

BEREC Report on the outcome of the public consultation of the draft BEREC Report on the regulatory treatment of business services

08 June 2023



Contents

1. Introduction	2
2. General view on the feedback received	3
3. Comments on the Executive Summary and Chapter 1 – Introduction and Objectives	3
4. Comments on Chapter 3 – Retail business products and related wholesale markets	6
5. Comments on Chapter 4 – M2/2020	8
5.1. Geographic segmentation	9
5.2. Degree of competition and remedies	10
6. Comments on Chapter 5 and Chapter 6 – M1/2020 and M3b/2014 in the context of business services	11
7. Comments on Chapter 7 – Relevance of physical infrastructure access for business services	12
8. Comments on Chapter 8 – Symmetric regulation in the context of business services	14
9. Comments on Chapter 9 – Data collection, reports and good practices by NRAs	15
10. Comments on Chapter 10 - Conclusions	15
11. Comments on Chapter 11 - Future work	16
12. Other comments	19
12.1. Important elements from the External Study	19
12.1.1. Inclusion of demand-related aspects	20
12.2. Summary of the stakeholders' Workshop and outcomes	21
12.3. NRAs approach to regulation of business markets and remedies imposition.....	21
12.3.1. Remedies: copper switch-off	23
12.4. Observed trends in the business markets	24
12.5. Countries covered by the Report.....	25
12.6. NRAs' Key Performance Indicators.....	26
12.7. Comments concerning other markets than the business services markets.....	26



1. Introduction

This report summarises the responses provided by the stakeholders during BEREC's public consultation on the Draft BEREC Report on the regulatory treatment for business services¹ (hereafter "the Draft Report"), as well as BEREC's views on the issues raised by the respondents. The Draft Report was opened to public consultation from 13 December 2022 to 3 February 2023.

Eight respondents contributed to the public consultation, namely:

1. 1&1
2. Colt Technology Services (Colt)
3. Deutsche Glasfaser Holding GmbH (DG)
4. European Competitive Telecommunication Association (ecta)
5. European Telecommunications Networks Association (ETNO)
6. The GSM Association Europe (GSMA)
7. MVNO Europe
8. Vodafone Group (Vodafone)

Comments, observations and recommendations raised by the respondents are summarised and structured in different chapters, and BEREC's views are presented in separate boxes that follow right after. All non-confidential contributions are publicly available and accessible on the BEREC webpage.² This report is a summary and it does not explicitly elaborate on comments or observations that are not directly related to the Draft Report subject to this public consultation.

The Report on the outcome of the public consultation is organised following the sections of the Draft Report, with exception of Chapter 2. The details of the positions expressed by the stakeholders in relation to the Draft Report are summarised in the Chapters 3-11. Several separate subsections have been added to reply to specific comments, as presented in section 12 of this Report.

This Report on the outcome of the public consultation complements the final BEREC Report on the regulatory treatment for business services³. Both reports are being published simultaneously.

¹ BoR (22) 185, Draft BEREC Report on the regulatory treatment for business services, 12. 12. 2022. <https://www.berec.europa.eu/en/document-categories/berec/reports/draft-berec-report-on-the-regulatory-treatment-for-business-services>

² <https://berec.europa.eu/en/public-consultations/closed-public-consultations-and-calls-for-inputs/public-consultation-on-the-draft-berec-report-on-regulatory-treatment-of-business-services>

³ BoR (23) 89, BEREC Report on the regulatory treatment of business services, 8. 6. 2023. <https://berec.europa.eu/en/document-categories/berec/reports/berec-report-on-the-regulatory-treatment-of-business-services>

2. General view on the feedback received

Overall, the stakeholders welcomed the consultation by BEREC on this important topic of business services and their provision in the telecommunications markets, being keen on providing feedback. Some explicitly complimented BEREC in general for the Draft Report – **GSMA**, **Colt** and **ETNO**.

BEREC's response:

BEREC thanks all the stakeholders having responded to this public consultation for their valuable input on the broad topic of business services, their regulatory treatment and overall impact on competition.

The input received allowed BEREC to have a more complete view on the different aspects addressed in the Draft Report. Several of the responses included reflections on issues not directly addressed in the Draft Report that will be considered by BEREC in future discussions and potential work, subject to an opportunity assessment.

The next sections present in detail the specific feedback received on the topics addressed in the BEREC Draft Report open to public consultation, as well as BEREC's views on the comments and issues raised.

3. Comments on the Executive Summary and Chapter 1 – Introduction and Objectives

In what follows, BEREC is including the comments received from the stakeholders which were either (i) directly/explicitly targeted to this part of the Draft Report or (ii) suggesting that BEREC lacks ambition in its approach, sometimes with reference to potential substantial additions to the Report.

1&1 considers that BEREC should include a section in the Draft Report about whether and how it will utilise its findings. It also underlines that there is no elaboration regarding the future steps which BEREC could/will undertake to "*address this persistent market failure*" (i.e. the high concentration in the business markets depicted in "most countries surveyed").

Another comment made by **1&1** concerns the issue of the protection of the interest of the access seekers and considerations on the bearing of migration costs⁴ in the context of the replacement trend of traditional leased lines by Ethernet leased lines.

⁴ As potentially part of a migration plan that some NRAs are overseeing.

1&1 also mentions that the Draft Report does not evaluate the outcome of the wholesale pricing regulation imposed – whether it has achieved its purpose or, on the contrary, it proved counterproductive.

Then, related to the harmonization duties as understood by the contributors, in **ecta's** and **Colt's** opinion, BEREC is missing an opportunity to provide best practices and to revisit and update its Common Positions on WLA/WBA/WLL.

Colt specifically stresses the need for harmonised product and geographic market definitions, approaches to SMP finding, and remedies. Additionally, according to **Colt**, BEREC should consider impact assessments of NRAs' decisions.

ecta regrets that the focus of BEREC's Draft Report stems from the European Commission's (EC) Recommendation on relevant markets susceptible to *ex ante* regulation, being reflective *inter alia* of the regulatory treatment of the selected wholesale markets, rather than of the provisions of the European Electronic Communications Code (EECC). Because of its approach, BEREC neglects "*its harmonisation duties*" and does not pay sufficient attention to end-user demand, as well as competition problems on retail markets. Furthermore, **ecta** continues with some statements on the general state of regulation of business services, stressing that NRAs have consistently lacked commitment to address retail business markets' failures and have so far failed to deliver effective competition. In this light, **ecta** expresses a critical view on BEREC's commitment with the Draft Report, stating that it is not sufficient to deliver competition in the concerned markets within the upcoming 5 years.

ecta considers that BEREC's approach is self-limiting, not dealing with potentially problematic issues such as "*the fact that many B2B customers require, at the same location as well as at different sites, high-quality/high-capacity dedicated connectivity, but also internet access which can be best effort, voice services (fixed, nomadic and mobile), and increasingly services for teleworkers, including mobile connectivity*", the "*issues with bundled services on retail markets (e.g. combinations of ECS/ECN and IT services)*" and others. From **ecta's** perspective, BEREC "*has withdrawn itself to an observer role*" of NRAs' decisions.

ecta asks BEREC to extend the Report to include "*a strategic dimension, fostering a harmonised application of the EU regulatory framework for electronic communications*", as well as tangible regulatory best practices⁵. Further details are provided in the accompanying proposals presented in paragraph 53 of **ecta's** contribution. Additionally, **ecta** shows its concerns related to the lack of impact analysis of the imposed regulation by BEREC, providing as an example the fact that "*the Draft Report does not analyse which are the NRAs that mandate Equivalence of Input (EoI) or Equivalence of Output (EoO) to the provision of relevant wholesale inputs for B2B markets*".

⁵ Some areas which are mentioned in **ecta's** contribution are (i) on which retail services must the market reviews focus, (ii) which are the wholesale markets that need to be examined in the context of business services, (iii) which are the remedies that must be considered, (iv) the application of non-discrimination and (v) access obligation.

Moreover, “a methodological issue which **ecta** has raised on multiple occasions in relation to other BEREC materials, is that BEREC’s Draft Report combines experience and NRA decisions from 33 countries, which include EU Member States that are fully subject to the EU regulatory framework, the EEA countries, and non-EU Member States. In this Draft Report, the countries are not always named or presented with acronyms, making it difficult to draw reliable conclusions”.

Finally, **ecta** indicates that the public consultation period of 6 weeks (including the period of the end-of-year holidays) was too short to answer several BEREC consultations that ran in parallel. **ecta** “hopes and trusts that BEREC will take better account of its stakeholders’ constraints in the future”. Besides, **ecta** asks for a re-consultation process to take place.

BEREC’s response:

BEREC acknowledges the scope of the Draft Report as a fact-finding exercise aiming to portray the regulatory regime which is applicable to business services throughout Europe. It’s value-added lies with linking together and presenting comparatively all the relevant information, while providing examples of convergence or, on the contrary, divergence of regulatory approaches, argued thoroughly in the market notifications and based on the national circumstances. Among others, this will allow NRAs to see other similar cases and help them benchmark their analysis and conclusions.

As such, the natural starting point of the depiction of regulation which these services are under was the EC’s Recommendation on relevant markets. This Recommendation is indeed a recognised tool for harmonisation of the regulatory focus in the electronic communications sector that NRAs need to take into utmost account. However, as widely acknowledged, the means to achieve adequate competitive outcomes are a national prerogative, as they are highly dependent on the specific circumstances of the analysis. Differently put, the tools and methodology with which NRAs operationalise are harmonised, but the outcomes may be different considering these specificities.

Therefore, BEREC cannot change the current focus of the report and its scope, as **ecta** demands. However, BEREC will assess the opportunity of following-up the current workstream with another one related to business services, which could provide further relevant insights.

Addressing overall and widely the comments on BEREC’s level of ambition with the Draft Report and the suggestions for additions mentioned, it is noteworthy that they are not in the scope of the current piece of work, which is to provide a snapshot of the regulatory treatment of business services by BEREC members and observers. However, several of the issues mentioned are touched upon and/or implied in BEREC’s Report, some of them being already acknowledged as areas of interest for future work. In the same line, BEREC considers that the particular assessments requested by **Colt**, **ecta** and **1&1** exceed the scope of the Report.



With regard to **ecta's** comment on the clarity of the countries included, the concerned NRAs and the corresponding used acronyms, BEREC would like to refer to Annex II of the Draft Report that encompasses all these elements in a clear manner.

Regarding the comment on the consultation period, BEREC would like to highlight that it did its utmost to keep the consultation open for a period compatible with its established deadlines. BEREC notes the comment and will try to meet, to the extent possible, the stakeholders' expectations in the future.

Finally, since **ecta** is asking for a secondary consultation of the stakeholders (following the inclusion of the additions it requests), BEREC reminds that the course of action regarding stakeholders' involvement is decided depending on the scope of the work, on a case-by-case basis. Therefore, BEREC cannot follow, at this stage, with an additional consultation of the Draft Report.

4. Comments on Chapter 3 – Retail business products and related wholesale markets

DG is of the opinion that BEREC needs to clarify how the market shares presented have been calculated, particularly "*if the mark of 50% is reached in direction of customer contracts*" (retail market shares) and/or if those are assessed based on the share of infrastructure usage (wholesale market shares). At the same time, given that the Draft Report depicts the interplay between the downstream retail business markets and the upstream markets 1/2020, 2/2020 and 3b/2014, it should be made clear to which markets reference is made. In any event, "*in case only market shares are considered from the position of customers/business customers*" (i.e. retail market shares), "*there is a possibility that the market share over the infrastructure is higher*" (i.e. wholesale market share).

ecta calls on BEREC to revise the Draft Report by removing the characterization of "*market shares of at least 50%*" by stating SMP operators' market share explicitly. The manner of data presentation is misleading when it is "*well known, and shown in the External Study, that the SMP operator holds market shares of 70% and above in some EU Member States*". More generally, **ecta** states that the data provided on the market shares is "*too aggregated and does not provide any granularity with respect to both absolute value and the country to which it is associated*". To that end, **ecta** asks BEREC to include a full retail analysis of market share of the SMP operator(s) and all relevant market participants, "*including a breakdown by country of the market shares and number of operators*".

Thus, the comment made by **ecta** concerns the inclusion in the Draft Report of the number of competitors in the market, as well as a description of their operations since "*there is a large number of smaller providers relying on wholesale access from the SMP operator*". In that vein, BEREC fails to examine "*to which extent challenger B2B operators rely on their own infrastructure, or wholesale inputs from SMP operator, or both*".

Concerning the NRAs' analysis of the retail business products, in particular about the Layer 3 VPN services, **ecta** asks BEREC to explain why some NRAs do not include these services in their market analyses.

BEREC's response:

On the clarity of the market shares presented in the Draft Report, BEREC would like to clarify that the information it provides depicts the situation at retail level. While there is widespread recognition that the wholesale market shares may be quite different to the retail market shares, taking due account on the specificities of the retail business markets, it is highly unlikely that an operator with large market share at retail level would not hold *inter alia* a large market share at wholesale level. Such operators would typically be identified as SMP in the related upstream wholesale markets according to the well-established methodology. From that standpoint, BEREC considered retail market shares to be more relevant and to provide a better depiction of the competitive situation underlying any of the wholesale markets 1/2020, 2/2020 and 3b/2014.

Having said that, concerning the request by **ecta** for further disaggregation of market shares, BEREC would like to highlight that for many NRAs retail market share data, especially in the context of a specialised segment of the market such as business services, is considered confidential. To that end, from the outset, NRAs were assured that market shares data would only be published in aggregate form. However, BEREC recognises the pertinence of providing further information on market shares in the form of relevant intervals, as it may portray a more accurate image of the state of the market. Hence, BEREC will include in the final Report relevant intervals for the description of market shares of both incumbents and main competitors, for all business services categories taken into consideration.

With respect to the mandated provision of wholesale access to the SMP's operator(s)' networks, details are provided in the Draft Report in chapters 4 (section 4.10 and 4.11), 5 (section 5.2) and 6 (section 6.2). Additionally, since business services are multi-site types of products and operators quite often use a mixture of both own network and wholesale access to cover expansive areas of interest, further details on this are very specific, country-related and, thus, not further assessed in the current Report. However, this may be a topic of interest for BEREC in the future.

Finally, on **ecta's** comment about the VPN Layer 3 services, BEREC would like to point to Table 2 of section 3.1, whereby it is noticeable that the great majority of NRAs have specifically considered these business services as underlying the wholesale market 2/2020. By contrast, they were not explicitly considered as regards the upstream wholesale markets 1/2020 and 3b/2014, since these markets are focused on mass-market products. However, it is noteworthy that BEREC's intention was to provide a high-level overview of the retail products specifically considered in the context of business markets, but not dive into the particular reasons of one choice or the other, given its interdependency with the overall competition context in the country.

5. Comments on Chapter 4 – M2/2020

DG considers that the market for fibre and mobile backhaul, as well as for dark fibre usage are competitive. Thus, it rejects any kind of approaches to regulate the named wholesale products.

Vodafone is of the view that the definition of business retail and wholesale markets must be fully aligned with actual bandwidth usage, reflective of the shift in demand to higher bandwidths and even Gigabit speeds.

As far as dark fibre is concerned, **Vodafone** notes that there is some inconsistency in the establishment of national access remedies leading to unharmonised offers, especially in the context in which high quality business services are transnational. Therefore, by contrast to the request of **DG**, **Vodafone** asks for regulation of dark fibre access.

At the same time, **Vodafone** asks for appropriate wholesale access pricing to be established for an effective retail competition. Those prices need to be transparent, while access seekers need to have the means to assess their effective application.

Colt considers that BEREC's Draft Report reveals a substantial lack of harmonisation among NRAs in defining the retail business services markets (and consequently wholesale regulatory solutions for SMP). **Colt** does not think that these differences are justified and invites towards further investigation into the national specificities that may "*result in widely different scopes of retail and wholesale product markets*".

Furthermore, **Colt** states that the wholesale regulated offers of the SMP operators "*must include all QoS features which are on demand*", explaining that the focus of NRAs should be on (i) non-discrimination and (ii) wholesale pricing of the QoS features.

ETNO considers that, despite the widespread use of combined business and IT services (such as cloud storage, collaborative solutions, security services, hosting etc.), "*IT services are not and shall not be part of the wholesale relevant market 2/2020*". They do not represent a barrier to market entry in **ETNO**'s view.

Moreover, **ETNO** considers that, given the current development of very high-capacity connectivity, the presence of alternative competing fibre networks, and the current and forward-looking competitive constraints exerted by hyperscalers, market 2/2020 should no longer be susceptible to *ex ante* regulation across the EU.

BEREC's response:

Regarding the comments received on how market 2/2020 regulation is approached by NRAs, BEREC wants to stress that the aim of the Draft Report is to describe the regulatory situation in EU Member States (and non-EU BEREC members/participants) and not to evaluate or discuss the approaches adopted by the NRAs or to define best practices.

On the point raised by **ETNO**, that market 2/2020 should no longer be susceptible to *ex ante* regulation across the EU, BEREC wants to point out that it is the task of the European Commission to periodically review the Recommendation on relevant markets and decide which markets are to be included from an EU-perspective. Moreover, in June 2022, this market was still regulated in most of the countries surveyed (see Table 1 in Chapter 2 of the Draft Report). In any case, NRAs must justify in detail (subject to scrutiny by the European Commission) any regulations they impose on this market.

5.1. Geographic segmentation

DG considers that, before any geographic market distinction is addressed, it is necessary to assess the current level of deployment of broadband infrastructure. In mature markets, fibre networks are already deployed nationally, providing for a working infrastructure competition. By contrast, in evolving markets, fibre networks are not deployed in general at a national level. In the latter case, *“the alternative operators face many obstacles to deploy fibre”* and *“a geographic market segmentation would raise even more obstacles”*. To that end, only the incumbent is seen able to serve fibre on the national level to cover all sites of a business customer. Because of that, *“any kind of market power needs to be determined on the national level”* according to **DG**.

Along the same lines, **Vodafone** cautions regarding the premature geographic segmentation of market 2/2020 as multi-site demand and sourcing from a single supplier play a key role. In light of prevailing local bottlenecks, access to the SMP’s network on a national basis remains necessary.

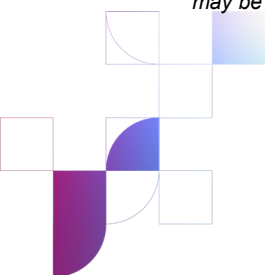
Colt is also supportive of the argument that *“the geographic deregulation is likely to reduce competition for business services rather than enhance it”*.

Contrary to the view of the aforementioned stakeholders, **ETNO** believes that a more granular geographical analysis is appropriate which *“should allow to focus regulatory analysis, if need be, only in non-competitive (possibly less densely populated areas) to accommodate if needed the possibility to replicate multi-site contracts”*. **ETNO** supports BEREC’s views on geographic segmentation as stated in the Draft Report⁶.

BEREC’s response:

BEREC agrees with **DG** on the fact that the availability of alternative (fibre) infrastructure can be an important criterion in a geographic market definition. The criteria used to aggregate

⁶ *“Although most NRAs do not define sub-national M2/2020 markets, an analysis of geographical aspects of market analysis in the context of business services may also be useful for NRAs in the medium and long term, and the analysis done in this report may be extended and be addressed in more depth.” (page 38).*



geographic areas in the analysis of market 2/2020 are discussed in section 4.6 of the Draft Report.

Also, BEREC acknowledges **Vodafone's** standpoint that multi-site demand is an important point to consider in the geographic market analyses (see, for example, the case of Spain discussed in section 4.5 of the Draft Report). However, it is up to the NRA to assess the importance of multi-site demand and its impact on the geographic dimension of the market.

Finally, with regard to **Colt's**, **Vodafone's** and **ETNO's** comments on the result of geographical analysis and its regulatory implications thereof, BEREC wants to point out that it is up to the NRA to analyse the geographic dimension of the market in light of the national circumstances and reiterate that it is not the goal of this Report to judge on the analysis made or to define best practices in that regard.

5.2. Degree of competition and remedies

ETNO believes that the intensity of the competition (in the market for wholesale dedicated capacity) should be analysed through different criteria, such as the number of alternative operators able to exert, even potentially, significant competitive pressure in the market. For instance, suppliers of mass-market fibre with large networks are increasingly more relevant for the assessment.

At the same time, **ETNO** and **GSMA** explain that OTT and IP services change the boundaries of the markets and affect the competitive constraints exerted on the "*traditional high-quality dedicated connectivity services*". To that end, SDN and NFV virtualisation need to be paid particular attention to.

In terms of the requirements of the challenger operators, **ecta** invites BEREC to include a description of the wholesale inputs they demand and use. Additionally, **ecta** explains that the availability and description of SLAs/SLGs, as well as their wholesale pricing are relevant to prevent discrimination. In the same vein, "*an assessment is needed as to whether there are problems regarding how premium SLAs are applied*". Furthermore, **ecta** finds inexplicable the fact that, in some cases, the SLAs/SLGs for the legacy copper network are superior to the ones applicable to the new fibre infrastructures.

BEREC's response:

BEREC agrees with **ETNO** that potential competition should be considered in the market analyses (see e.g. the 2018 SMP Guidelines, paragraphs 54 and 58). However, a more detailed discussion on potential competitive constraints in market 2/2020 is beyond the scope of this Draft Report, as it regards the local specificities of the markets.

Regarding the SLAs/SLGs, BEREC draws the attention that these are specific contractual clauses, most of the times considered confidential if negotiated bilaterally, and it has not been the aim of the Draft Report to describe, assess and draw some conclusion about those.

However, the stakeholders may find some thoughtful insight in the External Study commissioned by BEREC.

6. Comments on Chapter 5 and Chapter 6 – M1/2020 and M3b/2014 in the context of business services

DG states that more consideration should be given to the regulated wholesale products (for instance, with respect to the corresponding SLAs, pricing, etc.) *“and to not simply compare them as equal”*.

Vodafone states the regulation of mass market type of products is key to ensure *“backup”* for the reliability of the overall retail business customer solutions.

Vodafone further states that, while the wholesale access products imposed on markets 1/2020 and 3b/2014 usually address both the residential and the business users, the Draft Report does state that several of the products have specific business features⁷. These features must be safeguarded.

Along the same lines, **Colt** explains that *“wholesale regulated offers of SMP operators”* need to include all the QoS parameters that are required by business customers.

ecta considers that *“the final Report should explain why 6 NRAs have responded that Market 1/2020 is not defined as a relevant wholesale upstream market for B2B purposes”*, including the regulatory implication of a *“country-by-country basis”*.

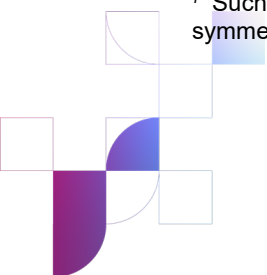
Furthermore, **ecta** explains that many NRAs do not differentiate enough their analysis from a demand-side perspective, taking due account of the differences between the *“consumer demand and B2B customer demand”*.

Finally, some of the comments from **ETNO** and **ecta** mentioned in section 5 above could be seen as relevant for this part, too. However, BEREC does neither repeat those comments nor their answers here. Such comments concern the impact of OTT and IP services, as well as the virtualisation functions of the networks on the competitive conditions in the connectivity markets, the requirements in terms of wholesale services for the provision of retail business services of the challenger operators and other aspects related to SLAs/SLGs.

BEREC’s response:

BEREC understands the point raised by **DG** and would like to note that each NRA takes into account the differences between products for mass market and for business users in their market analyses, not simply comparing them as such. Section 5.1 of the Draft Report

⁷ Such as better QoS, SLAs or a lower level of contention / overbooking, specific bandwidth profiles and/or symmetric bandwidth which primarily target the business segment (pg. 24 and 25 of the Draft Report).



illustrates the situation in the different countries as regards the market definition, while section 5.2 provides the relevant information concerning the regulated products. The reader may see which countries have identified separate markets for business users as the underlying retail market of market 1/2020 and/or which are the corresponding regulated services at the wholesale level. This is informative in that one can conclude on the cases in which the advanced characteristics of business services (SLA, bandwidth, etc.) have led to definition of separate markets.

With regard to **Vodafone's** and **Colt's** comments, BEREC notes that the Draft Report illustrates whether market 1/2020 and/or market 3b/2014 wholesale products are considered relevant for the provision of business services, irrespectively of the business need they cover (i.e. backup solution for business customers). Moreover, it agrees that, in some cases, products have specific business features such as better QoS, SLAs or a lower level of contention/overbooking (please refer to Table 12 and Table 16 of the Draft Report). Nevertheless, the BEREC Report records these cases without identifying any best practices or providing any guidance towards an 'optimal' approach. In any event, within the boundaries of the imposed SMP regulation, BEREC stresses that it is, however, a decision of the operators to structure their products with the characteristics they consider appropriate.

With regard to **ecta's** comments, BEREC once more stresses that the scope of the Draft Report is to provide an overview of the current regulatory situation in the different countries rather than identifying and assessing the different motivations underlying NRAs' decisions. Then, particularly regarding the demand-side assessment, the NRAs are at liberty to decide on the most appropriate approach for the national circumstances, but BEREC notes that demand considerations are unequivocally taken into account in the market notifications.

7. Comments on Chapter 7 – Relevance of physical infrastructure access for business services

According to **DG**, the NRAs should not implement regulations for using passive infrastructures and dark fibre of the alternative operators, in countries or regions where fibre is not fully deployed, as this action would hamper the fibre rollout only to the benefit of incumbents.

GSMA and **Vodafone** consider that the availability of a register/map of SMP operator's passive infrastructure is essential to safeguard competition in the business markets.

ETNO states that "*NRAs should consider whether access to physical or virtual over the top infrastructure is already available upstream and sufficient for competition*". In the same vein, **ETNO** reads in the text of the Draft Report that NRAs see no need to impose physical



infrastructure access remedies unless this is considered sufficient to enable effective competition in the downstream markets⁸.

ecta draws BEREC's attention to the inherent importance of the access to civil engineering infrastructure, which is "crucial" for many of its members providing retail services to businesses. **ecta** urges BEREC "to avoid wrongly creating the impression that such wholesale access would largely be considered intrinsically unimportant", based on experience in some countries with limited relevant underground civil engineering infrastructure.

In addition, in a wider setting of the analysis of the markets downstream of a potential stand-alone physical infrastructure access market (market for wholesale access to civil engineering infrastructure, as **ecta** calls it), **ecta** mentions again that "many NRAs do not look at retail markets in a manner differentiating consumer demand and B2B demand".

Referring to the terminology, **ecta** asks BEREC to use 'civil engineering' instead of 'passive infrastructure'.

BEREC's response:

BEREC takes note of **DG's** comment but points out that it is not under its remit to advise NRAs on certain conclusions. The market review procedure is a national prerogative which must follow the established regulatory standards and methodologies, but without prejudicing on the outcomes of the analysis. Thus, the conclusions are a logical consequence of the arguments presented and cannot be imposed or drawn *a priori*.

With regard to **ETNO's** comment on the sufficiency of physical or virtual over-the-top infrastructure, BEREC would like to emphasise that there is no such automatism, meaning that if this wholesale input is imposed, no further remedies need to be imposed. On the contrary, NRAs need to analyse whether this is the case and if not, impose the additional necessary remedies.

BEREC agrees with **ecta** that the importance of access to civil engineering infrastructure depends on the exact conditions that prevail in each country (especially the availability of such civil engineering infrastructure in the country) and that, quite generally, it is seen as an important input which may deem competitive downstream conditions effective. In that sense, regarding the comments of **Vodafone** and **GSMA**, BEREC also notes the importance of the mapping of physical infrastructure and wants to recall that this matter was addressed in the Broadband Cost Reduction Directive⁹.

BEREC observes that section 7 of the Draft Report, referring to the relevance of physical infrastructure access for business services, has been interpreted differently by the stakeholders. On the one hand, **ETNO** considers that NRAs do not see any need to impose

⁸ See last sentence in Chapter 7 of the Draft Report "As a conclusion, there is not a clear trend among the NRAs regarding the significance of passive infrastructure for business services".

⁹ BEREC's answer here is without prejudice to the outcome of the undergoing revision of the BCRD.

physical infrastructure access remedies unless this is considered sufficient to enable effective competition in the downstream markets, while **ecta**, on the other hand, is of the view that the Report creates the impression that such wholesale access would largely be considered intrinsically unimportant. BEREC notes that the Report presents the responses of the NRAs (i.e. 13 out of 33 NRAs (39%) responded that, indeed, wholesale physical infrastructure products are important for business services, while 13 NRAs (39%) do not consider such products as especially important for business services). In any event, BEREC will amend section 7 in order to avoid misinterpretation.

Finally, considering **ecta**'s comment on the terminology of either 'passive infrastructure' or 'civil engineering', BEREC would like to highlight that the report examines business services from a market analysis perspective and that the Relevant Market Recommendation specifically refers to *physical infrastructure access*¹⁰. Apparently, the terms "physical infrastructure", "passive infrastructure" and "civil engineering" are very close and in many cases may be used interchangeably.

Taking into consideration the above, although the questionnaire filled by the NRAs specifically asked whether passive infrastructure has been used by the NRAs as a remedy, BEREC is of the view that it is appropriate to change the expression used from "passive infrastructure" to "physical infrastructure".

8. Comments on Chapter 8 – Symmetric regulation in the context of business services

DG considers that symmetric regulation is not accurate as no alternative operator can compete with the incumbent because of the lack of national coverage, pointing to the case of Germany, where there is low fibre coverage nationwide.

ETNO highlights that it is important to "*ensure compliance with existing symmetric legal obligations*" in cases in which the connectivity services are bundled with "*IP-based services provided as OTTs*".

BEREC's response:

As shown in the Draft Report, there is no symmetrical regulation in Germany. Nevertheless, as the relevant NRA is best placed to assess the specificities of that particular market, BEREC does not comment on the national situation in Germany.

¹⁰ The Explanatory Note of the Recommendation defines physical infrastructure as: "*facilities or elements associated with an electronic communications network, which enable or support the provision of services, and include buildings or entries to buildings, building wiring, antennae, poles, towers and other supporting constructions, ducts, conduits, masts, inspection chambers, manholes, and cabinets*", while at the same time it cross-refers to Article 72 of the Code "Access to civil engineering".

Concerning **ETNO**'s comment, while BEREC acknowledges the importance of abiding by the obligations imposed, it is worth noting that several services with which connectivity is bundled are not considered electronic communications services and, therefore, beyond the scope of *ex ante* regulation as such.

9. Comments on Chapter 9 – Data collection, reports and good practices by NRAs

Colt proposes that NRAs should coordinate and share their experiences to ensure reliable and consistent data collection in business markets, and to facilitate operators' provision of information. Particularly, BEREC should be focusing on "*how to properly measure market shares of operators active in the business markets*". **Colt** draws attention to the need that any deregulation based on market shares should be done from a position of assurance of the correctness of the data, being concerned that alternative operators' market shares may have been overstated, leading even to geographic deregulation in one case. In this vein, market shares should not include SD-WAN services provided over broadband internet connections.

ETNO emphasises that the reporting requirements for business services should be appropriate and take into account the development of IT services beyond the wholesale market for dedicated capacity.

BEREC's response:

BEREC shares **Colt**'s view on the relevance of data collection, also in particular with regard to market shares. As explained in the Draft Report, BEREC has identified a number of data collection issues and difficulties that NRAs should consider in order to further improve this task, given the significant impact that unreliable data could have on regulatory decisions. BEREC takes note of the suggestions for future work to improve such calculations as an important element.

BEREC agrees with **ETNO** that information requirements should be appropriate and consider all relevant market developments. As regards IT services in particular, BEREC is following this market trend, as shown in the External Study accompanying the current Draft Report. In this sense, each NRA may, if it deems necessary, request specific data to assess the potential impact of these services on the business electronic communications markets.

10. Comments on Chapter 10 - Conclusions

GSMA believes that the changing nature of the business markets is characterised not only by more complex products, but also by an increasing number of players involved in providing the solutions. Thus, **GSMA** is supportive of BEREC and NRAs continuous monitoring of the business markets taking into account the full picture of competition dynamics.



ecta finds that BEREC's conclusions contain relevant and positive elements but overall they are very limited.

Also, **ecta** has a series of specific comments to some of the paragraphs of Chapter 10. They are summarised as follows and can be found in **ecta's** contribution, in section 6, page 12: (i) with reference to para (2), remove the "*overly prudently*" characterisation of the market share values¹¹, (ii) with reference to para (5), expresses doubts on the interpretation of the statement, (iii) with reference to para (14), mentions serious problems with BEREC's approach regarding the significance of access to civil engineering infrastructure.

Concerning (ii) above, **ecta** is concerned that the statement in para (5)¹² "*may be interpreted as BEREC endorsing a state of affairs in which Market 3b/2014 is seen as a wholesale market with remedies to serve consumers but not businesses, while in some EU Member States under Market 2/2020 (Market 4/2014) no equivalent wholesale input is available*". In this respect, they refer to the case of Germany and Spain.

BEREC's response:

BEREC notes and upholds **GSMA's** comment on business markets monitoring.

As for **ecta's** concerns about the interpretation of the regulation of market 3b/2014, BEREC highlights that the referenced sentence merely describes the findings of the questionnaire on this matter and that BEREC does not analyse them in depth in order to take a position on them.

11. Comments on Chapter 11 - Future work

MVNO Europe is calling on BEREC to investigate the market situation regarding business services in the mobile and IoT markets, and not only focus on fixed business connectivity markets, as retail business-to-business communications services are increasingly commercialised as part of fixed-mobile convergence bundles. Thus, BEREC is called to explicitly cover the integration of fixed and mobile communications (Unified Communications as a Service – UCaaS). Furthermore, **MVNO Europe** asks BEREC to look into issues related to the provision of "*wholesale mobile access for the provision of services to businesses and public administrations*".

¹¹ In the Draft Report, BEREC makes reference to "market shares of at least 50%".

¹² "*Similarly to M1/2020, the standard mass market wholesale products are often used by business services providers for the SME segment, but not in general for the high-end business segment, and just a few NRAs regulating M3b/2014 wholesale access products have characteristics specifically addressing the business segment*".

1&1 calls on BEREC to critically examine certain shortfalls in the German regulatory landscape of business services, namely regulatory loopholes, devaluation of competitors' infrastructure, migration costs and faulty cost analysis in the margin squeeze tests.

Colt considers that while regulatory remedies in the residential market have allowed alternative operators to gain market share and benefit consumers, the business market remains strongly dominated by incumbent (ex-monopoly) operators. For this reason, **Colt** encourages BEREC to conduct follow-up work, including a specific analysis to verify whether deregulatory decisions by NRAs (including those where sub-national markets are deregulated or remedies are differentiated on a geographic basis) result in a more (or less) competition for business customers.

Colt wishes to encourage BEREC to conduct future work on SLAs, in particular making progress towards better guaranteed intervention/repair times offered by SMP operators.

Colt invites BEREC and NRAs to further investigate market circumstances and promote wholesale competition, especially "*where the SMP operator and one or more mixed (consumer + business) operator(s) are present*". A niche operator (like **Colt**) has to reach an agreement with the SMP operator even if a major mixed alternative operator exists "*because mixed operators have neither incentives nor the interest to provide fit-for-purpose wholesale services to niche operators*".

While **Colt** warmly welcomes the three first paragraphs of Chapter 11 of the Draft BEREC Report, it does not think that the lack of harmonization in NRAs regulatory decisions regarding business markets is justified by the "*differences in the structure of the national retail markets*". Therefore, BEREC is urged to engage in an assessment of the reasonability of the wide differentiation of the scopes of retail and wholesale products markets.

ETNO is supportive of BEREC's view on geographic segmentation as presented in page 33 of Chapter 11.

In a future perspective, **ecta** asks BEREC to update the 2012 Common positions on best practices concerning the WLA, WBA and WLL markets.

While collaboration between ECS operations and IT specific players is for sure relevant for the future competitive dynamics, **ecta** draws BEREC's attention that it should carry its duties according to the EECC and the BEREC Regulation, as explained on page 14 of the contribution¹³. Moreover, as there is an agreement on the importance of switching behaviour, **ecta** draws on BEREC's attention that "*the complexities of switching B2B services*" are not

¹³ **ecta** asks for consideration of "the imposition of multiple remedies on SMP operators, in the areas of fit-for-purpose wholesale access to civil engineering infrastructure, physical access and virtual/active access, and possibly more creative and new remedies designed specifically to address competition problems situated above the civil engineering, passive access and active transmission access layers".

negligible and, thus, “*any initiatives in this regard are thoroughly checked in advance with alternative operators*”.

ecta goes on to explain its reservation towards more focus by BEREC on “*potentially promoting geographical segmentation of markets and/or geographic differentiation of remedies*”¹⁴.

While welcoming the proposals in paragraphs 7 and 8 of Chapter 11, **ecta** considers that the topics of coordination and experience exchanges among NRAs (para 7) and recommendations for companies and public institutions aimed to incentivise competition (para 8) “*cannot constitute the main threads of BEREC’s future work on B2B markets*”. On the contrary, **Colt** welcomes the consideration of BEREC planning to prepare recommendations for private and public entities as regards the encouragement of competition in the business markets.

In accordance with paragraph 9, **ecta** considers that the full scope of wholesale inputs underlying the retail business markets must be “*seriously examined*” and “*cautions against any suggestion concerning the effective competitiveness of the market due to the constraints exercised by ‘over-the-top’ and ‘big tech’ offerings, and/or that remaining mass market remedies would be ‘good enough’ to constrain the SMP position on B2B*”.

Finally, **ecta** calls on BEREC to initiate a separate research workstream into market shares for ECN/ECS provided to public administrations.

BEREC’s response:

BEREC takes note of the request from **MVNO Europe** to investigate the market situation regarding business services in the mobile and IoT markets. In this regard, as shown in the External Study accompanying the Draft Report, BEREC is already following the interplay between fixed and mobile services in the business segment. However, in their market analyses responses, NRAs did not specifically mention mobile services as an issue related to the business markets.

Concerning **1&1’s** request to assess the competitive landscape in Germany, BEREC underlines that this is a national prerogative that only BNetzA can exercise. However, there are several consultation mechanisms in place that could be used to clarify further the view on the regulation in the mentioned MS.

As shown in the Draft Report, **Colt** is right to observe that the incumbent operators still hold significant market shares. This is one of the reasons for which the wholesale markets upstream from the retail business markets are still considered relevant to *ex ante* regulation and broadly regulated at national levels. As explained, BEREC is considering engaging in

¹⁴ With reference to para (6) of Chapter 11 of the Draft Report.

further workstreams related to the regulation of business markets and their effectiveness. A more detailed work on specific SLAs may be envisaged.

Concerning the above-mentioned **ecta** comments regarding BEREC's future activity, they have been duly noted and will be further discussed within BEREC and taken into account to the extent possible in the follow-up activities.

Finally, in the light of the observations received, BEREC has slightly amended the text of Chapter 11 of the Report.

12. Other comments

BEREC has received a series of other comments, which are presented in the following subsections.

12.1. Important elements from the External Study

ecta and **ETNO** expressed concerns that (substantive) elements from the External Study are not materially reflected in BEREC's Draft Report.

At the same time, **ecta** finds it disappointing that it was not interviewed and, even more, that only two of its members were part of the sample for the External Study.

BEREC's response:

BEREC has incorporated some important elements and conclusions from the External Study in the final version of the Report. BEREC intended to integrate them already into the Report ahead of the public consultation, but because of unforeseen changes to the schedule it was not possible to do so. Thus, BEREC thanks the stakeholders for paying attention to the relevant elements of the Study.

Having mentioned that, BEREC deemed it useful to integrate in the Report the following conclusions of the study: (1) there is an appreciable level of satisfaction among business users of their offers (in terms of quality, contractual relationships, and price), and (2) an emerging trend to commercialise bundled offers including communications services and IT services can be noted, although it does not show a clear trend towards consolidation between ECN and IT services, notably as both have their own specificities and engage specialised skillsets. Furthermore, BEREC acknowledges that the External Study highlights some cases where choice and switching may be more difficult for business users. Nonetheless, BEREC does not share the same opinion that this accrues to a "*severe competition problem*" as mentioned in some contributions.

Regarding the comment from **ecta** on the sample of interviewees for the External Study, BEREC acknowledges this feedback. However, it has to be noted that BEREC commissioned

the Study without prescribing a mandatory list of interviewees, as this selection fell in the remit of the contractor. Nonetheless, when preparing the general terms of the tender, BEREC recommended that the list be as comprehensive as possible, so as to represent a complete view of the main actors involved in the offer of business services, (including (a) operators using mainly own infrastructure, (b) operators which mainly buy wholesale inputs). In doing so, BEREC did indicate European Operators Associations (including **ecta**) amongst the possible interviewees. When looking at the analysis reported in the External Study, BEREC notes that, indeed, **ecta**'s views have been represented too.

12.1.1. Inclusion of demand-related aspects

ecta asks BEREC to include an in-depth analysis of the demand and usage patterns of wholesale access seekers¹⁵. The draft Report does not discuss whether or to which extent alternative operators are able to bid competitively in tenders/requests for proposals from larger B2B end-users. Additionally, **ecta** asked for the inclusion of a retail analysis encompassing: (1) a thorough assessment of the demand-side, i.e. of the needs of various types of B2B end-users and how end-users including public administrations purchase B2B services, and (2) an in-depth description of the B2B ECN/ECS market participants, their characteristics, and their market positioning in relation to multi-national and global providers. **ecta** explains that the fact that B2B customers also need internet access and voice services (not HQ services) is also not taken into account and reflected in the Draft Report.

BEREC's response:

Regarding **ecta**'s comments on the need for a more extensive description of the demand-related perspective of the markets (retail and wholesale), BEREC notes that this Report is intended to provide a focused view of how business services are handled at the regulatory level, leaving a more comprehensive take on the needs of business market operators and business customers for the External Study. For instance, Chapter 3 of the Draft Report seeks to provide just a high-level snapshot of the main categories of retail business services taken into consideration by NRAs and the competitive scenery related thereof. Also, a discussion on whether or to which extent alternative operators are able to bid competitively in tenders, as raised by **ecta**, is beyond the scope of the Report which focuses on the regulations that target the business segment.

To conclude, BEREC stresses that the retail demand and supply-sides analyses asked by **ecta** fall into the scope of the External Study, which will be reflected in the final Report.

¹⁵ According to **ecta**, likely showing that they need and use a wide portfolio of SMP operator wholesale inputs in order to stand a change of competing across the board with the SMP operator, even when combined with their own infrastructure.

12.2. Summary of the stakeholders' Workshop and outcomes

1&1, ecta, ETNO and GSMA point to the proceedings of the dedicated stakeholder Workshop held in October 2022 and mention that it should be reflected in the Report.

BEREC's response:

BEREC agrees with the stakeholders' observations and, subsequently, will include a summary of the Workshop's proceedings in the final Report.

12.3. NRAs approach to regulation of business markets and remedies imposition

DG states that every remedy for an operator that has no market power on a national level implies a manifestation of incumbent market power. To that end, one of the main messages of its contribution would be that the alternative operators are not to be regulated.

ETNO emphasises that remedies imposed on SMP operators should be proportionate and take into account the specificities of the business market. To that end, **ETNO** considers that if business services are offered over a mass market product¹⁶, either no regulation should be imposed on market 2/2020 or this should be considered when assessing market 2/2020 SMP. Quite generally, **ETNO** believes that market 2/2020 should no longer be susceptible to *ex ante* regulation at EU level, which is opposite to **ecta's** and **Vodafone's** view presented below.

Another comment by **ETNO** concerns the fact that price control obligations should only be an extraordinary means of regulation, especially in the case of fibre networks, when they should never be imposed. If, however, such remedies are set, inflation adjustments should be allowed. In the same line, ERT should never be imposed when a costing orientation obligation is still in place.

Regarding the retail segmentation of the businesses markets, **ETNO** requests that NRAs assess whether the market segmentation into low and high bandwidth segments is justified in the light of the national circumstances. **ETNO** considers that, in a forward-looking perspective, the low-bandwidth segment is no longer relevant due to the demand shift to the high bandwidth. At the same time, the high bandwidth segment is, in many countries, not susceptible to *ex ante* regulation anymore.

Finally, **ETNO** stresses the fact that, because of the diversity of regulations applicable in the different MS, the operators find it "*difficult and time consuming*" to comply with. Also, **ETNO** mentions that the operators are sovereign in choosing the best fitting technological solutions.

¹⁶ Based on a market 1/2020 input.

Vodafone makes reference to the high concentration¹⁷ featured by the business markets in the majority of countries, stating that “*deregulation of the relevant wholesale markets/inputs at this point in time could prove premature and risk recreating bottlenecks*” for the industry, affecting the ability to offer high quality services to business markets.

Moreover, **Vodafone** considers the appropriate wholesale access pricing and the application of an effective non-discrimination obligation essential to safeguard competition in the regulation of business markets. Also, greater flexibility regarding the modification processes for capacity update and/or premises location is mentioned as an area of improvement.

GSMA states that the (large) variations in the NRAs’ application of remedies “*affect companies providing pan-European services negatively by increasing compliance costs or preventing their cross-border service supply*”. **GSMA’s** expressed concerns are related to the transnational dimension of the business services markets being inconsistent with the remedies imposed at national level. This leads to a lack of harmonised offers cross-border.

Colt indicates that it is imperative for NRAs and BEREC to “*proceed to the implementation of bold regulatory measures to ensure a healthy competitive scenario in the provision of ECN/ECS to business customers*”. For instance, **Colt** believes that the situation can be improved by implementing three regulatory remedies: (i) wholesale access to civil engineering infrastructure of SMP operators on cost-oriented and fully non-discriminatory terms, (ii) fit-for-purpose active wholesale regulated products provided at prices enabling margins stimulating competition by both infrastructure-based and service providers, with different levels of Quality of Service and (iii) a strict Economic Replicability Test.

Another comment from **Colt** relating to the retail products assessed deals with the SD-WAN services, which should not be considered as part of the wholesale access markets, since these services are provided ‘*on top*’ of broadband internet access. On the contrary, **ecta** considers that the NRAs should indeed include them in their assessment of the business markets. **GSMA** also mentions the WAN services as more important as an input to the provision of business services.

ecta is critical about the fact that BEREC does neither take a stance nor provide reasoning for the differential treatment of the business markets by NRAs. It does not believe that the national circumstances in MS are so different as to warrant such a wide array of regulatory approaches. Moreover, **ecta** supports the definition of national markets.

At the same time, **ecta** points to the new practices in the retail market (i.e. teleworking, mobile connectivity, bundling of ECS with IT services, etc.) for supporting the idea that “*the scope and definitions of wholesale markets and/or remedies on wholesale markets may need thorough re-examination*”.

¹⁷ Showing market shares above 50% for the SMP operator, and, in most of them, also a market share lower than a 30% for the main alternative operator, according to the data presented in the Draft Report.

ecta also highlights that there is no information about which NRAs mandate Equivalence of Input (EoI) or Equivalence of Output (EoO) for the provision of relevant wholesale inputs for retail business services.

An additional issue to examine in **ecta's** view is that “*SLAs/SLGs for wholesale access to new fibre networks are in some cases inferior to long-standing SLAs/SLGs for the legacy copper network*”, since “*this cannot legitimately be the direction of travel*”. Quite generally, **ecta** “asks **BEREC** to pay particular attention to repair KPIs/SLAs/SLGs of wholesale inputs”, being ready to explain the existing differences in that regard.

Another comment raised by several stakeholders concerns the imposition of dark fibre access in the context of business markets. While **Vodafone** considers it important and relevant for the deployment of networks, **DG** pleads for its non-imposition for alternative fibre operators.

BEREC's response:

BEREC preliminary notes that all comments received and mentioned above concern broadly the implementation of regulatory measures and application of remedies. Also, BEREC believes it is important to note that some stakeholders express opposite views towards the issues presented, which speaks to the non-triviality of the tasks that NRAs are to fulfil on the one hand and, on the other, to the different circumstances that indeed create sometimes divergent views on the side of the operators.

With regard to this, BEREC wants to stress again that the aim of the Draft Report is to describe the regulatory situation in EU Member States (and non-EU BEREC members/participants) and not to evaluate or discuss the approaches adopted by the NRAs, their underlying reasoning, or assess the adequacy of the imposition/modification of remedies. Therefore, BEREC takes this opportunity to remind that the assessment of the business markets, the SMP designation and, most importantly, the imposition of remedies to alleviate competitive concerns are national prerogatives, to which BEREC may play an advisory role. In this vein, BEREC is not to instruct NRAs into how to set or design the specific obligations of choice.

With regard to **ETNO's** comments related to business services offered over mass market products and segmentation of the market into low and high bandwidth, BEREC wants to point out that NRAs periodically analyse the markets and evaluate whether it is necessary or not to proceed with the partial or total deregulation of some services, as well as to the set remedies on SMP operator(s) according to the specific market situation of a country. The same argument is valid in relation to the rest of the comments provided, asking BEREC in one way or the other to take a stance on NRAs' decisions and conclusions as regards the regulatory measures imposed on the business markets.

12.3.1. Remedies: copper switch-off

According to **ETNO**, the wholesale services “*should be provided according to the technical evolution allowing the shutdown of the legacy network*”. Differently put, the VHC network-

based wholesale products should be “*comparable*” in terms of qualitative parameters with the legacy-based ones, but never fully “*identical*”. Nevertheless, this aspect and the technological differences should not hinder the copper switch-off. Moreover, clear timelines should be established for the migration and the SMP operator should be allowed to migrate customers with an appropriate prior notice. Overall, NRAs need to be supportive of the copper networks decommissioning.

BEREC’s response:

With regard to **ETNO’s** comments concerning the migration from legacy infrastructure and copper switch-off, BEREC notes that Art. 81 (2) of the EECC clearly states that the decommissioning or replacement process includes a transparent timetable and conditions, including an appropriate notice period for transition and also that the alternative products that provide access to the upgraded network infrastructure substitute the replaced elements. Those should be of at least comparable quality in order to safeguard competition and the rights of end-users. This Report does not add anything on this, neither does it provide any conclusion contradicting the aforementioned article of the Code. However, if the reader wants to deepen the understanding on these processes, BEREC stresses that it has been working previously on such topics and further information could be found in the BEREC Report on a consistent approach to migration and copper switch-off, BoR (22) 69¹⁸.

12.4. Observed trends in the business markets

According to **GSMA**, the market for business services is seeing “*increasing diversification and intensified competition. There’s an acceleration and continuous shift to online*” and there is a wider trend in “*shifting towards cloud-based services*”. **GSMA** advises BEREC to “*consider specifically the increasing market power of global content providers, like Meta (WhatsApp), Microsoft (Teams), Cisco (Webex), Zoom and Amazon*”, and the impact on the regulated wholesale market 2/2020. Additionally, **GSMA** observes that “*most high-quality business services do not necessarily require underlying high quality network infrastructure and bespoke network solutions*”. More and more high-quality services are built based on software solutions provided by non-telecom players than can run over plain broadband IP networks. Such statements are upheld by **Vodafone** as well.

ETNO also believes that competition from cloud-based service providers like Microsoft, Zoom or Google increases rapidly. **ETNO** further states that the monitoring of the market should also mean going beyond the pure relevant market in order to have a more holistic view of the competition.

BEREC’s response:

¹⁸ <https://www.berec.europa.eu/en/document-categories/berec/reports/berec-report-on-a-consistent-approach-to-migration-and-copper-switch-off>

BEREC agrees with **GSMA** and **ETNO** that there is an acceleration and shift to online and cloud-based services and observes an increasing importance of online collaboration tools. However, BEREC would like to highlight that it has not made an assessment of potential competition problems in the wider space of online business services or cloud services. BEREC further considers that the arguments of GSMA and ETNO do not fall within the scope of the current Report and, therefore, no changes are necessary.

However, BEREC does see the need to investigate those market trends more closely and thus decided to include an external study on the trends and policy/regulatory challenges of cloudification, virtualisation and softwarisation in telecommunication in the 2023 Work Programme¹⁹. The publication of the study is foreseen for December 2023. This study will be followed up with a workshop in Q1 2024 and all relevant input from stakeholders will be most welcome.

12.5. Countries covered by the Report

ETNO states that the countries in the Report cover more than the EU, which is “*interesting but in respect to the EC regulation questionable*”. Along the same lines, **ecta** asks BEREC to systematically (in all documents, and in all their aspects, both text and tables) report separately on EU, EEA and non-EU countries.

BEREC’s response:

With regard to **ETNO**’s comment, BEREC notes that the questionnaires for the reports are typically sent to all of its members and participants, therefore to Member States, EEA countries and non-EU countries. As such, the Reports cover all different cases of countries.

With regard to **ecta**’s suggestion that EU, EEA and non-EU countries should be reported separately, BEREC points out that, in most of the cases, the responses to the questionnaire are analysed with reference to the countries responding, so the reader is able to identify the practices that are followed in the MSs and in the other countries. In addition, inclusion of separate tables for EU, EEA and non-EU countries, instead of one table, would decrease the readability of the Draft Report significantly. Therefore, BEREC does not consider it appropriate to adapt the final Report as suggested by **ecta**.

¹⁹ Document BoR (22) 193 - <https://www.berec.europa.eu/en/document-categories/berec/berec-strategies-and-work-programmes/berec-work-programme-2023>

12.6. NRAs' Key Performance Indicators

As regards the monitorization of the obligations imposed, several stakeholders raised comments on the potential key performance indicators that may be used by NRAs to assess the impact of the imposed regulation.

For instance, **Vodafone** considers that there is a need for the improvement of the audit done by the NRAs (i.e. KPI-related process) to properly detect and tackle discriminatory practices.

Then, **GSMA** and **ETNO** note that some information on the KPIs used by NRAs for business markets-related products would be highly relevant.

BEREC's response:

Regarding the comments of **Vodafone**, **GSMA** and **ETNO** for the KPIs, although BEREC agrees with the comments that KPI-related processes are essential for safeguarding competition, it stresses that an in-depth discussion for KPIs is out of scope.

12.7. Comments concerning other markets than the business services markets

BEREC has received a series of comments that do not directly address the broadband access business markets and may be linked with other markets or aspects of the ECS, as follows:

- **GSMA** refers to (i) the distribution of liability in the end-to-end business communication services related to emergency calling obligations and (ii) the existing numbering framework that are not suited to modern communications use cases.
- **Colt** mentions (i) numbering issues for the provision of voice services for business customers, (ii) CLI spoofing and (iii) a market for the "*provision of services to public administrations*" in the sense of investigating the contracting practices, for instance.
- **ecta** indicates the inception of a separate workstream for ECS/ECNs provided to public administrations.
- **ETNO** names the compliance with (i) public safety/security, (ii) emergency preparedness and (iii) customer protection as regards certain services provided as OTTs such as SIP telephony or cloud communications.



- **MVNO Europe** notes issues²⁰ related to the obtaining of fit-for-purpose wholesale mobile access which would prevent them from competing head-on with Mobile Network Operators.

BEREC's response:

BEREC notes the issues raised but considers them outside the scope of the current Report. Therefore, there is no need for amendments to the consulted document with respect to these issues.

However, BEREC would like to invite all stakeholders, if they experience problems to the functioning of ECS markets or would like BEREC to consider particular aspects or products, to raise these points in the annual public consultation of the BEREC Work Programme.

²⁰ Such as restrictions on the ability to use their own systems/interconnections, discriminatory situations on wholesale QoS (e.g. 4G and 5G being withheld or subject to speed restrictions), undue restrictions on the use of wholesale roaming (resale) access, margin-squeeze situations.