GSMA comments on the
Draft BEREC Report on OTT services (BoR (15) 142)

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The GSMA welcomes the opportunity to respond to "BEREC's Report on OTT Services".

Electronic communications have been an essential part of life for both consumers and businesses. While the definition of "electronic communications services" set out in the Framework Directive has not changed since 2002, the nature of the way in which people communicate has transformed entirely. Internet telephony, instant messaging, social networks and many other services compete with the more traditional voice and text services. At the same time, consumer regulation in the Framework Directives has not developed holistically alongside the horizontal consumer protection and there are both overlaps and gaps. Consequently, we agree with BEREC that there is a need to carry out an analysis of OTT services, their definition and their impact on the electronic communications sector, both in terms of competition and consumer protection, as well as their impact on the current EU regulatory framework.

Redefining communications services

The definition of electronic communications services[1] (ECS) in the Framework Directive was intended to address the convergence[2] of telecommunications, media and information technology sectors under one regulatory framework at the time of its introduction with controversial results. The same review needs to occur again to take into account the convergence of communication services across ECS and Information Society Services (ISS).

BEREC has categorised OTT services as follows:

(a) OTT-0 services, which are OTT services that qualify as ECS
(b) OTT-1 services, which are OTT services that do not qualify as ECS but do potentially compete with ECSs and
(c) OTT-2 services, which are the remaining category consisting of OTT services that are not an ECS and do not potentially compete with ECSs

The classification of OTTs falling within (a) above has always been unclear and difficult to enforce and the differences between all categories are becoming blurred. OTT services providing outgoing or incoming access to or from the PSTN have been classed as falling within the definition of ECS, these services do not in practice convey signals as a result of access,

[1] Article (c) "'electronic communications service' means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks" Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)

[2] Explanatory note of the Commission: "the legislative package for the electronic communications sector aims to establish a harmonised regulatory framework for networks and services across the EU and seeks to respond to convergence trends by covering all electronic communications networks and services within its scope"

which is still a function of the underlying network operator. This is an example of how the traditional definition does not adapt well to new services and has resulted in inconsistent application and compliance. This has been shown by the fact that the 2007 ERG Common Position on VOIP has not been consistently implemented. Also, this classification fails to recognise that end users no longer see these services as different, which is crucial in the scope of assessing substitution effects between communication services and when defining required protection standards.

OTT-1 services are perceived by customers as functional substitutes to their current voice and text services. As the guiding regulatory objectives in the current framework are to promote competition and, protect consumers, ensure choice and consumers' safety and address social inclusion, the starting assumption should be first to assess to what extent specific regulation is needed and if so, to ensure that the same regulatory aims apply to all communications services, notwithstanding the technology used to provide those services. It should be underlined that from a public policy perspective, and contrary to what BEREC appears to consider, it would be futile to attempt to allocate the fulfilment of regulatory objectives to a specific category of services, if this regulatory allocation contributes to the reduction of use of these regulated services by consumers as the growing proportion of consumers not using regulated services would no longer benefit from the protection of regulation.

This approach is supported by Recital 13 of the Universal Service Directive:

"*Definitions need to be adjusted so as to conform to the principle of technology neutrality and to keep pace with technological development. In particular, conditions for the provision of a service should be separated from the actual definitional elements of a publicly available telephone service…. It is the nature of such a service that it is bidirectional, enabling both the parties to communicate. A service which does not fulfil all these conditions, such as for example a "clickthrough" application on a customer service website, is not a publicly available telephone service.*"[3]

OTT messaging has replaced large numbers of SMS by offering equivalent messaging services, with more features and at a minimal cost. VoIP is slower to replace traditional voice at present, but as services start to offer converged functionalities (voice, messaging, video, sharing) and with transition to an all IP environment, this will change.

In addition more and more digital services that BEREC would classify as "OTT-2", e.g. social networks, on-line gaming, e-commerce, CRM platforms, e-administration or collaborative economy platforms, include communication features and messaging as a minimum. Within the time horizon relevant for the framework review, it is likely that a significant and growing

[33] DIRECTIVE 2009/136/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws

proportion of communication needs will be covered by communication features included in general services, rather than by isolated communication services.

Consequently, we agree with BEREC that the current ECS definition has become obsolete and there needs to be a new approach to enable legislation to keep pace with the current technological developments.

The problem of blurred lines and inconsistent regulation does not only concern e.g. messaging, voice or video services. As developed in a report written by Hogan Lovells and Analysys Mason for the French regulator Arcep[4] in 2011, similar ambiguities exist for other of services such as CDNs or Cloud, which depending on the interpretation of the definition and of the identity of the provider may qualify or not as ECS in the current framework. It is likely that identical concerns will arise with the development of IoT in the future. The review of the framework should also address this challenge.

Proportionate regulation

There are a number of challenges today. In addition to outdated definitions and technological advances, regulations have been implemented differently across Europe and there are inconsistencies and gaps when compared to horizontal consumer protection. This was identified in the OECD paper "Empowering and Protecting Consumers in the Internet Economy" which stated that "*trust in e-commerce remains affected by a number of problems that both businesses and consumers continue to experience. These include i) practical barriers, such as language problems, time required for businesses to set up effective e-commerce platforms, and a lack of interoperability of delivery and payment systems; and ii) regulatory barriers, such as complex VAT systems, overlapping frameworks addressing e-commerce issues (including consumer, privacy, intellectual property, telecommunication and competition rules), or regulatory gaps. Such difficulties are perceived to be aggravated in cross-border transactions*." [emphasis added]

We would agree with BEREC that there are a number of requirements that need to be considered when reviewing the appropriate regulatory framework for all forms of communication services. The level playing field is just one of these, albeit a very important one.

First and foremost, regulation needs to stand the test of time. Technology is developing at a rapid pace and a new approach is needed which provides a focus on outcomes rather than the technology being used. The revised framework is likely to enter in force by 2020 and last at least one decade and hopefully more if it is well designed.

[4] Hogan Lovells & Analysys Mason: "Etude sur le périmètre de la notion d'opérateur de communications électronique", June 2011. www.arcep.fr/uploads/tx_gspublication/etude-Hogan-Analysys-juin2011.pdf

Secondly, regulation needs to be proportionate, justifying the economic costs entailed for each regulated provider and targeted, as we move from a prescriptive to a light touch regime. There is evidence that this approach is the right one to deliver the objective of a true Digital Single Market to ensure the competitiveness of Europe for the benefit of its citizens: in relation to communications services the market is competitive independent of regulation and consumers are extensively using new OTT communication services with popular, attractive and innovative functions and at low cost. In contrast, traditional communication service providers are burdened by fragmented, prescriptive ex ante regulation. Going forward, care will need to be taken not to further embed this distortion, by interpreting proportionate requirements differently depending on who is providing the service. Such a distortion would also endanger the fulfilment of regulatory objectives as unbalanced regulation will favour the adoption by consumers of services not benefitting from the protection of regulation.

Thirdly, as recognised in the Framework Directives, the overall aim should be to "*reduce ex-ante sector specific rules as competition in the markets develops and, ultimately, for electronic communications to be governed by competition law only. Considering that the markets for electronic communications have shown strong competitive dynamics in recent years, it is essential that ex-ante regulatory obligations only be imposed where there is no effective and sustainable competition*." This also has the advantage of moving away from very prescriptive rules and towards an ex-post horizontal regime for services where there is sustainable competition. A self and co-regulatory approach should be applied more extensively when it is more effective to allow NRAs and industry to respond to issues on an immediate and flexible basis.

Finally, regulation of communications must be reviewed alongside horizontal consumer protection and privacy regulation, to avoid the overlaps and gaps we have seen in practice. This means addressing regulation which applies to all services provided in the digital market as well (including BEREC "OTT-2" services terminology), as the same regulation also applies to the communications sector. A current example of where this is necessary is the proposed regulation of digital and tangible products, where there is a risk that double regulation will apply to traditional telecommunications service. In some cases, this is also conflicting regulation; proposals include a right to terminate in the event of changes to the main provisions of the contract (compared to a right to terminate following any modification, major or minor, of the contract as set out in the USD). The same issue will again arise when reviewing the e-Privacy Directive, which contains many requirements around the confidentiality of communications, storage of traffic data, billing information and standardisation and that clearly needs to be reviewed at the same time as the telecoms framework.

Regulation in practice

Specific rules for communication functions may be required, based on a careful assessment of the needs of consumers and wider society. Existing regulation needs to be examined to see how this can be adapted to deliver against these specific outcomes, which may vary depending on what is technologically possible and therefore proportionate in practice.

The two specific examples addressed by BEREC in their report are excellent opportunities to see how this could operate in practice.

For example, for emergency services, as highlighted by BEREC, the provision of an emergency service locating a customer may not be proportionate for a provider not using telephone numbers. However, we would suggest that given the rapid transition to an all IP communications world the consequential impact on emergency services should be anticipated. Services allowing communication functions (including BEREC "OTT-1" services terminology) who do not provide emergency services should (1) inform the end user (2) ensure that they do not do anything to restrict the end user from accessing a service which provides an emergency calling facility.

In relation to transparency, there are, as identified by BEREC, many regulations which are duplicated at the horizontal consumer regulation level. Indeed, as highlighted in the BEREC report, the differences between the requirements are "*mostly due to the fact that a specific category of services is targeted by the USD while the Directive on Consumer Rights covers a wider range of activities*." Then again sector specific regulation means that two regulatory bodies will monitor compliance, which in itself means a more burdensome process, since ECS have to interact continuously with several different authorities. Consequently, such regulation should be removed from sector specific requirements and where possible consumer protection regulations in relation to contracting, transparency, redress and dispute protection should all be dealt with in the same way for all services provided in the digital market, taking into account the fact that some digital services may be bundled with tangible products.

There may also be the need to address new risks, as identified by BEREC, such as increased transparency requirements for platform providers, who are currently not required to provide any information to consumers for services provided by third parties via their platform.

Information gathering

The draft report notes NRAs' lack of legal competence to request information from OTT providers in the execution of market analyses.

The GSMA welcomes BEREC proposal to extend the scope which is currently included in Article 5(1) of the Framework Directive so as to grant NRAs the power to request information also from OTTs (i.e. "all relevant parties") which reflects the fact that OTT-1 and ECS services are services which end-users sees as competitive services which have led to an increased competitive environment, reducing the need for ex ante regulation.

Harmonisation

The lack of harmonisation of consumer protection has aggravated the regulatory issues, with consumers being unaware of their rights and different levels of protection across Europe and barriers to start ups reaching scale across Europe. The 2015 Consumer Scoreboard demonstrated that consumers' and retailers' awareness of key consumer rights guaranteed by EU legislation remains limited. Full harmonisation is needed, both geographically and across sectors to ensure consumers understand their rights and can exercise them effectively. Equally important is that this required geographic harmonisation comes at proportionate costs for industry, to avoid disruptive effects on cross-border service provisioning.

Conclusion

Going forward, we agree with BEREC that the current ECS definition has become obsolete and there needs to be a new approach to enable legislation to keep pace with the current technological developments. We also support harmonisation of rules applied to services across the EU Member States, to support European wide service provisioning which will need European legislation. In this regard, the GSMA would recommend the following approach:

1. Ensure that all rules applied to the various communication functions are consistent, and applied irrespective of the provider or the technology. In principle, only horizontal consumer rules should be applied to all services that allow communication, with specific rules in selected areas only where necessary. It is important to distinguish between cases where competitive market now substitutes for regulation in delivering the policy objectives and those where regulation might be required.
2. Consistency of rules should not be limited to all services that allow communication, but similar standards should apply e.g. in the areas of privacy, security and neutrality in a proportionate way across the whole Internet ecosystem.
3. Definition of communications functions should reflect the changes in technology and an assessment should be done to see which regulations are still needed, which can be removed as no longer necessary and which need to be adapted.
4. Quality standards of services that are highly valued by the customer should be preserved, for example, voice services which are based on phone numbers and any-to-any connectivity. However, providers of such quality standards must not be specifically burdened.
5. In general, specific rules, in selected areas, can only be justified and acceptable where the benefits for society exceed the costs.

Finally, we would support the approach which acknowledges that there are a number of principles to be considered when reviewing the telecommunications framework.