Body of European Regulators for Electronic Communications

BEREC

BoR (17) 202

BEREC views on ITRE proposals introducing a country of establishment principle under the Code

Summary

In its report adopted on October the 2nd, ITRE proposes that general authorisations for ECS providers should be subject to a "country of establishment" regime. ECS providers established in the Union and providing services in more than one Member State would be subject to the general authorisation conditions applicable in the Member State of their main establishment (country of establishment – COE).[1] Article 13(1) of the report states that (unless otherwise provided in the Code), providers would only be subject to the rules applicable in the COE. The COE NRA would be responsible for enforcing the conditions attached to the GA. If the NRA in any "country of destination" (COD) needed to request information from at provider established in another Member State, it would have to send such requests via the NRA in the COE.

BEREC fully shares the European Parliament's ambitions to promote the internal market and reduce the administrative burden on operators. BEREC understands that the proposal to introduce the COE principle is part of this perspective.

Although positively aimed at promoting the single market dimension, the system proposed by ITRE raises concerns due to interpretation and ultimately implementation problems that it might trigger. In particular, BEREC is concerned that this approach, as it is currently proposed, could undermine NRAs' ability to perform their statutory functions under the Code in the countries where the ECS are supplied, ultimately risking undermining the reliability of regulatory protection available to European end users.

Considering the unintended and important consequences that could result from the introduction of the COE principle, BEREC would suggest instead to seek to improve the coordination mechanisms foreseen under the Code and the BEREC Regulation, where BEREC could act as an information sharing portal, making available information on the notification procedures within each Member State as well as a list of undertakings operating within each Member State based on an integration of the registers maintained by each NRA.

What is the General Authorisation?

The general authorisation (GA) refers to a framework of rights and obligations applicable to all ECN and ECS providers in European national markets. Providers covered by the GA, depending on whether they provide networks or services, may only be subject to the rules

[1] The main establishment would in substance be the one where the following cumulative conditions are met – where substantial activities are performed, strategic decisions taken and a significant part of the turnover produced. In case of conflict over the definition of the main establishment, BEREC would act as a mediator and if necessary issue a decision.

listed in parts A to C of Annex I[2] of the Code. These cover a wide range of issues, such as end user protection, administrative charges, obligations to ensure access to emergency services or to provide interconnection of networks and interoperability of services, conditions for enabling legal interception, etc,

The GA regime provides the *maximum* set of categories of obligations to which providers may be subject (i.e. not all rules in parts A to C of Annex I will necessarily apply to all providers in all Member States). It is also the case that some obligations (even ones that are expressed as being fully harmonised) might legitimately be implemented differently depending on the particular nature of the consumer harm in the different national markets.

1. Complexities of cross-border enforcement

On the basis of the provisions proposed in ITRE Report, it can be understood that the NRA responsible for taking enforcement action against an ECS provider pursuant to article 30 would not be the NRA carrying out the investigation or making the breach allegations.

However, where the rules in question are not "binary", not "on/off" (as is the case for the majority of the end user rules applicable to ECS providers under the GA), cross-border enforcement is not straightforward. So, for example, if the rule were that "all publicly available ECS must include their head office address on all written correspondence", then it would be straightforward to enforce without much debate over whether or not the company was compliant. Nevertheless, if the rule were that all publicly available ECS "shall provide the end user with adequate information before and during the switching process..." (as in Article 99(1) of the draft Code) then assessing compliance would become a far more complex exercise as the NRA in the COD would be best placed to determine what is "adequate" for their market.

Furthermore, each of the NRAs in the different CODs would have to familiarise themselves with the rules applicable under the COE general authorisation regime (in the relevant language), and monitor compliance with those, and it would be more complex for the COE NRAs to enforce the applicable national GA framework, ensuring compliance with it by operators active in different Member States.

2. Risk of regulatory forum shopping and penalisation of smaller providers

ITRE's report may imply that the COE NRA would regulate how services are provided in the other Member States where the provider is active. This could result in tactical decisions by providers to establish themselves in jurisdictions with fewer or lighter rules[3] or laxer enforcement.

Indeed, Europe's biggest (pan-EU or multi-territorial) providers would only have to pay any administrative charges in their COE – this could have a disproportionate effect on the smallest (single-country) operators, who in turn would have to bear the bulk of the cost of regulation in their (COD) Member States. Furthermore, many NRAs rely on this to fund their regulatory activities, and could be affected by the disappearance of this particular resource.

[2] Except for parts D and E of Annex I which list the conditions attached to rights of use for radio spectrum and numbers.

[3] Even though the proposal is to fully harmonise the end user protection provisions in Title III, as noted above Annex I parts A-C contain a maximum set of rules that might be applied. And even if Title III is "fully harmonised" there are several areas for unavoidable NRA discretion in its implementation.

The net result could be that the legal regime applicable to both providers and consumers would be defined not by the needs of the national market in question, but by the strategic business decisions of providers.

3. Preventing providers from applying for additional rights in the COD

Article 15 of the draft Code (recasting Article 4 of the Authorisation Directive) requires a provider to be authorised under the GA regime in order to qualify for additional rights (e.g. rights of way, rights to use radio spectrum, rights to apply for number allocations). Under ITRE's proposal, either providers could be barred from applying for such additional rights in the COD, or (if Article 15 were to be amended) the NRA in the COD would be required to grant such rights to a provider even where it could be prevented from having a direct enforcement relationship with it in relation to the underlying ECS/N provided in its territory.

4. The importance of the regulatory relationship

Each NRA will be dealing with local operating companies in their respective national language, and information requests will relate to the functions carried out by each NRA (enforcement, market reviews, etc.) at the national level. Information requests will by definition relate to the national operating company (even if it is part of a wider pan-EU corporate group) because the NRA will be looking at issues which are relevant in their national market.

As a result, the proposal requiring NRAs to request information from stakeholders via the COE NRA would significantly obstruct NRAs' ability to carry out their functions and add to the red tape and cost of regulation, and potentially undermine the efficiency and effectiveness of regulation at the national level.

It is also important to realise that information requests are not binary on-off communications, but are often part of an ongoing dialogue between regulators and stakeholders. These proposals risk slowing down regulators' work and dragging out their own decision-making processes.

Looking at it from the other side, under ITRE's proposals, NRAs in the COEs could have to administer information requests from other NRAs in the COD as a middle-man. From an enforcement perspective, NRAs in some COEs (where operators are established that are active in many other Member States) would be similarly disproportionately burdened by having to deal with information requests and/or allegations of breach about national operators' operating companies in many other countries

5. Risk of regulatory fragmentation *within* individual national markets

In BEREC's understanding, the effect of the proposed rules could be that different providers in a single national market could be subject to different rules, depending on their COE, and consumers in a single national market could be exposed to different forms and levels of protection depending on the provider.

By way of example, in cases of emergency or major catastrophe, an NRA might be unable to enforce national rules against all providers, and maximum permissible contract terms might vary between Member States, and therefore between providers.

For the above-described reasons, even if the rules in the COD and the COE were very similar, the “ex-pat” providers would in practice be subject to slower and less efficient (and less effective, arguably more lenient) regulation. This would create an uneven playing field within individual national markets.