



Response to

BoR (17) 176

Draft BEREC Work Programme 2018

Also covers

BoR (17) 181

*Impact of Premium Content on ECS markets and the effect of
Devices on the open use of the Internet*

BoR (17) 186

Monitoring Mobile Coverage

8 November 2017

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I. About MVNO Europe

1. MVNO Europe represents various types of Mobile Virtual Network Operators, with different business models, addressing retail consumers, business users, the public sector, machine-to-machine (M2M) and Internet of Things (IoT), etc. <http://www.mvnoeurope.eu/members>
2. Our members provide mobile-only offers, fixed-mobile convergent offers and offers incorporating audio-visual media content, financial services, machine-to-machine communications including connected cars, embedded data SIMs for tablets, laptops and other devices, etc. Our members are also active on wholesale markets as MVNE (Enabler) / MVNA (Aggregator). MVNO Europe does not represent branded resellers.
3. MVNOs currently represent +/- 10% of SIM cards in the European Union.
4. MVNOs contribute strongly to competition and provide clear Business to Consumer (B2C) and Business to Business (B2B) end-user benefits. MVNOs also contribute to financing mobile networks through payment of wholesale charges which assure revenues to mobile network operators, whilst avoiding costly duplication of network assets.

II. A sincere THANK YOU to BEREC

5. MVNO Europe first wishes to take this opportunity to **thank BEREC for its 9 June 2017 update of the Wholesale Roaming Guidelines**¹. BEREC's clarifications have all been useful, and especially in **Guideline 4** regarding numbering ranges in the context of eligibility to wholesale roaming access/wholesale roaming resale access (the reference to the ITU E.212 Recommendation). Guideline 4 has helped to put an end to undue restrictions practiced by some operators, thereby facilitating our members' roaming IoT offerings.

¹ http://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/7116-berec-guidelines-on-regulation-eu-no-5312012-as-amended-by-regulation-eu-20152120-and-by-regulation-eu-2017920-wholesale-roaming-guidelines

III. Introduction and Elements of Key Importance

6. MVNO Europe welcomes BEREC's initiative to consult interested parties on its draft Work Programme for the year 2018 (hereafter 'draft WP2018'), on mobile coverage, and on (mobile) devices and operating systems. MVNO Europe is pleased to provide this brief contribution.
7. This contribution should be read in conjunction with our response to BEREC's consultation on its Mid-Term Strategy 2018-2020 – BoR (17) 109, in which we set out in considerable detail our mid-term expectations from BEREC and NRAs.
8. This contribution is focused on the draft WP2018 (we refer to specific Sections of the draft WP2018 in *italicised text where relevant*). It also briefly addresses parts of BEREC's simultaneous consultations BoR (17) 181 and BoR (17) 186, notably as regards (mobile) devices and operating systems, and mobile network coverage. Please refer specifically to paragraphs 11 a), 16 and 17 of this MVNO Europe response with regard to those two specific BEREC consultation documents.
9. The extent to which pro-competitive policies, legislation and regulation will continue to be pursued in the years to come is at stake, as is the shape of EU telecommunications and ICT/Digital markets going forward. **We expect BEREC to maintain and enhance its pro-competitive stance, and continue to pursue an EU internal market on a basis which makes sense for Europe-based challenger operators, ultimately for the benefit of end-users.** Indeed, MVNO Europe expects BEREC to be instrumental in enabling challenger operators such as MVNOs to continue to play their role in delivering innovative solutions for all types of customers, building on MVNOs' lead in areas such as attractive data-led offers, fixed-mobile convergence (for professional users and for consumers), connected cars and embedded SIMs.
10. We note with satisfaction that BEREC will be devoting particular attention to specific issues relating to **IoT and '5G'** in the relevant work streams (*Section 2.3, and Section 3.1-3.5 draft WP2018*). We ask BEREC to explicitly take account of the **B2B segment** in mobile markets and converged markets involving mobile connectivity. We especially ask BEREC to ensure that its actions **enable and foster a viable and diversified European-led ecosystem for M2M and IoT, without undue fragmentation along national lines.**
11. MVNO Europe's **key points of attention** for the remainder of 2017 and for 2018 are as follows (the points below include references to the relevant Sections of the draft WP2018):

- a) **Removal of remaining undue restrictions on wholesale access** (wholesale roaming access/wholesale roaming resale access + domestic MVNO access), by BEREC and NRA enforcement action in application of Art. 3 of the Roaming Regulation (and NRA mediation/dispute resolution powers).

Special attention is warranted to the situation in **Germany**, as several of our members (and other companies) continue to experience severe difficulties in obtaining wholesale roaming access (e.g. drawn-out negotiations/unacceptably long implementation lead-times, non-inclusion/delay of 4G roaming, refusal of Full MVNO access/use of own SIM cards/use of own core network, etc.). The situation in Germany is **hampering the development of pan-European IoT**, leading to European MVNOs not being able to serve pan-European and global market segments, e.g. in the automotive and connected devices markets.

If undue restrictions of a similar nature were to appear in EU Member States in the context of '5G', this would severely damage the innovation potential of '5G'. **We therefore ask BEREC to include the wholesale access dimension (roaming access as well as domestic MVNO access) in its work on '5G'** (*Sections 3.2 and 3.4 draft WP2018, and mobile coverage in BoR (17) 186*).

- b) The **level of the wholesale roaming caps** compared to retail (incl. domestic=retail) prices being practiced, **causing exclusionary effects for MVNOs**. We are aware that BEREC is not the body setting the caps, but **we urge BEREC to make an inventory of problems, to feed into the European Commission's end-2018 Interim Report** on the functioning of the Roaming Regulation (*Section 6.2 draft WP2018*).
- c) Effectively implementing a **unified Mobile Termination Rate (MTR)** across the EU, **at a low rate**, not only in the context of mobile roaming, but also for cross-border calls (*Section 6.5 and Section 6.6 draft WP2018*).
- d) The **review of the EU regulatory framework**, notably the EC legislative proposal for a European Electronic Communications Code, which has entered the trialogue phase, is of structuring importance for the markets that concern MVNOs. We ask BEREC to continue to be proactive in this area (*Section 6.1 draft WP2018*). For reference, we support unequivocal independence for NRAs, a clear 'toolbox' for NRAs which is not artificially constrained by legislation, and NRA powers over radio spectrum, including the possibility to include pro-competitive wholesale access conditions in spectrum licences.

We reiterate (see our response to the draft BEREC WP2016 and WP2017) that **fit-for-purpose wholesale access for MVNOs**, incl. in terms of network technologies and in terms of wholesale charges, is necessary in order to ensure sustainable competition and innovation (in technical and in commercial terms). MVNOs need to: (i) benefit from the **same RAN** technologies and the same RAN coverage as the Host MNO(s) **on a non-discriminatory basis**, and (ii) **not be subject to margin-squeeze**. In the context of 4G, several of our members have faced (and some continue to face) a situation in which their host MNO(s) launched 4G retail services, but withheld 4G wholesale from MVNOs hosted on their network, for periods lasting several months to several years. Similarly, 4G wholesale roaming is withheld by some operators to this day. If no action is taken, the same is likely to occur for '5G'. Such a state of affairs will harm competition and innovation. **We therefore ask BEREC to include the wholesale access dimension (roaming access as well as domestic MVNO access) in its work on '5G' (Sections 3.2 and 3.4 draft WP2018, and mobile coverage in BoR (17) 186).**

IV. Specific MVNO Europe Comments

12. Section 2.3: MVNO Europe supports a potential BEREC initiative to develop and monitor IoT indicators. This should not only count the number of devices in use, it should also categorise them, including whether they are static or move regularly, domestic or trans-border. **In addition, the BEREC initiative should examine whether there are competition-related obstacles/bottlenecks to IoT development, and keep track of the conditions of competition for service delivery**, to ensure that threats to competition are identified in a timely manner, and can be addressed if needed. That being said, BEREC and NRAs need to be budget conscious, and avoid imposing material new costs on industry, including data collection and data presentation costs. If any additional fees are to be levied on market participants, these should be duly justified and should be apportioned in accordance to revenues generated.
13. Section 3.2: MVNO Europe strongly supports a BEREC best practices report regarding spectrum authorisation and award procedures with a view to '5G', and the related 'market shaping' aspects of frequency licence granting, amendment or renewal. We agree that *'[...] the design of selection procedures for frequency licences and the conditions attached to these licences have consequences on the structure of national mobile markets (either by enhancing competition or by limiting it)'*. **We ask BEREC to explicitly include in the description of**

the planned best practices report, and in the forthcoming report itself, an explicit reference to (potential) wholesale network access conditions (which is not the case in the draft WP2018). We also ask BEREC to make this report a subject of public consultation (which is not the case in the draft WP2018).

MVNO Europe hereby draws BEREC's attention to the EU Radio Spectrum Policy Programme: Decision No 243/2012/EU of the European Parliament and the Council of 14 March 2012 establishing a multiannual radio spectrum policy programme² (hereafter 'RSPP'). This is a binding legal instrument, formally agreed by all EU Member States.

Article 5 of the RSPP concerns competition, and includes wording as follows (our underline):

"Article 5: Competition

1. Member States shall promote effective competition and shall avoid distortions of competition in the internal market for electronic communications services in accordance with Directives 2002/20/EC and 2002/21/EC.

They shall also take into account competition issues when granting rights of use of spectrum to users of private electronic communication networks.

2. For the purposes of the first subparagraph of paragraph 1 and without prejudice to the application of competition rules and to the measures adopted by Member States in order to achieve general interest objectives in accordance with Article 9(4) of Directive 2002/21/EC, Member States may adopt, inter alia, measures:

a) limiting the amount of spectrum for which rights of use are granted to any undertaking, or attaching conditions to such rights of use, such as the provision of wholesale access, national or regional roaming, in certain bands or in certain groups of bands with similar characteristics, for instance the bands below 1 GHz allocated to electronic communication services. Such additional conditions may be imposed only by the competent national authority;

[...]"

NRAs (and other authorities in charge of spectrum licensing) are therefore required by the RSPP to give reasoned consideration to potentially mandating wholesale network access as part of spectrum licensing proceedings.

² RSPP: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:081:0007:0017:EN:PDF>

14. We also wish to emphasise that the European Commission's legislative proposal of 16 September 2016 for a European Electronic Communications Code (which is currently in triologue negotiations with the European Parliament and Council), contains a 'codification' of Art. 5 of the RSPP, to incorporate the pro-competitive measures, including potentially mandating wholesale access into the core of future EU legislation on electronic communications. This is Art. 52 of the draft EECC³.

EU Member States/NRAs have included wholesale access obligations in radio spectrum assignment proceedings, notably in Germany (historically only airtime resale), and Ireland (where the 2100 MHz spectrum assignment proceeding included offering a licence which required MVNO access⁴).

We draw particular attention to the much more recent French cases, where the 4G spectrum assignment proceedings were a hybrid beauty contest/auction, in which candidates could win points by committing to providing Full MVNO access. In the 2011 2.6 GHz proceeding, 3 out of 4 winning bidders committed explicitly to providing Full MVNO access⁵. In the 2011 800 MHz proceedings, 3 out of 3 winning bidders committed explicitly to providing Full MVNO access⁶, not only on the 800 MHz spectrum won in the proceeding, but also on their other previously licensed spectrum. Details on the Full MVNO nature of the licence condition are contained in Section 5 of the spectrum licences⁷. Strong focus is placed in the MNO licence conditions on the ability for Full MVNOs to be able to: (i) switch between Host MNO networks, (ii) rely on multiple host MNOs in parallel, (iii) have full commercial autonomy on all retail markets and distribution networks, and (iv) own their customer base, and not be subject to restrictions on changes in their shareholding structure, or selling the wholesale access rights they

³ EC legislative proposal EECC: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=comnat:COM_2016_0590_FIN

⁴ The Irish licence was won by Three Ireland, and included specific MVNO access obligations and retail-minus 35% wholesale charges, set out in Schedule 5, Part 7, of its subsequently granted licence: <https://www.comreg.ie/media/2017/02/M3G1011.pdf>

⁵ ARCEP page in English, including the MVNO commitments, which were subsequently included in the spectrum licences of the MNOs: https://www.arcep.fr/index.php?id=8571&no_cache=1&tx_gsactualite_pi1%5Buid%5D=1431&tx_gsactualite_pi1%5BbackID%5D=1&cHash=136860fe4eb69ee4fb08ce241c378d76&L=1

⁶ ARCEP page in English, including the MVNO commitments, which were subsequently included in the spectrum licences of the MNOs: https://www.arcep.fr/index.php?id=8571&no_cache=1&L=1&tx_gsactualite_pi1%5Buid%5D=1478&tx_gsactualite_pi1%5Bannee%5D=0&tx_gsactualite_pi1%5Btheme%5D=0&tx_gsactualite_pi1%5Bmotscle%5D=800%20MHz&tx_gsactualite_pi1%5BbackID%5D=2122&cHash=131ed5455f1cccd964db8c91959c0702

⁷ For example, the Orange France licence, pages 14-15 (in French only – we can provide a translation on request): https://www.arcep.fr/uploads/tx_gsavis/12-0038.pdf

contractually acquired. In addition, the MNO licence conditions provide for: (v) technical non-discrimination in favour of MVNOs on quality of service, compared to the Host MNO's own services, (vi) an explicit right for the Full MVNO to own and operate its own core network and its own interconnections with third party operators, and (vii) reasonable economic conditions, compatible with effective and loyal competition on wholesale and retail markets.

An EU Competition Brief (published by DG COMP of the European Commission) in 2013 describes the position of the French Competition Authority on the matter of (Full) MVNO access⁸.

(Full) MVNO access was also mandated by National Regulatory Authorities in other EU/EEA Member States, by way of findings of single and joint Significant Market Power (SMP). Key cases are: Spain (joint SMP, 2006 – withdrawn in 2017 – the 2017 EDPR report discusses the impact of MVNO access⁹), Slovenia, Cyprus, and Norway (single SMP).

In addition, Full MVNO access was mandated as part of antitrust proceedings of EC DG Competition, in Austria, Ireland, Spain and Belgium in the 2012-2016 timeframe.

The German Telefonica/E-Plus merger approval by EC DG Competition is subject to various ongoing legal proceedings, including on the exact nature of the wholesale access requirements, notably as regards Full MVNOs.

15. Section 3.3: MVNO Europe's members are not involved in mobile infrastructure sharing / RAN sharing at this time. However, we believe that infrastructure and network sharing, and new forms of sharing, will gain importance going forward. Several of our members highlighted, in an event held at the European Parliament on 28 June 2017¹⁰, that '5G' networks are expected to be intrinsically 'shared', e.g. by way of joint rollout and 'network slicing', involving telecommunications operators, but also other 'vertical' industry and actors from the public sector. New deals are also imaginable for our fixed operator members, in the context of the fixed backhaul requirements for new small cells, etc. We note in this regard that some fixed operators (including MVNO Europe members) have obtained experimental spectrum authorisations for '5G'. Fastweb's experimentation with TIM in Italy (and Huawei as the equipment vendor) specifically includes sharing, between two telecommunications operators,

⁸ EU Competition Brief – extract: http://ec.europa.eu/competition/ecn/brief/01_2013/fr_mobile.pdf

⁹ EC EDPR Report 2017 on Spain: http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=44458

¹⁰ <http://mvnoeurope.eu/project/save-the-date-breakfast-on-5g-and-the-key-role-of-mvnos/>

and test arrangements with others (52 partners in total)¹¹. On the basis of the above, **we ask BEREC not to constrain its report to a description of legacy situations, but also report on, and stimulate innovative future forms of sharing.**

16. Section 3.4 (and mobile coverage in BoR (17) 186): MVNO Europe confirms (see comments in chapter II above) that **there have been (and remain) situations in which Host MNOs do not extend their full RAN coverage to the MVNOs they host** (e.g. lengthy exclusion of 800 MHz 4G coverage in the UK to hosted MVNOs), and situations in which providers of wholesale roaming access/wholesale roaming resale access do not include 4G roaming (e.g. currently a remaining issue notably in Germany). As stated above, **MVNO Europe has real concerns that this could happen again with '5G', and perhaps even in manners which are more exclusionary. Undue restrictions of a similar nature in the context of '5G' would severely damage the innovation potential of '5G'**. That being said, BEREC and NRAs need to be budget conscious, and avoid imposing material new costs on industry, including data collection and data presentation (coverage mapping) costs. If any additional fees are to be levied on market participants, these should be duly justified and should be apportioned in accordance to revenues generated.
17. Section 5.1 (and BoR (17) 181 – specifically the section on effect of devices on the open use of the Internet): We note that BEREC will report on termination of contracts and switching of provider, and we are pleased to see that e-SIM is mentioned in this context. MVNO Europe has been, and remains, concerned about practices of device manufacturers and their deals with operators, which may de-facto reduce the customers' choice of operator, and/or damage the customer experience where the customer decides to rely on an MVNO as their operator. On the basis of the above, **we ask BEREC to include in its reports the customer activation experience – on all types of devices, not just mobile handsets. This includes:**
- a) Can the customer/end-user really choose its operator (specifically including an MVNO) on a device they purchase unlocked?
 - b) Is the customer/end-user experience limited (specifically if they choose to use an MVNO), even on an unlocked device?
 - c) If (e-)SIM-locking is applied, is the maximum contractual duration respected?

¹¹ <http://www.fastweb.it/corporate/media/comunicati-stampa/tim-fastweb-e-huawei-parte-progetto-per-sperimentazione-5g-a-bari-e-matera/?Ing=EN>

d) Are there/will there be new forms of locking-in beyond temporary contractual SIM-locking where the device is bundled/subsidised?

18. Sections 6.2 and 6.3: As stated in Section II above, we urge BEREC to make an inventory of problems relating to the level of wholesale roaming caps in the light of retail (domestic=roaming) pricing, to feed – as early as possible – into the European Commission’s end-2018 Interim Report on the functioning of the Roaming Regulation. We ask BEREC to make a draft of that inventory public, and to make it subject to public consultation.

The introduction of RLAH has resulted in an exponential increase in roaming traffic, particularly for voice and data, that is having a severe impact on MVNOs, since MVNOs only have outbound roaming traffic, and cannot generate revenues from inbound roaming traffic.

Indeed, in several cases, MVNOs are now incurring net losses on the provision of retail roaming services to their customers. The main reason is simply that retail (domestic=roaming) prices are generally far lower than wholesale caps, and that MVNOs typically pay wholesale charges +/- at the wholesale cap level, including in some cases de-facto higher charges than the wholesale caps.

The fact that some MVNOs have been able to secure ‘sustainability mechanism’ derogations from NRAs, allowing the application of a retail roaming surcharge, has only somewhat mitigated the situation, but affects MVNOs’ competitiveness on retail markets. MVNOs will lose customers to MNOs where they charge higher roaming retail prices, thereby fundamentally putting at risk their position as challenger competitors.

The International Roaming BEREC Benchmark Data Reports foreseen in 2018 (*Section 6.3 draft WP2018*) should be developed in a manner to highlight discrepancies between widely practiced retail (domestic=roaming) prices, the level of wholesale caps, to provide the necessary evidence of distortions of competition.

MVNO Europe encourages BEREC to gather specific and relevant data and benchmarks to evaluate the impact of the introduction of RLAH on the market, and specifically on MVNOs.

19. Section 6.6: Some of our members continue to call into question whether EU regulated MTRs are fully applied in practice in all EU Member States for calls originating from other EU Member States. We ask BEREC to examine whether some operators apply differential MTRs depending on the origin of the calls, where the origin is clearly within the EU.

20. Section 6.11: MVNO Europe requests to be involved in the annual BEREC Stakeholders' Forum, and in all BEREC engagement with stakeholders going forward.

V. MVNO Europe Contact Details

Should you require any clarifications or further information on the elements and positions set out by MVNO Europe in this response, please contact:

Political Intelligence (Functions as Secretariat of MVNO Europe)

Ms. Morgane Taylor

Tel: +32 2 550 41 10 – morgane@mvnoeurope.eu www.mvnoeurope.eu

Rue du Commerce 124/5, 1000 Brussels, Belgium