



Cable Europe comments on the BEREC Working Programme 2015

23 October 2014

Cable Europe appreciates the initiative of BEREC to invite the industry to comment on its Working Programme 2015.

Cable Europe supports BEREC's task to ensuring independent, consistent, and high-quality application of the European regulatory framework as well as its work of providing valuable input and opinion to the European institutions and was therefore very happy to participate these two last years to BEREC stakeholder forum and will be keen on continuing this strategic dialogue with BEREC in 2015.

Generally speaking, Cable Europe supports this very ambitious BEREC's proposed working programme based on its Strategy 2015-2017 and would like to make the following comments.

Promoting Competition and Investment

Work item 3.1.2 Implementation of the Recommendation on Relevant Markets and Common Position on Geographical Segmentation

The recommendation triggers market analyses which are carried out by National Regulators. These in-depth analyses of the competitive dynamics of each market result in the identification of the dominant player, who then becomes subject to a range of regulatory remedies. To date, the majority of National Regulators have concluded that cable operators do not have such a dominant position in the market. Going forward, the new recommendation and subsequent market analyses will allow regulators to take into account new competitive market forces such as OTT. Thus with the revision comes the acknowledgement that sectors such as cable, which operate in a highly competitive environment and are fully captured by the relevant regulatory frameworks, must not be stifled by prescriptive market regulation if they are to continue to invest and innovate.

Also, the identification of sub-national geographic markets might be justified in well defined circumstances for certain product markets, but this approach has also the potential to create many more complications. Cable Europe would support BEREC to look at a geographic segmentation of remedies. In circumstances where the conditions of competition in a particular area can change quickly either because the NRA initially made an error or because the market evolved faster than expected, remedies will need to be able to adapt to those needs in a speedy manner. If an NRA chooses to vary remedies

within a broader geographic market they retain the ability to change such remedies rapidly when appropriate.

Work item 3.1.3 Challenges and drivers of NGA roll-out and infrastructure competition

Cable Europe welcomes the overall initiative to incentivise NGA investment. However, we are very cautious towards measures that could create a disincentive to invest in infrastructure, could result in a distraction to the upgrade plans of existing communications networks and depart from and conflict with the approach taken in article 12 of the framework directive. Reports suggested in the work program (i.e. NGA investment drivers, regulatory policies and even existing regulation) might be indeed very useful to have a proper overview of what is strictly necessary for achieving the goal perceived. This could also be very useful for the future regulatory framework review.

Work item 3.1.5: Oligopoly analysis and regulation

Cable Europe acknowledges BEREC's plan for an analysis on oligopoly as well as for providing input to the Commission on the review of the market analysis Guidelines and on the Framework Review and we would very much like to be informed at the forefront of this exercise.

Cable Europe would very much support the proposed fact-finding exercise on the most recent merger cases and their regulatory remedies to help defining the impact the conditions attached to these cases might have on a future European and national sector specific regulation.

As far as how joint dominance concept should be taken into account in any future legislation, see the section below.

Promoting the Internal market

3.2.3 Legislative Evolution

Cable Europe welcomes BEREC's planned works on the Commission's proposal for a Telecom Single Market as well as the preparation for the review of the regulatory Framework. We will be more than happy to collaborate with BEREC on this issue and provide input as necessary.

Cable Europe considers there is a bright future in Europe where less regulation and more pricing flexibility allows for space to grow, compete with one another to the letter of the law, consolidate and push for a more international and service-oriented market. But to invest you need a good investment environment where risk levels are not aggravated by significant variations in the market due to regulatory intervention.

Two independent NGA infrastructures can clearly drive network upgrades and evolve towards the provision of ultra-fast services. Cable Europe encourages BEREC to further promote sustainable and efficient investment in high speed broadband infrastructure and services.

Cable Europe shares BEREC's views to avoid too intrusive regulation that would hinder innovation and focus on more proportionate means to achieve the proposed harmonisation objectives.

Cable Europe shares BEREC's view that the situation of **OTT providers** might trigger a debate as to what extent their activities should be covered by the regulatory framework. We therefore support any report on OTT services BEREC's might launch according to **working item 3.2.5** and we would engage BEREC to launch this work as early as possible.

However, we would be very cautious about reflections on **Joint dominance**.

As a general principle, Cable Europe believes that an allegation concerning the presence or otherwise of joint dominance is not well suited to ex ante regulation and is much better suited to an ex post examination. The rationale for preferring an ex post examination is that market events are interpreted as being undertaken in a way that is collusive rather than as a unilateral action. If a series of decisions are taken by two firms on unilateral, business interest grounds without reference or expectation of the reaction of other firms, then such decisions are not tacitly collusive. On the other hand, if the same decisions were taken unilaterally but with a view to eliciting a response or provoking a response in another party, then such actions would be tacitly collusive. In an ex ante regulatory context, an NRA will need to rely on an understanding of events that is either clearly static on a forward-looking basis or will need to rely on very informed speculation as to the likely future structure of the market and the commercial motivations of the various economic actors on that market. Essentially, an NRA is making an educated guess as to the rationale and motivation behind the decisions taken. The likelihood of getting such an approach wrong is at least as high as the likelihood of getting such an approach correct. In the broadband market, the risk of getting the appraisal wrong in arriving at a conclusion of joint dominance (or joint SMP) is very high in an ex-ante context (50/50 at best) but such uncertainties could be eliminated by an ex post examination.

In an ex post investigation the problematic market conduct in question is observable in most instances through reviews of major decisions which are documented. A Competition Authority has the right to gather evidence to demonstrate whether the actions in question were motivated by unilateral or collusive considerations. An ex-ante examination does not have such powers and relies on a balance of probability.

According to Cable Europe, there is likelihood that in the foreseeable future substantial parts of the Single market will be served by 2 or more ultrafast broadband network and that rivalry and intense innovation can be expected from these networks.

Empowering and Protecting End-Users

Cable Europe has followed closely BEREC's work on the consumers' issues especially all the work done on Net Neutrality and is committed to continue to do so.

Work item 3.3.1 Broadband quality of service and net neutrality

Cable Europe welcomes a regulatory approach on Net Neutrality that gives the possibility of development of future business models. This should help innovation and provide legal certainty. Cable Europe considers that it is essential that network operators are equally free as content and service providers to test new business models and to differentiate their offers on both sides of the market towards consumers and service providers.

Cable Europe also considers that Internet access service and specialized services can work well with each other. Cable operators have been able to increase both the network resources dedicated to Internet access service and the network resources dedicated to digital TV for example. And cable operators, given their strong HFC network with high capacity, certainly can meet this requirement of not degrading the Internet access service even when developing specialized services. There is nowadays no objective justification for NRAs having to impose any QoS requirement on cable operators as cable operators are constantly working on upgrading their network and there should be no worry of its degradation. In any case, we believe that transparency and competition tools would suffice to remedy the situation.

As regards monitoring of QoS in the context of NN, Cable Europe supports BEREC's initiative in fostering dissemination of knowledge among NRAs and identifying monitoring systems. Monitoring QoS in the context of NN is important to improve NRAs capacity to perform regulatory assessments of potential degradation of service and provide sufficient information to end-users about the performance of their services.

As it is widely recognized, European electronic communications markets are highly competitive in what regards to broadband services. This competition in fixed markets has been a cornerstone that prevents market failures on what concerns Net Neutrality.

BEREC's role on promoting a coherent and uniform model of measuring internet services performance should be limited to what is strictly necessary. BEREC's involvement will benefit from all stakeholders' input and Cable Europe is willing to contribute actively to this task that will improve all European broadband consumers' experience.

We would also suggest due account is taken of the prominent **self-regulatory initiatives** that several Member States are developing.

As recognized, there are various factors that contribute to the fixed broadband consumers' experience and a measuring model that aims at covering the whole Internet ecosystem, although necessary in theory, will be unrealistic in operational terms. These models will never be able to include all variables, especially those that can be highly impactful on the consumer's experience and ISPs don't completely control, mainly because they are just a result of how IP (Internet Protocol) was conceived.

This being the case, any measurement requirements on cable ISPs should be limited to the HFC network which we control end-to-end. We cannot be responsible for reporting on how the quality of the end user's hardware, the upstream the IP transit path, or the location of the server, affects the broadband speeds consumers experience, and this should be made explicit in any policy guidance BEREC develops. Such an approach would also improve consumer choice as it would allow for a clear comparison between competing ISP networks on a like-for-like basis.

As regards the “ISP leg”, a reliable measurement tool therefore has to be restricted to the sphere that the relevant internet service provider has actual control over. That means that all external influences – on the side of the end-user (e.g. WIFI, software applications etc.) as well as on the side of the “internet” (outside the ISPs network borders) – have to be securely excluded from the measurement surrounding.

Any relevant measurement system regarding the “ISP leg” can only operate between the network termination point on the customer side and the peering point on the ISP side. Outside these borders the responsibility for any service quality parameters lie with the end-user and possible manufacturers of end-user equipment on the one side and third network operators and service, content and application providers on the other side.

Further given the current policy focus on the relationship between the best-effort-internet and specialized services, we would encourage BEREC to examine the impact of specialized services on the **speed of the internet**. Communicating transparently on the impact of specialized services on the open internet would also be welcomed by consumers.

It should also not be overlooked that ISPs already have significant transparency requirements on their electronic communications’ contracts that are in place with consumers, which already provides guarantees of their rights, but also framed by a fierce competitive environment that creates the onus on ISPs to provide the best possible service to retain their customers.

Considering our comments above, Cable Europe invites BEREC to organize a **workshop** on the subject where stakeholders could present their views and work on a consensual model to evolve.