

Vodafone response to the BEREC report on the impact of premium content on ECS markets and the effect of devices on the open use of the Internet

8 November 2017

Vodafone welcomes BEREC's decision to analyse the impact of premium content on ECS markets and would like to use the opportunity to comment on the conclusions BEREC draws, based on its findings, on premium content/ECS bundling practices (section 2.2.4, p. 16/17 of the draft report from 05. October 2017).

- Vodafone agrees that the bundling of services, including such of telecommunications services with Pay TV, in general provides good outcomes for the consumer and increases competition.
- However, as described by BEREC¹, there is a particular risk related to **an operator with SMP in the fixed broadband market**, as for this operator, incentives to foreclose the market by pursuing an anti-competitive bundling strategy are increased. Hence, the bundling of premium TV content² by one **single operator with SMP in the fixed broadband market** is more likely to be anti-competitive and therefore should be the primary focus of BEREC.
- While regulatory intervention must always be evidence-based and carried out on a case-by-case basis, Vodafone agrees with BEREC's findings that NRAs are currently not sufficiently equipped to deal with competition issues arising from bundling **by a single operator with SMP**³, even if the NRA found competition issues to exist in a specific case. Such issues can currently often only be addressed in combined work of the local NRAs and NCA.
- Thus, the BEREC report rightly highlights the need to improve
 - the cooperation between NRAs and NCAs, as well as to clarify the important role of Media NRAs, including in cases of mergers between telecommunications operators and broadcaster, for which to Vodafone's awareness, only some countries foresee a binding opinion for Media NRAs⁴.
 - the level of remedies available to NRAs to address anti-competitive behaviour by a **single operator with SMP in the fixed broadband market** through the bundling of fixed broadband and premium TV content. NRAs must remain able to deal with

¹ "The larger ECS providers are the most able to offer premium content under exclusive terms bundled with ECS.", BEREC Draft report on the impact of premium content on ECS markets and the effect of devices on the open use of the Internet, p.17.

² While what specifically constitutes such premium TV content may vary from market to market and depend on a case-by-case analysis, Vodafone understands this to be content that is sufficiently compelling for a significant number of customers to influence their choice of fixed broadband provider.

³ "The telecommunications regulatory framework is focused on ECS, and premium content is not included in its scope. This implies that most NRAs do not have any power to intervene directly on competition issues related to premium content provision and rights management, although those with powers that extend to audio-visual markets can also act on content issues not directly related to ECS. However, as explained in the previous sections, ECS operators are bundling premium content with ECS. This allows for a limited intervention by NRAs, focused on ex-ante regulation, as is the case for the replicability of bundles including ECS and premium content."; BEREC Draft report on the impact of premium content on ECS markets and the effect of devices on the open use of the Internet, p.21.

⁴An illustrative example is the merger case of Portuguese incumbent Portugal Telecom and TVI, where NRA opinion lack a clear binding nature.

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dominance in interdependent markets.⁵ Such remedies could include access to content as well as improved economic replicability tests.

With regards to the effect of devices on the open use of the internet, Vodafone agrees with the key findings and the conclusion that any potential threats remain rather hypothetical and that at present no further regulatory intervention is necessary.

⁵ Vodafone believes that NRAs are in continuous need of competences as provided for in Art. 14 (3) Framework Directive and that removing these powers will have a negative effect on the NRAs ability to deal with anti-competitive behaviour by operators with SMP in fixed broadband.