

BEREC views on information gathering powers

Article 20 of the draft Code grants national regulatory authorities (NRAs), other competent authorities and BEREC the power to request data from undertakings providing electronic communications networks and services associated facilities, or associated services. Article 21 of the draft Code determines the information that can be requested under the general authorisation, for rights of use or the specific obligations. These provisions are linked to Article 29, which requires Member States to lay down rules on penalties to be imposed by NRAs and other competent authorities.

In its report, the ITRE Rapporteur does not introduce substantial changes to Article 20 and 21 but, in Article 29, deletes the obligation on Member States to lay down rules on penalties for infringements of any relevant legally binding decision of the NRA or other competent authority.

NRAs, other competent authorities and BEREC should be empowered to gather all information necessary to fulfil their tasks

Obtaining the relevant information is essential for NRAs to understand the national market situation and its developments and, by extension, to enable them to regulate (or de-regulate) appropriately and proportionately, based on robust evidence. In this regard, ensuring adequate data collection powers is critical for NRA effectiveness. The information collected through this process could also be used to empower end-users in making informed choices. Moreover, as proposed in relation to BEREC's tasks, BEREC could act as a hub at the EU level for information relating to the development of the digital sector.

The draft Code provides NRAs with the power to gather information only from electronic communication service (ECS) providers – and from undertakings that provide associated facilities or associated services-. This scope should be broadened to allow NRAs and other competent authorities at national level to request all information necessary to fulfil their tasks under the Code, not just from ECS providers (and associated entities) but also from any other relevant player in the market such as, for instance, the providers of other services (e.g. media services) that are increasingly been offered in a bundle with ECS or potential co-investors in relation to which NRAs might wish to exercise their powers under the new Article 74, or providers of services delivered over the Internet. The absence of such powers, and the requisite corresponding sanctions for non-compliance, could jeopardize NRAs' capacity to determine whether a service constitutes an ECS in the first place, or to proceed to the effective implementation of the electronic communications rules on matters such as net neutrality, market analysis, consumer protection or margin squeeze surveillance.

In this regard, it should be clear that the power to request information should also extend to requiring an undertaking, within an appropriately specified period, to start collecting information that it might not already be recording, but which is considered necessary for an NRA to carry out its functions (e.g. in relation to any mapping obligations).

NRAs should be empowered to gather information to contribute to BEREC's work

BEREC's work relies on information provided by NRAs. Under the current Framework, NRAs have powers to request information relevant to their own activities, but these powers do not extend to information necessary to enable BEREC to carry out its tasks. This is the case, for example, in relation to information requests issued by NRAs on behalf of BEREC for the implementation of Regulation 2120/2015. Except where NRAs' enforcement powers under national legislation happen to be broader than under the Framework, some NRAs have had to rely on stakeholders' voluntary cooperation in order to be able to provide the relevant information to allow BEREC to carry out the tasks entrusted to it relating to the application of "roam like at home".

The draft Code proposes that BEREC be empowered to request information directly from undertakings. At first glance this might appear efficient, but in practice this raises serious enforcement and coordination issues both for the NRAs and for BEREC, including from the potential overlap between BEREC requests (required for BEREC purposes) and NRA requests (required to enable the NRA to carry out its own national functions), as well as greater administrative costs and burden for stakeholders. This should therefore be rationalised, with NRAs expressly being given the power to gather information necessary to enable BEREC to carry out its statutory functions (with such information also being capable of being used by NRAs in the discharge of their own functions). In addition, any provisions relating to the proposed BEREC powers to request information directly from undertakings should be deleted.

NRAs should be granted all the necessary sanctioning powers to enforce the Code

Related to this, NRA powers (or those of other competent national authority) to issue penalties (including periodic penalties) and fines should apply to the enforcement of any relevant legally binding decision of the NRA or other competent authority.

Proposed amendments

Art 20(1)

20. 1. Member States shall ensure that ~~undertakings providing electronic communications networks and services, associated facilities, or associated services~~ provide all the information, including financial information, necessary for national regulatory authorities **and**, other competent national authorities and BEREC **have the power to request from all relevant persons all the information, including financial information, necessary for them to carry out their regulatory tasks as specified in** to ensure conformity with the provisions of, or decisions made in accordance with this Directive.

In particular, national regulatory authorities shall have the power to require those undertakings to submit information concerning future network or service developments that could have an impact on the wholesale services that they make available to competitors. For that purpose, relevant persons include undertakings providing electronic communications networks and services, associated facilities, associated services, or any other undertaking or person who appears to competent authorities to have information required by them for the purpose of carrying out those regulatory tasks. Member States shall ensure that national regulatory authorities have the power to require the provision of information requested by BEREC, to facilitate the fulfilment of its responsibilities under Union law.

~~They may also require information on electronic communications networks and associated facilities which is disaggregated at local level and sufficiently detailed for the national regulatory authority to be able to conduct the geographical survey and to designate digital exclusion areas in accordance with Article 22. In accordance with Article 29, national regulatory authorities may sanction undertakings deliberately providing misleading, erroneous or incomplete information.~~

~~Undertakings with significant market power on wholesale markets may also be required to submit accounting data on the retail markets that are associated with those wholesale markets.~~

~~National regulatory authorities and other competent authorities may request information from the single information points established pursuant to Directive 2014/61/EU on measures to reduce the cost of high-speed electronic communications networks.~~

Undertakings shall provide such information promptly upon request and in conformity with the timescales and level of detail required as may be specified by the NRA. The information requested shall be proportionate to the performance of that task. The competent authority shall give the reasons justifying its request for information and shall treat the information in accordance with paragraph 3. In accordance with Article 29, Member States shall ensure that competent authorities have the power to sanction any relevant person and/or undertaking from whom they have requested information where that person unreasonably fails to provide the information within the timescale specified by the competent authority, or provides information that the relevant person knows or ought to have known to be false, misleading, erroneous or incomplete or the relevant person and/or undertaking is reckless in the provision of information that is false, misleading, erroneous or incomplete.

Justification

The proposed amendments aim to broaden the scope of information gathering powers to allow NRAs and other competent authorities at national level to request all information necessary to fulfil their tasks under the Code, not just from ECS providers but also from any other relevant player in the market.

While Article 20 lays down the general information gathering power, the concrete examples are reflected in Article 21. Therefore, these paragraphs should be deleted to avoid overlap (information concerning future network or service developments that could have an impact on the wholesale services) or moved to Article 21 (geographical survey).

Sanctions for providing misleading, erroneous or incomplete information should cover both intentional and recklessness behaviours. Also, information should be provided in a timely manner to the extent possible.

Article 20(3)

20.3 Where information is considered confidential by a national regulatory or other competent authority in accordance with Community Union and national rules on business confidentiality or the protection of personal data, the Commission, BEREC and the national regulatory authorities concerned shall ensure such confidentiality. In accordance with the principle of sincere cooperation, national regulatory authorities and other competent authorities shall not **automatically** deny the provision of the requested information to the Commission, to BEREC

or to another authority on the grounds of confidentiality or the need to consult with the parties which provided the information. When the Commission, BEREC or a competent national authority undertake to respect the confidentiality of information identified as such by the authority holding it, the latter shall **endeavor to** share the information on request for the identified purpose ***subject to first informing or consulting*** without having to further consult the parties who provided the information.

Justification

Article 21(3) requires that national regulatory and other competent national authorities inform undertakings when requesting information for the specific purpose for which this information is to be used. The possibility to share this information without informing them would contradict this provision.

Article 21

21.1. Without prejudice to ***any information requested in conformity with Article 20 or*** information and reporting obligations under national legislation other than the general authorisation, national regulatory and other competent national authorities may **only require** undertakings to provide information under the general authorisation, for rights of use or the specific obligations referred to in Article 13(2) that is proportionate and objectively justified for ***in particular***.

- (a) systematic or case-by-case verification of compliance with condition 1 of Part A, conditions 2 and 6 of Part D and conditions 2 and 7 of Part E of Annex I and of compliance with obligations as referred to in Article 13(2);
- (b) case-by-case verification of compliance with conditions as set out in Annex I where a complaint has been received or where the competent authority has other reasons to believe that a condition is not complied with or in case of an investigation by the competent authority on its own initiative;
- (c) procedures for and assessment of requests for granting rights of use;
- (d) publication of comparative overviews of quality and price of services for the benefit of consumers;
- (e) clearly defined statistical , **reports and studies** purposes;
- (f) market analysis for the purposes of this Directive **including, without limitation, data on the downstream or retail markets associated with or related to the markets which are the subject of the market analysis;**
- (g) safeguarding the efficient use and ensuring the effective management of radio spectrum and of numbering resources;
- (h) evaluating future network or service developments that could have an impact on wholesale services made available to competitors, on connectivity available to end-users or on the designation of digital exclusion areas;
- (i) **conducting geographical surveys;**
- (j) **responding to a reasoned request for information made by BEREC;**

~~The~~ ***With the exception of the*** information referred to in points **(c)**, **(a)**, **(b)**, **(d)**, **(e)**, **(f)**, **(g)**, and **(h)** of the first subparagraph, ***the information referred to in articles 20 and 21*** may not be required prior to, or as a condition for, market entry.

Justification

The list of examples of information gathering powers that NRAs have under Article 21 should be non-exhaustive to ensure consistency with the general powers granted under Article 20.

~~21.4. National regulatory or other competent authorities may not duplicate requests of information already made by BEREC pursuant to Article 30 of Regulation [xxxx/xxxx/EC(BEREC Regulation)]~~

Justification

In order to reduce the administrative burden on undertakings and to help ensure coordination, BEREC should rely on NRAs to gather information necessary to carry out its statutory functions.

Article 29

29 (1) Member States shall lay down rules on penalties, fines and periodic penalties, where necessary, applicable to infringements of national provisions adopted pursuant to this Directive ***or of any relevant legally binding decision of the national regulatory or other competent national authority*** and shall take all measures necessary to ensure that they are implemented. Within the limits of national constitutional law, national regulatory and other competent authorities shall have the power to impose such penalties. The penalties provided for must be appropriate, effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by [date for transposition] and shall notify it without delay of any subsequent amendment affecting them.

Justification

Powers to issue penalties and fines should also apply to the enforcement of relevant legally binding decisions of the NRA or other competent authority. We propose to restore the drafting proposed by the Commission.