Vodafone response to the public consultation on the BEREC medium-term strategy outlook

Vodafone welcomes comments or questions on the views expressed in this submission. They should be directed to Giulio Maselli at giulio.maselli [at] vodafone.com

1. Vodafone welcomes the public consultation by BEREC on its mid-term strategy. This initiative will help BEREC and the industry to set the wider priorities for the years ahead. BEREC has made significant progress in the past year and will play an important role in the future.

2. With this in mind, Vodafone believes that BEREC needs to take a step forward in the approach to policy issues. BEREC Common Positions and Guidelines (i.e. the policy documents that NRAs should take utmost account of) are too often descriptive accounts of the work of NRAs or a menu of options, and too rarely a collective commitment by the members of BEREC to take specific policy decisions or to pursue joint priorities. BEREC positions and guidelines should drive NRA policies rather than just follow them.

3. Vodafone believes that BEREC should focus on its activities on the following four areas:

   a) Realisation of the single market
   b) Thinking through the transition from 'telecom centric' regulation to 'internet centric' regulation
   c) Protecting consumers by setting required outputs rather than regulated detailed inputs
   d) Improvement of BEREC functioning and liaising with stakeholders

   We also attach a recent article by Richard Feasey on regulatory challenges in Europe.

Realisation of the single market

4. Vodafone agrees with BEREC that the main focus of its work should still be the realisation of the single market. The EU regulatory framework provides for the general regulatory principles and some specific rules, but the detailed regulatory approach is managed by national authorities. This has led in many cases to diverging regulatory outcomes, particularly in relation to consumer protection measures. These differences create obstacles to the definition of uniform services across Europe (particularly for business services) and increases in the overall costs of provision. Services have to be customised to different markets not because customers want different things, but simply because regulatory obligations are different.

3. To date, the Commission has focused on harmonisation of wholesale prices. It started with fixed and mobile termination and it is looking at replicating the exercise for fixed access costing and pricing[1]. However, there has been no similar attempt to harmonise other areas of the regulatory environment. Universal service, numbering, number portability, emergency services, spectrum assignment and management, customer protection, unbundling access, bitstream services, etc. have been implemented with substantial differences among the different states.

Refocusing on the internet

[1] The EC has also defined wholesale prices for international roaming albeit within a context of regulating also retail prices.

4. The work of BEREC remains focused on the regulation of telecoms networks and traditional telecoms services. These are familiar territory, but the key strategic issues for the industry increasingly lie elsewhere. Traditional person to person communications services (i.e. voice and messaging) required numbers, interoperability and standards. New 'Over The Top' services operate instead within a closed user group environment (no interoperability or interconnection, but only proprietary platforms) and with addressing not based on numbers, but usernames[2]. Most NRAs devote too little attention to such developments, and to thinking through the implications for future telecoms policy.

5. For example, BEREC is currently consulting on regulatory arrangements for Special Rate Services. Whilst important, many of these telecoms-based services will be rapidly replaced by app or IM-based alternatives based on IP platforms. BEREC should ensure that it pays equal attention to understanding future markets as to regulating segments which are already in decline.

6. The traditional telecommunications ecosystem has been based upon enforceable licences or obligations between regulator and service provider. Providers were granted rights to offer services in exchange for meeting direct fees or indirect costs related to obligations that guarantee social objectives or general economic interests. The list and level of fees and obligations has increased over time, largely to reflect consumer protection concerns.

Fee/obligation	Costs	Social objective/general economic interest
Authorisation and NRA fees	One off and annual costs generally based on revenues	To repay the costs of defining/ applying regulation and running costs of NRAs
Spectrum and numbering fees	One-off and annual fees based on amount/type of spectrum and numbers	To optimise the use of scarce resources
USO contributions	Annual fees based on revenues	To ensure universal access to communications (rural areas and disadvantaged users)
Emergency calls	Investments to manage routing and localisation systems + interconnection fees	To guarantee access to emergency services
Legal interception	Investments and maintenance costs of legal interception systems and management of requests	To assist judicial authorities in crime fighting and prevention
Data retention	Investments and maintenance costs of data retention systems and management of requests	To assist judicial authorities in crime fighting and prevention
Interconnection	Investments in systems to guarantee interconnection with other operators	To guarantee any-to-any communications

[2] However, some OTT providers use the phone numbers of the clients as usernames. This facilitates the acquisition of the existing contact of the user into the platform. For example, Apple and Viber VoIP and messaging services use this approach.

Network resilience	Investments in network redundancy, special equipment, batteries in customer equipment	To ensure continuous functioning of networks also in case of disasters or emergencies
Number portability	Investments and maintenance costs of portability systems and databases	To minimise disruption to users when switching operators
Public directory databases	Investment and maintenance of user databases common to all operators	To guarantee that users can have their phone numbers on public directories
Services to disabled users	Investments and costs of specialised services	To guarantee access to communications services by disabled users

7. These obligations and fees have been met by operators, but are not applied to new 'Over the top' internet service providers. In many cases it is hard to see how they could be (i.e. there are difficulties with enforcement against extra-territorial service providers). The transition from telecoms-centric to internet-centric services will render these existing arrangements both unfair and unsustainable. BEREC will need to find an alternative.

8. A particular challenge will be enforcement. Many NRAs today do not enforce the relevant obligations because OTT players do not charge end-users for the communication services provided (as so there is presumed to be no risk of consumer harm). This is a misconception: customers 'pay' for the services by having their personal data sold to advertisers or used in marketing campaigns. This concept of privacy as an economic right rather than a human right has been raised in a recent report commissioned by the European Parliament and it should be recognised by regulators too.[3] Clarifying the boundaries between telecoms NRAs and the role of privacy authorities is one task for BEREC in the coming period.

End-user protection via outputs rather inputs

5. The EU regulatory framework is based on the principle that the best results for end-users will come from healthy competition among market players. Detailed regulation of final services has always been considered the last resort. However, the latest set of EU directives suggests that competition might not be enough to reach the desired outcome for final users. This is confirmed by BEREC in its draft where it says "end user focus becomes increasingly important" and that "the complexity of technology and services offered require even more protection and empowerment of end-users."

9. Vodafone shares the view that the end-user should be at the centre of regulatory policy and that customer empowerment is the best way to protect end-users. However, this should not be translated in cumbersome and detailed regulation that might be reasonable at the time of adoption, but that will hinder innovation when market conditions and services change. A more sustainable approach is via the definition of clear and specific end-user protection

[3] http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=65871

objectives that will then implemented by the operators in the way that is most effective and less costly (and which produce better solutions by harnessing competition). In this way, customers can be better targeted, implementation costs could be lowered and innovation is not hindered.

10. A practical example should help to clarify this approach: the need to alert mobile broadband users that they have reached the limit of their data bundle and that, thereafter, the connection is throttled or a higher price is charged. The usual regulatory approach would be to provide detailed obligations on what tools to be used (e.g. an SMS, email, etc.), when they should be used (e.g. when the customer reaches 80% of the bundle, after it has reached the limit, etc.), the content of the alert, to whom the message should be sent to, etc. However, taking into account the variety of broadband tools (data cards, smartphones, mobile broadband wifi routers, etc.), the variety of plans and the technical characteristics of the network and IT systems of operators, any detailed regulatory obligation would either restrict the freedom of operators to innovate or fail to reach the objective

11. In this case, a better approach would be to establish an obligation to make sure that end-users are alerted with the appropriate means at the right time and that they are allowed to upgrade their subscription, leaving operators to devise the most effective and less costly way to reach the objective. In any case, the regulator will monitor the market and it will intervene if the objective has not been reached.

12. BEREC has accepted this view to a large extent in its Transparency Guidelines adopted at the end of last year[4].

Improvement of BEREC functioning and liaising with stakeholders

13. Vodafone welcomes the effort put by BEREC in increasing transparency and involvement of interested stakeholders in the decision making process. This has been reached via greater use of public consultations and the publication of all documents on its website in a timely manner. However, Vodafone believes that BEREC's effectiveness and transparency could be improved further by adopting a number of initiatives, in most cases, by revising the internal rules of procedure:

    - More frequent use of public hearings to allow for more interaction with interested parties rather than simple static public consultations.
    - Two-stage consultation process for most important issues. The first stage will involve a short document with key principles and open ended questions. The second stage will ask interested parties comments on a document where the draft position of BEREC is fully detailed.
    - Longer consultation periods on key policy matters as the current maximum period of 20 working days is often not enough. This will also guarantee higher quality responses.[5]

[4] See http://erg.eu.int/doc/berec/bor/bor11_67_transparencyguide.pdf

- Provision of more details on which issues BEREC is currently working, the foreseen deliverable, the working group in charge (and their membership), the expected timing for publication of draft documents and for final adoption. This could be a more detailed version of the usual BEREC work programme.
- Vodafone agrees with BEREC that an office in Brussels in addition to its main one in Riga would facilitate interaction with stakeholders

[5] Vodafone recognises that BEREC has implemented a *de facto* longer consultation period in the last Board meeting by publishing some of the documents a few weeks in advance to the actual start of the consultation.

Annex 1

Nice to nasty: the changing outlook for European telecoms regulation

Article by Richard Feasey

Europe's leaders are often accused of reacting too slowly to the unfolding sovereign debt crisis. Europe's institutions are struggling to adapt to fast changing conditions. Policymakers remain trapped by their own prejudices or by short term political considerations which prevent them from taking decisive or strategic action.

This gloomy diagnosis is not confined to macroeconomic or fiscal policy in Europe today. It applies to microeconomic regulation as well. The approach to regulating Europe's telecommunications sector – a sector which needs to perform strongly if Europe is to escape from its current economic woes – is a case in point.

The nice period

Much of the regulatory architecture which oversees the telecommunications sector (but also transport, energy and water) was designed during the late 1980s and 1990s. This was a period when Europe was an attractive place for global investors and when a policy of opening up markets attracted firms from the US and Asia and allowed the creation of home grown companies like Vodafone. The sector grew by over 8% in 1998[6] and mobile markets ticked along with growth rates of 15-25% every year.

Prices for telecommunications services in Europe were still high. A three minute national fixed call cost 65 cents in 1998 (but had fallen to 24 cents by 2009)[7]. The twin legacies of political ownership and monopoly meant there were large pockets of cross-subsidy between different services and between different groups of consumers. At the heart of this world were the newly created national telecoms regulators – Oftel, ART, AGCOM and the rest – staffed by technical experts and charged with injecting competition and making sure the resulting benefits were allocated equitably between different groups of consumers.

The biggest challenge for policymakers during this period was whether to favour a model of 'services competition' or 'infrastructure competition'. This was before Martin Cave invented the concept of the 'ladder of investment' which allowed them to claim support for both at the same time[8]. The idea that such apparently conflicting objectives could be neatly reconciled in a positive way was a key feature of this period, and not only in telecoms regulation. This was the

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6 http://ec.europa.eu/information_society/policy/ecomm/doc/library/annualreports/3rdreport/3rd_report_en.pdf, p.1

7 http://ec.europa.eu/information_society/policy/ecomm/doc/implementation_enforcement/annualreports/15threport/comm_en.pdf fig 8

8 See, e.g., 'M. Cave 'Encouraging infrastructure competition via the ladder of investment' *Telecommunications Policy*, April/May 2006, pp. 223-237

period in which the Governor of the Bank of England coined the acronym 'nice' to describe a world of non-inflationary constant expansion[9]. In telecoms, it meant that prices could fall sharply year on year without any apparent drag on levels of investment. Much of the investment in infrastructure was already sunk and there were still opportunities to extract large efficiency gains from it. In short, the telecommunications sector seemed a perfect example of the kind of non-inflationary growth which policymakers were targeting for the broader European economy at the time.

There was some room for doubt, even at this early stage in the experiment:

- third, fourth or fifth entrants into European mobile markets struggled to gain sufficient scale to become profitable, despite the efforts of regulators to support them through 'temporary' asymmetric rate regulation over many years

- the new fixed network competitors entered by relying on (highly) regulated access to the incumbent's copper network but then failed to climb any further up the investment 'ladder'. The incumbent operators largely avoided fixed competition between themselves and remained focussed on defending their home markets. Cable networks were largely ignored by the policymakers during this period (but despite (because of?) this have since emerged as key competitors in the fixed broadband market)

- in 2005, after 10 years of almost permanent litigation, the United States abandoned the 'services' model for fixed network competition favoured by the Europeans and embarked on a very different 'duopoly' path instead

None of these developments was sufficient to prompt a fundamental reappraisal of the European model during the review which was held between 2006 and 2009[10].

The nasty period

The initial reaction of policymakers to the financial and economic crises which hit Europe in 2008 was to reaffirm the importance of the telecommunications sector for the broader European economy and establish a new set of targets for it[11]. No serious attempt was made to ask whether the underlying policy framework was capable of delivering those targets. This was in part because Europe was already mid-way through review referred to above, but also because all of the existing regulatory institutions, particularly the national regulators, were by that time heavily invested in the status quo. Not much changed inside telecoms regulators in 2008, even as the economic storm began to rage outside. By nature cautious people with a strong attachment to precedent and consistency, telecoms regulators simply continued much as before.

[9] Mervyn King, Governor of the Bank of England, Speech to East Midlands Development Agency, 14 October 2003, at http://www.bankofengland.co.uk/publications/speeches/2003/speech204.pdf
[10] Instead policymakers engaged in the age old sport of arguing about the balance of power between national and European institutions, an argument which eventually produced a new body, the BEREC (Body of European Regulators of Electronic Communications)
[11] See http://ec.europa.eu/information_society/digital-agenda/index_en.htm

Inside the industry, doubts about the approach were becoming more acute. The years of steady retail price reductions, squeeze on costs and commitments to private shareholders meant that industry players had much less financial headroom when the debt markets seized up. The result was that telecoms markets did not grow at all in 2009[12] and the 'nice' period came to an abrupt halt.

Differences between regulators and those they regulate are commonplace and to be expected. But earlier disagreements about the application of rules in a particular case or against a particular firm had been conducted against widespread consensus amongst almost all players – regulators and firms, incumbents and new entants alike - about the merits of the overall European approach. We are now seeing more fundamental disagreements emerge on a wide range of issues, with critics claiming:

- regulators remain preoccupied with driving down consumer prices, despite these being many times lower today than in the 1990s when the framework was conceived. If anything, recent pressures on disposable incomes have made regulators are even more focussed on prices than before

- promoting new entry remains an overriding objective for many telecoms regulators, as it was in the 1990s, despite the fact that Europe's diminished growth prospects, maturing markets, lower margins and higher costs of finance make entry increasingly unlikely today

- pricing rules devised by regulators assume that investments in networks have already been sunk and so can be ignored, or that very large fixed costs, such as the payments for spectrum in recent years, can all be recovered from non-regulated services.

- few regulators seem to fully understand that capital is no longer abundant or cheap, or that Europe is no longer an attractive continent on which to deploy it. If they do, it is not apparent in the decisions they take.

- regulators must undertake regular reviews of markets to safeguard competition. The uncertainty this creates for the investment climate is rarely recognised, and no proposals have been made for alleviating it. In the same vein, some regulators plan to require existing mobile players to rebid for their spectrum auction, ignoring implications for investment or for existing customers if this were to produce unintended results (as auctions have been known to do)

- the Commission presses for ever greater harmonisation of policy and of prices just at the moment when the economic outlook amongst Member States is diverging sharply

12 http://ec.europa.eu/information_society/policy/ecomm/doc/implementation_enforcement/annualreports/15threport/comm_en.pdf Table 1

Where to now?

Some of today's industry critics can be dismissed as harking back to the pre-1990 days of unregulated monopoly. But others, myself included, are making what I think is a more subtle case which cannot be so readily dismissed. This critique does not yet amount to a coherent alternative approach to regulation, but it suggests that the approach taken in Europe needs to change in at least some or all of the following ways:

- much more focus on outputs and market performance and much less on inputs, such as the number of players or market concentration (a legacy of the early liberalisation days). Prices become only one of the outputs with which regulators must concern themselves whilst investment, innovation, and in particular the sustainability of competitors receive much more attention than in the past[13]

- accept – as the US has done - that oligopolistic rather than perfect competition is the only way for markets to generate sufficient returns to fund major new investments in fixed (i.e. non-variable) assets. Abandon attempts to support sub-scale firms which are not viable, particularly when these inhibit the capacity of existing firms to invest or grow or otherwise undermine other objectives.

- experiment with new models of competition, which allow capital to be used more efficiently (by avoiding unnecessary duplication) without sanctioning a return to monopoly. Examples are the proposal for a 'Netco' investment model for fixed Next Generation Access, as proposed by Oxera in a recent paper for Vodafone[14] or more aggressive network sharing arrangements in the mobile sector

- make structural measures a much more important part of the regulatory toolkit and resist constant tinkering. Invest more in setting up the right incentives and market structure at the outset (as occurs with mobile spectrum allocations) rather than simply assuming that regulation can solve problems later (as occurs in fixed telecoms markets today).

- recognise that technological neutrality is not an end in itself, particularly if different technology choices have far reaching implications for competition later

- welcome, perhaps even encourage, industry co-operation. Recognise that Europe needs to safeguard competition between firms in downstream markets, but it also needs to create interoperable services of sufficient scale and reach to compete on what are increasingly global markets.

[13] For an interesting discussion of these issues in the US context, see Faulhaber, Hahn and Singer 'Assessing Competition in US Wireless Markets: Review of the FCC's Competition Reports', at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1880964

[14] http://www.oxera.com/cmsDocuments/Press%20Releases/Oxera%20NetCo%20press%20release.pdf

- weigh the temptation of short term consumer gains much more carefully against longer term dynamic benefits which will always be much more elusive. Experiment, as the Commission proposes to do[15], with pricing rules which embody positive incentives to invest. (This does not mean simply allowing prices to rise, although the possibility that prices may need to rise should not be excluded either.)

- be much more tolerant of cross-subsidy and value based pricing in both retail and wholesale markets. Abandon attempts to normalise margins across services which face fundamentally different demand conditions

There are some positive early signs of thinking along these lines from the Commission, but no coherent approach has emerged as yet. The Commissioner, Neelie Kroes, organised a series of CEO telecoms summits during 2011 to discuss how European regulation was performing and what might be done differently[16]. Ideas such as linking copper prices to investment commitments or proposals to deregulate co-invested networks are being discussed. The Commission is proposing a new (structural) approach to regulation of international roaming markets.

But the Commission is still trying to use spectrum auctions to inject new entrants into mobile markets which are contracting. The Commission also holds firm to Digital Agenda targets which are clearly unachievable in today's environment. And it is still trying to force harmonisation of rates across Member States without regard to fundamental differences in their economic circumstances.

This highlights the institutional as well as the intellectual challenge which Europe faces. The European Commission is best placed to build a new approach but seems to lack the capability to do so in a coherent (or rapid enough) fashion. This leaves a vacuum into which the parliamentary institutions – the European Parliament and national parliaments – are moving quickly. We have seen this, for example, with the European Parliament's recent actions on spectrum policy[17] and the Dutch Parliament's efforts to rewrite net neutrality rules[18]. Neither case suggests this is the right way to meet Europe's challenges.

Instead of parliamentary politics we face the altogether more difficult task of finding a new approach to telecoms regulation which will allow a better balance to be struck between short term gains for hard pressed consumers and long term objectives of European growth. Before 2007 most telecoms policymakers could pretend that such trade offs did not have to be made. Now we will all have to adjust to a new, nastier, reality.

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[15] See http://ec.europa.eu/information_society/policy/ecomm/doc/library/public_consult/cost_accounting/costing_methods_questionnaire.pdf

[16] See http://ec.europa.eu/information_society/newsroom/cf/itemdetail.cfm?item_id=7211

[17] The Parliament secured additional powers of oversight over spectrum policy in the 2006-9 review of the EC framework, most recently evident in the debate over the adoption of a Radio Spectrum Policy Programme for Europe, see http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20111028IPR30574+0+DOC+XML+V0//EN&language=EN

[18] See http://www.bbc.co.uk/news/technology-13886440