TELEFONICA comments with regard to BEREC BoR (17) 38

Stakeholder consultation on the review of the BEREC Medium-Term Strategy for 2018-2020.

31 April 2017

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0. INTRODUCTION

Telefónica S.A. (hereinafter Telefónica) welcomes the opportunity to provide inputs to the BEREC's consultation about the "Stakeholder consultation on the review of the BEREC Medium-Term Strategy for 2018-2020".

In what follows Telefónica would like to submit its views about the different questions included in the consultation, following its structure, in the hope that they will be acceptable to BEREC.

1. PRESENTATION OF THE CONSULTATION.

After presenting the general terms and rational for the consultation, BEREC poses this general question: **Do you have any comments on the elements presented above?.**

In this regard, we have the following remark:

The strategy to be adopted by BEREC during these years (2018-2020) will be particularly relevant, as, during this period, the implementation of the new code will take place. This will involve BEREC itself in an essential way, since, because of the new code, BEREC nature, mission and objectives could be significantly changed. Therefore, we believe that, although the final outcome of the Code could alter the way that BEREC will be involved in its implementation and development, the MTS strategy, as such, should have a clear focus on the upcoming review for electronic communications. Once the new code is adopted, BEREC's strategy will have to be updated in accordance to the new framework.

In addition, we think that a very relevant element on which BEREC could support the sector is the "standardization policy". Harmonization is a key in new technological developments and standardization bodies are lagging behind the needs of the market. This takes the sector to the "winner takes it all" or to rely on sectoral associations. BEREC guidance on this would be very much welcomed.

2. SECTION 1. Market and Technological Developments.

Below our views regarding the four categories identified by BEREC

A. The end-user experience

1) Of the issues listed above, which do you consider to be the most important in shaping the end-user experience? Please explain your answer in detail.

We believe that BEREC´s involvement on the issue of End-user experience can be approached from a double perspective: networks and services

Networks:

Regarding the performance of the networks, Telefonica considers that the transparency framework established by the Regulation (EU) 2015/2120 is well balanced and sets the path in order to avoid over-prescriptive obligations regarding monitoring, inter alia, of the QoS and the traffic management practices while granting a high level of transparency both to end-users and Regulatory Authorities.

In particular, it is important to notice that the goal of a QoS measurement program should be to allow the valuation of the adherence of operators' offers to the quality level indicated in the commercial offers and contracts (i.e. to ensure compliance with the provisions of transparency).

However, to rule on the design, build and implement the regulatory assessment and the technical architectures in order to monitor compliance with NN provisions ex-ante implies a very different scope while in view of Telefonica is not proportionate and exceeds the monitoring of compliance with transparency obligations.

NRA's should primarily monitor for complaints to identify issues and trigger further investigation, where necessary" and always complain-based.

We are convinced that no further work is required in the area of network performance and monitoring of transparency obligations.

Services:

In the field of services we firmly believe that the main challenge to be addressed now is posed by so-called on-line platforms. Indeed the relevance of online platforms in the digital world is increasing day by day and it raises a range of new issues that should be tackled.

It is important to notice that the evolution to a Digital world has resulted in a disruptive transformation of the telecommunication industry. This disruptive revolution arrived with full development of Internet ecosystem, as we know it today and is leading to a new scenario where the traditional Telecom market will be diluted into the broader digital environment. Newly arrived agents (although they have achieved huge sizes in very short time) are developing a new breed of Internet based services.

Within this context there has been a rebalancing of powers in the digital ecosystem, as essential on-line platforms have the potential to become enduring bottlenecks and gatekeepers of our digital lives able to apply restrictions that eventually foreclose access to end users. Indeed, there are undertakings who may be in position to hinder the capacity of users to switch to other alternative platforms, thus jeopardizing competition and consumer choice. Examples of these bottlenecks are present in specific App Stores, Operating Systems or search engines whose position in the Internet value chain make them essential platforms.

An open and non-discriminatory approach should be applied in all parts of the Internet value chain, not only on internet service providers as is currently the focus on net neutrally. Focus should be placed on digital bottlenecks, irrespective of the operating sector within the digital value chain, to solve customers' foreclosure once detected. This constitutes a new area still unexplored and on which the contribution of the BEREC can be fundamental.

Finally, although the EECC proposal aims at creating a level playing field between Telecom Operators and OTTs, the current Commission proposal could possibly not fully solve all the existing problems. Depending on the final form of the EECC, BEREC will also play an important role in creating fair rules for all market players.

2) How can the interests of digitally disengaged citizens be best protected?

We firmly believe that any measure related to the protection of potentially disengaged citizens should be considered as a part of public policies and be promoted/financed by public budgets.

We think that a better tax treatment (VAT) for telecommunications services could also be of help.

From the point of view of a telecommunications operator, this question also gives us a new opportunity to present our vision of what the future Universal Service Obligations should look like. In this regard, we want to bring up the following reflections:

The market has reached a level of evolution that makes Universal Service obligations unnecessary and counterproductive (due to the distortions that they introduce in the market). Measures for the purposes addressed with Universal Service Obligations should instead be taken from a double perspective:

- Coverage: should be handled by public aid following the existing broadband state aid guidelines (and not via definition of Digital exclusion areas as proposed in the Code).

- Affordable prices for low income or special social needs should be treated by Member States as a public policy separately.

If Universal Service Obligations are finally deemed necessary we believe that the following considerations should apply:

It is of the utmost importance that Universal Service Obligations remains an instrument to provide a social safety net and ensure inclusion to the digital society. Because of this general societal goal, its costs should be borne by the society as a whole through public funding, and not by the electronic communications sector. Furthermore, the scope of the Universal Service regime should be limited to policies which ensure affordability, and not go beyond to solve other policy problems. Otherwise, the risk would be to create significant inefficiencies and market distortions. We generally believe that the setup proposed in the Code by the European Commission goes in this direction.

3) What can be done by BEREC to improve the end-user experience by providing more and easier-to-use information?

We believe that BEREC could provide very valuable guidance in an area that we understand is critical to the users' experience. Namely, we believe that consumers require a similar set of rules applied to commercial services, irrespective of the kind of counter-performance. Therefore, rules applied to commercial services that charge money need to be fully but also reasonably translated to contracts that are based on "data as a currency". This translation needs to take into account that commercial exploitation of data is partly different from charging money and that general data protection law covers some aspects of consumer protection, but not all – while being limited to personal data only. New rules need to be proportionate: ensuring effective and consistent protection standards, while not preventing new business models.

4) Are there any other significant trends/developments that BEREC should consider in relation to the end-user experience?

We would like to emphasize that it is essential to have a regulatory framework for consumer protection that is future-proof and that can accommodate changes in such a dynamic environment as the one in which the digital sector is immersed. The best way to achieve it is to rely as much as possible on horizontal regulation, avoiding overlapping and cross references between horizontal / sector specific rules.

Moreover and as a general rule, consumer should have the same protection when using similar services i.e.: to apply to same services, the same rules, to protect to the same customers, the same rights and to implement to the same markets, the same supervision. In other words using the same principles across the overall value chain.

It should also be considered the layered provision of services over the Internet: end user experience is the result of a group of interdependent services, one provided on the top of another. It is useless to protect consumers' rights for most of the services if just one can avoid such obligations then ruining customers' experience. Consumer protection, or any other intended safeguard, should have a holistic approach in order to be effective.

In particular, an updated Competition Law for the data economy would allow to tackle non-monetary transactions with much faster procedures.

B. Competitive dynamics in the digital ecosystem

1) Of the issues listed above, which do you consider to be the most important in shaping the end-user experience? Please explain your answer in detail.

We believe that the most relevant of the issues mentioned, which still has not been addressed, is the appearance of new entrants with particular reference to on-line platforms, as stated in the answer to the first question in section 1. We insist on our vision that tackling the issue of on-line platforms is perhaps the most relevant and challenging issue ahead.

In any case, we do not want to miss the opportunity to comment on another of the issues listed. Specifically the reference to oligopolies. In our view, BEREC should take into account the following:

- The telco sector does not generally exhibit the typical negative features attributed to oligopolies by some economic theories, such as: awareness of competitors' actions and strategies, comfortable equilibrium situation, homogeneous product, absence of real competition ending up in higher prices and lower quality, market leader usually setting prices as first mover.

- On the other side, the concept of "oligopolies regulation" would become a catch-all and pave the way to impose regulation in virtually all situations of current telecom markets. Such an approach is both inefficient and potentially ineffective and sends completely the wrong message to investors at a time when the Commission is looking to sharpen investment incentives in the sector.

- A potential regulation based on Oligopolies goes against the objective of the gradual removal of ex ante regulation and a greater reliance of ex post competition law in the long run.

2) Are there any other significant trends/developments that BEREC should consider in relation to the digital ecosystem?.

We have not identified any other relevant trend/development for the period covered by the consultation.

C. Evolution of networks

1) What aspects of the issues listed above do you believe to be most important? Please explain your answer in detail.

From our point of view "**investment in high speed networks**" (Very High Capacity Networks in accordance with the terminology of the Code) is by far the most relevant during the period considered. As stated in the DSM strategy all activities in the digital economy depend on electronic communication (broadband) networks. The DSM can only be realised when all European citizens, businesses and public administrations are connected to reliable, high-speed and affordable networks.

It is necessary to ensure that Europe’s will be timely equipped with new innovative networks and technologies if we want to become leaders on key innovative areas of the digital future such as 5G communications, M2M/IoT, etc. In fact, this is required to boost the European industry as a whole. **Europe needs ubiquitous best-in-class high-speed connectivity to impulse leadership in the Digital Economy and compete in the global technology field.**

Massive private investment will be required to attain this ambition. That´s why we welcome the emphasis made by the Commission in the new Code on favouring infrastructure competition and sustaining the deployment of very high capacity networks.

Nevertheless, although the Code takes some steps in that direction, the proposed reform still falls short of providing for sufficient investment incentives and fails to provide confidence to market forces. More ambition is needed in terms of simplification and predictability in the application of the rules envisaged in the proposed framework.

In relation to other issues mentioned, we would like to make the following comments:

- **5G**: During the period covered by the consultation it will be too early for this technology to have any significant impact.

- **SDN/NFV**: We also believe that it is very premature to have a talk on regulation about those technologies during the period covered by the consultation; taking into account that virtualization is still a technology in its initial stages, as an implementation choice.

2) Are there any other significant trends/developments that BEREC should consider in relation to evolution of networks?

We have not identified any other issues during the period covered by the consultation.

D. Over-arching Questions

1) Are there any market or technological trends that have not been addressed above? Please explain your answer in detail.

We have not identified any other relevant issue for the period covered by the proposed strategy

2) Over the next three years, which market or technological trends do you anticipate having the most significant impact on the ECS markets? Please explain your answer in detail.

Basically, the most relevant trends would be in our view:

- The rise of strong infrastructure competition from cable and alternative FTTH players

- The evolution of DOCSYS technology that will allow Cable operators offer wholesale services and consequently, the need to consider the self-provisioning of wholesale services when analysing market 3 in future reviews.

- The new possibilities provided by new and enhanced network infrastructures (fixed and mobile).

- The transition to all IP networks.

- Market Consolidation.
- More complex and heterogeneous markets: pockets of strong infrastructure competition, areas with lack of NGA coverage, mobile substituting fixed for certain market segments.
- IoT/m2m services will be increasingly more relevant.
- Services provided by platforms on top of the networks
- Fixed and mobile convergence,
- Big data

3) Do NRAs and BEREC have the appropriate tools to deal with anticipated market changes and associated regulatory challenges over the next three years? Please explain your answer in detail, and, if possible, outline potential solutions.

We believe that the new Code to be implemented during the considered period should provide the right tools for that.

In any case, and in the light of the current proposal, we would not want to miss the opportunity to comment that, from our point of view, we would have expected a profound streamlining of the future institutional set-up, consistently with the new competitive environment, that requires a reduction of the regulatory intervention.

We believe that the current review represents an opportunity to move from a heavy handed ex-ante regulatory regime to a lighter and more responsive ex-post regulatory oversight. Ensuring that voluntary commercial arrangement are provided with strong regulatory clarity and predictability should become a key component of this.

4) In which ways can technological and market developments impact upon promotion of the single market?

From our point of view technological and market developments have a decisive influence on the promotion of the digital market. However, this should not make us lose sight of the fact that access networks have a local character and should be locally regulated taking into account the different situations that can apply in a given geography.

3. SECTION 2. How BEREC works and engages with stakeholders.

Below our views regarding the two categories identified by BEREC

A. BEREC´s work with the regulatory objectives

1) Do you have a concrete example where better coordination/harmonisation between NRAs would be or has been particularly beneficial for your activity, either directly or indirectly?

We believe that, in the case of the prevention and adoption of measures against fraud, good coordination / harmonization would be of the utmost importance.

2) How do you consider that BEREC could further contribute to the development of a Digital Single Market (e.g best practice dissemination)?

BEREC´s technical work and expertise has been valuable in the recent years to contribute to the development and better functioning of the internal market as well as to improve a consistent application of EU regulation. Nevertheless, timely industry involvement in BEREC guidance remains critical for operators due to more and more complex regulatory provisions such as TSM Regulation on Roaming and Net Neutrality or the new measures envisaged in the Code. In order to improve efficiency, BEREC´s should further increase transparency and more regularly engage with industry stakeholders, especially as they deliver very specific technical guidelines where operator's know-how and input are key.

In our opinion, the future role of BEREC should not be based on binding powers or executive tasks but more on its capacity to provide timely technical guidance that facilitates harmonized implementation of EU regulation. We believe that the role of BEREC, as currently proposed in the Code, should be reconsidered in order to shift its perspective towards an advisory body that provides this timely technical guidance. That, in order to ensure consistency in the implementation at the national level of the provisions adopted by the EC (i.e guidelines on roaming or NN for the implementation of the TSM provisions).

B. BEREC´s work with the regulatory objectives

1) Which of the above described practices can be used in order to increase BEREC's transparency and accountability? Are there any additional proposals for BEREC to increase its transparency and accountability?

Public Workshops and public consultations provide good basis to increase engagement with stakeholders but more involvement with the industry would be desirable (eg: creation of forum with the industry to discuss relevant issues, provide channels to ease direct communication with operators, be receptive to specific meetings with players when required, etc..).

2) Do you consider that BEREC's current engagement with stakeholders provides the opportunity to engage in the work of BEREC at the right time and at the right level? Are there any particular areas where you believe BEREC could improve or do things differently?

In this respect, we believe that there is substantial scope for progress, in particular with regard to the activities of BEREC Expert Working Groups (EWGs). We encourage BEREC to continue engaging in open discussions and increase the transparency of its work, in particular by subjecting its foreseen activities to public consultation.

3) How can BEREC improve its communication to stakeholders and to the public? More specifically, which instrument(s) (press releases, public debriefings, information on the website, etc.) do you consider to be particularly useful and why? Do you have any proposals for new channels of engagement or for the improvement of the existing ones?

Among others, we consider that the following proposals could be useful:

- Establish communication channels with the sector allowing to exchange views with BEREC Expert Working Groups (EWG) on a more regular basis prior and after the launch of its consultations. Thus BEREC would further increase the level of professional discussion between the industry and BEREC experts on the substantive issues.
- Public workshops and exchanges between the EWGs and stakeholders, to be envisaged since the earlier stages of the formulation of BEREC's reports and positions, would represent a substantial step forward.
- Develop more initiatives aimed at fostering the dialogue between BEREC and stakeholders, such as Stakeholders' Forums.
- Envisage public consultations for all the relevant items included in the Working Plan.