



ETNO comments on the draft BEREC Report on the regulatory treatment for fixed and mobile backhaul

General Comments

ETNO welcomes the opportunity to comment on the draft BEREC “Report on the regulatory treatment for fixed and mobile backhaul” (“the report”) to express its views and conclusions.

ETNO would like to share the following analysis on the report. In general terms, ETNO considers that at present, the current regulatory framework (EECC, BCRD) has the necessary instruments and obligations on the different relevant markets included in the EC 2020 recommendation, to be able to address any competition issues that may arise in the future. Therefore, we do not consider the potential regulation of mobile backhaul to be justified or proportionate, as no competitive issues have been identified in the relevant retail market that would request to consider backhaul as a relevant market susceptible to be regulated.

Indeed, we would like to recall that, within the conclusions of the 2020 Relevant Markets recommendation, the EC did not identify backhaul as a relevant market susceptible of ex ante regulation at EU level either. As such, ETNO is really concerned that letting fixed access regulation interfere with competition on the mobile infrastructure market, while there is no related retail market defined or analyzed, might constitute a serious risk of market distortion in the mobile market.

Fixed Backhaul

Currently, the different regulators have a series of regulatory obligations derived from the analysis of different markets (market 1 and market 2, 2020) or from the consideration of backhaul as part of these markets that allows addressing any competition issues in retail markets. Specifically:

- Physical Infrastructure Access (ducts & poles mainly)
- Leased lines
- VULA services
- Dark fibre

This existing regulatory framework makes available to alternative operators a set of measures that guarantee the possibility of deploying the infrastructure they need according to the competitive approach they have chosen. Therefore, from ETNO’s perspective, there is no material need to enlarge the set with additional obligations to those previously mentioned, specially taking into account that



these are complemented in the regulatory framework, with the transposition of the BCRD (2014/61/EU). As included in the report, “in general it can be said that the BCRD provides a general entitlement for access to physical infrastructures usable for (mobile and fixed) broadband deployment”. Therefore, the BCRD guarantees the right of operators to request access to network operators' infrastructures for the deployment of NGA networks and to negotiate such access with them under fair and reasonable conditions. These additional provisions complement the obligations arising from the market analysis by extending access to alternative operators' infrastructure.

In the future, it is likely that infrastructure-based competition will be further enhanced, thanks to the availability of ducts and poles of operators and other utilities, in light of the implementation of the Broadband Cost Reduction Directive. Mobile operators can deploy backhaul infrastructure based on ducts, where available, and other passive infrastructure for which the framework for sharing is already in place.

As a matter of fact, it is worth to mention that according to the report, both in the short and medium term, situation as regards procuring backhaul on the market for operators, seems to have worked and works well based on offers both from regulated and/or commercial offers:

- For example: “Under the assumption that current regulation remains unchanged, dark fibre is expected to be bought most often from other operators as well (not from the incumbent)”
- In general, the share of operators buying regulated products is low and, under the assumption that regulation remains unchanged, seems to be decreasing in the future.

In light of the EECC provisions aiming proportionality in the regulatory regime, prior to the imposition of additional remedies on the SMP operator, NRAs might need to assess whether the sole imposition of access to civil infrastructure alone may be a reasonable means to promote competition and the end-user's interest. Accordingly, ETNO calls regulators to effectively identify what are the conditions that need to be met in order to progress towards such regulatory streamline instead of potentially consider the extension towards mobile backhaul.

For all these reasons, it seems more necessary than ever that the national regulatory authorities review any existing SMP obligations imposed on backhaul by assessing the sufficiency of the existing access obligation to physical infrastructure, the existence of effective commercial agreements and considering the competition that alternative operators exert in the market and accordingly progress towards a regulatory relief for backhaul.



Mobile Backhaul

ETNO believes that the mobile backhaul market is highly competitive and benefits from infrastructure deployments undertaken by both SMP and alternative operators. With the presence in each market of at least 3 MNOs and a variety of MVNOs, the mobile market in Europe is characterized by great dynamism and infrastructure competition. As previously mentioned, and acknowledged in the report, where retail markets are effectively competitive in the absence of wholesale regulation, regulation will not be needed on related wholesale markets. An interventionist regulatory approach towards mobile backhaul could not be possible without a prior careful assessment of the retail mobile market and the establishment of potential a market failure, which up to date has been discarded within 2020 EC Relevant Market Recommendation¹:

- On the one hand, the EC recognizes in its conclusions that the retail mobile market does not present competition problems in the EU as a whole.
- On the other hand, wholesale regulation should only be applied in the event that competition problems are identified in a retail market.

Therefore, it should be concluded that the possible regulation of mobile backhaul would be not only excessively intrusive but also undue in the absence of an identified market failure to remedy.

In addition to the previous reasoning, if backhaul was meant to be considered as a relevant market, it should have to pass the 3 criteria test in a forward-looking approach. Yet, ETNO believes that the three criteria test is not fulfilled due to the fact of effective competition in infrastructure:

- Market does tend towards **Effective Competition**:
 - The availability of ducts of operators and other utilities, in light of the implementation of the Cost-Reduction Directive (2014/61/EU) but also under cost orientation derived from SMP obligations. Mobile operators can deploy backhaul infrastructure based on ducts, where available, and other passive infrastructure for which the framework for sharing is already in place. Mobile operators also use their own radio links.

¹ EC relevant market Explanatory Note; 4.1.5 page 59

“... with a view to delineating the boundaries of the market for dedicated capacity and other business access products **NRAs should ensure that the relevant wholesale products correspond to the retail market problem identified**. In particular, because **currently retail mobile markets are in general competitive at EU level** absent wholesale regulation, in the absence of additional elements relevant in a prospective analysis to include the mobile backhaul within the market for wholesale dedicated capacity.”



- The deployment of fibre in the B2B segment, with mostly several operators building fibre networks and offering dark fibre solutions. They equally use regulated access to physical infrastructure and the BCRD to deploy in existing ducts.
- The availability of viable wholesale solutions of integrated fixed operators on the market, also absent SMP regulation.
- There are no real barriers to entry.
- In case of dispute, the competition law could deal with the problem.

All these elements materially **put in question mobile backhaul fulfills the three criteria test** and hence, a specific regulatory focus on dedicated access in the context of mobile networks is not justified.

Considering also that for backhaul networks a wide range of alternatives are available and that mobile operators present in the market have strong economic incentives to upgrade their networks to remain competitive at retail level, it appears highly improbable that absent regulated access to backhaul services competition in retail mobile markets would be impeded or weakened.

Finally, considering that we are talking of new networks, which are just at the early stages, the discussion **of regulatory obligations at this stage is premature** and could be counter-productive and hamper the required investments.

In ETNO's view, and according to the report, the conditions to work on a retail market analysis are not in place and are not expected to be in the near future. So, we would urge BEREC to let the 5G ecosystem reach a certain maturity before carrying out a proper analysis of the retail mobile market and the related backhaul market and other infrastructure elements, and before taking any stance regarding the regulatory treatment of backhaul in this context.

Remarks about BEREC's future work

According to ETNO, the final remarks and conclusions of the report are not necessarily derived from the analysis and information gathered in it. In our view, the conditions for the preparation of a common position are not met and are not expected to be met in the medium term. Therefore, they tend to be overstated, premature and not fully fit for purpose as it stresses so much the need to monitor the "regulation by NRAs of wholesale inputs for backhaul" or draft a "common position".

*BEREC will continue **monitoring** the evolution of backhaul use and needs, as well as its **regulation** by NRAs of wholesale inputs for backhaul, with a **special focus** on backhaul needs and use for 5G deployment and the **application of the new recommendation** on relevant markets that entered into force in December 2020.*



Decisions by NRAs on markets where backhaul or relevant inputs for backhaul are regulated, further workshops to be organised with the stakeholders, as well as the EC input on the application of the new recommendation on relevant markets will provide valuable information to complete the current analysis.

Even more, considering adopting a formal BEREC document (under the form of a common position) as regards definition of an ex ante regulatory relevant market (absent from 2020 RMR), might go beyond BEREC's tasks and competences in this regard:

*On this basis, and once a relevant number of NRAs decisions and corresponding EC input on the application of the recommendation will be available, BEREC **may consider the preparation of a common position on the analysis** (retail market analysis, wholesale market definition, SMP assessment) and remedies for fixed and mobile backhaul.*

Common positions might be related to elements that are part of the regulatory framework, which is not the case for the definition of wholesale relevant ex ante markets that are not part of the 2020 Market Recommendation.

Concluding

- An extension of fixed access regulation to include mobile backhauling would constitute an extension of SMP-regulation into a competitive market environment contradicting both the spirit and wording of the acquis in this area.
- From a regulatory perspective and in a forward-looking analysis of mobile backhaul markets, ETNO believes that the three criteria test is not fulfilled, and hence, a specific regulatory focus on dedicated access in the context of mobile networks is not justified.
- In any possible future discussions, ETNO's position should be taken into account: regulation should only apply if and where this input is identified as a "key network input", which is strictly necessary to allow effective competition in a retail market, and a refusal to provide access to the facility concerned, at reasonable conditions, would result in the unfeasibility to compete at retail level. (This condition is cumulative with the need to satisfy the three criteria test)
- Considering that 5G networks are in its early stage of deployment and in some cases not even built yet, the discussion **of regulatory obligations at this stage is premature** and could be counter-productive and hamper the required investments to meet the Digital Compass targets to have 5G in all populated areas of the EU by 2030.