

DRAFT REPORT ON THE REGULATORY TREATMENT FOR FIXED AND MOBILE BACKHAUL

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INTRODUCTION

First and foremost, Deutsche Telekom welcomes the opportunity to comment the draft Report on the regulatory treatment for fixed and mobile backhaul by BEREC. As a company present in many markets with very different features, in both incumbent and challenger roles, we are able and willing to contribute based on our diverse and extensive experience.

The draft report itself declares its objective as a description of the current regulatory situation: *“The objectives of this report are to present the legal provisions applicable to mobile and fixed backhaul, the regulation in force and use of different types of backhaul networks and services in Europe, as well as views expressed by operators on their current and future needs for backhaul.”*¹

The report indeed assembled a lot of information about the current market situation and the implementation of EU regulatory framework. The impetus for this report is a clear EU Commission’s view on the delineation of markets in the current Commission Recommendation of 18.12.2020 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (hereinafter: 2020 Recommendation)

In the Commission’s Staff Working Document accompanying the 2020 Recommendation, it was stated clearly that mobile backhaul should not normally be susceptible to ex-ante regulation.² Only if there are proven severe, national competitive problems, NRAs could have extended regulation to mobile backhaul. But the facts assembled in this report show that there are no such circumstances present. This is a remarkable change, as many NRAs have included mobile backhaul to recommended markets, mostly the market for leased lines and VPN (Market 2 of the 2020 Recommendation).

Why BEREC has included fixed backhaul in its report remains unclear. We assume BEREC approaches backhaul in a comprehensive manner, as a single overarching topic.

For our statement to the draft report, we therefore dedicate distinctive chapters to mobile and fixed backhaul.

MOBILE BACKHAUL

Besides reciting the current regulatory framework and mentioning the tools applicable, BEREC conducts a survey among incumbent and alternative operators. Barely surprising, in self-serving statements alternative operators wish for more regulated products in the future. No analytic or fact-driven evidence is given why. It is only declared to be needed.

As all incumbent operators stated that they have commercial agreements covering mostly unregulated mobile backhaul services, there is no evidence for the need of regulatory intervention. In fact, this demand for regulated services is tactical and not a genuine commercially-driven preference: a hope that NRAs will overrule commercial agreements by intervening via reference offer proceedings and price control.

The same applies to the demand for dark fiber as a regulated product. This demand echoes the low willingness of competitors to invest into network infrastructure of their own. The question why they do not deploy more self-supply remains open.

The imposition of regulatory remedies is at least an additional benefit for competitors. There is never a negative impact from regulatory remedies imposed for them in contrast to operators who are subject to those remedies imposed. Therefore, opting for a regulatory intervention is without any risk for them.

¹ BoR (21) 129, S. 2

² *with a view to delineating the boundaries of the market for dedicated capacity and other business access products NRAs should ensure that the relevant wholesale products¹⁷⁵ correspond to the retail market problem identified. In particular, because currently retail mobile markets are in general competitive at EU level¹⁷⁶ absent wholesale regulation, in the absence of additional elements relevant in a prospective analysis to include the mobile backhaul within the market for wholesale dedicated capacity.”*

Therefore, the simple expression of demand for dark fiber should never lead to regulation of dark fiber.

Due to the fact that commercial agreements took place in unregulated, competitive environments over years, NRAs should be reluctant to giving in such demands, leading to regulatory distortion of market-driven processes. Incentives for deploying infrastructure will be severely harmed.

Moreover, NRAs are now directed by the 2020 Recommendation to correct – at least to review – current inclusions of mobile backhaul services into the scope of markets evaluated.

We share the Commission's view of mobile backhaul not being part of the list of recommended markets by default. We further share the competitive analysis of the Commission, that mobile markets are effectively competitive on retail and wholesale level from the beginning. The facts assembled in this draft report underline this view.

High-capacity broadband leased lines emerged as data links for mobile sites significantly in the late 2000s, when mobile telephony became mobile broadband and high bandwidths became necessary for mobile backhaul. Many NRAs did not explicitly include those connections to the recommended leased line markets, because these were seen a natural part of leased line markets by them.

Over the course of the years between the second and the fourth recommendations on relevant markets, the Commission's view on that market evolved, including more technologies and applications. Beside the traditional leased lines with guaranteed bi-directional symmetric bandwidths and high service levels, EU Commission and national regulators included applications with lower standards, still separated from best effort services from the local and national access markets (former markets 3a and 3b of 2014's Market Recommendation). In the end, this meant a significant expansion of the market borders and the scope of services and products being regulated.

However, some incumbent providers of those services were not subject to regulatory remedies, as mobile backhaul services demanded very high bandwidths and those (often distinctly delineated) leased line markets were identified to be competitive due to low market shares and high revenues compensating high construction costs, thus enabling market entry without significant barriers. In many cases, such as in Germany, incumbent operators were identified as market followers in that market. The first movers were often alternative operators. So there already have been no indications of mobile backhaul being susceptible to ex ante regulation. Therefore, the statement of the EU Commission on page 2 of the draft report finally only picked up existing facts and drew the right conclusion:

"In particular, concerning mobile backhaul, the EC considers that mobile retail markets are in general competitive on a Union-wide level. This implies that asymmetric regulation of mobile backhaul is only possible if a prospective analysis presents additional, relevant elements which would justify its inclusion within a relevant market susceptible to ex ante regulation."

After issuing the latest Recommendation in late 2020, the Commission repeated its view on mobile wholesale markets being competitive and in general not part of the recommended markets. One occasion stating that again was at the WIK Workshop „Recommendation on Relevant Markets 2020" on January 19th³. Consequently, NRAs, which have included mobile backhaul, have to remove mobile backhaul from the list of markets analyzed. Future inclusions have to be justified by very exceptional national circumstances rooted on the level of retail mobile markets.

The mobile markets, save for unique exceptions and unfinished attempts, have never been susceptible to ex ante regulation except for call termination markets (which are likewise and de facto regulation valid for all access networks – fixed and mobile of all operators alike). Significant market power has never been established on the retail level, this should therefore apply to the corresponding wholesale markets. There are at least two or more mobile network operators in every Member state. No mobile network operator has any difficulties providing nationwide network coverage. The draft report itself stated a wide presence of commercial, unregulated agreements for mobile backhaul with incumbent operators. Hence, mobile operators vastly have the choice between “make” or “buy” for rolling-out mobile backhaul of their mobile networks.

Therefore, the EU Commission's move to explicitly exclude mobile backhaul is necessary due to the competitive situation of the markets. The next step is not to assess how to regulate mobile backhaul, but how and when NRAs follow the EU Commission's Recommendation.

³ <https://www.wik.org/en/veranstaltungen/weitere-seiten/relevant-markets/workshop-19-01-21: Introduction to the relevant markets recommendation> (Kamila Kloc, European Commission), Slide 4: „It is not generally justified to include the mobile backhaul in the market given the competitive situation of the correspondent retail markets absent wholesale regulation”

FIXED BACKHAUL

The regulation of relevant markets for fixed backhaul differs in EU Member States based on their competitive situation, which have to be reflected in the scope of national ex-ante remedies. Especially submarkets for different bandwidths have been defined and some of the higher bandwidths are currently not regulated.

Most striking here is once again the demand for dark fibre as a regulated product by alternative operators. Once again like in the mobile backhaul section, competitors simply demand it for evading investments on their own. The report barely explores the question whether such regulation might lead to less deployment of backhaul, because regulated access with low prices strongly demotivates operators from deployment of their own backhaul.

CONCLUSIONS

There is no indication for the need of regulation of mobile backhaul. Moreover, future regulation of those competitive markets and services will, paradoxically, lead to less deployment of 5G, as competitors hope for excessively regulated low prices in order to rent ("buy") network facilities instead of investing and deploying infrastructure of their own ("make").

Therefore, derived from the findings of the draft report, NRAs should start analyzing the relevant markets and exclude mobile backhaul if they do not find special national competition problems.

That also applies for dark fiber as a regulated product. NRAs have been very cautious to oblige SMP operators to provide it, and for a good reason: demand for dark fiber as a regulated product echoes the low willingness of competitors to invest into network infrastructure of their own. Therefore, the simple expression of demand for dark fiber should never lead to regulation of dark fiber. Otherwise, incentives for deploying infrastructure will be severely harmed.