



ECTA RESPONSE

TO THE PUBLIC CONSULTATION BY BEREC

ON THE

DRAFT BEREC REPORT ON

THE IMPACT OF PREMIUM CONTENT ON ECS MARKETS AND

THE EFFECT OF DEVICES ON THE OPEN USE OF THE INTERNET

BoR (17) 181

8 NOVEMBER 2017

I. Introductory remarks

ECTA welcomes that BEREC has delivered a draft report in line with its 2017 Work Programme on two subjects that command increased relevance as markets for electronic communications services (‘ECS markets’) are seeing bundles develop into an increasingly widespread commercial practice as well as a general tendency for connectivity to be provided in the form of Internet access products.

ECTA notes that the draft final deliverable entails a somewhat changed emphasis relative to the one announced in the 2017 Work Programme, where the project had been presented under the heading *The impact of content markets (incl. premium audiovisual) and devices on fixed and mobile Electronic Communication Services (ECS) markets*. ECTA considers that despite this change in denomination, the report remains relevant to the development of ECS markets in their entirety. ECTA would therefore underline that notwithstanding the change in the title of the report, the developments it portrays are globally relevant to competitive dynamics among market participants offering electronic communications services. In particular, ECTA does not believe that the two topical strands dealt with in the report should be strictly separated in terms of the applicable regulatory regime, or, more generally, be treated in isolation from each other.

II. ECTA’s observations

ECTA considers that the draft report provides a generally useful framework for thinking about how market relationships beyond traditional core ECS markets interact with the wider digital ecosystem and impact on providers of connectivity solutions.

ECTA agrees that the questions of access to content and of the impact that equipment can have on end-users’ experience of the Internet constitute competitively relevant aspects of service provisioning in a converged market environment, which are capable of affecting competitive dynamics among ECS providers and between them and non-ECS competitors, including OTT service providers.

At the same time, ECTA believes that the analysis presented remains too general to provide NRAs and other addressees of the report with adequate orientation and guidance on how to deal with these developments. In the following subsections, ECTA outlines a number of observations in respect of each of the two major domains of study, before turning to a number of transversal considerations.

II.1. Premium content

As regards the analysis of the impact of premium content on ECS markets, the draft report does not succeed in establishing areas of concern regarding the impact of bundling practices and exclusivity agreements on ECS markets, which had been one of the objectives for this deliverable. The finding that the competitive impact of bundling practices will be a function of ‘the ability of all actors to compete effectively with the bundled offers of large ECS providers’¹ should at the

¹ BoR (17) 181, p. 17.

current stage of market development, and given the importance of bundling for customer retention, arguably have been the starting point of analysis rather than its conclusion. This is underlined by the fact that the scale economies of the acquisition and exploitation of content rights have been well known from traditional television programme distribution and content packaging. Given the definition of premium content on which the report is based, at least a qualitative assessment of competitive demand-side impact would have seemed appropriate.²

While agreeing that the assessments to be conducted necessarily must take account of complex factual and legal configurations that exist at the level of individual Member States, ECTA considers that such complexity needs to, and can, be tackled. Indeed, bundling of audiovisual content in this sense is but a particularly prominent instance of an issue likely to increase in importance as connectivity-enabled services become more prevalent with increasing degrees of digitisation. The report could therefore usefully have compared in more depth the cases analysed, and notably discussed more extensively the cases in which NRAs have dealt with issues of premium content under the current framework. This would not only have provided regulators and policy-makers with welcome insight into the performativity of existing legislation and its limitations, but could also have offered inspiration for market analyses dealing with the subject and provided a basis for the elaboration of future common positions and input to the revision of the Commission's Guidelines on Significant Market Power. In the latter context, ECTA has called on the Commission to provide guidance on the analysis of retail and wholesale dimensions of bundle markets.³ ECTA notes that while invoking the potential leveraging of market power in the context of premium content, the draft report does not provide for any analysis of the relevance of the current leveraging regime in this context, nor does it specify what precisely is meant by the ability to provide premium content.

Going forward, ECTA invites BEREC to elaborate on its analysis and foresee a follow-up study in the context of its Mid-Term Strategy 2018 to 2020. ECTA underlines that such follow-up already today assumes a degree of urgency insofar as the competitive impact might be foreclosing in kind, and thereby lead to a splitting of markets between the parties capable of engaging in bundling competition and others being unable to do so. As BEREC has rightly identified, this is likely to prejudice the competitive positioning of smaller, non-incumbent ECS providers, and it should therefore be urgently analysed to what extent this leads to a reduction in competitive pressure, and notably in the size of the contestable market share. The execution of such follow-up work is subject to the general remarks regarding task primacy and institutional capacity set out below.

² ECTA observes here that the report in its analysis of content does not consistently apply the criterion of inducing a sizable share of end-users to switch ECS provider, which leads to the conclusion that smaller ECS providers could 'have access to a variety of other premium content' (p. 16). Even without an empirical analysis of switching behaviour that would normally have been required for the application of this definition, it appears clear that the amount of programming with the capacity to induce switching is necessarily limited. The suggested conclusion therefore seems excessively optimistic in its assessment of the availability of premium content, and, if maintained, would risk underestimating the associated lock-in effects.

³ Cf. ECTA's response to the Public Consultation on the Review of the Guidelines for Market Analysis and Assessment of Significant Market Power, available from: <https://www.ectaportal.com/images/Positions/ECTA-submission-to-SMP-Guidelines-review-consultation.pdf>.

II.2. Devices

As regards the analysis of how devices may condition end-users' ability to use the Internet in an open manner, ECTA would first underline that the role of hosting companies and transit operators requires continued scrutiny and monitoring to recurrently test the assumption that these service providers operate 'in a sufficiently competitive market'⁴. This requirement of continuous monitoring of competitive dynamics applies at all levels of the value chain.

Secondly, ECTA considers that the analysis appears somewhat skewed towards the role of software functionalities, and notably the relationship between operating systems and app stores on mobile devices, while the hardware dimension of equipment is left unanalysed. Given the impact that hardware has on the quality of Internet access and consequently on the experienced openness of the Internet, notably as regards usage limitations on mobile devices, ECTA considers that this dimension should be separately examined and its links with different aspects of network functioning clarified. Especially the issues of network integrity and security are relevant aspects under the current regulatory framework as well as under the Open Internet Regulation, which are complemented by the NIS Directive⁵ and an evolving EU policy on cybersecurity.⁶ This means that the report excludes from scope relevant equipment design aspects falling within the scope of the framework and which thus might already be covered by NRAs' competences, to the advantage of a 'purely prospective discussion'⁷. This is surprising insofar as usage restrictions in an app store context are considered as potentially legitimate where these seek to ensure the security of the offered applications.⁸ ECTA further notes that even though the report recognises the distinction between fixed and mobile access devices,⁹ it appears to have had but insignificant bearing on the actual analysis. Indeed, while the definition of devices is so broad as to potentially encompass any object of the Internet of Things featuring an end-user interface,¹⁰ the report subsequently seems to narrow its analytical span of attention primarily to mobile devices.

ECTA notes that this lack of attention to the interface between equipment and network functioning under the regulatory framework is paralleled by non-examination of provisions that might have relevance to service provisioning beyond the question of Internet access itself, notably through the facilitation of end-to-end service delivery.

The empirical analysis of the interactions between devices and the open use of the Internet, thus defined, builds on a number of observations that given the lack of supporting evidence often assume axiomatic character. The resulting analysis paints a somewhat impressionistic picture of

⁴ BoR (17) 181, p. 25; ECTA assumes here that the BEREC's use of the term 'sufficiently' implies a degree of competition that qualifies as effective competition in the sense of Article 16(3) FD.

⁵ Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union, OJ L 194, 19.7.2016, p. 1.

⁶ COM(2016) 410, 5.7.2016 and COM(2017) 477 and JOIN(2017) 450, 13.9.2017.

⁷ BoR (17) 181, p. 25.

⁸ BoR (17) 181, p. 29.

⁹ BoR (17) 181, p. 25.

¹⁰ BoR (17) 181, p. 25, note 50.

device openness, which remains first and foremost conceptual. The list of contestable assumptions and empirical claims that shape the final picture includes the following:

- Applications have replaced web browsers as the primary means of accessing Internet content on mobile devices;¹¹
- As long as different actors compete on the degree of Internet openness that their devices enable, at least one operating system provider will have an incentive to offer a maximally open operating system;¹²
- A lack of Internet openness may decrease user interest in devices running a restrictive operating system.¹³

As the different dimensions under investigation remain detached from each other in presentational terms, the report only partly seems to fulfil the objective set out in the Work Programme of providing an analysis of device openness. ECTA therefore encourages BEREC to consolidate the analysis by systematic examination of the different intersections with the regulatory framework and the dimensions governed by other bodies of law. This should, in particular, seek to identify the responsibilities for and options for influencing the different dimensions of device openness by different parties involved in the value chain. From the perspective of ECS providers, this should be linked to an analysis of the role of device bundling and of device exclusivity in shaping switching behaviour and its competitive implications. Moreover, possible interference by app store providers with the general authorisation to provide electronic communications services might constitute a further path of enquiry towards an approach more grounded in the regulatory framework.

Without developing such an approach that is more tangibly grounded in the legal regime governing electronic communications, the role of what the draft report qualifies as elements other than Internet access necessary for the provision of Internet-based services are likely to remain beyond the reach of NRAs, despite the possibly substantive implications of these elements for the functioning of the networks and services clearly under NRAs' jurisdiction.

II.3. Overarching considerations

Outside of the specific comments attached to the two major domains of enquiry dealt with by the draft report as they have been set out in subsection II.1. above as regards premium content and related bundling practices, and subsection II.2. above as regards the effects of device openness on Internet use, ECTA considers it important to raise three horizontal issues that are of equal overarching importance to both domains.

II.3.1. The institutional dimension

The draft report on several occasions qualifies the enquiry as primarily exploratory in nature. Substantively, it is acknowledged that the subject matters under scrutiny largely or entirely fall outside of the tasks commonly assigned to the NRAs responsible for electronic communications,

¹¹ BoR (17) 181, pp. 26, 28.

¹² BoR (17) 181, p. 31.

¹³ BoR (17) 181, p. 33.

even though it is occasionally noted that where the authorities have competences also for other sectors, they might be able to take a wider approach and thus at least partly address the issues identified.

While ECTA would generally agree that the subjects of premium content and of device openness would not immediately appear to fall within the scope of the regulatory framework for electronic communications, it believes at the same time, as outlined in the preceding subsections, that there do remain potentially important intersections with sectoral regulation that BEREC should explore further.

To the extent that these subjects have thus far only been addressed by converged regulators, the reasons for this as well as the precise pathways of intervention should be analysed in greater detail. This is pertinent notably where intervention has relied upon a combination of ex ante and ex post measures, which were tied to the exercise of different powers of enquiry.

ECTA considers that the present draft report would have greatly benefitted from a thorough evaluation of the limits of existing NRA powers, not only in imposing remedies to address potential competition concerns in the context of ex ante market analysis, but more generally in terms of requiring information to be provided for purposes of market monitoring and analysis. Beyond an assessment of the functioning of Article 5 of the Framework Directive, this should include an analysis of the possibilities for information sharing between NRAs and NCAs and of best practices concerning the latter's proactive involvement in market monitoring and analysis. With a view to establishing the opportunities that collaboration may give for NRAs to remain apprised of wider market developments and capable of taking these into account in their own enforcement work, such stocktaking should also identify specific cooperation arrangements and mechanisms provided for in national law beyond the common baseline arrangements laid down in the regulatory framework.

Overall, ECTA therefore believes that any further work by BEREC in these domains requires for its institutional foundations to be clearly laid out, including mapping of relevant opportunities for information sharing and cooperation between relevant authorities. Importantly, any further work must be conceived in a manner that allows for it to be performed in a manner fully compatible with NRAs' core task of ex ante market regulation. To assure that such compatibility can be ensured on a lasting basis requires a more substantiated learning of lessons from existing administrative practice in electronic communications and other relevant fields that takes stringent account of its institutional and further contextual parameters, including notably the stage of market development.

II.3.2. The evidentiary dimension

While ECTA commends the initiative that BEREC has taken with the draft report to remain vigilant in respect of competitive developments that may affect the functioning of electronic communications markets, ECTA also believes that the pertinence of such enquiry must be established in terms of rigorous evidence.

In this respect, ECTA observes that the draft report contains little concrete data and even less in terms of detailed analysis. ECTA particularly regrets that neither the questionnaire sent to NRAs, nor the results that were generated by it, have been published. This not only makes it difficult to

assess the magnitude of the trends reported, but, more fundamentally, also to arrive at a precise estimation of data availability and the relative prevalence of certain issues beyond the illustrations provided by concrete cases.

In ECTA's view, a necessary next step would be at a minimum to build a shared evidence base from the case studies referred, which could be placed in the context of general market developments and whose position in relation to those developments should be explained. Particular emphasis should in this context be put on events with anti-competitive implications, be they direct or indirect, in the markets for electronic communications services, regulated or unregulated. To the extent possible, such work should take account of historical investigations that have been conducted into the domains concerned (e.g., sector enquiries, ex post evaluations, business reports and academic studies). Interim findings should be made public for consultation and the final results published by BEREC in a widely accessible format.

11.3.3. The operational dimension

Finally, ECTA considers that further advances along the lines of enquiry presented in the draft report will require a targeted move from conceptual to methodologically sound enquiry. This requires notably that certain key concepts, such as that of 'premium content', are given an operationally precise definition that allows for different approaches to market monitoring to be tested. Ultimately, experience in measurement and continuous application of these concepts should allow for possible warning lights to be established, when seen in the context of the development of relevant markets.

ECTA observes that the draft report even at the most general level of market monitoring, on which its recommendations for follow-up action focus, does not provide for any direct discussion of the possible options for how to meaningfully approach the task of arriving at an accurate portrayal of market realities in the two major domains of enquiry. While this task interlocks with both the institutional and the evidentiary dimension outlined above, it constitutes a distinct dimension in its own right, which conditions both the availability, use and refinement of the evidentiary means available for the analysis of those domains.

While certain types of analysis may already be possible with currently available data on the basis of existing metrics and indicators, NRAs should review these with a view to identifying measurement gaps as well as transnational discrepancies. This review should be undertaken in order to ensure not only that the resultant evidence is valid, but also adequately probative when situated in the context of business decision-making in electronic communications and related fields, whose developments are expected to potentially cause competitive prejudice in ECS markets. ECTA considers that agreement on the basic building blocks in this respect should constitute a necessary precondition for BEREC to pursue this workstream further. This could build on a national stocktaking exercise by all NRAs, which could be joined up with the efforts to clarify the institutional framework for future enquiry.

III. Conclusion and key messages

Overall, ECTA welcomes the attention that BEREC gives with its draft report to wider market developments that despite their apparently incidental nature may exert significant influence on the functioning of electronic communications markets, and notably the provisioning of services.

The issue of bundling in particular, as here illustrated by the example of premium content, reflects a development of much wider concern, as connectivity solutions are being integrated with an ever-wider range of products. The emergence of OTT operators as mass purveyors of premium content may thus only presage commercial interests from farther afield: As traditional distribution channels for premium content become increasingly fragmented, the appeal of stand-out programming to complement an essentially unrelated product in order to tie in the customer to its continued use may grow across wider ranges of potential suitors. To the extent that such purchasing behaviour may cause significant switching behaviour among end-users and/or limit the competitive pressure that competitors can bring to bear in the marketplace, this constitutes a development the implications of which should carefully be considered by NRAs.

In its response, ECTA has outlined a number of analytical issues in respect of the two domains of premium content (section II.1) and device openness (section II.2) that it believes should be accounted for in finalising the report and considering follow-up action. ECTA has further provided remarks and associated suggestions on three horizontal dimensions that are equally pertinent to either domain, which are the dimensions of institutions (section II.3.1), evidence (section II.3.2) and operationalisation (section II.3.3). ECTA believes that taken together these observations provide useful input both to the imminent completion of the draft report and to the forward planning of further activities.

In closing, ECTA wishes to recall three premises that in its view should guide all future activity by BEREC in these and related or structurally similar fields of enquiry:

All investigations into adjacent and related markets must

- 1. examine possible linkages to the regulatory framework and report clearly on how this has been done;**
- 2. specify the anticipated tentative bearing on the competitive dynamics of electronic communications markets; and**
- 3. never detract from the thorough, diligent and unfettered discharge of NRAs' core task of ex ante regulation.**