



February 2023

ETNO response to the draft BEREC Report on the regulatory treatment of business services

Introduction

ETNO contributed to the internal workshop on **regulatory treatment of business services** organised by BEREC in October 2022 and welcome the opportunity to contribute to this BEREC draft report on the regulatory treatment of business services.

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

1. Methodology of the report

ETNO would like to share some general remarks on the report methodology and structure and hope that they will be taken into account in the final report.

- ETNO is missing the information about the KPIs used for the products related to this business market.
- The report is very factual, however, we think that it is important to also acknowledge that due to the diversity of rules to comply with, operators implementation of the rules provided by NRAs is making the work of companies operating in different markets and providing pan-European services difficult and time consuming.
- ETNO believes that the monitoring of the market should also mean going beyond the pure relevant market in order to have a more holistic view of the competition. In particular, the project of looking at the progressive use of IT goes into the right direction. ETNO has provided some further input on this during the BEREC workshop as well as during the interview done by the consultant mandated by BEREC, last year. Thus, we would appreciate to have those elements integrated in the report as well.
- The countries in the report cover more than the European Union ones which is interesting but in respect to the EC regulation questionable.

2. The business market definition

The increased capabilities of electronic communications networks providing mass-market broadband access products may satisfy the connectivity needs of certain business customers, notably SMEs. In some Member States, the deployment of alternative infrastructures (additional to the SMP network) providing a (dedicated) very high-capacity connectivity that can serve business needs just as well as it serves the needs of residential customers, has increased significantly in particular in more densely populated areas, commercial centres and business districts.

In these cases, business customers can contract specific QoS requirements and security services on top of broadband connectivity similar or same as used by residential customers, according to their specific needs.

However, increasingly larger segment of the business market and the new demand arising from the digitization require more specialized services. In the past, business services consisted in voice and basic connectivity services, but in the recent years business services have evolved to include high speed connectivity combined with IT services. These IT services are cloud storage, collaborative solutions such as MS Teams or WebEx, security services, hosting, Infrastructure as a service (IaaS), Software as a service (SaaS) etc..

ETNO thinks that IT services are not and shall not be part of the wholesale relevant market 2/2020 and, above all, they do not represent a barrier to entry in the business connectivity market at the retail level, given the wide and differentiated availability of IT offers in the market. An operator can provide these services on its own or relying on other providers. Comparative relevance of these products is increasing considerably in the recent years and this trend is expected to continue.

Next to the presence of and wholesale access to very high capacity physical or virtual network elements, the increasing importance of “over the top” business services over plain public Internet connections enter into competition with traditional high-quality connectivity.

IP products have become more and more relevant in the provision of business services with integrators using IP services and WAN as an input. OTT and IP services change boundaries of the market by broadening it and affect competitive constraints on traditional high-quality dedicated connectivity services.

Also, the provision of most of high-quality business services does not require underlying high-quality network infrastructure and bespoke hardware-based network solutions, but high-quality virtual private network services aimed at business users are increasingly being built based on software solutions that can run over plain broadband IP networks.

Such software-based solutions built on broadband IP products are replacing traditional products.

In the European Electronic Communications Code five years ago, the European Commission already addressed the point on SDN and NFV virtualization. Today, it is crucial that the current impact of these functionalities - in particular, the prospective impact on the provision and procurement of high-quality connectivity - is taken into account when analysing fixed connectivity markets.

Given the current development of VHC connectivity and the presence of alternative competing fibre networks and the current and forward-looking competitive constraints exerted by hyperscalers (see annex 1), market 2/2020 should no longer be susceptible of ex ante regulation across the EU.

3. Degree of competition and relevance of Physical Access Obligation

Despite the market for wholesale dedicated capacity is still considered by the 2020 Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible of *ex ante* regulation at the Union level, already several National Regulatory Authorities (NRAs) **have deemed this market competitive at national level** (e.g. in BG, CZ, DK, EE, LV, NL, PL, RO, SK and SE). Others have found **no SMP at product or geographical level** (e.g. AT, FI, DE, IE, IT, PT and UK). BEREC also noted that more than a third of countries analysed in its report (12 out of 33) have no regulation for that market.

Additionally, BEREC acknowledge in its draft report that incumbent market shares are declining in most countries (Table 3, page 8): *“With regard to the evolution of the incumbent’s market shares in the last years, the vast majority of NRAs report a trend towards a decrease or at least a stable situation of the market share (82% of overall responses).”*

ETNO believes the intensity of the competition should be analysed through different criteria considering potential competitive conditions. One of these criteria should be the **number of alternative operators able to exert, even potentially, significant competitive pressure in the market.**

Prime example of such significant competitors are suppliers of mass-market fibre with large regional or nation-wide networks, who are increasingly more relevant competitors to the incumbent for the provision of dedicated capacity services than traditional niche business connectivity providers (ie. Colt). Therefore, this should be considered when analysing the competitive dynamics in the relevant market (wholesale access obligations on active products, economic replicability test, ...).

Additionally, the presence of alternative networks in black areas and of subsidised fibre networks in the other geographical areas should be duly taken into account in the market definition or in the segmentation of remedies across the national territory (see the following section).

Also, different types of wholesale broadband access services increasingly impact the competitive dynamics for dedicated connectivity services for businesses. NRAs should consider whether access to physical or virtual over the top infrastructure is already available upstream and sufficient for competition (Art. 73.2 of EECC). Indeed, this was also the trend recognised by the Commission already in the 2020 Staff Working Document (SWD) Explanatory note accompanying the Recommendation on relevant markets: *“Based on an analysis of demand and supply conditions (including the need for business-grade SLAs) some NRAs also included business-grade bitstream as substitute for dedicated business-grade products in a number of markets.”*

4. Geographical segmentation

As highlighted by the Commission in the SWD Explanatory Note accompanying the Recommendation on relevant market, as competition in VHC networks develops, role of the geographic segmentation in the market for wholesale dedicated capacity (specifically the high-bandwidth segment based on fibre connections) increases. **The trend towards a more granular analysis should increase in the future, as the infrastructure-based competition is developing at a different pace in the Member States¹. The different competitive characteristics justify the lifting of the regulation or a different regulatory approach at subnational level.** In particular, price control measures should normally be excluded, first of all when it comes to remedies applied to fibre networks.

Typically, geographical segmentation according to the level of infrastructure-based competition should tend to coincide in market 1 and market 2, however additional competitive areas might be identified in market 2 thanks to the presence of dedicated capacity offered by alternative operators based on the inputs of market 1 or by niche business operators.

This more granular geographical segmentation should allow to focus regulatory analysis, if need be, only in non-competitive (possibly less densely populated areas) to accommodate if needed the possibility to replicate multi-site contracts.

ETNO believes that more efforts should be done in that sense. As noted in the draft BEREC report, only five NRAs have defined sub-national markets. We support BEREC views on geographic segmentation as stated below:

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

5. Product market segmentation

NRAs should assess whether the segmentation of the market into low and high bandwidth segments is justified in the light of the national circumstances. Some NRAs have segmented market 4/2014 and market 2/2020 according to the capacity/technology of terminating circuits (AT, DE, EL, HU, IE, PL and PT)² with partial deregulation. Indeed, demand and supply side features significantly vary according to the speed of terminating segments. In light of technological evolution and migration from copper to fibre, the demand is progressively switching from low-bandwidth circuits (i.e. copper-based circuits up to 2 Mbit/s) to high-bandwidth circuits (i.e. fibre-based circuits above 2 Mbit/s) where competition is driven by the presence of alternative (VHC-fibre) infrastructures

¹ Besides this, note that connectivity rolled out with state aid, which inherently has access obligations attached, is an increasingly important competitive factor.

² In UK business-grade connectivity services provided over copper are excluded from the definition of the relevant market.

Therefore, the low-bandwidth segment is under a forward-looking approach prospectively no longer relevant due to the shift of the demand to the high bandwidth and NRAs should adopt an approach supporting the decommissioning of services provided over the legacy networks.

At the same time, the high bandwidth segment is in many countries no longer susceptible of ex ante regulation in the light of the competitive constraints exerted by the presence of alternative VHC infrastructures.

6. Proportionality of the remedies imposed.

Where an SMP is still identified, it is important that the remedies imposed on the SMP operator are proportionate and properly take into account the peculiarities of the business market compared to the mass-market:

- If business services are offered over a mass market product (based on a market 1/2020 input), no regulation should be imposed on market 2/2020 (high quality market) or at the very least this should be taken into account when assessing market 2/2020 SMP.
- As mentioned in the BEREC report, “As a conclusion, there is not a clear trend among the NRAs regarding the significance of passive infrastructure for business services.” Meaning that NRAs see no need to impose these access remedies unless this access is considered sufficient and higher level access obligations are removed.
- Price control obligation should normally be avoided, first of all on fibre networks should never be subject to price controls. If exceptionally, price controls were imposed, they should allow (as well as in the other wholesale regulated markets) for wholesale price adjustments following the inflation levels.
- The economic replicability test should be never imposed when cost orientation is still in place. Where imposed, it should be based on the economics of equally efficient competitors of the SMP operator.
- Reporting requirements for business services should be proportionate and fit for purpose, considering the development of IT services out of scope of the wholesale dedicated capacity market.
- Wholesale services should be provided according to the technical evolution allowing the shutdown of the legacy network, namely, VHC network-based wholesale products should be “comparable” in terms of qualitative parameters, but never fully “identical” to legacy-based ones, as it is not possible for technical differences between the old and new networks. This however should not be the barrier for legacy network switch-off.
- NRAs should allow the shutdown of the legacy network within certain timelines (i.e. the migration should be concluded within a clear timeline and the SMP operator should be allowed to migrate customers once a proper prior notice has been observed).
- Heavy/disproportionate workload related to regulatory obligations for the “small” Business services providers while they are even more impacted by the inflation.
- Sovereignty of the technical solutions/proposal is also a concern for the operators

It is also important to ensure compliance with existing symmetric legal obligations in situations when electronic communications services are realized as a bundle of connectivity services provided by telecommunications operators and IP-based services provided as OTTs, e.g. for SIP telephony or cloud communications. These obligations comprise measures with regards to e.g. public safety/security, emergency preparedness and customer protection. For example, OTT service providers have to ensure that privacy rules are followed or the data needed to ascertain the location are transmitted.

Annex 1: More diversified and intensified competition: hyperscalers gaining pace

There is an acceleration of the **move to cloud for many IT and IS players**. Competition from cloud-based service providers like Microsoft, Zoom, Google increases and it triggers a disintermediation of the operators.

Covid pandemic has accelerated the collaborative applications including voice. For example, in France at the end of 2021, 24% of large companies considered to replace fixed lines by collaborative application.

In 2021 and early 2022, hyperscalers keep on **gaining pace in this race towards the telco edge**. Please find below some examples illustrating that phenomenon:

- Microsoft bought AT&T's 5G core network platform to move it to its cloud infrastructure Azure for operators. Microsoft is also developing its expertise through mergers & acquisitions (Marsden Group with its vertical expertise, AI giant Nuances and the multicloud cybersecurity platform CloudKnox) while also surfing on its successful Operator Connect solution launched in 2020. Note that in March 2022, Microsoft announced Operator Connect Mobile for Teams.
- Google is also actively bolstering its vertical expertise whilst also expanding its cybersecurity practice through the acquisition of cybersecurity firm Mandiant, security player Simplify and by setting up a cybersecurity "cloud first" strategic consulting practice.
- Finally, Amazon Web Services continues to accelerate into networking solutions with the recent launch of AWS Cloud WAN, in December 2021.
- Strong momentum with Unified Communications moving to cloud with RingCentral and Mitel forming a partnership or Ericsson entering communications API business through its acquisition of Vonage for \$6.2bn.

We find the same very competitive landscape for CDNs. Key players in the worldwide services market in 2021 are Akamai (33% market share)³, then ChinaNetCenter (12.7%), Cloudflare (6.3%), Fastly (3.4%), Edgecast (3.2%), ChinaCache (3%), and Limelight Networks (2.1%).

There are also CDN services from hyperscalers such as AWS CloudFront, Microsoft Azure CDN⁴, and Google Cloud Platform (GCP) CDN, CDN resellers and a large pool of small players in the market, represented in the "others" segment, which have a 34.4% share.

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.

For questions and clarifications regarding this position paper, please contact Maarit Palovirta, Senior Director Regulatory Affairs or Xhoana Shehu, Policy Manager at ETNO.

³ Akamai's purchase of Linode in 2022

⁴ Microsoft has launched a private enterprise-grade Content Delivery Network (CDN) solution