DIGITALEUROPE Input to Consultation on BEREC Strategy 2021-2025 and Work Programme 2021

Executive Summary

DIGITALEUROPE greatly appreciates the opportunity to comment on the BEREC Strategy 2021-25 and to provide inputs for the BEREC WP 2021.

DIGITALEUROPE supports BEREC's work to provide recommendations to National Regulatory Authorities (NRAs) to have a consistent approach of the different regulations across Member States in order to promote the objective of a Digital Single Market.

Strategic priority 1: Promoting full connectivity

Full connectivity in Europe is a high priority for DIGITALEUROPE members to ensure that all users and businesses can access to digital services online. Though Member States have reached 100% basic broadband penetration rate, the coronavirus pandemic revealed that not all children can study online, nor household members can watch streaming video services on TV or communicate with video through messaging applications. There are still households in Europe which do not have access to a fixed broadband connection, nor do they have sufficient mobile coverage, as it was agreed that satellite is a sufficient technology to reach the objective of 100% broadband penetration rate.

BEREC should aim at promoting through the regulatory application of the EECC regarding the deployment of VHCN:

» fixed connectivity to ALL households, for users to rely on their residential broadband connection to work remotely, access business services, play online and watch high-definition video content,

» fixed connectivity to ALL businesses and public sector to boost digital transformation and industrial connectivity, and

» 5G connectivity in ALL regions and not only along transport paths and in the main cities.

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Strategic priority 2: Supporting sustainable and open digital markets

Open Internet Regulation

We believe the Open Internet Regulation as agreed by the European legislators strikes a reasonable balance between protecting the rights of end users of Internet Access Services (IAS) and ensuring freedom to continue to innovate and develop new services for the entire ecosystem. We support BEREC in ensuring its consistent application across Europe.

Again, especially as network operators and content, application, and service providers are making investments in a strong 5G ecosystem, DIGITALEUROPE would like to see consistent and non-ambiguous Open Internet Regulation Guidelines to support the development of a Digital Single Market and commercial practices for all providers to invest, conduct business and innovate in Europe. 5G networks are not only communications systems but will also play an important role as a platform for innovation. Experience tells us that it is extremely difficult to predict what will be the major use cases of a new technology. Regulators can promote innovation by providing clear and consistent guidance that enables users and innovators to develop and use services that fulfil their needs in new and better ways.

Supporting sustainable and open digital markets

BEREC's strategy also includes multiple references to digital platforms. The strategy questions about the impact of such platforms on internet openness and competition, as well as "whether the current competition framework can address any anti-competitive behaviour or whether sector-specific regulation might be warranted."[1] It then proposes to make platform regulation one of two priorities (along with connectivity/5G) for institutional cooperation, stating that "emerging issues around the digital ecosystem (including platforms), may require new and enhanced cooperation among European regulators."[2] BEREC suggests a host of potential "co-legislators," including the European Data Protection Board (EDPB), the European Data Protection Supervisor (EDPS), the European Competition Network (ECN), and the European Regulators Group for Audiovisual Media Services (ERGA).[3]

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[1] Body of European Regulators for Elec. Commc'ns, *BEREC Strategy 2021 - 2025,* BoR (20) 43 at 5 (Mar. 5 2020), *available at* https://berec.europa.eu/eng/document_register/subject_matter/berec/ annual_work_programmes/9039-draft-berec-strategy-2021-2025.

[2] *Id.* at 11.

[3] *Id.* at 9.

DIGITALEUROPE has concerns about this aspect of the strategy. Issues around the digital market and the economic dynamics of digital platforms have been assigned to the responsible competition authorities, whose delegated role should not be intruded upon in the absence of specific direction from the European Commission. For instance, DG COMP of the European Commission, as well as a significant number of national competition authorities across the EU, have already published detailed reports on the issues BEREC proposes examining.[4] Some of these authorities have even proceeded to propose legislative measures to implement their findings.[5] We fear that it would be a misallocation of BEREC's valuable resources to attempt to force itself into the ongoing discussions with no obvious end, and without a clear invitation from the assigned decision makers, as regulation of digital platforms is currently outside of the remit of telecom regulators. Concurrent with the establishment of the European Electronic Communications Code ((EU) 2018/1972) (EECC), the December 2018 Regulation (EU) 2018/1971 aimed to "strengthen the role of BEREC,"[6] and set out specific responsibilities for BEREC without mentioning engagement on digital platform matters.

Rather, we believe that BEREC can do much more to encourage flourishing digital markets throughout Europe. BEREC already possesses a substantial toolkit of measures at this disposal to efficiently enable digital transformation. We believe it would be more effective for BEREC to use these tools rather than pursuing new digital platform measures that are currently outside of its remit. Indeed, legislation such as the EECC and Regulation (EU) 2015/2120 specifically set out additional tasks for BEREC related to projects such as promoting the greater availability of open internet access services and the

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[4] European Comm'n, *Competition Policy for the Digital Era (2019)*, *available at* https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf; for Germany: Bundesministerium für Wirtschaft und Energie, *Ein Neuer Wettbewerbsrahmen für die Digitalwirtschaft: Bericht der Kommission Wettbewerbsrecht 4.0* (Sept. 2019), *available at* https://www.bmwi.de/Redaktion/ DE/Publikationen/Wirtschaft/bericht-der-kommission-wettbewerbsrecht-4- 0.pdf?__blob=publication File&v=10.

[5] For example, in January 2020 Germany published a draft update for its Competition Law, focusing on the regulation of digital platforms. *See* Bundesministerium für Wirtschaft und Energie, Referentenentwurf zur 10. GWB-Novelle, Jan. 28, 2020, https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/ AktuelleMeldungen/2020/28_01_2020_GWB_Novelle.html (last visited Apr. 1, 2020).

[6] Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 Dec. 2018 on Establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), Amending Regulation (EU) 2015/2120 and Repealing Regulation (EC) No 1211/2009, 2018 O.J. (L 321/1) 11, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/ PDF/?uri=CELEX:32018R1971&from=EN.

development of 5G networks. BEREC should, in our view, focus its work primarily on its designated missions.

In this respect, DIGITAL EUROPE wishes to emphasize that IOT and 5G driven innovations, boosted by the central role of data and developments in artificial intelligence, will to a very large extent be international applications that move seamlessly over national borders. We see that traditionally local operators are increasingly offering sophisticated IOT solutions, in the B2B sphere but not limited thereto, to companies operating at European scale or even in other national markets than the historical home markets of the telecommunications operator. The successive Roaming Regulations have further facilitated the provision of such cross-border solutions. The cross-border nature of these activities makes regulatory harmonization efforts by BEREC and other EU institutions particularly timely and relevant.

More specifically, the challenge today is that efforts to implement the existing telecommunications framework, as well as the EECC, are too fragmented to allow telecommunications and digital players to grasp the full potential of these new cross-border IOT opportunities and markets. Local telecommunications operators who wish to offer 5G-based innovative solutions to international customers must take into account a wide variety of national telecommunications rules that often differ materially, including those addressing end-user protection, security outages, privacy, and data retention. This fragmentation conflicts with the objectives of the EECC and discourages the adoption and roll-out of innovative digital services.

Therefore, DIGITAL EUROPE believes that BEREC can most effectively support Europe's digital transformation by deploying its traditional toolkit towards greater harmonization in the ongoing implementation of the EU telecommunications regulations. In this respect, the BEREC strategy paper fails to set out a strategic roadmap to achieving a digital single market – which is after all one of the EECC's four priority regulatory goals. Also, while the successful implementation of the EECC currently receives a brief mention in the introduction of its strategic priorities, DIGITAL EUROPE believes that this effort warrants inclusion as one of the cornerstones for achieving thriving and resilient digital markets, and that BEREC should play an essential role by working to ensure maximum harmonization of these rules across the EU.

Such harmonization is also relevant to the enlarged scope of the EECC after December 2020, when OTT applications and particularly NI-ICS will be brought under the scope of the national telecommunications regulations. It goes without saying that many of the NI-ICS providers operate at a European-wide or even global scale and that the current national telecommunications frameworks are ill-suited to deal with these new services. See annexe document where an illustration of these problems is provided with regard to the application of article 40 of the EECC.

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DIGITAL EUROPE believes strongly that it is in the interest of regulators, providers, and ultimately end-users, that BEREC assists the NRAs to take a fresh look at these issues and to squarely acknowledge the need for increased regulatory harmonization and cross-border co-operation with regard to NI-ICS. Other instances like the work of ENISA have already recognized the importance thereof. It is therefore surprising to see this priority responsibility entirely absent from both BEREC's 2021-2025 strategy and its 2021 work program, and we encourage BEREC to include this dimension after the review.

BEREC's strong focus on platform regulation also runs the risk of creating regulatory overlap, causing problems for current digital platform regulators. Similar to BEREC's mandate in the EECC, the European Commission's DG Comp and national competition authorities are the relevant regulators to oversee the activities of digital platforms by imposing fines and remedies in case of breach of antitrust rules. Data protection authorities and national consumer bodies are also regulatory authorities overseeing the activities of digital platforms in relation to privacy and consumer law.

Fragmented and/or overlapping regulation would also negatively affect companies' ability to innovate, ultimately negatively affecting the consumer experience. Companies in any sector desire certainty, including regulatory certainty, particularly when developing and rolling out new products and services. In the absence of certainty about the regulatory landscape, companies may choose not to invest in areas that may be desired by consumers, but which present too much risk of unintentional non-compliance.

In order to avoid regulatory overlap and ensure that any competition issues implicated by digital platforms are addressed coherently by competent authorities, DIGITALEUROPE urges BEREC to revise its proposed strategy to more clearly and firmly emphasize using its current regulatory tools and authorities to boost Europe's digital transformation rather than diluting its effectiveness and impact by directing its energy towards new digital platform measures which are currently outside of its remit, and adequately covered already by other European regulatory bodies. BEREC's most appropriate and beneficial contribution is to remain at the European institutions' disposal to share its deep knowledge of and extensive experience with regulation of electronic communications services and electronic communications networks to the extent that the lead administration deems BEREC's expertise to be relevant and helpful with evolving digital platforms issues.

International cooperation priorities

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DIGITALEUROPE welcomes BEREC's focus on strengthening its international network and cooperation. We note, however, the lack of mention of future cooperation with the United Kingdom. We recognize the uncertainty surrounding the future relationship between the EU and the UK but at the same time we believe both sides would benefit greatly from the continued close collaboration. To our understanding BEREC has sufficient autonomy under its new regulation to start forming its working relations with Ofcom irrespective of the future FTA, even if it would be preferable if a future EU-UK FTA includes close regulatory cooperation on telecoms.

Stakeholder engagement

DIGITALEUROPE welcomes the increased level of engagement with BEREC EWGs as this provides stakeholders more opportunities to provide inputs and to exchange views with BEREC.

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About DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies. DIGITALEUROPE ensures industry participation in the development and implementation of EU policies.

DIGITALEUROPE Membership

Corporate Members

Accenture, Airbus, Amazon, AMD, Apple, Arçelik, Bayer, Bosch, Bose, Bristol-Myers Squibb, Brother, Canon, Cisco, DATEV, Dell, Dropbox, Epson, Ericsson, Facebook, Fujitsu, Google, Graphcore, Hewlett Packard Enterprise, Hitachi, HP Inc., HSBC, Huawei, Intel, Johnson & Johnson, JVC Kenwood Group, Konica Minolta, Kyocera, Lenovo, Lexmark, LG Electronics, MasterCard, METRO, Microsoft, Mitsubishi Electric Europe, Motorola Solutions, MSD Europe Inc., NEC, Nokia, Nvidia Ltd., Océ, Oki, Oracle, Palo Alto Networks, Panasonic Europe, Philips, Qualcomm, Red Hat, Ricoh Europe PLC, Rockwell Automation, Samsung, SAP, SAS, Schneider Electric, Sharp Electronics, Siemens, Siemens Healthineers, Sony, Swatch Group, Tata Consultancy Services, Technicolor, Texas Instruments, Toshiba, TP Vision, UnitedHealth Group, Visa, VMware, Xerox.

National Trade Associations

Austria: IOÖ
Belarus: INFOPARK
Belgium: AGORIA
Croatia: Croatian Chamber of Economy
Cyprus: CITEA
Denmark: DI Digital, IT BRANCHEN, Dansk Erhverv
Estonia: ITL
Finland: TIF
France: AFNUM, Syntec Numérique, Tech in France

Germany: BITKOM, ZVEI
Greece: SEPE
Hungary: IVSZ
Ireland: Technology Ireland
Italy: Anitec-Assinform
Lithuania: INFOBALT
Luxembourg: APSI
Netherlands: NLdigital, FIAR
Norway: Abelia
Poland: KIGEIT, PIIT, ZIPSEE
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