



# **ecta RESPONSE**

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

**DRAFT BEREC REPORT ON THE REGULATION OF PHYSICAL  
INFRASTRUCTURE ACCESS**

**BOR (24) 178**

**24 FEBRUARY 2025**

## 1. Introduction

1. **ecta**, the **european competitive telecommunications association**,<sup>1</sup> welcomes the opportunity to comment on the draft BEREC Report on the regulation of physical infrastructure access, BoR (24) 178 (hereafter “draft BEREC Report”).
2. **ecta** represents those alternative operators who, relying on the pro-competitive EU legal framework that has created a free market for electronic communications, have helped overcome national monopolies to give EU citizens, businesses and public administrations quality and choice at affordable prices. **ecta** represents at large those operators who are driving the development of an accessible Gigabit society, who represent significant investments in fixed, mobile and fixed wireless access networks that qualify as Very High Capacity Networks and who demonstrate unique innovation capabilities.

## 2. Key ecta considerations

3. **ecta** thanks BEREC for preparing this draft Report, which gives a detailed overview of NRA practices relating to ex-ante regulation of physical infrastructure access (both SMP based and symmetric ex-ante) and regulation based on the Broadband Cost Reduction Directive (hereinafter “BCRD”) - Gigabit Infrastructure Act (hereinafter “GIA”).
4. **ecta** has identified important issues and areas for improvement of the draft BEREC Report, on which we provide **ecta**’s constructive input below.

### 2.1. Structural issue: distinguishing the legal basis for PIA regulation

5. **ecta** considers that a much more systematic approach is needed, distinguishing, throughout the BEREC Report, the legal basis for applicable regulation of wholesale physical infrastructure access (hereafter “PIA”). Systematic distinction should be introduced in the final text of the Report between:
  - a) Ex-ante sector specific regulation based on the Significant Market Power regime.
  - b) Ex-ante symmetric regulation (identifying its exact legal basis and nature).
  - c) BCRD/GIA derived symmetric regulation.

This is necessary to enable policymakers to draw insights and correct conclusions from BEREC’s work. Absent this systematic distinction, there is a significant risk for the stakeholders reading the report to overestimate the relevance and application of specific forms regulation compared to the others.

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

6. ecta notes in this context that Table 1 in Section 2, page 3, does not distinguish Significant Market Power (SMP)-based access to civil engineering infrastructure from other (voluntary and BCRD based access) PIA. Furthermore, Table 1 does not give any indication of the extent of PIA usage, and consequently the use of a few km of PIA, supporting a few lines, or the use of a million km of PIA, supporting millions of lines, is treated in the same way. Both of those elements constitute a real problem for the effectiveness and credibility of the draft Report.
7. In fact, the absence of information on the effective extent of use of SMP telecom PIA, non-SMP telecom PIA, and non-telecom PIA is an issue throughout the draft Report. This kind of absence entails risks of the importance of non-telecom PIA being overestimated and overstated. ecta notes that the annex 43 shows that NRAs are collecting data on the use of PIA. ecta therefore kindly invites BEREC to include granular specific data in the final Report, to show clearly the distinct percentages of use of SMP telecom PIA, non-SMP telecom PIA, and non-telecom PIA.
8. ecta further invites BEREC to significantly amend Table 1 in the final Report, by inserting a distinction between SMP based PIA, BCRD based PIA and voluntary PIA, and to review the whole report to indicate the effective use of physical infrastructure, its legal basis, and its type, by adding the quantification of its use in the relevant parts of the Report. These amendments are essential to avoid misinterpretation and possible misuse of information.

## 2.2. Benchmarking issues

9. ecta regrets that the benchmarks mix EU Member States with other BEREC members. This is a flaw that ecta highlighted in the comments to several previous BEREC draft reports, and will continue to highlight, because it stands in the way of straightforward assessment and significantly affects outcomes and considerations that can be drawn from the Report for possible future amendments to European Union regulation. ecta therefore invites BEREC, in the final text, to focus the graphs and figures on the EU Member State NRA practices (with other countries shown entirely separately).

## 2.3. Substantive issues

10. ecta appreciates that in the draft BEREC Report, the factual evidence, as well as the NRAs' positions, point strongly in the direction of the need for SMP-based regulation of access to civil engineering infrastructure. In fact, in Section 2 it is stated, first, that: *"The rollout of own PI and, to a lesser extent, the access to telco's physical networks were the most important alternatives for the purpose of deploying a VHCN, according to responses of 16 and 10 NRAs, respectively<sup>6</sup>. The NRAs that considered access to*

*telco's PI relevant<sup>7</sup> further specified that such an access pertained predominantly to the incumbent operator's infrastructure. RU was the only NRA that referred to the access to alternative telco operators' PI as being highly relevant as well, as detailed in table AII.2 of Annex II". and then: "Overall, the data showed that: (i) the access to telco operators' PI concerned almost exclusively the incumbent operators' PI, (ii) the access to non-telco operators' PI was the least important alternative as compared to the deployment of own PI and the access to telco incumbent's PI and (iii) the access to non-telco's PI mainly concerned the PI for the supply of electricity, followed by that of transportation services". (ecta emphasis added). In other parts of the text and in the BEREC conclusions, the wording is ambivalent, and in the executive summary, these key findings are absent.*

11. ecta therefore asks BEREC to be much more explicit in articulating that there is strong evidence on the need for SMP-based regulation of civil engineering infrastructure.
12. ecta also firmly believes that the findings of Sections 6.2 and 6.3 are very relevant for the outcome of the draft Report and asks that these are properly reflected in the executive summary and in BEREC's conclusions.
13. In addition, the following consideration by BEREC: "*Considering the fact that just 5 NRAs provided feedback to this questions, it may be too early to clearly determine whether regulatory experience to date suggests that symmetric regulation on PI elements and/or in wiring and cables could be sufficient to resolve the identified competition problems on its own. Nor is it possible to argue that the need for asymmetric obligations on PI has been made redundant, as several countries find the SMP regime appropriate for establishing pricing obligations, for instance*" and the consideration on the fact that: "*A significant number of NRAs that responded to this part of the questionnaire (9 NRAs out of 11 in total) highlighted the importance of access to passive SMP infrastructure for the promotion of high-speed network deployments in their countries. However, in 2 countries, the BCRD had been seen as the most efficient instrument for ensuring the availability of access to PI elements*". together with the BEREC statement: "*Being asked about the perspectives of PIA regulation and whether the GIA would be the right tool to solve competitive issues identified related to wholesale access, most of the respondents to this question (11 NRAs) consider that, for the time being, the BCRD/GIA are deemed a complementary or subsidiary instrument to SMP regulation (see tables AII.45 and AII.46) (ecta emphasis added)*" should definitely be included in the BEREC conclusions.
14. ecta notes that, while in Section 6, the clear outcome is that there is widespread agreement among NRAs on the high relevance of the SMP-based regulation of access to civil engineering infrastructure, in the conclusions, BEREC takes a different and weaker line, stating that Asymmetric and Symmetric (BCRD) access for PIA are complementary and could prevail one over the other in different countries. ecta

notes that the evidence emerging from the draft Report is clear in terms of indicating that SMP-based regulation of access to civil engineering is essential today and will remain essential going forward. **ecta** therefore, invites BEREC, in the final text of the Report, to clarify better the prominence of the asymmetric SMP-based ex-ante regulation in the conclusions.

15. Furthermore, **ecta** notes that the draft Report does not contain any information with respect to the effective implementation of the physical access remedies imposed by the NRAs in their respective Member State. This is very relevant information that the final version of the report should, in **ecta's** view, include. For instance, in Germany the SMP-based PIA remedy is not effectively available (after more than two years from its adoption), as the implementation process is delayed until today. The pricing method for SMP-based PIA in Germany is deeply problematic, and has been strongly criticized by the European Commission and by German alternative operators and **ecta** itself as it foresees a model to artificially increase the PIA wholesale access tariffs which should normally be based on historical costs. In fact, the German situation appears even more serious for the competition dynamics when considering the fact that access to local unbundled fibre loop is not available and the access seekers to the VHC networks can currently rely only on active products such as bitstream, with extremely high wholesale access prices applied by the SMP operator. Overall, Germany counts for almost 20% of European Union's population. Consequently, the significant flaw of the competition dynamics, deriving from the poor implementation of the EU regulatory framework, has an impact on the achievement European Union's 2030 Digital Decade Connectivity Objectives: Germany is among lowest scoring Member States in terms of FTTP deployment and take-up vis a vis the other Member States and EU averages.
16. When it comes to the section on expectations for the future, **ecta** notes with interest and endorses the French regulator's consideration, which is reported by BEREC as follows: *"ARCEP noted the future shift from regulations aimed at speeding up the rollout of fibre networks towards measures centred on maintaining the existing infrastructure. This paradigm change will bring about new costs and coordination needs, and therefore an even more challenging environment for the regulation of PIA in the French regulator's view"*. (**ecta** emphasis added).
17. **ecta** therefore invites BEREC, in the final text of the report, to include this important consideration in the conclusions.
18. Finally, when it comes to BEREC's draft conclusions on the *"the adequacy of PIA to solve the competitive issues identified in the market"* and PIA being *"an effective means for deregulation of other relevant markets"*, based on the sole argument of the definition by a small number of NRAs of a PIA standalone market, **ecta** would like to point out that this statement is clearly contradicted by the results of the draft Report, which shows a predominance of the regulation of the PIA as an ancillary

remedy for SMP in other product markets (15 NRAs in the WLA market and 6 NRAs in the WDC market). Moreover, even if it is not indicated in the report, on the basis of the factual evidence and data, as of today, 23 NRAs out of 27 NRAs regulate Market 1/2020 by finding SMP either on a national or geographic basis. Similarly, 16 NRAs regulate Market 2/2020 by finding SMP either on a national or geographic basis. [ecta](#) would like also to highlight that PIA access cannot not be seen as the “panacea” of regulation, given that still today, it is the remedy that can be seen as fit for purpose for those operators aiming to reach the last step of the ladder of investment. As is well known, infrastructure based competition by building own VHC infrastructure is not feasible for the operators in all geographic areas across Europe, and, at least in those areas where the VHC infrastructure deployment by multiple operators is not feasible, passive and active access remedies other than PIA will be needed also in the coming years.

19. [ecta](#) therefore urges BEREC to amend its conclusions by highlighting: i) the importance of the remedies imposed in markets 1/2020 and 2/2020, and ii) the crucial role played by Article 72 EECC in providing the possibility to NRAs to impose PIA remedies in the relevant markets listed in the EC Recommendation on Relevant Markets Susceptible to Ex-Ante Regulation issued in 2020.

### 3. Final [ecta](#) remarks

20. [ecta](#) kindly asks BEREC to take into account the elements formulated in response, and in particular to **put more emphasis in the executive summary and in the conclusions on fact that the SMP regulation is and will remain essential** and cannot be substituted by BCRD-GIA based symmetric regulation.

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