



Draft Work Programme 2011 BEREC Board of Regulators

- for Public Consultation -

1. Introduction

The BEREC draft Work Programme 2011 as set out below aims to build on the achievements in the work performed in 2010, and in previous years by ERG, while at the same time preparing for the challenges of 2011 and future years.

This draft BEREC Work Programme 2011 was discussed and agreed at the BEREC Board of Regulators meeting in Amsterdam on 30th September. In accordance with the practice of previous years and in accordance with article 5 of the BEREC Regulation, the BEREC Work Programme is subject to consultation. The role of public consultation is to increase transparency and to provide us with valuable feedback from stakeholders. All comments from stakeholders are welcome and will be considered.

The consultation period runs from 8th October to 5th November 2010. Please send your comments to [bereg@ec.europa.eu](mailto:berec@ec.europa.eu). A public hearing on the Work Programme, open to all stakeholders, is scheduled for 3rd November 2010 and will be held in Brussels.

Following consideration of stakeholders' views, the 2011 Work Programme will be adopted at the meeting of the Board of Regulators to be held on 2nd and 3rd December 2010 in Bruges.

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Chair 2010

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Chair 2011

2. Background

It's been almost a year since the BEREC regulation was adopted. This moment marks not only the end of a long process of negotiations, but also the beginning of a more formalised platform of national regulators with the objective to harmonise the application of the European regulatory framework within the Member States and the European Union. In January 2010 BEREC had its inaugural meeting, followed by a set of actions to get BEREC functional, including preparations to make sure that BEREC Office will be able to work autonomously in 2011. In May 2011 the revised directives will have to be transposed in national law, which means that all the new provisions will enter into force. After many years of negotiations and preparations, one can say that 2011 will be a crucial year for BEREC. From mid-2011 BEREC will have to be ready to perform as a fully-fledged platform. BEREC notes the Digital Agenda and the recently published Broadband Communication and welcomes the goals and ambitions set out therein. BEREC aims to assist the Commission and NRAs in their efforts to achieve these goals and this Work Programme will set out the mechanisms by which this will happen.

This means that BEREC will have to focus on what is expected from BEREC in the outside world. BEREC will have to prioritise its efforts on actions and products that actually do contribute to the interests of the citizens of Europe and to the promotion of competition. As a consequence BEREC should have the ambition to continue to develop and disseminate among NRAs regulatory best practices on the implementation of the EU regulatory framework. Also BEREC will have to make its new relationship with the European Institutions work. Not only can the European Commission ask BEREC for its opinion, the Council and the European Parliament can also do so in accordance with the BEREC Regulation. BEREC will seek and continue cooperation with other advisory bodies, such as RSPG and ENISA where that cooperation contributes to the interests of citizens and the promotion of competition.

To ensure consistency with the previous work of ERG and BEREC, the BEREC Work Programme is based on three themes:

- Improving harmonisation
- Emerging challenges
- Set-up of BEREC and implementation of revised framework

To ensure continuity and coherence of activities, BEREC has decided that some aspects of the Work Programme will become multiannual. This can be seen as an experiment and will be reviewed after one year. BEREC will start with a two-year approach combined with an annual review. This will also guarantee the necessary degree of flexibility to deal with the dynamic nature of the telecommunications sector. The items that qualify for a multiannual approach are International Roaming, benchmarks and harmonisation of the key-remedies (non-discrimination

and regulatory accounting).

In 2010 BEREC has put a lot of effort in getting the BEREC Office up and running. The activities of the BEREC Office will become clear in 2011 under the guidance of the Administrative Manager who has now taken up his position. It will be a challenge to recruit the necessary qualified personnel to perform all of the tasks expected of BEREC and the BEREC Office but the process is well underway. Until the BEREC Office attains the appropriate level of staffing, resourcing and support for the Expert Working Groups will continue to be provided by the NRAs. However there are some tasks foreseen in the 2011 Work Programme that the BEREC Office will be capable of performing and taking over from the experts of the NRAs.

3. Improving harmonisation

The Regulatory Framework and the BEREC Regulation recognise that BEREC has an important role when it comes to developing a consistent regulatory practice. Both end-users and market players rely on a consistent and harmonised application of the regulatory framework, in order to be protected and to compete on the same basis at the European level. BEREC needs to be reliable, predictable and also firm in case it detects unjustified non-conformity.

3.1 Consistency of remedies

Consistency of remedies remains an important theme for BEREC. It is important for developing the internal market that NRAs impose remedies consistently in the European Union. The new Regulatory Framework has introduced changes in the procedure for imposing remedies in the national markets with a new role for the Commission and BEREC.

BEREC's work in 2011 on this theme contains:

3.1.1 Monitoring conformity of NRA's with ERG and BEREC Common Positions

As in 2010 BEREC continues the programme started by ERG to monitor national practices with its Common Positions. This is a tool for encouraging consistency, but also for keeping the Common Positions relevant and up-to-date. During 2010 BEREC has conducted monitoring exercises on 3 Common Positions (wholesale broadband access, wholesale local access and wholesale leased lines). These will be reviewed for continuing relevance, taking account also of the earlier work on business services (see 2.5). It is also a way to identify the need for new Common Positions on remedies. Stakeholders will specifically be asked in the consultation to specify which current Common Positions are most important considering their business and need to be monitored. Also stakeholders will be asked to identify any subject missing in the existing Common Positions.

3.1.2 Capturing remedies proposed by NRAs and Commission concerns about remedies expressed in comments letters systematically

Based on Article 7a of the Framework Directive the Commission can express its serious doubts about the intention of a NRA to impose an obligation on an operator with significant market power. If this situation occurs, BEREC shall cooperate closely with the Commission and the NRA concerned. To ensure the development of consistent regulatory practice, BEREC will begin to capture in a more systematic way the remedies proposed by the NRAs in their notifications, the Commission's concerns as expressed in their comments letters, both of comments letters looking back and also tracking comments letters going forward and set up a database. BEREC will also prepare a procedure for providing an opinion concerning any serious doubts expressed by the Commission.

3.1.3 Involvement in investigation of Commission into the cost of non-Europe in telecommunication markets

The Commission announced in its Digital Agenda that it will "conduct an investigation into the cost of non-Europe in telecommunications markets to take further measures to reinforce the benefits of the single market". Not only does BEREC need to be involved in this investigation, it is also a reason for BEREC to continue to participate in the debate about the single market for telecommunications and to point out the benefits of the single market achieved through a consistent regulation and to run a proper cost-benefit analysis.

3.2 Implementation of recommendations

In recent years Commission recommendations have been issued, e.g. on NGA regulation and Termination Rates. Article 19 of the Framework Directive creates the possibility for the Commission to take a decision after at least two years following the adoption of a Commission recommendation. BEREC has a formal advisory role about both recommendations and decisions. To be prepared for this role, BEREC will look into recommendations based on article 19 of the Framework Directive and national practices, keeping in mind that recommendations are not binding and NRA, while taking the utmost account of them, can diverge from them in justified cases. In 2011 the recommendations on termination rates and NGA will be analysed. Based on these analyses BEREC will be in a position to advise on any future actions that might be proposed by the Commission under Article 19

3.2.1. Recommendation on termination rates

BEREC will continue its work already engaged on best practices in MTR and the issues related to transition towards cost orientation in line with the LRIC methodology recommended by the Commission, such as the move towards symmetry and the definition of proper glide paths. The recommendation on termination rates still leaves quite some degree of freedom for NRA's to make its own choices. BEREC will look more into this and give common guidance. This may include an assessment of the effect of pure BULRIC for FTR on the implementation of price

regulation of fixed voice origination (should exclusion of common cost for FTR mean extra common cost should be allocated to fixed voice origination, and if yes, how much?).

3.2.2 Next Generation Networks - Access

In its opinion on the draft NGA recommendation BEREC underlined that regulatory certainty and consistency are crucial in order to foster a competitive environment for long-term investment in NGA. . In 2011 BEREC will continue working on an internal document how to best implement the NGA recommendation. BEREC will also monitor the implementation of the NGA Recommendation, including measuring the baseline and various issues associated with regulatory accounting for NGA.

Some issues may still need to be dealt with in more detail:

- co-investment of operators rolling out NGA networks,
- when to remedy fibre networks and on what level should access be offered
- best practices for both passive and active remedies.

3.3 Implementation of key-remedies

The Commission has announced in its European Digital Agenda to focus on key-remedies. The identified key-remedies are regulatory accounting and non-discrimination.

3.3.1 Regulatory Accounting

In recent years ERG and BEREC have produced a yearly report on regulatory accounting to assess the level of harmonisation. During the consultation of the work programme stakeholders will be specifically asked on which fields harmonisation is important.

The yearly report confirms that the level of harmonisation has increased over time. Despite this, differences among Member States may arise from different ways in which the same regulatory accounting approach is implemented. Therefore, in its 2011 report BEREC will also analyse the reasons why NRAs choose one implementation approach rather than another. The Commission recently expressed the need to work on consistent regulatory accounting for key access products across Europe. BEREC will pave the way on this subject and broaden the yearly report, building on European best practices and tackling the several issues identified in notified market analysis decisions and co-operate with the Commission's services on a document on cost methodologies for consistent access prices. It can also benefit from the output of the Expert Working Groups on both termination rates and NGA.

3.3.2 Non-discrimination

The Commission has announced recently that it intends to produce a document on non-discrimination tools. BEREC will co-operate with the Commission's services in this work. BEREC could give an overview of the existing non-discrimination obligations, based on NRA's extensive experience with these remedies. This is also linked to the work BEREC is planning to do in the field of functional separation.

3.4 International Roaming

The Roaming regulation has resulted in more transparency and harmonised tariffs for end-users in the whole European Union. BEREC will continue to monitor the evolution of the market and the implementation of the Regulation and BEREC will continue to report periodically on this.

During 2010, as preliminary input to the Commission's own Review, BEREC investigated the likely need for further regulation after the expiry of the current Regulation in 2012 and analysed the different forms which any such regulation could take, the advantages and disadvantages of each for consumers, the effects on the competitive landscape and any spill-over effects into national markets. This included consideration of the target set in the European Digital Agenda for the difference in roaming prices and domestic prices to approach zero by 2015.

BEREC will continue to provide professional input to later stages of the Review of the Roaming Regulation (and during any subsequent legislative process) on request from the European institutions or, where appropriate, on its own initiative.

3.5 Business Communication Services

Business communication services are increasingly offered on an international scale. Stakeholders claim to experience inefficiencies because of inconsistent regulation of building blocks to offer data communication services. In 2009 and 2010 BEREC has inventoried the ways in which NRAs regulate these wholesale building blocks for the provision of communication services to business users. BEREC understands that especially operators who provide transnational services may experience inefficiencies, even if remedies justifiably differ among Member States. In 2011 BEREC will focus on the inefficiencies market players claim to experience, analyse the substance of these inefficiencies and if substantial, search for ways on how to resolve these. This work also includes an analysis of the remedies needed in the business segment.

3.6 Wholesale access originating to value added services

Providers of shared cost, premium rate or freephone number services pay a wholesale originating fee to the operator of the originating network, that is to the network to which the user that calls the information service is connected. Sometimes this originating fee seems excessively high compared to the cost. This seems especially the case for the wholesale fee for mobile originating traffic that is destined to freephone numbers/services. This kind of voice originating seems to have similar features as voice termination in the sense that there is no alternative for the provider of the information service. This provider can choose either to pay the fee or disconnect from the originating network in case his service can not be reached by customers of the network..

The objective of this BEREC project would be first to investigate the situation and market forces regarding these services in different member states. Depending on these first results, there could be a follow up to assess whether there are competition problems regarding these originating services and to give guidance on how to address these problems.

4. Emerging Challenges

4.1 Promotion of Broadband

BEREC shares the objective of the Commission of comprehensive broadband coverage in Europe. Recently the European Commission has explicitly referred to the BEREC Work Programme in its broadband communication, making the suggestion to BEREC to include measures to support broadband development as a priority in 2011. BEREC welcomes this suggestion¹ and recognises the important role of broadband networks in the further development of the economies of Europe and the benefits that they can bring to its citizens. There are different mechanisms/tools which can be used to promote broadband. The SMP regime and implementation of the NGA recommendation are probably the most well-known instruments for NRAs. However, the (public) funding of networks, the inclusion/exclusion of broadband access in the universal services obligation (USO) and the promotion of open access in the context of state aid can also contribute to the promotion of broadband coverage.

Although the different mechanisms are based on different frameworks and not all mechanisms fall within the remit of either BEREC nor the NRAs, it is desirable for BEREC to look more into the interdependency between the mechanisms/tools. This may require that BEREC assesses mechanisms/tools not being within the scope of NRA, such as the major cases of public-private intervention and other relevant measures such as tax incentives, to the extent that they have impact both on markets and users. The potential impact of these interventions among competitive forces should also be stressed, balancing short run benefits of these initiatives with long run disadvantages of non sustainable competition.

Broadband penetration depends on the value perceived by consumers. It may also be desirable to tackle specific issues, such as an analysis of the constituent costs that drive broadband offerings and the reasons behind the great price variations that exist in Europe, or an analysis of factors that affect broadband take up and benefits to the national economy from a wide broadband take up. On the other hand, the existence of long term discounts and promotions or other retail clauses should be analysed to determine their impact on prevailing competition conditions.

¹ COM (2010) 472, Communication from the Commission on European Broadband: investing in digitally driven growth.

By choosing a broader focus towards the different mechanisms/tools, BEREC will be able to clearly define its own role regarding each of them. The policy objectives in article 8 of the Framework Directive (to promote competition as well as to promote the interests of the EU citizens) will be the guiding principles. In this context, the Broadband Communication as well as the announcements made by the Commission in the Digital Agenda and the Europe 2020 Strategy should be taken into account and BEREC will co-operate with the Commission's services in this work.

Working on the notion of open access in the case of public funding of NGAs in 2010, it appears that some provisions are difficult to implement considering the European regulatory framework and NRAs' remit. The Commission announced the revision of the State Aid guidelines published in 2009 for the end of 2011. BEREC will discuss the guidelines with the Commission, in order to help align the guidelines with the current regulatory framework.

4.2 Network Neutrality

In 2010 BEREC made a start in exploring the regulatory aspects of this broad theme. The Commission also initiated a consultation. In its response BEREC noted that incidents so far remain few and for the most part have been solved without the need for regulatory intervention. BEREC believes that, at present, it would be premature to consider further intervention with respect to net neutrality on an EU level. This, however, does not mean that problems could not arise in the future. For this reason, BEREC believes that it is important that the conditions of net neutrality and the openness of the Internet be monitored over time. Furthermore there seems to be a need for BEREC to explore the following issues related to net neutrality more specifically in 2011:

- Transparency: Commissioner Kroes has indicated in her speech at the ARCEP seminar in April 2010 that transparency issues are non-negotiable. Also in more recent speeches she has underlined the importance of transparency. How will transparency obligations work in practice? A harmonised approach towards transparency obligations is favourable. BEREC could issue guidelines on this.
- Quality of Service requirements: The Regulatory Framework introduces the competence for NRAs to set minimum requirements. What is meant by it? When should NRAs set minimum requirements and what should those be? Internet services are offered on an international scale. Therefore a harmonised approach towards minimum requirements is not only favourable, but necessary to avoid creating inefficiencies for operators, that have to be compensated by consumers.
- Application of the access obligations to the debate of network neutrality. In particular guidance from BEREC on how the provisions regarding symmetrical regulation will be used by NRAs.
- Current IP interconnection agreements (peering/transit) between market parties (not necessarily with SMP) will have to cater with demands of content and application providers. Both regulated and commercial agreements will be looked into.
- What is the impact of the new definition of access in the Access Directive?

- BEREC should investigate further whether there is a consistent approach towards relevant internet players.² The presence of this kind of agents – at present out of any electronic communications regulation in all or most member states – has an increasing impact on the model of exchange of internet traffic with broadband providers and network operators, both covered by the regulatory framework. In this context the consideration whether these entities might be providing ECS services should be analysed.

4.3 Bridging market evolution and the objectives of spectrum management

In recent years ERG/BEREC has strengthened its cooperation with RSPG. Spectrum management can be an important instrument for ensuring both the respect of competition objectives and the promotion of the widest geographic accessibility. BEREC from its economical expertise will continue to analyse the impact of fixed-mobile convergence, complementarity and potential substitution and its effects on fixed and mobile communications markets in terms of voice and broadband, in order to assist NRAs in their next round of market analysis.

In addition it may deliver insights for spectrum management policies. BEREC will also explore whether there is a need to further harmonise the way the spectrum value is determined. For this reason and with regard to the draft Radio Spectrum Policy Programme presented by the Commission, BEREC in cooperation with RSPG, benefiting from their respective expertise, could follow the conditions for the attribution of the frequencies of the Digital dividend band in the Member States. Such review could be extended to the 2.6 GHz band. This analysis could cover the national allocation process, spectrum value, coverage obligations or the conditions for infrastructure sharing where appropriate.

5. Set-up and implementation of BEREC and implementation of the revised framework

As 2011 progresses, BEREC will increasingly have the resources of the BEREC Office to provide professional and administrative support. 2011 will also be the year in which the regulatory framework will have to be transposed in national law. In recent years ERG/BEREC have been working on preparations to fulfil its new role. In 2011 BEREC will continue activities to professionalise and achieve further harmonisation and consistency.

² Although BEREC is reluctant to single out specific market players, it thinks that in this case it clarifies this part to mention that BEREC in this case means internet players such as Skype and Google.

5.1 Cross-border and End-user issues

Some articles in the regulatory framework ask for a cross-border approach. In 2010 BEREC has for example been working on the provision in article 28 of the Universal Service Directive that consumers are protected from fraud or misuse of numbering resources. BEREC should be the platform for NRAs to adopt a consistent approach and make sure that the procedures are clear in case the situations described in the relevant article occur.

Subjects that fall into this category are:

- article 28 USD: Any consumer should be able to access any number in the EU. In 2010 BEREC has looked at fraud and misuse. In 2011 BEREC will shift its focus towards accessibility of numbers.
- Accessibility to ECS for disabled citizens.
- Consumer rights (articles 20, 29 and 30 USD): given the amendments to these articles it would be appropriate to consider how this could affect the work of NRAs. It may also be appropriate to explore current practices and to establish some best practices.
- article 21 Framework Directive: resolution of cross-border disputes.

During the consultation stakeholders will specifically be asked to state which cross-border subjects are most important in order to prioritize the workload.

5.2 Functional separation

The regulatory framework has introduced the remedy of functional separation. Also it comprises an article on how to deal with voluntary separation. In 2010 BEREC has started working on this subject in order to issue guidance that can be used by NRAs when considering the appropriateness of functional separation. Based on this guidance, BEREC will look into further issues. The regulatory framework recognizes a formal role for BEREC in the context of the Commission either authorising or preventing the imposition of functional separation. Therefore BEREC will in due course need to gain expertise on this subject to be prepared for its role to evaluate the appropriateness of functional separation in a specific case. It should be clear to NRAs how BEREC will evaluate the imposition of functional separation in case an opinion of BEREC is needed or requested. Once it is clear that an NRA will come forward with such proposals, BEREC will analyse in more depth the subject in cooperation with the Commission. BEREC will develop a set of criteria that BEREC will use for the evaluation when advice of BEREC is required in a specific case.

5.3 Benchmarks

In order to monitor harmonisation it is important to collect data and compare the evolution of markets in different countries. BEREC produces benchmarks itself, but also co-operates with the Commission and CoCom. In 2011 BEREC will continue this co-operation. Furthermore, having the BEREC-Office at its disposal to produce benchmarks, BEREC will have the chance to evaluate its own benchmarks and the co-operation with other organisations. The role of

BEREC should be supplementary, complementing if deemed necessary, but not replicating existing benchmarks. In 2011 BEREC will therefore perform a strategic review of its current activities related to benchmarking.

5.4 Other BEREC tasks

In 2011 BEREC has to be prepared to fulfil its tasks from the Regulation and the directives. To mention a few, this includes performing the advisory role towards the Commission, but also on request to the Council and European Parliament. It also includes executing its task in the article 7/7a FD procedures. Specifically BEREC has to advise regarding recommendations and decisions based on article 15, article 19 and article 21 FD. Upon request BEREC will assist NRAs. BEREC has also to issue an annual report.

BEREC will continue its preparatory activities for its new role in the article 7/7a FD (e.g. develop appropriate procedures). BEREC will also maintain its relations with the Commission, the Council, the European Parliament and individual NRA's, specifically to be transparent about what can be expected from BEREC in case of a request for advice or assistance. This also includes procedural aspects, which may have to be formalised in co-operation agreements, in particular for the co-operation with the Commission (e.g. regarding the timing and the notice periods from the Commission for an opinion of BEREC and setting up a timetable when requests can be expected to ensure a better planning).

5.5 Cooperation with RSPG and ENISA

As mentioned in the introduction BEREC will seek and continue co-operation with RSPG and ENISA. BEREC has strengthened its cooperation with RSPG since 2008. In paragraph 3.3 specific issues are mentioned on which BEREC wants to work and continue to be working with RSPG, taking into account that different models for cooperation are possible.

In 2011 BEREC intends to explore possible cooperation models with ENISA, looking also at the amendments in the Regulatory Framework with regard to network security and integrity.