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**Subject:** The remarks of Magyar Telekom with regards to the Berec Common Position on Mobile Infrastructure Sharing

## General Remarks

### Introduction

Magyar Telekom (“**MT**”) welcomes the Berec Common Position on Mobile Infrastructure Sharing (“**Common Position**”). The Common Position was released at a crucial point in time when the telco industry prepares for the next leap in technology with the appearance of 5G solutions. MT therefore highly appreciates the opportunity for a fruitful discussion between the regulators and the market players on this vital issue.

MT particularly welcomes that the Common Position provides a refined typology of the different types of mobile network sharing arrangements, consolidating experience from a wide range of Member State examples. Furthermore, it offers a very useful compilation of the electronic communications regulatory framework’ relevant provisions with respect to network sharing while at the same time summarizes the principles of competition law with regards to said cooperations. The relationship of regulatory and competition law is of quite complex nature, hence we point out the following aspects for deliberation.

### The link between regulatory environment and competitive assessment

As stated in Article 4 (k) in Regulation 2018/1971/EU (“**BEREC Regulation**”), BEREC is entitled to issue recommendations and common positions, and disseminate regulatory best practices addressed to the NRAs in order to encourage the consistent and better implementation of the regulatory framework for electronic communications.

It is clear that a guidance concerning network sharing serves the purposes of the consistent and better implementation of the regulatory framework – however, the Common Position not once blurs the line between *ex ante* and *ex post* market interventions as well as between the general principles of competition law the application of specific competition law legal concepts

Under Section 2, the Common Position summarizes the legal regulatory framework for network sharings, where under Section 3.1.2., it displays scenarios when an NRA might find itself in a position to assess such sharings. We underline that in the light of these sections it would be useful to distinguish between *ex ante* and *ex post* assessment of sharings: as correctly stated under Section 2, under the regulatory framework there might be cases where a sharing would be imposed as a regulatory obligation (we add that in addition to this, in some Member States the NRA approves specific types of sharings for the sharing agreement to take effect.) However, the situation when two entities willfully enter into a network sharing cooperation agreement in general should be assessed under general competition law.

The extent to which an NRA might engage in a competitive assessment *ex ante* should depend on the competence of said NRA and the respective NCA or Commission. Thus the benefits and drawbacks set out in Section 2.2. should be defined with a forward-looking mindset, within the regulatory framework used by the NRAs, rather than a result of the *ex post* competition case law under the competition law framework.

In Hungary, current court practice also supports the NRA's ability to apply sector-specific considerations when assessing a network sharing arrangement, in contrast to applying competition law *ex post*. Hungary is a Member State in which the NRA has a specific authority in approving spectrum sharing agreements under NMHH Decree 7/2013. According to the Decree, upon approval the NRA is obliged to assess whether the spectrum sharing in question (...) ensures the principles of efficient spectrum use. Upon the appeal against the NRA approval of the 900 Mhz spectrum sharing between Magyar Telekom and Telenor Hungary, Budapest Capital Regional Court stated that the NRA does not have authority over competition law issues, hence should not carry out a competitive assessment, since these issues are to be decided by the Hungarian Competition Authority ("HCA").

Therefore, we point out that it should be useful if the Common Position differentiated into more detail between *ex ante* and *ex post* assessment of network sharings while pointing out the exact tools ought to be used in an *ex ante* assessment by an NRA.

### **The technological background to network sharings – more flexibility needed in the Common Position to accommodate upcoming 5G developments**

The Common Position aims to assess the different types of network sharings, however, it lacks a comprehensive description of the effect of different infrastructure layers (e.g. core, RAN, backhaul, etc.) with regards to retail competition. Since telco markets are overwhelmingly technology-driven, it would be quite useful if the Common Position assessed in more detail the specific infrastructural elements of an MNO's infrastructure and specify the role of each element in said MNO's competitive behavior.

In accordance with the ETNO-GSMA remarks, we add that the above thought will have an overwhelming importance in a 5G ecosystem, that will substantially change the overall network configuration and management.

As a consequence, the technological evolution towards 5G will quite surely shift the parameters of competition outside the network access layer, thus active network sharings as we know them today will not play the same role in a 5G framework.

Given this change in the network ecosystem, making it broader and more complex, the need for sharing increases, be it passive or active. Therefore it would serve the purposes of innovation and competition itself not to set out restrictions which may generate chilling effects on future innovation and will slow down the introduction of 5G and the meeting of EU connectivity goals, but rather enable efficient investments avoiding redundant infrastructure, also resulting in environmental and public health benefits.

With regards to the awaited huge leap in technology due to 5G, we think that the technological explanation of an MNO's operation mentioned above is even more important in a Common Position.

### **Substantiation of statements – the Common Position should clarify whether it provides guidance on active or passive sharing, or sharing involving spectrum sharing**

The Common Position quite unequivocally evaluates the different types of network sharings (especially active sharings) as such that might have drawbacks to competition. However, the Common Position in more than one case does not substantiate these statements neither specifically, not generally. In our opinion, this leads to the fact that qualitative statements with regards to network sharings are rather generalized (especially under Sections 3.2.2. and 4.2.) and do not take into consideration the fact that each and every network sharing should be assessed on a case-by-case basis, taking into consideration the market position of the partners, the competitive landscape, the nature of competition, etc.

Overall, the impact of active network sharings on competition is overestimated in the Common Position. In the upcoming 5G environment the access network ecosystem will be more competitive as more technologies come into play.

## Detailed remarks

### 2.2.2. Potential drawbacks of infrastructure sharings

Amongst the potential drawbacks of infrastructure sharing, the Common Position points out to reduced incentives to invest, the requirement for increased cooperation between MNOs and reduced network resilience. However, these phenomena are merely touched upon without further substantiation or analysis.

We underline again that at this point, the Common Position uses the term “sharing agreement” generally, referring to infrastructure, without detailing the ways in which different infrastructure layers might play a role in product differentiation in the context of different market setups.

In addition, we suggest considering the deletion of the following statement in paragraph 5 of page 10: *“and remain a concern in some European markets currently”*. Even the first half of the sentence should refer to a *“range of potential problems”*, rather than *“range of problems”*. MT believes that such broad and unqualified statements may be misinterpreted as prejudicing any future or ongoing *ex post* competition law investigations. This would imply conclusions without providing a meaningful opportunity for the relevant operators to comment on any market-specific concerns.

## 3.1. Common position (CP1) on the typology of infrastructure sharing types

### 3.1.2. Active sharing

In line with the ETNO-GSMA remarks, we point out that national roaming is distinct from the other forms of active sharing (at least financially), since it is not about sharing Opex and Capex investment in infrastructure, but merely a wholesale contract. For this reason, it may be better placed under other sharing types.

### **3.2. Important objectives and factors to consider when assessing mobile network infrastructure agreements**

We propose that Section 3.2. reflects back on Section 2.2. and only consists of situations where the NRA act in the context of implementing or enforcing the rules of the general regulatory framework. Therefore we propose Point 4. to be clarified in a way that it directly addresses the approval competence of several NRA's.

Moreover, under 3.2., the Common Position argues that one context in which an NRA should assess a network sharing is when constructing a spectrum auction. We point to the fact that network sharings only have a potential link to spectrum auctions where spectrum is shared in a network sharing, i.e. in the case of spectrum sharing. Thus Point 1. should be modified accordingly.

#### **3.2.1 Common position (CP2) on the main objectives to be pursued when considering the network sharing agreements**

MT welcomes this CP2, and believes that its points constitute a highly significant contribution by BEREC to the NRAs *ex ante* assessments of network sharing arrangements.

In addition, MT considers this section of the Common Position as an excellent opportunity to provide further guidance to NRAs to highlight how a counterfactual should be applied when conducting an *ex ante* analysis. This guidance is very much justified NRAs themselves very often play a very active role in shaping this counterfactual, e.g. by designing frequency tenders or shaping passive sharing obligations. Therefore, the counterfactual for the purpose of the *ex ante* assessment of a network sharing arrangement should also take into account any future regulatory intervention that the NRA might engage in to promote the goals stated in CP2.

#### **3.2.2. Common position (CP3) on the parameters to consider when assessing network sharing agreements**

MT points out that CP3 – as opposed to giving an *ex ante* assessment – provides an *ex post* competition guidance on network sharing.

As stated above, the parameters listed in this Section are rather generalized and unsubstantiated. For example, section 1 lists dimensions of competition that are to be taken into consideration when assessing a network sharing.

However, the enumeration under “Feasible level of competition” seems to be leaving these aspects aside, with a simplified view on when a network sharing could be beneficial for competition, with only taking into consideration the geographical type of the area where such sharings might occur. In particular, the language used in Points a) to c) appears to be based on the generalized and unsubstantiated principle that network sharing in densely populated areas (point a) is *per se* harmful. This impression is caused by the expression in the title of Point b), which provides that such cases require a “case-specific” assessment – which might be misinterpreted so that the cases under Point a) do not even require such case-by-case assessment.

This section 2 (Feasible level of competition) should highlight how such traditional geographic concepts are set to change, if NRAs take an *ex ante* view of the market. The paragraph after Point c) very helpfully makes the point that further consideration should be given to sharing in case of non-replicable sites. This Point however should be elaborated further, to clarify at least two aspects:

First, non-replicable sites are much more likely to exist in densely populated areas, i.e., Point a) of this section 2. This therefore means that there can be no *per se* rule against network sharing even in densely populated areas, contrary to what is suggested by the current language of point a).

Second, MT considers that the Common Position should make it clear that the views expressed in points a) to c) carry the experience of past *ex post* competition law cases, and will not apply in the same manner, if NRAs take an *ex ante* view of the market. 5G deployment, particularly in high frequency bands are widely expected to require very significant investments. As a result, it is possible that standalone network development may not be financially viable even in densely populated areas. In such a situation, the rules of thumb expressed in points a) to c) should be replaced with case-by-case assessment.

Finally, we add again that under this Section, the Common Position again fails to differentiate between the possible effects of different sharing types that again might result in a more detailed analysis of infrastructure sharings.

#### 4.2. Active Sharing

As general observation and as stated above according to our opinion it would be a generalization to say that RAN sharing does impede innovation or differentiation between MNOs. This view again seems to be omitting the compelling role of other technological layers (such as the core) in the differentiation ability of an MNO. In a simple RAN sharing, individual MNOs tend to continue to separately operate their own core networks and IP platforms and are able to pursue unilateral build-outs.

#### 4.3. Spectrum sharing

We again underline the fact that in some Member States, the NRA has the competence to approve spectrum sharings. We feel that it would be quite useful to analyze the conditions under national law by which approvals might be granted. Should several Member States require the same circumstances, it would serve the aim of approximation of the different legal regimes to compare the implementation of such conditions.

#### 4.4. National roaming

The differentiation between national roaming and an MVNO agreement seems to be quite arbitrary and seems to be underestimating the role of MVNOs in the market. Here again, the Common Position seems to divert from the goal of effective competition on the retail market, where MVNOs might play a substantive role in several national markets.

#### Appendix

While the appendix gives a quite comprehensive introduction to the application of Article 101 TFEU, MT proposes that it should at least expressly stated that general competition law is enforced by competition agencies.

Budapest, January 18, 2019.

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