

Consultation on Draft BEREC Report on Relevant Market Definition for the Business Services

Response from the International Telecommunications Users Group (INTUG)

Introduction

INTUG is pleased to contribute to the public consultation on BEREC's draft report on its continuing work aimed at enabling the creation of a competitive international market for communication services to business users throughout the European Union.

The December 2009 Report noted that "conceptually it is possible to distinguish high end business user needs" following a survey of business users which INTUG helped conduct. INTUG's response to that report is included as an appendix to this document.

The arguments included in that earlier response remain as high priority issues of concern:

- the inappropriateness of using consumer market analysis for business users
- the special factors arising from multi site and cross border connectivity needs
- the regulatory risks of sub-national geographic segmentation and deregulation
- the continuing dysfunctionality of the international mobile services market
- the potential for loopholes in the interpretation of the NGA Recommendation
- the oversimplification of broadband definition using headline downstream speed
- the risk of anti-competitive service quality issues arising from traffic management

Executive Summary

INTUG believes that the Draft Report runs the risk of missing the target through over analysis of detail and over emphasis on detailed implementation difficulties, whilst aiming only for "general guidelines", rather than a "binding" check list which NRAs must follow.

The draft report lacks urgency in identifying actions to be taken to correct a market failure with adequate speed. The further work proposed, e.g. into the effect of geographic segmentation is welcomed, but this implies that little progress has been since the original consultation 9 months ago. The report uses the term "High End" to distinguish non-mass-market customers, but this risks excluding the Small and Medium Enterprise who are equally disadvantaged by the current situation. INTUG agrees that the Wholesale Broadband Access market is not the only market needing specific consideration.

INTUG is disappointed that the tone of the draft report suggests BEREC is unconvinced there is demand across Europe for business-grade services which warrants particular attention in the market analysis process, with specific remedies for businesses which are consistent across the EU. INTUG believes the evidence for this is sufficient. Whilst the wholesale market is mainly national in nature, there is a retail market for cross-border business communications, which is uniform in demand (as noted by users in the BEREC

2009 survey). Urgent action by BEREC or the Commission is needed to ensure NRAs adopt consistent measure, which will enable retail competition to emerge and flourish.

Detailed Points

INTUG does not consider it appropriate to provide comments on the individual 129 paragraphs in the substantial draft report and has simply highlighted a few issues below.

The characteristics of business user needs in Paragraph 32 highlight major differences in the market from those applying to residential consumers and it is these, amongst others that need to be transparently open and competitive if the market is to prosper and the benefits of the EU Single Market are to be enjoyed by customers and suppliers.

These are contributory factors to satisfying the first of the 3 criteria, since they represent high and non-transitory barriers to entry for competing operators. The current market structure shows no signs of tending towards effective competition - indeed the ex-incumbents are re-establishing dominant market shares in some Member States. Competition Law is demonstrably insufficient and the exclusion of remedies from the consultation is therefore a cause for concern.

The ability of a customer to switch to another provider or an alternative product or service, i.e. the existence of interchangeable or substitute alternatives is very different for the business user, especially in the context of a multi-organisation extended supply chain. Given the need for consistency of service provider across a business process, it is simply not possible for a business user to switch one or more connections to another provider, if one exists, nor to require one of its business partners to do so for some or all of its links.

The issue of demand-side substitution addressed in paragraph 47 focuses on price as a measure for determining whether pricing is feasible, but this is not the only issue for business customers, where partial or complete migration represent a major project.

The inconsistency of regulatory approach implied by subnational geographic segmentation as considered in Paragraph 56 again focuses just on price, whereas for a business user it is also availability of the same product from the same provider which is at stake. MNEs already have to deal with all 27 national telecommunication markets and their individually regulated products when they try to operate telecommunication networks within the EU. Sub-national geographic segmentation increases the complexity of patchwork networks by an order of magnitude, increasing cost and reducing manageability dramatically.

Paragraph 74 provides a sound summary of some of the issues from the December 2009 report, which were identified from the survey of business users, facilitated by INTUG at the time. INTUG believes that, contrary to the claim of the report, the existence of these distinguishing factors does strongly imply the existence of a separate business market.

The prevalence and size of early termination payment for demand side switching in retail in paragraph 79 are of equal concern regarding contractual obligations for wholesale products used by service providers for their enterprise customers. Such obligations can represent hidden discrimination and can block competition. This loophole must be firmly closed in monitoring interpretation of the NGA Recommendation by NRAs.

Conclusion

The “difficulties” of drawing a precise line between consumer and business markets should not be used as an excuse for not attempting this since it is not an unusual challenge. The AGCOM conclusion in Paragraph 96 that leased lines provided to end-users and to mobile operators belonged to separate markets confirms that such lines can be drawn.

OPTA in the Netherlands has already acknowledged and acted on the need for separate analysis of the business market, and has provided definitive guidance on a way forward. INTUG urges BEREC to focus efforts on actions which will prompt all Member State NRAs to adopt consistent regulatory measures to create and develop flourishing competition in the provision of cross-border retail services for business users throughout the EU.

Confidentiality

Nothing in this document is confidential. The contents may be considered as in the public domain, and available for distribution. They are based on regular consultation by INTUG with its member associations, and their members, of draft documents prior to submission.

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About INTUG

The International Telecommunications Users Group (INTUG) represents the interests of business users of telecommunications globally. These include some of the world’s largest financial institutions, car manufacturers, pharmaceutical companies, fast moving consumer goods enterprises, and retail and distribution companies. They also include small and medium enterprises, who are increasingly dependent on telecommunications services.

The INTUG community includes user associations in many large Member States, including Belgium, Denmark, France, Germany, Spain, the Netherlands, Sweden and the UK, and the multinational user group EVUA. Each represents public and private business customers of telecoms operators, both directly and indirectly through service providers. INTUG is an association established in the Netherlands, governed by an elected Board.

INTUG was established in 1974, with close links to user groups throughout the world, in countries as diverse as Australia, New Zealand, Hong Kong, India, Korea, Mexico, Norway, Switzerland, and South Africa. INTUG also has a signed Memorandum of Understanding with the Commonwealth Telecommunications Organisation (CTO).

INTUG has permanent observer status at the ITU, participant status in APECTel and CITEL, chairs a user group in ICANN, and is an expert group within the OECD/CISP.

INTUG engages actively with the European Commission and Members of the European Parliament, and has made submissions to many EU regulatory consultations and events.

APPENDIX: Consultation on ERG Report on the regulation of access products necessary to deliver business connectivity services

Response to the December 2009 Report from the International Telecommunications Users Group (INTUG)

Introduction

INTUG is pleased to provide this preliminary response to the ERG Report on Business Services, following the survey of business users and national regulatory authorities, and the public hearing held in Brussels on Friday 29 January. Comments in this response relating to proposals for BEREC follow up work have not been subject to INTUG's normal process of consultation with members prior to submission, since these proposals were only disclosed at the public hearing. Further comments may therefore be forthcoming.

Segmentation of the Business Market

INTUG welcomed the initiative by ERG to address a long-standing market failure of competition for business services. It is hoped that the devotion of specific resources to understanding this distinct market will be reflected by NRAs, who have almost all ignored the need for separate market analysis. INTUG believes there is now a strong case for BEREC to recommend consistent business market definitions and, where appropriate, associated remedies, where analysis of these markets reveals an absence of competition.

INTUG notes that BEREC will address options for such segmentation, including the possibility of using product specification (e.g. of so called "high end" or "premium quality" products and services) as a means of achieving an effective segmentation. INTUG cannot say at this stage whether it believes this method will enable effective analysis of markets to determine if business users are served by a truly competitive market.

The limited number of complaints received by NRAs does not reflect an absence of market failure, but is more probably due to the absence of a viable complaints process for needs which are cross border, and thus not the responsibility of a single NRA. Businesses continue to find difficulty in obtaining seamless networks across international operations from a single supplier, whether that is their incumbent or another Member State incumbent or alternative network provider, and whether it is a fixed and/or mobile need.

International Mobile Markets

The survey and the work programme currently envisaged focused mainly on fixed network services, but a business market failure exists equally for international mobile services. The problem manifests itself in different ways - e.g. in international and national roaming, with lack of MVNOs, inconsistent licensing and spectrum, and blocking of GSM gateways.

INTUG has produced a new Position Paper highlighting the issues for International Mobile Services for the multinational customer, which concludes that it is a dysfunctional market. The paper lists recommended actions for service providers, regulators and corporates.

Observation on Survey Results - NRAs

The results of the survey of NRAs in Annex 3 established an excellent benchmark of what is best practice. INTUG is pleased to note that all but one of the NRAs responded to the questionnaire, but believes that in most cases the “No” answers given by NRAs over time should become “Yes” answers, unless there are demonstrable and justifiable reasons for alternative approaches. Proposed BEREC follow-up work, to address why open access obligations do not exist, is welcomed and should at least eliminate some discrimination. INTUG believes absence of access obligations on an incumbent is a barrier to competition.

Qualification or even absence of obligations to provide service also represent a barrier to cross border trade and may obstruct efficiency of on-line transactions in a Member State. If the service is offered, but only at a discriminatory or prohibitive price level, it represents protectionism and a tax on trade. INTUG strongly rejects the notion that a wholesale market’s scope should be defined solely by the products and services the incumbent chooses to provide to its own downstream/retail operation. This would foreclose the NGA market completely, and suppress innovation and efficient ICT investment by customers.

Businesses are particularly concerned that the situation may get worse rather than better, if incumbents are allowed to deny NGA wholesale access to businesses or their suppliers or systems integrators. The existence of “co-operative arrangements”, as suggested in an early draft of the NGA recommendation, does not give adequate assurance of competition, but simply encourages a duopoly at best. The answers in the survey regarding wholesale are amongst the weakest already, and are a priority concern in addressing the market failure. Open access to bitstream and Ethernet remain essential to effective networking.

Observation on Survey Results - Business Users

INTUG and EVUA were pleased to assist with the process of obtaining responses from business users, which covered corporate enterprise users of varying sizes across the EU. The scale and scope of the corporate response might have been greater, but nevertheless we believe that although not statistically conclusive, the results in Annex 4 reinforce the case which INTUG and EVUA has been making regarding lack of competition.

The survey shows a significant proportion of businesses seeking a single supplier solution, and strong presence for incumbents as the chosen supplier. However, even where the business wishes to use its home incumbent for all services, this is not always possible due to discriminatory practice by an incumbent in another Member State. Alternate network providers may be forced to commit to SLAs with penalties, without back up guarantees from an incumbent supplying some elements of the access within the contract.

It remains a concern of business users that sub-national or geographic segmentation can produce a mixture of regulated and non-regulated sites, which makes competitive bidding by alternative network service providers open to partial discrimination, and adds difficulty in ensuring availability of access at all sites required by a customer within a Member State.

Balancing the Virtuous Triangle of Competition, Investment and Innovation

The role of ex ante sector specific regulation is not simply to achieve these three highly desirable dimensions within the supply side of the telecommunications sector alone, but to act as an important enabler. The temptation by some incumbents to delay introduction of new services to avoid cannibalising high margin revenue from legacy services remains a risk, which must be monitored. The bigger prize from investment, however, which is ten times as great as that within the telecommunications sector, comes from enabling the use of the communications environment to facilitate efficient and effective competition, and ICT investment and business innovation in the economy as a whole.

The overall aim of efficient and effective telecommunications investment should not be confined to physical infrastructure. It is even more important that business users are able to invest efficiently and effectively in ICT equipment, software, applications, content and services for consumers, which generates overall social welfare and economic growth.

Market Definition

The report of the survey raises some very important questions, which need addressing in BEREC's follow-up activities, as part of its work programme for 2010. As indicated in the public hearing, an approach of product market segmentation between high-end service and standard service might offer at least a partial solution.

Care must be taken to avoid this resulting in false definition of a product as substitutable by another product within a single market, for example by grouping broadband to include fixed and wireless as one product, when wireless broadband is not a substitute for fixed.

There are many practical considerations to be taken into account when defining market boundaries, for example interaction between product and geographic market definition. BEREC must help NRAs define the international business market consistently, as each conducts its own transposition of the revised framework. NRAs must co-ordinate their definition of multi site national business markets consistently. BEREC must undertake monitoring of the definition of products, if this is the segmentation used for identifying the distinct business users' needs, and not permit some NRAs to limit wholesale markets to services self-supplied by incumbents.

Business needs must also be considered when SMP operators in a market withdraw products, for example leased lines and ISDN. A consistent position is necessary also.

More technical questions will also arise with regard to product specification and service level agreements (SLAs) and KPIs, which may prove to be another optional differentiator. For example, what level qualifies a product or SLA or customer for being classified as in the separate market? Could this vary between Member States depending on the current status of their market offerings? How will the multiple dimensions of latency, reliability, international multi site, time to repair, and upstream/downstream bandwidth balance be segmented? How will legacy services on which many businesses still depend be handled, given the immaturity of IP VPNs and SIP trunking of corporate networks?

Remedies

Whilst BEREC can usefully monitor conformity with ERG common positions, and pay increased attention to these in the context of business connectivity, remedies are too late for the business user. Application of remedies operates to an extremely long timescale, even without delaying factors through appeals, and the damage has already been done.

There are opportunities to use the new framework remedies to good effect, for example functional separation. This could be applied not just to fixed services, but also to mobile, to ensure open access to NGA and 4G for service providers to international businesses.

Enforcing support of GSM gateways/MVNOs might generate some international mobile services and could reduce roaming abuses. Remedies will also be needed to prohibit damaging vertically integrated bundling, although this should not be executed in a way which stifles innovative packages, involving content or device developments.

Conclusion

There is clearly important and urgent follow up work to be done by BEREC on the topic of business service provision. INTUG and EVUA stand ready to help. The Digital Agenda work plan and the NGA recommendation must produce regulation that frees up European business enterprises to make the most of communications networks in the EU in order to generate economic recovery, sustainable growth, improved productivity and new jobs.

The ERG report on Business Services has demonstrated the need for NRAs to recognise the distinct and special needs of business users of communications services, and to ensure that their market definitions and applications of remedies addresses these needs.

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