

Colt response to public consultation on Draft BEREC report on the regulatory treatment of Business Services

Colt's view of the present state of the business market

Colt Technology Services presentation

Colt Technology Services (hereafter "Colt" - <https://www.colt.net/>) is global provider, operating in over 30 countries, focused on assisting business clients to meet their requirements for high-quality Electronic Communications Services.

The services offered to its customers, mainly in Europe but also in North America and Asia, include the supply of high and very high speed connectivity, fixed telephony and hosting for both business customers (retail market) and other electronic communications operators also serving business customers (wholesale market).

Colt is positioned at the top of the business services market by essentially providing services with a high quality of service (guarantees provided in terms of throughput, security, resilience, maximum service interruption, recovery time in the event of an incident, etc.) and by making available offers that meet the specific and complex needs of companies.

These needs vary according to services requested by enterprises (connectivity, IP, telephony, etc.) but also according to the number and type of sites to be served and the level of reliability required for the connections (e.g., multi-access fibre connections to the same locations for security purposes). Clients represent a variety of business sectors, including some where the provision of high-quality services is of vital importance (financial services, e-commerce, media, etc.).

Colt's network is now present in 4 continents, Europe, Asia Pacific, North America and Australia. Our On-net footprint (own fibre networks) together with our Off-Net capability (relying on wholesale access using trusted partners), enables customers to be sure to benefit from Colt's award-winning solutions wherever they are.



By way of example, the head office of DG CNECT of the European Commission is within Colt's metropolitan fibre network footprint in Brussels, as is shown on the map below. Brussels is one of Colt's 32 metropolitan fibre networks in Europe (51 metropolitan networks world-wide).

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Map deleted by the BEREC
Office due to confidentiality

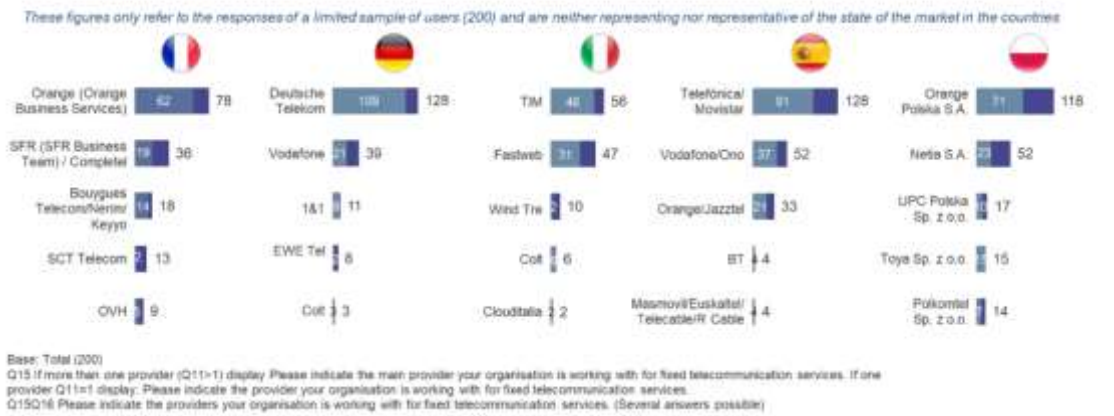
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Colt welcomes the opportunity to provide its insights in relation to the status of the Electronic Communication Network and Services (ECN/ECS) provision in the business market. Colt would like to express its views on the main challenges that the business market is facing and the areas in which BEREC and NRAs should concentrate their attention in the coming years.

Degradation of competition in the business market

Colt was among the very first new entrants in the European market for ECN/ECS, building and operating its own highly resilient end-to-end fibre networks in major metropolitan areas, since the mid-1990s, and providing high quality services to business customers. The liberalization of the telecommunications market in Europe has, unfortunately not led to effective competition in the business market. 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. This results in a worrying trend towards monopolies or duopolies, as shown by data from the External Study conducted by DECISION Etudes & Conseil and Kantar for BEREC¹.

Table 5.5: Main fixed telecommunication services provider of the respondents (Top5)



In the delivery of ECS to business customers, there are three types of operators active in essentially each EU Member State: the incumbent operator (ex-monopolist), mixed operators (defined as operators mostly present in residential market that use this presence to also provide services to business customers), and niche operators like Colt; specialized in providing services to business customers. Many EU Member States have many niche network operators and service providers focused on business markets, but these represent, both individually and collectively, a very small market share.

¹ BoR (22) 184: External Study on Communication Services for Businesses in Europe: Status Quo and Future Trends.
<https://www.berec.europa.eu/en/document-categories/berec/others/external-study-on-communication-services-for-businesses-in-europe-status-quo-and-future-trends>

Niche operators are vital for the development of the business market, they bring innovation and new services that help European companies in their digital transformation, to be more efficient and compete in better conditions in the international arena.

The indisputable reality of the business market in each EU Member State is that incumbent operators have been able to maintain their excessive market shares despite the appearance of substantial alternative operators (mixed operators) in their domestic markets and the regulatory remedies imposed by NRAs in the EU. Many NRAs have insufficiently focused on making business markets more competitive, and some have prematurely or inadequately deregulated wholesale inputs that are essential to enable competition on business markets.

It is imperative that NRAs, with the active encouragement and support of BEREC, proceed to the implementation of bold regulatory measures to ensure a healthy competitive scenario in the provision of ECN/ECS to business customers, so as to enable European companies to benefit, in the same way that residential customers have benefited, especially given the inevitable digital transformation that every company must undertake in the coming years.

Considering this lack of competition, any reduction in regulatory remedies for wholesale markets underpinning the business ECN/ESC markets will only serve to exacerbate the dominant position of incumbent operators, and to further strengthen the monopoly/duopoly trend and exclude smaller-scale operators from the market, who lack the bargaining power to compete on equal terms.

Scale problem

Regulation was put in place to create a level playing field for all market participants. However, while competitive dynamics have developed in the residential market, the same cannot be said for the business market, where regulatory remedies have failed to achieve their intended goals. As stated before, in the business market, a monopoly or duopoly structure dominates, with a significant number of niche operators struggling to survive.

These niche operators are dependent on wholesale regulated remedies, but their limited scale limits their bargaining power when negotiating commercial agreements with former monopolies. Therefore, wholesale regulated remedies are a crucial reference for niche operators, not only for the ability to compete in

the market but also when negotiating with incumbent operators. By contrast, mixed operators benefit from their greater scale and higher ability to negotiate better commercial agreements and in some cases co-investment agreement. As a result, mixed operators can use these agreements to compete in improved conditions not available to niche operators.

One of the most significant outcomes of this situation is the price that incumbent, mixed, and niche operators can offer to business customers. According to the External Study conducted for BEREC, *"price is the main motivation for changing provider"*. Therefore, if former monopolies are able to maintain such impressive market shares, it is because they are offering better prices than their competitors.

Colt believes that this situation can be improved by NRAs determinedly implementing three regulatory remedies: wholesale access to civil engineering infrastructure of SMP operators on cost-oriented and fully non-discriminatory terms, 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 not preventing business-focused operators from purchasing consumer-grade services if they wish), and a strict Economic Replicability Test that takes into account the economies of scale of competitors through the imposition of a Reasonably Efficient Operator approach, among other features. Additionally, promoting wholesale competition among the players in the market by providing a level playing field for niche operators and new entrants can help to break the dominance of the incumbents and bring down the prices for business end-users.

Delineation of the market. A key challenge for NRAs in promoting competition in the business services space

One of the major issues that NRAs face in imposing efficient measures to boost competition in the ECN/ECS markets aimed a business customers is the delineation of the market, defined as identifying which electronic communications services fall within the scope of the products and services that the businesses need in order to develop their activity and to start and/or develop their digital transformation in order to enhance their efficiency and to promote new services.

From Colt's perspective, business customers require a diverse portfolio of services, which can be segmented based on their specific needs:

- Enterprises that do not need different services compared to consumer markets. Typically SOHOs.
- Enterprises which, in addition to services corresponding to consumer markets, also need improved services, or services with special characteristics (especially QoS, guaranteed bandwidth, latency, jitter etc.), regardless of their size (and being single-site, multi-site, and multi-country). Very small enterprises may need very high quality services, and some sites of very large enterprises may have moderate quality needs. The size of the enterprise is not a determinant of its needs at a particular site.

The above differentiation highlights the importance for promoting competition of developing the existence of wholesale regulated offers from SMP operators that cover the entire national territory of EU Member States, and enable the supply of a diverse range of services requested by business customers. This is necessary for niche operators to be able to be competitive. Due to the limited scale of niche operators, the only functioning solution is to have a robust regulated offer enabling each of the retail services demanded by business customers. If not, niche operators will have tremendous difficulties to compete in the market since, again due to their limited scale, they won't be able to reach commercial agreements with the SMP operators on the same terms as mixed operators.

- **Relevant geographical market**

As stated above, geographical segmentation (in particular partial or full deregulation of the SMP operator in specific sub-national geographic areas) forces niche operators to negotiate with SMP operators the terms of the commercial agreements, in order to continue to be able to serve customers based on wholesale access throughout the national territory. This situation, along with the lack of negotiating power of operators with smaller scale, results in the establishment of terms that are not appropriate for niche operators to compete successfully in the market. It even sometimes results in niche operators not being able to reach a wholesale access agreement with the SMP operator, because niche operators do not reach the minimum amount of purchase demanded by SMP operators (typically ex-monopolies).

As a general rule, geographically deregulated areas are usually the most dense areas, with higher presence of business customers than in other areas. One of the main reasons to impose geographical segmentation and deregulate one particular area is the presence of more than 2-3 NGA networks. NRAs deregulate areas where there have been alternative NGA deployments, even where these

mostly are network deployments to provide services to consumers. However, typically, alternative operators who deployed an NGA network do not have a wholesale offer that niche operators can realistically subscribe to, so in practical terms, niche operators only have the option to use incumbent's commercial agreements to provide services in these deregulated areas. This brings us back to the problem of lack of negotiating power of niche operators when reaching agreements with SMP operators. It is why unequivocal regulatory obligations placed on SMP operators to meet the concrete and specific needs of niche B2B operators are essential. In Colt's view, when discussing services provided to business customers, areas can only be deregulated insofar as the alternative operator owning the NGA network provides a wholesale offer that competes directly with the wholesale offer of the incumbent. It is necessary for the NRA to monitor that this wholesale competition is genuine and is maintained over time, otherwise the geographic deregulation is likely to reduce competition for business services rather than to enhance it. 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 situation for business customers.

Lastly, Colt wishes to draw 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 obtained by the NRA. In this sense, it is worth mentioning the case of the deregulation of the city of Milan, which has been deregulated by the Italian regulator based on completely unrealistic market share data, and which has had clear consequences on the ability to compete of the niche operators. Given that Milan is one of the most important areas for business focused operators in Italy, due to the important business presence in Milan (including many headquarters of companies having sites in other cities), the negative effects for competition extend nation-wide.

- **Relevant product market**

In relation to the relevant product market analysis, Colt would like to emphasize four points:

- BEREC's draft Report reveals a substantial lack of harmonization among NRAs when identifying the retail business services markets (and consequently wholesale regulatory solutions for SMP). Colt, as an operator with presence in the majority of Member States of the EU, does

not think that there are important differences in the structure of the national retail markets or the needs of business customers within the national markets that justify such lack of harmonization.

- Without prejudice that business customers need a diverse range of ECN/ECS, ranging from standard internet access to high quality services, wholesale regulated offers of SMP operators must include all the Quality of Service (QoS) features that business customers demand.

Currently in most European countries, QoS, especially SLAs for repair times, are not suitable for the needs of business customers that demand high quality services. There are two aspects where BEREC should put special focus: non-discrimination scenarios and wholesale pricing of wholesale QoS features.

- Regarding non-discrimination: Colt in its day-to-day practice has observed that the parameters of the SLAs offered in wholesale regulated offers of SMP operators for business customers are far away of the parameters Colt can offer when providing on-net services based on its own infrastructure, and are far away from the market practice and the parameters included in incumbent's own retail offers.
 - Wholesale pricing: NRAs should place special attention on excessive prices of the QoS features for business customers included in wholesale regulated offers of SMP operators, and prevent that such prices impede the development of effective competition. This is especially the case when the SMP operator's regulated offer makes it mandatory for the alternative operator to purchase the improved QoS when subscribing a wholesale connection using the regulated offer. For reference, there are cases in which Colt's customer does not require improved QoS, but Colt is anyway required to purchase it and pay for it at wholesale level. BEREC and NRAs should ensure that alternative operators are entitled to, and effectively able to, purchase any regulated wholesale offer from the SMP operator, and use it as they see fit.
- One of the main areas where BEREC and NRAs should further investigate market circumstances and promote wholesale competition, is where the SMP operator and one or more mixed (consumer + business) operator(s) are present. A niche operator, when trying to offer a complete range of services to its business customers covering the whole territory of a

Member State, is forced to reach an agreement with the SMP operator (typically the ex-monopolist), 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.

The above paragraph does not mean that the solution to increase wholesale competition is deregulation. In Colt's experience, deregulation only leads to price increases, market foreclosure and increasingly detrimental wholesale conditions offered by incumbent operators, particularly to operators with limited scale. SMP operators (former monopolies) are tempted to reach better agreements with mixed operators in order to share the market, establish a strong duopoly/oligopoly, and exclude the rest of the competitors from the market.

- Services provided using another operator's network access: Technological developments currently allow to provide services, like SD-WAN, over broadband internet connections using another operator's network access.

When analyzing markets, NRAs should not consider SD-WAN services as part of the wholesale access markets (Markets 1 & 2/2020 and Market 3b/2014), since these services are provided 'on top' of broadband internet access. Therefore, the competitive dynamics are totally different from the wholesale access markets. Including these services in the wholesale market analyses carried out by NRAs would result in interfering in the market development of such services, which shows a more balanced competition behavior than the access market.

Voice

Colt also believes that there are further important topics to which BEREC and NRAs should pay attention for the coming months and years with regard to business services. These include voice services for business customers:

- Numbering issues: considering the migration from TDM to IP and the efficiencies that this migration enables, there should be a relaxation in the constraints of the use of numbers. This flexibility will lead to a higher efficiency in the use of numbers.
- CLI spoofing: fraudulent use of ECS is a problem that affects legitimate telecom operators. For that reason, unequivocal rules (preferably harmonized for all EU Member States) that provide clarity on the use of CLI and how to present CLI are necessary in

order to not to impede legitimate business development. For example, Colt is aware of cases in which contractually imposed CLI presentation requirements are misused (especially by large operators) to apply surcharges for wholesale call termination, even when the calls are demonstrably EU/EEA originated. Colt has responded to the CEPT/ECC consultation (CEPT NaN2 Report 338 on CLI spoofing) in March 2022 with detailed points on this matter. This response is available to BEREC on request.

Future work

Colt warmly welcomes the three first paragraphs of Chapter 11 of the draft BEREC Report, which concern future work, with special emphasis on:

- Collecting and identifying good practices to be shared among all NRAs.
- Evolution of competition dynamics among different actors.
- Encouraging competition, investment and innovation.
- Easing use of IT services (such as cloud services) by business users and the dynamics of competition/collaboration between traditional ECS players and IT specific players.

However, where BEREC refers, in paragraph 2 of Chapter 11, to “*competition dynamics among different actors and its relation to countries characteristics*”, and “*diversity of BEREC members*”, please allow us to reiterate (see section on relevant product market above) that Colt, as an operator with presence in the majority of Member States of the EU, does not think that there are important differences in the structure of the national retail markets, or the needs of business customers within the national markets, that justify a lack of harmonization in NRA decisions on business markets. Colt therefore invites BEREC and NRAs to engage in a critical re-examination on whether there are truly substantive country characteristics (national specificities) that can justifiably be invoked by NRAs and result in widely different scopes of retail and wholesale product markets.

Colt also believes that, given the serious competition problems on business markets identified by Colt in this response (see sections entitled ‘Degradation of competition in the business market’ and ‘Scale’), BEREC needs to be more proactive in driving harmonization of NRA product and geographic market definitions, approaches to SMP finding, and remedies. There is certainly scope

for BEREC to come forward with best practices, already before this draft Report is finalized, and certainly in the near future. For instance, the BEREC Common Positions on Best Practices for WLA/WBA/WLL date back to 2012, and could usefully be confirmed and updated where appropriate based on experience gained over the past decade. Particular consideration in this context should be given to ensuring that all SMP operators' wholesale offers must be available to all alternative operators irrespective of the latter's activity (consumer or business services). Investigations and impact assessments of changes made to SMP operators' wholesale offers post-reduction of regulatory obligations (and post-deregulation where applicable) is also worthwhile, to assess whether NRA decisions produce the expected effects or not, whether they lead to benefits or detriment to business customers, etc. The EU regulatory framework requires periodic re-analysis of markets; there should be no taboo on reviewing and, if necessary, reversing decisions that do not enable progress towards genuinely more competitive markets.

More and new work is also clearly needed on ensuring that SMP operators wholesale access offers are fit-for-purpose for smaller alternative operators, enabling them to offer the Quality of Service and prices required by business customers of all types, in a manner which does not structurally or incidentally favour the retail divisions of the SMP operators. Attention is also needed to ensure that the way in which wholesale regulation is structured, does not create advantages for some alternative operators over others, ultimately driving the market towards a duopoly or tight oligopoly of the ex-monopoly SMP operator and the largest alternative operator(s), which often benefit from mixing consumer-oriented and business services.

As is clearly indicated above (section entitled 'Relevant geographical market'), Colt has serious concerns about the manner in which NRAs have adopted and applied geographic market segmentation and geographic differentiation of remedies. Colt invites BEREC and NRAs to engage in a critical re-examination on whether the conditions for geographic segmentation/differentiation have really been properly fulfilled for business markets, and to run a joint verification exercise, covering whether the equivalent of Type II errors² may have occurred when proceeding to deregulation or differentiation of remedies on a sub-national basis.

Paragraphs 7 and 8 of Chapter 11 suggest greater coordination and exchange of experiences among NRAs, including on data collection issues, in order to learn

² In antitrust cases, a Type II error represents a false judgment in which the court fails to condemn a conduct that is anticompetitive. Type II error reflects under-enforcement or under-regulation.

from each other on how to best ensure reliability and consistency of data, while facilitating the work on the operators' side providing the information. This is certainly welcome, and should include how to properly measure market shares of the operators active on business ECN/ECS markets. This is particularly important from Colt's perspective, given the serious concerns we have that market shares of alternative operators may have been severely overstated in specific cases, notably one that led to geographic deregulation. Also, as indicated above, SD-WAN services provided over broadband internet connections should not be included when calculating market shares for underlying wholesale access market shares on Markets 1 & 2 2020 and Market 3b/2014.

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. It is shocking to discover that, in one case, the repair SLA/SLG for fibre connections was inferior to that offered for copper local loop unbundling, and that this matter required regulatory intervention by the NRA. As discussed above, the making available of specific improved SLAs/SLGs for business services and their wholesale pricing also deserves attention and comparison, notably to prevent discrimination between the SMP operator and alternative operators, and to prevent that business-focused operators are required to pay for an improved SLA/SLG, even if they do not require it for particular connections.

Colt welcomes that BEREC may consider the preparation of recommendations for companies and public institutions aimed to encourage competition in the context of business services. An ARCEP guide³ exists, is quite extensive, and may be a worthwhile reference. Colt also believes that the market for the provision of services to public administrations needs further specific examination, including its contracting practices, the constitution of lots in tenders, etc, and the possible existence of continuing privileged relationships that ex-monopoly and fully or partly state-owned operators enjoy, which impede or distort competition.

All in all, Colt considers that it is imperative that NRAs, with the active encouragement and support of BEREC, proceed to the implementation of bold regulatory measures to ensure a healthy competitive scenario in the provision of ECN/ECS to business customers, so as to enable European companies and public administrations to benefit from competition, and engage successfully in the inevitable digital transformation that every company and organization must undertake in the coming years.

³ https://www.arcep.fr/uploads/tx_gspublication/guide-pratique-telecom-tpe-pme_juin2019.pdf