



ECTA RESPONSE

BOR (17) 38

**STAKEHOLDER CONSULTATION ON THE REVIEW OF THE BEREC
MEDIUM-TERM STRATEGY FOR 2018-2020**

5 APRIL 2017

INTRODUCTION

ECTA, the European Competitive Telecommunications Association, representing over 100 challenger telecoms operators and digital communications companies, welcomes the opportunity to present its views and expectations relating to the BEREC Mid-Term Strategy for the period 2018-2020.

1) Do you have any comments on the elements presented above? (BEREC introduction)

ECTA believes, first and foremost, that BEREC should maintain and re-affirm the three over-arching strategic objectives of its current Mid-Term Strategy, i.e. promoting competition, contributing to the development of the internal market, and promoting the interests of EU citizens.

We ask BEREC in particular to re-include the following precise wording from page 3 of BoR (14) 182, which perfectly sets out how the EU policy objectives and BEREC's strategic objectives interrelate and mutually reinforce one-another:

BEREC and its members, the National regulatory authorities (NRAs), must promote effective competition, and in so doing promote efficient investment and innovation in new and enhanced infrastructures and services. Central to this approach is the understanding that *effective* and *sustainable* competition is what drives *efficient* investment. These qualifiers are important to the integrity of the *ex ante* economic regulatory regime which NRAs are tasked with implementing and enforcing, whereby *ex ante* economic regulation can be gradually scaled back over time as markets become effectively competitive.

Competition also serves the interests of European end-users, as it helps to fuel innovation and provides for maximum benefit in terms of choice, price, and quality. Finally, effective competition at the national level fuels the development of the internal market – Europe's global competitiveness relies on competitive European (national) markets. A competitive European telecoms sector in turn contributes to a vibrant European economy, which in turn should provide the conditions for continued efficient investment and innovation.

As ECTA, we call this the virtuous circle of competition:



Competition, enabled and supported by specific and non-mutually exclusive forms of wholesale access to SMP operators' networks where appropriate, has been a win for all - it has led to an increase in broadband penetration and revenues, with benefits shared between end-users, who have gained access to (better) broadband products at lower prices, and operators, through a massive increase in revenues which has allowed re-investment in network development.

Competition is, and will continue being in an NGA environment, the key to satisfying explicit demand and discovering latent demand from customers (consumers and businesses), including the price points at which large-scale adoption of services takes off, thereby driving take-up of services, achieving broad socio-economic benefits, and generating economic rewards for those companies which best satisfy evolving customer demand and are best able to industrialise the satisfaction of such customer demand.

The promotion of competition should therefore remain at the core of the EU regulatory framework, and at the core of BEREC's over-arching strategic priorities.

It is particularly important for BEREC to re-affirm how the objectives interrelate and mutually reinforce one-another at this point in time – and we urge BEREC to do it not only as part of its Mid-Term Strategy, but also in the context of the ongoing review of the EU regulatory framework for electronic communications.

In addition, ECTA considers that the third pillar (promoting the interests of EU citizens) should be amended to explicitly include the promotion of the interests of EU businesses as well. EU businesses deserve equal attention, in particular given that: (i) in many Member States, micro, small and medium sized businesses benefit from less competitive intensity than consumers do when it comes to electronic communications networks and services, and there are particular issues for multi-site businesses, (ii) the Internet of Things/Industrial Internet will take hold, (iii) nearly all businesses will rely on cloud computing, (iv) new specialised services for businesses are likely to emerge, and (v) many businesses are likely to include digital communications as part of their evolving

products/services, i.e. they will increasingly become not only users, but also providers of products/services that incorporate digital communications, sometimes in ways that are not directly perceptible for the end-user.

Furthermore, in the global economy, it is of utmost importance for European businesses in all sectors – and more particularly for the small and medium sized businesses – to remain competitive and/or increase their competitiveness. Hence, it is instrumental for them to successfully embrace the digital revolution and effectively achieve their transformation towards Industry 4.0. Only a significant increase in competition on markets for business communications, with a large diversity of operators and service providers will: (i) allow businesses of all sectors to access the electronic communications services they need to remain competitive, and (ii) allow them to release their innovation potential - which is required to maintain and increase the European welfare and create products and services that will generate demand for Very High Capacity connectivity.

SECTION 1 – MARKET AND TECHNOLOGICAL DEVELOPMENTS

A. THE END-USER EXPERIENCE

2) Of the issues listed above, which do you consider to be the most important in shaping the end-user experience? Please explain your answer in detail.

3) How can the interests of digitally disengaged citizens be best protected?

4) What can be done by BEREC to improve the end-user experience by providing more and easier-to-use information?

5) Are there any other significant trends/developments that BEREC should consider in relation to the end-user experience?

From ECTA's perspective, what is most important with regard to the end-user experience, is that competitive markets enable genuine choice for end-users, and that the end-users need to be able to effectively switch to a challenger operator, for electronic communications networks and services in the traditional sense, and for digital communications more generally.

Genuine choice, means the ability for end-users (including digitally disengaged citizens) to choose from diversified offerings, at different quality ratios and price points, and to effectively switch to them, meeting different types of demand, and to enable the conversion of latent demand (including from digitally disengaged citizens) into actual take-up. This is valid both for consumers and for the varied types of business end-users, and, as discussed above, also to enable businesses to include digital communications in

their products/services and to successfully embrace the digital revolution and effectively achieve their transformation towards Industry 4.0.

For the avoidance of doubt, the reference we make to different quality ratios and price points does not mean that we would dispute a role for BEREC with regard to the end-user experience and performance of networks, or that we would have a preference for low-end offers. In actual fact, a large proportion of ECTA members operate at the very high end of the market (highest speeds, highest quality of service including repair times, most generous allocations/bundles), and it is well established that alternative operators were the ones who were first with: Fibre-to-the-Office, Fibre-to-the-Home, far faster xDSL than the incumbent operator, IPTV, triple-play, prepaid mobile, unlimited calls and SMS, big mobile data allocations, and we could go on giving examples...).

What we wish to indicate to BEREC is that, whilst we agree that access to high quality electronic communications services is a prerequisite for maximising the benefits of an inclusive digital society, a focus on QoS/performance of networks should not be single-minded, and the reference made by BEREC in its question to 'shaping the end-user experience', should not amount to regulators substituting themselves for market demand, and should certainly not lead to regulators determining operators' offers. Determining quality, and the price associated with a particular level of quality, should be a matter of market dynamics (market dynamics themselves enabled and supported by ex-ante wholesale access regulation where appropriate). Discovery of latent demand (including from digitally disengaged citizens), and converting it into actual take-up, is something that the market mechanism is most apt at.

We note in addition that we consider that the presence of alternative operators, creating new offers, new bundles, and even bundles which are not led by the traditional telecoms service (e.g. IoT, audiovisual, banking, multi-utility, etc.), new price points, advertising services in new ways, etc. has undoubtedly contributed significantly to take-up (including by previously disengaged citizens). Obvious examples include prepaid mobile communications, promotions on mobile data (including free of charge offers), affordable fixed broadband etc. BEREC would also be well-advised to recognise that: (i) in the absence of competition between telecommunications companies, the Internet as we know it likely would not have emerged (the first dial-up ISPs were challengers, were thwarted by incumbents, and were nearly all evicted from the market in the transition to ADSL), and (ii) the emergence of 'OTT' providers including broadcasters has contributed strongly to broadband take-up.

As regards devices, we do not at this stage see major issues in terms of gate-keeping at device level. With regard to data protection, privacy and network security, we recognise that there are huge areas of concern, but, as BEREC itself recognises, these mostly fall outside BEREC's remit.

This brings us to brief conclusions (succinctly answering BEREC's questions 2 to 5) as follows.

In ECTA's opinion, switching between providers (part of bullet point 3 and bullet point 5) and affordability (covered by bullet point 5) are the most important areas for BEREC to address in this set of issues. Affordability is strongly affected by the level of genuine competition in the market. As per our comments above, we consider this relevant not only for consumers, but also for business users.

The market mechanism enables discovery of latent market demand (including from digitally disengaged citizens), and to convert that demand into actual take-up. For a market to exist, competition needs to exist, enabled and supported by specific and non mutually exclusive forms of wholesale access to SMP operators' networks where appropriate. Furthermore, well developed competition will allow businesses in all sectors to release their innovation potential - which is required to maintain and increase the European welfare and create products and services that will generate demand for Very High Capacity connectivity.

B. COMPETITIVE DYNAMICS IN THE DIGITAL ECOSYSTEM

6) What aspects of the issues listed above do you believe to be most important? Please explain your answer in detail.

7) Are there any other significant trends/developments that BEREC should consider in relation to the digital ecosystem?

ECTA commends BEREC on the list of important issues it has identified. We agree with each item on the list (our suggestions for additions follow below).

We wish to emphasise that none of the competitive dynamics listed by BEREC justify a departure (by BEREC, by NRAs, as well as by co-legislators) from the need for a predictable rigorous process, the need for decision-makers to consult stakeholders fully, and provide reasoned justifications for regulatory intervention and for deregulation, i.e. the same set of tests is needed for mandating wholesale access regulation as for withdrawing wholesale access regulation.

Indeed, the system in the EU regulatory framework for electronic communications, requiring market definition, SMP assessment, and imposition of ex-ante wholesale regulatory obligations on SMP operators, is likely to be the best guarantor of effective and sustainable competition at all levels of the value chain, drives efficient investment, and supports innovation and maximum benefit to EU end-users (consumers and business users). If flanking provisions (e.g. symmetric wholesale access regulation complementing asymmetric wholesale access regulation) and/or additions to the system (e.g. to address co-investment agreements and to better specify how joint SMP

can be identified, and/or to address non-competitive tight oligopolies), these should be subject to the same predictable rigorous process.

ECTA is on record in supporting BEREC when it stated in BoR (16) 213 that 'two is not enough' for fixed networks. It would take us too far to re-iterate ECTA's extensive position on oligopolistic markets (which focuses specifically on non-competitive tight oligopolies) in this response. Please refer to the [ECTA Response to BoR \(15\) 74](#).

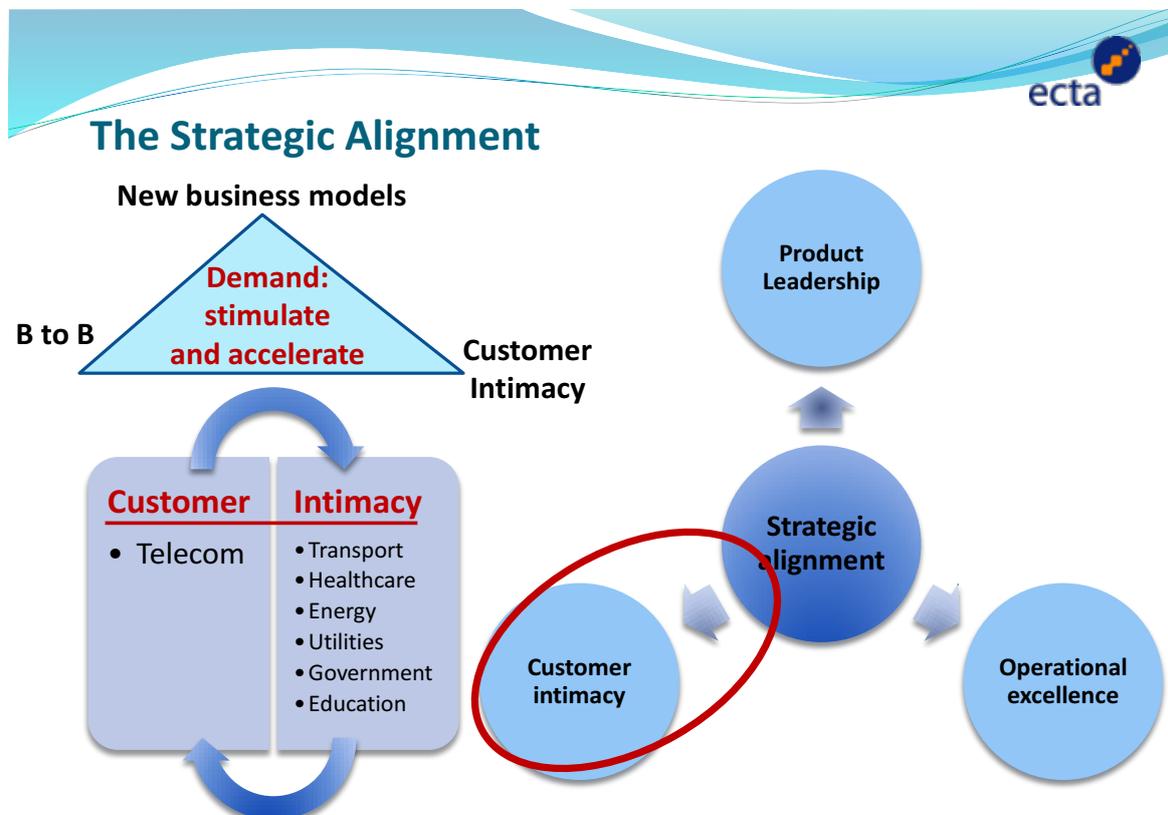
ECTA is also on record in cautioning BEREC and NRAs against de-emphasising wholesale physical network access in favour of wholesale virtual access ([ECTA response to BoR \(15\) 64](#)) because we consider that this is likely to have severe negative effects on competition and ultimately end-user interests. For the same reasons, ECTA is on record cautioning BEREC and NRAs against pursuing sub-national geographic market segmentation too eagerly ([ECTA response to BoR \(13\) 186](#)). We firmly stand by those positions, and we consider that they remain completely relevant also for BEREC's Mid-Term Strategy for the period 2018-2020 (as well as for the ongoing review of the EU regulatory framework).

By making the points above, we believe that we made clear (addressing BEREC's question 6) that the treatment of SMP positions, properly addressing non-competitive tight oligopolies in a manner which respects legal certainty, and the avoidance of regulators unduly or artificially fragmenting markets geographically, are the most important points in BEREC's list from ECTA's perspective. This is without prejudice to our agreement with BEREC that all elements of BEREC's list are relevant.

As regards other significant trends/developments (BEREC question 7) there are a few trends, which are policy-making and regulatory trends, that we wish to address. For instance, we observe with misgivings that several NRAs have taken decisions relating to fibre access networks, permitting SMP operators to architect their networks in a manner which impedes physical wholesale access, and thus severely restrict competition. In our view this is contrary to the 2010 EC Recommendation on Regulated Access to Next Generation Access Networks. Furthermore we would very much welcome a firm BEREC position against those practices because, in our view, it is incompatible with BEREC's fundamental stance on competition (which ECTA has systematically welcomed). As regards upgrades to metallic access networks, one NRA went so far as to grant an explicit 'Phase A' exclusivity over the network to the SMP operator, and another NRA explicitly placed its market analysis in the context of a 'response' to the SMP operators' unilateral proposals on investment. In both cases, this resulted in granting the SMP operator total exclusivity over the > 2.2 MHz portion of the frequency spectrum on its metallic access network, based on one current specific technology and one specific technology that is in the standardisation process, without proper consideration of current and near-future alternatives and perspectives for technology development. The effect is that technologies that enable co-existence and competition over metallic and fibre access networks are not given the consideration

they need to be given. We consider that the NRA decisions concerned encourage regulatory gaming by SMP operators, and we caution BEREC and NRAs that this type of decisions impedes competition as well as the development of technologies (which do exist both for metallic and for fibre networks) that do enable and support competition. We also note in this regard that BEREC's own material on Layer2 WAP (on which ECTA expressed its disappointment) identifies the fact that NRA decisions have enabled SMP operators to set wholesale access charges for L2WAP which vary strongly by the amount of bandwidth provided. ECTA considers that, certainly in the access network, tiered wholesale access charges for bandwidth fundamentally alter the competitive landscape, by enabling SMP operators to determine the pricing structure of all operators relying (in part) on that portion of the network, even where there is no technological justification given that the connection is either entirely unshared, and/or the feeder segment has plenty of (fibre) capacity to support all of the access network users' usage.

Finally, the digital revolution and the emergence of the Industry 4.0 makes is more than ever important for electronic communications network operators and service providers to be able, through a pro-competitive regulatory framework, to freely choose their strategic alignment. This is particularly important for operators active in the business markets on sectors such as transport, healthcare, energy, utilities, government, education etc. that would most benefit from the emergence of new business models.



Source: Vlerick Business School, 2006 and The Discipline of Market Leaders: Choose Your Customers, Narrow Your Focus, Dominate Your Market, Michael Treacy & Fred Wiersema, 1997

C. EVOLUTION OF NETWORKS

8) What aspects of the issues listed above do you believe to be most important? Please explain your answer in detail.

9) Are there any other significant trends/developments that BEREC should consider in relation to evolution of networks?

ECTA agrees with BEREC's identification of the ongoing and expected evolution of networks.

BEREC, and its constituent NRAs, need to keep a close eye on technology development, and in particular the inclusion of 'things' (via the Internet and/or via specialised services) as receiver/transmitter. Real questions are likely to arise on what this may entail in terms of the evolution of the value chain, who is considered to be the provider, who is considered to be the (end)-user, and the status of (a likely increasing number) of different and new intermediaries, etc.

We re-iterate that it is likely that businesses (including small businesses) will include digital communications as part of their evolving products/services, i.e. they will increasingly become not only users, but also providers of products/services that incorporate digital communications, sometimes in ways that are not directly perceptible for the end-user. Hence, they will significantly contribute to enhancing the demand for Very High Capacity connectivity.

Network convergence between fixed and mobile technologies, along with NFV/SDN, and '5G' (which remains undefined at this time) needs particular attention, to ensure that competition is preserved and to ensure that competition is further promoted. Incumbent operator advantages, i.e. ownership of the largest and ubiquitous fixed network (including deep access and backhaul which can be used for mobile base stations and to connect small cells), remaining privileged contractual (and indeed non-contractual) relationships with public sector entities that were never really opened to competition, need to be addressed (we refer in addition to the fact that several governments retain significant shareholdings in the incumbents operators, which creates real concerns around conflict of interest). It would, for instance, be of real interest for BEREC to encourage NRAs to assess the market share of the operator found to hold SMP on wholesale fixed network access markets for the provision of network and services to the public sector (and entities that can be assimilated to the public sector), in the light of the fact that basically all these operators also own or control a mobile network. Cross-leverage between fixed and mobile has been an undeniable fact in contracts between incumbent operators and public administrations for many years, and on business-to-business markets more generally. More recently, bundling of fixed and mobile services is also occurring on consumer markets.

In addition, we emphasise (see also our response to BEREC's question 7) that network evolution and technological change more broadly, does not justify a departure (by BEREC, by NRAs, as well as by co-legislators) from the need for a predictable rigorous process, the need for decision-makers to consult stakeholders fully, and provide reasoned justifications for regulatory intervention and for deregulation, i.e. the same set of tests is needed for mandating wholesale access regulation as for withdrawing wholesale access regulation.

Finally, the network evolutions as listed by BEREC constitutes in their own right, sufficient grounds for ensuring that NRAs continue to dispose of a full and flexible toolbox of remedies that should be used to promote competition on consumer **and** business markets.

D. OVER-ARCHING QUESTIONS

10-13)

ECTA's answers to the previous questions 1-12 cover, in considerable detail, the strategic issues relating to the BEREC Mid-Term Strategy for the period 2018-2020. Therefore, no further specific comments are provided here.

ECTA wishes to take this opportunity to express its deepest concerns that the NRAs and BEREC may in future not dispose anymore of the required tools to identify market failure and intervene in an effective and appropriate way in the light of the draft European Electronic Communications Code (EECC) and the ITRE Committee draft report. For more details, we refer to the following documents:

http://ec.europa.eu/transparency/regdoc/?fuseaction=feedbackattachment&fb_id=BC8A2A82-CC0B-D184-5D0BD3322EEA2010

<http://www.ectaportal.com/en/NEWS/ECTA-Press-Releases/2017/Competition-the-missing-element-of-the-European-Parliament-s-draft-report-on-the-proposed-EECC/>

SECTION 2 – HOW BEREC WORKS AND ENGAGES WITH STAKEHOLDERS

A. BEREC'S WORK WITH THE REGULATORY OBJECTIVES

14) Do you have a concrete example where better coordination/harmonisation between NRAs would be or has been particularly beneficial for your activity, either directly or indirectly?

15) How do you consider that BEREC could further contribute to the development of a Digital Single Market (e.g. best practice dissemination)?

ECTA has requested, welcomed and supported the ERG and BEREC Common Positions on remedies for SMP on WLA/WBA/WLL markets, whilst providing detailed comments and suggestions. ECTA has commented on the related subsequent ERG/BEREC Reports on the implementation of these Common Positions.

A number of ECTA's comments and suggestions have been reflected by ERG/BEREC over time, and real improvements have resulted from it.

Better coordination/harmonisation between NRAs has resulted. This has been beneficial to ECTA members' activity where NRAs recognised that they could learn from best practice by other NRAs (ECTA answer to question 14).

The effectiveness of coordination/harmonisation is unfortunately limited by the fact that the ERG/BEREC Common Positions, and the Reports, remain mainly high-level and are mostly descriptive.

Therefore, we believe that important improvements might result from clearly identifying, from the best practices, remedies that have demonstrated their effectiveness (and are recognised by the stakeholder as such) in addressing real competition problems and market failure and would then be put into practice in **all** EU Member States. This could be achieved by making a detailed full listing of very specific issues that can be objectively recognised, including where they can readily be identified as relating to a specific Member State and where a known effective solution has proven to be effective in (an)other Member State(s) when at the same time identifying Member States where the proven solution has not been implemented while the same problem has been identified.

A step-change by BEREC in this direction would be very welcome because it would definitely help to ensure that real problems are genuinely discussed and thoroughly assessed at BEREC level between the NRAs. Effective and best practice solutions of one or some NRAs or other applicable legislation would be considered for efficiency and best practice and hence should be promoted and prioritised in all Member States.

We further comment that most of the issues at stake on WLA/WBA/WLL are, objectively, not very different between Member States. Hence, having thorough and transparent assessments would help to favour the most effective solutions and minimise the risk of a lowest common denominator approach.

B. TOWARDS A BEREC STAKEHOLDER ENGAGEMENT STRATEGY

16) Which of the above described practices can be used in order to increase BEREC's transparency and accountability? Are there any additional proposals for BEREC to increase its transparency and accountability?

17) Do you consider that BEREC's current engagement with stakeholders provides the opportunity to engage in the work of BEREC at the right time and at the right level? Are there any particular areas where you believe BEREC could improve or do things differently?

18) How can BEREC improve its communication to stakeholders and to the public? More specifically, which instrument(s) (press releases, public debriefings, information on the website, etc.) do you consider to be particularly useful and why? Do you have any proposals for new channels of engagement or for the improvement of the existing ones?

ECTA has responded to essentially all BEREC/ERG/IRG public consultations over time. We are thankful for having been enabled to represent the challenger operator community in all relevant public consultations.

We welcome any measures to ensure that any and all other stakeholders are able to effectively make their representations.

Please allow us to welcome the fact that it is EU legislation (the 2002 Directives on Electronic Communications) that introduced due process, i.e. that EU legislation made public consultations on draft NRA decisions a requirement. We strongly support a full consultation process on all NRA regulatory decisions, be they to impose regulatory obligations, or to withdraw regulatory obligations. The key parameter in those decisions is the promotion of competition.

To conclude, we suggest to BEREC to engage with its stakeholders in specific transparent case studies from specific NRA decisions and analyse the effectiveness or lack of effectiveness of market failure identification and related remedies as well as the replicability in other Member States.