

ARTICLE 19 response to Public consultation on draft BEREC Common Position on Mobile Infrastructure Sharing

Introduction

ARTICLE 19 welcomes BEREC's commitment to focus on effective competition between actors for the benefit of end-consumers. Focussing BEREC's supervisory activities on promoting the interests of the European citizens, including when these citizens act in the capacity of end-consumers of mobile communications services is appropriate, and furthers other BEREC goals, such as the strengthening of the inner market and promoting competition. ARTICLE 19 would like to bring to BEREC's consideration that effective competition for the benefit of end-consumers may not only be construed as short-term assessments on quantitative elements, such as prices, but should also include long term assessment on qualitative elements, like access to choice and quality of products. Therefore, we encourage BEREC to take into due account not only exclusionary conducts towards competitors, but also exploitative abuses towards end-consumers.

Unlike internet technologies, mobile technologies have always been and risk continuing to be developed and standardized in such a way that they necessarily rely on a vertically integrated network operator. With the advent of 5G and the separation of control plane from data plane, BEREC should consider initiating a dialogue with industry actors about the possibility of enhancing competition by enabling a stronger vertical separation for the mobile sector. We note that this would increase infrastructure-based competition,¹ in the same way that consciously pursuing city-network and local fibre rings have contributed to infrastructure-based competition in EU countries such as France and Sweden.²

ARTICLE 19 wants to recall, in this regard, that regular internet technologies have developed to a state of strong robustness globally, and in fact form the core of modern mobile communications as well, precisely because they enable the interoperation of many smaller networks that can be deployed at the leisure of a geographically limited actor.

Infrastructure-based competition is service competition on mobile markets

In fixed network incarnations of these words, they have been understood to imply competition between networks using different technologies. A coax cable network would compete with a fibre ring or a copper network, for instance. In practise, however, infrastructure-based competition has not

¹ BoR (18) 236, Sec. 3.2.1.1.a.

² EPSC, 25 July 2016 | Issue 19, Connected Continent for a Future-Proof Europe Ensuring Affordable, Fast and Reliable Internet Access for a Thriving Digital Ecosystem

suggested there is competition between actors operating services on the same kind of technology network. Infrastructure-based competition has had the advantage, in this sector, of enabling different technology providers to compete one the benefits of consumers, in terms of latency or speed.

We argue that infrastructure-based competition needs to be understood differently in mobile markets. For one, roll-outs of new technologies are made homogeneously over a market for mobile technologies. The 3G and 4G/LTE roll-outs were performed by different MNOs concurrently, and MNOs were not, in fact, competing with each other on the merits of their respective technologies, but only on the merits of the services they were able to provide through their new networks. Because all the providers have used the same technology, latency and speed have been the same.

Infrastructure-based competition in the mobile sector is therefore inherently different from infrastructure-based competition the way it has been understood for fixed networks.

Infrastructure-based competition is, in fact, a form of service-based competition in the mobile sector and we believe BEREC's goals of benefitting European consumers would be served from a deeper reflection by BEREC on this point.

ARTICLE 19 believes a first step BEREC could be taking in this direction is including in the assessment of infrastructure sharing agreements their impact on the long-term availability, for consumers, of service quality and service choice, to limit the possibility of exploitative abuses by dominant actors.

National roaming and spectrum sharing

It is a concern for ARTICLE 19 that BEREC points to national roaming as a temporary arrangement between entities, rather than a useful way of ensuring consumer choice and quality for services by increasing the number of plans available to those consumers.³

In fact, BEREC lends itself to a vertically integrated view of a mobile network where one and the same entity is MNO and service provider. ARTICLE 19 argues there is no need to have such a narrow view of the opportunities presented by mobile technologies developments. Rather, BEREC should recognise that its regulatory approach will impact the way in which the mobile technologies of the future will develop.

One could imagine novel approaches to national roaming, joint ventures and spectrum sharing arrangements where two or more MNOs acquire the rights to deploy the network, but can only provide services on those networks on equal terms as MVNOs. Investments would then be recuperated through leveraging usage fees from MVNOs, but a form of functional separation would have to be imposed on the MNO's end-consumer service provision. In such a model, infrastructure coverage would be ensured by the same methods that broadband expansion in the European Union was dramatically enhanced by the local loop unbundling reforms of the 1990s.

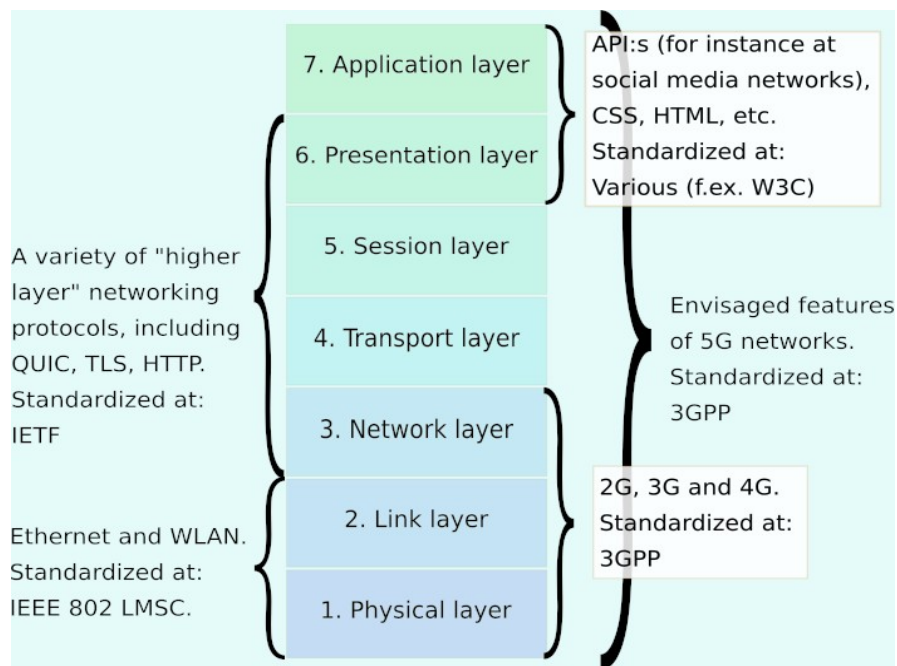
³ BoR (18) 236, Sec. 3.2.1.1.b.

BEREC and its members could explore if such a larger degree of vertical separation could assist MNOs in acquiring investments partners such as local bodies and governments. Practically speaking, this means assessing what opportunities exist to mix the various sharing strategies already identified by BEREC in different combinations, and also for BEREC's members to provide support to local governments, for instance in rural areas, that are struggling with connectivity.

To support its approach, ARTICLE 19 recalls current examples of national roaming, as investigated by ENISA in 2013.⁴ It is instructive that markets with stronger national roaming obligations, that are neither time-limited nor restricted to 2G networks, appear to be capable of serving their consumers with more diversity and higher quality of services.

Passive sharing and network virtualisation

BEREC appears to be angling for an understanding of passive sharing that is somewhat conformant with the provision of dark fibre or passive infrastructure in the fixed internet connectivity space.⁵ However, this is unsuitable since the technical layering of mobile technologies is inherently different from the technical layer of fixed technologies.



Approximate OSI structure of networks

While internet technologies have, for a large part, been specifically designed to enable the interoperability between different layers of a network operated by different actors, mobile technologies are specifically designed to do the opposite. Passive sharing appears then, not to at all be a part of the envisaged functioning of the network and spending too much time trying to work out how to best encourage or regulate it risks being a waste of time.

⁴ ENISA, National Roaming for Resilience, National roaming for mitigating mobile network outages, November 2013

⁵ BoR (18) 236, Sec. 3.1.1.

ARTICLE 19 provides here an approximate sketch of how different kinds of technologies presently used in internet environments map against the old Open Systems Interconnection conceptual model. Recognising the flaws of this model, ARTICLE 19 still believes it is a helpful visualisation for BEREC to bear in mind when considering not only the market structure that is best able to serve European consumers' interests, but also to compare the mobile markets to the fixed markets.

BEREC might instead consider whether network virtualisation and software-defined networking enables new ways of encouraging sharing of hardware equipment, spectrum resources, co-deployment of network infrastructure or control functions, or the ability to enhance service quality and choice for consumers by enabling a larger range of market actors access to consumers. We recognise this to be an inherently challenging task, since it moves BEREC's oversight activities from the familiar space of hardware into a new territory of software.

Finally, ARTICLE 19 notes that BEREC focuses on, and thus seems to encourage, mostly passive sharing. Nevertheless, market data, as collected also by BEREC in its last report on infrastructure sharing⁶, show that active sharing is rather common within the EU. As known, active sharing has numerous advantages, among which the optimisation of scarce resources, the decrease in duplication of investments, the enhancement of service differentiation, etc.. Such advantages are weighted against competition concerns arising from decrease in network competition and possible refusal to deal, which, though could be avoided through appropriate regulatory intervention. This recalled, ARTICLE 19 believes that BEREC should consider having a clearer position on active sharing, to enhance legal certainty for market operators.

ABOUT ARTICLE 19

ARTICLE 19 is an international human rights organisation, founded in 1987, which defends and promotes freedom of expression and right to information worldwide. It takes its mandate from the Universal Declaration of Human Rights, which guarantees the right to freedom of expression and information.

An increasingly important means of expression and to seek, receive, and impart information is through information and communication technologies such as the Internet. ARTICLE 19 has been promoting Internet freedoms for over 10 years and is active in developments of policy and practice concerning freedom of expression and the Internet through our network of partners, associates and expert contacts.

⁶Reference is made to the BEREC Report on Infrastructure Sharing, BOR (18) 116.