ECTA RESPONSE

TO THE PUBLIC CONSULTATION BY BEREC
ON THE

DRAFT BEREC WORK PROGRAMME 2018

BoR (17) 176

8 NOVEMBER 2017

Introduction

ECTA welcomes the comprehensive draft BEREC Work Programme 2018 for its cross-cutting and explicitly forward-looking character, and commends BEREC for continuing to offer stakeholders the possibility to contribute to refining the Work Programme prior to its final adoption.

Below, ECTA elaborates its observations on the draft around six focal points of attention, before closing with a concluding section that summarizes the requested amendments and provides a strategic outlook on the implementation of the Work Programme in 2018.

1. Continued relevance of Strategic Objectives

ECTA considers that the continued pursuit of the Strategic Objectives defined in relation to the Medium-Term Strategy 2015-2017, and consolidated in the recently adopted BEREC Strategy for the period 2018 to 2020,[1] constitutes an appropriate foundation for the Strategic Priorities around which the draft Work Programme has been structured. ECTA welcomes that the Objectives have been included into the Strategy to underline what goals the Strategic Priorities and their associated work items are to pursue, and would ask BEREC to include these goal posts also into the introduction of the final Work Programme to ensure coherence between it and the BEREC Strategy.

2. Clarity as to work envisaged and objectives pursued

ECTA commends BEREC for identifying a set of Strategic Priorities that combines necessary development of key established regulatory priorities to facilitate application of the regulatory framework in light of evolving market realities with forward-visioning of emerging issues that may reshape market dynamics from outside those markets. To ensure that the Strategic Priorities stick and effectively attain their goals in contribution to the objectives of the regulatory framework, ECTA is convinced that appropriate goal orientation and specification of both priorities and work items remains key.

3. Equitable approach to treatment of legacy and future networks

In this context, ECTA asks BEREC to unequivocally confirm that its commitment to accompanying the transition to high-capacity networks, as set out as its first strategic priority, does not detract from further improving, adapting and consolidating regulatory practice in respect of existing network infrastructures and related wholesale access arrangements. In ECTA's view, a competitively sustainable introduction and continued expansion of high-capacity networks must not overlook the various aspects essential to successful transition management in order to maintain vivacious competition as investment occurs. ECTA believes that this orientation must also be fundamental to BEREC's continued engagement with the work on key legislative and regulatory files such as the European Electronic Communications Code and the review of the Significant Market Power Guidelines, which are included under the heading of obligatory work and stakeholder engagement. The Strategic Objective of promoting competition and investment can ultimately only be achieved if there is regulatory predictability, and thus reliability, for all market participants that BEREC and its members are committed to managing the transition process in a

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[1] BoR (2017) 175, 5.10.2017.

balanced manner that remains well-attuned to evolving market realities. ECTA therefore calls upon BEREC to reassure market participants in its finally adopted Work Programme that evolving administrative practice, identification of regulatory best practices and development of common positions shall be based on a holistic assessment of competitive dynamics in and across relevant markets that includes consideration of legacy as well as high-capacity networks. ECTA considers that a reference to NRAs' experiences with the existing regulatory framework, as contained in the Mid-Term Strategy,[2] and the need to update these experiences in the light of the new competition problems that have been identified in the course of high-capacity network deployment, would be an appropriate complement to such reassurance to demonstrate that new networks do not cause complete discontinuity in regulation.

4. Non-prioritisation among Strategic Priorities

More generally, ECTA notes that the presentation of the different Strategic Priorities in the background section of the draft Work Programme[3] appears to suggest that special emphasis will be given to Strategic Priorities 3 (on 5G), 4 (on net neutrality) and 5 (on consumer empowerment). This presentation as well as the order in which the different Strategic Priorities are presented could be taken as evidence of the principle of their equivalence in terms of priority, as set out in the BEREC Strategy 2018 to 2020,[4] being eroded. ECTA finds this unfortunate, notably since the one strategic priority comprising the most work items, Strategic Priority 1, does not feature among the focus areas, while the work on net neutrality, which is primarily an extension of previous work items and execution of review and reporting obligations, does. ECTA believes that all Strategic Priorities must enjoy the same priority and be adequately resourced to make a tangible contribution to furthering the Strategic Objective(s) to which they relate. ECTA therefore requests BEREC to enshrine the principle of non-prioritisation in the introduction of the Work Programme on par with the BEREC Strategy. ECTA further suggests that the second section, now entitled `II. Background´, be revised to include key elements of all Strategic Priorities in an appropriately representative manner.

5. Need for discernible emphasis on network technologies and a thoroughly competitive vision for 5G

As regards specifically the emphasis given to Strategic Priority 3 `Enabling 5G and Promoting Innovation in Network Technologies´ in the background section of the report, ECTA observes that this appears not only to unduly emphasize 5G relative to other Strategic Priorities, but even to the exclusion of the second dimension of this priority, i.e. the promotion of innovation in network technologies. As the subsequent elaboration of individual work items and the accompanying introduction do not level the balance between these two poles of activity, as recognised in the BEREC Strategy,[5] ECTA calls for clarification of how technological aspects, both of 5G and in a wider network context, will be addressed under this Strategic Priority. This should notably

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[2] BoR (2017) 175, p. 5.

[3] BoR (2017) 176, p. 4.

[4] BoR (2017) 175, p. 5.

[5] BoR (2017) 175, p. 6.

include a clear delimitation relative to equipment matters, as they are dealt with in other BEREC work items.[6] Furthermore, ECTA recalls its comments on the BEREC Strategy to appropriately consider the competitive aspects of 5G.[7] While the Strategy defines an aim of enabling `European-scale solutions that promote competition´[8], this has not been translated into the Work Programme. ECTA believes in particular that references to market shaping in the context of spectrum authorization and award practices must not be dissociated from the objective of fostering competition,[9] lest the work items deteriorate into a mere description of administrative practice. More generally, ECTA considers that the perception of competition in relation to 5G even in the BEREC Strategy remains inappropriately limited when it fails to consider the importance of backhaul availability for the development of a competitive 5G environment. As it is insufficient only to consider infrastructure sharing `above the surface´ in this regard, ECTA calls on BEREC to explicitly recognise backhaul as a priority in the 5G network development context and integrate it in work item 3.3[10] with a view to a possible separate follow-up investigation on how different sharing and backhaul settings interact in terms of observed competitive outcomes. Similarly, BEREC's work going forward should also include fixed wireless access 5G use cases and examine their contribution to achieving competitive electronic communications markets in the EU.

6. Procedural aspects

Finally, ECTA wants to attach some remarks to certain procedural aspects of the draft 2018 Work Programme. The first of these remarks concerns the role of transparency and stakeholder engagement in the development of the BEREC deliverables. ECTA notes that out of 21 planned work items, only seven foresee stakeholder engagement by means of public consultation. In two of those cases, the draft Work Programme currently only suggests that a public consultation will take place, but the timing thereof remains unclear.[11] ECTA also notes that of the other 14 work items, certain constitute follow-up actions to previously carried out work, whose results, given the prominence of the subject matter and its importance to future pro-competitive market regulation, should at least be subject to indirect review in the context of the newly scheduled work items.[12] Furthermore, ECTA observes that the 14 work items not subject to public consultation even include subjects that by way of their outline description would clearly appear suited to stakeholder involvement.[13] ECTA notes with concern that stakeholder engagement is

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[6] Cf. ECTA's response to the consultation 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).

[7] Cf. ECTA's response to the consultation on the draft *BEREC Strategy 2018-2020* (BoR (17) 109), 5.7.2017, p. 4 et seq.

[8] BoR (2017) 175, p. 6.

[9] BoR (17) 176, p. 14 et seq. Similar considerations apply notably in relation to work item 3.3 on infrastructure sharing, at p. 15.

[10] Ibid.

[11] BoR (17) 176, work item 2.3, p. 12 et seq and work item 5.3, p. 20.

[12] Work item 1.4 on the benchmarking on technical and economic replicability assessment in the context of symmetrical access, p. 8 et seq., provides an example.

[13] Such as work item 5.2, p. 19 et seq., which is to provide `a report about best practices of measures and initiatives that have been carried out in this context *by the relevant stakeholders* (NRAs, *equipment*

even absent in fields where the work to be carried out[14] is linked to ongoing work items that are being consulted on concurrently with the present consultation, and where responses to the latter clearly suggest that such added openness could help to improve the deliverables.[15] ECTA therefore calls on BEREC to better explain the choices made in this regard and indicate whether alternative means for providing evidence on the work items in question are envisaged.

The second remark relates to the forward planning of BEREC deliverables relating to the legislative process on the European Electronic Communications Code. ECTA notes with interest BEREC's intention to `continue to provide insights and advice to the European Parliament, the Council and the European Commission´[16], as set out in the background section of the draft Work Programme. As regards the specific nature of the insights to be generated, work item 6.1 on inputs to the legislative proposals in the context of the EC Regulatory Framework and the e-Privacy Directive merely states that BEREC is conducting `further investigations on additional themes´[17]. However, in the context of work item 1.6 concerning the update of the BEREC Common Positions on markets 3a, 3b and 4, BEREC refers to the organization of an internal workshop to `discuss potential changes arising from the EECC and its impact on the possible revision of the CPs´[18]. In line with its first branch of procedural remarks above, ECTA appeals to BEREC to conduct such work to the greatest extent possible transparently and with the involvement of affected stakeholders. More important, however, is it in ECTA's view not to bless political negotiations with the adoption of anticipated administrative adjustments to regulatory guidance, or, more extremely still, to decision-making in the context of market regulation. The deliberations on the access rules being volatile and having led to political compromises that go as far as to calling into question NRAs' independence in matters of market regulation,[19] ECTA urges BEREC to reserve its position on those developments and abstain from any premature adjustments seeking to anticipate the outcome of the legislative process. ECTA recalls in this regard its agreement with BEREC's position on the unduly premature review discussions on the SMP Guidelines,[20] and trusts that it can count for such agreement to also carry over into the context of the legislative process, to avoid competitive harm notably to challenger operators whose business models rely and depend on regulatory predictability and the reliability it gives them to compete fiercely to the benefit of end-users.

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manufacturers, providers of electronic communications services, application and content providers, consumer associations and associations representing disabled end-user).´ (at p. 20, italics added).

[14] Work item 2.2, p. 12.

[15] Cf. ECTA's response to the consultation 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).

[16] BoR (17) 176, p. 4.

[17] BoR (17) 176, p. 22.

[18] BoR (17) 176, p. 10.

[19] Cf. ECTA press release `Less regulatory independence for more investment uncertainty: Council position threatens foundations of EU telecoms regulation´, 23.10.2017, available from: www.ectaportal.com.

[20] 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.

Conclusion

ECTA welcomes the comprehensive draft BEREC Work Programme 2018 for its attempt to strike a balance between renewal and continuous improvement of established practice and guidance work on the one, and attention and sensitivity to broader digital economy developments that may impact the competitive dynamics of electronic communications markets on the other hand. As far as the latter dimension is concerned, ECTA also refers to its response to the concurrent consultation on premium content and device openness.[21]

ECTA has previously confirmed its broad agreement to the Strategic Priorities for the BEREC Strategy 2018-2020, and the Strategic Objectives that they seek to realise.[22]

Based on the draft of next year`s Work Programme, ECTA asks BEREC to:

1. **include the Strategic Objectives into the Work Programme;**
2. **ensure that individual work items are fully specified and state the Strategic Objective(s) pursued;**
3. **confirm its commitment to continued improvement of regulatory work in respect of existing network infrastructures and avoid one-sided focus on questions of high-capacity deployments;**
4. **enshrine the principle of non-prioritisation among Strategic Priorities in the introduction of the Work Programme and add highlights of each in the background section;**
5. **specify how the Work Programme will encompass the promotion o network technology innovation and ensure a competitively holistic approach to 5G;**
6. **ensure maximum transparency and stakeholder engagement in its activities, while abstaining from any premature adaptations in regulatory guidance and practice in response to political negotiations on the European Electronic Communications Code.**

Fuller explanation of these requests, accompanied by more detailed suggestions, is contained in the corresponding sections of this response.

In closing, ECTA wishes to underline that BEREC's implementation of the Work Programme 2018 comes at a critically important juncture for the future development of electronic communications markets. The level of competition achieved by the existing EU regulatory framework for electronic communications is at risk, not only from in-country consolidation, but also due both to certain NRA decisions and to developments and proposals at EU level. These include forced application by NRAs of non-binding Commission Recommendations without adequate regard to market realities and the competitive prejudice from such application to a proposal for a future regulatory framework and accompanying political negotiations that appear ready to put at risk current competitive achievements and the regulatory mechanisms underpinning them in favour

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[21] Cf. ECTA's response to the consultation 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).

[22] Cf. ECTA's response to the consultation on the draft *BEREC Strategy 2018-2020* (BoR (17) 109), 5.7.2017.

of investment promises. It is ECTA's perception that many of these debates remain removed from both business and regulatory reality.

ECTA therefore counts on BEREC to keep electronic communications markets on an even keel by uncompromisingly promoting more effective competition and creating further awareness of the investment that has been realised under the existing framework. This, in ECTA's view, not only has to constitute an integral part of the first Strategic Priority for BEREC's work between 2018 and 2020 as reflected in the draft Work Programme, but must indeed be the foremost means of demonstrating how the promotion of efficient investment and innovation in new and enhanced infrastructure as an established regulatory principle under applicable law has guided and continues to guide NRAs' work. Standing regulatory practice and work under the current regulatory framework, including implementation of the future Work Programme, must therefore not, in any case, react with over-anticipation to political discussions about possible legislative changes.

In this sense, ECTA would welcome if BEREC's investigations of additional themes foreseen for 2018 were also to include focus on past investment performance. ECTA remains committed to its fruitful dialogue with BEREC and is willing to constructively engage with it over the Work Programme as well as the BEREC Strategy, to help it achieve its objectives and make a lasting contribution to sustainable competition in a predictable regulatory environment, while legislative debates continue.