

Open Fiber answer to “BEREC work programm 2019” dated 4 October 2018

We welcome the opportunity to express our views on the ambitious BEREC 2019 Work Program (WP).

Before entering into specific comments on the topics included in the WP strategic priority list, we would like to address a subject, not included in the priority list, that in our view has to be addressed with maximum priority within the scope of the “Strategic priority 1: Responding to connectivity challenges and to new conditions for access to high-capacity networks”.

The urge to foster investment in VHC networks in order to achieve the objectives of the EC Communication COM (2016) 587 (Gigabit Society) requires to pay specific attention to guaranteeing that the wholesale-only business model can evolve in a fairly competitive market, together with its ability to foster both competition and VHC networks rollout.

There is in fact strong evidence that wholesale-only operators are entering the market by building very efficient VHC Networks. Widely resorting to the opportunity to re-use existing infrastructures (allowed by the Broadband Cost Reduction Directive) is the main enabling factor of this increased efficiency.

This market development, that is proving very effective in order to foster both VHC networks rollout and network competition, represents a major challenge to existing network monopolies. These are strongly reacting to the relevance of this unprecedented competitive challenge, which undermines their ability to maintain their dominant position, strictly based on their control of the network and of its evolution.

Our experience as the main wholesale-only operator in Europe has made us aware of the fact that the present regulatory toolkit and, in some cases, the regulatory approach, is not addressing the issue of guaranteeing a fair competition between incumbent and wholesale-only operators.

So far, we have seen different cases where incumbents have reacted with anticompetitive practices to the entry of wholesale-only operators. To give an idea of the anticompetitive behaviours that wholesale-only operators are facing, we list:

- the selective price cuts and other lock-in practices put in place by incumbents to discourage wholesale-only operators in specific geographic areas;

- the strategic duplication of investments by incumbents in the same area where wholesale-only operators are developing their network. In such cases, where the incumbent modifies its plans and decides to carbon copy the investment plan of the new comer (or part of it), it is clear that the incumbent's priority is not to earn an adequate return on the capital employed (that would have reasonably led to an investment decision at least in part independent from the footprint of the newcomer) but mainly to challenge the financial viability of the newcomer's project, depressing the potential economic returns of the investment made by the wholesale-only operator;
- the refusal to grant access to incumbent's physical infrastructures in order to prevent the entry of third parties into the market (in other words, economic and technical barriers);
- the adoption of communication strategies which are likely to distort the customers' economic behaviour with regard to the proper distinction between wholesale-only offers (based on full fiber FTTH networks) and incumbent offers (mainly based on hybrid fiber-copper FTTC networks).

Before the advent of wholesale-only operators, the European regulatory framework and its national application had been developed considering the strategic interaction between incumbents and new entrants, that usually operated only at retail level or, in a few cases, were vertically integrated as the incumbent (usually CATV operators using DOCSIS on their networks).

In this context, because of the lack of direct wholesale competition, NRAs intervened in the wholesale market “[...] *whether, absent regulatory intervention upstream, there is a risk of consumer harm on the retail market [...]*”¹. In other words, interventions at wholesale level has been conceived as a remedy to address the efficiency of retail market.

The market entry of wholesale-only operators requires taking into account the new market structure and guaranteeing a fair competition at wholesale level. This would in turn produce direct positive effects on the competition at retail level. Since the modified greenfield approach above mentioned was adopted in the absence of competition at wholesale level (and more specifically, because of this lack of competition), we suggest that before applying this approach the NRAs should also consider all the measures deemed necessary to ensure the development of the insurgent

¹ So called “Modified Greenfield approach”, see page 13 of COMMISSION STAFF WORKING DOCUMENT EXPLANATORY note - Accompanying the document Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services. Brussels, 9.10.2014 SWD(2014) 298.

competition at wholesale level. In doing so the NRAs would take into consideration the aim to defend competition in the wholesale market as a *per se* objective.

In conclusion, because of the significant development of the wholesale only model, we strongly believe that BEREC should address the definition of appropriate guidelines for the imposition of ex-ante measures, aimed at guaranteeing a fair competition in the wholesale market and therefore the market entry of efficient wholesale-only operators.

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With reference to the proposed priority list, Open Fiber expresses its agreement to the vast majority of the items proposed. Our following comments focus on the few topics where we suggest some changes to the initial proposal.

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

Q1.8. Migration from legacy to fibre-based networks

The migration scenario taken as reference of the proposed analysis is the one where customers migrate from the incumbent's copper network to the incumbent's fibre network. Network competition and the relevance of the migration process in order to foster competition at wholesale level has not been considered.

The design of the migration process should not only guarantee that retail operators have all the time and information necessary to migrate their customers from copper to fiber, but it should also guarantee that the process allows the migration of end customers from the legacy incumbent's network to a new entrant's network. The migration process must in fact ensure some form of "equality of treatment" between the migration towards the incumbent's network and the migration towards a new entrant's network.

It is necessary to analyse the topic by starting from the necessity of a pro-competitive design of the migration process.

It is important to bear in mind that migration processes led by incumbents may reveal themselves to be designed in order to take advantage of the migration process and to maintain/strengthen their dominant position in the market. Such is the case of specific migration offers promoted by incumbents aimed at locking-in customers on their own network, avoiding the migration to

alternative infrastructures, even if the latter are both more efficient and more performing, or the case of migration processes that take place shortly before the building of a competitive VHC Network.

For this reason, it is critical that a consistent European approach insists both on a procompetitive design of the process and on the necessity to monitor carefully the ways in which incumbents work out the migration processes, in order to safeguard the alternative operators' network/investments.

More specifically the NRAs should guarantee that migration processes allow end customers to migrate towards the most performing VHC networks in order to maximise the consumer welfare.

Since Open Fiber believes that the migration from legacy infrastructures to fiber-based networks will be the most relevant competitive process of the next decade in the telecom sector, Open Fiber communicates its willingness to bring its contribution in the upcoming workshops.

Q1.11. Carry-over work on pricing for access to infrastructure & civil works

We consider that the access to existing infrastructures is of the utmost importance in order to build VHC networks in a timely and efficient way.

We express our concerns about the fact that the analysis concentrates on prices, while our on field experience has taught us that the most relevant barrier to accessing existing infrastructures are:

- the availability of information in a standardised format (in particular in the case of in-building infrastructure);
- the processes designed to access infrastructures, that normally do not allow to place massive orders for an area in which an operator is building a competitive network.

We suggest that the analysis should include these issues.

2. Strategic priority 2: Monitoring potential bottlenecks in the distribution of digital services.

Q2.3. Ex-ante margin squeeze tests

The experience of selective price cuts that has followed the market entry of wholesale-only operators requires that wholesale prices charged by incumbents should be subjected to some ex-ante economic test in order to reduce the risk of setting prices at levels aiming at the exclusion of competitors.

Since the same issue at retail level has been successfully solved through the development of replicability tests, we suggest that an economic test similar to the replicability test applied for retail offers should be applied at wholesale level. The test should ensure that the wholesale price charged by an incumbent operator does not exclude an equally efficient wholesale operator from the market and should take as a reference cost orientation principles.

Open Fiber suggests that the workshop should encompass also margin squeeze or other fit for purpose tests with the aim to assess the economic replicability of the incumbent offer at wholesale level.

3. Strategic priority 3: Enabling 5G and promoting innovation in network technologies

Q3.3. Carry-over work on infrastructure sharing

The development of the 5G licensing process throughout Europe is taking place within a multi-operator environment and this may entail a relevant risk of under-investment in infrastructures, if operators do not put in place effective cost sharing programs.

One of the most promising scenarios is the appearance of Neutral Hosts, acting as wholesale-only operators, which build and manage relevant infrastructures for a plurality of network operators.

The resulting cost sharing could in fact prove to be effective both in maintaining competition among a higher number of operators and in extending network coverage, to the benefit of all customers.

We suggest an investigation in order to identify how NRAs may help foster this scenario within the boundaries set by the new EECC.