

Body of European Regulators for Electronic Communications

Work Programme 2010

May 2010

Introduction

The Body of European Regulators for Electronic Communications (BEREC) was established by regulation published in December 2009¹. According to this Regulation, “*BEREC should continue the work of the ERG, developing cooperation among NRAs, and between NRAs and the Commission, so as to ensure the consistent application in all Member States of the EU regulatory framework for electronic communications networks and services, and thereby contributing to the development of the internal market*”². Article 5 of this Regulation sets out that the Board of Regulators of BEREC shall adopt an annual work programme before the end of each year preceding that to which the work programme relates.

The 2010 IRG/ERG Work Programme was intended to provide the basis for the BEREC work programme, and indeed was prepared with that in mind. A public consultation was held on the 2010 IRG/ERG Draft Work Programme, and many of the resulting suggestions were accommodated in the final IRG/ERG Work Programme. The main bulk of the work to be carried out by BEREC is a continuation of, or follow-up to this Work Programme. This enables these regulatory bodies to ensure a high level of consistency and continuity in the work.

The resulting BEREC Work Programme as set out in this document does not explicitly take into account the fact that the European Council, Parliament or Commission may request formal Opinions from BEREC on various topics from time to time. Given the unknown nature of these requests, it is not possible to include them in the planned work programme, but nonetheless these will be accommodated accordingly. Where it deems it to be necessary, BEREC may also offer advice on its own initiative to these institutions.

¹ Regulation (EC) No 1211/2009 of the European Parliament and Council of 25 November 2009.

² Ibid, Recital 8.

Background

2010 has already seen the launch of BEREC and will see the beginning of the change from the current regulatory framework to the updated rules of the revised framework. This legal development will bring with it new challenges for regulators, and it is the responsibility of BEREC to develop co-operation between NRAs to ensure the consistent application of the framework.

In addition to the market-related work that BEREC will undertake, there are a number of practical issues relating to the establishment of the Office that require completion. Recruitment for and establishment of the Office, which will provide professional and administrative support to the Work Programme, will be an essential task for the Board of Regulators of BEREC.

A consultation on the BEREC Work Programme was launched on February 9th, 2010 and ran until March 2nd, 2010. As noted in the consultation document, the 2010 BEREC Work Programme was based on the 2010 IRG/ERG Work Programme, which was prepared with that transfer in mind. A public consultation was held on this latter Work Programme in late 2009, to which twelve responses were received. Stakeholders have therefore had two separate opportunities to ensure their voices have been heard and the views considered.

Eight responses were received to this consultation, and unless the respondents marked their submission confidential, these are published alongside this document.

Final Work Programme

While each respondent to the consultation has a particular viewpoint that it wishes BEREC to adopt, BEREC must ensure that it takes a balanced view of each subject in the context of the regulatory framework and commercial reality in which the market must operate. In addition, BEREC must prioritise items to ensure that the work programme is realistic and achievable.

On that basis, BEREC does not consider it appropriate to diverge significantly from the work programme as originally published. Many of the comments made in the course of the consultation consider the detail of the workstreams, rather than the direction thereof and due account will be taken of these comments by the various project teams as the work progresses. For example, where it may have traditionally been the case to focus on price-related performance metrics, it may now be appropriate to consider those metrics not directly related to price.

BEREC welcomes the views of participants, and looks forward to receiving the opinions of its stakeholders on specific topics as will be consulted on over the course of 2010.

BEREC has now finalised its Work Programme for 2010, and a full list of the deliverables proposed in the 2010 IRG/ERG Work Programme is set out below.

The work programme is set out in three separate but related strands:

- Harmonisation
- Emerging challenges
- Changes to the legal regulatory framework

In order to ensure consistency with the ERG work, many of the actual workstreams that will be conducted by BEREC are either a continuation of the 2009 ERG workstreams, or will take into account the work already completed under the auspices of that organisation.

1. Improving Harmonisation

1.1. International Roaming

In 2009, the Roaming Regulation 717/2007/EC was revised to extend its scope and duration. BEREC will continue to monitor the implementation of the Regulation through preparing a report on its operation in Member States as requested by the Commission. Taking into account the trans-European aspect of roaming, it is necessary to coordinate the regular data collection and monitoring exercises of the NRAs on the legal basis of various articles of the Roaming Regulation. ERG has performed this task since the 2007 Regulation came into effect.

Deliverable: BEREC Reports

Deadline: 1st and 4th quarters of 2010

Consultation: No

Under the 2009 revision to the Roaming Regulation, the Commission is required to assess methods other than price regulation which could be used to create a competitive internal market for roaming. In doing so it is required to have regard to an independent analysis carried out by a body of European regulators. BEREC will, including on the basis of its analysis of data collected as part of the monitoring exercise, assess compliance, market developments, consumer needs, the continued need for regulation and analyse alternatives to price regulation. BEREC will make submissions to inform the Commission's interim report due in June 2010 and also for the full report which is due in June 2011.

Deliverable: BEREC Opinions

Deadline: 1st and 4th quarters of 2010

Consultation: No

1.2. Next Generation Networks – Access

In May 2009 ERG published a report on the economic analysis of Next Generation Access³ in light of developments, including on-going roll-out and the draft Commission Recommendation on NGA. An Annex to the report contained extensive information on actual and planned NGA roll-out in 22 countries. BEREC plans to update this Annex during 2010 in order to continue to monitor developments and to inform possible further consideration of Next Generation Networks in 2011. BEREC also plans, as part of this project, to consider the situation of Multi-Fibre networks.

Deliverable: BEREC Report

Deadline: 4th quarter 2010

Consultation: No

³ ERG (09) 17 – Report on next Generation Access – Economic Analysis and Regulatory Principles

Implementation Issues related to the Commission Recommendation on NGA

The Commission conducted a second round of public consultation on Next Generation Access networks in July 2009 and the resulting Recommendation is expected to be published in mid 2010. ERG participated in both public consultations and BEREC will, once the Recommendation is published, review follow-up actions, taking into consideration all of the previous ERG efforts on this topic. At this stage it is not planned that BEREC will publish a report but this will be kept under review.

BEREC also intends to consider the regulatory aspect of open access, particularly in the context of the recently published Community Guidelines on State Aid Rules and the rapid deployment of broadband networks in different contexts across Member States.

BEREC has already concluded a workstream commenced by ERG in 2009 relating to NGN Wholesale Products⁴, and is expected to shortly conclude during the another workstream commenced by ERG in 2009 relating to future charging mechanisms/long term termination issues in the context of NGN.

Deliverable: BEREC Report on the Regulatory principles of Open Access

Deadline: 4th quarter 2010

Consultation: Yes

1.3. Conformity with ERG Common Positions

ERG committed itself to a regular programme of monitoring of the conformity of national regulatory practices with its Common Positions, both as a tool for encouraging consistency in regulation across Europe and in order to keep the Common Positions relevant and up to date. BEREC will continue this programme.

In 2010 BEREC will review conformity with Common Positions on wholesale broadband access, wholesale unbundled access, and wholesale leased lines, and will consider practical implementation issues regarding geographic differentiation. The exercise in respect of symmetry of termination rates, begun in 2009, will also be completed.

The above-mentioned Common Positions relating to wholesale access remedies are highly relevant to the question of the competitive supply of business services (see below). These exercises were originally expected to be conducted in 2009 but it became clear that it would be appropriate to take into account the lessons of ERG's work in this area. If the monitoring exercises lead to the conclusion that any Common Position needs to be updated, there would of course be a consultation on the relevant changes. Such a consultation would lead to BEREC Common Positions.

⁴ BoR (10) 08 BEREC Report on NGA wholesale products

Deliverable: BEREC Reports

Deadline: Symmetry of termination rates – 1st half 2010

Broadband Common Positions – 2nd half 2010

Consultation: No

1.4. Benchmarking Activities

In 2010 BEREC will continue to collect data to support the calculation of benchmarks on a range of indicators. BEREC will also consider methodologies and continue to provide input where appropriate into external benchmarking development including in particular work being currently undertaken by the Commission.

Deliverable: BEREC MTR Benchmark Snapshot

Deadline: 2nd and 4th quarters of 2010

Consultation: No

1.5. Regulatory Accounting

The Regulatory Accounting Report will continue to be updated regularly to assess the level of harmonisation achieved by NRAs.

To this end it will also investigate the extent to which further alignment among Member States might be achievable. This could include carrying out additional analysis of NRAs' regulatory accounting approaches in key wholesale markets, aiming in particular at identifying the rationale behind different price control methods and modelling choices, taking into account that some parameters are set at different values, generally for reasons related to national circumstances. Subject to our findings, this could be the basis for the development of more consistent regulatory approaches across the internal market.

The pricing/costing issues raised by NGA wholesale products (in particular duct access, but also dark fibre) will be analysed in more detail from a cost accounting perspective. The proposals regarding costing principles made in the Commission's Draft Recommendation on NGA will be analysed in detail for their implications on pricing.

Deliverable: BEREC Report

Deadline: 4th quarter of 2010

Consultation: No

2. Emerging Challenges

2.1. Business services market

In 2009, ERG accepted a proposal by ECTA, EVUA and INTUG to investigate the state of competition for the supply of communications services to large multi-site businesses, in particular the availability and specification of wholesale services on which competitive suppliers would to some extent need to rely.

As part of its commitment to regular reviews of best practice in regulation, ERG considered, and subsequently, BEREC considers, that it is now appropriate to investigate a particular aspect of wholesale regulation. All NRAs have now put in place a full package of regulatory measures under the Framework, which have been largely effective in facilitating competition. But regulation of some wholesale markets remains necessary and NRAs are required to carry out regular market reviews.

In 2009, ERG began its investigations into NRA approaches to the regulation of whole-sale services and the part played by business-specific issues, the extent to which NRAs apply specific wholesale access remedies, which are considered particularly important to the large business segment, and the broad experiences of large multi-site business end-users in choosing a retail supplier. Those stakeholders argue that there is in practice a limited choice of supplier to this segment, in particular because of problems of availability and specification of wholesale services on which competitive suppliers would to some extent need to rely. Arising from the outcome of the investigation, BEREC will continue this work in 2010. Stakeholder feedback and input has already been sought by way of public consultation, including a public hearing held in January 2010.

Deliverable: BEREC Report

Deadline: 4th quarter of 2010

Consultation: Yes

2.2. Convergence

The development of new convergent networks and services raise new regulatory challenges. BEREC will analyse new convergent services and consider if and how these may be subject to regulation as Electronic Communications Services under the regulatory framework. The work will focus initially on market developments, and then will consider whether the regulatory framework is fit for purpose to deal with these challenges or whether these developments require new regulatory instruments or adjustment of existing ones.

Deliverable: BEREC Report on convergent services regulation

Deadline: 2nd half of 2010

Consultation: No

In view of the growing importance of bundled products in the field of market definition, ERG has been keeping developments under review. During 2010 BEREC will continue to monitor commercial developments and the impact they might have on the regulatory environment.

Deliverable: BEREC Report on impact of bundled offers in retail and wholesale market analysis

Deadline: 4th quarter of 2010

Consultation: No

2.3. Cross-border enforcement

Traditionally consumer protection issues in the electronic communications sector have been limited to within the consumer's own Member State borders, largely because service providers were based within the Member States where their customers were, using national networks. However, new technology (especially the Internet) means that there is increasing scope for consumers to consume services provided from Member States other than their own. This has already created some new consumer protection challenges for NRAs, and it is expected that cross-border consumer protection challenges will increase as service providers are increasingly able to provide services to consumers outside their own national borders.

One particular example of cross-border service provision is in the area of numbering. Article 28 of the revised Universal Service Directive provides that (subject to some caveats) consumers in one Member State should be able to access any number in the Community. The new Article also anticipates that these consumers may become victims of fraud or misuse (of numbering resources) and empowers NRAs to block access to the numbers in question and to require operators to withhold interconnection revenues.

ERG began in 2009 to consider the scope of problems associated with cross-border enforcement. During 2010, BEREC will continue this work and will focus particularly on the numbering aspect with reference to Article 28 USD.

Deliverable: BEREC Report

Deadline: 4th quarter of 2010

Consultation: Yes

2.4. BEREC-RSPG Co-operation

Starting from the very good work carried out in cooperation between ERG and the Radio Spectrum Policy Group (RSPG) during 2009, BEREC and the RSPG will maintain and further develop the newly created joint working group. This working group is focused on intertwined issues in market regulation and spectrum policy.

Spectrum management and market regulation increasingly impact on each other and also have a mutual dependence. The main drivers are, in particular, that:

- the distinction between different access methods is becoming less important given that similar services can be provided over a number of different electronic communications platforms;
- there is growing convergence in infrastructure and services;
- the introduction of more flexible spectrum usage and the increased opportunities for trading spectrum usage rights are expected to reduce spectrum scarcity and lower barriers to entry. While this is expected to be beneficial for competition and promote innovation, it is important to ensure that the move to a more market-driven approach does not have negative consequences for competition in electronic communications services and networks, especially over the transitional period.

For the 2010 Work Programme some areas have been identified where further analysis may be beneficial.

The first workstream could be based on reporting on the possible effects on competition of electronic communications infrastructure sharing between wireless broadband operators, including spectrum sharing, noting that this may provide some scope for increasing the capacity of networks and addressing potential spectrum shortages.

A further workstream could be the continuation of the work on competition (transitional) issues including the impact of legacy spectrum distribution and of assignment and pricing methods and how to avoid competition distortions between incumbent users and newcomers resulting from the transition to a liberalised spectrum management regime.

Deliverable: BEREC/RSPG Joint Reports

Deadline: 2nd half of 2010

Consultation: No

2.5. Future of Universal Service Obligation

In 2010, the Commission is expected to publish proposals for legislative changes to the scope and funding of the Universal Service Obligation. As part of the 2009 Work Programme, ERG has been examining issues surrounding Universal Service and this work will continue. BEREC will be in a position to contribute to the debate on all relevant aspects of the proposals.

Deliverable: BEREC Opinion

Deadline: Depending on timing of Commission proposals

Consultation: No

2.6. Accessibility Services for disabled end-users

An issue related to Universal Service is the question of ensuring that disabled users have equivalent access to and choice of electronic communications services to that enjoyed by the majority of end-users. The revision to the Universal Service Directive introduces a provision which would empower NRAs to set requirements as a general obligation where this would be appropriate. Where such requirements are not set, Member States are required to take specific measures as part of the Universal Service Obligation.

BEREC will review how accessibility services are currently provided, conduct a high-level analysis of the costs and benefits associated with different accessibility services and produce a report to facilitate consideration of the issues at the national level.

Deliverable: /BEREC Report

Deadline: 4th quarter of 2010

Consultation: Yes

2.7 Net Neutrality

During 2010, the debate on enhancing net neutrality is likely to develop further. The revision to the regulatory framework will make important revisions to strengthen requirements in this area. BEREC will contribute to this debate and examine issues which fall within the scope of the electronic communications regulatory framework. In particular, BEREC will work with the Commission and provide input to any measures or communication which will be developed by the Commission including a formal opinion in response to public documents issued by the Commission.

Deliverable: BEREC Opinion on Commission communication

Deadline: Depending on timing of Commission initiatives

Consultation: If appropriate

3. Changes to the legal regulatory framework

3.1. Transition from ERG to BEREC

The BEREC Regulation came into effect 20 days after publication in the Official Journal. With publication in the Official Journal on 18 December, BEREC therefore came into being on 7 January 2010. In the course of 2009 ERG made a number of preparations in anticipation of an early adoption of the revised regulatory package, including the BEREC Regulation. As the IRG/ERG Work programme indicated, a number of tasks must be undertaken including governance arrangements for BEREC in accordance with the Regulation and the establishment of the Office as a support to BEREC. A start has been made to these with the convening of the inaugural meetings, the election of the Chair and Vice Chairs for 2010 as well as the Chair 2011, initiation of the recruitment procedure for the Administrative Manager of the Office and the consultation on the 2010 Work Programme.

In addition, BEREC will engage directly with the Commission on procedural issues related to some of the new provisions in the revised regulatory framework.

Deliverable: Timely establishment of BEREC in accordance with the Regulation, appointment of Administrative Manager and recruitment of staff for Office

Deadline: Continuous

Consultation: No

In the course of the consultation on the Draft Work Programme, two issues emerged. Firstly, a number of stakeholders proposed that BEREC should facilitate stakeholder involvement in its work programme and clarify its consultation procedures. ERG has always sought stakeholder input where appropriate. As part of the transition to BEREC, it is planned to set out the principles for stakeholder involvement including consultation and consultation methodologies.

Deliverable: Establishment of BEREC public consultation procedures

Deadline: 1st half of 2010

Consultation: Yes

3.2. Functional Separation

A further issue which arose from the public consultation was a call from a number of stakeholders to clarify the position in respect of the new remedy of Functional Separation. Building on the 2007 ERG Opinion on Functional Separation, BEREC will develop guidelines for the implementation of the new provisions as set out in Articles 13a and 13b of the Access Directive.

Deliverable: BEREC Report

Deadline: 2nd half of 2010

Consultation: Yes

3.3. Article 7 Expert Reports

As a consequence of the success of the IRG's voluntary commitment to assist its member NRAs upon request during the second phase procedure of the Framework Directive's Article 7, it was decided during 2007 that a team of independent experts would be set up automatically upon the launch of every second phase procedure. The establishment of the relevant team, the study of the details of the case and draft the report, including recommendations, within a maximum of 60 days is quite a challenging and resource-intensive exercise for the experts of the NRAs.

When the new provisions of the Framework Directive become operative, BEREC will be responsible for delivering opinions under Art 7 and 7a. As part of the transition process from ERG to BEREC, arrangements will be set in motion to transform the existing procedure of considering Phase II cases to the procedures required to comply with the new provisions while noting that some aspects of the revised Framework Directive will not come into effect until the required date for national transposition. In advance of this transition, the IRG Article 7 expert team will continue to provide reports as necessary.

3.4. Switching Providers

In 2009, ERG began to consider issues related to the ability of consumers to switch service providers, taking advantage of competition by selecting a service provider which best meets their needs in terms of price and range and quality of service. Issues of consumer protection also arise through the marketing process e.g. through “slamming”. The ability of consumers to switch providers also has a direct bearing on the development of competition, as foreclosure of the market may result from customers being locked into contracts with existing suppliers for lengthy periods.

BEREC will review the current experience of NRAs and identify key principles for facilitating switching and ensuring effective consumer protection in accordance with the new provisions in the draft Citizens’ Rights Directive.

Deliverable: BEREC Report

Deadline: 2nd quarter of 2010

Consultation: Yes