



BEREC report of the consultation on the draft BEREC procedures for public consultations

October 2010

Introduction

Regulation 1211/2009, establishing the BEREC, lays down general principles regarding public consultations. In particular, article 17 sets the obligation on BEREC to consult interested parties, where appropriate, before adopting opinions, regulatory best practice or reports.

Article 16 of the Rules of Procedure (RoPs) of the Board of Regulators (BoR), approved on January 2010, defines detailed criteria under which the BoR shall decide to launch public consultations and sets general procedural provisions.

Such general rules need to be developed through detailed procedural rules.

In the context of the BEREC 2010 Work Program consultation, several stakeholders have requested to be consulted on these procedural rules.

Based on the above mentioned provisions and in compliance with the general EU principles governing consultation and transparency, the BoR has elaborated draft procedures for public consultations on BEREC documents.

On June 4th, BEREC published for consultation the draft BEREC procedures and an explanatory note, providing, *inter alia*, general indications to the stakeholders about draft BEREC documents that might go subject to public consultation.

The consultation ended on July 2nd 2010; four contributions were received by BEREC in response to the consultation by (in alphabetical order) COLT, ETNO, Vodafone Romania and Wind.

This report summarizes the contributions received and provides clarifications on how they have been evaluated and taken into account for the drafting of the final text of the BEREC procedures for public consultations.

Colt holds the inconsistency of the explanatory paper with art. 17 of the legal basis providing for also opinions and reports to be consulted, and holds that BEREC cannot have a discretionary approach to consultation.

However, the legal basis itself clearly provides room for discretion to the BoR in the evaluation of the need to hold public consultations, when it states “**Where appropriate, BEREC shall, before adopting opinions, regulatory best practice or reports, consult interested parties.....**”; the BoR RoPs and the draft procedures elaborate along the line of the Regulation, without broadening the BoR room for discretion.

On the other hand, the explanatory note clarifies that the assessment provided is just an elaboration based on the concrete ERG experience (according to which Reports and Opinion very rarely deserved public consultation); a case by case evaluation by the BoR on the opportunity to consult also reports and opinions will be needed, based on the criteria set by article 2 of the procedural rules.

Colt also points out that the timescale for responses is inconsistent with the EU practice and it should be aligned.

On this matter, it has to be noted though that the term of 20 working days specified in the RoPs is substantially in line with the common practice (30 days) applied by many NRAs at national level, while it is not appropriate to fully align BEREC consultation timescales with those of the Commission due to the different nature and legal standing of BEREC opinions,

regulatory best practice and reports and in some cases a statutory deadline for the delivery of a BEREC opinion.

Furthermore, the RoPs provide a general indication and the BoR may set different timescales, depending on the specific circumstances. Nevertheless, in order to make more explicit such ground of flexibility, an amendment is introduced to article 3.4, deleting the reference to exceptional circumstances for the setting of different timescales. A revision of art. 16 of the RoPs will be evaluated within the scope of a future general assessment of the RoPs.

Finally, Colt claims that rules on public hearings should be developed and the practice strengthened. The BEREC is fully committed to follow on with the good practice established by the ERG of organizing hearings and workshops with the stakeholders on specific lines of activity.

ETNO identifies similar concerns to the ones reported by Colt and holds that they basically arise from the current BoR RoPs.

A general matter of concern also for ETNO is the absence of a specific obligation on BEREC to consult within the RoPs, which is considered in contrast with art. 17 of the Regulation. ETNO would like RoPs and draft procedures to be amended, to insert an obligation on BEREC to consult and to allow for exceptions on the basis of detailed and objective criteria.

Furthermore, also ETNO states that art. 17 of the Regulation includes “*..opinions, regulatory best practices and reports...*” within the scope of documents to be consulted, whereas the explanatory note seems suggesting that the first and the latter should not be subject to consultation.

ETNO also holds that the BoR RoPs themselves should be considered provisional and be consulted among stakeholders before being finalized.

On this latter issue, it has to be pointed out that the legal basis (art.4.10) requires to make RoPs publicly available, but does not request any prior consultation on them. Besides legal arguments, it is the nature of the RoPs (aiming at governing the daily life of the newly established Institution) suggesting to leave them completely in the control of the members, without any external interference, as it is for any other Institution.

In general terms, it is worthwhile to restate the considerations expressed above on comments by Colt and reassure that the BEREC will be committed to ensure the maximum level of transparency and involvement of the stakeholders in its institutional activities (in full continuity with the good practice already established by the ERG); the BoR will act according to such attitude in the concrete application of the criteria set by article 2 to specific cases.

On the timescale allowed for submitting contributions to public consultations, ETNO points out that the average term of 20 working days is too short and not aligned to ERG, NRAs and Commission's practices. Also on this matter, see considerations above.

Vodafone Romania has proposed two specific amendments to the draft procedures and a general comment on the explanatory note.

The two proposed amendments to the draft procedures are:

- on art. 3.2., it is proposed to add a provision to allow submission of contribution to public consultation only if contributions derive from unveiled identities;
- it is also proposed to amend art.4, so as not to allow completely anonymous comments; confidential contributions shall be published at least with the indication of the category of the author (private, operators, associations...).

While it is important to keep the possibility to provide anonymous comments (in order not to hinder the opportunity to get the maximum amount of input; it will be then up to BEREC to take them into account), it can be useful, in case of requests for confidentiality, to disclose at least the category of the author of the comments.

The comment on the explanatory note suggests the addition of a reference to art. 2.e) of the establishing Regulation (related to dissemination of regulatory best practices to third parties) under the scope of Regulatory best practices, within the relevant table.

It has to be pointed out though that this provision is referred rather to a Commission's or NRAs' deliverable that BEREC helps disseminating to third parties. Actually, under art. 2.e, BEREC is only required to help the Commission and NRAs in disseminating to third parties something which is not elaborated by BEREC itself.

WIND provides several comments of different tenure, ranging from specific comments to the draft procedure and to the explanatory note to general suggestions on alternative tools to improve the level of transparency and stakeholders' involvement into BEREC activities.

With reference to the publication of the consultations' results, Wind asks that a possibility to submit confidential information be granted to stakeholders; this is already granted under art. 20 of the BEREC Regulation and accordingly under art. 5 of the draft procedures, so no need arises to amend the draft BEREC paper in this respect.

On the timescale for responses, also Wind holds that it should be extended to 30 days in order to be aligned with NRAs' average consultation periods (see above for the evaluation of comments on timescale).

Wind also proposes several comments on the table in the explanatory note, namely:

- BEREC Reports adopted at BEREC's initiative on issues not covered by the Regulation and BEREC RoPs should be subject to public consultation. While for RoPs it seems inappropriate, for the above stated reasons, to issue a public consultation, as far as BEREC Reports are concerned, the need for public consultation will be assessed on a case by case basis;
- BEREC advice to single NRAs should be published. It is considered appropriate that a decision about publication of BEREC advice should be left to the beneficiary NRA; a general rule providing for the publication of such BEREC advices could indeed hinder the use of such a fundamental advisory tool by NRAs;

- NRAs' conformity with CPs assessed by the BEREC should be consulted with stakeholders, together with BEREC plans to overcome inconsistency problems; There have been already cases where monitoring reports have been consulted taking into account the nature of the issue and the suggestion will be duly taken into account for the future.
- The category of "common statement" should be inserted within the list of possible BEREC deliverables. It has to be noted that the table refers only to deliverables explicitly identified by the Regulation; the case of "common statement" (as of any other BEREC deliverable not mentioned by the Regulation) will be dealt with in the same way as all kind of BEREC deliverables and will be subject to a "case by case" evaluation, according to the generally stated criteria.

Wind also proposes that all BEREC papers that are not deemed to be consulted could be subject to a sort of informal consultation process (e.g.: BEREC shall inform of any new line of activity through its website or via a press release; market players could then have 2-3 days to express their views on the need for consultation on the specific case concerned).

On this topic, it has to be said that stakeholders are always timely made aware of all BEREC lines of activity by means of press releases and public debriefings soon after BoR meetings, so, they already have the opportunity to show their interest in being consulted.