

BEREC's Strategy 2018-2020: The Competition Complications of E-Communications

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Will Holmes (Sidley Austin LLP)

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As 2018 and Father Christmas approach, it is important to remember that there will be those in Copenhagen next month more interested in dominant market presence than Christmas market presents. To the Body of European Regulators for Electronic Communications (BEREC), which will meet in Denmark's capital on 7 December for their 33rd Ordinary Plenary Meeting, 1 January 2018 marks not just the start of a new year, but also the beginning of its implementation of a new three-year medium-term strategy plan. BEREC, which commits itself to "independent, consistent, high-quality regulation of electronic communications markets for the benefit of Europe and its citizens,"¹⁾http://bereg.europa.eu/eng/about_bereg/what_is_bereg/ has released its Strategy 2018-2020²⁾ BEREC Strategy 2018-2020, accessed here: http://www.bereg.europa.eu/eng/document_register/subject_matter/bereg/annual_work_programmes/7310-bereg-strategy-2018-2020 just in time for Christmas. The contents of the proposed Strategy address the implications of the growing "digital ecosystem" across the EU and put forward priorities for BEREC's tackling of them in the years to come.

As many of the issues prioritised by BEREC will have wide-reaching implications for competition lawyers, it is worth examining BEREC's areas of priority for clues as to some of the potential problems that may be looming in e-communications markets.

Very High Capacity Networks

One of BEREC's priorities for 2018-2020 is to respond to challenges presented by very high capacity (VHC) networks, intended to ensure a fast and reliable internet connection. The European Commission considers VHC network roll out across Europe to be vital for education, healthcare, manufacturing and transport,³⁾European Commission Press Release, *State of the Union 2016: Commission paves the way for more and better internet connectivity for all citizens and businesses*, 14 September 2016, accessed here: http://europa.eu/rapid/press-release_IP-16-3008_en.htm and so within its proposed European Electronic Communications Code (the EECC)⁴⁾The EECC is accessible here:

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=comnat:COM_2016_0590_FIN has suggested a substantial reduction in regulation governing rival operators' co-investment in VHC networks. In particular, the proposal aims to make it easier for small players to enter into investment projects through the pooling of costs.

However, VHC networks are not being rolled out across Europe at an equal pace. Though in some Member States large parts of old networks have already been replaced, in others existing infrastructure is being upgraded, and in still others the transition has yet to occur at all. Such an unequal roll out, alongside takeovers that are reducing the number of providers, has led some, including BEREC,⁵⁾BEREC Strategy 2018-2020, p.2 to express concern over the emergence of oligopolies or even sub-national monopolies in the market.⁶⁾Dugie Standeford, *Joint Dominance Issue Roils EU E-Communications Code Debate*, Communications Daily, Vol.37, No.204, Monday 23 October 2017

As such, in December 2016, BEREC issued a high-level Opinion on the proposals within the EECC⁷⁾*BEREC high-level Opinion on the European Commission's proposals for a review of the electronic communications framework*, 30 November 2016, accessed here: http://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/6615-berec-high-level-opinion-on-the-european-commissions-proposals-for-a-review-of-the-electronic-communications-framework and, in May 2017, responded to the EECC's VHC network plans.⁸⁾*BEREC views on Article 74 of the draft Code Co-investment and "very high capacity (VHC) networks"*, 10 May 2017, accessed here:

http://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/7033-berec-views-on-article-74-of-the-draft-code-co-investment-and-8220very-high-capacity-vhc-networks8221 BEREC wrote that the proposals placed restrictions on the ability of national regulatory authorities (NRAs) to “prevent the creation of new monopolies,”⁹⁾ Ibid, page 3 and that, ultimately, “the risk is that co-investment does not ensure sufficient competition in the provision of services to consumers... potentially allowing the co-investors to foreclose the market.”¹⁰⁾ Ibid, page 1

BEREC’s 2018-2020 strategy suggests that increased co-investment into VHC networks, encouraged by the EC, could result in monopolies and oligopolies against which NRAs may have decreased strength as a result of the proposed EECC.

Network and Spectrum Sharing

The considerable investment needs of high-speed communications has led to increased cooperation between Electronic Communications Services (ECS) operators. This network sharing may be efficient, but, where competition law principles are not respected, it also limits infrastructure competition. Spectrum, demand for which is increasing due to the competing needs of different wireless technologies (such as 5G or fixed wireless access technology), is another area in which cooperation between ECS operators might increasingly be explored.¹¹⁾ BEREC Strategy 2018-2020, p.2

Europe has historically enjoyed a large share of global network sharing. In their attempts to quickly deploy new technologies like 4G and 5G, European telecommunications companies have increasingly signed deals agreeing to share network coverage across the continent, or have increased the scope of existing deals¹²⁾ <https://cms.law/en/INT/Publication/Network-sharing-deals-rapidly-expand-across-Europe> This increased cooperation has led in some cases to competition issues.

Furthermore, given the necessarily finite nature of radio spectrum, the introduction of new technologies that require the use of spectrum necessitates regulation aimed at better coordinating the use and efficiency of this resource.¹³⁾ <https://ec.europa.eu/digital-single-market/en/policies/wireless-europe> However, the jostling for space within the spectrum market has meant that,

increasingly, telecommunications firms are agreeing to share their spectrum.

BEREC, in its Strategy 2018-2020, expresses concern that high investment requirements and limited space have meant that firms are increasingly cooperating in their provision of essential services. According to BEREC, this cooperation will require regulators to keep a close eye on potentially anticompetitive arrangements.¹⁴⁾BEREC Strategy 2018-2020, p.2

The Digitalisation of Services and Data Reliance

Service digitalisation has increased the number and variety of different services and service providers competing at the retail level. Whereas in the past music labels almost exclusively competed against one another, with content generation and distribution generally bundled, digitalisation has allowed distributors also to compete. The entry of independent distributors distinct from the networks has contributed positively to competition and innovation at the service level, but it has also introduced the potential for new competition concerns.

Bottlenecks can still form within the service distribution chain. Device manufacturers, online platforms and content providers can potentially have positions in these new markets that may allow them to affect competition adversely. Distributors can still favour one service over another, with exclusive licensing agreements limited to specific territories. Device manufacturers might bundle their devices with particular services. These various types of arrangements may be either procompetitive or anticompetitive depending on the particular facts.

With the digitalisation of services has come a new age of bundling: bundles are no longer limited to vertically integrated telecom and audio-visual services, but increasingly provide better access to popular internet content. Though consumers may benefit from having a “one stop shop,” BEREC fears that these bundles can lead to higher dependency on an increasingly complex and heterogeneous market.¹⁵⁾BEREC Strategy 2018-2020, p.3

As data becomes more valuable, traditional telecom operators and content and application providers (CAPs) are increasingly cooperating in a bid to increase brand exposure, provide higher value to end users and promote more data consumption. Horizontal cooperation agreements in particular and vertical cooperation agreements sometimes may produce anticompetitive effects, but those effects

might well be offset by procompetitive efficiencies benefitting consumers. Whatever the outcome may be, increasing levels of cooperation in e-communications markets are likely to create new work for competition lawyers.

A further issue with data and mobile phone operators is that, as individuals increasingly rely on the data stored on their mobile phones, the difficulties of transferring one's personal data across to a new provider might act as a barrier to switching.¹⁶⁾ BEREC Strategy 2018-2020, p.3 Ultimately, as services are increasingly digitalised and data becomes more important, the emergence of new technologies and growing cooperation across historically embattling industries will inevitably lead to competition issues, with companies sharing more information and infrastructure, and data increasingly becoming bundled and relied upon by end users.

A glance at BEREC's Strategy 2018-2020 gives competition lawyers some food for thought going into the New Year. The rapidly changing and growing e-communications market has led to innovation in both technology and cooperation strategies. These changes may lead to competition issues, with new technology resulting in the potential for bottlenecks as early innovators gain strength across Europe, and increased horizontal and vertical cooperation. The Strategy might only offer a snapshot of time – but BEREC's priorities offer some important insights into the competition issues that will arise over the next three years.

Will Holmes is a trainee, at Sidley Austin LLP. The views expressed in this article are exclusively those of the author and do not necessarily reflect those of Sidley Austin LLP and its partners. This article has been prepared for informational purposes only and does not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers. Please let us know if you have any questions or comments.

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