



**GSMA response to public consultation on the draft BEREC report on
the Internet Ecosystem (BoR (22) 87**

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About the GSMA

The GSMA is a global organisation unifying the mobile ecosystem to discover, develop and deliver innovation foundational to positive business environments and societal change. Our vision is to unlock the full power of connectivity so that people, industry, and society thrive. Representing mobile operators and organisations across the mobile ecosystem and adjacent industries, the GSMA delivers for its members across three broad pillars: Connectivity for Good, Industry Services and Solutions, and Outreach. This activity includes advancing policy, tackling today's biggest societal challenges, underpinning the technology and interoperability that make mobile work, and providing the world's largest platform to convene the mobile ecosystem at the MWC and M360 series of events.

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Introduction

GSMA, welcomes BEREC's draft report on the internet ecosystem. The report is a timely contribution to the ongoing debate about a fair and balanced digital market regulatory framework and the findings serve as important input to understand the changes that the internet ecosystem is currently undergoing and their impact on the different actors of the internet value chain. GSMA appreciates the opportunity to comment on BEREC's analytical work on the changing dynamics in the internet ecosystem and the internet economy.

Firstly, GSMA would like to highlight some important findings from our recently updated study on the Internet Value Chain¹ which we find are essential to keep in mind when analysing and further examining the internet ecosystem:

- Although the growth across the value chain is strong, the return on capital of the telecom operators, that was already below 10%, has declined further to single digit numbers. The benefits and returns are flowing primarily to players in the online services segment.
- Despite continuous investments in highly complex networks to meet ecosystem demand, the low returns raise questions about the robustness of investment in capacity, coverage and speed, in addition to computing functionalities at the edge.
- Unbalanced market and bargaining powers along the digital value chain prevent a natural correction. The problem is magnified by asymmetric regulatory obligations, sector specific taxes and fees, high spectrum cost and network deployment restrictions.
- In essence, network operators confront a challenging financial situation created by the combination of increasing consumer traffic demand which they cannot monetise because of the competitive nature of the retail market and established payment modalities (typically broadband offers provide for unlimited or very high data traffic allowances at a flat rate) and increasing traffic volumes delivered by OTT services that do not bear access network costs.

It is on this background, that GSMA has called for policy makers and regulators to appreciate the critical role of the internet infrastructure and to sustain long term investment by working to ensure that market distortion, regulatory requirements or other factors do not limit actors in making sufficient returns in all segments of the internet value chain.

Comments to BEREC's draft report on the internet ecosystem

To BEREC's draft report on the internet ecosystem, we would like to offer the following general and specific comments:

¹ The Internet Value Chain, Kearney (2022)

The Role of Digital Gatekeepers in the Internet Ecosystem.

The internet ecosystem is under considerable changes. Some large actors in the internet ecosystem, whose purview had to-date been limited to the client and server sides of the internet ecosystem, are increasingly investing in and rolling-out submarine cables and related backbones, virtualized network services, and CDNs. While investment by OTTs in Europe is valuable, the level of investment is not comparable to that of the telecom sector. Every EUR invested by OTTs is being matched tenfold by network operators who build the most expensive part of the network, notably the aggregation, local loop and terminating segment, without mentioning the investment into spectrum licenses required to run mobile networks. Further, operators' network investments form an important basis for creating competition for the benefit of the consumers, not least in the provision of content.

We strongly support BEREC's analytical conclusion that *"Together with BEREC's previous work on the regulation of digital gatekeepers, this report shows how a small number of digital platforms have reached a position allowing them to shape and restrict both the competition dynamics on different elements of the internet ecosystem and the relative openness under which content, services and information can be accessed and shared."* (p. 6)

Also, as highlighted by the Kearney report, the flourishing digital market does not equally benefit all players of the internet chain, indicating a structural problem in the current model. While OTT revenues are booming, the revenues of telco's are declining and the financial power of the large content providers in terms of valorisation is significantly beyond that of the European telecom operators.

In view of the current debate and recent commitment by the EU *for developing adequate frameworks (..).....and make a fair and proportionate contribution to the costs of public goods, services, and infrastructures, for the benefit of all Europeans²*, we believe the report would have benefitted from further analysis of the relationship between the costs of providing internet access services and the value creation and of the serious market failure in the connectivity market stemming from differences in bargaining power between OTT companies and ISPs. Without consideration to this aspect, the report is missing a very important element that could impact the assessment of the competitive environment. We encourage BEREC to consider this topic as part of its new work item on OTT Fair Share, as also further detailed below.

Impact of the DMA on the Internet Ecosystem

The GSMA welcome the focus on digital platform regulation in the BEREC Internet Ecosystem report, in particular the focus on forthcoming *ex ante* regulatory regime which will be instituted under the Digital Markets Act, taking effect in early 2023. Members of the GSMA have been strong advocates of new rules for digital platforms in the EU for several years, ensuring that providers take full responsibility for the spread of illegal and harmful material online and tackling

² European Declaration on Digital Rights and Principles for the Digital Decade, (COM 2022)

the market power of the largest digital companies to ensure a more competitive marketplace for digital products and services, operating in the interest of EU citizens. This work goes hand in hand with our attempts to ensure a fairer allocation of value in the digital ecosystem.

The BEREC Internet Ecosystem report correctly identifies the key elements of digital platform regulation that will come into force over the coming months and years. In our view BEREC and its members will have a role to play in supporting the European Commission in its role as lead enforcer for the DMA, coordinating closely with national competition authorities (and the European Competition Network).

BEREC should leverage its experience in overseeing the application of ex ante regulation in the telecoms sector to support the effective implementation of the DMA for example by sharing best practices between Member States and developing analytical tools to help in identifying gatekeeping behaviour.

For instance, we anticipate BEREC will have a particularly important role in supporting the enforcement of Article 6 (Obligation for gatekeepers on interoperability of number-independent interpersonal communications services) given the significant overlap here with traditional (number-based) communications services. BEREC should provide learnings from the enforcement of portability provisions under the Electronic Communications Code that can assist gatekeepers and third parties in practical implementation of these new interoperability provisions for OTT messaging services.

Anticipated challenges are primarily technical, with a lack of available standards today to support seamless interoperability across heterogeneous OTT messaging services. Over time, the obligations will extend to supporting full functionality of NI-ICS, including voice and video calling. Again, we expect BEREC should be able to extrapolate some learnings from the application of portability requirements in the telecoms sector that will assist in enforcing these rules

In relation to the DSA, we envisage BEREC will have a more limited role, with national broadcasting regulators taking a stronger role here on enforcing transparency, reporting and platform design requirements.

In summary, we encourage BEREC to make best use of the tools at its disposal to support the Commission, competition authorities and Member States in their enforcement duties for this important piece of legislation.

The Role of Operating Systems

We find it highly relevant not to underestimate the influence of the OS providers on the overall openness of the Internet and to acknowledge the lock-in effects of devices (p.4 and 5), and we welcome the recognition of the termination monopoly that is held by the OS providers.

Domain Name System (6.2.4)

Chapter 6.2.4 on the Domain Name System does in our view only provide a light touch analysis of the potential problems regarding circumvention of multistakeholder frameworks and the potential of blocking or degrading competing services by OTTs offering “secure” DNS lookup services. This topic represents another example of the imbalance in the regulatory framework. DNS services of ISPs are subject to provisions under the open internet regulation, while those of OTTs are not.

BEREC dismisses possible competitive issues arising from DNS provided by entities other than ISPs not being subject to any regulation, even highlighting possible positive impacts on openness and convenience, while maintaining that openness of the DNS provided by ISPs is ensured because it is subject to the Open Internet Regulation (par 6.2.4 and 7.2.4). This is a regulatory asymmetry that has been introduced by BEREC itself and should be considered further as part of BEREC’s future work.

IP Interconnection Markets (6.2.5)

BEREC concludes in its draft BEREC Internet Ecosystem Report that *“for the time being, transit and interconnection players do not seem to pose major difficulties to competition”* (section 6.2.5). However, the report is missing a very important element that could seriously negate an effective assessment of the competitive environment.

In fact - there is a depth of analysis showing that IP interconnection markets are overall not functioning well. In particular:

- IP interconnection for internet traffic conveyance, connecting OTT services with end-customers, constitutes a two-sided market.
- Internet traffic conveyance is currently provided by telecom network operators to OTT players, i.e., service provision takes place.
- **But** – current market dynamics and strong bargaining power from large CAPs do not allow ISPs to negotiate fair terms for specific traffic costs generated by those actors, and there is currently no effective framework that would enable telecom network operators to levy appropriate fees for the services provision involved.

There are clear reasons for the market failure, namely the asymmetric bargaining power between telcos and large OTTs whose content and applications services are essential to competitive retail internet offers. This issue has been acknowledged by BEREC, but in our view not considered in depth. For example, an important structural difference is the financial power of the large content providers that in terms of market capitalisation is ten times the size of the European telecom operators.

The OTT networks also lack commercial incentives to enter commercial relationships with network operators. The asymmetry is notably due in the negotiating power of the OTT and the operators.

The OTT having the possibility to bypass an operator if it disagrees with the terms of a contract. OTT can reroute their traffic through a variety of alternative free routes instead of negotiating a contractual relationship directly with the ISP.

There is currently no compensation for the specific costs, as quantified by the Frontier report³, generated by few large OTT content providers that represent a huge part of the (streaming) traffic sent over operators' networks.

The ability of OTTs to by-pass operators may impact on the QoS. The use of free peering by large content providers, entering operator networks through interconnection gates that are not properly designed for such extra traffic, inevitably leads to congestion. Congestion is a problem for the operators and for the consumers if not managed properly, it has an impact on the QoS. This again has an impact on network operators who are under regulatory scrutiny in respect to the IO regulation and QoS obligations.

As a result of this asymmetry, telecom operators are not able to sustainably invest into their networks because OTTs do not contribute to the specific traffic costs they cause. We therefore believe more analysis is needed to explore and understand the fact that the relationship between the OTTs and networks is not as "symbiotic" and complaisant as it could and should be (p. 64).

We appreciate that the issue is identified as a "relevant topic for further analysis" (p. 70), and we want to commend BEREC for launching a new work item on OTT Fair share, which will focus on this issue. The GSMA is looking forward to future cooperation with BEREC also in this context and stands ready to continue sharing industry's knowledge and expertise.

However, we would like to emphasize that, because of the issues raised above, there would be significant benefits if an OTT Fair Share regulatory solution was introduced, as the Commission has indicated it is working on. Such a fair contribution mechanism would indeed be able to address the market failure and allow network operators to obtain fair share contributions to their network cost usage from the largest OTT data generators that would benefit the entire EU society in terms of jobs, GDP or environmental aspects, as illustrated by the Axon report⁴.

As an additional point, we want to caution that BEREC adopts any early conclusion in relation to smaller CAPs and their ability to grow because of operator's peering policies (p.48). As we understand the reference is a study based on practices in the Netherlands. At this stage we do not think the issue is sufficiently documented and hasty conclusions should not be drawn.

On the same topic, we disagree with BEREC stating that "*IAS providers have an incentive to exploit their termination monopoly which may lead to obstacles for CAPs when providing internet-based services*" (p.64). BEREC disregards the fact that the market for IAS being under the scrutiny of NRAs, any specific issue that would occur can be dealt with based on the EECC provisions.

³ Estimating OTT traffic-related costs on European Telecommunications Networks, Frontier Economics (2022)

⁴ Europe's Internet Ecosystem: Socio-economic benefits of a fairer balance between tech giants and telecom operators, Axon Partner Group (2022)

IAS (6.2.3)

The trend towards bundled offers by ISPs is reported as having increased switching barriers, making it more difficult for new market entrants to compete but BEREC fails to mention that this issue, when and if it occurs, has already been addressed by the EECC (par 6.2.3).

We also question BEREC's negative assessment of ISPs imposing specific equipment (as an exception to the general rule) when technically justified, as this is aimed at ensuring the performance levels for the end user and has been acknowledged and permitted by the regulation (p. 60)

Hosting, CDN and Cloud Computing (6.2.6)

As for the role of CDN networks, we want to add that in our view, the economies of scale in the CDN market are systematically overestimated (p.49), as barriers to entry are in fact comparatively low, i.e., investments in server infrastructure are not sunk. This is in stark contrast to investments in other infrastructure elements, such as fiber lines.

Open Internet Regulation (7.2.3)

We welcome the recognition that the application of the OIR has ensured that internet access services remain open, and therefore support an innovative environment, whilst avoiding "innovation by permission" (p.61).

However, there is a concern regarding the impact the OIR is having on the development of new digital services, in particular services *other than internet access services, under the so-called "specialized services' regime"* The specialised services regime is becoming of increasing importance, with the increase in content, applications, and services (together 'content') that require optimised treatment which can be achieved through, for example 5G network slicing and edge computing.

Despite the fact that the current guidance indicates that such use cases are not, per se, prohibited, the current guidance on the interpretation and application of the OIR makes it hard to identify, without taking a strict 'innovation by permission' approach, which content can be treated as a specialised service, as the criteria against which these are assessed are very challenging to apply in the context of an increasing volume of 5G-slice based specialised services.

We would ask that this concern is reflected in the Internet Ecosystem Report.

We also welcome the BEREC's recognition that Gatekeepers, can impact the openness of the internet ecosystem, and innovation. For example, that:

- OS providers can restrict openness on the internet through their activities (p. 57/58).

- Application layer service providers can “nudge” users and direct traffic towards specific content and applications (p.19).

Future studies

We understand, that BEREC’s Internet Ecosystem report is a starting point for identifying different areas of work where BEREC can contribute to the policy debate over the coming years. Several important areas for further studies have been identified though out the report. GSMA has also highlighted areas where further analysis is warranted, and we invite BEREC to further consider these areas and address the market failures and imbalances in the Internet ecosystem first and foremost as part of its contribution to the Commission’s coming initiative on a framework which allows all segments of the internet ecosystem a fair return.