



ecta RESPONSE

**TO THE PUBLIC CONSULTATION BY BEREC
ON THE**

**DRAFT BEREC REPORT ON COMPETITION AMONGST
MULTIPLE OPERATORS OF NGA NETWORKS IN THE SAME
GEOGRAPHICAL REGION**

BOR (22) 188

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1. Introduction

1. **ecta**, the **European Competitive Telecommunications Association**,¹ welcomes the opportunity to comment on the draft BEREC Report on competition amongst multiple operators of NGA networks in the same geographical region, BoR (22) 188. **ecta** thanks BEREC for preparing the draft Report.
2. **ecta** represents those alternative operators who, relying on the pro-competitive EU legal framework that has created a free market for electronic communications, have helped overcome national monopolies to give EU citizens, businesses and public administrations quality and choice at affordable prices. **ecta** represents at large those operators who are driving the development of an accessible Gigabit society, who represent significant investments in fixed, mobile and fixed wireless access networks that qualify as Very High Capacity Networks and who demonstrate unique innovation capabilities.

2. Key **ecta** considerations – missed opportunity to provide best practices and BEREC Common Position

3. **ecta** considers that geographic segmentation of markets and geographic differentiation of regulatory obligations imposed on operators with Significant Market Power are extremely important issues, to be treated by NRAs and by BEREC with utmost seriousness and caution, given the major impact these can have on competition and ultimately on end-user interests.
4. The draft BEREC Report consists of a factual presentation of NRA responses to a BEREC questionnaire on specific market analyses conducted by NRAs, and on selected factual features of market situations.
5. Whilst this is to some extent informative, **ecta** wishes to express its disappointment with the draft Report, for the following key reasons:
 - a) BEREC limits itself to reporting in a merely descriptive way on NRA decisions and on the market situations reported by NRAs.
 - b) The fact that very unharmonized NRA decisions are revealed (e.g. relating to: (i) grouping of geographical units into homogeneous submarkets and/or areas with differentiated remedies, and (ii) thresholds used by NRAs for triggering geographic segmentation of markets or geographic differentiation of remedies) elicits no comment whatsoever from BEREC. In this regard, **ecta** considers that BEREC would have been able to point to a state of affairs in which NRAs have taken substantially different decisions that do not appear to be objectively attributable to national specificities.
 - c) BEREC singularly:

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

- (i) does not identify any suggestions for improvements or regulatory best practices.
 - (ii) does not provide any guidance or recommendations.
 - (iii) does not present any proposals for follow-up or future work or actions.
6. This is surprising, especially given that the BEREC Common Position on geographical aspects of market analysis (for both geographic market definition and geographic differentiation remedies) dates back to 2014 and the report on the application of this Common Position dates back to 2018. ecta considers that BEREC is missing an opportunity to provide best practices and to revisit and update its Common Position on these important matters.
7. ecta observes with great concern that BEREC seems to have retreated to a position of observer of NRA decisions. BEREC (and the ERG before it) have in past years regularly issued best practices and common positions, which had (and continue to have) a demonstrated track record of encouraging NRAs to take justified and reasoned decisions. Publishing best practices and common positions helps NRAs defend their decisions, including in case of appeals. This is an approach which reinforces the position of both NRAs and BEREC in carrying out their duties in an impartial way, strengthens the institutions' standing, and helps in demonstrating their effectiveness, including when seeking to act on new subject areas.
8. ecta wishes to kindly ask BEREC to focus more on its regulatory remit, contained in Regulation No 1211/2009 (the BEREC Regulation), and in particular in Article 3 (Objectives of BEREC), points (1) and (2) and in Article 4 (Regulatory Tasks of BEREC), points (1) (e) and (k) thereof, as cited below:

Art. 3

(1) BEREC shall act within the scope of Regulations (EU) No 531/2012 and (EU) 2015/2120 and Directive (EU) 2018/1972.

(2) BEREC shall pursue the objectives set out in Article 3 of Directive (EU) 2018/1972. In particular, BEREC shall aim to ensure the consistent implementation of the regulatory framework for electronic communications within the scope referred to in paragraph 1 of this Article.

[...]

Art. 4(1)

(1) BEREC shall have the following regulatory tasks:

[...]

(e) to issue other guidelines ensuring the consistent implementation of the regulatory framework for electronic communications and consistent regulatory decisions by the NRAs, on its own initiative or upon the request of an NRA, the European Parliament, the Council or the Commission, in particular for regulatory

issues affecting a significant number of Member States or with a cross-border element;

[...]

(k) to issue recommendations and common positions, and disseminate regulatory best practices addressed to the NRAs in order to encourage the consistent and better implementation of the regulatory framework for electronic communications;

[...]

9. BEREC is understandably keen to provide its expertise and regulatory knowledge in new areas which are adjacent to electronic communications regulation, but this should not be to the detriment of continued focus on BEREC's remit established by EU legislation. **ecta** considers it highly problematic that BEREC's draft reports on interoperability on number-independent interpersonal communications (NI-ICS) and on artificial intelligence (AI) (on which BEREC is consulting in the same timeframe) are deeply researched and substantive, and – by opposition to the two draft reports on ECN/ECS which take an observer position – are clearly drafted in a way to include a strategic dimension, with a clear intent of assessing the competition issues with a view of ascertaining the need for regulation.
10. **ecta** wishes to note that BEREC's remit does not include in a direct or indirect manner the regulation of competitive issues in application of the Digital Markets Act (DMA) and of artificial intelligence, with the exception of the technical advice that BEREC could provide if requested by the European Commission on the technical details and the general terms and conditions published in the reference offer that a DMA-designated gatekeeper intends to implement or has implemented in order to ensure compliance with the obligation of interoperability.
11. On the basis of the above, **ecta** kindly invites BEREC to re-focus on its regulatory remits and to re-start its previous practice of developing deliverables that provide best practices and common positions on the regulation of ECN/ECS markets, which remain subject to competition problems and need BEREC's pro-active contribution. Finalizing the draft BEREC Report on competition amongst multiple operators of NGA networks in the same geographical region by the addition of meaningful regulatory best practices is a good and worthwhile starting point for such a re-start.

3. **ecta** suggestions for specific improvements to the draft Report

12. Having carefully studied the contents of the draft Report with our members, **ecta** provides constructive suggestions for methodological improvements of the factual presentation of information that BEREC has gathered, and adds some brief punctual comments.

Need to systematically distinguish geographic segmentation of markets from geographic differentiation of remedies

13. **ecta** is concerned that the draft Report does not always fully distinguish: (i) geographic segmentation of markets, and (ii) geographic differentiation of remedies. This distinction is essential, and needs to be meticulously maintained at all times. **ecta** asks BEREC, as a minimum, to make this distinction much more clearly in table 3, and to use sub-titles throughout each section of the final Report to make the distinction clear to all readers.

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

14. **ecta** finds it surprising that, more than 4 years after the publication of the EECC, which contains the key concept of Very High Capacity Networks (VHCN), and after the European Commission has set Gigabit network targets², BEREC issues a draft Report which concerns Next Generation Access (NGA) networks as defined by the 2010 EC Recommendation on Regulated Access to Next Generation Access Networks (footnote 7 of the draft Report). A few paragraphs of the draft Report to acknowledge the concept of VHCN and refer to VHCN, but these are exceptions. **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 (which BEREC has declared to be potentially qualifying as VHCN³) has not been deployed on any meaningful scale by SMP operators. **ecta** is of the view that the contents 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. Indeed, 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. In fact, the very fundamental nature of the EU regulatory framework is such that NRAs must look carefully at markets again and again (also when they have been deregulated), and be prepared to reach fresh conclusions based on the evidence at hand. Some NRAs have adopted geographic market definitions / geographic differentiation based on NGA retail and wholesale market shares of the SMP operator, and even based on *potential* NGA development especially by the SMP operator, whereas the development trajectory has in reality changed materially. For example, many incumbent copper network owning SMP operators have evolved their strategies

² https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/europes-digital-decade-digital-targets-2030_en

³ <https://www.berec.europa.eu/en/document-categories/berec/regulatory-best-practices/guidelines/berec-guidelines-on-very-high-capacity-networks>

towards FttH rather than proceeding to further incremental upgrades to their legacy copper networks. Many cable HFC operators also are tending towards moving to FttH rather than proceeding with the next DOCSIS upgrade. The increased cost of energy may further drive operators in the direction of adopting FttH. An open question is whether the evolution of networks will also lead to different outcomes of market analyses going forward. [ecta](#) has faith that the EU regulatory framework enables NRAs to examine and address markets without pre-conceived positions as to the outcome of market definition, SMP findings, and the definition of appropriate regulatory obligations.

15. The draft Report's information provided on the number of NGA networks present in particular (sub-national) geographies in each of the countries covered is, in [ecta's](#) opinion, too aggregated (provided only in terms of large percentage intervals) and does not provide any granularity with respect to both the absolute value and the country to which it is associated, except in the selected country cases of Denmark, Estonia, Czech Republic and Sweden. The issue of NGA vs. VHCN networks also arises in this context. As such, the draft Report is not sufficient for the purpose of understanding what is the type and state of infrastructure-based competition in each (sub)national market. [ecta](#) asks BEREC to provide precise numbers for each Member State, disaggregating the information so as to show the numbers for both NGA and VHCN.
16. In light of the points made in the paragraphs above on NGA versus VHCN, and other factors, it is essential for BEREC to establish best practices, notably on: (i) the types of geographical units for NRAs to rely on, (ii) the approach to and grouping of homogenous areas, (iii) the types of networks (not only counting the number of infrastructures or networks, but assessing their genuine ability to compete) and the thresholds for proceeding to geographic segmentation and/or geographic differentiation of remedies in a VHCN context. Table 11, for example, shows a very unharmonized state between thresholds (for NGA) used by NRAs when it comes to the number of competitors with an individual infrastructure coverage above a certain threshold. In [ecta's](#) opinion, these differences are not readily attributable to objective differences in national (or sub-national) circumstances. There is therefore a real opportunity for BEREC to provide an impetus to harmonization, in the form of best practices, or an updated Common Position.

[Need to report on all EU Member States, need for proper categorisation of particular cases, and need to report separately on EU Member States, EEA countries and others](#)

17. [ecta](#) was surprised to note that Poland, an EU Member State that 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), is absent from the draft BEREC Report, and that this is not flagged anywhere as a caveat. [ecta](#) asks BEREC to include Poland in the final Report. If for some reason this would not be possible, [ecta](#) asks BEREC to explain in clear and explicit terms 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.

18. Finland and Hungary are EU Member States that have had multiple geographically non-overlapping incumbent operators for many decades, indeed dating back to prior to the liberalization of telecommunications markets. [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.
19. [ecta](#) also has questions on the manner in which Austria, Bulgaria and Romania are portrayed in the draft Report. The NRAs in these EU Member States proceeded to deregulation, including of local loop unbundling, 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](#) asks BEREC to reflect the exact situation in the final Report, and to scrupulously avoid creating the impression that recent sub-national geographic developments drive deregulation in countries where this is not in fact the basis for deregulation. Accordingly, 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.
20. 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 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](#) asks BEREC to systematically (in all documents, and in all their aspects, both text and tables) to report separately on EU, EEA and non-EU countries.

Need to systematically distinguish 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

21. Regarding Sections 2.2 and 2.4 which concern retail prices, and in the related points contained in the executive summary and in the conclusions, **ecta** asks BEREC to unequivocally distinguish two scenarios:
- a) Scenario 1 in which a single SMP operator practices different retail prices in different geographic areas (a practice potentially indicating responses of the SMP operator to competition, although there could also be other reasons, as noted in the draft Report, for instance relating to the technologies employed in particular areas).
 - b) Scenario 2 in which multiple non-overlapping SMP operators practice different retail prices (which is entirely logical, especially if they do not face strong direct or indirect retail price constraints, and does not necessarily indicate any response to competitive pressure).
22. **ecta** notes that the elements illustrated on this topic on pages 4 and 9 of the draft report do not provide this essential distinction. In particular, in the discussion of the cases of Germany and Denmark, there is a need for additional clarity.
- a) Germany: Table 4 indicates that Germany has different retail prices (for different bundles) in different geographic areas, but only slightly, which may be understood by many readers as suggesting that the SMP operator (Telekom Deutschland) practices differentiated retail prices on a sub-national basis in response to competition. In the text on page 27, it is clarified that: *“The incumbent operator itself did not differentiate its prices in its nationwide network and applies national pricing. At the same time price differentiation by alternative network operators within their networks was limited to a small number of network operators and was insignificant in scale.”*
 - b) 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). The differences in the retail prices discussed in table 18 seem to be referring not to the incumbent TDC, but to the FttH operators with separate non-overlapping footprints that have newly been declared as holding SMP.
23. Based on the above, 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.

Need to amend statement that NGA networks do not yet have significant effect on competition

24. ecta was disconcerted to read the following controversial paragraph 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.”

25. From the perspective of challenger 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 (e.g. those that amounted to phasing-out physical access, negatively affecting access taker alternative operators’ ability to innovate and differentiate their services including in terms of speed and quality). ecta kindly asks BEREC to reconsider its approach and not to include the statement cited above in the final Report, or to amend and nuance it substantially. However, as stated in paragraph 23 above, ecta kindly invites BEREC to state in clear terms what the key findings are, including where these call into question the merits and effects of geographical segmentation of markets and geographic differentiation of remedies. Similarly, and in accordance with what ecta stated in paragraph 14 above, ecta asks BEREC to recognize that geographic findings that rely on NGA as a basis for product definition will need to be reviewed by NRAs, because they may no longer be correct in a world where VHCN networks, and particularly FttH, constitute the reference.

4. Sum-up of ecta remarks and requests to BEREC: thorough amendment and extension of the draft Report, and re-consultation of stakeholders

26. In light of the comments made above, about the fundamental approach taken by BEREC in preparing this draft Report (Section 2 above), as well as the methodological and punctual points (Section 3 above), ecta asks BEREC to thoroughly amend and extend the draft Report prior to its finalization, and to re-consult stakeholders.

27. ecta therefore kindly asks BEREC to:

a) Make the necessary amendments based on the specific suggestions for improvement put forward by ecta. Work is needed especially on avoiding reliance on the outdated notion of NGA, and ensuring that VHCN is properly assessed, on the clarity and granularity of data presented, and on ensuring that NRA market analyses are represented correctly, in particular avoid that readers conclude that some NRAs’ measures have a basis in sub-national geographic

analysis, where in fact they do not. The conclusions on the impact of NGA (and of NRA decisions) on retail markets also need sharpening

b) Prepare a substantive extension to the Report, to include 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:

(i) the types of geographical units for NRAs to rely on.

(ii) the approach to and grouping of homogenous areas.

(iii) the types of networks (not only counting the number of infrastructures or networks, but assessing their genuine ability to compete) and the thresholds for proceeding to geographic segmentation and/or geographic differentiation of remedies in a VHCN context

c) Re-consult stakeholders on the amended draft before its finalization.

d) Update the BEREC Common Position on geographical aspects of market analysis (for both market definition and remedies). This 2014 document is one of the most useful BEREC outputs for industry stakeholders.

28. As stated above, [ecta](#) is concerned that BEREC has withdrawn itself to an observer role. BEREC should, in a re-energized manner, 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 EECC, and an explicit duty for BEREC to aim to ensure the consistent implementation of the regulatory framework for electronic communications.

29. This means that BEREC should actively be developing regulatory best practices and promoting 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.

30. Geographic segmentation and geographic differentiation of remedies are crucial regulatory subjects today and going forward, and are subjects that are not going to go away for the foreseeable future. Adopting Common Positions is what BEREC (and the ERG before it) did regularly and successfully in the past. BEREC can and must do it again.

4. Closing [ecta](#) remark: timeframe of BEREC consultations

31. Please allow [ecta](#) to briefly express, as done during the debriefing of the 53rd BEREC plenary, that granting a timeframe of 6 weeks including the period of the end-of-year holidays for responding to 4 parallel BEREC consultations is not realistic for stakeholders such as trade associations that must engage a dialogue with their

members in the course of the preparation of their responses. [ecta](#) hopes and trusts that BEREC will take better account of its stakeholders' constraints in the future.

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In case of questions or requests for clarification regarding this contribution, BEREC and NRAs are welcome to contact Mr Luc Hindryckx, Director General of [ecta](#) or Ms Pinar Serdengeçti, [ecta](#) Regulation and Competition Affairs Director.