



Response to BoR (20) 163

Draft BEREC Work Programme 2021

5 November 2020

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## I. Introduction and Overarching Messages

1. MVNO Europe welcomes the opportunity to provide its comments on BEREC's draft Work Programme for 2021 (hereafter 'draft WP 2021').
2. Our overarching messages address two categories of subjects:
  - a) Promoting innovation and competition on mobile/wireless electronic communications markets, and
  - b) Ensuring that gatekeeper digital platforms, notably operating systems, do not undermine innovation and competition on electronic communications markets.

### **Promoting innovation and competition on mobile/wireless electronic communications markets**

3. MVNO Europe urges BEREC to place the promotion of innovation and competition for mobile/wireless electronic communications, including mobile broadband, Internet of Things (IoT), and 5G, at the core of its priorities and work programme.
4. We call upon BEREC to actively promote wholesale access to mobile/wireless networks. BEREC's deliverables should encourage National Regulatory Authorities ('NRAs') (and, where applicable, other authorities) to ensure such wholesale access, where justified by regulatory means, including:
  - a) Pro-competitive conditions/obligations in spectrum assignment proceedings, in particular the granting of MVNO access.
  - b) NRAs or other authorities seeking explicit voluntary wholesale access commitments from spectrum licensees (in particular MVNO access), possibly in exchange for discounts on spectrum fees.
  - c) Sector-specific ex-ante regulatory obligations.
  - d) Dispute-resolution proceedings.
  - e) Remedies in case consolidation is expected to lead to welfare loss.

Please also refer to our comments on BEREC's consultation on the '5G Radar' – BoR (20) 110 – in which we urged BEREC to not only focus on industry-specific wholesale access to 5G networks (services for industry 'verticals', involving differentiated QoS requirements, and

network slicing), but also to ensure generic wholesale access to 5G networks in order to stimulate innovation and competition, thus realising the potential of 5G, and promoting end-user interests.

5. More broadly, we ask BEREC to actively monitor and report on the wholesale dimension of mobile markets, including IoT and 5G, and specifically to expand the data collection and reporting that BEREC already conducts for traditional mobile international roaming and wholesale call/SMS termination rates, to include additional elements. The elements we suggest are listed in paragraph 26 below.

### **Ensuring that gatekeeper digital platforms, notably operating systems, do not undermine competition on electronic communications markets**

6. MVNO Europe warmly welcomes the fact that BEREC has put forward the concept of '*digital platforms with Significant Intermediation Power*', encompassing operating systems<sup>1</sup>, and that BEREC is suggesting forms of ex-ante regulation – and a role for regulatory authorities, to prevent abuse of market power. Indeed, MVNO Europe would welcome that both BEREC and National Regulatory Authorities play a role in ex-ante regulation of gatekeeper digital platforms in the future.
7. The topic of gatekeeper digital platforms is highly relevant for MVNO Europe, given that several of our members face unjustified technical restrictions at operating system level, imposed by the entity controlling a major operating system. These restrictions damage competition for mobile electronic communications services. MVNO Europe is available to provide technical details on the issues that several of its members face.
8. MVNO Europe urges BEREC to accelerate its work on digital platforms, and to affirm a requirement of 'device neutrality', i.e. the principle that inescapable device manufacturers should not, merely for their own business reasons, be allowed to deliberately degrade the selection of functionalities on their own devices. Mobile telecommunications operators should be entitled and readily be able to access the functions of operating systems they need to fully provide their services and enable their users to use all features of devices/operating systems in all parts of the value chain.

## II. Response to Selected Elements of BEREC's draft WP2021

### **BEREC's introduction and background sections**

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<sup>1</sup> BEREC Response to the Public Consultations on the Digital Services Act Package and the New Competition Tool - BoR (20) 138. References to operating systems at pages 4, 8 and 10.

9. At page 3, paragraph 5 of the draft WP2021, BEREC indicates that *'Much of our work will shift from providing Guidelines towards assessing future technological and market developments, related to end-user provisions within the scope of electronic communications and the digital ecosystem in particular [...]'*. At page 4, paragraph 1, BEREC refers to *'To do this, we must continue to develop our expertise in digital platform regulation. We will perform the first monitoring exercise of future technological and market developments [...]'*. MVNO Europe is concerned that BEREC may retreat to the position of an observer, and that it may place too much focus on the end-user/consumer dimension. This is not what is needed at this time, considering that competition is the most important driver for promoting end-user interests. Restrictive and anti-competitive practices must be put to an end. The concept of end-users must be assessed broadly, to not only encompass consumers, but also business users and the public sector as users of electronic communications networks and services. We need a BEREC that guides NRAs' work, and actively encourages them to take action to promote competition and remove restrictions to competition, where justified by ex-ante regulatory measures. This applies to electronic communications markets, where much work remains needed in order to promote competition, and to digital ecosystems more broadly, where BEREC and NRAs are just beginning to contemplate action.
10. The relationships at wholesale level between operators of electronic communications networks and services (wholesale access, interconnection, roaming, interoperability, etc.) are a known problem area, where much more work remains needed, and indeed is needed immediately. MVNO Europe expects BEREC to actively encourage NRAs in taking decisive action where wholesale access to networks is unjustifiably denied/delayed/degraded. Historically, action has been taken for fixed networks, and only exceptionally for mobile networks. Given that wholesale access to 4G networks remains denied to some MVNOs in important Member States, that wholesale access for the purposes of delivering IoT is also being denied (e.g. in terms of NB-IoT/LTE-M) and that several of our members have received tacit or explicit negative responses to their requests for access to 5G networks, action is needed, and it is needed now. This is necessary to ensure that innovation and competition benefits materialise. MVNO Europe calls upon BEREC to explicitly acknowledge that a more competitive mobile/wireless market is the best way to achieve end-user benefits, and to include this in the introduction and background sections of its final Work Programme for 2021.
11. With regard to digital gatekeeper platforms, damage is being inflicted now through restrictive practices. Therefore, new forms of ex-ante regulation urgently need to be put in place, and regulators need to be able to act in practice to enforce it. Specific attention is needed to the role of operating systems constituting digital gatekeeper platforms. Given several of our

members' negative experience with one operating system supplier and the obvious negative effect of its practices, which distort competition on electronic communications markets, this is a good a topic for BEREC and NRAs to be proactive on, and to put their ambitions for the regulation of digital platforms into practice early-on. MVNO Europe calls upon BEREC to explicitly acknowledge the role of operating systems as form of digital gatekeepers that should be subject to ex-ante regulation, and to include this in the introduction and background sections of its final Work Programme for 2021.

**Strategic Priority 1: Promoting full connectivity**

12. MVNO Europe supports BEREC's work in this area. We do not comment on the items relating to fixed networks (copper network migration/switch-off and (fibre) backhaul).
13. As regards **item 1.3: Work on the impact of 5G on regulation (carry-over)**, MVNO Europe wishes to express its concern that BEREC positions itself very much as an observer, and gives no indications that it is prepared to give active guidance to NRAs, or that it intends to encourage NRAs to act to resolve issues. This is insufficient. Many MVNOs are confronted with tacit or explicit negative responses to their requests for access to 5G networks. Action on this is needed, and it is needed now. Without action being taken now, it is likely that (inevitable) competition problems will be allowed to emerge, and will be addressed too late, after (irreversible) damage to competition and consequently to end-user interests has occurred. In addition, as explained in our comments on the '5G Radar', MVNO Europe considers that BEREC should not only focus on industry-specific wholesale access to 5G networks (services for industry 'verticals', involving differentiated QoS requirements, and network slicing), but also ensure generic wholesale access to 5G networks. MVNO Europe explicitly requests BEREC to expand item 1.3 to address generic MVNO access to 5G networks. MVNO Europe also expects to be invited to participate in the workshop envisaged at page 9, paragraph 6.
14. MVNO Europe brings to the incoming BEREC 2021 and 2022 chairmanship's attention that, in many EU Member States, MVNOs were prevented from launching 4G simultaneously with their host operator(s), with delays on network capability parity often exceeding 18 months (and notably in Germany far longer). Our members have painfully experienced that technology transitions (in mobile, e.g. from 3G to 4G, but also in other markets) have often led to restrictive commercial practices, foreclosing markets for MVNOs. Regulatory inaction or lag has resulted in competition problems remaining unresolved. This state of affairs has ultimately resulted in hurting end-user interests. In recent years, consolidation in mobile markets has also led to significant changes in market structures, and in some EU Member States, to serious

competition problems, partly due to the lack of fit-for-purpose MVNO access. The competition problems resulting from Mobile Network Operator consolidation have to a limited extent been acknowledged in BEREC's document BoR (18) 119. Widespread RAN sharing and other co-operative arrangements being engaged in by Mobile Network Operators, and profound fixed-mobile network integration notably in the context of 5G, are likely to bring about new concerns about undue market concentration, and a resulting concern need to find new ways to ensure effective competition.

15. Market foreclosure (including undue delays for MVNOs to gain network access) should not happen again with IoT and 5G, and yet this is precisely what is happening in reality (e.g. several of our members have faced access refusals, notably in Germany and Italy). Fit-for-purpose wholesale access for MVNOs, incl. in terms of network technologies and in terms of wholesale conditions/charges, is necessary in order to ensure sustainable competition and innovation (in technical and in commercial terms), and pan-European/global IoT reach and competitiveness.
16. MVNOs need to: (i) benefit from the same RAN technologies and the same RAN coverage as the Host network operator(s) on a non-discriminatory basis, and (ii) not be subject to margin-squeeze. A regulatory system needs to be in place to enable, to preserve and to enhance sustainable competition. This requires that NRAs (and BEREC) are prepared for dealing with potentially negative outcomes, and 'feel the pulse' of the market, i.e. are aware of market dynamics, or the absence thereof. It is antithetical to the 5G vision of involving and serving 'verticals' (e.g. automotive, health, industry 4.0, etc.) that 5G networks are not open to fit-for-purpose MVNO access from day one. We urge BEREC to ensure that the past will not repeat itself.
17. Concerning **item 1.4: Workshop on NRA experiences with 5G**, MVNO Europe requests to be invited to participate in the planned workshop, i.e. this workshop should not be reserved to NRAs, but also involve stakeholders, or a separate workshop with stakeholders should be held prior to it. MVNO Europe highlights that some of its members are leading providers of solutions to business and industrial end-users, e.g. in sectors such as connected mobility, aerospace, etc. and thus are eminently placed to provide a perspective on 5G from the innovators' perspective.

**Strategic Priority 2: Thriving sustainable and open digital markets**

18. MVNO Europe eagerly anticipates BEREC's **item 2.1: Report on digital platforms** and BEREC's **item 2.3.1: Report on the Internet Value Chain**. This is where we expect BEREC

to 'put meat on the bone' in putting forward and specifying the need for new ex-ante regulation on gatekeeper digital platforms. We especially welcome the reference at page 14 paragraph 4 to 'the concept of intermediation power' and text on page 16, paragraphs 5 and 7, where reference is made to 'end-user equipment' (para 5) and where the following statement is made: *'Therefore, internet experience for users is affected by many other elements such as terminals, operating systems, applications, app stores or content that condition in many different ways user experience when accessing the internet'*. MVNO Europe emphasises the importance of operating systems and (related) hardware devices, which can be used (and are used) to affect other markets, and notably electronic communications markets.

19. This is therefore where we expect BEREC to affirm a requirement of 'device neutrality', i.e. the principle that inescapable device manufacturers should not, merely for their own business reasons, be allowed to deliberately degrade the selection of functionalities on their own devices. Mobile telecommunications operators should be entitled and readily able to access the functions of operating systems they need to fully provide their services and enable their users to use all features of devices/operating systems in all parts of the value chain.
20. In this context, we invite BEREC to examine MVNO Europe's response to the European Commission's consultation on the New Competition Tool, in which we make the case for imposing obligations on entities controlling operating systems where they unfairly prevent access to the operating systems' functionalities. These entities should be treated as gatekeeper platforms, notably to put an end to distortions on markets for electronic communications services.
21. We do wish to express regret at BEREC's timeline for item 2.3.1. Holding a public consultation as late as the end of Q1 2022, and BEREC adopting a final Report in Q3 2022 is clearly too late, given that the European Commission is expected to publish legislative proposals, possibly including a draft Digital Markets Act, as soon as 2 December 2020.

### **Strategic Priority 3: Empowering end-users**

22. MVNO Europe welcomes the work areas put forward by BEREC, but wishes to ask BEREC to make sure (within Strategic Priority 3 and throughout all its future deliverables) that the concept of end-users is not equated solely with consumers, but also explicitly encompasses business users and the public sector as a user of electronic communications networks and services.
23. As regards **item 3.2: Report on how to handle third-party payment charges on mobile phone bills (carry-over)**, we reiterate the surprise we expressed on the draft WP2020. We



urge BEREC to handle this topic prudently, and to interact with stakeholders such as MVNO Europe on this as early as possible in the development of BEREC deliverables, in order to avoid introducing new overly bureaucratic rules, which might end-up harming competition rather than promoting it

### **BEREC obligatory work**

24. MVNO Europe notes that much of this work is triggered by draft legislation or by formal requests from EU institutions. We thank BEREC for being generally open to MVNO Europe's proactive input in this regard, and we appreciate having been able to make our views known in particular on mobile roaming. We expect this to be the case again in the future.
25. With regard to **item 5.1.5: Peer review process**, BEREC makes the following statement at page 28, paragraph 2: *'BEREC's participation in the Peer Review Forum contributes to the objective of promoting full connectivity by enabling relevant exchanges with the RSPG on the market-shaping aspects of spectrum assignment'*. In MVNO Europe's opinion, BEREC needs to bring not only the full connectivity dimension to the table, but also the promotion of competition and end-user interests. We highlight in this context the contents of Article 5 of the Radio Spectrum Policy Programme, which enables pro-competitive conditions (e.g. wholesale access including MVNO access) to be included in spectrum assignment proceedings. Also, BEREC proposes no exchanges with stakeholders regarding the peer reviews. This is problematic. It is essential for stakeholders to understand BEREC's role and attitude in peer review processes. The outcome of peer reviews should also be published.
26. On **item 5.2.2.1: International Roaming Benchmark Data Report**, MVNO Europe welcomes this BEREC workstream, which has always yielded highly relevant information for policy-makers, regulators, industry and consumers, notably on the wholesale charges set by Mobile Network Operators when they negotiate roaming bilaterals compared to the wholesale charges paid by MVNOs as unilateral buyers of wholesale roaming. More attention is needed to the level of wholesale charges incurred by MVNOs, and to how (and why) these are far higher than charges for domestic wholesale access to mobile networks. More attention is also needed to the very large discrepancy between retail tariffs and the wholesale caps. MVNO Europe has clear suggestions for additions to BEREC's monitoring activities, as follows:
- a) Wholesale international roaming for IoT and 5G (generic wholesale mobile international roaming and attention to specific arrangements for NB-LTE/LTE-M/5G): data collection and reporting on availability, whether international roaming agreements are concluded, and applicable wholesale inter-operator charges.

- b) IoT and 5G MVNO access and other forms of wholesale access enabling MVNOs to provide 5G-based services (Enhanced Mobile Broadband and Massive Machine Type Communications / Ultra-Reliable & Low Latency Communications): data collection and reporting on availability and whether agreements are concluded for the provision of wholesale access and available and used on a multi-country basis.
- c) 5G 'network slices': data collection and reporting on availability and whether bilateral agreements have been concluded between network operators, agreements have been concluded between network operators and MVNOs, and with industrial users, for the provision of 'network slices'. This should specifically include reporting on whether multi-country agreements setting out the characteristics of 'network slices' or some forms of international roaming or exchange of 'network slices' at specified quality and price levels are agreed.

27. As regards **item 5.2.2.3: Inputs to any legislative proposals of the European Commission on roaming**, MVNO Europe counts on BEREC to continue to advocate, as it has done in BoR (19) 101 (June 2019), BoR (19) 168 (September 2019), and BoR (20) 131 (June 2020):

- a) Reduced wholesale caps. (MVNO Europe has clear proposals for the future levels of wholesale caps, and the corresponding justification).
- b) Imposing on Mobile Network Operators the pass-on of any discounts they have negotiated at wholesale level to MVNOs they host. This is justified because the outbound roaming traffic generated by MVNOs contributes to the volumes negotiated by the Host Mobile Network Operator.
- c) Improvements to ensure that 5G and IoT are adequately encompassed by the future EU Roaming Regulation. This includes changing the wording of Article 3 to no longer narrowly refer to Machine-to-Machine (M2M) communications and to acknowledge the growing importance of diversified Internet of Things (IoT) use cases and traffic types, including those for automated mobility, etc. Legislative solutions in the EU Roaming Regulation are necessary to ensure competitive pan-EU IoT services markets, including in configurations justifying permanent roaming. Note: MVNOs are the most apt and agile market participants to serve pan-EU and IoT needs.

28. For **item 5.3.7: Termination rates at European level**, MVNO Europe strongly supports continued data collection and publication by BEREC. The existence of the future EU Delegated Regulation on 'Eurorates' does not justify BEREC ceasing or reducing monitoring activity. It will

in particular be of key importance for BEREC data to reveal whether some large operators or operator groups trade below the 'Eurorates' with each-other, while discriminating others.

### **Stakeholder engagement**

29. MVNO Europe is thankful for having been invited to ask questions at BEREC's 2020 Stakeholder Forum and is grateful for the responses received. We encourage BEREC to enable MVNO Europe to also participate in panels at these recurring BEREC events in the future. However, we do consider it appropriate to comment that the panels held so far did not contain as diverse a representation of stakeholders as we consider necessary, notably those who rely upon wholesale access.

### **Potential BEREC work for 2022 and beyond**

30. We note that on page 47, item 5 is entitled: '*State of Mobile roaming: 5G including cross network slicing*'. MVNO Europe welcomes this proposed workstream, but we caution explicitly that it risks coming far too late. As indicated in paragraph 13 above, without action being taken now, it is likely that (inevitable) competition problems will be allowed to emerge, and addressed too late, after (irreversible) damage to competition and consequently to end-user interests has occurred. In addition, as explained in our comments on the '5G Radar', MVNO Europe considers that BEREC should not only focus on industry-specific wholesale access to 5G networks (services for industry 'verticals', involving differentiated QoS requirements, and network slicing), but also ensure generic wholesale access to 5G networks. For further details, please refer to MVNO Europe's response to the BEREC consultation on the '5G Radar' – BoR (20) 110.

## **III. About MVNO Europe**

31. MVNO Europe represents various types of Mobile Virtual Network Operators (MVNOs), with different business models, addressing consumers, business users (including start-ups/scale-ups)/medium/large businesses, the public sector, ICT service/systems integrators, and Internet of Things (hereafter 'IoT') markets, etc. <http://www.mvnoeurope.eu/members>

32. MVNOs currently represent +/- 10% of SIM cards in the European Union.

33. The term "virtual" refers to the fact that MVNOs do not control radio frequencies and related mobile physical infrastructure (antennas, base stations etc.). However, MVNOs do control the necessary hardware/software/resources to provide wireless/mobile services and may own other telecom infrastructures depending on the extent of their business model.

34. Our members provide mobile-only offers, fixed-mobile convergent offers and offers incorporating audio-visual media content, financial services, machine-to-machine communications, embedded data SIMs for tablets, laptops and other devices, connected mobility for vehicles, IoT in a broad sense, etc. Some of our members are also active on wholesale markets as MVNE (E=Enabler) / MVNA (A=Aggregator) supporting other companies and brands that provide wireless/mobile services. MVNO Europe does not represent branded resellers.
35. MVNOs contribute strongly to innovation and competition and provide clear Business to Consumer (B2C) and Business to Business (B2B) end-user benefits. MVNOs also contribute to financing mobile network infrastructure through payment of wholesale charges which assure revenues to Mobile Network Operators, whilst avoiding costly duplication of network assets.

#### IV. MVNO Europe Contact Details

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

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