

BEREC views on the double lock veto in the Commission's proposal and ITRE draft Report

The current Framework

With the objective of consolidating the internal market for electronic communications networks and services, the 2002 Framework (Article 7 of the Framework Directive) introduced an obligation on NRAs to notify the European Commission of their intended regulatory measures following a market review. The Commission was given the power to launch a "Phase II" procedure (i.e. express serious doubts on the measure and thereby suspend its adoption by the NRA for up to 2 months) and potentially to veto the NRA's proposed market definition and assessment of Significant Market Power (SMP). NRA measures relating to the proposed regulatory obligations to be imposed on SMP operators (the "remedies") were not covered by this process, as NRAs were considered to be best placed to design appropriate remedies for their national markets.

In the 2009 review of the Framework, Article 7 was amended and a new Article 7a was introduced, aimed at promoting greater consistency around NRAs' choice of remedies. These changes built upon the "Phase II" procedure, extending it to cover remedies (but without a Commission veto power) and giving BEREC a role in issuing an opinion on the Commission's serious doubts (including on remedies). The scrutiny of NRA remedies decisions was thereby increased, as NRAs are required to take utmost account of the Commission's serious doubts, as well as any BEREC opinion. This is the system currently in place.

The legislative proposals

Building on the Commission's current powers to scrutinise NRAs' choice of remedies, Article 33(5)(c) of the draft Code goes further and gives the Commission the power to veto NRAs' proposed remedies.

Unlike the Commission's veto power in relation to market definition and SMP assessment, the veto on remedies is conditional upon a BEREC opinion sharing the Commission's serious doubts.

The draft report by the ITRE Rapporteur supports this approach.

This paper provides BEREC's views on the Commission's and ITRE Rapporteur's proposals. In summary, BEREC believes that the level of scrutiny provided for under the current Framework is appropriate and that no further changes are warranted. Of the 723 notifications made under Articles 7/7a since the current Framework came into force, the Commission launched only 44 Phase II procedures on remedies (6% of the total), almost half of which were withdrawn. The proposed new process described in Article 33 (5) (c) of the draft Code should therefore be deleted.

BEREC analysis

BEREC has serious concerns regarding the proposed expansion of the Commission's veto power to the choice of remedies to be imposed by NRAs in national markets. The current system, as designed by the co-legislators in 2009, has been shown to work well in ensuring

that appropriate remedies, where needed, are defined in way that is tailored to the national context.

Although the proposed Commission veto power would be subject to a prior BEREC opinion sharing the Commission's serious doubts (the "double lock veto"), the attribution to the Commission of decision-making powers over the regulation of individual national markets is *per se* not justified.

- **NRAs are already sufficiently constrained.** The list of possible remedies that NRAs can impose on SMP players in their national markets is already defined exhaustively in the Directives in force (and broadly speaking confirmed in the draft Code). Furthermore, NRA choices are constrained by soft law instruments of which NRAs are required to take utmost account (recommendations, guidelines). In addition, BEREC is tasked with developing, and has developed, common positions outlining best practices derived from the collective experience of its members, which orient NRAs' choices within their market reviews.
- **There is no "problem definition" warranting this shift in the balance of power.** The number of "Phase II" proceedings opened by the Commission is proportionally very small and continually falling. Since 2011, there have been 723 notifications¹, and only 44 Phase II cases launched on remedies (6% of the total); of these 44 notifications, 20 were withdrawn by the NRAs. Whereas 16 Phase II cases on remedies were launched in 2012, only 4 cases were launched in each of the last two years.

Regulatory harmonisation does not mean that the same solutions should be applied throughout Europe and a functioning single market for electronic communication services requires that NRAs are able to apply the common European tools to their national markets in a way most appropriate to their national circumstances. The current system achieves an appropriate balance between this flexibility and a degree of oversight from the Commission and BEREC. The proposed double-lock veto would represent a significant shift in the institutional balance of power, increasing centralised oversight over the choice of remedies, in conflict with the subsidiarity principle.

Given that the NRAs' regulatory practice is already constrained by the Directive, soft law, and BEREC common positions, there is no case for further limiting the NRAs' discretion to adopt remedies depending on national market circumstances which, in turns, the Commission recognises as a fundamental condition in other parts of the draft Code.

BEREC proposals for amendment

Article 33 - Procedure for the consistent application of remedies

1. Where an intended measure covered by Article 32(3) aims at imposing, amending or withdrawing an obligation on an operator in application of Article 65 in conjunction with Article 59 and Articles 67 to 74, the Commission may, within the period of one month provided for by Article 32(3), notify the

national regulatory authority concerned and BEREC of its reasons for considering that the draft measure would create a barrier to the single market or its serious doubts as to its

¹ As of December 2016.

compatibility with Union law. In such a case, the draft measure shall not be adopted for a further three months following the Commission's notification. In the absence of such notification, the national regulatory authority concerned may adopt the draft measure, taking utmost account of any comments made by the Commission, BEREC or any other national regulatory authority.

2. Within the three-month period referred to in paragraph 1, the Commission, BEREC and the national regulatory authority concerned shall cooperate closely to identify the most appropriate and effective measure in the light of the objectives laid down in Article 3, whilst taking due account of the views of market participants and the need to ensure the development of consistent regulatory practice.

3. Within six weeks from the beginning of the three-month period referred to in paragraph 1, BEREC shall, acting by a majority of its component members, issue an opinion on the Commission's notification referred to in paragraph 1, indicating whether it considers that the draft measure should be amended or withdrawn and, where appropriate, provide specific proposals to that end. This opinion shall be reasoned and made public.

4. If in its opinion, BEREC shares the serious doubts of the Commission, it shall cooperate closely with the national regulatory authority concerned to identify the most appropriate and effective measure. Before the end of the three-month period referred in paragraph 1, the national regulatory authority may:

(a) amend or withdraw its draft measure taking utmost account of the Commission's notification referred to in paragraph 1 and of BEREC's opinion and advice;

(b) maintain its draft measure.

5. The Commission may, within one month following the end of the three-month period referred to in paragraph 1 and taking utmost account of the opinion of BEREC if any:

(a) issue a recommendation requiring the national regulatory authority concerned to amend or withdraw the draft measure, including specific proposals to that end and providing reasons justifying its recommendation, in particular where BEREC does not share the serious doubts of the Commission;

(b) take a decision to lift its reservations indicated in accordance with paragraph 1;

~~(c) take a decision requiring the national regulatory authority concerned to withdraw the draft measure, where BEREC shares the serious doubts of the Commission. The decision shall be accompanied by a detailed and objective analysis of why the Commission considers that the draft measure should not be adopted, together with specific proposals for amending the draft measure. In this case, the procedure referred to in Article 32(6) shall apply *mutatis mutandis*.~~

6. Within one month of the Commission issuing the recommendation in accordance with paragraph 5(a) or lifting its reservations in accordance with paragraph 5(b) of this Article, the national regulatory authority concerned shall communicate to the Commission and BEREC the adopted final measure. This period may be extended to allow the national regulatory authority to undertake a public consultation in accordance with Article 23.

7. Where the national regulatory authority decides not to amend or withdraw the draft measure on the basis of the recommendation issued under paragraph 5(a), it shall provide a reasoned justification.

8. The national regulatory authority may withdraw the proposed draft measure at any stage of the procedure.