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ETNO response to the draft BEREC Report on competition amongst multiple operators of NGA networks in the same geographical region

Introduction

ETNO welcomes this report and deems very useful an analysis on how competition in fixed access electronic communications market is evolving in the specific segment of fibre access networks and how this evolution affects regulation in the different EU countries. ETNO would like to highlight some points below for BEREC's consideration in the final report.

1. Definitions

ETNO believes BEREC should provide more clarity and transparency with respect to definitions.

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

2. Inconsistency and representativeness of the data sources

ETNO deems that the summary tables provided in the report may be misleading due to the fact that they merge together data that refer to different periods, depending on the date of the last market analysis in the different countries, whereas in some cases the last market analysis also dates back to 2016/17.

The inclusion of outdated data in the report provides an underestimated and distorted overview of the current state of infrastructure competition reached at geographical level in EU countries.

In addition, the showed figures, being not updated for all the countries, are not consistent with the last Commission's update. For example:

- in Czechia, where the last market analysis dates to 2017, BEREC table 37 reports no NGA networks for 11-25% of homes, while the Broadband Coverage in Europe 2021 (BCE) shows that the NGA coverage reached 92.6%;

- in Greece (last market analysis in 2016) BEREC table 53 reports no NGA network for 11-25% homes, while BCE shows an NGA coverage of 91.7%;
- in Ireland (last market analysis in 2018) BEREC table 62 reports no NGA network for 11-25% homes, while BCE shows an NGA coverage of 96.4%;
- in Portugal (last market analysis in 2017) BEREC table 86 reports no NGA network for 11-25% homes, while BCE shows an NGA coverage of 90,5%

We also observe for some countries other inconsistencies, for example in Slovakia.

ETNO thinks that the **share of parallel NGA networks looks too high** and Table 91 (below) is difficult to understand. More than 3 NGA networks present in the same area are up to 75% of homes covered, among Top-3 EU at such coverage % – that perhaps suggests that FWA and possibly even WiFi networks are included?). **Thus, ETNO suggests BEREC to provide more insights into methodology used.**

Table 91: Answers from RU (Slovakia) – Number of NGA networks present in the same geographical area

Number of NGA networks present in the same area	Homes passed in relation to total number of homes covered by the area					
	0-1%	2-10%	11-25%	26-50%	51-75%	76-100%
No NGA network		X				
1 NGA network		X				
2 NGA networks			X			
3 NGA networks		X				
>3 NGA networks					X	

Source: BEREC

50%. The area covered by more than three NGA networks is even smaller, in most (16) countries 0-10% HP and only in five countries larger than 10% HP.

Table 2: Overview of the presence of multiple NGA networks in the same geographical area

Number of NGA networks present in the same area	Homes passed in relation to total number of homes covered by the area					
	0-1%	2-10%	11-25%	26-50%	51-75%	76-100%
No NGA network	5	8	8	0	0	0
1 NGA network	1	5	6	5	2	2
2 NGA networks	1	1	10	4	1	4
3 NGA networks	6	4	8	3	0	0
>3 NGA networks	11	5	1	1	3	0

Source: BEREC¹⁰

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

3. Need to update more frequently the geographical analysis

The **delay in the updating of the geographical analysis and in the consequent adjustment of remedies** is an important issue that the BEREC report should address. It is also important that analyses include a forward-looking view of infrastructure deployment, and are not based on static data, sometimes data from much earlier dates.

In order to avoid an underestimation of the current state of competition across the national territory in each Member State, NRAs should without delay carry out a new market analysis where a significant change in the competitive conditions is observed and maximum within 5 years from the previous review, as provided for by the EECC. This is necessary in order to remove or lessen *ex ante* remedies imposed on historical SMP operators where they are no longer justified in the light of the presence of parallel competitive networks. At least, in these competitive areas the price control remedy should be removed if the conditions (currently being revised) provided for in the Recommendation on non discrimination and costing methodologies are satisfied.

In its monitoring activities, the NRAs should update with a certain frequency the geographical analysis in order to correctly assess the need for a new market analysis/revision of remedies.

In some cases, the market analysis itself provides for an update of the competitive municipalities with a certain frequency (e.g. annual) with subsequent decisions. However, we observe an “inertial” regulatory approach with delays in the update of the list of competitive municipalities and in the adaptation of remedies.

Accordingly, we suggest that BEREC should encourage NRAs to update the geographical analysis more often and in any case, more frequently than markets are analysed, and also to run a prospective analysis.

4. Criteria used by NRAs across Europe to identify competitive areas

BEREC report should also address the issue of the **coherence and consistency across the Union of the criteria used by NRAs to identify competitive areas** (only presence of multiple networks or other criteria) **and the consequent regulatory relief applied**. Indeed, divergent approaches are applied by NRAs (as also confirmed by BEREC table 7) without an evident justification:

- Different numbers of NGA networks are considered sufficient: 3 or 2.
- Different coverage thresholds are applied, for example: 20% in Spain, 30% in Ireland (for market 3b), 50% in Portugal (markets 3b and 4/2014) and 60% (coverage of each network) and 75% (cumulative coverage of the NGA networks present) in Italy.
- Most EU countries consider the home passed, Italy “ready to service” homes, in UK “potential”/forward-looking coverage is considered.
- Some countries set a threshold for the incumbent’s retail market share, also in this case with different values across countries, for example: 50% is considered in Spain and Hungary markets (3a and 3b/2014), in Ireland (market 3b/2014) and Portugal (markets 3b and 4/2014); only in Italy, Polonia and Slovenia (this latter for market 3b) a lower threshold of 40% is used.

- Only in Italy a threshold for the incumbent's wholesale market share is used as an additional criterion on top of retail MS and coverage thresholds.

Besides the application of divergent criteria, also the impact on the market/remedy segmentation varies significantly among EU countries, with less stringent criteria leading to complete deregulation and more stringent criteria allowing only a limited regulatory relief, without evident justification based on different national circumstances. The application of too stringent criteria and too limited regulatory relief has the effect to distort competition in the areas that have become competitive.

As a matter of example, in Italy, in the last analysis of wholesale access markets, against the wide presence of alternative networks in several geographical areas, as also recognised by the Commission¹, only the Municipality of Milan was deregulated, corresponding to 3% of HHs. In the rest of the territory, very stringent cumulative criteria (the strictest in Europe) have been applied to identify competitive municipalities, namely: i) presence of at least two “ready to service” NGA alternative networks (that means that the alternative NGA networks can be already commercialised at wholesale level), with a single coverage $\geq 60\%$ and cumulative coverage $> 75\%$; (ii) TIM's retail (access) market share $\leq 40\%$; (iii) TIM's share of active VULA and Bitstream accesses $< 80\%$. As showed in the BEREC report (see table 2), reaching at least 60% or 75% of home passed is very rare and it is quite unlikely if the “ready to service” coverage is even considered. As a consequence, only a limited number of competitive municipalities has been identified (43 municipalities, corresponding to about 8% of technical households, that exclude important urban municipalities like Rome) and, in addition, a very limited regulatory relief has been granted therein: fair and reasonable prices instead of cost orientation for bitstream services (corresponding to only about 2/3% out of total bitstream accesses). VULA service is still cost oriented across the whole national territory, given that its price flexibility in the competitive municipalities was conditioned to an additional very stringent criterion requiring an FTTH take-up at national level of at least 15%, that by the way was reached in 2022.

5. Competitive spill overs between geographical areas

Section 2 of the report provides evidence of relevant competitive spill-over effects between areas with different number of NGA networks competing: around half of the NRAs don't find differences in the prices or characteristics of the retail products across geographical areas.

ETNO notes that this is a result foreseen by the *fragmented oligopoly* theory². When the market size of the areas with more operators and the overlap between their networks are significant (as it is increasingly the case), competition in these areas spills over to other areas where there are fewer competing networks.

¹ Commission's letter C(2019) 5406 final: “With respect to the other Italian municipalities (Rest of Italy), **notwithstanding the comparatively stronger competitive dynamic in some municipalities**, in particular where there are several alternative access networks, AGCOM does not consider such differences sufficient to justify the definition of separate geographical markets.”.

² See “Fragmented Duopoly: A Conceptual and Empirical Investigation” (2003), by T. Randolph Beard, George S. Ford, R. Carter Hill and Richard P. Saba.

This happens because factors like the cultural homogeneity of the country, reputation in the market and/or the optimization of billing, marketing and advertising costs, constrain operators' ability and willingness to discriminate between customers depending on whether or not they face competition in the area the customers live in. As a result, consumer welfare in areas where there are fewer competing networks benefits from the protection of the more intensive competition in the areas where more operators are present.

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

ETNO (European Telecommunications Network Operators' Association) represents Europe's telecommunications network operators and is the principal policy group for European e-communications network operators. ETNO's primary purpose is to promote a positive policy environment allowing the EU telecommunications sector to deliver best quality services to consumers and businesses.

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