



ETNO response to the Public Consultations on BEREC Report on Access to physical infrastructure in the context of market analyses

23 January 2019

ETNO welcomes the opportunity offered to comment the draft BEREC report on Access to physical infrastructure in the context of market analysis. We welcome the comprehensive overview BEREC offers of the way various NRA's treat physical infrastructure in the context of their respective national markets. However, we do have questions regarding the chapter reflecting on ways to deal with a hypothetical separate market for physical access. We elaborate on the reasons for that below.

Comprehensive overview

Based on survey with 34 NRA's (of which the NRA's of the 28 EU Members States) the report investigates the regulatory treatment of physical infrastructure, taking as a starting point the same analysis as the one that is at the basis of the Broadband Cost Reduction Directive, namely:

Physical infrastructure (such as ducts and poles used to deploy networks) represents a significant proportion of the investment in NGA networks. Civil engineering works are lengthy and costly processes, for instance due to the need to gather the necessary permissions and the intensive use of human resources, among other issues. Moreover, replicating existing physical infrastructure is sometimes not technically feasible and, in many cases, not economically profitable. Measures aimed at facilitating greater use of existing physical infrastructure can reduce the civil engineering works required to deploy new networks, significantly lowering costs. (BoR (18) 228, p. 3).

It results in a comprehensive overview. At several places the report acknowledges that the way physical infrastructure should be approached depends on the specific national circumstances and the conditions on the particular markets, starting the assessment from the situation in the retail market. We take well note of the fact that the report demonstrates that NRA's do find the necessary tools to do so under the current regulatory framework to address physical infrastructure. As the reports highlights most (25 out of 26) NRA's address physical infrastructure under market 3a. Where physical infrastructure is regulated effectively, it should follow that regulation of services which are downstream of such physical infrastructure should be removed or reduced. This is justified using a modified greenfield analysis of this downstream services. The report does not provide any insights or analysis on whether the regulation of physical infrastructure in the concerned Member States effectively influenced more upstream regulation or not.

We think it would have been useful if the report would have been able to also provide insight on the access to physical infrastructure established under the BCRD, and in particular the access to physical

infrastructure provided for by non-telco players. The same is valid for access falling under symmetric measures. These insights are missing from the report.

The report also seems to imply that the imposition of any physical infrastructure remedy always leads to competitive effects on the market, while such effects depend on actual demand and effective take-up, which is not necessary present in all concerned markets. In our opinion, the report misses a proper evaluation of the effectiveness of the remedies imposed by NRA's.

Physical infrastructure as a separate market

The report gives a rather important weight to the analysis of a separate relevant market for physical access and for which it is difficult to understand what justifies such extensive focus. As we understand it, the report very briefly mentions some "potential challenges" (on which it does not elaborate), then mentions a number of "potential answers" (which are equally not analysed), to then swiftly enter into a discussion on how "an alternative approach" (i.e. a separate relevant market for physical infrastructure) "could be constructed":

This paper does not attempt to assess these alternatives, nor the degree to which the changes in the new regulatory framework may assist in making existing regulation more robust to challenges. Instead the focus of the remaining subsection of Section 5 and the supporting annexes will be devoted to considering how an alternative approach, that is the definition of a separate market for physical infrastructure, might be constructed (including some consideration of the three criteria test and the assessment of SMP in this newly-defined market). (BoR (18) 228, p. 16).

The report provides in our understanding no analysis or justification that explains in what respect and how such separate market would be relevant or should come into existence and how it relates to the perceived potential challenges. As it is not the purpose of the paper to assess this and go into it, the question raises why this point is so extensively¹ elaborated on in the report. Indeed, rather than analyzing the necessity or relevance of such separate relevant market the report focuses on "the different factors that an NRA should consider if such an option is chosen" and "issues which need to be taken into account should such market be defined". To ETNO there is a concern that the report singles out one particular alternative approach to elaborate on in a practical sense, while the principle and primary question are not addressed, while it is not an obvious direction to take.

Indeed, we believe this should in the very first place be the result of a much more profound reflection in which in a first instance a thorough and detailed analysis of the three criteria test should be conducted in order to answer the question if and into what extent and with which scope such a relevant market would be justified.² This is a discussion that in our view should be conducted in the context of the broader discussion on the revision of the EC Recommendation on relevant markets. Instead, BEREC here assumes the existence of such new separate market categorizing and justifying it as relevant. ETNO does not regard this assumption and categorization as separate relevant market as obvious at all.

We note – as the report documents – that defining a separate market is today a non-existing approach in the EU: 25 NRA's in EU Member States address physical infrastructure within the context of the existing relevant markets (i.e. market 3a). The potential challenges such as convergence between

¹ It constitutes nearly half of the report.

² It should be noted that the brief description in annex 2 does not meet this requirement. In this respect it should also be remarked that the assertion that it can in broad terms be assumed that the first criterion would be readily satisfied, as is stated in the brief description in annex 2, is an incorrect shortcut.

markets or increased infrastructure-based competition (briefly raised in the report) do not put such approaches into question.

We also note that two EU member states decided not to or no longer regulate physical infrastructure in the context of relevant markets, based on an analysis that the obligations under the Broadband Cost Reduction Directive (BCRD) were sufficient (this is also evidenced in the report on, pp. 13-14). This latter point is relevant, when we consider the scope of the product market that would apply to a separate physical infrastructure market. This scope would unavoidably comprise the scope of the BCRD, given that the Directive imposes supply on all telecom and non-telecom physical infrastructures that are considered capable to be used for the deployment of telecommunications networks. In other words, the BCRD at the least implicitly establishes both a supply and a demand side substitution amongst the telecom and non-telecom infrastructures comprised under the scope of the BCRD. The question then rises why a separate market should still be defined, while it is already regulated and monitored by a competent authority (often the NRA) in the context of BCRD. From this derives that BCRD provides for ample forward looking competitive dynamics behind potential access barriers (cf. second criterium of the three criteria test). The existence of a legally imposed general obligation to negotiate access combined with a competent authority in place to enforce possible violations excludes by definition the risk of undue refusal for access.

In this context we appreciate that other physical networks differ from those which have been created for telecoms purposes. However, such exact replication is not necessary for such networks to have a largely similar function to telecoms infrastructure in many geographies i.e. to have the potential to provide fixed telecoms services. Physical differences do not by themselves imply economic differences, and it is clear both that alternative physical networks can be combined (with some self-build and some use non-telecoms networks) and that network ubiquity is not a “must have” for competition. NRAs should therefore resist the temptation to impose physical infrastructure regulation on one network as a “policy shortcut” and without making full consideration as to where alternative networks exist, and how they can be used to provide fixed telecoms services which compete with those of incumbents.

In any case, if the infrastructure relevant market were to be designed and regulated, taking into account the circumstances and addressing a competition problem on the retail market, then this would put the question whether markets 3a and 3b, and possibly also 4, should be regulated plainly on the table.

Also, the approach for a separate market establishing an alternative ex ante asymmetric framework could not be inspired by doubts whether the BCRD is effective. Doubts on the well-functioning of the BCRD – should they exist - may well be premature³ and – should they be justified – should be addressed by improving the concerned legislation so that this becomes relevant for all infrastructure capable of supporting the roll-out of very high capacity. If not, this would mean a set-back for the promotion of broadband roll-out instead of an improvement (that is comprised in the widening of scope the BCRD provides for).

Moreover, additional to the BCRD, also article 72 under the new EECC provides the NRA ample possibilities to address possible competition issues through the imposition of obligations related to the passive physical infrastructure. The Code does in fact even broaden the area of application by the fact that such measures – where justified and proportionate in view of remedying the established problems of competitiveness – can indeed be imposed irrespective of whether the assets that are affected by the measures are part of the relevant market in accordance with the market analysis, as at several places

³ Due to late transposition of the BCRD in many Member States there is still too little experience with the implementation to allow drawing accurate conclusions on its efficiency of the directive.

mentioned in the report. Further also symmetric measures under art. 44 and 61 of the Code can be mentioned as a possibility that indicates against the necessity to venture with separate markets.

This all being said, an NRA has in any case the possibility – when established that the three criteria are met – to define such market. However, it seems that in most markets - given the evolutions of the framework - this is not the expected and necessary way to go. Yet it remains perfectly possible where it makes sense.

As a conclusion, we consider that, if relevant, this question is not mature enough, and the elements given in the report are not sufficient to have a definitive and well-argued opinion on the potential added value of inserting a relevant market on infrastructure in the related Recommendation. We believe that this question if and where relevant should be addressed in an overall review of the recommendation on relevant markets. Such review will eventually need to happen in the context of the implementation of the European Code.