DIGITALEUROPE Response to BEREC 2018-2020 Strategy

Brussels, July 2017

BEREC Strategic Priorities 2018-2020	DIGITALEUROPE Comments
9. The continuing transition to next generation fixed and mobile broadband access and the increasing trend among consumers towards internet enabled services (as opposed to traditional telecom services) are underpinned both by technological developments in networks and terminal equipment and by a greater willingness by end-users to buy and use services in new ways. High speed broadband connectivity is increasing as operators respond to end-user demand for fast, seamless and reliable connectivity.	
12. The wider access to-, higher quality and more resilient internet based services has played an important role in accelerating the transition to digital services and the wider digital ecosystem, be it for banking, social, entertainment or communication purposes. The digitalization of services has greatly increased the number and variety of different services and service providers competing at retail level. While this separation of service distribution from the network layer has done much to improve competition and innovation at a service level, there is the potential that new bottlenecks may emerge in the service distribution chain. Device manufacturers, on-line platforms and content providers can have positions in new emerging value chains that enables them to adversely affect the competitive dynamics on digital markets.	The separation of service distribution from the network layer has done much to improve competition and innovation at a service level but has been implemented in a way supporting conservation of the existing copper based networks in the last mile, having very limited transport capacities thus preventing shifting the services to the more advanced level. An ex-post regulatory approach could accelerate this replacement.
13. The relationship between traditional telecom operators and OTT	This paragraph suggest that telecom network access providers are dependent

providers has also changed much during the last number of years as data-driven business models for telecom operators have replaced the old models based on voice and SMS. Traditional network access providers, facing the risk of disintermediation, have entered into different forms of partnerships or cooperation with OTT providers that aim to increase brand exposure, provide higher value to end-users and promote more data consumption that can also deliver indirect cross-benefits to other interlinked partners of platforms. There are also examples where the interaction between the network and service level is taking the form of cross-sector mergers. Bundles are no longer limited to a number of vertically integrated telecom and audio-visual services but are increasingly being designed to provide better access to popular internet-based content and services, usually through promotional prices or through so called "zero-rated" access. While consumers may benefit from the efficiency of one-stop shops, this might also make them more dependent on their providers and the increasing complexity and heterogeneity of bundles could make it more difficult for them to properly compare propositions and exercise informed choice. With an increasing value of data, for both the providers and the end-users, there is also a risk that the inability to transfer personal data from one provider to another could become a barrier to switching. This could create new barriers to switching and dampen some of the benefits of competition.

on OTT providers and not vice-versa. This is not the case. DIGITALEUROPE would like to underline that telecom network access providers, device manufacturers and OTT providers are interdependent – OTT services require functioning devices and good quality network access to develop innovative services and satisfy end-users. This interdependence is visible in the commercial relationships and partnerships between these actors in the ecosystem.

With regards to data, the General Data Protection Regulation provides in its art. 20 a right of data portability which should ensure the transfer of personal data and facilitate switching by end-users between service providers.

14. As more players have become involved in the distribution of digital services, it has become more difficult for end-users to understand the factors influencing their experience of using digital services. The download speed, once of paramount importance for understanding what quality to be expected, is now just one of many several aspects determining the quality of experience for end-users. Service providers and regulatory agencies have been providing data on the characteristics of service provision using supply side indicators that measure network speed, jitter,

latency and reliability. As the digital ecosystem becomes more complex, there will be an increasing need to ascertain the drivers of consumer engagement with digital services from a demand side perspective, to complement data on supply side aspects. Better and more granular information for people and businesses on the availability, speed, quality and pricing of services and indicators as experienced in the end-user environment when using internet based services will play a greater part in their ability to engage with the market and switch providers. The protection and empowerment of consumers, for example around issues such as billing, affordability and switching, is essential to the effective functioning of a digital society. In this context, the availability of choice and the ability to exercise that choice freely among service offers, principles that were recently reaffirmed with the adoption of the EU rules on Net Neutrality, needs to be safeguarded through effective monitoring and implementation by national regulators.

15. The shifts in technology and usage patterns, while leading to an increased consumption of digital services, might also increase the risks of digital exclusion as the digital ecosystem evolves from being primarily about value added services to becoming an essential utility. The development and benefits of the digital society requires that all citizens are connected so that they can experience the benefits of digital innovations and the digital market. Digital exclusion can manifest itself in new and different ways and its consequences will be greater as more and more services are only enabled by high capacity networks and as IoT becomes more prevalent in day to day life.	DIGITALEUROPE fully agrees with the focus on preventing digital exclusion, considering the importance of very high-speed, high-capacity broadband access to be able to participate in the digital society. This is also why DIGITALEUROPE welcomed the proposals in the Code on rural access. For certain rural areas that still have a reasonable population density, co-investment could help overcome the barrier to investment through sharing the uptake risk. We also welcome the proposal on Digital Exclusion Areas and broadband mapping and believe that there is positive experience from some NRAs to build on using such tools to work with operators and local communities with the aim of deploying high speed broadband in rural, sparsely populated areas. For some areas public funds will likely also be necessary and BEREC could look into best case practice of the NRAs working with their relevant competent authority in charge of state aid to ensure as many synergies as possible

between the new regulatory framework for electronic communications networks and the EU state aid guidelines.

Another crucial aspect to the digital divide which is not apparent from the BEREC consultation is the educational and skills aspect. Even where there is coverage, if the users do not have the sufficient knowledge or skillset that they feel comfortable to use the internet and online tools, they won't connect. This educational aspect may be less of an issue for the younger generations that are mostly digital natives but it may be an issue for the older generations. Many of them cannot or don't like to understand the Internet and its applications. When life is increasingly becoming digitalised, it is important to make sure there are local options for trainings etc. for this group of citizens. Even for younger generations as the internet evolves so will the required skillset. While DIGITALEUROPE recognises that this many not be within BERECs and the NRAs core competences it should be kept it mind as a crucial aspect of the multifaceted policy challenge of preventing digital exclusion.

Strategic Priority 1: Responding to connectivity challenges and to new conditions for access to high-capacity networks

Roll out of fibre networks and migration from legacy networks, as well as market consolidation, can lead to new forms of competition problems which need to be tackled by national regulators with the appropriate tools Very high-capacity networks have become central for end-users to enable them to enjoy the full potential of the digital ecosystem and access to some non-replicable elements is important to promote and protect competition, but the variance in the deployment of high-capacity networks has led to different market conditions across Europe. BEREC will make it a strategic priority to continue its work on identifying competition problems that arise in different member-states as high-capacity networks are being developed and legacy networks phased out or where markets

The need to tackle the situation - DIGITALEUROPE appreciates the high quality work of BEREC and hopes the latter will continue to pay proper attention to the question whether there is effectively a need to tackle a situation. Because indeed "the cost of error is much higher in the case of a so-called "Type I" error – i.e. when a regulator mistakenly imposes a remedy – than for a "Type II" error – i.e. when a regulator mistakenly fails to impose a remedy. This leads to the conclusion that where there is a significant uncertainty due to rapid technological and market changes, regulators should have a bias in favor of doing nothing rather than imposing a remedy. In fast-moving markets, the perceived harms are often addressed by the market, making regulatory remedies unnecessary". (« Les trois facettes de la neutralité technologique », Winston J. MAXWELL, avocat associé, Hogan Lovells, et Marc BOURREAU, professeur d'économie, Les cahiers de l'Arcep, octobre 2014).

have become mature - with the intention to increase awareness on how incentives to invest change with changing market conditions and how competition is affected. The experience national regulators have with applying the SMP-framework and/or symmetric remedies will be a key aspect of this work. There will also be an important role for BEREC to look at access to high-capacity networks in more general terms (both fixed and wireless), such as how access to fixed high-capacity networks influence wireless network coverage and how the relationship may impact on the ultimate goal of increased connectivity.

Appropriate tools - DIGITALEUROPE believes national regulators should be equipped with toolsets that enable them to capture more accurate and detailed pictures of the conditions in which market players are operating as well as allow them to define more adequate and proportional sets of remedies.

Different market conditions across Europe – This should also allow national regulators to take better account of the differences in market conditions across Europe and the influence this has on market players' competitive and investment behavior.

SMP Framework – Current competition rules for the telecom markets have been developed to break up the old monopolies based on the legacy copper networks. With a new challenge to deploy new very high speed, very high capacity networks, some adaptations were needed. DIGITALEUROPE therefore very much appreciates the proposal by the Commission with respect to the SMP regime, including prioritization of access remedies related to civil engineering over access remedies related to specific network facilities. DIGITALEUROPE would even go as far as prioritizing access remedies related to specific passive network facilities over access remedies related to specific active network facilities.

Very High Capacity Networks – DIGITALEUROPE fully supports the use of the definition of "Very High Capacity Network" to formulate the exceptions to the general rule of the SMP based access regime in the new Electronic Communications Code. Whilst NRAs should hold an important responsibility to assess co-investment projects on a case-by-case basis to ensure they indeed live up to the criteria in the proposed art. 74 and related Annex, to provide legal certainty for potential investors and to prevent the digital divide from further widening, when such criteria are respected the NRAs shall refrain from imposing SMP remedies it otherwise would have imposed. DIGITALEUROPE therefore also supports the Commission wording in art. 74 that NRAs shall not

impose remedies, instead of the proposed 'may' as advocated for by some Member States. A 'may' implies instead that NRAs could choose to still regulate a co-invested VHCN that lives up to the list of criteria. That position would undermine the effectiveness of the provision as a whole potentially rendering it redundant and thereby severely decreasing the investment-driving provisions of the Code.

One important related aspect of the VHCN provision in the proposed Code is the ambiguity whether that same definition could be used down the line outside that scope of the co-investment provision. DIGITALEUROPE does not believe that this is the intention but the ambiguity around this nonetheless raises serious questions. Outside determining whether the fixed network technology being deployed in a co-investment is indeed a VHCN as defined by the Commission, DIGITALEUROPE strongly recommends to instead rely on assessing any networking technology against its capability to deliver the Gigabit Society ambitions, i.e. gigabit connectivity for all main socio-economic drivers such as schools, transport hubs and main providers of public services as well as digitally intensive enterprises and at least 100 Mbps, upgradable to Gigabit speed, for all European households, rural or urban.

Strategic Priority 2: Monitoring potential bottlenecks in the distribution of digital services Against a back-drop where the internet continues to change the ways in which digital services are delivered and consumed, where more actors are becoming involved in the digital value-chain and where interaction between service and network providers is changing, BEREC will make it a strategic priority to evaluate/analyse how the various digital markets evolve in the coming three years – looking particularly at how market power is distributed, the existence of potential bottlenecks to competition and how these can be best addressed.	DIGITALEUROPE calls on BEREC to exercise cautiousness as BEREC and its members expand the scope of their market analysis beyond the traditional telecom market to the broader digital ecosystem. Every layer – device, platforms and services – is composed of an important variety of business models and ways of approaching B2B/B2C relationships, coupled with fast-changing markets. BEREC and its members must ensure they have the right expertise before analysing these markets and must be ready to embrace regulatory approaches that are different than the tools used in the traditional telecom sector. Furthermore, the fact that telecom regulators do not necessarily have the regulatory grounds to request information from non-traditional telecom actors may lead to market analysis based on a partial

DIGITALEUROPE
Rue de la Science, 14 - 1040 Brussels [Belgium]
T. +32 (0) 2 609 53 10 F. +32 (0) 2 431 04 89
www.digitaleurope.org | info@digitaleurope.org | @DIGITALEUROPE
Transparency register member for the Commission: 64270747023-20

	understanding of these markets.
	For DIGITALEUROPE, competition authorities, which have the necessary expertise and enforcement tools, must remain the primary actor in charge of assessing and addressing bottlenecks to competition in digital markets. Duplicating assessment and enforcement responsibilities can lead to diverging views, undermining legal certainty in the market.
Strategic Priority 3: Enabling 5G and promoting innovation in network technologies The next generation mobile networks (5G) will likely not be operational in Europe until 2020, but there is already a lot of activity going on in various groups and committees. The challenges that need to be addressed range from work on standards, interoperability, new business models, network sharing, coverage and security. BEREC will make 5G a strategic priority in the coming three years with the aim to enable European-scale solutions that may help reap the benefits of early and coherent implementation in terms of innovation, productivity and growth in the internal market. BEREC will within the scope of its competence actively and closely follow the development of 5G and will, where relevant, work in cooperation with other EU bodies (in particular RSPG) to identify potential hurdles to a smooth and quick implementation in the Member States. BEREC will also need to follow innovation in other network technologies, both fixed and wireless, to find common regulatory perspectives of how these technologies influence markets and should be treated by regulators. The network technologies and developments that have the potential to directly change the way services are used and delivered, such as IoT, NFV/SDN, as well as the technologies that may play a part in enabling such changes, e.g. small cell deployment, will be of particular importance for	**Strategic priority** – DIGITALEUROPE supports BEREC's intention to make 5G a strategic priority in the next three years to come. 5G's successful development and deployment will depend on the legal certainty the EU will be able to offer investors as well as the degree of harmonization that the EU will be able to guarantee with respect to the spectrum management and allocation rules across the EU. License durations of 25 years or longer would increase certainty of investments and allow for continuous technological upgrades. In our opinion, the peer review mechanism of the auction proceedings between national regulators (as proposed in the European Electronic Communication Code) would help in achieving an early and coherent implementation of the 5G networks across EU. Fibre availability remains an important aspect in the roll-out of 5G, as major parts of networks will rely on fibre connectivity. Therefore, incentives to invest in fibre are equally crucial for 5G to be deployed in a timely manner. Another aspect that BEREC rightly pointed is the growing importance of small cells densification of the mobile networks. To this end we encourage the BEREC to investigate ways that can facilitate the economic and fast roll out of small cell equipment taking into account all aspects that might humper such deployments: equipment taxes, access to sites, rental fees, administrative processes, etc. DIGITALEUROPE sees the benefits of a European harmonization of the norms of deploying such equipment throughout Europe for a consistent

BEREC to follow in the coming three years.	and timely coverage with very dense networks. **Innovations** – DIGITALEUROPE would be very happy to be a sounding board for BEREC with respect to the innovations in network technologies, both fixed and wireless, and the impact these may have on markets.
Strategic priority 4: Fostering a consistent approach of the net neutrality principles BEREC has a long history of working on Net Neutrality issues and has recently received new responsibilities with the adoption of the TSM regulation (Regulation 2015/2120). With the growing trend among consumers towards internet enabled services expected to continue, the measures on open internet access will become ever more important and BEREC will need to work actively to support national regulators in applying the Regulation in a consistent way throughout Europe. To that end, BEREC will make it a strategic priority to continue its work looking at how net neutrality is affected by changes in markets and new technologies and to encourage national regulators to share experience on the practical implementation of the Regulation and the BEREC guidelines.	DIGITALEUROPE has continuously been involved in the net neutrality discussion providing technical expertise around network technology developments and new services delivery methods. DIGITALEUROPE recognizes BEREC important role in the application of the Regulation, as a best-case practice sharing platform for NRAs and to ensure a shared approach to the application of the rules. DIGITALEUROPE remains committed to continue the dialogue with BEREC on this important issue.
Strategic priority 5: Exploring new ways to boost consumer empowerment The focus of increasing consumer empowerment and engagement is to ensure consumers have the information and tools to make informed choices and engage effectively with the market. In the past, BEREC has focused on 'market shaping' activities that encourage investment and which promote competition and connectivity. BEREC should complement this work by prioritizing a more active role in the coming three years with assessing and promoting consumer empowerment and consumer protection.	DIGITALEUROPE fully supports measures to increase consumers' technology understanding and awareness of their technology needs in view of their consumer habits, e.g. developing tools to enable consumers to assess the IAS package best responding to their needs (number of people in the household, number of connected devices, video services used, simultaneous use by different household members etc.) At the same time BEREC and NRAs should also be mindful of the balance between helpful information and information overload for the consumers. When looking into consumer empowerment in digital markets,

This means more transparency to enable consumers to assess and compare the performance of products and services (e.g. better and more targeted information for people and businesses on the availability, speed, quality and price of services) and seamless and user-friendly switching processes. Qualitative methods of gauging end user satisfaction and a more rounded set of performance metrics that lend themselves to better capture the quality of experience (QoE) for consumers may lead to greater consumer engagement. This will entail deploying the data, either directly in the form of accessible and informative consumer information, or through open data that enables the market to respond to consumer needs.

At the same time, BEREC will need to be mindful about the emergence of new switching barriers such as data portability as well as switching barriers like restrictive contractual terms and new types of bundled packages which are being addressed in the draft European Electronic Communications Code still under discussion. NRAs will also need to enhance consumer trust in new services by working with manufacturers and network operators to ensure that the security and integrity of networks is paramount in their consideration and by building in privacy-by-design practices in digital services.

NRAs will also need to complement consumer empowerment initiatives with consumer protection measures that safeguard the interests of all citizens and especially those of the digitally disengaged.

DIGITALEUROPE would advise BEREC to be mindful of the fact that the consumer markets for digital services in general are highly competitive, rapidly changing and characterised by high levels of consumer choice. Furthermore several pieces of legislation are already in the pipeline providing more protection for consumers. Any attempts at strengthening consumer protection in these markets must therefore be based on evidence of consumer harm and great care should be taken that any such new rules are proportionate, targeted and aligned with technology, as opposed to the political willingness to extend telecom-specific rules to a broader sector.

--
For more information please contact:
Jochen Mistiaen, DIGITALEUROPE's Policy Manager (Digital Technology & Innovation)
+32 496 20 54 11 or jochen.mistiaen@digitaleurope.org

ABOUT DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies.

DIGITALEUROPE ensures industry participation in the development and implementation of EU policies. DIGITALEUROPE's members include 60 corporate members and 37 national trade associations from across Europe. Our website provides further information on our recent news and activities: http://www.digitaleurope.org

DIGITALEUROPE
Rue de la Science, 14 - 1040 Brussels [Belgium]
T. +32 (0) 2 609 53 10 F. +32 (0) 2 431 04 89
www.digitaleurope.org | info@digitaleurope.org | @DIGITALEUROPE
Transparency register member for the Commission: 64270747023-20

10