The Consumer Voice in Europe

BEREC DRAFT REPORT ON OTT SERVICES

BEUC response to the public consultation

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The European Consumer Organisation (BEUC) welcomes the opportunity to comment on BEREC's draft Report on OTT Services. We believe it is important for BEREC to analyse the economics behind so-called Over-the-Top (OTT) services, their interplay with traditional telecoms services, and more generally, the interactions between different markets in the digital economy.

The remarks outlined in this paper represent our preliminary views on the issues that are relevant for consumers in the BEREC report. Yet the broader question of how OTT services should be addressed to enhance consumer protection is of key importance and we will continue analysing it carefully. These questions are also part of the European Commission's work on the review of the electronic communications framework, and so we will be providing more detailed input through that process.

Objectives of BEREC's report

BEREC's report stated objectives are 1) to define and provide a taxonomy for OTT services and 2) assess if the "OTT phenomenon" has implications for the application of the current electronic communications framework. BEREC's report should have as a third objective to identify the shortcomings of the existing electronic communications regulatory framework and analyse its interplay with horizontal legislation like the consumer law acquis and the eCommerce Directive, and how these rules apply to new services in digital markets.

The data collection exercise that BEREC has undertaken to produce the OTT report is of much value, and we encourage BEREC to make the data publicly available for other stakeholders to benefit from it.

In addition, as BEREC develops this line of work, it should analyse the competitive dynamics in different digital markets, the consequences that internet services have on online and offline competition, and the impact of new trends in the digital economy in terms of consumer protection.

Scope of BEREC's analysis

In underdoing the analysis of the "OTT phenomenon", we believe BEREC should expand the scope of the report to include not only services provided over the Internet, but also other services provided over broadband connections more generally. Not all services whose role in the market should be analysed by BEREC are provided over the Internet. Some such as IPTV or IP telephony are provided off the Internet, over the consumer's broadband link. We fear that if these services are not considered too, the conclusions of the report will represent an incomplete picture of the state of the market(s), the interplay between traditional telecom services and more recent IP-based services, and the measures needed to better protect consumers.

This is especially important when considering that the practice of bundling several services together in triple or quad-play contracts has become commonplace across the EU. Most of the services in such bundled contracts are IP-based and work over a broadband link, and not necessarily over the Internet. It is therefore important to

analyse and evaluate the impact that these bundling practices have on competition and on consumer protection.

Reform of the electronic communications regulatory framework

BEUC believes it is time to reform the so-called telecoms package to make sure that consumer protection standards in the digital economy are updated to reflect the state of the markets today, and to guarantee high levels of competition and protection for the years to come.

We agree with BEREC that the goal of the regulatory framework needs to continue to be foster efficient competition, which has already brought about a significant increase in consumer choice and service quality concerning mobile and internet access services, as well as a boost in investments and a decrease in prices.

This positive cycle would not have been possible without a regulatory framework purposely designed to achieve these goals. The pro-competitive objective of the current electronic communications regulatory framework should continue to be the guiding principle during the reform.

Yet competition alone is not enough. Consumers need to be able to easily compare offers, switch freely when they are dissatisfied, benefit from strong protection by a solid and enforceable set of rights, and have access to effective resolution mechanisms when disputes arise. Unfortunately, much progress is yet to be made on all of these fronts in the rapidly evolving telecoms market.

Therefore, the future reform of the regulatory framework must ensure that consumer rights and protection mechanisms are strengthened and updated to reflect the state of the markets today and, via an update of the Universal Service Obligation, guarantee that all consumers can have quality internet access at an affordable price. Maintaining a set of sector-specific rules to protect consumers is therefore very important. In particular, these sector-specific rules should be strengthened to tackle important switching barriers such as those presented by bundled contracts.

Getting the details of the reform right

We agree with the importance of evaluating the adequacy of the definitions, and in particular the definition of "electronic communication service" (ECS), with a view to reforming them where necessary. This reform should ensure the scope and applicability of the legal framework reflects the reality of today's markets, and guarantee that a high level of consumer protection is present with regards to all types of communication services.

We acknowledge that with the development of new services, the boundary between conveyance of ECS and online services becomes more blurred and makes interpreting the ECS definition more difficult. One of the key objectives when defining what services fall in the scope of the legal framework must be to provide legal certainty both for businesses and consumers alike. Consumers need to know the rules and protective measures that are in place when they contract a service, and thus be able to easily access information about their rights and options to seek redress if something goes wrong.

We are concerned by the fact that different NRAs interpret the definition of ECS and its applicability to online services differently, and hence impose different remedies and obligations to the same service providers. This not only contributes to sustain fragmentation and impedes the development of a Digital Single Market, it also puts consumer protection at risk. Popular online services offer by and large the same services and functionalities regardless of the Member State they are accessed from, but with different legal interpretations by NRAs, the protection measures in place will differ according to the Member State the consumer is in.

BEUC is currently preparing more concrete suggestions on how the electronic communications framework should be reviewed and will present them in the context of the European Commission's work on the review of the framework. These views will include an analysis on whether specific obligations of the existing telecoms framework, such as emergency calling and transparency obligations, should be extended to online services.

Analysing and classifying OTTs

Considering the complexity of the Internet value chain and the great variety of services present therein, it is important to acknowledge that any given taxonomy approach to OTTs will never be entirely reflective of reality. We nonetheless recognise the utility that using the proposed OTT taxonomy can have in identifying which characteristics of OTTs would make them qualify as equivalent to traditional telecommunications services. Therefore, we believe that such a taxonomy should only serve the purposes of this analysis, and never beyond such purposes, for example be used as a basis to legally categorise services in the reformed framework.

According to BEREC's proposed taxonomy, OTT-0 is a service that already qualifies as ECS due to its inherent telecoms nature (eg: SkypeOut); OTT-1 is a service that is not an ECS but potentially competes with an ECS (eg: Skype); OTT-2 are all other services on the Internet, even those which don't necessarily provide communication functionalities. One of the shortcomings of BEREC's proposed taxonomy is that there are many online services that overlap several categories, most notably OTT-2 and OTT-1. For example, online platforms such as Facebook, Gmail/Hangout, Twitter, or Airbnb, all have OTT-2 and OTT-1 elements.

A level playing field – between what services and for what purpose?

We agree with BEREC that establishing a regulatory level playing field should not be an end in itself, but rather represents a specific criterion to evaluate whether regulatory change is needed. When evaluating whether certain changes are needed to the different legislative and regulatory instruments, as highlighted above, one of the guiding objectives should always be to maximise consumer protection across markets. In this regard, establishing a level playing field in any given case should never represent a decrease in rights or protective measures for consumers.

Taking into account consumers' experience, OTT services and traditional telecoms services do not easily overlap, and there are key differences to bear in mind. Firstly, OTT services require a connection to the Internet, while traditional voice and SMS do not. It is important to remember that a large portion of EU consumers still do not have access to the Internet, and since Internet access is technically necessary to be able to use the

OTT service, many consumers would have an additional burden (contracting internet access) to be able to use the OTT service.

Secondly, OTT services require newer, more expensive and technically demanding equipment such as smartphones and tablets, which in turn require more advanced skills and knowledge, as compared to traditional voice and SMS services which only require a compatible mobile phone.

Thirdly, OTT services often provide numerous additional functionalities such as video calls, recorded video or audio messages, file sharing, or group calls/chats, while traditional telecoms services normally do not offer such additional possibilities to consumers. Regarding SMS, it is also important to consider that except for cases where SMS are unlimited, they usually have a unitary price, a factor that acts as a disincentive to use as an instant messaging *chat room*. On the other hand, instant messaging services do not depend on the number of messages sent and many are provided for free. SMS also have a character limit, while instant messages generally do not. Many instant messaging platforms also allow the easy creation of *chat groups* enabling groups of users to exchange messages with each other. This is a functionality that is more difficult to use or entirely inexistent via SMS.

Lastly, OTT services are often limited in their *service interoperability*, as consumers can only reach the users of that same service, while in traditional voice and SMS interoperability is ensured regardless of the telecoms provider. On the other hand, OTT services often offer *device interoperability* (eg: online services that are equally usable over mobile broadband and over WiFi, as well as usable via a smartphone, tablet or desktop computer), while traditional phone services do not (eg: it is generally not possible to use a traditional voice or SMS service from a desktop computer).

These four angles of comparative analysis (connectivity, devices, functionalities and interoperability) show that the substitutability of one service for the other is not only not self-evident, but is rather very difficult to establish. Taking into account these important differences, we agree with BEREC that OTT voice services are not a natural substitute of traditional voice services, and we would also argue that instant messaging services are not a natural substitute of SMS. That said, one of type of service can surely have a competitive impact on another type of service, and it is thus reasonable and important to understand these competitive dynamics.

Also importantly, the fact that one type of service is not a natural substitute of the other, does not mean that one or the other should not be regulated. Rather on the contrary, what is important is to ensure that all digital services, and in particular those offering communications functionalities, guarantee high standards of consumer protection as highlighted above.

Switching as a key pre-requisite for consumer empowerment

When consumers are dissatisfied, they need to be able to easily vote with their feet and move from one service or platform to another. Compatibility and interoperability of OTT services is important so that consumers don't face switching barriers if they'd like to change service provider. At the very least, BEREC should analyse the market to understand where bottlenecks and switching barriers exist. Barriers can be technical, because one service is not compatible with the other, or because consumers cannot easily port their data from one to the other. But barriers can also be commercial, because by partnering together, the bigger online service providers and the bigger telecoms providers give consumers economic incentives to pick them as providers for

their connectivity and online services. These partnerships may offer important economic benefits to consumers, but can also be detrimental to consumers if the partnerships worsen the chances of new entrants, both online and offline, thus reducing consumer choice.

Considering the functional and technical differences between competing online services, we acknowledge that achieving full compatibility or even interoperability is not an easy objective to achieve, but it should nevertheless be explored as a major measure to foster consumer welfare in online and telecom markets.

Partnerships between telecom and online providers: benefits but also challenges

As BEREC identifies, partnerships between providers of telecom services and of online services have become commonplace across Europe. Increasingly, telecom operators differentiate themselves by the kind of OTT services they provide: 85% of providers of internet access also offer OTT services, either directly themselves or via partnerships. It is therefore important to analyse and understand the indirect effect that these partnerships have on competition and consumer protection, both online and offline.

The concerns explained above regarding the potential bottleneck effects of these type of partnerships are already well illustrated in BEREC's draft report. For example, in the music streaming market, two main service providers (Spotify and Deezer) take up the majority of the partnerships with internet access providers.

BEREC also categorises two main partnership models that can be found in today's markets: *cost sponsoring* and *data sponsoring* (or zero-rating). *Cost sponsoring,* the practice of including the price of the online service in the price of the internet access service, as a temporary discount for example, is a marketing practice which is in principle acceptable as it offers consumers the possibility to access premium services at lower prices. Yet as mentioned above, the indirect effects of these practices both on the online ecosystem and the level of competition in internet access markets needs to be carefully monitored and analysed.

On the other hand, regarding *data sponsoring*, or what we commonly call zero-rating of content, it is worrying to see that BEREC's draft Report seems to consider it as an acceptable practice under certain conditions. Zero-rating of content is a clear violation of the principles of openness and neutrality that must govern access to the Internet, and which ensure consumers can exercise their right to freely choose their preferred content and service providers. The anticompetitive effects of this kind of practice are detrimental to online innovation and in time will reduce consumer choice, hence zero-rating should be outlawed.

We therefore urge BEREC to work with NRAs in the context of the Net Neutrality Guidelines that it will be preparing over the coming months to ensure these problematic practices are no longer used by operators and OTT providers.

Powers and obligations of National Regulatory Authorities (NRAs)

Considering the intricacies and overlaps that exist between online services and traditional communication services, we agree with BEREC that NRAs should have the powers and be mandated to monitor and analyse other markets beyond traditional

telecom markets. These expanded powers of NRAs should allow them to better understand the market dynamics and ensure a harmonised regulatory approach across the EU, helping to construct a real Digital Single Market. The monitoring of NRAs should also include OTT-2 services, in particular to understand the competitive dynamics of commercial deals, as highlighted above.

As BEREC highlights, the power to request information from providers not strictly defined as ECS exists in some Member States but not in all. As this is anyway the trend at national level in some countries, and especially for the purpose of avoiding fragmentation, we believe these powers should be granted to all NRAs across all Member States.

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