

## **Peer review process (Article 35)**

### **1.1 Description of the Commission's proposal**

The Commission is proposing to introduce a mandatory peer review procedure for national spectrum assignments aimed at achieving a more coordinated approach to spectrum assignment procedures and licence conditions at Union level.

The proposal requires first of all that all National Regulatory Authorities (NRAs) are entrusted with a harmonised set of competences relating to the management of radio spectrum (Article 35 (1)). This includes, inter alia, responsibilities for the selection process (in the case of individual rights of use), eligibility criteria for bidders, the duration of the rights of use, renewal conditions and conditions related to assignment and transfer (including trading and leasing) of rights of use for radio spectrum, as well as the parameters of coverage conditions reflecting Member State public policy objectives.

NRAs would be required to make any draft measure relating to the areas described above accessible to BEREC, the Commission and other NRAs for peer review. Within one month, BEREC would have to issue a reasoned opinion stating whether the draft measure should be amended or withdrawn. In addition, other NRAs and the Commission would also have the opportunity to comment. The NRA concerned would have to take utmost account of the BEREC opinion and of any comments made by the Commission and other NRAs before adopting its final decision. Furthermore, the NRA in question would have to provide a reasoned justification, where it decided not to amend or withdraw the draft measure based on the BEREC opinion.

The proposal would not lead to a binding decision requesting amendments to, or to a veto of, an NRA's draft measure. However, it would require the NRA concerned to provide a reasoned justification where it decided not to follow the BEREC opinion, and to formally cooperate with BEREC and the Commission to identify the most appropriate and effective solution.

### **1.2 Description of the ITRE Rapporteur's proposals**

The draft ITRE Report maintains the peer review procedure as proposed by the Commission but extends the time given to BEREC to produce an opinion from 1 month (with a possible extension if the NRA agrees) to 3 months. The RSPG would be given a role in the peer review procedure (AM 65 and 66).

### **1.3 BEREC analysis**

BEREC welcomes the Commission's objective to achieve ubiquitous connectivity for all citizens across Europe, and agrees that effective spectrum management is critical to the Digital Single Market. BEREC also welcomes and agrees that NRAs should have an important role to play in relation to market shaping aspects of spectrum management with a harmonised minimum set of tasks.

However, BEREC has serious concerns that the Commission's proposal for a more centralised approach towards national spectrum assignment procedures and licence conditions at Union level would not lead to achieving the aims, shared by all, of improving spectrum assignment mechanisms across the EU and promoting regulatory best practice in this area.

- The Commission's proposal would undermine effective and efficient spectrum assignment procedures across Europe, adding bureaucracy and delay to an already lengthy and complex process.
- The scope of the notification requirement encompasses *all* spectrum management measures (award, conditions, renewal, etc.) and measures relating to *all* ECS uses of spectrum. This represents a substantial number of measures to be considered, quite possibly with multiple proposed national spectrum award assignments coming under review at the same time. This would be impractical at best, if not unfeasible.
- The proposed peer review process would occur too late in the process of award design. Given how complex the process of designing an award can be and how long the process can take (up to 2 years), it is not realistic to subject a final design to scrutiny and expect the Member State to make substantial alternations so late in the day without subjecting any amended proposed award to the full range of stakeholder consultation. The delays described above become much longer than just the one month that BEREC would have to issue a reasoned opinion, and could run into many months of multiple rounds of further consultation. Any review would therefore have to take place in relation to an early draft decision, potentially when the NRA first seeks the views of stakeholders on its proposals.
- The proposed peer review process is not practicable, and raises the risk of litigation (and by extension, further delay in spectrum release). Draft licence award designs are long and complex documents often reaching thousands of pages. Whether BEREC is given one or three months to assess a draft award, it is simply not a feasible task, particularly considering that the draft will often only be available in the Member State's national language. Any written opinion, therefore, would necessarily be based on a limited appreciation of the proposal.

The draft ITRE report does little to address BEREC's concerns.

Against this background, any alternative to the Commission's proposal should be based on the following criteria:

- (1) a deepened exchange of best practices. This would support awarding authorities in making consistent spectrum assignment decisions and foster the creation of a collective bank of knowledge and expertise that could be called upon by all those involved in designing, planning and executing spectrum assignments.
- (2) a limitation of any review to assignments in harmonised ECS spectrum bands that have substantial impact on the markets. The scope of the procedure should be limited to market shaping aspects of the awarding conditions (as listed in Article 35.1.)

- (3) the involvement of all relevant experts from competent European bodies and national authorities, in which respect, BEREC and RSPG have already expressed their will to strengthen their cooperation.<sup>1</sup> It is important to acknowledge that both BEREC, with its role in the functioning of the electronic communications markets, and the RSPG, concerned with spectrum management in general, have a part to play based on their respective roles. Therefore, RSPG should be associated to this process at an appropriate level respecting the independence of BEREC and its members.
- (4) timeliness – scrutiny of planned awards should take place early enough in the process to enable the Member State in question to take account of comments received in finalising its licence award.
- (5) pragmatism – any scrutiny process must take into account the length and complexity of national award designs (often available only in the official language of the Member State), and be designed in such a way to maximise the understanding of those providing feedback on the award, so as to enable them to contribute positively. A sensible process should be measured by reference to the value it adds to the awarding Member State.

BEREC would therefore recommend replacing the Commission's proposal for a mandatory peer review. Based on the previous analysis, two options should be considered:

- a voluntary peer review taking into account the criteria set above, where the national regulatory authority would have the discretion to decide whether or not to submit its draft measure to BEREC. In this process, BEREC would collect inputs from the RSPG.
- a different and more effective mechanism, which would also meet the criteria described above. This could take the form of a workshop co-organised by BEREC and the concerned NRA, where it would be required to share its draft measure with all relevant experts at EU level, at the stage of its national public consultation or equivalent. Concretely, the NRA would be required to convene a meeting of competent experts from at least [5] Member States. The meeting would be open to all other members of NRAs and European bodies, including in particular the RSPG and the Commission and would take the form of a presentation followed by a "challenge session"/Q&A, led by the [5] experts (but potentially with the participation of all attendees). The objective would be to stress test the draft measure, sharing experiences and lessons learned and exposing for consideration potential deficiencies in the draft award in a confidential, professional environment ("stress test").

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<sup>1</sup> [Joint BEREC/RSPG News Release on Spectrum and the Framework Review](#), 3 February 2016. It should also be noted that other EU organisations may also be involved in such matters, in particular COCOM/RSCOM.