



Cable Europe comments on the BEREC Working Programme 2011

5 November 2010

Cable Europe appreciates the initiative of BEREC to invite the industry to comment on its Working Programme 2011.

Generally speaking, Cable Europe supports BEREC in its task to assist the Commission and NRAs in their efforts to achieve the goals set in the Digital Agenda and Broadband Communication. We agree that BEREC should focus on promoting competition and interests of EU citizens, especially when developing best practices on the implementation of the EU regulatory framework. Regulation, however, must take into account high investments made by operators to develop new services. Regulation can not lead to distorting operators' incentive to invest in the first place. This remains the primary challenge for BEREC and NRAs: to take fully account of the market drivers and investment conditions before applying any 'dynamic and differentiated' regulatory approaches.

Improving Harmonisation

Work item 3.2.2 - Next Generation Networks

Effective regulation must, as far as possible, avoid unintended consequences that could lead to undesirable structural and economic changes to the market. From the Cable industry's perspective, regulation of Next Generation Networks should be about ensuring the right incentives for network operators to compete and innovate.

Cable Europe believes that it is essential that NGA policy encourage the investments made by operators such as the cable industry. Overall the European Cable industry generates a turnover of €18bn on an annual basis of which, on average 25% is reinvested into further network build out¹.

In addition to their own significant investments in next generation networks, Cable operators act as a catalyst for network investments by other telecommunications players, making the Cable industry one of the most important drivers in the roll-out of a future-focused high-speed broadband infrastructure.

Regulatory policy should serve to promote genuine infrastructure-based competition so as to allow operators to invest and deploy technologies that are independent of the SMP operators' network.

¹ Solon Management Consulting, *Cable Industry in Europe*, 2009

Accordingly Cable Europe believes that BEREC should clearly have in mind when implementing the NGA Recommendation that competition between independent infrastructures is the most beneficial for investment and ultimately end-users while service-based competition has been trapped by technological developments and did not succeed in driving investments in FTTH in Europe.

In this regard, BEREC should in particular strive to ensure that implementation measures avoid undermining both investments that have already been made by alternative infrastructure owners as well as the incentive for future investments.

Cable Europe would appreciate to be closely involved in the work done by BEREC on this topic.

Work item 3.3.1 - Regulatory accounting

It is essential to recognize and reward the role that cable operators play in delivering infrastructure-based competition in the context of NGA, a role which has resulted in higher broadband penetration and market dynamism where cable is present.

The implications of this approach are profound. Insufficient recognition of the role that cable plays in delivering infrastructure-based competition will result in NRAs potentially adopting proposed remedies which have negative implications for cable investment, past and present.

The condition necessary to promote efficient investment in infrastructure is a fair access pricing regime which reflects investment risk but which discourages wholesale prices detrimental to infrastructure investment already made, or about to be made. Of particular concern is the risk that cable faces competition from other operators relying on below-cost passive wholesale inputs priced on the basis of the current costs accounting of a former monopoly, or on active wholesale broadband access inputs that are similarly mispriced. Whereas this might provide asymmetric regulatory assistance for entry to non network operators (and their business cases) it will be detrimental to cable's past and future investments.

It is therefore essential that any work undertaken by BEREC in relation to the pricing/costing issues of NGA wholesale products from a cost accounting perspective takes this into account.

Work item 3.6 – wholesale access originating to value added services

Cable Europe supports BEREC's plan to investigate charges for wholesale access origination to value added services. It seems indeed important to check the situation in various Member States as there might be a need to address competition problems regarding these originating services. However, we strongly urge BEREC to ensure that its assessment is sufficiently comprehensive and incorporates the entire value chain (and all parties therein). We note that BEREC highlights what it perceives to be a problem of excessively high origination fees charged by originating providers together with a lack of choice (and by implication countervailing buyer power) for providers of these services. While we do not dispute the fact that such circumstances might exist in some jurisdictions, we would highlight that in other Member States, notably the UK, examples of an opposite situation

exist. That is, as a consequence of the UK market structure and prevailing regulatory regime, terminating providers are effectively free to impose termination charges on originating providers at a level of their own discretion. As an inverse to the situation described by BEREC, in these circumstances the originating provider has no alternative option – it can either choose to pay the charges or block access to the services in question. The latter of these approaches is invariably impractical/undesirable due, amongst other factors, to competitive pressures at the retail level.

We would encourage BEREC, therefore, to ensure that it does not adopt a one-dimensional approach to the matter, and that it considers the wider competitive issues that may exist within certain Member States. This should include an assessment of the market structure and how such interacts with the prevailing regulatory regime.

Emerging challenges

Work item 4.1 – Promotion of Broadband

The EU Commission announced its Digital Agenda objectives. By 2020, 100% of Europe citizens need to have access to 30 Mb and 50% of European households subscribe to 100 Mb.

The great news, from a cable perspective, is that we deliver on those objectives today already. We are getting over 100 million EU households ready for ultra fast broadband as quickly as we can.

Using the Docsis 3.0 standard, cable companies across Europe are delivering superfast speeds and are forcing the competition to step up their investments.

In that context, we believe that external intervention should only be needed where private sector cannot achieve results and we trust BEREC to follow this important principle.

One should leave to the market the possibility to respond to the demands by investing and rolling-out broadband networks. We believe in the value that can be brought by infrastructure based competition to raise broadband penetration and delivering competitive innovative services combined with public funds in rural areas only where private investments cannot be made, as indicated by the EU Guidelines for broadband State Aid.

State Aid can complement broadband investments made by the private sector but must not distort existing infrastructure competition, nor should it undermine the preconditions usually associated with the development of competition. Cable Europe supports the public funding for the development of networks only in areas where, due to market failures, it exists a persistent lack of commercial initiative by any private infrastructure providers to invest in the building of new, or the upgrading of existing, infrastructure. However, in such cases, State Aids should be proportionate to the market failure they intend to correct.

More particularly, we question the necessity of widening the scope of universal service to cover broadband as this is likely to distort market dynamic and places new financial burden on electronic communication

operators. **It is essential that no confusion between the goal and the obligation is made.**

The way in which fixed, mobile and satellite networks can best contribute to addressing Europe's digital divide is by being given the best opportunity for true infrastructure based competition. Also, the EU should adopt a technology neutral approach.

Work item 4.2 - Net Neutrality

Cable Europe is very keen to follow BEREC's work on this issue. We believe it is essential that this important work is accompanied by a full public consultation with industry on the different issues BEREC plans to explore in this context. We especially question the guidance BEREC plans to give to NRAs, in the context of Net Neutrality, on how the access obligations and the provisions regarding symmetrical regulation should be used. In the wider realm, we consider that any consideration of the application or exercising of these provisions must necessarily take the utmost account of the principle of proportionality, and must include a thorough assessment of the consequences of mandating such obligations – including the effect on the incentives for continued investment and innovation in the deployment of broadband services.

On the subject of Net Neutrality, we believe in openness and transparency which permit consumers to access the services, applications, and content of their choice on the Internet, allowing them to use the Internet differently than in the past. However if the Internet is to remain open, traffic may need to be managed and freedom to negotiate between content providers and network operators must be preserved. The resultant growth in traffic on-going cannot take place without adapted traffic management. Traffic management practices used by operators ensure a robust and efficient functioning of the network and support the provision of innovative services in the interest of users. Our vision is to see Europe continue to benefit from a strong, competitive market that provides high quality services to the end-user.

Fruitful and non-emotive debate should take account of the necessity for reasonable traffic management as a basis for discussion. Traffic management, needed to get the most out of current and future networks, is a reality. Already today traffic and network management are therefore issues that should be at the core of the debate.

Anyone in the Internet value chain should be able to innovate and develop new business models, as long as they do not behave in an anti-competitive manner, hindering innovation by other players. Nevertheless, a clear distinction must be made between the "upstream market" – concerning the relationship between web companies/network access seekers and network operators, and the "downstream market" – concerning the relationship between Internet access providers and end-users. In the first case, it is crucial to leave a nascent market developing itself within the limits of the competition rules and the telecom package. In the second case, setting transparency standards regarding traffic management practices and defining certain QoS levels are foreseen in the revised telecom rules which correct implementation should be usefully discussed within BEREC. Enhancing transparency for consumers about traffic management is clearly a first step to be discussed with all stakeholders.

There is no evidence of market failure which would require regulators' intervention. Today's debate should address whether the tools of competition law are sufficient to tackle any eventual problem that might emerge or whether ex-ante, rigid, pre-defined rules are to be established in anticipation of those problems.

Given that questions remain today about the way innovation will take place and how market players will evolve, Cable Europe believes that it is premature for the Commission or the regulators to resolve this debate in the short term by intervening in what should be left to commercial agreements. This debate cannot be held properly without taking a more profound consideration of the whole value chain of the Internet rather than seeking to categorize and single out different stakeholders.

Work item 4.3 – Bridging market evolution and the objectives of spectrum management

Cable Europe welcomes BEREC's plan to continue the analysis of the impact of fixed-mobile convergence, complementarity and potential substitution and its effects on fixed and mobile communications markets in terms of voice and broadband. We consider this as a very big issue for the future given the evolution of the mobile market which will necessarily have an impact on regulation.

We also welcome the strengthened cooperation between BEREC and the RSPG on spectrum issues and their review of the conditions for the attribution of the frequencies of the digital dividend band in the Member States. It will indeed be important for BEREC to review whether appropriate measures are taken/foreseen by Member States in order to mitigate the interference issue for end-users following the LTE roll-out.

According to latest testing, low-power mobile terminals, base stations and repeaters operating in the 790-862MHz band will cause interference to existing network services that are operating in the same or neighbouring spectrum. This will affect services above 775MHz which could be rendered unusable for Internet Protocol (IP) data services (internet traffic and telephony), and both digital and analogue TV services.

LTE services are therefore likely to cause interference within customer premises and to customer equipment such as set top boxes, modems, TV sets, flat screens, game consoles... This interference could negatively affect the customer experience with a multitude of UHF receivers.

Looking forward, a closer look should be taken at the current process resulting in mandating CEPT to analyse the interference and disturbance issues created by the deployment of new radio technologies. In particular, the impact on fixed cable networks and associated customer premise equipments ought to be considered at an early stage in the process. CENELEC maintains current EMC standards for Cable networks and equipments. Therefore a specific role for CENELEC during this impact assessment should be envisioned.