

Position paper

ETNO Response to BEREC consultation on procedures for public consultations held by BEREC



July 2010

Executive Summary

ETNO welcomes this opportunity to comment on the draft procedures for public consultations for the Body of European Regulators for Electronic Communications (BEREC). We appreciate the BEREC's positive response to the request of ETNO and other stakeholders to be consulted on these procedural rules, made in the context of the BEREC 2010 Work Programme consultation.

The Rules of Procedure (RoPs)¹ of the Board of Regulators (BoR), adopted at the inauguration of the BEREC in January 2010, understandably included consultation modalities. The RoPs should, however, be considered provisional until the completion of this consultation. If the RoPs are considered final, as implied in the consultation document, this consultation is rendered meaningless.

ETNO has serious concerns about how the BEREC is interpreting and implementing its obligation to consult interested parties as per Article 17 of the Regulation establishing the BEREC and the Office² (the "BEREC Regulation"). In particular,

- we find the discretion that the BoR has granted itself in assessing "cases where the input and comments of stakeholders is required" is exceptionally broad and could allow for public consultation to be avoided;
- we find that the proposed 15-20 working days do not constitute a "reasonable period" for public consultation, deviating from the practice of the European Regulators Group, from that of BEREC member national regulators and from that of the European Commission.

ETNO thus calls for the RoPs and the draft "Procedures for Public Consultations held by the BEREC" to be amended to address these concerns.

¹ BoR (10) 03, 28 January 2010.

² Regulation (EC) No 1211/2009 of the European Parliament and Council of 25 November 2009.

Comment on BEREC draft public consultation procedures

As ETNO has expressed in previous communications, we believe that a key success factor for the BEREC will be its transparency and accountability.

In the BEREC Regulation, Article 17, "Consultation," states,

"When appropriate, BEREC shall, before adopting opinions, regulatory best practice or reports, consult interested parties and give them the opportunity to comment within a reasonable period. BEREC shall, without prejudice to Article 20, make the results of the consultation procedure publicly available." [emphasis added]

This is followed by Article 18 on "Transparency and accountability" which states:

"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."

Transparent and well-informed position-taking and decision-making processes, underpinned by public consultation, will help to increase the quality of the BEREC's opinions and regulatory guidance and their acceptance in the market place. This openness will contribute to a consistent and proportionate implementation of the revised Regulatory Framework for electronic communications.

True consultation on procedural rules needed

The RoPs of the BoR, adopted on 28 January 2010, understandably included consultation modalities to allow the BEREC to commence its functions. The RoPs should, however, be considered provisional until the completion of this consultation. If the RoPs and the consultation procedures defined within are already considered final, as implied in this consultation document, the current consultation is rendered meaningless. Otherwise, it would appear that the BEREC is simply 'going through the motions,' having effectively pre-empted public consultation on these procedural rules by defining them in advance.

Sufficient public consultation required

As explained in the consultation document, the BoR has decided to interpret and implement the "When appropriate" clause in Article 17 of the Regulation by "leaving it up to the BoR itself to decide on a

case-by-case basis about the need to consult interested parties” [p.2]. We also note that there is no requirement – current or proposed – for the BoR to make public or justify such decisions.

We find the discretion the BoR has granted itself in assessing “cases where the input and comments of stakeholders is required,” as per Article 16.1 of the RoPs, is exceptionally and excessively broad and could allow for public consultation to be avoided. As currently implemented, in fact, no obligation to conduct public consultation is being imposed.

Article 16(4) of the RoPs contains ill-defined and possibly subjectively interpreted decision criteria by which the BoR is to decide whether to consult or not. It states:

“In deciding on whether and how to consult, the Board of Regulators shall take into account considerations such as the nature of the specific subject, possible alternatives to consultation, confidentiality issues, the interests of third parties, and the urgency of the matter.”

One sees the bias against conducting public consultations in the table providing “a tentative assessment of what types of BEREC documents could be subject to public consultation, given their nature” [pp.4-5]. Despite Article 17 explicitly listing “opinions, regulatory best practice or reports” as in scope for public consultation, the table indicates that BEREC Opinions and BEREC Reports are ‘deliverables’ where public consultation is not needed. Only for BEREC Regulatory Best Practices documents will public consultation be the norm. The consultation document simply states but does not explain the BEREC’s position on the “relevant general suitability for public consultation” of the various deliverables.

In this context, one takes little comfort in the statement “However, the specific content and scope of the documents will drive each specific Board of Regulators’ decision on whether to consult stakeholders and how long each consultation should last” [pp.3-4].

ETNO thus calls for the RoPs and the draft “Procedures for Public Consultations held by the BEREC” [pp.6-7] to be amended to impose an actual obligation for the BEREC to conduct public consultation as per Article 17 of the Regulation. The aim would be that BEREC documents containing regulatory opinions, recommended best practices or guidance for NRAs, which could have a material impact on stakeholders, should be consulted. Any discretion to not consult should be strictly limited and subject to detailed, objective criteria.

Reasonable consultation period necessary

We find that the proposed 15-20 working days do not constitute a “reasonable period” for public consultation.

Based on ETNO’s experience with the ERG, the BEREC’s predecessor, matters consulted upon are often complex, reflecting several months’ work of expert project teams. Formulating a thorough, meaningful response requires adequate time. And the proposed short response deadline would pose an even great challenge for trade associations, key respondents to BEREC consultations, who develop consensus positions which require formal adoption by their memberships. For ETNO, for example, this adoption process requires five working days. The proposed 15-20 working day rule is thus considered unreasonable, as it risk excluding valuable contributions from important industry stakeholders.

The proposed 15-20 working day rule is also seen as unreasonable as it deviates from the practice of the ERG, from that of its member NRAs and from that of the European Commission³.

The Commission, for example, in a 2002 communication commits itself to the following:

“The Commission should provide sufficient time for planning and responses to invitations and written contributions. The Commission should strive to allow at least 8 weeks for reception of responses to written public consultations and 20 working days notice for meetings.”

The U.K. Office of Communications (Ofcom) takes a more detailed approach as per this extract from the “Consultation Guidelines – November 2007”⁴:

“Category 1: Consultations which contain major policy initiatives and/or of interest to a wide range of stakeholders (especially those who may need a longer time to response); we will consult for 10 weeks.

Category 2: Consultations which, whilst containing important policy proposals, will be of interest to a limited number of stakeholders who will be aware of the issues; we will consult for 6 weeks.

³ European Commission, COM (2002) 704final, “Communication from the Commission - Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission,” 11 December 2002.

⁴ http://www.ofcom.org.uk/consult/consult_method/ofcom_consult_guide

Category 3: Consultations which fall within one or more of the following

- i. detailed technical issues;
- ii. where there is a need to complete the project in a specified timetable because of market developments or other factors which require the project to be concluded within a short period;
- iii. the issue has already been the subject of a consultation;
- iv. a proposal will have a limited effect on a market;
- v. a proposal is only a limited amendment to existing policy or regulation.

The time period for consultations in this category is one month.

Under the law we must allow at least one month for consultation on many issues relating to electronic communications networks and services. We think this period will be long enough for most of these consultations, but we will extend this period in some cases if needed.

We will usually also make allowances for holiday periods in setting our timetable, adding 2 weeks to the usual timescales for consultation issued during July and August and the Christmas/New Year period.” [emphasis added]

Ofcom thus allows in most instances period of 30 working days (or six calendar weeks) for a public consultation, a period which ETNO finds reasonable.

ETNO believes calls upon the BEREC to establish similar objective consultation period guidelines and then to apply them consistently in practice. The RoPs and the draft “Procedures for Public Consultations held by the BEREC” should then be amended accordingly.