



ecta RESPONSE

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

**DRAFT BEREC REPORT ON THE REGULATORY TREATMENT
OF BUSINESS SERVICES**

BOR (22) 185

3 FEBRUARY 2023

1. Introduction

1. **ecta**, the **European Competitive Telecommunications Association**,¹ welcomes the opportunity to comment on the draft BEREC Report on the regulatory treatment of business services, BoR (22) 185. **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.
3. **ecta**'s members include various types of companies that compete on Business-to-Business (hereafter 'B2B') electronic communications markets. These companies are major challengers (some combining consumer market and B2B activities and others solely focused on B2B) and smaller specialist B2B operators active within specific EU Member States, companies owning and operating end-to-end fibre networks and services in multiple EU Member States, and companies active across the entire EU and beyond, with a focus on national and multi-national B2B clientele.

2. Key **ecta** considerations: importance of B2B markets, history, continued concentration of B2B markets in the hands of SMP operators, and missed opportunity to provide best practices and BEREC Common Position

4. **ecta** has, over the past decades and in recent years, systematically expressed forcefully that NRAs and BEREC need to pay more attention to competition problems relating to B2B electronic communications markets. These markets encompass networks and services ultimately used by SMEs, start-ups and scale-ups, medium-sized, and large (including multi-site and multi-national) businesses, as well as services for all types of public administrations (ranging from central government and universities with sophisticated requirements to the smallest and remotely located municipalities, schools, etc.). Many business and government customers issue Requests for Proposals (RFPs), covering multiple sites and multiple services, including for secure and dedicated fixed connectivity at their sites, internet access, voice services, mobile communications and, increasingly, Unified Communications (UC), Software as a Service (SaaS), and Cloud Computing requirements.
5. B2B services were initially liberalized in the EU in 1990 (many years before consumer telecommunications services), B2B networks were fully liberalized in

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

1996, and in 1998 all remaining exclusive and special rights of incumbent telecommunications organizations were removed. This is, respectively, 30, 28 and 25 years ago. NRAs (most of which were founded in the 1980s-1990s), the IRG (founded in 1997), the ERG (founded in 2022 as a result of an EU Directive), and BEREC (founded in 2009 as a result of an EU Regulation) have broadly been in existence for the corresponding period or at least for 20+ years, with an explicit mandate to promote competition and the EU internal market, including for B2B electronic communications.

6. The unfortunate factual state of affairs in the EU is that, as of the year 2023, retail and wholesale markets for B2B electronic communications networks and services remain substantially more concentrated in the hands of the incumbent (ex-monopoly) telecommunications operators than consumer and mobile markets. Incumbent operators hold B2B market shares often not only exceeding the prima-facie threshold for Significant Market Power (hereafter 'SMP') in many EU Member States, but in several cases their B2B market shares extend to 70% and above. **ecta** has serious problems with BEREC's seeming inability to publicly acknowledge this factual state of affairs, by referring overly prudently to "*market shares of at least 50%*" (shown 3 times in the draft BEREC Report²). **ecta** calls on BEREC to revise the draft Report by removing this overly prudent characterization, and by stating SMP operators' market share numbers to their full objective extent.
7. Whilst **ecta** has many concerns about the External Study³ commissioned and made available by BEREC, notably the shocking lack of representativeness of supply-side interviewees (several of which are incumbent rather than challenger operators). Table 5.5 shows quite clearly the extent to which B2B retail markets remain outright dominated by SMP operators in the largest EU Member States (noting the caveats included in the text above Table 5.5).
8. **ecta** also notes with concern that the External Study is not materially reflected or referred to in BEREC's own Draft Report, and that it has not been given any prominence by BEREC. The consultants' findings, in **ecta**'s opinion, validate that there is a severe competition problem on B2B markets in many EU Member States, and that SMP operators hold an ultra-dominant position in many EU Member States. From the perspective of challenger fixed network operators and service providers, there cannot be a snippet of doubt that NRAs have, for decades, often lacked commitment to address B2B market failures with the necessary determination, and that misguided deregulatory initiatives and decisions have not been helpful towards achieving the EU regulatory framework's legal and regulatory objective of progressing towards effective competition.

² Page 2, para 5. Page 7, last para. Page 31, para 2 of the draft Report.

³ 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>

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9. The draft BEREC Report consists of a factual presentation of NRA responses to a BEREC questionnaire on the specific market analyses conducted by NRAs, concerning Market 2/2020, Market 1/2020 and Market 3b/2014, plus a (potential) stand-alone market for wholesale access to civil engineering infrastructure. The focus is therefore strongly on the NRA analyses of the wholesale upstream markets for business services, although retail aspects of the analysis are mentioned.

[Need for a different starting point of BEREC's draft Report: objectives of the EECC, end-user demand on retail markets, competition problems on retail markets](#)

10. [ecta](#) observes with regret that the focus of BEREC's draft Report is to describe decisions taken by NRAs on the wholesale markets defined in the European Commission's Recommendation on Relevant Markets Susceptible to Ex-Ante Regulation, in particular the following: Market 2/2020 (Market 4/2014), Market 1/2020 (Market 3a/2014) and Market 3b/2014, with brief consideration also of (potential) stand-alone markets for wholesale access to civil engineering infrastructure. The problem with this approach is that BEREC is not in the 'mode' of pursuing the objectives of the EECC (Article 3 EECC) as per its remit (set out in Article 3(2) of the BEREC Regulation), but in the 'mode' of reporting on NRA decisions taken on predefined wholesale markets. In fact, this 'mode' amounts to putting the EC Recommendation on Relevant Markets above the EECC, whilst the Recommendation is simply one of several derived instruments of the EECC. This 'mode' also leads BEREC to neglect its harmonization duties (Articles 3 and 4 of the BEREC Regulation), and to pay insufficient attention to understanding the demand of B2B customers on retail markets, and to the problems that occur on retail markets for B2B services. In fact, BEREC's draft Report reveals that many NRAs do not look at retail markets in a manner differentiating consumer demand and B2B customer demand, and the same problem occurs with wholesale Market 1/2020 (Market 3a/2014) and with the (potential) stand-alone market for wholesale access to civil engineering infrastructure. It is doubtful that NRAs and BEREC can properly identify problems on markets if they do not specifically investigate the B2B retail markets, and the B2B dimension of wholesale markets other than Market 2/2020 (Market 4/2014).
11. Whilst the Draft Report to some extent is 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 BEREC draft Report, while containing elements on retail markets, is, in practice, focused around the wholesale markets identified by the European Commission in the EC Recommendation on Relevant Markets Susceptible to Ex-Ante Regulation (2020 and 2014 editions). This is severely problematic, because BEREC thereby limits its assessment. A fully proper investigation of B2B markets (retail and wholesale) may well reveal competition issues (long-standing and

new) which are not fully captured by focusing strictly on the limitative set of wholesale markets identified by the European Commission. Issues that spring to mind include 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. Issues with bundled services on retail markets (e.g. combinations of ECS/ECN and IT services) are also increasingly relevant, and need to inform NRA market analyses. As a result of new practices on retail markets, the scope and definitions of wholesale markets and/or remedies on wholesale markets may need thorough re-examination, where needed to ensure that competition on retail markets / for retail bundles for B2B services is sustained and promoted.

c) The fact that very unharmonized NRA decisions are revealed (e.g. as shown in tables 2, 5, 6, 7, 10, 11, 15 – and Chapter 7) elicits no comment from BEREC. Are enterprises, enterprise types, and enterprises' structures so different in different Member States so as to justify such an extent of difference between NRA decisions? [ecta](#) doubts this very much: indeed, every Member State surely has SMEs, single-site businesses, multi-site businesses, and presence of multinational enterprises. Similarly, certainly every Member State has public administrations, large and small, some concentrated in the capital and major cities, and others spread throughout the country. The question therefore is whether there really are national specificities that would justify such differential treatment by NRAs. As a secondary consideration, the question also arises as to whether national specificities would justify that NRAs depart from having a national market definition for many B2B markets. In this regard, [ecta](#) considers that BEREC would, as a minimum, have been able to point explicitly to a state of affairs in which NRAs have taken substantially different decisions that do not appear to be objectively attributable to national specificities.

d) By way of example, with regard to Chapter 7, where the draft Report states:

“13 out of 33 NRAs (39%) responded that, indeed, wholesale passive infrastructure products are important for business services, while 13 NRAs (39%) do not consider such products as especially important for business services.”

This, (i) does not provide granular information (a methodological point discussed below), and (ii) should not be presented as a mere statement with barely any explanation or questioning. It should rather sound alarm bells within BEREC, trigger an in-depth examination, and motivate BEREC to develop best practice guidance to NRAs, in accordance with its duty to promote harmonized application of the EU regulatory framework. [ecta](#) hereby states firmly that wholesale access to the civil engineering infrastructure of SMP operators is crucial from the point of view of many of its members, including companies that

focus solely on B2B markets, and have their own civil engineering infrastructure, but also require complementary wholesale access in other locations.

ecta also wishes to add the following. Whilst it is the case that there is limited relevant underground civil engineering infrastructure (ducts, chambers, etc.) in some countries, and thus it might be understandable that the NRAs in those countries do not see wholesale access to civil engineering infrastructure as of critical importance for business services, such a finding/statement does not mean that wholesale access to civil engineering infrastructure is not intrinsically important where it is available / if it would be/become available. ecta therefore urges BEREC to be very cautious on this subject, to avoid wrongly creating the impression that such wholesale access would largely be considered intrinsically unimportant.

e) Overall, BEREC:

(i) does not identify any suggestions for improvements or regulatory best practices.

(ii) does not provide any guidance or recommendations.

12. BEREC's conclusions (chapter 10) and BEREC's section on future work (chapter 11) contain relevant and positive elements (discussed in Sections 6 and 7 below) but overall they are very limited. As stated at the Debriefing of the 53rd plenary, ecta considers, based on the draft Report, that BEREC's commitment is clearly insufficient for bringing B2B markets to a state of effective competition within the next 5 years.
13. Indeed, ecta is surprised that BEREC is missing the opportunity of putting forward clear regulatory best practices, especially given that the revised BEREC Common Positions on WLA/WBA/WLL of December 2012⁴ are now over 10 years old. In ecta's opinion, BEREC is missing an opportunity to provide best practices and to revisit and update its Common Positions on these important matters.
14. 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.
15. ecta wishes to kindly ask BEREC to focus more on its regulatory remits, contained in Regulation No 1211/2009 (the BEREC Regulation), and in particular in Article 3

⁴ <https://www.berec.europa.eu/en/news-publications/news-and-newsletters-2014/the-revised-berec-common-positions-on-wholesale-local-access-wholesale-broadband-access-and-wholesale-leased-lines>

(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;

[...]

16. 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 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.
17. **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.

18. On the basis of the above, **ecta** kindly invites BEREC to re-focus on its regulatory remit 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 the regulatory treatment of business services by the addition of meaningful regulatory best practices is a good and worthwhile starting point for such a re-start.
19. **ecta** therefore asks BEREC to revise this draft Report, being more conscious of the issues listed above.
20. Further issues relating to the methodology and substance, identification of missing items and specific problems, triggering suggestions for specific improvements of the draft Report, are indicated below.

3. Methodological points

21. 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.

Need to report separately on EU Member States, EEA countries and others

22. 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. **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.

Data collection, and data provided needs to be more granular, especially on retail B2B market shares and on the number of B2B competitors

23. As already indicated in paragraph 6 above, **ecta** takes serious issue with the presentation of the state of market concentration in each country. Referring overly prudently to "*market shares of at least 50%*" is simply incorrect 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.
24. More generally, 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. As such, it appears quite empty for the purpose of

understanding what the actual state of concentration and market share distribution is in each national market.

25. **ecta** also finds it regretful that the draft Report makes no statement on the number of competitors, and their market shares, in each EU Member State. Instead, the draft Report places perhaps excessive emphasis on the market share of the largest competitor. Fact is that the B2B market is fragmented in many EU Member States, with dozens and in many cases hundreds of smaller providers of combined ECN/ECS and IT services, most of which are structurally reliant on the SMP operator for wholesale inputs.
26. Based on the elements contained in the 3 paragraphs above, **ecta** asks BEREC to revise the draft Report to provide a more correct depiction of retail B2B markets, including a breakdown by country of the market shares and number of operators. There is a clear opportunity for BEREC to improve the final Report in this regard.

4. Substantive points on retail and wholesale B2B market analyses

27. As regards the different retail B2B products, the draft Report shows that Layer 3 VPN services are analysed by NRAs only in a subset of countries. The final BEREC Report should explain the motivation of some NRAs for not analysing such services. BEREC should also provide as a best practice that it is necessary and appropriate for NRAs to analyse Layer 3 VPN and SD-WAN services, which are increasingly taken up by B2B customers.
28. Regarding the wholesale upstream markets of the retail business services, the final Report should explain why 6 NRAs have responded that Market 1/2020 (Market 3a/2014) is not defined as a relevant wholesale upstream market for B2B purposes, and what has been the regulatory outcome thereof, specifying this on a country-by-country basis. This is evidently a matter of very serious concern from **ecta's** perspective. The same holds true as regards the relevance of wholesale access to civil engineering infrastructure of the SMP operator. For details, see also paragraph 11 d) above.
29. Related to the previous point, is the fact that **ecta** is aware that there are several EU Member States in which either the NRA market analysis decisions, or the practices of the SMP operator (tolerated by the NRA), result in a situation in which B2B-focused operators are not entitled to make use of certain wholesale inputs (e.g. wholesale access to civil engineering infrastructure, local access network unbundling, consumer-grade VULA/bitstream) to deliver B2B services. In other EU Member States, the NRA market analysis decisions lead to a situation in which identical wholesale inputs have a higher price when used for B2B purposes than when used to serve consumers. **ecta** calls on BEREC to identify all such practices explicitly in the final Report, and to make a firm statement to the effect that restrictions of these types are inappropriate, because they distort competition (not only between the SMP operator and challengers, but also in some cases among

alternative operators, depending on whether they provide both consumer and B2B services, or only B2B services).

30. Based on the 3 paragraphs above (and paragraph 11 d) above), **ecta** expresses its concern that some NRAs are not conducting necessary analyses, not considering certain markets as relevant, whereas in fact they are, and/or NRAs or SMP operators restrict the availability of wholesale access products. Regrettably, BEREC limits itself to merely taking note of these situations. There is clearly an opportunity, and indeed, a need, for BEREC to provide best practices in terms of: (i) which retail services must necessarily be examined, (ii) which wholesale markets must necessarily be considered in the context of B2B, (iii) which remedies must necessarily be imposed when finding SMP in a B2B context, and (iv) ensuring non-discrimination in terms of the right to make use of regulated wholesale inputs. In **ecta's** opinion, best practice is also, (v) that any remedy imposed on an SMP operator should be unequivocally available to any access seeker.

5. Identification of missing items and specific problems

31. Unfortunately, **ecta** is compelled to point out a number of missing items and problems with the contents of the draft Report. **ecta** considers that these need to be addressed and included before finalization, in order to represent the B2B market situations in the various countries properly.
32. The draft Report fails to describe or analyse who the B2B market competitors are: (i) what kinds of companies address B2B markets? (many different types, finding their origin as specialists in telecom but also specialists in IT and systems integrators); (ii) are they integrated consumer/business providers? (a small number are, many are not); are they specialist B2B providers? (very many exist); do they serve all business segments, or only sub-segments? (single site customers, multi-site customers, small / medium / large/ multinational / public sector); etc. In **ecta's** opinion, the final Report should be extended to include a section describing the B2B market participants and their market positioning.
33. In a similar manner, the draft Report does not examine to which extent challenger B2B operators rely on their own infrastructure, on wholesale inputs from the SMP operator, or both⁵. **ecta** considers that most B2B providers do not require a single

⁵ In Germany, for instance, the SMP operator's wholesale leased lines offers are only regulated up to a certain bandwidth (<155Mbit/s), and do not sufficiently meet the demand of alternative B2B operators. The alternative B2B operators are thus lured towards the SMP operator's commercial, i.e. non-regulated, wholesale offers. As such, the regulatory remedies are outdated and no longer suitable. Moreover, the regulated wholesale pricing structure drives alternative B2B operators towards purchasing wholesale end-to-end leased lines (including core network connectivity provided by the SMP operator) instead of purchasing wholesale terminating segments of leased lines and maximising the use of the alternative B2B operator's own core network. The consequence is that alternative B2B operators' investments in their own network are devalued, thus negatively influencing progress towards end-to-end infrastructure competition. This situation could be addressed by the NRA adopting measures requiring the SMP operator to apply a revised regulated wholesale pricing structure, in which alternative B2B operators only have to pay a correctly set price for the wholesale inputs from the SMP operator

or a couple of wholesale inputs, but in fact require a wide portfolio of wholesale inputs, and that this may vary depending on the geography required by the B2B customers. ecta invites BEREC to analyse the matter, and to include a description of the requirements of challenger B2B operators, in terms of the wholesale inputs they demand and use. BEREC's Report on the regulatory treatment for fixed and mobile backhaul⁶ was much more communicative with regard to the use and demand of challenger operators, and could serve as an example (subject to ecta's comments⁷ on the relevant BEREC public consultation).

34. Along the same lines, the draft Report does not address at all how B2B customers contract for B2B retail services. The External Study contains elements on this. ecta considers that special attention is needed to contracting based on tenders/requests for proposals, covering multiple sites requiring different services, such as redundant fibre at large/important locations, leased lines for locations of major and medium importance, SD-WAN and VPNs at all locations, and perhaps simpler solutions such as internet access at the smallest locations (with the VPNs run by the operator or by the end-user itself or a systems integrator over the internet connection, etc.). An important point to note is also that B2B customers not only need high-quality secure, low latency connections, etc. they also need internet access and voice services, including at the same locations. It is difficult to understand why these aspects of the demand from end-users are not taken into account and reflected in the draft Report. Clearly, there is an opportunity for BEREC to improve the final Report in this respect.
35. Related to the previous paragraph, 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. It is a known fact that there are cases in which alternative operators simply cannot obtain a quote from the SMP operator for the relevant wholesale inputs to respond to the same request for proposal that the SMP operator's retail B2B division is surely bidding on.
36. The SLAs/SLGs, especially repair times, and the making available of improved SLAs/SLGs and their wholesale pricing also deserves attention and comparison, notably to prevent discrimination between the SMP operator and challenger operators. BEREC's draft Report is almost silent on this crucial matter, even though

they actually require. Regrettably, BNetzA enables the strategy of the SMP operator by means of its recent approvals of wholesale product offers and pricing, see e.g. BNetzA decision dated 25.11.22. concerning reference offer for CFV 2.0 (BK2-18/004), and BNetzA decision from 17.08.22 concerning VPN 2.0 wholesale prices (BK2-22/007). This state of affairs calls into question the NRA's commitment to promoting competition and undermines alternative B2B operators' confidence in the NRA's decision-making practice.

⁶ BoR (22) 33: <https://www.berec.europa.eu/en/document-categories/berec/reports/berec-report-on-the-regulatory-treatment-for-fixed-and-mobile-backhaul>

⁷ ecta response to BoR (21) 129: <https://www.berec.europa.eu/en/document-categories/berec/public-consultations/contribution-by-ecta-to-the-public-consultation-on-the-draft-berec-report-on-the-regulatory-treatment-for-fixed-and-mobile-backhaul>

it is well known that there are huge differences between Member States (e.g. 4 hour actual repair time in one Member State, and ‘next half day’ or ‘next day’ repair times in others). The External Study contains some information on SLAs/SLGs. The treatment of ‘VIP’ B2B customers and key B2B accounts by the SMP operator is an especially relevant area of serious concern in terms of possible discrimination of operators relying on wholesale access from the SMP operator, but the draft Report does not address this in any meaningful way. In the same vein, the draft Report does not address the issue of Premium SLAs widely used and sometimes imposed on alternative B2B operators. An assessment is needed as to whether there are problems regarding the how premium SLAs are applied. This issue is a key one in some EU Member States such as Spain where the alternative B2B operators are obliged by the SMP operator to subscribe to what is called “premium maintenance” and pay 50% more with respect to the sole monthly recurrent price for a service which is useless since the committed repair time is between 24-36 hours. [ecta](#) considers it imperative for BEREC to include a section on KPIs/SLAs/SLGs in the final text of the Report, given that this is a ‘make or break’ issue on whether an alternative operator relying on wholesale inputs from the SMP operator can credibly compete with the SMP operator on retail B2B markets.

37. Finally, 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. Consequently, the draft Report provides no impact analysis on this matter. [ecta](#) is on record with BEREC repeatedly in emphasizing that EoI is a very important paradigm for wholesale inputs for business markets.
38. BEREC uses the terminology ‘passive infrastructure’ when referring in fact to civil engineering infrastructure. [ecta](#) asks BEREC to use ‘civil engineering’ in its terminology, consistent with Article 72 of the EECC.
39. Globally, [ecta](#) underlines that the final Report and future BEREC reports should include thorough and insightful analysis of all elements mentioned as missing in the above 7 paragraphs.

6. [ecta](#) comments on BEREC’s draft conclusions

40. Chapter 10 (Conclusions) of the draft BEREC Report is very brief. It elicits the following [ecta](#) comments.
41. With regard to paragraph 2, which reads:

“Markets for retail business services are highly concentrated in the majority of countries, 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. Many NRAs, however, report a trend for a declining market share for the SMP operator, and only a minority report a trend to increasing market shares for the SMP operator.”

please allow **ecta** to reiterate that it takes serious issue with BEREC referring overly prudently to “*market shares of at least 50%*”. It is clear that the number is considerably higher in several EU Member States, and in some cases above 70%.

ecta calls on BEREC to:

- a) Remove this overly prudent characterization, and to request NRAs to provide the SMP operators’ market share numbers to their full objective extent, and include these numbers explicitly in BEREC’s final Report.
- b) Initiate a separate research workstream into market shares for ECN/ECS provided to public administrations. Several **ecta** members have experienced and continue experiencing serious difficulties in competing for public administration tenders. There is a distinct possibility that the SMP operators’ market share is even higher for public administration contracts, for various reasons (e.g. insufficient separation into lots / excessive bundling, requests for traditional fixed telephony services at numerous locations, that cannot be served competitively by alternative operators because the relevant wholesale inputs have been deregulated, SMP operators not providing quotes for fit-for-purpose wholesale inputs within the required timeframe, etc.).

42. In paragraph 5 of BEREC’s draft conclusions, the following is stated:

“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.”

ecta is concerned that this statement may be interpreted as BEREC endorsing a state of affairs in which Market 3b/2014 is seen as a wholesale market resulting in 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. Indeed, **ecta** is aware of at least one EU Member State (Germany) where challenger operators making requests for wholesale access under Market 3b/2014 for B2B purposes are redirected to Market 2/2020, which consists of wholesale leased line terminating segments. Also, **ecta** is aware of an EU Member State (Spain) where a wholesale B2B product exists which is in practice identical to the consumer Market 3b/2014 product, but is priced arbitrarily at a higher level on account of being ‘for business purposes’. These situations are not acceptable, because they result in product and/or price discrimination between the SMP operator’s self-supply and takers of wholesale access inputs from the SMP operator.

43. In paragraph 14, BEREC concludes on the major theme of wholesale access to civil engineering infrastructure as follows:

“There is not a clear trend among the NRAs regarding the significance of passive infrastructure (i.e. ducts and poles) for business services.”

Please refer to [ecta](#)'s comments in paragraph 10 d) above, in which [ecta](#) expresses its serious problems with BEREC's approach and asks BEREC to correct it.

7. [ecta](#) comments on BEREC's proposals for future work

44. Chapter 11 (Future work) of the draft BEREC Report is also very brief.
45. [ecta](#) explicitly welcomes paragraphs 1 and 2 of Chapter 11, in which BEREC expresses a clear commitment to encouraging competition, investment and innovation in business services, and states its intent to identify good practices to be shared by NRAs.
46. This is very necessary indeed, because the state of the B2B markets is far from being satisfactory due to it remaining strongly dominated by the SMP operators, despite being liberalized in, respectively, 1990 (selected services), 1996 (networks) and finally and completely in 1998. Indeed, [ecta](#) considers that NRAs and BEREC must place a 'turbo' on the work on B2B markets, because the status-quo is not acceptable, and prudent draft Reports such as the one under consultation will not move the needle, and certainly not bring the B2B markets to a state of effective competition within the foreseeable future. As was stated at BEREC's 53rd plenary debriefing session, [ecta](#)'s question to BEREC is, concretely: which initiatives will BEREC and NRAs will take to ensure that in 5 years' time, we will not see BEREC coming forward with a Report containing broadly unchanged limited findings, including that SMP operators continue to dominate B2B markets, and that NRAs continue to be timid in decisively addressing the competition problems that they are mandated to bring to an end? In this light, [ecta](#) asks BEREC to determinedly carry out its duties of pursuing the objectives set out in Article 3 of the EECC, and to be a driving force for change. BEREC should do so in a more decisive manner, for instance by updating the 2012 Common Positions on Best Practices for WLA/WBA/WLL. These documents are one of the most useful BEREC outputs. Action is necessary for Europe's economy and society, to become more competitive, to digitize businesses small and large, and to transform the public sector to deliver performant services to European citizens.
47. With regard to paragraph 3, there can be no doubt that IT and Cloud Computing (and cloud-based communications) will grow in importance, and that it is relevant for BEREC to address the dynamics of competition/collaboration between traditional ECS players and IT specific players. However, as important as this may be, [ecta](#) asks BEREC to ensure that this does not become a distraction from BEREC and NRAs carrying out their actual duties, as contained in the EECC and in the BEREC Regulation, of properly regulating B2B ECN/ECS markets where necessary. This includes considering 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. All of these

are complementary to one-another, and are in high demand by alternative operators that wish to grow in serving B2B customers of all types.

48. **ecta** agrees with the statement by BEREC in paragraph 4 that easy switching from one provider to another is a key aspect to encourage competition, and business services have specificities compared to mass-market and deserve an analysis by BEREC. **ecta** agrees with BEREC's statement that this may involve switching issues for IT services that can be sold in conjunction with ECS. That being stated, BEREC and NRAs should not underestimate the complexities of switching B2B services, especially when they combine multiple services, delivered at multiple locations, with multiple underlying infrastructures and wholesale inputs. Therefore, BEREC and NRAs need to make sure that any initiatives in this regard are thoroughly checked in advance with alternative operators.
49. **ecta** has reservations about paragraph 6, which suggests further work potentially promoting geographical segmentation of markets and/or geographic differentiation of remedies. **ecta** considers that this cannot be a priority area, given that the position of SMP operators is one of ultra-dominance in many EU Member States.
50. Paragraphs 7 and 8 contain welcome proposals. **ecta** agrees that there is value in coordination and exchange of experiences among NRAs, and that this may help on data collection issues, in order to learn from each other on how to best ensure reliability and consistency of data, while facilitating the work on the operators' side providing the information. **ecta** also agrees that BEREC could consider the preparation of recommendations for companies and public institutions aimed to encourage competition in the context of business services. That being stated, **ecta** considers that these two items cannot constitute the main threads of BEREC's future work on B2B markets following the finalization of the Report. The focus of future work should determinedly be on NRAs and BEREC taking initiatives to promote competition in B2B markets, and on sensible harmonization where there are no national specificities justifying widely different NRA approaches. The ultimate core goal must be that the ultra-dominant position of SMP operators is decisively addressed, to bring the B2B market towards a state of genuine effective competition, relying on regulated wholesale inputs where and when necessary.
51. Finally, in accordance with paragraph 9, **ecta** agrees that a more in-depth analysis of the needs of SMEs for business services, potential issues they may have, as well as taking their specificities into account on the wholesale regulation, can also be particularly useful for NRAs, but also for all stakeholders. **ecta** considers that the full scope of wholesale inputs must be seriously examined and **ecta** cautions against any suggestion (by BEREC, NRAs, or by other respondents to the BEREC consultation) that the B2B market is effectively competitive, is constrained 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 markets retained by the incumbent (ex-monopoly) operators in EU Member States.

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

52. 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 (Section 3), substantive (Section 4) and missing and punctual points (Section 5), as well as ecta’s comments on BEREC’s draft conclusions (Section 6) and proposed future work (Section 7), ecta asks BEREC to thoroughly amend and extend the draft Report prior to its finalization.

53. ecta therefore kindly asks BEREC to:

- a) Make the necessary amendments based on the specific suggestions for improvement put forward by ecta.
- b) Prepare a substantive extension to the Report, to include a strategic dimension, fostering a harmonized application of the EU regulatory framework for electronic communications, notably:
 - Retail analysis: A thorough assessment of the demand-side, i.e. of the needs of various types of B2B end-users (ranging from the smallest, to the largest and most sophisticated multi-site and multi-national users with specific resiliency and security requirements), and how end-users including public administrations purchase B2B services. Specific attention is needed to the fact that small start-ups and scale ups may have exceptionally sophisticated ECN/ECS and data center connectivity requirements.
 - Retail analysis: An in-depth description of the B2B ECN/ECS market participants, their characteristics, and their market positioning (showing that specialist providers have sprung up to serve particular types of B2B customers, with providers ranging from local/regional (several hundred in larger EU Member States) to multi-national and global providers, which themselves may be small or large, including large globally but small on the scale of a single EU Member State).
 - Retail analysis: Full analysis of the market share of the SMP operator(s) and all relevant B2B market participants, not just the largest of few largest alternative providers. Revealing that there is a large number of smaller providers relying on wholesale access from the SMP operator is important.
 - Wholesale analysis: Demonstrate the (often ultra-dominant) position of the SMP operator(s) (ex-monopolies) on the wholesale markets, distinguishing the wholesale markets that are relevant to serving the various categories of retail B2B customers, with special and separate attention for public administrations.

- Wholesale analysis: An in-depth analysis of the demand and usage patterns of wholesale access seekers (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).
 - Wholesale analysis: Particular attention to repair KPIs/SLAs/SLGs of wholesale inputs. Recommended best practice KPIs/SLAs/SLGs. BEREC should also be prepared to highlight the wide and inexplicable differences that exist in this regard. An additional issue to examine 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. This cannot legitimately be the direction of travel.
- c) Extending the Report with tangible BEREC regulatory best practices, in the following areas:
- Which B2B retail services markets must necessarily be examined by NRAs as part of their B2B (retail and wholesale) market definitions and analyses.
 - Which wholesale markets must necessarily be considered by NRAs in the context of B2B market analyses. Recommended best practice list of wholesale markets to be defined and to be analysed, which can be broader than the markets listed in the EC Recommendation on Relevant Markets.
 - Which remedies constitute best practice when finding SMP in a B2B context.
 - Ensuring non-discrimination in terms of the right to make use of any regulated wholesale inputs for B2B service delivery purposes.
 - In ecta's opinion, best practice is also that any remedy imposed on an SMP operator should be unequivocally available to any access seeker, irrespective of whether it was 'designed' or imposed with consumer or B2B usage in mind.
- d) Re-consult stakeholders on the amended draft before its finalization.
- e) Update the BEREC revised Common Positions on WLA/WBA/WLL. These 2012 documents are one of the most useful BEREC outputs for industry stakeholders.
54. 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.
55. This means that BEREC should actively be developing regulatory best practices and promoting their adoption by NRAs, including, and indeed in particular, on B2B markets. 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.

56. B2B markets are crucial for the digitalization of EU companies and public administrations, and thus are crucial regulatory subjects today and going forward, and they 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.

9. Closing ecta remarks: Meet&Greet, Workshop and External Study are not reflected in the draft Report; timeframe of BEREC consultations

57. ecta would like to express the following points of concern relating to BEREC's process leading up to the publication of the draft Report for consultation (in reverse order):

a) ecta was surprised to find that BEREC has not included any substantive elements from the External Study it has commissioned in the draft Report. In addition, BEREC has not given any prominence to the External Study (it is objectively difficult to find, even on BEREC's own website).

In addition, BEREC not taking on board any material elements from the External Study in the draft Report appears to be in contradiction with the statement contained in the BEREC Work Programme 2022⁸ (page 18).

"The results of the study will provide BEREC members with an overview and an analysis of the evolution of the business services and will feed the work to be done by BEREC on the regulation of wholesale products for business services."

b) ecta and its members put major effort into preparing a deeply researched slide deck and presentation for the BEREC Workshop on Business Services of 4 October 2022, and ecta participated actively in the Workshop discussions. It is deeply disappointing to find that the intervention of ecta is in no way reflected in the draft Report. Indeed, it appears that there is no detectable connection between BEREC's workshop and BEREC's draft Report.

c) During the 'Meet&Greet' session with the BEREC co-chairs responsible for the work on business markets, on 23 March 2022, and at many other BEREC stakeholder events, debriefings, and in ecta responses to BEREC consultations, ecta has made very clear what its expectations are of BEREC relating to B2B markets, and the External Study. It is unfortunate for ecta to conclude that BEREC seemingly has chosen not to reflect the points made by ecta during the interactions with BEREC's experts and leadership in the draft Report.

d) ecta explicitly asked BEREC to ensure that it would be interviewed by the team conducting the External Study, and for its B2B focused members to be

⁸ BoR (21) 175: https://www.berec.europa.eu/sites/default/files/files/document_register_store/2021/12/Work-Programme-2022.pdf

interviewed, and to be involved in the preparation of BEREC work on B2B markets. It is disappointing that [ecta](#) was not interviewed, but it is even more concerning that only two [ecta](#) members were interviewed for the External Study (two members from Italy; none from any other EU Member States), whereas for example Orange/OBS and Vodafone were both interviewed twice.

58. All of the points mentioned in the paragraph above are a cause for broader concerns. BEREC appears to be trending away from proposing harmonization initiatives, even where its findings are that NRAs are adopting widely different decisions, which cannot be explained by objective differences in national circumstances. [ecta](#) would kindly like to encourage BEREC to re-focus on its mandate to foster the achievement of the ECN/ECS market objectives set at EU level, including the promotion of the EU internal market, and its explicit harmonization mandate.
59. Finally, 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 Serdengecti, [ecta](#) Regulation and Competition Affairs Director.