ECTA Response to BEREC Call for Contributions

on

Possible existing legal and administrative barriers with reference to the provision of electronic communications services for the business segment

(BEREC FR IMPL EWG_BS_110704)

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A. Introduction

ECTA very much welcomes BEREC's continued attention to issues hindering the development of effective competition for the provision of electronic communications services to the business segment(s) of the market(s)

We appreciate that BEREC appears to recognise that a variety of obstacles exist, including obstacles of a legal and/or administrative nature, and we comment on those in this response.

However, ECTA wishes to emphasise that, irrespective of this useful BEREC call for contributions, much work remains to be done to achieve a situation in which all NRAs recognise (through explicit decisions) the specificities of the business communications environment. This concerns, first, identification of the characteristics of retail demand (in product specification terms and in terms of geographic coverage. Secondly, it concerns the derived wholesale demand emanating from operators seeking to meet that retail demand, and in particular: (i) these operators' need for fit-for-purpose wholesale access inputs delivered against a clear and up-to-date specifications (i.e. (Ethernet Layer 2 with ability to configure and provide multiple VLANs in particular), which should not differ widely among EU Member states, and (ii) delivery thereof at realistic levels of aggregation reflecting the spread of customer locations to be served, and this inside a specific country as well as across multiple countries. ECTA's position on this has been articulated on several occasions in more detail to BEREC, and is not repeated here.

B. General Remarks

This BEREC call for contributions addresses legal and administrative procedures related principally to the national authorisation regimes in place today, which result from the transposition of the EC Authorisation Directive 2002/20/EC (now amended by 2009/140/EC) into the national law of the Member States and into the administrative practices of NRAs.

A reflection on the genesis of the 2002 Authorisation Directive is relevant. Indeed, in the context of the '1998 Review' of the EU Framework, the Commission took note of the complaints made in preceding years by new entrant operators regarding extremely onerous licensing procedures/terms in nearly all EU Member States. At the same time, the Commission learned that Denmark was the only EU Member State which did not require individual licensing for telecommunications activities, and that no manifest problems were identifiable with the Danish approach. This led the Commission to propose, and the EU institutions to adopt (in 2002), the provisions of the Authorisation Directive 2002/20/EC. In Directive 2009/140/EC, a specific addition was made relating to notification of activities by undertakings providing cross-border electronic communications services to undertakings located in several Member States, to begin to curtail excessive notification requirements. The provisions of the Authorisation Directive (including the 2009 amendments) are cited below (with our underlining), given that they are relevant to our general remarks and to our responses to BEREC's 4 specific questions.

Article 3
General authorisation of electronic communications networks and services

1. Member States shall ensure the freedom to provide electronic communications networks and services, subject to the conditions set out in this Directive. To this end, Member States shall not prevent an undertaking from providing electronic communications networks or services, except where this is necessary for the reasons set out in Article 46(1) of the Treaty.

2. The provision of electronic communications networks or the provision of electronic communications services may, without prejudice to the specific obligations referred to in Article 6(2) or rights of use referred to in Article 5, only be subject to a general authorisation. The undertaking concerned may be required to submit a notification but may not be required to obtain an explicit decision or any other administrative act by the national regulatory authority before exercising the rights stemming from the authorisation. Upon notification, when required, an undertaking may begin activity, where necessary subject to the provisions on rights of use in Articles 5, 6 and 7. Undertakings providing cross-border electronic communications services to undertakings located in several Member States shall not be required to submit more than one notification per Member State concerned.

3. The notification referred to in paragraph 2 shall not entail more than a declaration by a legal or natural person to the national regulatory authority of the intention to commence the provision of electronic communication networks or services and the submission of the minimal information which is required to allow the national regulatory authority to keep a register or list of providers of electronic communications networks and services. This information must be limited to what is necessary for the identification of the provider, such as company registration numbers, and the provider's contact persons, the provider's address, a short description of the network or service, and an estimated date for starting the activity.

We have underlined 'may', 'may be required' and 'when required' in Art 3.2, to emphasise that the EU Framework does not require Member States to institute or maintain a notification requirement for the provision of electronic communications network or electronic communications service provision (hereafter 'ECN/ECS'). Indeed, Denmark and the UK do not have any notification requirement for the provision of ECN/ECS, and in Finland telecommunications activities of minor significance (whereby the number of connections does not exceed 500 or where the annual turnover does not exceed €300000) are not required to be notified. Perhaps BEREC and other EU and national institutions could carefully study whether refraining from instituting a notification requirement, or waiving it for activities of minor significance, has any substantial disadvantages. Conversely, it would be worthwhile to study which justifications may exist for the regimes that are in place in other Member States, and whether these have any substantial advantages over the regimes in existence in Denmark, the UK and Finland in particular, and whether such advantages justify maintaining regimes such as 'application for a general authorisation', 'emission of declaration' and notification requirements in their various forms (discussed in Section C. below).

We have underlined most of Art 3.3, because it is clear that the 'application for general authorisation', 'emission of declaration' and notification regimes (discussed below) in some Member States go beyond what is permitted by Art 3.3.

As a general remark, it should be noted that many Member States are still in the process of transposing the 2009 EC Directives into their national regimes.

C. Responses to the BEREC Expert Working Group's questions

1) Under the current authorization regime laid down by the 2002 Authorization Directive (and substantially confirmed by the 2009 review), the ECNS operators are entitled to start activities upon notification/declaration to the NRA.

What is your overall experience of the practical implementation of such administrative regime in member States?

Did you encounter inconsistencies or operational constraints potentially affecting the provision of cross-border business services? If yes, please provide a description.

As we have stated in Section B. above, the Authorisation Directive does NOT in fact require Member States to institute or maintain a notification requirement, and indeed at least two Member States (Denmark and the UK) do not have a ECN/ECS notification requirement.

Our overall experience is that the administrative regimes in Member States vary widely, from non-existent, over a very simple notification requiring less than the maximum permitted by Art 3.3 of the Authorisation Directive, to regimes in some Member States going beyond what is permitted by Art 3.3 and which impose a very real burden on companies aiming to provide electronic communications services.

Key issues experienced by ECTA members are listed below. It is clear that these include inconsistencies and result in genuine operational constraints, at the very least in terms of the time it takes to be able to effectively provide networks/services to business customers. The time factor is important, because operators of business services often respond to tenders for multi-site/multi-country connectivity, and may have to 'add' a country or a few countries quickly to meet the tenderer's requirements, even where it concerns a single location or a dozen or a few dozen locations to be connected in additional countries.

- Several Member States require (in particular for permanent network or service provision), the establishment of a legal entity (which can be a branch or equivalent) on their national territory, or registration in the domestic Company Registry. → *This is in contradiction with Art 3 of the Authorisation Directive.*

- Several Member States interpret the notification requirement as an 'application for a general authorisation' or 'emission of declaration', which de-facto amounts to withholding the right to provide networks/services until the NRA has delivered a certificate of authorisation. Such a de-facto licensing regime (as if the general authorisation and notification system does not exist) combined with a long assessment period before the confirmation of the notification (de facto licensing procedure) is being granted (e.g. up to 2 to 3 months even when no numbering or frequency use rights are required, including requests for clarification, further information, etc.) constitutes a serious barrier to entry. → *This is in contradiction with Art 3 of the Authorisation Directive.*

- Many Member States require a contact person/address in the Member State, able to speak the language, receive correspondence, etc. and sometimes including a requirement for a domestic telephone number. Very detailed identification data on the person identified as the contact person is also required. In some cases more than one contact person is required (e.g. for notifications, for interception/data retention, for emergency situations, etc.) → *This can be difficult and costly to arrange.*

- Several Member States require extremely detailed and up-to-date information on the company making the notification (e.g. company articles of association, certified as being up-to-date, extract from trade register, certified as being up-to-date, up-to-date proof from tax and other authorities that the company is not in arrears of payment of all outstanding taxes and social security contributions, shareholder structure up to the 2nd level, statement of financial capability, security manuals, etc.). Where the company is from another Member State, certified translations can be required on these documents. → *This makes the process extremely tedious, time-consuming and costly.* There are cases where the type of document required simply does not exist in the Member State of incorporation of the company making the notification. We have been made aware of a case where the extract from the trade register (from another Member State) was not accepted, and the NRA insisted on an extract from the trade register of its own Member State (the company not being registered there, this amounts to a de-facto requirement for establishment of a legal entity, or complex administrative procedures with the trade register, and related accounting issues).

- Several Member States require extremely detailed identification data on the person signing the notification on behalf of the company (proof that this person can legitimately represent the company, certified as being up-to-date, proof that this person has not been convicted of certain offences and/or filing a certified criminal record, certificate of good standing, identification data which does not exist for citizens of some Member States, etc.). Where the person is from another Member State, certified translations can be required on these documents. → *This makes the process extremely tedious, time-consuming and costly.* We have been made aware of a case in which the directors of the company had to appear in front of a notary of the Member State in which the company wished to initiate service provision, to certify that they had not been convicted of certain offences and to prepare a specific 'anti-mafia declaration'.

- In a few Member States, payment of one-off notification fee has to occur in advance or together with the notification (and/or proof of payment has to be added to the notification), with authorities unwilling to issue invoices for these payments. → *This causes problems with accounting requirements of companies.*

- Some Member States require detailed network/service information (including network diagrams, addresses of equipment location, copies of commercial agreements with underlying providers, etc.) to be filed as part of the notification. Some NRAs analyse this information and request clarifications before 'emitting' a declaration to the notifying operator. We have been made aware of a case where the interface specifications have to be filed with the NRA 1 month before service launch. → *This de-facto results in a timeframe during which networks/services cannot be provided.*

- Some Member States request information on the geographic coverage of the network/service, number of network nodes, a roll-out calendar, etc. → The requirements for geographic information are sometimes linked to differentiated fees for nation-wide, regional, and smaller network/service footprints (which can be a positive cost-reducing factor for sub-national providers); *some requirements go beyond Art 3 of the Authorisation Directive.*

2) As far as the administrative regime is concerned, can you identify some national best practice across Europe which may help in supporting the provision of cross-border business services?

Yes, Denmark and the UK do not require notification ECN/ECS, which evidently facilitates swift provision of cross-border business services in those Member States, certainly when compared to the administrative burdens which exist in several other Member States, as we have described in response to Q1 above.

In Section B. above, we suggest that BEREC and other EU and national institutions could carefully study the motivations for Member States instituting or maintaining notification regimes, and we also suggest comparative study of the advantages and disadvantages of regimes with or without notification requirements.

3) Besides the authorization system, are there any other differences in administrative procedures in the area of telecommunications that may affect the provision of business services across Europe?

Yes, several.

a) Fees to be paid by notifying/notified operators

The approach to one-off and recurring fees to be paid by notifying/notified operators varies considerably between Member States, in terms of complexity (e.g. filing of statistical data enabling calculation of fees, certification, etc.), payment modalities, and in terms of the actual amounts due by notifying/notified operators and the actual amounts of universal service obligations. There are most definitely cases where the amounts concerned, combined with the administrative burden of notification and recurring information provision, call into question the direct economic rationale of provision of connections/services to a dozen or a few dozen locations for a multi-site/multi-country business customer, the use of VSATs to address a handful of locations, the provision of WiFi hotspots at a few selected locations, etc. We also wish to highlight that several Member States have introduced a good practice, which is to waive or strongly reduce the fees to be paid by smaller operators (e.g. Belgium, Luxembourg, UK, etc.).

Fees paid by the operators to cover administrative costs relating to the issue, management, control and enforcement of the general authorisation regime should be associated to cost-efficiency objectives to be met by NRAs. Otherwise, these fees will be detrimental to the competitiveness of the operators, and ultimately detrimental to users (including business users) with concomitant effects on the economy as a whole.

b) Numbering, number portability and lawful interception/data retention

Various administrative service-specific barriers exist throughout Europe.

The approach to numbering varies considerably between Member States, in terms of the information/justification to be provided when applying for numbering resources, restrictions applicable to the use of geographic numbers; e.g. NSPCs and ISPCs in several cases allowed only to be deployed on equipment located on the national territory, numbers only allowed to be used on the national territory, prohibition to use geographic numbers for specific types of services or applications, requirement to use specific VoIP numbers (called “nomadic”), etc. In many cases, “nomadic” numbers are more expensive or not implemented in all networks or not reachable from abroad and thus not attractive for users.

Participating in number portability arrangements (number portability being a requirement) is often extremely tedious (6-month process to join the system in several cases), and disproportionately expensive for operators focused on the business market delivering just a few connections to multi-site/multi-country businesses. Both the one-off and the annual participation fees in entities that manage central reference databases for number portability run into several tens of thousands of euros each.

Several Member States require that lawful interception/data retention is carried out on-site on the national territory, including by granting access to equipment on the national territory, require in-country staff 24/7 to deal with lawful intercept/data retention, etc. We wish to highlight that Germany has introduced a good practice, i.e. it imposes a less onerous interception requirement for networks with less than 10,000 connections or user permissions (alongside other exceptions, e.g. where no end-users are connected). These entities are only exempted from the obligation to meet specific and very detailed technical and organisational arrangements, not from the obligation to allow the monitoring of communications in case a valid intercept order has been served.

Whilst no ECN/ECS notification is required in Denmark, providers of electronic communications services are required to register with the Danish national police (in addition to the obligation to register with the OCH database for statistical reporting). The contact

service for law enforcement authorities ("døgnbetjent kontaktpunkt") should be available 24/7/365, and needs to be security cleared by the National Police to handle classified information. A similar obligation exists in various other Member States.

c) Filing of statistical data and coherence of data for cross-border services

The requirements to file statistical data vary considerably between Member States in terms of the type of data to be provided, the level of detail, the format and the tools available to market players. The usage of local language results in enhanced complexity, costs and non-efficient communication. These requirements constitute a considerable burden for operators focused on the business market, especially where they provide only a few connections in a large number of countries. A further issue is how to account for cross-border connections (A-end and B-end) or cross-border sales in statistical reporting.

4) Do you believe that the provision of cross-border business services could be subject to a specific administrative regime?

- **If so, for which reasons and under which legal basis?**
- **What should be the special features of such regime?**

Yes. BEREC, other EU and national institutions should give serious consideration to not requiring notification for the provision of cross-border business ECN/ECS, as is already the case in Denmark and in the UK, and to some extent in Finland (no notification required under the thresholds of max. 500 connections or annual turnover not above €300000), or to at least require the Member States to actually implement the principles of the Authorisation Directive by introducing a simple notification upon commencing a service without any additional conditions.

The key reasons are:

a) Likely limited justification for the existence of an ECN/ECS notification requirement

Where the extent of activity is limited, which is often the case when the cross-border provision is mainly to 'add' a relatively small number of connections of a multi-site/multi-country business customer, it is not self-evident that notification and associated statistical reporting requirements are of critical importance to the functioning of the market.

b) Promoting competition and choice for business customers

Under prevailing circumstances in several Member States, operators are dissuaded from signing contracts 'adding' a relatively small number of connections in a Member State where they are not yet present, due to administrative burdens and associated costs represented by the authorisation/notification regime (which in several Member States goes beyond what is permitted by the Authorisation Directive) and certain obligations.

As a consequence (among other factors), (i) incumbent operators continue to control a large proportion of the business market(s) (often >70%), (ii) this state of affairs leaves smaller business customers underserved (smaller multi-site/multi-national customers are important, and likely represent an increasing proportion of the European economy), and (iii) small

business-focused operators are prevented from expanding outside their home market, and growing into multi-country or pan-European businesses.

With regard to the sub-question *"if so, under which legal basis"*, we have already highlighted in Section B. above and in response to Q1 above, that the Authorisation Directive does NOT in fact require Member States to institute or maintain a ECN/ECS notification requirement. Therefore, there should not be concerns regarding the legal basis.

We recognise that once operators reach a certain scale in a Member State, their activity and market share may become more relevant, and may require attention, e.g. (i) to ensure that NRA market analyses correctly represent the market situation, and (ii) once there is a proven regular demand from the authorities to carry out lawful interceptions, etc. Whilst we do not believe that this readily or necessarily justifies a ECN/ECS notification requirement (as is proven by the Danish and UK cases), it may be considered that notification, if a requirement, should be subject to meeting certain thresholds. Such thresholds could for instance be set along the lines of the Finnish threshold of a relevant number connections (for notification) and the German threshold of a relevant number connections (for compliance with detailed technical and organisational arrangements for lawful intercept). Such a regime based on thresholds should involve restraints also on the payment of fees and universal service contributions (this is already the case in several Member States), the filing of periodic statistics, etc. More generally, we believe that attention is also necessary to legacy/undue restrictions and costs associated with numbering, number portability, and lawful interception/data retention.

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In case you require any additional information with regard to the contents of response, or wish to discuss these and other aspects of this response in more detail, please contact Ilsa Godlovitch.

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Yours sincerely,

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