

KEYNOTE SPEECH

by Dr Georg SERENTSCHY – BEREC Chair 2012
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Ladies and Gentlemen,

It is with great pleasure that I address the distinguished audience of the **23rd Annual Communications and Competition Law Conference**. Before I start, I would like to disclaim that the views I'm expressing here, are personal.

BEREC – the Body of European Regulators for Electronic Communications – has been invited to be present today.

I would like to think that when a conference of such long tradition and strong international reputation invites BEREC to participate in its deliberations, this means that it believes that BEREC is playing an important role in the development and application of communications and competition law.

I, too, believe that BEREC is playing such a role, and can continue to play such a role effectively. This belief is not only derived from the legislative framework, which defined BEREC's role in law, but also from my experience working within BEREC, and chairing it for the last 5 months.

Let us look back to where we have come from.

In 2002, we had a new competition-based European regulatory framework comprising 5 directives and giving the Commission certain powers in the fields of market definition and SMP-determination. This helped to achieve a more consistent application of competition law principles and methodologies in the national regulators' market analyses. However, by the time we began to review the 2002 framework, significant differences in the implementation of this legal framework remained.

Take for example mobile termination rates across Europe: The price-range for the same service, the termination of a call, differed in Europe enormously. Although these differences came down over time they are still at 100% and more leading to unintended consequences like asymmetric payment streams between operators and member states.

This was and is contrary to the spirit of a single market, created additional costs for industry, distorted competition and added no value to the economy. Ultimately, consumers suffered.

The review in 2009 sought to address some of these problems. The desire to establish a real European single market for telecoms led to a Commission proposal in 2007 for a European agency (originally known as the "European Electronic Communications Market Authority" or EECMA).

The Commission originally contemplated that this Agency should have the power to scrutinize and veto the regulatory decisions of EU NRAs across all relevant economic markets in order to ensure the consistent implementation of the legal framework (essentially, as the Commission would have had it, ensuring that the same regulatory remedies applied everywhere).

While the aim of pursuing the single market was laudable, NRAs - and, in the end, the Council and the European Parliament - were not convinced that this would be the appropriate approach to the regulation of telecoms markets in Europe.

In the end, everyone agreed that the *national* Regulatory Authorities are the ones who know their national markets best, and know which specific regulatory obligations should be imposed on their SMP operators in order to most effectively promote competition in those markets.

At the same time, the legislators recognised the value of collaboration between the national regulators and the European Commission, and of rigorous and accountable peer review.

BEREC was therefore the **compromise** reached in 2009. BEREC is not a European agency with executive or regulatory powers like ACER, the Energy Agency established a few weeks before it. Nor does BEREC have any legislative power (as only the Council and European Parliament can have).

Rather, BEREC is a network of national regulators whose opinions carry weight – both its member NRAs and the Commission are under a legal obligation to take the utmost account of them. And while the close cooperation of NRAs is nothing new – BEREC’s precursor, the ERG, did this for several years – BEREC represents – from a legal point of view – a new quality of common rule-making,

Let me give you just a few examples of BEREC’s enhanced role.

- The first is BEREC’s role in the Article 7 and Article 7a procedures under the revised Framework Directive. These provisions might well be called the “heart of harmonised regulation”. The Commission has had a veto power in relation to NRAs’ decisions on market definition and SMP assessment, ever since 2002, but essentially worked alone in performing this function. In the new framework, the Commission also has scrutiny powers in relation to NRAs’ decisions on *remedies* (but not a veto). And in both cases, the Commission is required to seek the input of BEREC and to take the utmost account of it.
- In addition to this, more “formal” advisory role, BEREC is also legally required to work in close cooperation with the Commission and NRAs in helping NRAs to devise appropriate regulatory decisions. The rationale for this new framework is that BEREC represents the collective experience and knowledge of its member NRAs, and is therefore a credible contributor to ongoing efforts to promote high-quality and effective regulation across Europe, and, in the end, the single market.
- International roaming is another example of BEREC’s role as “rule-maker”. The latest Roaming Regulation, which is about to become directly applicable across Europe, requires BEREC to adopt guidelines for operators to follow in relation to their reference offers for wholesale roaming access. BEREC is also required to advise the Commission on the implementation of structural measures to enable the separate sale of roaming services. These guidelines and advice will both have an impact on the development of competition in the roaming market.

- Common positions are another area worth noting. These are statements of best practice, derived from the experiences of regulators on the ground of what works and what doesn't, and oriented by a collective desire to raise the bar on the quality of regulation in the sector across Europe. The ERG began to develop common positions almost as soon as it was established in 2002, and was often criticised for generating "least common denominator" positions lacking in ambition. BEREC is continuing this programme, but taking advantage of the fact that NRAs are now legally obliged to take the utmost account of BEREC common positions. This year we are revising our broadband common positions, and have publicly stated our commitment to be ambitious in order to raise the bar.

But BEREC is not only involved in formal rule-making. BEREC has also a role to play in collating evidence and providing advice to the European Institutions, on request and on its own initiative. BEREC is deeply involved in grappling with this rapidly changing eco-system, helping both NRAs and legislators to identify the appropriate policy responses to developments in our sector.

To do this job properly, BEREC has to acknowledge and get to grips with the speed and scale of the changes that we are seeing in our sector. This means being ahead of the curve, understanding – for instance – the impact of a move towards "all-IP" networks and services, the rise of "over the top" players and their data-hungry applications. As we consider how our regulation affects market players, we also have to be alive to the wider environment in which they operate – currently one with expensive credit, dramatically slowed growth, and continued uncertainty of demand. What else is needed to meet the Commission's Digital Agenda targets, beyond the proper deployment of the regulatory tools we currently possess?

To phrase it a little bit more provocative: The Web 2.0 revolution is not only changing the eco-system of the market players, it may also lead in the mid-term to the development of new regulatory paradigms – I call it "Regulation 2.0". And to make reference to a new recommendation of relevant markets which is currently in the Brussel's pipeline: In the past, it was important for us regulators to regulate the markets right, now the question is getting more and more important, if we regulate the right markets.

Let me make clear – our role as regulators is clearly not to design industrial policy. Whether we like it or not, we operate under the constraints of a regulatory framework that is deliberately designed to protect, first and foremost, the promotion of competition. We are also required to operate in an independent and transparent manner, taking due account of the real variety of market conditions across Europe, and sometimes within our own national territories.

This, inevitably, creates a tension between the objective to pursue increased harmonisation in the pursuit of the digital single market, and the need to recognise the inherent differences that exist, sometimes even within a Member State.

To conclude, let me ask you a question, one that you are bound to ask me otherwise: wasn't ex ante regulation meant to be withdrawn as competition developed? Am I doing my job properly?

The gradual removal of ex ante regulation is indeed the ultimate goal. However, as you all well know, the reality is much more complex. I believe there will continue to be a role for regulators to identify and deal with distortions of competition in relevant markets, and to ensure consumers are protection in a fast-moving marketplace, so I envisage us needing to work together for some time still.