

ETNO Reflection Document on BEREC 2012 WP



November 2011

Executive Summary

- BEREC plays an increasingly important role in ensuring a consistent and proportionate regulatory regime in Europe. ETNO looks forward to a continued cooperation with BEREC and its Chairman in 2012.
- The electronic communications sector continues to face pressure on revenues that increasingly restrict its investment capacity. BEREC's work in 2012 should primarily focus on creating a regulatory framework that incentivises private investment in high-speed wireline and wireless networks.
- Against this background, ETNO welcomes BEREC's intention to carry out work on regulatory accounting, Next Generation Access networks and the implementation of the EU framework provisions on net neutrality in 2012. We invite BEREC to also consider market definition and the impact of reduced mobile termination rates on the mobile sector for its 2012 WP.

I. General remarks

1. ETNO cooperation with BEREC

ETNO welcomes the possibility to comment on the present draft work program (WP) of BEREC for 2012.

The multiple requests to BEREC for advisory work for the European Commission as well as its own initiative work in 2011 demonstrate that BEREC plays an increasingly important role in ensuring a consistent and proportionate regulatory regime in Europe under the EU framework for electronic communications.

This larger role for BEREC comes with higher expectations of stakeholders as regards the transparency, accountability and relevance of BEREC's work. In 2011, BEREC and in particular its Chairman for 2011, provided a distinct voice in the EU regulatory debate. In many respects, BEREC is already living up to the high expectations. We look forward to a continued dialogue with BEREC and its incoming Chairman for 2012.

It is against this background that ETNO would like to comment upon selected elements of the draft 2012 BEREC WP.

2. Improving investment conditions as a horizontal objective for BEREC work

European telecommunications markets are in a critical phase. Revenues in the industry have declined for two consecutive years.¹ Expectations of policy makers as regards investment in new high-speed networks, expected to bring major benefits to society, often contrast with the financial situation of the sector. The shift of revenue creation in the internet value chain towards large internet Groups continues and regulatory pressure on revenues of network operators has even increased, in such fields as mobile termination rates, roaming tariffs and access regulation.

The BEREC WP for 2012 should therefore explicitly recognise the creation of a regulatory framework that gives incentives for private investment in high-speed wireline and wireless networks in line with Art. 8 (5) of the Framework Directive as a central objective of BEREC's work in 2012 and beyond. Any new regulatory initiative should be subject to a rigorous assessment of its impact on the investment conditions and financial health of Europe's leading investing companies in the 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.*" and added "*long term consumer interests coincide with the promotion of innovation and investment*".² ETNO is aware that these considerations are already high on BEREC's agenda. BEREC should further strengthen the importance of investment conditions in particular in access networks in its work on individual topics.

¹ S. ETNO Economic Report 2010, p. 7

<http://www.etno.be/LinkClick.aspx?fileticket=uOnejlv80Y%3d&tabid=1077> ; EU Commission Digital Agenda Scoreboard 2011

² "How to achieve the Digital Agenda targets",

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

3. Transparency of BEREC work

ETNO believes, in line with previous comment on BEREC WPs that the increased tasks entrusted to BEREC under the revised EU framework of 2009 should be matched by increased transparency and accountability vis-à-vis market participants.

We note that BEREC foresees co-operation with stakeholders in a flexible manner, stating in the consultation document: *“As some topics may not lead to an immediate public deliverable in the first instance, such issues may be the subject of workshops and discussions, both in public and bilaterally with stakeholders.”*

ETNO believes that such interaction in the build-up to BEREC draft reports and opinions is extremely important to build mutual understanding, both on the side of BEREC experts as regards the European industry perspective and on the side of market participants about the future course of BEREC work. Currently, some Working Groups regularly foresee interaction with industry while others operate under timelines that do not allow contacts with stakeholders or limit such contacts to standardised written consultations which cannot fully take account of the complexity of BEREC WGs’ work. The increased importance of BEREC EWG work should be matched by an increased responsiveness towards stakeholders.

Moreover, ETNO invites BEREC to

- recognise that as a rule all public documents by BEREC that express a regulatory opinion with the exception of those in the Art. 7 /7a procedure are subject to a public consultation. Regarding article 7/7a procedure, while acknowledging that the timing is short for BEREC, ETNO invites BEREC to be as transparent as possible vis-à-vis stakeholders, especially in case changes to market definitions or remedies would be proposed to the NRA.
- revise its rules to establish a rule of longer consultation periods (cf. ETNO comment on WP 2011, six weeks should be the standard period for consultations on regulatory guidance documents).
- maintain a clear distinction between different deliverables such as reports, opinions and common positions.

II. Specific remarks on BEREC's Work Program in 2012

1. Regulatory accounting

ETNO welcomes the continued work of BEREC on the issue of regulatory accounting and encourages BEREC to continue to promote economically sound solutions for costing methodologies in a dialogue with all stakeholders and with the EU Commission.

An EU-level approach to access product costing which would be disruptive to established and effective national practices and/or would price the access network below its economic value would severely undermine regulatory certainty for investors in the transition from current to next generation broadband and stall investment in the roll-out of high-speed access technologies in Europe.

BEREC has an important role in ensuring that the basic principles laid out in its Common position on the EC Recommendation on Cost accounting³ continue to be the yardstick for best practice regulatory accounting in Europe. Any EU policy approach to costing methodologies should fully reflect the results of NRAs' long-standing experience in applying costing methodologies in e-communications markets and contribute to competition, investment and innovation in the sector.

2. Next Generation Networks – Access

Given the strong efforts our members make in contributing to the deployment of NGA and NGN networks, ETNO welcomes that BEREC considers the regulatory approach for next generation (access) networks as a core topic of its 2012 WP.

ETNO encourages BEREC to take full account of the **different types of next generation access networks** based on different architectures and technologies when proceeding with the announced update of its Common Position on Wholesale Broadband Access and the unbundled local loop. Therefore, at the least all NGA networks falling under the definition of the Commission Recommendation on regulated access to Next Generation Access Networks⁴ should be in the scope of this update.

³ ERG (05) 29 ERG CP: Guidelines for implementing the Commission Recommendation C (2005) 3480 on Accounting Separation & Cost Accounting Systems

⁴ 'Next generation access (NGA) networks' (NGAs) under this definition cover wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband access services with enhanced characteristics (such as higher throughput) as compared to those provided over already existing copper networks. In most

A regulatory evaluation of NGA should in particular also address very high-speed broadband services delivered over HFC access networks. These currently often appear to be outside the scope of the regulatory analysis, despite their already widespread coverage and successful take-up in several Member States. ETNO also invites BEREC when proceeding with an update of its Common Position on Wholesale Broadband Access and Unbundled local loop, to update the 2005 Chapter on bitstream access on cable networks⁵, as the situation has evolved significantly with the introduction of DOCSIS 3.0 technologies.

Another challenge for NRAs in an NGA environment is to apply **symmetric obligations** to prevent the emergence of new 'bottlenecks', such as in building wiring for instance. In view of deployments of NGA by different players in different local areas (e.g., a street, a multi-dwelling unit, a district) NRAs have to increasingly address local monopolies in very high-speed access owned by other than the established operators. To ensure competition and facilitate investment by all investors in NGA, NRAs have to address such situations in an equitable manner. ETNO encourages BEREC to consider developing best practice guidance for symmetric regulation to contribute to a consistent regulatory environment throughout the EU and include this item in the final 2012 WP.

Another, related challenge for NRAs and relevant aspect for BEREC's work on NGA is to apply an appropriate **geographic segmentation** of broadband markets, at the level of market definition and remedies.

On NGA-investment in general, ETNO welcomes BERECs decision to make the **strengthening of the demand side** one of the over-arching horizontal principles of the BEREC work programme relevant for many of the proposed 2012 activities.

3. Next Generation networks - 'Business communications services'

As regards the review of the elements listed in the work programme under "business communications services", there is in ETNO's view no reason to analyse these separately from the general regulatory analysis on NGA/NGN and the above-referenced update of the Common Position.

A separate BEREC work stream on ex-ante intervention on business communications services at this stage of NGA deployment does not appear meaningful in the light of

cases NGAs are the result of an upgrade of already existing copper or co-axial access networks.

⁵ Cf. ERG (03) Rev2 Revised Common Position on wholesale bitstream

regulatory practice and the current Recommendation on relevant markets and would risk leading to a disproportionate implementation of the EU framework.

When reflecting on business communication services in the context of NGA, BEREC should moreover especially guard against any undue extension of the scope of regulation into the service layers of the network (where Ethernet technology is also used).

4. Definition of relevant markets

In addition to the elements listed in BEREC's work programme, we underline that a review of the regulatory approach of the definition of relevant product markets should not be done on an ad hoc basis, as seems to be the case in the work programme now. It is essential that NRA's and also BEREC carefully approach the subject of product market definition, which to a large extent conditions the regulatory assessment of electronic communications networks and services in specific local circumstances.

BEREC - as of the body of NRAs - has indeed a genuine interest that the Recommendation of Relevant Markets reflects the realities and specificities of the markets for electronic communications within the respective Member States. As a review of the Recommendation on Relevant Markets is expected to start in 2012, ETNO invites BEREC to actively reflect upon a genuinely technology neutral and a forward-looking definition of those relevant markets that are expected to continue to form part of such a revised Recommendation. This consideration applies namely to broadband wholesale markets (current markets 4 and 5).

Given the in-depth know-how of the local circumstances regarding NGA and NGN of BEREC's twenty-seven NRA's, BEREC is a key stakeholder in this process. Such reflection deserves in our view to be part of the topics of the BEREC work programme.

Finally, we repeat our call for regulatory predictability as regards the regulatory framework on NGA and NGN. Indeed, it goes without saying that decisions on, and the actual deployment of, such networks by our member companies are not taking place overnight. More importantly, the magnitude of the financial resources required to do so are unprecedented in our sector. Predictability of NRAs' regulatory policy in this area is therefore imperative if regulation wants to yield the right effect and wants to avoid putting network investments at risk. We therefore invite BEREC to keep regulatory predictability and legal certainty at the centre of its work programme.

5. Net neutrality

ETNO welcomes BEREC's engagement on the open internet and net neutrality. BEREC's work in this field should be firmly rooted in the current EU regulatory framework, which recognises the network operators' ability to manage their networks, provided that network management is made transparent to end-users in an effective and meaningful way.

Dealt with in the appropriate way, ETNO believes that the European approach to net neutrality can have a significant positive impact on EU citizens and the European information and communications technology sector. Investment in new and enhanced broadband networks in Europe crucially depends upon network operators' freedom to innovate and develop new business and tariff models in line with EU competition and consumer protection rules. Actors on all levels of the internet value chain have the shared responsibility to operate within the legal framework which must also allow EU businesses to compete on the global market.

We encourage BEREC to not base its considerations on an own 'definition' of the concept of net neutrality, whether this were derived from academia or other jurisdictions⁶. BEREC's work in this field should be firmly targeted at contributing to the aim of the EU regulatory framework to promote access of end-users to all content, services and applications of their choice (Art. 8 (4) g) EU Framework Directive) and the implementation of the relevant provisions of the framework that contribute to this objective.

ETNO has responded to the BEREC consultation on transparency requirements⁷ and will further engage with BEREC on this key topic in 2012. In this context, we encourage BEREC to develop a constructive and open dialogue with stakeholders on all the topics quoted under net neutrality in the draft 2012 WP. This should include public consultation with reasonable response times on each topic (s. I. 3. above). ETNO moreover invites BEREC to associate market players to its reflections in different stages of its analysis, not only at the already advanced stage of a public consultation, allowing for direct exchanges with the relevant working group(s).

6. Mobile Termination rates (MTR)

In addition to the reference made in the draft Work Program on fixed termination rates, ETNO invites BEREC to also assess the effect of the 'pure BULRIC' methodology on MTR. As pure BULRIC covers only a fraction of network and common costs it can be expected that network and common costs will have to be

⁶ BEREC BoR (11) 44, on p.7 defines a working definition of net neutrality that has no basis in the EU framework

⁷ ETNO Reflection Document 360 (2011/11), <http://www.etno.eu/Default.aspx?tabid=2439>

recovered by other services. However, cost recovery by other services may not be possible due to strong competition (including by new players such as OTTs). Where cost recovery is not possible, the price setting for MTR would conflict with the underlying EU framework provisions which foresee cost recovery. In such a case, operators would moreover be seriously restricted in the ability to further invest into the network and sustainable infrastructure competition in the mobile sector could be put at risk in the long term.