VATM • Square Ambiorix 13 • B-1000 Brüssel
Board of European Regulators for Electronic Communications (BEREC)
And the Heads of the National Regulatory Authorities
BEREC Office
Zigfrīda Annas Meierovica bulvāris № 14, 2nd floor
LV-1050 Rīga

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+32-2-235 09 80	28.05.2014

BEREC Opinion on the draft Revised EC Recommendation on Relevant Markets and accompanying Explanatory Note

VATM, the Association of Telecommunications and Value-Added Service Providers representing the interests of about 120 pro-competitive companies active in the German market, has already raised concerns over the revised draft recommendation on relevant markets and the accompanying Explanatory Note.

As BEREC is preparing its opinion on the market recommendation, the VATM reiterate its serious concerns. We deeply regret that DG CNECT has refrained from introducing essential changes in the slightly changed draft provided to BEREC. By no means, it is sufficient to address criticism by merely adjusting the accompanying Explanatory Note. To guarantee access to the fixed infrastructure which remains essential to competition and investments by all market players, this is not enough. Regrettably, the impression remains that DG CNECT still pursues its paradigm to move away from access- and infrastructure-based services competition only for political reasons by reducing regulators ability to secure competition, choice and diversity.
VATM therefore reiterates maintaining the non-substitutable and necessary regulatory access opportunities for infrastructure-based competition within the fixed market. Furthermore we also explicitly state that the review of the recommendation has to reflect the results of the vote of the European Parliament and the ongoing discussion in the Council's working group on introducing a telecom single market.

Major Concerns still exist

1. *Need for continuing regulation of market 1 and market 2: Deregulation of market 1 and market 2 dictated by political considerations*

Due to a lack of competition, Market 1 and Market 2 have been subject to ex-ante regulation so far. The NRAs' market analyses indicate that in most member states the current markets 1 and 2 still fulfil the three criteria test and remain uncompetitive. A premature removal of the *ex-ante* regulation for purely political reasons would lead to negative consequences for competition, consumers and business services.

VATM Verband der Anbieter von Telekommunikations- und Mehrwertdiensten e. V.
Square Ambiorix 13 • B- 1000 Bruxelles• Tel.: 0032 2350980 • Fax: 0032 22350982• E-Mail: brussels@vatm.de

Präsidium: Peer Knauer (Präsident), Norbert Westfal (Vizepräsident), Nicolas Biagosch, Vlasios Choulidis, Markus Haas, Christian Plätke, Martin Witt, David Zimmer • Geschäftsführer: Jürgen Grützner

VATM urges to maintain the non- substitutable and therefore necessary regulatory access opportunities for infrastructure-based competition within the fixed market. Arguments for remaining Market 1 and Market 2 for infrastructure based services has been presented in detail in the comprehensive WIK study, which we once more provide to BEREC (see annex).

– DG CNECT has presented no evidence that **Call-by-Call / Carrier Preselection (CS/CPS)** has lost its ability to provide indirect pricing constraints on the retail tariffs of the still dominant incumbent operator. To the contrary, as CS/CPS still effectively constrain the retail prices of the incumbent operators (especially for calls to mobile and international destinations), its importance cannot be judged by the actual minutes generated, but must include the price differential generated for incumbent retail minutes. We also underline that without imposing CS/CPS increased prices for end customers would be the result. If choice for businesses and consumers is reduced and restricted at the same time, no correction provided by competition is available to avoid the negative effects on end customers. This would damage the favoured harmonization in the EU as European callers will suffer a significant price increase. We also acknowledge that CS/CPS is used by a disproportionally large number of customers with advanced age (the discussion about old-age poverty shows that the potential of customers who are "old" and "poor" is trending upwards) and persons with a migration background. The WIK also assumes that low-priced telephone services are important for users with a limited household budget. CS and CPS services allow transnational calls on a competitive background for the benefit of the end customers. All these groups will greatly suffer by DG CNECT's move.

– VATM stresses that the European Commission did not take account of the **origination problem as part of the business services market**, which we clearly illustrated during several meetings and is also addressed in the WIK study we provided to you earlier (see annex). It was shown that the the business service market for VAS (**Value added services e.g. 0800 and 116- European phone numbers)** actually requires the interaction of many market participants. To ensure that all subscribers of all network operators can access all VAS, the provision of specific wholesale services is essential. As the market participants in the business services market for VAS numbers (retail) sometimes differ from the (local) fixed and mobile access operators, a removal of market 2 would lead in an originating-monopoly of the incumbent and therefore in a "dehydration" of the market of value-added telephony services (e.g.by increasing costs for companies offering services like 0800). In addition, SMP in the retail access market will (due to the absence of *ex-ante* origination services regulation) - spill over into increasing SMP in the business services market for VAS. One reason for this is that origination costs are the main cost component of providing VAS services (services based on the prefixes 116 or 0800). Therefore, either by raising competitors costs (by increasing origination costs or declining to offer transit services) or by using the extra margins from providing origination services above costs and then undercut-ting non-SMP operators in the business services market for VAS, the market power from the retail access markets can affect SMP in the business services retail market for VAS and then – via integrated demand by business customers – into the whole business services market.

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- Nationwide alternative offers for the business customer segment would not be available without **Preselection and VAS business communication services.** The same is true for alternative offers of 0800- customer hotlines. If just one origination is missing due to a lack of regulation or just one subsidiary of a medium-sized or large company cannot be connected, the offer won't be able to match the incumbent's services. A competitive offer assumes at least all locations be connected and all services be reached. In this context we attach our position paper on the need of business customers (currently only available in German).

Conclusion:

It is thus insufficient to open the door halfway by only inserting light improvements in the explanatory note. Such patchwork solutions will not address the issues of ensuring competition and consumer welfare and regulatory certainty. Inconsistency is also given within the context of the vote of the European Parliament on a Telecom Single Market (COM/2013/0627). Although the European Parliament deleted Article 21 (indicating the existence of corrective measures), the Commission is already anticipating the complete content of the draft regulation without accepting the parliamentary vote and awaiting the negotiations with the Council.

VATM therefore urges BEREC to keep both markets 1&2, but as a minimum to define a single wholesale fixed access and origination market (aggregating current markets 1 and 2). This would create more certainty for regulators and market participants and would comply with the level of existing competition instead of being based on political decisions or forecasts that cannot be proven. Even more, the Commission favored end customer pricing which is the most stringent regulatory instrument. Instead a wholesale regulation is needed based on market 1 and market 2.

2. Restrictions on physical unbundling

VATM is seriously concerned about the lack of clarity within the distinction between physical and virtual unbundling products. As the outcome of the future regulation of markets 3 and 4 (new) will be essential for a technologically and competitively neutral pro-investment policy, BEREC must ensure that the concept of current market 4 (newly proposed market 3a) will be maintained.

- Concerning the ongoing discussion pushed by DG CNECT of imposing virtual wholesale products VATM would like to stress out: **VULA is NOT functionally equivalent to and cannot replace LLU.** VATM has already raised its concerns about the discussed deviation from infrastructure-based competition. A harmonization of wholesale products (VULA business bitstream and leased lines) may be helpful for business customers if it enables customers to offer their products across Europe. Here, too, we are asking for consistency to the Single Market Package negotiations where the European Parliament deleted the Commission's proposal of Articles 17 and 18 while introducing a Wholesale high-quality access product allowing the provision of business communications services. We therefore agree with the proposal of identifying a separate market for business services – new market 4. Nevertheless, it should also be mentioned that favouring virtual products over physical ones is not compatible with the principle of promoting, where appropriate, infrastructure based competition - a principle which is highlighted in the regulatory framework (Article 8 (5) (c) of the Framework Directive). Physical unbundling remedies require more investments by alternative operators than virtual ones, but also allow further differentiation at the product level.

- Moreover, **we reiterate that it does not make sense to merge the markets for LLU and bitstream into one market**. The new rationale now with a possible supplement product in the absence of the possibility to unbundle does not hold water. The Draft Single Market Regulation clearly aims at restricting the physical access or even being able to remove it. Given the overall activities of TD and other incumbents to achieve this, extreme caution against any restriction of the LLU access is thus warranted.

- In addition, the arguments that were raised by the Commission1 (product supplement and technical factors such as vectoring) do not justify a cancellation of physical access. The purported issue that the LLU access is (no longer) warranted for technical reasons, such as vectoring, and instead only bitstream access should be provided, does not change the fact that there are two different markets. One must distinguish clearly between the cause and effect. The issue that a generally existing right to physical unbundling may be restricted if there is good cause and under exceptional ciurcumstances must clearly be distinguished from the issue whether this unbundling claim may be restricted within a market from the outset or not be granted at all (in potentially pre-defined cases).

- Consideration could also be given to differentiate wholesale submarkets. Such a differentiation could significantly help to precise regulation

Conclusion:

VATM urges BEREC to massively intervene with full force by clarifying that imposing EU virtual products is by no means a substitute for other existing wholesale access products. In this context it is of the utmost importance to leave no room for interpretation to the contrary. Activities of the European Commission for European standardization of wholesale products to replace an unbundled local loop are the wrong way if they lead to a suspension or abrogation of national unbundling obligations.

To maintain greater consistency, we also see a need of postponing the revision until the market has a clear view on the outcome of the Telecom Single Market Package. The current proposal is premature and hinges on results still to be delivered.

[1] EXPLANATORY NOTE, page 39, paragraph 2 and page 40, paragraph 2 and 3

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