**BOUYGUES TELECOM'S KEY MESSAGES**

**on the draft proposal for a single electronic communications market regulation**

**23 July 2013**

Bouygues Telecom is the third French mobile operator and a new entrant on the fixed market with over 10 million mobile customers and over 2 million broadband customers. We have been consistently investing in our fixed and mobile networks up to 1 bn euros per year over the past 10 years. We are committed to making further investments to bring LTE/4G and ultrafast broadband to the French population as quickly and efficiently as possible.

We support the Commission objective to create a European digital single market but would like to raise your attention on several provisions of the regulation proposal.

## 1/ HARMONISATION OF THE SPECTRUM POLICY IN EUROPE

We share the Commission's view on the necessity to harmonize spectrum policy as far as the calendar and the allocation conditions are concerned (articles 8 to 10).

First operators need to have a clear indication of the resources that will be made available on the long run either through individual authorization or general authorization. Consolidating a long term European Spectrum Plan should help us doing better investment decisions in the future and lead to a more efficient allocation of resources.

E.g. 700MHz in France: we paid close to 1 billion last year for the 800MHz band with the information that there wouldn't be further spectrum available before 2020. One year after, the French government announces the attribution of the 700MHz for 2016!

Second, technological neutrality of the spectrum should not be a new occasion for governments to extract unreasonable fees from mobile operators. This could be detrimental to the deployment of new technologies and to the efficient use of scarce resources. In any case, fees should not be payable before operators are able to effectively exploit the spectrum.

Third, operators do need predictability. The Commission should help ensuring that all the necessary information to ascertain the actual extent of the rights of use are made available to determine the correct price level for the spectrum. For instance, the French government refused prior to the auction for the 800 MHz frequencies to proceed to local experiments in order to evaluate the extent of the interferences between those frequencies and the adjoining broadcasting bands, which was quite detrimental to operators.

In addition, we strongly encourage the Commission to promote infrastructure-based competition on the mobile market by imposing mobile access obligations only when a market failure has been clearly identified, and by taking duly account of the investment risk supported by network operators (granting of spectrum usage rights, rolling-out costs, network maintenance, etc.).

Last, operators are more than ever stifled in their efforts to deploy new infrastructures due to fears of effects of radio emissions on public health. The Commission could help by harmonizing guidance

on radio sites deployment by setting scientifically objective and reasonable exposure limits that ensure public health protection while allowing efficient network deployment.

**2/ A CLEAR STABLE FRAMEWORK FOR ROAMING**

Concerning roaming (article 33), we still believe as we did one year before that an escape clause from decoupling obligations represents a good incitement for mobile operators to offer roaming prices close to domestic prices. Designing such an escape clause should take into account both frequent travellers and occasional travellers which represent, in southern countries at least, the large majority.

Wholesale prices have decreased much faster than the regulated caps since roaming regulation entered into force. We trade today on the wholesale market 50% below the caps or less and operators shall be free from developing innovative offers below the RRIII caps. Thus, there is no need for legally authorized alliances (a different name for collusion) between mobile operators to reach wholesale prices compatible with retail prices close to domestic prices. Alliances and their anticompetitive effects were precisely the reason why the roaming regulation was introduced in the first place.

Furthermore, we need to know with the utmost urgency which regulation regarding roaming should apply: RRIII and its decoupling provisions or the new dispositions proposed in the future single market regulation? A large amount of investments and resources are to be mobilized from now on to implement the decoupling solution in order to comply with the 1st July 2014 deadline. We would expect article 4 of RRIII be suspended until the adoption of the future telecom single market regulation providing an escape clause from decoupling.

**3/ MORE FOCUS ON BUSINESS SERVICES**

There has been a lot done for consumers but European businesses surprisingly have much less choice and benefit from less innovation than consumers. For example it can still be quite difficult for a business to switch to another provider. Often it is tied for several years to its communications provider. And most businesses, except very large companies, have no time or resources to spare and spend on negotiations to obtain satisfactory exit conditions. As a result incumbents remain super-dominant in the business user segment and businesses clearly suffer from it.

The lack of intervention from the legislators is thus surprising considering that the take-up of ultrafast broadband either fixed or mobile will provide businesses with new gains in productivity and new sources of innovation. Promoting competition on the business market seems to us paramount to stimulate growth in Europe.

We suggest that the Commission focuses its legislation not on consumer protection once again but on enabling more competition in business services provision, for instance by making switching a real possibility.

We therefore urge the Commission to replace some of its proposed measures for consumers by measures limiting switching costs for SoHo, SMEs and even larger businesses such as:

- Unreasonably long commitments
- Abusive discounts that increase switching costs

- Offers that prevent partial unbundling of the local loop by bundling POTS services (fax, alarms) with digital services (internet access, TOIP)
- Fixed and mobile convergence offers making it impossible for a customer to cancel only one part (fixed or mobile) of the contract...

**4/ A LEVEL PLAYING FIELD BETWEEN ALL ACTORS OF THE VALUE CHAIN**

Bouygues Telecom fully supports the openness of Internet. However, the lack of EU harmonization and consistency in the framework allowed some non EU actors to achieve very strong position in the EU compared to their EU competitors. At the same time, operators are facing massive investments to accommodate the growth of internet traffic, the retail markets appear to become mature and there is limited willingness to pay for very high speeds or for different level of quality.

Conversely, OTT players are profitable. Most of them global actors enjoying a quasi-monopoly have based their success on closed environment whereas the operators have the obligation to provide interoperable services.

We, therefore, believe that same rules should apply to all players as far as similar services are concerned. Three examples:

- Data protection: we welcome the will of the Commission to establish a clear level playing field in this field with the data protection regulation in discussion.
- Taxation:
  - According to Greenwich[1] study commissioned, the French State is losing around 500M€/year just because Google, Apple, Facebook and Amazon do not pay the right level of corporate taxes in France. This amount could reach 750M€ in 2015.
  - Bouygues Telecom supports any European and international actions aiming at achieving a real level playing field in the digital environment.
- Interoperability: Some of the interoperability obligations of operators should be extended to OTT players when they offer the same services as operators whether communications services or micropayment services.

[1] Study commissioned by the FFTelecom

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utlines preliminary positions on the draft Regulation which could potentially be subject to modifications later
ocess and in particular once the formal Regulation is proposed by the European Commission.

**sal for a Regulation on the Single Market for electronic communications**

**BEUC Preliminary comments**
**July 2013**

## General comments

BEUC welcomes the European Commission's initiative to adopt forward-looking measures that aim to create a Single Market for electronic communications services but underlines the importance of understanding and protecting the interests of consumers as a condition without which the proposed measures will not succeed in this crucial economic and social sector.

Creating an **EU Passport** that would allow providers of electronic communications services to more easily operate in multiple markets is an idea worth exploring which should in turn **help reduce costs and retail prices, in particular cross-border prices**. Nevertheless, there are **crucial aspects for consumers that remain unclear** in the first draft of the Regulation, in particular regarding the powers of National Regulatory Authorities (NRA) with respect to the application of other pieces of legislation, including consumer protection law, beyond the areas covered Regulation itself. Importantly, the draft Regulation does not solve the problem of forum shopping.

The Regulation makes the *home NRA* (that of the Member State where the European electronic communications provider, EECP, has its main establishment) the one competent to apply and enforce the provisions of the proposed Regulation, in particular Chapter 3 on end-user rights, in any Member State where the EECP has is present.

Firstly, **it is unclear which NRA would be competent to enforce other consumer protection legislation beyond the provisions of this Regulation** – an assumption can be that the place of residence of the consumer applies. In which case, there would be consumers who would depend on two different NRAs from two different Member States in order to have their rights enforced, creating unacceptable situations of legal uncertainty and lack of protection.

Secondly, making the *home NRA* responsible for enforcing the Regulation across all Member States where the EECP under its supervision operates poses **problems regarding the different capacities and resources of NRAs across the EU**, and the degree of efficient and effective cooperation that they have amongst themselves.

We strongly suggest that the following provisions are included in the Chapter on the EU Passport to ensure that the presence of strong safeguards for consumers within the new regulatory framework.

- **Obligation for Member States to provide NRAs with the appropriate financial, human and technical resources to fulfill their duties**. Otherwise, there is an increased risk of forum shopping with EECPs deciding to move their establishment to those Member States where NRAs are weaker are less resourced.

- **Obligation of cooperation between NRAs**. There needs to be more clarity as to the procedures put in place for NRAs to assist each other, and in particular to the obligations of the *host NRA*. In case of cross-border operations, NRAs should have an obligation to cooperate and decisions should be subject to co-decision.

- **Joint operations of NRAs.** Provisions are needed to pave the way for joint operations between NRAs from different Member States, in order to step up co-operation.

- **Right to lodge a complaint with any NRA.** Given the cross-border nature of electronic communications services, and the creation of a truly Single Market where consumers will increasingly use their national services abroad, it must be ensured that any consumer can lodge a complaint related to this Regulation with the NRA of the Member State of his/her residence. Specific rules need to be introduced to ensure that the handling of complaints works efficiently.

- **Right to a judicial remedy against an NRA.** When a consumer seeks a judicial remedy against a decision by an NRA which is in a different Member State, it must be ensured that the request may be filed with the NRA of the consumer's Member State, which shall bring the proceedings against the other NRA on his/her behalf.

## Article 17

Seeking to **abolish the price differences** between national services and cross-border services is very important for the creation of a true Single Market for consumers. Nevertheless, **it must be ensured that this does not entail an unjustified rise in domestic prices.**

The prohibition of differentiation of prices regarding to the geographical origin and destination of a service is an adequate approach, but **it remains unclear what criteria are supposed to be used when additional costs allow for different retail prices**. Therefore, "objectively justified" and "reasonably proportionate" need further clarification, which should be included in the body of the Regulation itself.

As with other provisions of the Regulation, it could be a task for BEREC to develop official guidelines as to how those criteria should be evaluated in practice. Further, the Regulation should call on NRAs to closely monitor that providers of electronic communications services are respecting the criteria when their tariffs are being discriminatory on a geographical basis.

## Article 20

The initiative to strongly protect the principles of openness and neutrality of the Internet through a European Regulation, and therefore of immediate application in all Member States is welcome as it is the only real way to fully safeguard this crucial principles for all European consumers. Unfortunately, **the wording of the proposed Regulation, and in particular of paragraph 1 of article 20, is inadequate and would pave the way for the exact opposite.** It would create the legal uncertainty and workarounds that would allow providers of electronic communications services to bypass the neutrality and openness principles that all Internet access services should fully respect, therefore *de facto* legalizing a non-neutral Internet in Europe.

In order for this article to be fully compatible with the intended objectives, we suggest that the article is modified according to the following points.

- **Accessing an open Internet free of discrimination is a right**, not a freedom. Legal certainty is ensured by codifying these principles as rights of end-users, with accompanying obligations on service providers.

- **Definitions of "internet access" and "managed services" should be included** in the proposed Regulation. Clearly defining each of the two categories of services, and the prohibitions and liberties that they entail for service providers is the best way to fully protect consumers of internet access services from undue manipulation from providers.

- **The definition of the right** should include "the ability of any person to use a service to access, use, send, post, receive or offer any content, application or service of their choice irrespective of source or target". This codifies the end-to-end connectivity aspect which is crucial as well as ensures compatibility with other legal texts around the world and within the EU, adding to its legal clarity.

- **Paragraph 1, subparagraph 2 ("In pursuit of... with a defined quality of service") should be deleted.** This subparagraph includes language which is too vague and can serve as a legal loophole for operators to achieve exactly the contrary of what the article is aiming to protect. First, the wording of this subparagraph seems to allow that operators can offer Internet access services (and not just managed services) of different qualities based on discriminatory management of traffic. Second, the subparagraph opens the door widely for commercial agreements between providers of electronic communications services and content/application/service providers in exchange for prioritization of the latters' traffic, which is totally incompatible with the principles of openness and neutrality.

  Instead, clear, concise and legally viable language should be included to allow the possibility that internet access offers can vary on data volumes and speeds, exclusively, as long as no discrimination takes place regarding what is transmitted through the service (with the exceptions that follow on paragraph 2). Separately, the article can specify that the provision of managed services do not carry the same obligations and prohibitions, and so providers are free to manage traffic as they wish on those services, as long as those services do not in any way hinder or degrade Internet access services. In accordance to this distinction, articles 21 and 22 on pre-contractual and contractual information should be amended to ensure that in the case of bundled contracts, consumers are fully informed of how their broadband technology is split between the internet access service and other managed services that could be delivered over the same infrastructure.

- **Paragraph 2 should be more stringent** as to the purposes of traffic management measures. "Solely or primarily to block, slow down or otherwise degrade" is a linguistic solution that leaves the door open to interpretation and could allow service providers to undertake traffic management that violates the principles of neutrality and openness in their own commercial interest, and therefore to the detriment of end-users.

## Articles 21, 22, 23

1) **Pre-contractual information and contract formation:** It is necessary to clarify that the list included in article 21 is without prejudice to the information and the formal requirements of the Consumer Rights Directive (CRD), in particular in off-premises / distance contracts.

   Regarding pre-contractual information, in some aspects the CRD goes beyond the list included in article 21 of the proposed Regulation. For instance, contact details of the telecom provider should be included as well. Additionally, the information about dispute resolution is not precise enough; the proposed text states that the internal complaint handling of telecom providers fall under 'available dispute settlement mechanisms', while in the CRD it requires third party ADRs ('to which the trader is subject') and the means to access it. There is currently no information on the right of withdrawal and it should be indicated that the consumer has a legal guarantee right over the acquired handset, if applicable.

2) **Right of withdrawal:** it is necessary to specify that the consumer has a right to withdraw from the contract within 14 days after it's conclusion at distance or off-premises and make reference to the CRD.

3) **Termination of the contract:** the solution of the 6-month period for termination (article 23 (2)) seems to be appropriate but it is necessary to define in advance how the 'compensation' for the 'residual value of subsidized equipment bundled will the contract' will be calculated.

   For example, the new Belgian telecom law (source of inspiration of this rule on termination) has a specific provision in this regard:

   > *- le cas échéant, tous frais dus au moment de la résiliation du contrat, y compris le recouvrement des coûts liés aux équipements terminaux si l'acquisition d'équipements terminaux est liée à la souscription d'un abonnement pour une durée déterminée,* ***un tableau de remboursement est annexé, lequel reprend la valeur résiduelle de l'équipement terminal pour chaque mois de la durée du contrat à durée déterminée. Une méthode d'amortissement linéaire est utilisée pour le calcul de la dépréciation mensuelle des équipements terminaux;*** *le tableau d'amortissement indiquant la valeur résiduelle de l'équipement terminal ne peut dépasser une durée d'amortissement maximale de ving-quatre mois,* (article 108)

   We could envisage a similar provision to be included in the proposal.

   The reference to a 'reimbursement for any other promotions' is also very broad and not linked to any objective parameter that informs the calculation of the compensation in case of promotions not linked to the handset (e.g. a number of free SMSs per month or a cheaper tariff during a specific period). We would suggest indicating that the compensation shall be proportionate to the elapsed contractual period (e.g. six months)

and the benefit the consumer obtained from the promotion. Further clarity on what is understood as 'promotion' is necessary, in order not to enable telecom providers to qualify standard tariffs as promotions, insert stringent compensation clauses in their contracts, and therefore hinder consumers' switching capabilities.

4) **Termination of the contract after tacit extension:** in article 23 (3) it should be clarified that after the tacit extension of the contract (so beyond the initial binding contractual period thus beyond the benefits from any promotions) the consumer can, upon one month notice, terminate the contract at any time and without penalty.

5) **Unilateral change of terms and conditions:** article 23(4) of the proposal does not deviate substantially from the solution of article 20(2) Universal Services Directive (USD). However, it indicates that if the contractual change is in the benefit of the consumer, then there is no obligation to give notice for withdrawal to the consumer. The problem with this provision is that it is not defined how and by who the claimed 'benefit' of the consumer will be assessed. Furthermore, we think that it is the consumer who is in the best position to assess and decide whether to accept or not the contractual change even if it might be on his / her benefit. Thus, this reference should be deleted.

   Furthermore, we also find that the system for unilateral change of terms and conditions of the USD does not work adequately in all markets since consumers who withdraw from the contract after a contractual modification might not be able to find a better or similar deal as the initial contract. Instead, we would suggest the inclusion of a rule that limits the possibility for the telecom operator to unilaterally change the T&Cs, in particular the price of the service.

   A solution would be to include a provision indicating that the possibility to change the contractual terms should be specified in the contract and justified by a valid and objective reason, which should not depend exclusively on the telecom operator's decision - meaning that it should not be up to the operator to decide that there is a reason to increase the price (e.g. price increase due to increasing cost of staff). Moreover, in case there is a price increase, there should be the possibility of a price decrease.

6) **Consumer remedies in case of lack of conformity of the service:** Article 23(5) gives the right to the consumer to rely on 'national' law remedies in case of non-conformity due to 'significant and non-temporary discrepancy between the advertised and actual performance regarding speed or other quality parameters'. The overall intention to give remedies to consumers in case of lack of conformity is welcomed but the remedies should be specified in the proposal.

   Since there is no harmonisation at EU level regarding the conformity in consumer service contracts, national laws might not include specific remedies for such cases or they could not be very consumer friendly (e.g. remedies are subject to cure by the service provider). Additionally, only few Member States count on rules on the fate of a contract if it was concluded as a consequence of an unfair commercial practice. Therefore, we would suggest that the consumer should be able to terminate the

telecom contract / switch provider without penalty in case there is a lack of conformity as defined in the proposed text. Furthermore, the obligation for NRAs to ensure that consumers have the possibility to 'make an independent evaluation of the actual performance' (article 21(3)) can help to prevent abuses and at the same time help consumer to prove the lack of conformity.

**Article 33**

Mobile phones and frequent cross-border travel have become almost commonplace for Europeans for many years now. Unfortunately prices for calling, texting or more recently downloading data by phone when abroad were so high as to be prohibitive. Following up a major BEUC survey in 2003, the European Commission intervened and prices have continued to be capped ever since.

In fact, **roaming is a clear evidence of a non-sufficiently integrated single market and there is no technical justification for keeping the concept of roaming itself**. Therefore, BEUC has been supporting the abolition of roaming charges for the past years. During the negotiations of previous roaming regulations, BEUC has mainly focused on improving the price craps and transparency provisions.

The idea of adapting the regulatory framework to foster the creation of **roaming alliances** could be potentially positive for European consumers as long as it is **ensured that roaming prices are the same as domestic prices, but especially, that domestic prices do not increase as a result of this new phenomenon**. Allowing for the possibility to insert a limitation of 'reasonable use' will not ensure that consumers can 'confidently replicate their domestic consumption pattern' while travelling within the EU. Additionally, concepts such as 'reasonable use' should be clearly defined within the Regulation, and the criteria used to specify what is considered to be 'reasonable use' listed out, so that there is legal certainty and harmonization of approaches across Member States.

**Domestic prices need to be carefully monitored.** The proposal should include an obligation for the relevant authorities to ensure that prices for telecom services are transparent and continue on a downward, competitive trend.

**The rules that determine what is to be considered a *roaming alliance* in the context of this regulation raise several concerns.** Firstly, the fact that alliances are only *de facto* to cover 21 Member States and 85% of the EU's population could result in the creation of a *2-speed roaming Europe.* The consumers that live in Member States where the alliance is not present would not benefit from the reduction in roaming tariffs to the level of domestic prices.

Secondly, the creation of these alliances raises serious competition concerns, as this new regulatory entity would favor the larger operators who are already present in several Member States. Therefore, it must be carefully analyzed how such a proposal would affect competition and ensure that smaller, new entrants in the market are still able to compete. Arguably, these are the companies that have been driving the downward trend in retail domestic prices in many Member States.

Lastly, according to the draft proposal, consumers who are customers of a member of a roaming alliance shall have the right to can **opt out of the alliance's benefits**, and remain a "normal roaming" customer, "in return for other advantages". While this provision aims at guaranteeing that consumers have the choice to explore which option is better suited to their needs, it needs to be made much clearer how service providers shall offer this to consumers. It could be the case where service providers heavily market their *off-alliance* services and hide their *on-alliance* ones – or viceversa, to the detriment of consumers. Further, criteria that help identify what is meant for "other advantages" are necessary and should be closely monitored and enforced by NRAs.

According to the EU Digital Agenda for Europe's objective, *the difference between roaming and national tariffs should approach zero by 2015*. However, for instance, **roaming prices for voice services are still more than three times higher than national call prices.**[1] In general, BEUC welcomes the fact that price caps have been continuously lowered. Lowering wholesale caps but not retail caps potentially only benefits the industry, as it increases their margins. In order to bring roaming prices even closer to domestic prices, **the level of retail price caps should be further lowered.**

The abolition of charges for incoming roaming calls is welcome and seems to be the only step that has been included in the proposed Regulation. **Data roaming charges remain the most important challenge.** Despite lowered wholesale price caps for data roaming, the retail price caps remain unacceptably high.

[1] Digital Agenda Scoreboard, 2013