

MVNO EUROPE'S FEEDBACK ON BEREC'S DRAFT REPORT ON THE
EX ANTE REGULATION OF DIGITAL GATEKEEPERS - BoR (21) 34

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I. ABOUT MVNO EUROPE

MVNO Europe represents various types of Mobile Virtual Network Operators (MVNOs), with different business models, addressing retail consumers, business users, the public sector, and Internet of Things (IoT). <http://www.mvnoeurope.eu/members>

MVNOs target various customer segments (e.g. young people, businesses, IoT, etc.) and provide innovative services. These customers are particularly sensitive to an optimal user experience with their devices (e.g. smartphones, wearable devices, tablets and foldable computers, industrial devices, etc.).

MVNOs in the EU represent +/- 10% of SIM cards. Their market share is higher in some European markets, reaching around 25% of all SIM cards in the Netherlands, and is stable or growing in key European countries, as reflected by the French, German and Italian examples where MVNOs have millions of customers.

MVNOs strongly contribute to competition and provide clear Business to Consumer (B2C) and Business to Business (B2B) end-user benefits. MVNOs also contribute to financing mobile networks through payment of wholesale charges which assure revenues to Mobile Network Operators, whilst avoiding costly duplication of network assets.

II. MVNO EUROPE'S INPUT ON BEREC DRAFT REPORT ON THE EX-ANTE REGULATION OF DIGITAL GATEKEEPERS

General remarks

1. MVNO Europe welcomes the opportunity to provide its brief written input on BEREC's Draft Report on the ex ante regulation of digital gatekeepers.
2. MVNO Europe welcomes BEREC's support to the European Commission's ambition to create contestable and fair markets in the digital sector for the benefit of European citizens and businesses. MVNO Europe agrees with BEREC that an ex ante asymmetric regulatory intervention towards digital gatekeepers is necessary to ensure that competition and innovation are encouraged, that end-users' interests are protected and that the digital environment is open and competitive.

Enforcement

3. MVNO Europe agrees that proper enforcement of regulatory measures is key, and in this respect supports BEREC's proposals for a swift, effective and future-proof regulatory intervention towards digital gatekeepers.
4. MVNO Europe shares the assessment that a continuous, structured regulatory dialogue, public consultations and repeated interactions will have to be created with all kinds of relevant potential stakeholders, and not only with the concerned gatekeepers, as it is currently explicitly set in the Digital Markets Act (hereafter 'DMA') proposal of the European Commission.
5. MVNO Europe takes note of BEREC's proposal to include alternative dispute resolution mechanisms in the DMA as a way of improving enforcement of the DMA. MVNO Europe agrees that groups directly affected by the behaviour of the gatekeepers should easily have access to a swift and effective dispute resolution. MVNO Europe expresses its point of view that dispute resolution must not lead to a compromise or "give and take", but must result in fast and unequivocal decisions which effectively solve grievances that business operators have towards digital gatekeepers.
6. MVNO Europe shares BEREC's assessment that close cooperation with and between the competent independent authorities of the Member States will be crucial. Synergies between the EU competent

authorities and national independent authorities – including on systematic and continuous data collection – will be necessary to ensure the coherent and effective enforcement of the DMA.

Regulatory measures

7. MVNO Europe welcomes BEREC's reminder that the approach to the Open Internet should be coherent across the value chain and that digital platforms active on the application layers should not be able to restrict the access to specific applications, and underlying services (incl. 4G and 5G connectivity, access to mobile Internet, Voice over LTE, Voice over Wi-Fi, GPS, or voice commands), information or content on other levels of the value chain. In this respect, like BEREC, MVNO Europe welcomes the general idea of Recital 51 of the DMA proposal. MVNO Europe however believes that this recital, along with Article 6.1 (e) of the DMA proposal, should not only target technical but also commercial restrictions that distort the level playing field, and must explicitly prevent distortions on markets for electronic communications (incl. for Internet access services). MVNO Europe asks BEREC to include this point explicitly in its final Report.

8. In order to be consistent, MVNO Europe would recommend BEREC to also express concerns concerning the obligation defined in article 6.1 (e) of the DMA proposal in its final Report. This article is intended to promote the principles of freedom of choice concerning the services that are accessed via the core service platform offered by the gatekeeper and rights of end users to access an open internet. This provision, together with recital 51, also intends to ensure that end users can effectively switch and choose between different internet access service providers, given that limitations that gatekeepers could unduly impose in this respect would distort competition for the provision of internet access services and ultimately harm end users. MVNO Europe asks BEREC to emphasize in its final Report that the text of the DMA should be amended in order to make sure that situations similar to the one identified by the European Commission in slide 13 of its presentation to the Working Party meeting on Competition on 19 February 2021¹ are regulated by the DMA. More specifically, it is crucial to make sure that Article 6.1 (e) of the DMA cannot be interpreted by gatekeepers in a restrictive way that would solely address switching and subscribing problems. As the recital abovementioned stresses, the text's intention is to guarantee freedom of choice and enable end users to openly access online content and services. MVNO Europe considers that the provisions should explicitly also address usage restrictions with regard to electronic communications services, resulting from decisions made by gatekeepers controlling operating systems. The text of article 6.1 (e) therefore needs to be modified to ensure that end-users will be able to select the electronic communications network/service provider of their choice and enjoy the full functionality of the electronic communications services they choose to utilise. In addition, MVNO Europe believes that more emphasis should be placed on the ability of end users to actually access and use all the features available via the operating system of the gatekeeper, and this regardless of the electronic communications service provider (not only internet access service provider) they have chosen (or their employer or other intermediary has selected for them). In addition, MVNO Europe would like to emphasise that one should not take the risk of failing to achieve the objectives of recitals 50 and 51 by solely prohibiting restrictions imposed by operating systems for *technical reasons*. Device manufacturers and providers of operating systems should not be able to impose restrictions on mobile operators/service providers, on app developers, and on end-users, which limit access to key device functionalities (e.g. the generation of mobile technology to be used such as 4G and 5G, mobile Internet, Voice over LTE, Voice over Wi-Fi, GPS, or voice commands, etc.) for purely *commercial reasons*. Commercial practices manifested in technical ways also need to be in scope of the DMA, and we ask BEREC to make that explicit in its final Report.

9. In order to provide BEREC with more context on MVNO Europe's position and the main arguments behind it, below are the remarks the association shared with the European Commission before the latter published the proposed DSA/DMA package.

¹ See presentation here: <https://www.euractiv.com/wp-content/uploads/sites/2/2021/03/wk02554.en21.pdf>

III. COMMERCIAL PRACTICES DIMINISHING COMPETITION, INNOVATION AND CUSTOMER SATISFACTION

Like other telecommunications operators, MVNOs' business model is primarily based on the provision of bundles of voice/SMS/data services, including internet access services. Nowadays, customers expect uninterrupted mobile internet connectivity so as to access the full range of functionalities – including navigation, music and video streaming, text/voice/video messaging, mobile hotspot capability, and so on and so forth – that are available on their mobile device. Indeed, time spent on the internet worldwide reached 79% for mobile devices in 2018².

For many years now, MVNOs have been encountering major obstacles preventing them from fulfilling their mission of providing their customers with the most flawless experience possible and of boosting competition in the telecommunications sector³. Some MVNOs' customers have faced technical issues primarily relating to the setting of various functionalities – such as the activation of mobile Internet, MMS, mobile hotspot and other messaging services – on their smartphone, being left with dysfunctions and/or compelled to manually configure those features themselves, often with disappointing results. Worse still, MVNOs are sometimes totally blocked and unable to even use some services such as 5G, Voice over LTE (VoLTE) or Voice over Wi-Fi (VoWiFi). This means that millions of end-users are potentially paying important amounts of money for buying expensive devices that cannot be used to their full potential. And this situation is going to be even worse with network operators ceasing their 3G networks in the upcoming years. Thus, it is possible that customers will not even be able to place a call from their handsets, if they are using a SIM card that has been dispatched by a MVNO and are in an area lacking basic 2G services. Additionally, the voice quality is inferior in 2G networks than it is in 4G networks, which again hinders MVNOs from competing in this market.

The above-mentioned obstacles originate from the commercial practices of some major handset manufacturers who deliberately limit the openness and interoperability of their operating system with certain mobile operators without any technical reasons⁴. Structurally reluctant to cooperate towards finding mutually beneficial solutions⁵, those handset manufacturers make the (proper) functioning of their operating system conditional upon the signature of a carrier partner agreement, which can include device distribution and promotion commitments. MVNOs, and probably some smaller Mobile Network Operators as well, experience these requirements as one-sided and financially and commercially unsustainable/unrealistic. This type of behaviour hampers innovation and prevents MVNOs from offering essential and innovative services (such as 5G, VoLTE and VoWi-Fi communications or eSIM)⁶ as they would like to their customers.

MVNO Europe has always been of the view that all operators – with or without “carrier partner agreements” – should be able to equally access and support features offered by operating systems/handset manufacturers, in the interest of users (be they consumers or business/public sector users).

² Study *Mobile Advertising Forecasts*, Zenith

³ This trend has been confirmed by the report ‘*Market study into mobile app stores*’ published by the Netherlands Authority for Consumers and Markets, in April 2019, p. 6

⁴ This is further substantiated by the report ‘*Market study into mobile app stores*’ published by the Netherlands Authority for Consumers and Markets, in April 2019, p. 81

⁵ This is confirmed by the report ‘*Market study into mobile app stores*’ published by the Netherlands Authority for Consumers and Markets in April 2019, p. 6

⁶ VoLTE is nowadays a must have functionality to ensure voice services for the mid and long term, especially considering that MNOs will be gradually decommissioning 3G as from 2021.

IV. COMPETITION AND FREEDOM OF CHOICE DAMAGED

The technical problems that smaller operators have to face because of the abovementioned commercial practices of some handset manufacturers constitute a structural competitive disadvantage on electronic communications markets, hampering new entrants on telecommunications and digital services markets and entailing risks of evicting MVNOs from certain (especially high-end) market segments. Such a situation is highly-detrimental to MVNOs' end-users and is not acceptable in a genuine and open digital single market.

EU policy aims to provide everyone in Europe with better quality goods and services at lower prices and is about applying rules to make sure companies fairly compete with each other and are encouraged to innovate for the benefit of consumers, business and public sector users. MVNO Europe is of the view that those goals should be pursued and respected by all companies active in the EU, including for the services provided through software/hardware combinations and especially the operating systems on devices.

The technical problems endured by MVNOs' customers clearly show that devices and their embedded operating systems may challenge the general objective of an open internet in terms of how end-users can (or rather cannot) practically access and use internet-based services on their devices. Acting as gatekeepers, operating system providers and mobile phone manufacturers are able to obstruct the chain that connects end-users to internet content, information, services and applications or even basic functionalities of a mobile phone. This is not only worrying from the perspective of the open internet but also from a freedom of choice perspective (including freedom to choose one's electronic communications provider) as choices are being made for the end-user him/her/itself. Indeed, if the end-user is to make full use of the mobile device of his/her/its choice and its functionalities, he/she/it may be forced to subscribe to telecommunications services that are provided by a mobile operator certified by the handset manufacturer – and thereby potentially turn down his/her/its initial preferred choice of mobile services provider.

V. DEVICE NEUTRALITY AS THE WAY FORWARD

The European Commission has indicated in its communication "Shaping Europe's Digital Future" that it will explore ex-ante rules to ensure that markets characterised by large platforms with significant network effects acting as gatekeepers, remain fair and contestable for innovators, businesses, and new market entrants in the context of the Digital Services Act (DSA) package.

MVNO Europe is of the view that, like the Regulation on platform-to-business relations⁷, such a package has the capability to deal with – among other things – the issues related to devices, operating systems and internet access that are described above, including where competition between electronic communications providers is distorted by the behaviour of device manufacturers and operating systems in phones, tablets, wearable devices, in-car systems, and other future devices.

Indeed, MVNO Europe considers that the DSA can provide end-users with improved freedom of choice by obliging certain big players to stop market-distorting behaviour and allow for more competitive market dynamics.

⁷ The results of the inter-institutional negotiations on this P2B Regulation failed to address the existing imbalances in the relationships between providers of operating systems and their business users.

The European Commission should be able to reach those goals by integrating the notion of device neutrality within its proposal, which is a principle that European consumer organisations⁸ and some national regulators⁹ would also like to be applied within the European Union and which aims to give end-users control over their devices and guarantee access to the open internet in all parts of the value chain. *“Device neutrality extends the principle of net neutrality to guarantee that, like your telecoms operator, a platform cannot interfere with your decisions by restricting your freedom of choice”*¹⁰.

As far as MVNO Europe is concerned, the following should apply if device neutrality is to make the market fairer and more competitive:

- Whether they are smartphones, tablets, smart speakers, voice assistants, wearable devices or any other connected devices, consumers must be able to use their devices in a neutral and non-discriminatory way¹¹.
- Inescapable device manufacturers should not, merely for business reasons, deliberately degrade the selection of content and services available on their own devices, by preventing providers from accessing the functions they need to fully operate their services¹².
- Device manufacturers and providers of operating systems should not be able to impose restrictions on mobile operators’ customers and app developers to limit access to key device functionalities (e.g. mobile Internet, GPS or voice commands) for purely commercial reasons.
- Operating systems developed for connected devices that are interoperable with a service offered by a M(V)NO should be interoperable with the same services provided by all mobile (virtual) network operators (principle of non discrimination). End-users should have the right/ability to smoothly access all the functionalities of a given operating system (i.e. features are properly working and do not require complicated manual configuration by the end-user) regardless of the choice they made for their mobile operator/telecommunications services. This interoperability should not be subject to any type of commercial agreement dictated by the hardware/operating system provider.
- To improve the overall information available on how device manufacturers and OS providers operate, the European Commission as well as an expert regulator may be given the power to gather general information from all market players¹³.
- The ability for affected market participants and end users to file dispute-resolution proceedings with the European Commission and/or an expert regulatory authority would be most welcome.

⁸ *An EU that keeps working for Consumers - BEUC proposals for the 2019-2024 European Commission*, BEUC p. 18

⁹ *The state of the internet in France - 2019 Report*, ARCEP & ‘*Market study into mobile app stores- April 2019*’, ACM, p. 8.

¹⁰ *The state of the internet in France - 2019 Report*, ARCEP. p. 64

¹¹ *The state of the internet in France - 2019 Report*, ARCEP. p. 65

¹² *Open Internet and devices - Devices, the weak link in achieving an open internet* (February 2018), ARCEP. p.56.

¹³ *Open Internet and devices - Devices, the weak link in achieving an open internet* (February 2018), ARCEP. p. 47.

VI. CONTACT US



MVNO Europe
Rue de le Loi, 38
B-1000 Brussels
Belgium
info@mvnoeurope.eu

Quentin Philippart de Foy
Policy Officer
T +32 2 789 66 23
quentin@mvnoeurope.eu

