

ETNO Reflection Document on BEREC draft Medium Term Strategy Outlook



January 2012

Executive Summary

- ETNO welcomes BEREC's initiative to provide a mid-term strategic outlook on its priorities. It reflects BEREC's increasingly important role in ensuring a consistent and proportionate regulatory regime in the EU.
- ETNO welcomes BEREC's recognition of increased convergence and the role of 'over-the-top' service competition. BEREC's overall activities should contribute to a level playing field for competition between actors on different layers of the value chain. BEREC should make this an overarching strategic priority.
- ETNO supports BEREC's goal to adopt common regulatory approaches in those areas "where differences impede the internal market". The completion of the digital single market is a core objective of the Digital Agenda and a key to stronger growth in Europe. Eliminating differences in national regulatory practice in itself, however, does not help to achieve the internal market and will often be an inefficient use of regulatory resources. The work of BEREC and other EU bodies should focus on areas where existing differences lead to barriers to competition in the single market.

ETNO comments on BEREC's Medium Strategic Outlook

I. BEREC's role in completing the internal market

ETNO welcomes BEREC's initiative to provide a mid-term strategic outlook on its priorities. BEREC plays an increasingly important role in ensuring a consistent and proportionate regulatory regime in the EU. Giving a longer-term outlook can help to guide interaction with stakeholders and EU institutions.

Completing the digital single market is a core objective of the Digital Agenda and a key to stronger growth in Europe. ETNO has consistently advocated for the removal of obstacles to cross-border trade, for example in the field of online content or services.

In electronic communications services, the EU regulatory framework already provides for a common set of rules and an detailed notification process to ensure a consistent application in the field of economic regulation (Art. 7, 7a of the Framework Directive). ETNO recognises BEREC's new role in this process and invites it to as far as possible allow interaction with stakeholders within the given timelines.

ETNO shares BEREC's understanding that the objective in electronic communications regulation should be to adopt common regulatory approaches "where differences impede the internal market" (p. 3 of the consultation document).

It is important to recognise that eliminating differences in national regulatory practice in itself does not always help to achieve the internal market, but instead may waste scarce resources (cf. section 6 of the consultation document) and – as has recently been argued – the 'political capital' of EU bodies that can be invested in achieving the single market.¹

In line with the EU Treaties, the work of BEREC and other EU bodies should focus on areas where existing differences lead to barriers in the internal market. The benefits of applying similar regulation in all Member States are more questionable where:

- regulatory approaches at national level have achieved consistency over time giving legal certainty to the market. A harmonisation of approaches could in that case be disruptive, lead to less regulatory certainty and even to a lower, not higher, level of harmonisation if the outcome of introducing a disruptive new approach would distort competition between Member States.
- a harmonisation of market outcomes is pursued, in particular with regard to prices. Indeed, national differences in population density, GDP per capita, labour costs, consumer preferences and the fact that most electronic communications services are not tradable between Member States (the most obvious example being network access) will inevitably result in differences in prices.²
- a 'pan-European' regulation is called for because services are provided in several Member States. For example, calls for similar wholesale regulation in all Member States to support the provision of business services to multi-national companies would *de facto* lead to a re-regulation of some wholesale markets that NRAs have found to be competitive. This would result in a serious distortion of competition between Member States and contradict the principles of the EU framework.

ETNO therefore supports BEREC's role in completing the internal market through the tool set described under section 4 of the consultation document and encourages it to focus its resources on areas where real barriers to the internal market remain.

II. Comments on BEREC's main themes for the medium term

ETNO notes BEREC's intention to focus on the themes of next generation access (NGA), consumer empowerment and service-related developments. Another

¹ S. "What is the digital internal market and where should the European Union intervene? A. De Streel and P. Defraigne, EUI Working Paper RSCAS 2011/3

² De Streel and Defraigne, *idem.*, p. 3

strategic challenge that in our view BEREC should respond to is the creation for a level playing field for competition between actors coming from different layers of the Internet value chain.

1. Next Generation Networks

ETNO welcomes the main theme of infrastructure development, in particular in NGA. We refer to our more detailed comments on BEREC's 2012 Work Program in this respect.³

BEREC should primarily focus on creating a regulatory framework that incentivises private investment in high-speed wireline and wireless networks. As ETNO has stated previously, regulatory approaches in an NGA market environment should increasingly involve symmetric access solutions responding to the symmetric competition challenge where several operators invest in access infrastructure. So far, this strategic task has not been taken into account by BEREC in its Work Programmes, despite approaches pursued in this field by many of its member NRAs.

Also, appropriate market definitions – noting that the Commission recommendation on relevant markets will be revised within the relevant time period - and geographic segmentation are important elements of a targeted regulatory approach to NGA.

In the context of NGA, BEREC states that access to end-users will be the “focal point” for BEREC in regard to new business models in a convergent IP environment. ETNO members' experience is that the freedom to offer differentiated access products and services with regard to speed and quality at different price points is an important element of a framework conducive to NGA deployment. BEREC should guard against unreasonable restrictions of pricing freedom both via access price regulation and in the field of net neutrality. We suggest clarifying the reference to access to end-users and also underline the need for product and price differentiation.

2. Consumer empowerment

ETNO recognises the importance BEREC attaches to consumer protection and agrees that it is part of BEREC's mandate to advise and guide member NRAs in this field. BEREC mentions the important areas of network security, privacy and protection of disabled users in this respect.

We note, however, the importance of a close cooperation between all the authorities /bodies involved in consumer protection - as acknowledged on page 5 of the consultation document - in order to ensure coherence and avoid over-regulation in this field. In some Member States consumer protection tasks are carried out by authorities other than the NRA and there is a risk of overlap between these authorities and the NRA.

BEREC work on consumer protection should therefore focus on those issues where a need for NRA action has been established in line with existing EU and national rules and should strictly comply with the principles of reasonableness and proportionality so as not to unnecessarily increase the costs of running a business.

³ ETNO RD361 - Reflection Document on BEREC 2012 WP, 2011/11, p. 6

In ETNO's view, competition, innovation and investment remain the best guarantees for sustained consumer benefits in the telecommunications sector. The recommendations of the CEO Roundtable of July 13 2011 concluded, based on a broad industry consensus, that

*“Europe should foster innovation and investment, as much as consumer interest. [...] Long term consumer interests coincide with the promotion of innovation and investment”.*⁴

It is against this background that ETNO calls for an approach to consumer protection that complements, but does not supersede, the legal framework for competition.

In this context, the statement in the consultation document that *“transparency and quality of service, affordability and accessibility are both an outcome and a pre-condition for a competitive market”* (p. 5) may be misleading. While this is true for transparency and the ability of consumers to switch, it is less clear that affordability is a pre-condition for a competitive market. Competitive prices rather appear to be the outcome of a competitive market. Quality of service is both a parameter of competition as well as an element covered by transparency. Any additional measures to pursue specific objectives such as affordability or specific service quality should be clearly distinct from competition regulation and be firmly placed within the provisions of the existing EU framework. The Citizens' Rights Directive, in force since last May, provides a wide and comprehensive set of rules to guarantee the protection of EU citizens in the field of electronic communications. It enhances consumers' position both in terms of protection of their rights when concluding contracts with operators (e.g. duration of contracts) and of transparency of information that must be granted related to the services and applications that they want to use and access or to their ability to switch operator (e.g. number portability).

3. Service-related developments

ETNO notes the important work items listed under this theme. As it appears to be the heading for a mix of different, not necessarily related topics such as net neutrality and special rate services, ETNO encourages BEREC to identify, instead or alongside, the overarching 'main theme' of a level regulatory playing field for the Internet value chain (s. below), reflecting the evolving role of BEREC in the Internet era. Under such a theme, net neutrality could be covered, as could Internet security and privacy.

On net neutrality, ETNO would like to refer to its comments on the BEREC draft Work Programme 2012 and on the BEREC draft transparency report.⁵

4. Creating a level playing field across the Internet value chain

ETNO welcomes BEREC's recognition of increased convergence and the role of 'over-the-top' service competition. Players active on the services and application layers of the Internet offer services that increasingly compete with traditional

⁴ “How to achieve the Digital Agenda targets”,

http://ec.europa.eu/information_society/newsroom/cf/item-detail-dae.cfm?item_id=7211

⁵ RD361, idem, p. 6; ETNO RD360 (2011/11), at <http://www.etno.eu/Default.aspx?tabid=2439>

electronic communication services such as voice telephony and sms. The shift of revenue creation in the Internet value chain towards large Internet Groups continues while regulatory pressure on revenues of network operators has increased. These competitive pressures should be fully recognised when deciding whether regulation should apply to the infrastructure layer and which obligations are appropriate.

Equally, European regulators and legislators should, in all policy fields, strive for a level playing field and ensure that EU network operators are not subject to more stringent rules than the large entities that control content, services and applications on the Internet. Whether data protection, transparency and consumer protection or openness and access are concerned, a focus on over-the-top competition would benefit the quality and relevance of regulation in Europe.

BEREC's overall activities should therefore contribute to a level playing field for competition between actors coming from different layers of the value chain and their respective business models in a converging market place. BEREC should make this an overarching strategic priority and also advise policy makers how to adapt the current rules and extend the remit of NRA activity where needed.

III. Stakeholder interaction and transparency

ETNO welcomes BEREC intention to closely interact with citizens, undertakings and EU institutions to guarantee the quality of its outputs. We agree that for an effective interaction with stakeholders, a presence of BEREC in Brussels would be helpful.

As underlined in previous consultation responses,⁶ ETNO encourages BEREC to further deepen its interaction with the sector's undertakings by ensuring transparency on its activities and allowing a systematic dialogue with all stakeholders. ETNO welcomes the important progress made in this respect by the BEREC Chairmanship in 2011 and by individual Expert Working Groups.

⁶ Idem