

## ETNO Reflection Document commenting on the draft BEREC Work Programme for 2011 agreed by the BEREC Board of Regulators



November 2010

### Executive Summary

- ETNO welcomes the new role of BEREC in working towards consistent and proportionate regulation in Europe under the revised EU regulatory framework for electronic communications.
- We encourage BEREC to prioritise its work in 2011 by taking into account the political goals of the “Digital Agenda for Europe” to achieve a high degree of high-speed broadband availability and take-up in the European Union.
- ETNO calls upon BEREC to address two urgent regulatory challenges regarding current and future broadband markets in its work programme (WP):
  - the need for a more symmetric approach to access regulation -- in particular, for next generation access networks (NGA);
  - the effects of platform competition -- in particular, the increasing importance of cable networks -- on market definitions and the imposition of remedies.
- ETNO encourages BEREC to focus its harmonisation efforts. The issue of business services-specific regulation has been addressed by ERG and BEREC in 2009 and 2010 and appears adequately addressed by NRAs in their respective markets. BEREC should not expend further resources on this work item.
- ETNO welcomes the continued work of BEREC on the issue of regulatory accounting and encourages BEREC to continue to promote economically sound solutions in a dialogue with all stakeholders and with the European Commission. An EU-level approach to access product costing, which would be disruptive to established and effective national practices, would severely undermine regulatory certainty for investors in the transition from current to next generation broadband and result in further delays in the roll-out of high-speed access networks in Europe.

## I. BEREC transparency and consultation processes

By way of introduction, ETNO would like to welcome BEREC's commitment to transparent consultations with stakeholders as expressed in the "BEREC rules of procedures for public consultations held by BEREC", BoR (10) 27 final.

ETNO remains concerned that the recommended consultation period of 20 working days (paragraph 3.3 of the BoR Rules of Procedure) will in many instances be too short for stakeholders to provide meaningful input on complex regulatory topics. Other regulatory bodies, including the European Commission and national regulatory authorities (NRAs) foresee, considerably longer consultation periods.<sup>1</sup>

ETNO does note that the Board of Regulators announced intention to remain flexible, stipulate longer consultation periods on a case-by-case basis. We welcome that a longer deadline for comment, that of six working weeks, was granted for recent draft regulatory guidance by BEREC.

In light of these short consultation periods, we appeal to BEREC to provide a precise work plan, indicating when BEREC will publish draft papers for public consultation over the course of the year. This would allow stakeholders to better anticipate work and allocate resources toward consultation responses.

Transparency should also be a guiding principle for BEREC's involvement in Art. 7 and 7a notification procedures under the revised EU regulatory framework (cf. pt. 3.1.2 of the WP).

In the legislative process on the telecoms package, ETNO had called for a formal right to be heard by the affected parties in phase II proceedings to be introduced at European level. In the absence of such right to be heard, BEREC should do its utmost to solicit direct input by relevant stakeholders in such cases in an equitable manner. It should also give full account of the reasons leading to BEREC opinions under Articles 7 and 7a of the Framework Directive, in accordance with Art 18 of Regulation (EC) No 1211/2009 establishing the Body of

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<sup>1</sup> For example, UK regulator Ofcom consults on important policy initiatives or regulatory proposals between 6 and 10 weeks, s. Ofcom Consultation Guidelines, November 2007

European Regulators for Electronic Communications and the Office on transparency and accountability:

*“BEREC and the Office shall carry out their activities with a high level of transparency. BEREC and the Office shall ensure that the public and any interested parties are given objective, reliable and easily accessible information, in particular in relation to the results of their work.”*

## **II. Comments on proposed priorities**

The following observations on the draft BEREC Work Program 2011 are made against the background of the need expressed in the introduction to WP to “*prioritise BEREC’s efforts on actions and products that actually contribute to achieving [the objectives set out in the EU regulatory framework].*”

### **1. Improving harmonisation**

ETNO supports the role of BEREC in working towards consistent and proportionate regulation across Europe under the revised EU regulatory framework for electronic communications.

We encourage BEREC to focus its efforts on contributing to developing consistent approaches in areas of key importance to the Digital Agenda for Europe. Against this background, we make comments on selected items listed under point 3. in the draft WP.

The WP should acknowledge that regulatory practice has an important role to play in achieving the ambitious European broadband targets for high-speed broadband roll-out and uptake by providing a regulatory environment which incentives network investments. Accordingly, BEREC’s activity should take into account the political objective of putting high-speed broadband at the disposal of EU citizens and businesses.

## 1.1 Proposed additional work items for BEREC's agenda:

Given the Commission's Digital Agenda's policy goals, endorsed by the Council of the European Union and the European Parliament, ETNO would like to reiterate its call to include two important regulatory issues on BEREC's agenda for 2011: symmetric access obligations and the impact of platform competition on ex-ante regulation in broadband markets.

ETNO raised these two items in its response to the BEREC Work Program 2010. Despite the urgent challenge to regulatory practice they constitute, they have not been taken up in BEREC work to date.

- **Symmetric access obligations**

A key future challenge for NRAs will be to apply symmetric obligations - and in addition to apply an appropriate geographic segmentation of broadband markets - to prevent new bottlenecks in NGA from emerging.

Deployments of NGA by industry players across various local areas (e.g., a street, a multi-dwelling unit, a district) lead to increasingly symmetric competition problems. The roll-out of fibre access networks by players other than those identified as SMP-operator on a national broadband market will create, in many instances, a non-duplicable 'bottleneck' infrastructure. To ensure competition for end-users and facilitate investment by all investors in NGA, NRAs will have to address such situations in an equitable manner. A degree of consistency of national approaches in this area may be needed to avoid distortions in the internal market.

The Commission confirms in its NGA Recommendation:

*"[...] where it is justified on the grounds that duplication of infrastructure is economically inefficient or physically impracticable, Member States may also impose obligations of reciprocal sharing of facilities on undertakings operating an electronic communications network in accordance with Article 12 of that Directive which would be appropriate to overcome bottlenecks in the civil engineering infrastructure and terminating segments."<sup>2</sup>*

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<sup>2</sup> C(2010) 6223, Commission Recommendation on regulated access to Next Generation Access Networks (NGA) of 20/09/2010

Article 12 of the Framework Directive attributes the task of implementing symmetric obligations for facilities sharing to NRAs:

*“Where an undertaking providing electronic communications networks has the right under national legislation to install facilities on, over or under public or private property, or may take advantage of a procedure for the expropriation or use of property, national regulatory authorities shall, taking full account of the principle of proportionality, be able to impose the sharing of such facilities or property, including buildings, entries to buildings, building wiring, masts, antennae, towers and other supporting constructions, ducts, conduits, manholes, cabinets. [. . .]”*

Specifically, NRAs can use their powers by imposing implementing measures under Article 5 of the Access Directive<sup>3</sup>.

In this context, an in-depth analysis of best practice in Europe concerning symmetric access obligations<sup>4</sup> should be on the agenda of BEREC for 2011, ideally resulting in guidance on how best to address bottlenecks in the access network in a proportionate and effective manner, irrespective of an SMP-position of the facility owner.

The work stream should also include an analysis where the efficient access point for symmetric access would be. Such access points may extend beyond the facilities listed by way of example in Article 12 Framework Directive, possibly in the context of commercial agreements.

- **Impact of platform competition on market definition and remedies**

ETNO invites BEREC in the context of its work on NGA (pt. 3.2.2 of draft WP) to explicitly treat the definition of markets and the imposition of regulatory remedies in light of the impact of competing broadband access platforms. This topic is also related to the changing competitive landscape in NGA and should be considered alongside the need for symmetric regulation.

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<sup>3</sup> Cf. paragraph 7 of the NGA Recommendation: when applying symmetric measures under Article 12 of Directive 2002/21/EC granting access to an undertaking's civil engineering infrastructure and terminating segment, NRAs should take implementing measures under Article 5 of Directive 2002/19/EC.

<sup>4</sup> National approaches to be analysed should include, for example, the French approach.

In EU member states with high cable penetration, for example, Belgium, Hungary, the Netherlands and Portugal, cable operators have their migration to the DOCSIS3.0 standard well underway. These cable-based NGA are covering most urban and suburban areas and are able to deliver the very-high-speed data service. Accordingly, in many cases the 'traditional' SMP operator on markets 4 and 5 is not the first-mover in NGA and may no longer be deemed have SMP when markets are re-defined, for example, taking into account geographic segmentation. The same applies in areas where new entrants roll-out their fibre networks, based on a strong market position in current generation broadband in certain geographic areas.

To capture such market developments and align SMP-regulation with actual market power in a given area, both a technologically neutral market definition at wholesale level and an appropriate delineation of geographic, or sub-national, markets are required. BEREC work on consistent regulatory practice in this field could start from successful geographic segmentation applied in countries, such as Portugal or the UK.

## **1.2 Prioritising areas for consistent regulatory practice**

Also with a view to the challenges outlined above, we believe that the inclusion of two items mentioned last in the harmonisation chapter in the 2011 draft WP – namely, 3.5 on business communication services and 3.6 on “wholesale access originating to value added services” – should be reconsidered.

On business services, it is worth recalling that the “ERG Report on the regulation of access products necessary to deliver business connectivity services,” ERG(09)51, did not establish a clear need for additional intervention and remained inconclusive on remedies to be recommended across member states. The report also noted a lack of reported problems in the field across a significant number of Member States. The report rather reflected the importance to apply a consistent set of principles in view of differing market conditions when imposing proportionate remedies in broadband markets. The apparent commitment by BEREC to individual stakeholders to carry over the business services work stream for several years of ERG and BEREC activity seems no longer justifiable against the background of the need recognised by BEREC to prioritise on providing meaningful guidance on key areas.

On “wholesale access originating to value added services”, the short paragraph in the WP does not convey a clear message of the problem identified and the state of competition regarding these services. We encourage BEREC to transparently state the reasons for including this

item and to list the problems encountered in the 27 Member States, which make this a priority issue for harmonisation under the Digital Agenda in BEREC's view, or to renounce to an EU-wide investigation.

### **1.3 Work on regulatory accounting and non-discrimination**

ETNO welcomes continued work by BEREC on the issues of regulatory accounting and non-discrimination.

ETNO welcomes the findings of the latest regulatory accounting report of BEREC and encourages BEREC to continue to promote economically sound and 'proven and tested' solutions in this field in a dialogue with all stakeholders and with the European Commission. Any EU-level approach to access product costing which would be disruptive to established and effective national practices would severely undermine regulatory certainty for investors in the transition from current to next generation broadband and effectively delay the roll-out of high-speed access networks in Europe.

Equally, we welcome BEREC's intention to contribute to work on non-discrimination at EU-level, building upon the experience of its Members with different models for ensuring non-discrimination.

### **1.4 Cost benefit-analysis for further measures to reinforce the single market**

ETNO welcomes BEREC's intention to be involved in the Commission's analysis of the costs of "non-Europe" in telecommunications markets (point 3.1.3 of the draft WP). In particular, we welcome the statement underlining the need for a cost-benefit analysis in the context of further harmonisation measures.

As in other policy fields, regulatory "conformity" can bring benefits as well as create costs across the single market, the latter especially where common regulatory outcomes are pursued at the expense of proportionate regulation to remedy identified market failures. An in-depth impact assessment should be carried out for future Recommendations in the field of telecommunications regulation, as well as for any further development of the institutional balance which is considered to strengthen the internal market.

## 2. Emerging challenges

We would like to recall that symmetric regulation of new and enhanced access networks constitutes a challenge today (see above 1.1). It could, of course, also be addressed as an important emerging challenge. In the following, we comment upon 4.1 and 4.2 of the draft WP.<sup>5</sup>

### 2.1 Promotion of broadband

ETNO agrees with the European Commission's Digital Agenda that a number of measures may be adopted in terms of public policy intervention to foster the development of broadband.

ETNO would like to highlight the following reflections concerning the relationship between the EU goal to promote broadband for all and the use of public funding, on the one hand, and universal service instruments, on the other.

- On public funding for broadband promotion

The deployment of high speed NGNs – and especially next generation access networks (NGA) - requires large scale investments. ETNO is convinced that investments to bring NGA to EU citizens must be primarily carried out by private capital, as has been case for the first generation of broadband services.

ETNO believes that public intervention aimed at the deployment of new fibre broadband network, though useful in some cases in rural / underserved areas, must never be detrimental to investments by market players. Any form of public intervention foreseen for NGA must therefore satisfy the primary and fundamental condition of not hampering private investments in a specific area or region.

In cases where public intervention is granted for the development of NGA, it must not jeopardize efficient allocation of investments within the internal market. For example, funding by the state or local authorities should not allow for a mere duplication of infrastructures, nor should it be granted in a non-symmetric way to some market

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<sup>5</sup> On the links between spectrum regulation and the tasks of BEREC, item covered by BEREC's cooperation with the RSPG under 4.3, pls. s. ETNO RD 2010 on the draft BEREC WP 2010

players to the detriment of a well-functioning market. Measures facilitating investments should also include easing of administrative and other technical burdens. Measures leading to lower capital costs of investments, such as tax incentives, should also be taken into consideration.

The role of demand-side initiatives is also very important and should therefore be considered by public authorities as a criterion in assessing the validity of financing for NGA. Sustaining the demand for and take up of advanced broadband services offered over NGA can have positive effects on operators' choice to invest in high speed networks.

#### - On the role universal service

Universal service provisions are meant to constitute a 'safety net' to ensure that in a liberalised market citizens of the EU would not be excluded from the provision of a basic set of electronic communications services, thus avoiding social exclusion. With this aim, the current regulatory regime provides that any reasonable request of access to a predefined set of basic services should be met at an affordable price.

A redirection of the universal service regime to provide a tool for the achievement of the 'broadband for all goal' would change the nature of this policy instrument: it would shift from being a tool to avoid exclusion from services already available to being an instrument for broadband roll-out. Such a dramatic policy change risks having major negative effects on market development given the flaws of the current financing regime for universal service. Neither would it, at the current stage of broadband take-up in Europe, yield the expected result.

While ETNO shares the objective of achieving 'broadband for all' stated in the Digital Agenda and its member companies are strongly committed to contribute to this goal, we believe that universal service is not the right tool to achieve this policy objective. Market players are already making huge investments to develop the broadband market, and competition is today a reality in the EU market players. An extension of universal service obligations to cover broadband provision would no doubt lead to market distortions in various regards and impede the natural development of competitive markets that grant technological development and competitive prices to customers.

The use of public funding or other instruments is better suited and targeted to meet national and/or local specificities than a mandatory

obligation defined at EU level because infrastructure development may vary significantly within and across member states. A commonly defined and mandatory universal service obligation for broadband services would not only result in making void the scope of existing instruments but would also result in a non efficient allocation of resources to the detriment of citizens' welfare.

## 2.2 Net neutrality

ETNO concurs with BEREC's finding that alleged net neutrality incidents have remained few and for the most part have been solved without the need for regulatory intervention. It is worth noting that this is the situation even before the new open internet-related provisions of the revised EU-regulatory framework have been put in place, which *inter alia* will increase consumer transparency with relation to access to internet content, applications and services.

ETNO supports BEREC's intention expressed in the draft WP to further cooperate on the implementation of the new transparency requirements of the EU framework. ETNO is prepared to contribute to a meaningful application of the provisions, to help facilitating their timely implementation.

ETNO believes that the market will continue to provide an adequate level of best effort internet access service while preserving incentives for developing smart, managed networks and quality of service differentiation. The provision of Article 22 (3) Universal Service Directive (minimum quality of service requirements) should remain a reserve competence for NRAs in case problems should not be solved by ex-ante or ex-post competition rules and transparency requirements.

In the context of the open internet debate, ETNO also welcomes the BEREC response to the European Commission consultation on the open internet and net neutrality, BoR (10) 42. While we support much of the analysis in this BEREC consultation response, ETNO would like to caution against any extension of the scope of, or lowering of the threshold for, asymmetric SMP-regulation which seem to be considered in the document. Interventions "*where de facto market power exists even if that hasn't been formally proven*" (p. 5 of BoR (10) 42) should remain strictly out of the scope of asymmetric regulation. The burden of proof required by the EU regulatory framework for SMP-regulation adequately reflects the fact that access remedies and related obligations can cause severe distortions in a market if they are not

proven necessary and proportionate. The open internet debate does not provide a reason to change the facts-based nature of intervention under the EU framework.

### **3. Implementation of the revised framework**

ETNO notes BEREC's work plan for the implementation of the revised EU regulatory framework.

On the issue of functional separation, ETNO will comment in a separate submission to the ongoing public consultation on functional separation under Articles 13a and 13b of the revised Access Directive and national experiences, BoR (10) 44.