). As the draft Report shows, further criteria can be used and in fact are used by NRAs. To consider only spill over effects between geographical areas



in the geographical analysis might be insufficient to define the markets correctly in order to address potential competition problems adequately.

BEREC's response to the FTTH Council Europe's view that caution should be exercised in pronouncing on the scope of potential competition and more consideration should be given to remedy variations within national markets is as follows. The NRAs consider in the market analysis not only potential competition in the future but the development of the market from the past to the current situation and only look in the future to the extent this is reliably possible. Therefore, the NRAs take their market analysis decision on a sound basis.

Regarding 1&1 Versatel's proposal to widen the scope of the Report and also examine the extent to which NRAs ensure sustainable competition when their sub-national market segmentation has been accompanied by deregulation measures, BEREC wants to clarify that this is a topic of deregulation in general and not a topic specific to geographic differentiation of market definition and/or remedies. Therefore, BEREC sees no need to include this topic in the Report.

BEREC's response to 1&1 Versatel's statement that an example of premature deregulation is evident in Germany is as follows. BEREC notes that the deregulation of market 3b/2014 in Germany was notified to the Commission under Article 7 Framework Directive and the Commission had no comments⁵. Moreover, the current report does not assess the appropriateness of the regulation in any given Member State but provides an overview of the current regulatory landscape.

With respect to ETNO's proposal that BEREC should encourage NRAs to update the geographical analysis more often, BEREC wants to clarify that the period between market analysis is defined in the EECC (Art. 67(5)), it also depends on national legislation and when a new market analysis is appropriate or necessary depends also on the national dynamics (market trends) of the development of competition.

5 List of Abbreviations

ANO	Alternative Network Operator
BEREC	Body of European Regulators for Electronic Communications
BSA	Bit Stream Access
ECN	Electronic Communications Network
ECS	Electronic Communications Service

⁵ See Commission Decision C(2020) 9179 final of 10.12.2020, Case DE/2020/2286.



EECC	European Electronic Communications Code
EEA	European Economic Area
EU	European Union
FTTB	Fibre To The Building
FTTH	Fibre To The Home
NGA	Next Generation Access
NRA	National Regulatory Authority
SMP	Significant Market Power
VHCN	Very High Capacity Networks

