



**BEREC report of the consultation on the
draft Work Programme 2011 BEREC Board of Regulators**

December 2010

1. Introduction

The 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 public consultation ran from 8th October to 5th November 2010 with an oral hearing held on 3rd November. The role of public consultation is to increase transparency and to provide us with valuable feedback from stakeholders.

Eleven contributions have been received in response to the consultation. Respondents are

- British Telecommunications (BT)
- Cable Europe
- European Competitive Telecommunications Association (ECTA)
- European Satellite Operators Association (ESOA)
- European Telecommunications Network Operators' Association (ETNO)
- Fiber to the Home Council Europe (FttH Council)
- the International Telecommunications Users Group (INTUG)
- The Number
- Telecom Italia
- Vodafone
- The Voice on the Net Coalition Europe (VON Europe).

Submissions received are available on the BEREC website. Specific contributions from stakeholders are summarized per paragraph of the Work Programme the specific comments refer to.

In general comments have been made by FttH Council and ETNO about the lack of deliverables and public consultations in the consultation version of the 2011 Work Programme. Indeed we find it important to be transparent about the deliverables and the timing of public consultation. Therefore the final version of the Work Programme 2011 includes deliverables and consultations.

Furthermore ECTA encourages BEREC to prioritise items in its Work Programme, since 2011 will provide a real test of BEREC's ability to deliver greater harmonisation. BEREC agrees with this comment. Since we do not have the resources to carry out this work, we are unable at this point to incorporate these suggestions into the Work Programme. That means that BEREC in 2011 will not specifically work on barriers to switching, such as the lack of interoperability between mobile devices, operating systems and different app store environments. Nor will BEREC actively be involved in current Commission initiatives on the protection of children online or the debate on privacy policy as suggested by Vodafone. Finally, BEREC will not proactively work on promoting the European space policy for the development of global electronic communications, as suggested by ESOA.

2. Specific contributions per paragraph of the Work Programme 2011

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

BT welcomes plans to continue the efforts in monitoring exercises and underlines that peer group pressure remains important for the purpose of changing the national approach on regulation.

ECTA would like to see an update on this work stream. In more detail ECTA prefers the NGA remedies (i.e. duct access and fibre unbundling) as well as business grade SLAs reflected in the Wholesale Local Access monitoring exercise. With regard to the proposed Wholesale Broadband Access monitoring exercise, ECTA prefers NG developments (i.e. remedies should cover all applicable speeds) and the need for differentiated consumer and business focused remedies reflected. Also the creation or replication of bundled offers is necessary to reflect upon. As far as the Leased Lines remedies monitoring is concerned, ECTA asks for clarification on the fact that remedies should include all applicable speeds and for more detail on the specifications of Ethernet interfaces.

BEREC is happy with the support for this issue and will take the recommendations made by ECTA into account when executing the work, but sees no need to adjust the WP2011.

Capturing remedies proposed by NRAs and Commission concerns about remedies expressed in comments letters systematically (par. 3.1.2)

BT asks for more transparency by publication of the outcome of the work undertaken and to set out a clear plan for further harmonization initiatives should significant disparities become visible.

BEREC will first have to make an overview of remedies, before any outcome of work can be published. The call for transparency will be taken into account when designing the format for this overview. However, the primary goal for the development of this database remains the need for a tool for NRAs.

Involvement in investigation of Commission into the cost of non-Europe in telecommunication markets (par. 3.1.3)

BT refers to their comments on business services: Europe is missing a major opportunity to realise further benefits without competitive supply of services needed to facilitate efficient cross-border cooperation between business sites in all sectors.

ETNO welcomes the statement underlining the need for a cost-benefit analysis. Regulatory conformity can bring benefits as well as create costs. An in-depth impact assessment should be carried out for future recommendations.

Comments during the consultation do not tend to adaption of the Work Programme.

Recommendation on termination rates (par. 3.2.1)

ECTA states that fixed origination rates (CS, CPS and access to non-geographic numbers) should be calculated consistently with the addition only of such cost relevant to the origination of the service. It is unclear why origination should attract more common costs than the directly comparable termination service.

INTUG states that the current billing model does not facilitate effective competition. Terminating rates remain unacceptable high and distort markets.

BEREC takes note of the opinions brought forward during the consultation, but sees no need for adaption of the Work Programme.

Next Generation Networks – Access (par. 3.2.2)

Cable Europe proposes that NGA policy should encourage the investments made by operators such as the cable industry. Competition between independent infrastructures is the most beneficial for investment and end-users.

The FttH council hopes that NGN will be a priority for 2011. BEREC should consider tracking NGA investments (and State aid) and to compare the form of access deployed and progress being made.

ECTA warns that BEREC should avoid interpreting recommendations. Guidance, particularly if unpublished, could weaken the regulatory certainty. However, BEREC should elaborate on some elements such as product definitions in an NGA environment and pricing regimes which may have a discriminatory effect.

ETNO states that BEREC should address the need for a more symmetric approach to access regulation, in particular for NGA and the effects of platform competition.

Telecom Italia states that an overall execution of the 20 September package is fundamental and should constantly take the EDA into account. Work on implementing the NGA recommendation should be fulfilled on a public stage. Telecom Italia highlights some specific points: (1) The need to address geographical variation of remedies as a result of different methodologies and the resulting need to review the ERG CP on geographic aspects of market analyses. (2) The implementation of risk premium and risk sharing provisions. (3) Further addressing the topic related to the prices tests for services on fiber. (4) Implementation of art 12 FD.

INTUG States that BEREC should monitor the interpretation and transposition of the recommendation to ensure there are no loopholes allowed which prevent business users from acquiring seamless network services from their chosen international provider.

Firstly, the call for tracking NGA investments is usually addressed in BEREC's regular country case studies. These include a general overview of national investments and forms of access. Specific suggestions have been made as to the specific issues BEREC should work on. BEREC will take these suggestions into account in the actual work, but sees no need to further adjust the Work Programme. Of the other statements and opinions made during the consultation, BEREC takes note.

Regulatory Accounting (par. 3.3.1)

BT emphasises the need to encompass both accounting methodology and their transparency.

Cable Europe warns that insufficient recognition of cable operators will result in remedies which have negative implications for cable investment. Necessary condition is a fair access pricing regime which reflects investment risks but which discourages wholesale prices detrimental to infrastructural investments already made.

Vodafone states that BEREC should reconsider its approach to the pricing of copper and duct as the use of LRIC methodologies are inappropriate to the pricing of copper and passive assets as ducts.

ECTA states that regulatory accounting should be a priority. ERG/BEREC reports show that divergent approaches have been taken by NRAs. As a result wholesale prices vary more widely than would be expected purely based on cost differences, according to ECTA. Guidance is needed on current generation pricing, a coherent approach between current and next generation network pricing avoiding overcompensation for assets that may have been fully depreciated, rules during the parallel operation of copper and fibre to prevent price instability and anti-competitive pricing strategies, key principles for margin squeeze and key principles for risk premiums and discount regimes.

ETNO encourages BEREC to promote economically sound solutions. An EU-level approach to access product costing would severely undermine regulatory certainty for investors in the transition from current to next generation broadband and result in further delay in the roll out of fibre.

INTUG wishes to draw BEREC's attention to the ineffectiveness of accounting separation and the whole cost accounting methodology. These remain exposed to extreme subjectivity and have failed to be an effective remedy against profiteering and discrimination. There would be benefit in BEREC reporting on progress, including a checklist.

Some suggestions, such as Vodafone and ECTA bring forward, would have to be part of the actual work and do not as such form a reason to change the working programme. Furthermore BEREC is aware of the fact that the roll out of fibre should not be hindered by regulatory uncertainty on the one hand, but this should not hinder competition on the other hand. BEREC takes note of the other statements, however sees no need to change the Work Programme as a result.

Non-discrimination (par. 3.3.2)

BT indicates that non-discrimination is particularly significant in the field of business services and more specific in relation to SLAs. According to BT, BEREC should publish NRA data on incumbents' performance.

Vodafone indicates that BEREC should benchmark non-price KPI's for the delivery of unbundled loops. According to Vodafone BEREC should focus on non-price issues.

ECTA states that non-discrimination should be a priority. According to ECTA there is significant evidence that very few countries have elaborated on non-discrimination or have enforced it effectively in practice. Guidance is needed on (1) non discrimination in services to ensure that inputs are provided timely to enable simultaneous launch of new products, (2) terms and

conditions should be subject to a minimum set of KPIs that should be collected and published internally and externally, (3) Identification of circumstances in which the use of the same information and ordering systems would be cost-effective (equivalence of input), (4) identification of harmonised core principles for the effective application of functional separation as a last resort remedy.

ETNO welcomes BEREC's intention to work on non-discrimination, building upon the experiences of its members with different models for ensuring non-discrimination.

Some of the suggestions by Vodafone and ECTA see to the actual work and will be picked up accordingly. Regarding the publication of NRA data, BEREC remarks that it is up to the NRA concerned to decide upon publication. Furthermore, BEREC takes note of the other remarks, but sees no need to adapt the Work Programme as a result.

International Roaming (par. 3.4)

BT states that international roaming should cover both voice and data.

ECTA states that BEREC should particularly focus on supporting the European Commission in identifying solutions that will address structural problems that are preventing the creation of a fully competitive market from which users can benefit.

INTUG welcomes the EDA target and states that BEREC should prepare for an extension of the regulation when the current regulation expires. This should aim at a further reduction in caps, including retail price caps for data as wholesale price caps are not passed on to consumers.

BEREC takes note of the remarks made by BT, ECTA and INTUG. All suggestions are part of the proposed work, thus BEREC sees no need to adapt the Work Programme.

Business Communication Services (par. 3.5)

BT emphasises the importance of this issue.

ECTA considers business services as a priority issue. Business users tend to procure their needs from a single provider. They regard communication services as a key input and have high demands. BEREC should encourage NRAs to look more closely at the respective national markets. In addition to competition related issues, BEREC should address administrative barriers to multi-national business provision.

BEREC has taken up the suggestions as made by BT and ECTA in the Work Programme and has shifted its focus accordingly.

Access to value added services (par. 3.6)

The Number provides a couple of suggestions. The suggestion to limit the focus to socially relevant value added services might be logical at first sight, but may be harder to work with in practice, since it might be hard to distinguish these from other value added services. BEREC

agrees to work on access in general and to include SMS. With regard to the suggestion to benchmark, BEREC will take this up as part of the initial survey.

BT, Cable Europe and ECTA support BEREC's initiative. Cable Europe suggests more concretely that BEREC's assessment should be sufficient comprehensive and incorporate the entire value chain. At least in the UK the originating provider has no alternative option.

ETNO is of the opinion that the draft WP does not convey a clear message of the problem identified and the state of competition. BEREC should transparently state the reason for including this item and list the problems encountered.

BEREC is glad to see so much support for this issue. Other comments, such as ETNO's on the problem identification, will be taken into account in the actual work, but do not lead to the need to change the Work Programme.

Promotion of Broadband (par. 4.1)

The proposed approach to look more into the interdependency between different mechanisms to promote broadband is supported by a number of stakeholders. According to ECTA BEREC should focus on achieving a coherent approach between SMP and publicly funded regimes. ESOA would appreciate that BEREC contributes to defend the cause that no one technology is favoured over others to achieve the EU broadband goals. ETNO is convinced that investments should primarily be carried out by private capital. Public intervention should never be detrimental to investments. In cases where public intervention is granted, it must not jeopardise efficient allocation of investment within the internal market. Also Cable Europe mentions that external intervention should only be needed where private sector cannot achieve results.

Three stakeholders explicitly express their worries about state aid in relation to competition. State aid must not distort existing infrastructure competition according to Cable Europe. ESOA states that BEREC should help ensuring that stated aid does not distort existing and well-established markets, in particular the video distribution market. INTUG mentions that BEREC has an important role in ensuring state aid can be used where this facilitates and/or accelerates broadband rollout, as long as this is not at the expense of long-term sustainable competition.

Also other mechanisms are mentioned by stakeholders. Vodafone suggests BEREC to advise on national broadband plans. ECTA welcomes BEREC's views on taxes targeting the sector.

The potential widening of the scope of the Universal Services to cover broadband are both mentioned by Cable Europe and ETNO. Cable Europe questions the necessity of widening the scope. ETNO consider Universal service to be a 'safety net'. A redirection to provide a tool for the achievement of the 'broadband for all goal' would change the nature of this policy instrument.

Finally there are two concrete suggestions for BEREC to work on. ETNO mentions that the role of demand-side initiatives is also very important and should therefore be considered as a criterion in assessing the validity of financing for NGA. INTUG advises BEREC to investigate wide pricing variations in the context of broadband between Member States.

BEREC considers the responses of stakeholders as a support towards the approach to look at the different mechanisms. The concrete suggestions for BEREC to work on will be evaluated further in the work.

Network Neutrality (par. 4.2)

Cable Europe believes in openness and transparency, however to remain open, traffic may need to be managed. According to INTUG traffic prioritisation rules (traffic management) are the real issue. It is the transparency of the rules, their consistency and the fair and non-discriminatory application of those rules operationally, which is the real objective. According to Cable Europe today's debate should address whether the tools of competition law are sufficient to tackle any eventual problem. ECTA states that the best way to address net neutrality issues structurally is by ensuring a competitive market. ETNO cautions against any extension of the scope of asymmetric SMP-regulation when it comes to the open internet debate.

ETNO believes that the market will continue to provide an adequate level of best effort internet access service while preserving incentives for smart, managed networks and quality of service differentiation. Therefore ETNO supports BEREC's intention to further cooperate on the implementation of the new transparency requirements. Also VON Europe endorses BEREC's comments regarding transparency and quality of service. Transparency on its own is not enough. VON encourages BEREC to harmonise the efforts to prevent degradation of services.

Unlike other stakeholders VON Europe has the opinion that harm is evidenced widely in the EU. This confirms the need for a pro-active and forward-looking approach. VON disagrees with BEREC's draft conclusions to intervene on this matter.

Based on the comments of most stakeholders BEREC feels encouraged to continue its intended work in 2011. BEREC finds it important to focus on key-issues transparency, QoS and discriminatory issues (in relation to traffic management and competition law). Most of the comments made by the stakeholders support such an approach.

Cable Europe pleads for more transparency regarding BEREC's work on this subject. BEREC's work should be accompanied by a full public consultation. In 2010 BEREC explored this subject, whereas in 2011 BEREC intends to give more guidance regarding the application of the articles in the framework relating to network neutrality. It speaks for itself that this work will be subject to consultation.

BEREC adapted the Work Programme as a result of the reactions brought forward during the consultation, specifically with regard to transparency and discrimination. Other remarks and opinions may be taken into account during the actual work, but do not as such influence the Work Programme.

Bridging market evolution and the objectives of spectrum management (par. 4.3)

Cable Europe underlines the importance of this issue for the future and supports the strengthened cooperation with RSPG. Also INTUG supports the cooperation between BEREC and RSPG. ESOA encourages BEREC to rely on its close cooperation with RSPG to press for a fair treatment of all spectrum users.

Regarding the assignment of spectrum, Vodafone finds it useful if BEREC develops some guidance on how NRAs undertake a competition assessment before mobile spectrum is allocated or reallocated. INTUG finds that BEREC should seek simpler ways of enabling

licensing of pan-European mobile operators to assist the establishment of international services. ECTA suggests that it could be useful for BEREC to give input on the assignment of digital dividend. ESOA would appreciate BEREC's assistance to help ensuring that full competition between communications platforms is guaranteed by taking due account of potentially conflicting needs of spectrum users.

In general, VON Europe states that BEREC should examine the increasing opportunities for unlicensed services and innovative spectrum access models. Governments have significant tools at their disposal to increase the effective and efficient use of spectrum and BEREC could help by identifying these tools.

The responses mentioned above can be regarded as support towards the proposed work on this issue. The responses will therefore be taken into account during the work.

Furthermore Cable Europe mentions that there may be interference problems and finds it important for BEREC to review whether appropriate measure are taken/foreseen by Member States in order to mitigate the interference issue for end-users. Cable Europe also mentions that a closer look should be taken at the current process resulting in mandating CEPT to analyse the interference and disturbance issues created by the deployment of new radio technologies. Cable Europe finds that a specific role for CENELEC during the impact assessment should be envisioned.

BEREC finds these remarks interesting and will signal this with the relevant authorities. However BEREC will not act proactively regarding these remarks, since it is not primarily in BEREC's remit to do so.

Cross-border and End-user issues (par. 5.1)

VON Europe supports BEREC's focus on article 28 of the Universal Services Directive regarding the access to numbers and services. Numbers are a critical resource for communication services. According to VON Europe BEREC should focus on removing the link between numbers and locations.

BEREC takes note of this suggestion and sees that there may be advantages in removing this link. However, the directives do not provide for removing this link, which means that this is not a task for BEREC. BEREC focuses on the tasks following the directives and will continue as written above.

VON Europe mentions the limitations that still exist for pan-European supply of VoIP, such as numbering and emergency calls.

BEREC does not want to single out any one of the technologies such as VoIP, but agrees that work on cross-border issues is needed. That is why this is specifically in the WP2011.

Functional separation (par. 5.2)

INTUG mentions its strong support towards BEREC's formal role in the application of functional separation. BT welcomes guidance from BEREC to NRAs and mentions that some current implementations fail to address the very market failures functional separation is designed to resolve.

As mentioned above in 2010 BEREC has started working on guidance for NRAs when considering the appropriateness of functional separation. The draft document for this is published for consultation, for which the period ends on November 19th. Specific comments regarding the effectiveness of functional separation in individual cases will be referred to that consultation.

Other BEREC tasks (par. 5.4)

Vodafone specifically refers to the article 7 procedures. According to Vodafone there is an unclarity regarding the interaction between parties. Vodafone needs to understand how BEREC proposes its responsibilities in this area, because of BEREC's increased role. Will BEREC be prepared to receive presentations from affected parties?

BEREC explicitly plays its role after the European Commission has issued its serious doubts. The timelines for BEREC to give an opinion are rather short and therefore ask for a flexible approach. Although BEREC would like to be open towards presentations of market parties, it may not always be possible in the second phase due to time constraints. BEREC relies on the information from both the NRA, who notified the draft decision and the European Commission. Both parties receive information from market parties, which may be passed on to BEREC as well. BEREC does not exclude that it may want to talk with market parties by itself in an individual case, but does not intend to make a general rule for this.

In order to meet these concerns, the Commission has undertaken in agreement with BEREC to facilitate full openness to BEREC's Expert Working Group both of submissions received from third parties and of meetings that may be held with interested operators, subject to any confidentiality request.