Comments on the BEREC's medium term strategy outlook

by VON Europe, January 2012

The Voice on the Net Coalition Europe ('VON') welcomes the opportunity to comment on the BEREC's medium term strategy outlook (hereafter 'the Consultation').

The BEREC's medium term strategy outlook recognises the following market evolutions:[1]

- the shift towards wireless and IP;
- the dramatic increase in data traffic in mobile networks and decrease in SMS traffic;
- the decline of fixed voice minutes and the rise of mobile voice minutes; and,
- the fact that content providers and Over-The-Top players challenge the conventional business models.

In light of these trends, the BEREC remarks that:[2]

- the end-user focus is becoming increasingly important;
- the existence of competitive markets in itself is not enough; and,
- transparency and other users' rights, such as switching and quality of service, are necessary to enable end users (including those with disabilities) to derive the most value out of electronic communication services.

Therefore, VON welcomes the fact that the BEREC envisages to:[3]

- facilitate access to radio spectrum;
- strike a correct balance between promoting competition, innovation and investment;
- address issues related to new business models;
- ensure access to end users;
- continue to prioritise consumer issues, such as transparency and quality of service, affordability and accessibility; and,
- continue its work on international roaming and net neutrality.

[1] See the Consultation, p. 3-4.
[2] See the Consultation, p. 4.
[3] See the Consultation, p. 4-5.

Departing from these goals and the BEREC's intention to *"effectively contribute to the development and better functioning of the internal market for electronic communications"*,[4] the BEREC should recognise that the communications ecosystem, and the way users experience it is such that services, content and applications running over the networks – over the Internet in particular – are at least as important as the pipes they go through, if not more because they stimulate demand (hence, return on investment) for the networks in the first place, and are a key contributor to the wider socio-economic benefits derived from broadband rollout. Focusing exclusively or predominantly on any one component of that ecosystem risks jeopardizing the development of other critical components.

Especially in an environment with fast-moving vertical and horizontal integrations and the commercial dynamics exemplified within the converging ecosystem (from hardware equipment, to infrastructure provision, to content and service provision, etc.) by such phenomena as 'bundling' (*i.e.* triple or quadruple play bundling voice, broadband Internet, TV and mobile), and the purchase of exclusive content rights, implies very careful monitoring by relevant authorities to avoid harmful and other undesirable discriminatory practices, which would have a negative impact for innovation, consumer choice, trade, etc.

Such undesirable practices include, for example, traffic management for commercial motivations based on the exploitation of a bottleneck, or discrimination between content, applications, and services of similar nature. The result of such behaviour is a decrease in choice and the switch of control from the end-user to the access operator, acting as gatekeeper. This behaviour is not just problematic for customers using these content, applications, and services, but also forms a threat to the continued survival of the companies creating and offering them (in many cases for free and to the benefit of customers).

Therefore, VON encourages the BEREC to take into consideration – and consider as a priority for its strategy outlook – the need to:

- assure **full – and preferably harmonised – utilisation** at the national level and across Europe of radio spectrum and the introduction of **more licence-exempt spectrum** and spectrum trading, as this is the best approach to increase efficiencies in the management of spectrum.
- put in place **safeguards to ensure the quality of Internet access**, in order to avoid a 'dirt road' effect, in parallel to the possibilities for operators to offer managed services. Such dirt road

[4] See the Consultation, p. 7.

effects could notably result from network improvements favouring managed services only, or Internet access becoming overpriced compared to managed services.

- oblige **State aid beneficiaries** to comply with a set of '**open access' requirements – not only as regards their infrastructure but also as regards the manner in which their Internet broadband offerings to end-users are set out –** on the beneficiaries' entire networks to safeguard that full and open access to the Internet is ensured at both the wholesale and retail levels.
- put in place guarantees for the development and growth of competitive alternatives to mobile international roaming in order to ensure consumer choice. It should be noted that, for example, under the second Roaming Regulation[5] Recital 49 asks the Commission to *"consider the availability and quality of services which are an alternative to roaming (such as VoIP)"* and that Recital 40 recommends that *"there should be no obstacles to the emergence of applications or technologies which can be a substitute for, or alternative to, roaming services, such as WiFi, Voice over Internet Protocol (VoIP) and Instant Messaging services"*. Similar statements should be explicitly kept when introducing the third Roaming Regulation.
- **assess Art. 8 (4)** of the Framework Directive, the objective for NRAs to *"promote the ability of end-users to access and distribute information or run applications and services of their choice"*, **at a network level** (*i.e.* does each access operator allow the end-user its freedom of choice) rather than at a market level (*i.e.* can end-users switch operators if they do not get choice with their current one).
- oblige operators to **disclose traffic management information in at least two different formats**: on the one hand, an easily understandable end-user fact sheet and on the other, a comprehensive and detailed technical fact sheet. The latter information is a critical resource for NRAs, content, application, and service providers, end-users, and consumers in order to allow them to determine whether operators are engaging in anticompetitive behaviour or putting in place harmful practices at the level of Internet access services. This can also help assure that content, application, and service providers' offers are optimised to make the best and most efficient use of the network.

[5] European Commission. (2009). Regulation (EC) No 544/2009 of the European Parliament and of the Council of 18 June 2009 amending Regulation (EC) No 717/2007 on roaming on public mobile telephone networks within the Community and Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Text with EEA relevance). *Official Journal of the European Union, L 167*, 12-23. Retrieved at, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:167:0012:0023:EN:PDF.

- seek a path that recognises the symbiosis which exists between the users (including the Internet players) and the companies that control the access network infrastructure and provide transmission services at the access network level; and balances interests in a way that serves the interests of end-users, network operators, and content, application, and service providers by taking the following steps, which only make sense if taken in conjunction:
  - **First**, the explicit endorsement of the widely-accepted principles that end-users have the right to send and receive the content of their choice, as well as access and use the Internet content, applications and services of their choice, and to connect hardware and use software of their choice that does not harm the network. This endorsement should specify that user choice should be exercisable at network level.
  - **Second**, the provision of a transparency standard requiring network operators to provide all end-users (*i.e.* consumers, but also service, content and application providers, including the media and cultural industries and governments at all levels) with clear, precise, and relevant information on the content, applications and services accessible through their network operator, the traffic management practices on the networks, and any quality of service limitations. We refer you to our more detailed point on disclosure above.
  - **Third**, there is a need for a behavioural standard intended to prohibit network operators from putting in place discrimination that is anticompetitive, creates barriers to innovation, or harms end-users, and it should bar conduct violating the other core principle of the open Internet: user choice on the Internet (see our first bullet point). VON agrees that regulation should not limit network operators' efforts to fairly use network management to overcome genuine technical challenges and maintain a high quality Internet service for their customers. But, this freedom to manage the network should not be a licence for network operators to engage in anti-competitive and other harmful conduct, such as blocking legitimate content and applications or unreasonably degrading services that users have paid to access. In general, network management practices should not discriminate between content, application, and service providers: if voice, email and video packets may be treated differently due to their respective sensitivities to jitter and latency, each voice packet should be treated equally to another voice packet, and the same accounts for e-mail and video, regardless of the application provider used to convey it.

Furthermore, VON would like to encourage the BEREC to also take into account small and medium enterprises (SMEs) as end-users. In 2008 the enterprise landscape in the European Union (EU) consisted for 99% out of SMEs, good for almost 21 mln. companies and not less than 90 mln. employees.[6] Moreover, micro enterprises – with a staff headcount of less than 10 people and a maximum annual turnover or balance sheet of €2 mln.[7] – represent not less than 92% of the total European SME landscape, or about 19 mln. enterprises and 39 mln. employees.[8] VON considers that business offers are not always adapted for these businesses, and that at the same time these businesses usually lack the necessary bargaining power.

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We thank you in advance for taking consideration of these views. Feel free to contact Herman Rucic, VON Europe, by phone (+32 (0)478 966701) or email (hrucic@voneurope.eu) should you need further information.

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About the VON Coalition Europe

The Voice on the Net (VON) Coalition Europe was launched in December 2007 by leading Internet communications and technology companies, on the cutting edge to create an authoritative voice for the Internet-enabled communications industry. Its current members are iBasis, Google, Microsoft, Skype, Viber and Voxbone.

The VON Coalition Europe notably focuses on educating and informing policymakers in the European Union and abroad in order to promote responsible government policies that enable innovation and the many benefits that Internet voice innovations can deliver.

[6] Eurostat. (2011). *Key Figures on European Business with a special feature on SMEs*. Brussels: European Union. p. 11. Retrieved at, http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-ET-11-001/EN/KS-ET-11-001-EN.PDF.

[7] See European Commission. (2005). *The New SME Definition: User Guide and Model Declaration*. p. 11-14. Retrieved at, http://ec.europa.eu/enterprise/policies/sme/files/sme_definition/sme_user_guide_en.pdf.

[8] See MaPEeR SME. (2011). *Measures to foster SMEs' participation in R&D&I activities and synergies' promotion in support of innovation and SMEs*. p. 81. Retrieved at, http://mapeer-sme.eu/en/~/media/MaPEer-SME/DocumentLibrary/Useful%20general%20documents/EEP-SME_Measures_26092011_publishable.