

## ecta salutes BEREC's Opinion on the Draft European Commission Gigabit Connectivity Recommendation

Brussels, 16 May 2023, **ecta**, the **European competitive telecommunications association** welcomes BEREC's Opinion<sup>1</sup> on the draft European Commission Recommendation on the regulatory promotion of Gigabit connectivity<sup>2</sup>. It confirms not only the severe concerns expressed earlier by **ecta** but also the legal analysis provided by internationally renowned law firm Jones Day.

On 23 February 2023, the European Commission invited BEREC to provide its opinion on the draft Recommendation on the regulatory promotion of Gigabit connectivity in accordance with Article 34 of the European Electronic Communications Code<sup>3</sup> (EECC). On 5 May 2023, BEREC issued its Opinion commenting on all sections and providing concrete amendment proposals.

BEREC's opinion is unambiguously in line with the fundamental criticism expressed by **ecta** in that it:

- Recalls that the objectives defined in Article 3 of the EECC are fourfold: *“BEREC appreciates the Commission’s work on promoting gigabit connectivity, which is one of the general objectives of Directive (EU) 2018/1972 (hereafter the Code or EECC). BEREC notes, however, that the other objectives of the Code, namely promoting sustainable competition, contributing to the development of the internal market and protecting the interests of end users, should be equally considered in this work.”*;
- Confirms that the draft Recommendation infringes the provisions and principles of the EECC. For example, BEREC mentions: *“It is also a major concern for BEREC that some terms of the Draft Gigabit Recommendation do not seem to be entirely in line with the provisions of the Code.”* Or *“The wording of the Draft Gigabit Recommendation (Point 39) also exceeds the provision of Article 74 of the Code. The latter states that the NRAs “shall consider not imposing or maintaining obligations (...)” whereas the Draft Gigabit Recommendation limits the flexibility left to the NRAs in the wording “the NRA should not impose or maintain (...)”. Recital (193) of the Code mentions that “National regulatory authorities should be able to decide to maintain or not to impose regulated wholesale access prices on next-generation networks if sufficient competition safeguards are present.” The final Gigabit Recommendation should be in line with the Code and not go beyond it.”*;
- Confirms that the draft Recommendation restricts the discretionary powers of NRAs: *“As a general remark, BEREC considers that the highly detailed and prescriptive provisions of the Draft Gigabit Recommendation risk to unduly limit the discretion given to NRAs by the Code.”*;
- De-facto confirms that the European Commission should have conducted an impact

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<sup>1</sup> <https://www.berec.europa.eu/en/document-categories/berec/opinions/berec-opinion-on-the-draft-gigabit-recommendation>

<sup>2</sup> <https://digital-strategy.ec.europa.eu/en/library/gigabit-connectivity-recommendation>

<sup>3</sup> Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1972>

assessment before releasing the Draft Recommendation: “BEREC also notes the absence of sources or impact analysis clearly demonstrating that relaxing regulatory obligations (e.g. removing remedies such as price regulation; allowing for an increase in copper access prices) is a measure that speeds up the deployment or take-up of fibre networks. In general, it is understood that the most important driver for innovation in a market is competition.” The absence of impact assessment is also a concern expressed by the European Parliament via a [priority question for written answer P-001106/2023 to the Commission](#).

- De facto confirms the bias in favour of the operators designated as holding Significant Market Power (mainly the incumbents), denounced by [ecta](#) as of June 2021, when it states: “In the Commission's Draft Gigabit Recommendation, great emphasis is placed on achieving the connectivity objective, and in particular the deployment of very high capacity networks (VHCN) by the SMP operators. While BEREC supports these objectives, it is also important to underline the goal of promoting competition including efficient infrastructure-based competition which – together with the connectivity objective – should be pursued by the NRAs. BEREC notes that alternative operators (including wholesale only) equally invest in the deployment of fibre.”.

Furthermore, [ecta](#) concurs unconditionally with BEREC when it mentions: “***BEREC underlines that competition is crucial in the telecom markets as it creates incentives for companies to innovate, invest in infrastructure, and provide better services to consumers and to ensure a fully functioning internal market. [...] Thus competition fosters innovation and encourages all companies to invest in new technologies and infrastructure, which ultimately benefits consumers. [...] In general, it is understood that the most important driver for innovation in a market is competition.***” (Emphasis added).

Commenting on BEREC’s opinion, [ecta](#) Director General Luc Hindryckx says:

*“We appreciate the wisdom of BEREC. It is reassuring that the body representing the 27 National Regulatory Authorities is independently acting as a guardian of the foundations of the European model and its regulatory framework. We count on the European Commission to fundamentally rethink its procedural and substantive approach with this recommendation.”*

Finally, [ecta](#) emphasizes that Article 34 of the EECC not only requires the European Commission to take utmost account of the BEREC Opinion but also requires it to carry out a prior public consultation. Indeed Article 34 mentions: “***After public consultation and after consulting the national regulatory authorities and taking utmost account of the opinion of BEREC, the Commission may adopt recommendations...***” (emphasis added).

The absence of a public consultation is further criticized by Jones Day in their [memorandum](#) to [ecta](#) dated 25 April 2023 when it mentions: “Pursuant to Article 11(3) TEU, the Commission must carry out broad consultations with stakeholders in order to ensure that the EU’s actions are coherent and transparent. Pursuant to the principle of transparency enshrined in Article 15(1) TFEU, in order to promote good governance and ensure the participation of civil society, the Commission must conduct its work as openly as possible.”.

The European Commission should have held a consultation based on the text of the Draft Recommendation. The public release of the draft text simultaneous to its request for opinion to BEREC is insufficient to constitute a complete and timely consultation. The same applies to

individual (one-way) meetings with certain stakeholders.

In view of the above, and taking into account the wide variety of situations regarding VHCN development and competition in the EU Member States and the extensive experience of NRAs with ex-ante regulation, **ecta** calls on the European Commission to:

- Either significantly adapt the text of the draft Recommendation in order to consider the positive impact of competitor operators on investment and citizens' interests, to avoid fuelling inflation and to respect the EECC and the will of the co-legislator. **ecta** also demands that the European Commission prepares a full impact assessment and submit an adapted draft text to a genuine public consultation.
- Or to consider repealing the 2010 NGA and 2013 NDCM Recommendations and to not adopt the draft Recommendation on the regulatory promotion of Gigabit connectivity.

**ecta further calls on the European Parliament<sup>4</sup> and Council to actively engage in the process to correct the procedural and substantive flaws identified, and to make sure that in no circumstances a recommendation solely issued by the European Commission will depart from what is stipulated in the act providing for its legal basis or impose a forced interpretation thereto.**


**ecta's** previous public positions on the subject can be consulted below:

- [28 April 2023 - External legal analysis confirms ecta's warning that the Draft Recommendation on the regulatory promotion of Gigabit Connectivity violates the provisions and principles in the European Electronic Communications Code.](#)
- [25 April 2023 - Jones Day's legal Analysis of Draft EC Recommendation on the regulatory promotion of Gigabit connectivity.](#)
- [31 January 2023 - ecta warns against undermining the European model with the proposed EC Recommendation on the regulatory promotion of Gigabit Connectivity.](#)
- [28 October 2021, BEREC stakeholder forum. ecta expresses its serious concerns about the Study on regulatory incentives for deploying very high capacity networks: Commission's Access recommendations<sup>5</sup>.](#)

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**ecta** members are united in their belief that competition is the best driver of efficient investments and the greatest enabler of innovation, choice and benefits for citizens and businesses, as well as for the European economy overall. This is the key message that **ecta** and its members continuously promote.

*For further information on the contents of this press release and **ecta's** positions, please contact:*  
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<sup>4</sup> The need for the involvement of the co-legislators has already been expressed through a priority question for written answer P-001106/2023 to the Commission: [https://www.europarl.europa.eu/doceo/document/P-9-2023-001106\\_EN.html](https://www.europarl.europa.eu/doceo/document/P-9-2023-001106_EN.html)

<sup>5</sup> Study on regulatory incentives for the deployment of very high capacity networks in the context of the revision of the Commission's access recommendations: <https://op.europa.eu/en/publication-detail/-/publication/44c8f4c0-32e6-11ec-bd8e-01aa75ed71a1/language-en>

**ecta, the european competitive telecommunications association** ([www.ectaportal.com](http://www.ectaportal.com)), 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.