



November 2022

ETNO response to the public consultation on BEREC draft Work Programme 2023

ETNO welcomes the opportunity to provide input towards BEREC's Work Programme 2023. We believe that BEREC should in general focus on the ongoing tasks as mandated by EU legislation, as defined in the EECC, the Open Internet Regulation, roaming and intra-EU calls, for example. We support BEREC's commitment establishing structured cooperation mechanisms with EU institutions and other competent authorities.

ETNO would like to have the possibility to contribute to the BEREC work for 2023 and the coming years in the best way possible. Thus, we would like to stress the importance to have longer consultation periods to provide comments to reports and reply to consultations. We think **setting consultation periods of 6 to 8 weeks would allow for a more efficient process and enrich the input provided.**

In addition, **ETNO deems of the utmost importance stakeholders are always involved and properly consulted;** in fact, we note with disappointment that for some BEREC studies (such as for instance the one on the evolution of competition dynamics of tower and access infrastructure companies not directly providing retail services and the external study on the trends and policy/regulatory challenges of cloudification, virtualisation and softwarisation of telecommunications) no consultation with stakeholders is planned.

Concerning the strategic priorities and carry-over projects from 2022 and potential work for 2023, ETNO will hereby provide some initial views:

- **Strategic priority 1: "promoting full connectivity"**

ETNO **strongly supports BEREC's strategic priority 1** that aims at promoting full connectivity and access to electronic communication networks. In the light of European Commission Decision 2030 policy programme "Path to the Digital Decade", 5G and Gigabit connectivity goals remain a priority for Europe and its economic recovery. To achieve that, a successful implementation of the EECC should be the necessary starting point. ETNO supports BEREC's intention to take stock of national experiences of the implementation of the EECC and to exchange good practices in this regard.

We would also encourage BEREC to include stakeholders in this exercise to capture different perspectives in the initial assessment. We caution BEREC from taking a silo approach to the detriment of providers of ECN and ECS (as for instance we notice might be foreseen in the work scheduled with



respect to the Report on cloud services and edge computing) and any action that is not complementary to the overall direction the EU will take in this space.

- Regarding BEREC's planned work and reports on **competition amongst operators in the same geographical regions and on regulatory treatment of business services**, ETNO would like to endorse the use and usefulness of good practices as a policy tool. ETNO looks forward to contributing on these reports. With reference to the first report, ETNO deems very useful an analysis on how competition in fixed access electronic communications market is evolving in the specific segment of fibre access networks and how this evolution affects regulation in the different EU countries. With regard to the second report, ETNO already contributed to the internal workshop on **regulatory treatment of business services** organised by BEREC in October 2022 and will also contribute to the BEREC public consultation on its draft report. Given the current development of VHC connectivity and the presence of alternative competing fibre networks and the current and forward-looking competitive constraints exerted by hyperscalers, ETNO believes that market 2/2020 should no longer be susceptible of ex ante regulation across the EU.
- Regarding the **update of criterion four of the BEREC Guidelines on very high capacity networks**, it's worth noting that Article 82 EEC provides that BEREC shall issue Guidelines on VHCNs by 21 December 2020 and update them by 31 December 2025, and regularly thereafter. The EEC neither specifically make reference to 5G when defining mobile very high capacity networks, but only requires the presence of fibre up to the base station (see Recital 13: "*In the case of wireless connection, this corresponds to network performance similar to that achievable based on an optical fibre installation up to the base station, considered to be the serving location.*"). Therefore, we deem premature for BEREC to update in 2023 one of the criteria, this would also infringe the principle of regulatory predictability.
- Regarding the **Report on practices and challenges of the phasing out of 2G and 3G** it is important to acknowledge that decisions to sunset 2G and 3G networks are in the remit of operators and are based on a wide range of considerations, aiming at improving and optimizing networks, services, spectrum efficiency, etc.. In drawing conclusions from its analysis of potential consequences of 2G/3G shutdown, as listed in the WP (e.g. environmental impact of replacement of the equipment), it is important that BEREC carefully weights any possible negative impact against the numerous benefits of transition to new technologies, which are most likely to offset the former.



- **Strategic priority 2: “Supporting sustainable and open digital markets”**

We encourage BEREC’s work on improving the functioning of digital markets. ETNO is fully invested in ensuring contestable and fair markets in the digital economy.

It is especially relevant as market players adopt new business models and expand into new services, and as the regulatory framework for the digital economy is changing, with the forthcoming entry into force of major regulations for the internet ecosystem, most notably the Digital Markets Act and the Digital Services Act.

- First, we welcome the initiative of BEREC to gain a **holistic picture of the internet ecosystem** and understand the current activities of market players in an evolving market. Nevertheless, some of the elements for future work raised by BEREC are better explored by other institutions and bodies, which have a clearer mandate to explore the issues in depth. For example, a detailed exploration of the architecture of the internet, and notably the evolution from ‘web architecture’ to ‘app architecture’ and the impact on governance, competition and security, does not fall strictly within BEREC’s remit, and could benefit from expertise from other bodies, e.g. ENISA, competition authorities and the European Commission.

A possible area for future work raised by BEREC on intersection between ECS services and other elements of the internet ecosystem (including unilateral implementation of some practices, such as the redirection of traffic to their own services) could be an opportunity to explore innovations by some market players which could hamper the ability of ECN/ECS providers to fulfil their obligations under EU law, especially those which limit the possibility for operators to understand traffic patterns or undertake lawful blocking of URLs mandated by court order.

- Aligned with the need to find synergies among the different workstreams, ETNO suggests broadening the scope of **BEREC’s report on the assessment of the IP interconnection ecosystem and the impact of the potential sending party network pays principle on Internet ecosystem and on end-users**. By focusing only on IP interconnection, the workstream fails to capture all the complexities of the internet ecosystem. Additionally, the term “sending party pays principle” is traditionally associated to the voice market and to the existence of individual monopolies in each terminating network. It would be appropriate not to prejudge the market analysis, and more clearly address the unbalanced bargaining power between suppliers of internet access services and large content providers. Accordingly, we suggest renaming the workstream to “*Assessment of the provision of the Internet access service and impact of a*”



potential fair contribution from content providers on the Internet ecosystem and on end-users”. In this regard, it is highly recommended to address this work item along with the workstream 2.4.1 on the entry of large content and application providers into the markets for electronic communications networks and services in order to fully capture all the relevant evidences coming from the two reports. Therefore, the timeline of the two reports should be aligned and concluded by the year 2023 (we notice that for the item 2.4.1 the deadlines refer to the year 2024) with an anticipation of the public consultation to P1 2023, considering the EC consultation on the fair share issue will be carried out at the beginning of the year.

- Second, we believe that **BEREC’s long-term objective to identify a possible harmonised methodology measuring the environmental sustainability of ECNs/ECSs is a valuable effort**. The same goes for considerations on circular economy, especially in relation to life cycle of devices and equipment. In principle, having a unified set of indicators might help bringing consistency and harmonization across the EU.

However, setting a common EU framework might also risk turning into an extremely complicated exercise when it comes to decide on which appropriate and feasible indicators should be included. On the one hand, there are specificities among Member States to be taken into account. On the other hand, while assessing and evaluating the environmental sustainability/circularity performance of ECNs/ECSs, we believe it would be important to take into consideration also the ICT enabling potential and not focusing on direct emissions only. Already today some ETNO members have started to develop indicators to assess such enabling potential, and an EU framework will be set up by the recently launched European Green Digital Coalition. ETNO would like to be involved in the BEREC process and therefore consulted if sector-specific indicators are to be developed.

- ETNO **welcomes the foreseen BEREC investigation of the enabling effects of the ICT sector on other sectors in the context of the green transformation** under the ad-hoc work on ICTs sustainability in the frame of the European Green Deal implementation. European telecoms sector has a long-standing commitment to reducing its carbon footprint, while promoting connectivity services and digital tools to reduce emissions across many sectors to benefit the environment and society. As reported by the published BCG report prepared for ETNO¹, the enabling potential for the telecoms sector could reduce carbon emissions in other sectors by

¹ Downloadable here <https://etno.eu/library/reports/96-connectivity-and-beyond.html>



up to 10-15%. It must be also reminded the potential of carbon reduction in many sectors due to the use of ECN.

- ETNO notes the **BEREC External study on the trends and policy/regulatory challenges of cloudification, virtualisation and softwarisation in telecommunications** to gather current trends in the provisioning of electronic communications networks and services and identify possible regulatory and policy challenges arising from therefrom. ETNO thinks it is important that stakeholders are able to provide their views and input to the study carried out externally.
- ETNO welcomes the **BEREC internal workshop on the migration to VHCN networks and copper switch-off with a focus on the needs of the end-users**. ETNO thinks that the decision regarding switch-off should indeed always remain with the network owner, on the other hand, NRAs should set the right incentives for not hampering the copper phase-out planned by operators and for facilitating the technical migration of customers to the new services. Indeed, the EECC requires to “facilitate the migration from legacy copper networks to next-generation networks, which is in the interests of end-users” and “to avoid unjustified delays to the migration”².
- Regarding **BEREC report on M2M and permanent roaming**, we understand the purpose of this report is to “investigate potential obstacles for operators to negotiate (permanent) roaming agreements, whether they allow permanent roaming in their network for the provision of such services, and what pricing schemes are applied”. However, ETNO thinks there are no problems in relation to enter into commercial agreements. A challenging aspect regarding this topic is whether member states allowed permanent roaming, as they are obliged to according the EECC. This could be an area of investigation for BEREC ahead of the consultation in Q3/Q4 2023.
- On **artificial intelligence**, we welcome BEREC’s assessment of the important benefits which artificial intelligence applications can bring to the telecommunications sector and provided input to BEREC on AI applications that can be deployed by telecom operators to optimise elements of the network, accompanied by use cases. However, it must be borne in mind that the regulatory framework for the development and use of AI, as well as the updated liability regime for AI, is still early in its development in the EU. Furthermore, AI-enabled solutions in

²https://etno.eu/downloads/positionpapers/etno_response_berec_consultation%20migration_copper%20switch%20off.pdf



the telecoms sector, and innovation in this field, should be driven by market forces and technological innovation. As such, we consider it premature to undertake a study of the state of play of AI use cases in the telecoms sector, and the challenges and benefits which this presents. BEREC should rather postpone such an activity at least until the EU has established specific rules on AI.

BEREC ad hoc work/other tasks

- with regard to **the calculation of WACC parameters according to the European Commission Notice**, ETNO believes that BEREC should investigate whether under the current financial and competitive scenario, values calculated by BEREC allow a proper recovery of the investments sustained by electronic communications network operators. Some NRAs (e.g. in Ireland and Germany) have already considered necessary to make an adjustment to WACC values in order to better taking into account current market scenario. In this regard, BEREC should in particular assess the impact of current high inflation rates on the WACC.
- Concerning **spectrum allocation**, predictability of the license holdings and conditions, and sufficient spectrum availability support investment. There should be long-term clarity on license renewals, preferably perpetual licenses should be taken in use. It is necessary to ensure operators get sufficient amount of resources (spectrum) for providing various 5G services, including the plethora of specific needs coming from several vertical sectors that 5G is especially intended to satisfy, for the majority of which (SMEs included) the MNOs will be key. As a general rule, set-asides should be avoided, as they invariably increase spectrum scarcity. Before any consideration on possible spectrum set-aside e.g. for new-comer or for private/local networks, a detailed analysis on demands, costs and benefits and the functioning of the market should be carried out and published. In this context, it should also be noted that regulatory measures such as wholesale obligations (e.g. through spectrum awards) should not be imposed *ex ante* without a market analysis and detection of market failure.

Finally, due to respective competences, we support more collaboration and information sharing between the competent authorities, including the RSPG and the European Commission in the contest of preparing for the new RSPD and the Annual Report on the State of the Digital Decade.

ETNO calls for the opportunity for MNOs to collaborate with the institutions in the peer review process, noting that MNOs as key stakeholders in spectrum awards have currently no possibility to challenge the national award decisions in the process. A more open and transparent peer review process would help adopting the best practices in use throughout Europe and would focus spectrum awards on common EU digital goals, avoiding bias of short term national political agendas.



- We would encourage BEREC to consult stakeholders when providing input to the European Commission on the **Review of the Commission Implementing Regulation on the Fair Use Policy and Sustainability of the Roaming Regulation.**

For questions and clarifications regarding this position paper, please contact Maarit Palovirta (palovirta@etno.eu) Senior Director Regulatory Affairs at ETNO and Xhoana Shehu (shehu@etno.eu), Policy Manager at ETNO.