

BEREC views on the draft report elaborated by ITRE Rapporteur Evžen Tošenovský on the proposal for a Regulation of the European Parliament and of the Council establishing the Body of European Regulators for Electronic Communications

BEREC takes note of the Proposal for a Regulation of the European Parliament and of the Council establishing the Body of European Regulators for Electronic Communications (BEREC) and of the relevant draft report elaborated by ITRE Rapporteur, Mr Evžen Tošenovský and would like to provide below some preliminary comments regarding the main features of the Rapporteur's document.

This does not preclude BEREC's future positioning on the subject, as the proposals around the sectoral institutional layout shall be read in conjunction with all relevant elements in the entire Commission's legislative proposals, and the BEREC Regulation shall therefore be examined together with the relevant provisions in the European Electronic Communications Code.

BEREC views on ITRE Rapporteur Evžen Tošenovský's draft report on the BEREC Regulation

BEREC welcomes the Rapporteur's draft report amending the Commission's proposals for a new BEREC Regulation. The Rapporteur has recognised the value and successful track record of the current independent, two-tier structure of the BEREC system rooted in its constituent national regulators, rejecting the bureaucratic agency model put forward by the Commission.

The Rapporteur is building on BEREC's successes, not trying to rebuild it on different foundations.

- BEREC has provided an effective forum for working through differences in national markets (including in terms of competitive conditions, historical network deployment choices, consumer preferences and behaviours, human and physical geography) and reducing the scope for unwarranted (as opposed to justified) differences in regulatory approach. The evidence shows that the problem of regulatory inconsistency is very small and shrinking (e.g. the number of Phase II cases opened by the Commission has fallen year on year, from 19 in 2012 to only 4 during 2015 and 4 in 2016, when one case was carried over from 2015).
- BEREC has a strong track record in delivering on the single market (e.g. the 2016 net neutrality guidelines, and more recently its advice to the Commission on the implementation of the new international roaming rules). Indeed, the Commission's own evaluation of BEREC in 2013 found it to be working very well.¹

¹ 'Study on the evaluation of BEREC and the BEREC Office' by PwC (September 2012)
http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=1403

The Rapporteur has recognised the importance of BEREC's independence.

- As an expert advisor to the Commission, the European Parliament and the Council, BEREC's independence from Member States and the EC institutions remains central to its effectiveness and value-added, as recently noted by the European Parliament.²
- The Rapporteur has preserved this by rejecting Commission proposals to convert the regulatory network into an EU decentralised agency, as well as proposals that would have seen the Commission exercise a degree of control over the appointment and functions of BEREC officials, notably its Director, and the membership of expert working groups.
- The Rapporteur's approach, together with the Commission's own proposals in the draft Code to harmonise a minimum set of competences for independent NRAs, should enhance regulatory harmonisation across the areas covered by the Framework. Together with the strengthening of provisions around the independence of NRAs, this should make it easier for NRAs to participate fully in the work of BEREC.

The Rapporteur is seeking to protect BEREC's rootedness in its constituent national regulators.

- BEREC's purpose is to work towards more harmonised regulatory approaches while ensuring regulation works on the ground in the different markets. Its main strength (and what distinguishes it from EU agencies) is that its work is done by its member NRAs, ensuring the rootedness of its outputs in the realities of the national markets.
- This enables BEREC to contribute to European single market initiatives, helping to maximise their effectiveness in practice (e.g. most recently in relation to the net neutrality guidelines or the implementation of the international roaming provisions under the TSM Regulation).
- The Rapporteur's retention of the two-tier model, where national regulators are responsible for the production of BEREC outputs and retain control of BEREC's external representation, is key to BEREC's continued effectiveness.

The Rapporteur has taken a rational and targeted approach to defining BEREC's tasks.

- BEREC welcomes the Rapporteur's simplification of BEREC's tasks, which do not need to be itemised as proposed by the Commission.
- BEREC also welcomes the Rapporteur's proposal for BEREC to play a role in the preparation and adoption of "legal acts" in the field of electronic communications. This should help ensure that legislative proposals in the field of electronic communications are as robust and well informed as possible so that the legislative negotiations can be focused and progress quickly.

²<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2013-0454+0+DOC+PDF+V0//EN> and BEREC's statement on the independence of NRAs: [http://berec.europa.eu/files/document_register_store/2012/11/BoR_\(12\)_119_BEREC_statement_on_independence_of_NRAs.pdf](http://berec.europa.eu/files/document_register_store/2012/11/BoR_(12)_119_BEREC_statement_on_independence_of_NRAs.pdf) .

Still, BEREC is not perfect, and it has identified further improvements that could be made to the Rapporteur's draft Report on the BEREC Regulation

It is right that BEREC should continue to challenge itself to be more effective in how it brings together the experiences and knowledge of its members, in how it advises the EU institutions and contributes to the achievement of the objectives they set, and in how it engages with stakeholders. While the Rapporteur's proposals go towards this, we can identify some further amendments to the Commission's proposals, including ensuring that the Commission (not just NRAs) is required to take utmost account of BEREC advice, further reducing the administrative overhead associated with the governance of the BEREC Office, aligning the provisions on the governance of BEREC (Board of Regulators) and the BEREC Office (Management Board), rationalising the BEREC and BEREC Office functions in relation to information gathering, external communications and external relations, and ensuring that EEA/EFTA and other third countries are able to fully participate in the work of BEREC.

These and other improvements are further detailed below.

BEREC goals and tasks

BEREC welcomes and fully supports the amendments to its goals and tasks, notably:

- The new wording of art. 1.3, together with the new paragraph 3b, which confirms BEREC's current bottom-up approach by providing that "*BEREC shall draw upon expertise available in the NRAs*" and that "*each Member State shall ensure that its NRAs have adequate financial and human resources to participate in the work of BEREC*";
- The reformulation of the BEREC tasks in revised art. 2; aligning art. 2 to the list of BEREC duties as in the BEREC Regulation currently in force, removing the detailed reference to individual BEREC duties stemming from the draft Electronic Communications Code and introducing instead an open-ended reference to any other tasks that might be conferred on BEREC by legal acts of the Union;
- The deletion of art. 2.1 b), regarding binding powers for BEREC³ and the consequent deletion of the provisions establishing a Board of Appeal;
- The new paragraph 2.e.7 enabling the European Parliament to invite the BEREC Chair or Vice-Chair to make a statement or answer questions in the Parliament, which should significantly improve BEREC's accountability;
The new BEREC task in new art. 2.1 ag, to assist the Commission in preparing and adopting legal acts in the electronic communications field.

Areas for improvement

- We would recommend keeping the provision in the current BEREC Regulation (art. 3.3) whereby "*NRAs and the Commission shall take the utmost account of any opinion, recommendation, guidelines, advice or regulatory best practice adopted by BEREC*" which, in the current proposal, is restricted to NRAs only.

³ Concerning the identification of transnational markets and the definition of a contract summary template.

- In relation to BEREC duties, we would suggest that BEREC be tasked with looking into the dynamics of the whole digital market and advise on any relevant regulatory impact, rather than simply the dynamics of the electronic communications sector (new art. 2.1 point af).
- Some adjustments might be useful regarding the proposed powers of BEREC and the BEREC Office to request, under certain circumstances, data directly from undertakings (art. 30.4.1) with the additional stipulation that NRAs would not be able to ask them again. Indeed, we do not see a role for the BEREC Office to issue requests of its own initiative, and the same could be mentioned as regards the envisaged Office's duty to collect information from NRAs and exchange and transmit it in relation to the tasks in art. 2. The BEREC Office should rather support any data requests from BEREC, e.g. by assisting with/managing the issuing of requests and processing responses. Furthermore, we would recommend that existing NRA enforcement powers under the Code be amended to include the enforcement of information requests on behalf of BEREC.
- On the power to assist the Commission in relation to draft sector legislation, BEREC believes that this role could even be strengthened if BEREC were to issue an opinion ahead of any sector specific legislative proposals which the Commission should duly consider. Any ambiguity around BEREC's role in this context should be removed by deleting the words "where relevant".

BEREC organization (Board of Regulators, Contact Network and Working Groups)

BEREC welcomes and supports the amendments to its organization, notably:

- the retention of its distinguishing features, including the current bottom-up approach and the central role and form of the Board of Regulators (BoR).
- The formalization of the Contact Network (CN) role (art. 2f), which correctly reflects its support function towards the BoR.
- The formalization of the Working Groups (art. 2g – though we would recommend that they remain known as "*Expert Working Groups*"), which reflects their current set-up and operation. This preserves the NRAs' prerogative in identifying their own experts for the relevant Expert Working Groups⁴.

Areas for improvement

- Art. 2b. requires the identification of the NRA "with primary responsibility for overseeing the day-to-day operation of the markets for electronic communications networks and services" and to cases where a Member State has more than one NRA responsible for implementation of the Code. In such cases, the Commission's proposals (not amended in the draft report) provide that NRAs themselves shall agree on a common representative in the BoR. The same approach is reflected in art. 4. 1, sub-para 2 as concerns NRAs' participation in the Management Board. We understand that this formulation draws from the current legislative framework. However, under art. 5 of the

⁴ In that regard, it would be useful to reflect this precision in recital 17 by removing the precision that the BoR should be in charge of appointing the members of the expert working groups.

draft Code, the core regulatory duties are assigned to each Member State's independent NRAs, meaning that there will be only one NRA per Member State⁵ and that this NRA must be independent from other bodies (including the government). It would seem logical that each independent NRA, i.e. the body entrusted with the relevant set of sectoral institutional duties set out in the Code in each Member State, be the relevant national authority participating in BEREC.

- Art. 2d, taken from art. 4.6 of the current BEREC Regulation, envisages that extraordinary meetings can be convened also at the initiative of the Commission. We do not believe this is appropriate, seeing as the Commission is just an observer in, not a member of, the BoR.
- While we fully share the need for including in the Rules of Procedure the contents identified in the new art. 2.d.4, we would recommend making it clear that this list is not exhaustive.
- Related to this, some of the provisions concerning the Contact Network and Working Groups could be simplified and made more general in order to retain the necessary flexibility; in particular: i) restricting to one the number of representatives from each NRA in the Contact Network (art. 2f), would be unnecessarily constraining given the level of turnover of NRA experts; ii) the proposed introduction of annual declarations of commitment and interest not only for BoR and Management Board (MB) members and alternates, as is currently is the case, but also for CN and Working Group members is excessively burdensome, given that these individuals are not decision-makers and these forums do not exercise decision-making powers. In any event, we believe these aspects would be more appropriately dealt with in rules of procedure.
- In art. 2g, it could be clarified that the BEREC Office's staff, in line with proposed new art. 2 h⁶ and the two-tier approach adopted in the report, support Working Groups and take part in the relevant activities upon the decision by the Working Group's co-chairs, but are not classified as "members" of the groups. The same applies to the Commission's experts, who can participate as observers, but not as members.

The role of the EEA EFTA Countries' NRAs (namely Norway, Iceland and Liechtenstein)

- Art. 4.3 of the current BEREC Regulation, which grants EEA and accession Country' NRAs observer status in BEREC, has created problems for the process of incorporation of the relevant *acquis* into the EEA Agreement, given that in the current Regulation the EU side unilaterally decides upon the terms of participation in BEREC, precluding any negotiations on the need for an adaptation text.
- Art. 26.2 of the Commission's proposal is aligned with the standard provision concerning third countries' participation in a number of EU acts, thus allowing third

⁵ Art 5.1 changes the plural in the current art 3FD for the singular: "the national regulatory authority shall be responsible of the following tasks". Also, art 8.1 establishes that any entity defined as NRA shall be politically independent.

⁶ The provision proposed to be re-inserted by the Rapporteur recovers the BEREC Office's tasks outlined in art. 6 of the current BEREC Regulation and supplements them with a wider role not only to the BoR, but also to the MB, CN and EWGs, as well as within BEREC public consultations.

country NRAs to fully participate in BEREC activities. BEREC would therefore urge the European Parliament to revert to Commission language on this point.

Areas for improvement

- In order to clarify that the participation of third country NRAs relates to both BEREC and the BEREC Office, art. 26.2 could be aligned with recital 23, as amended by the Rapporteur. are open.
- In addition, art. 2b.5 envisions that any third country NRA invited by the BoR shall have observer status, and the same applies to the Management Board according to art. art. 4.1a. This raises some concerns in relation to NRAs from the EEA/EFTA states in particular, as noted above, as it is not clear whether their participation should be negotiated between the contracting parties (i.e. the EU and EEA EFTA states) or if it would depend instead on an invitation by the Board of Regulators.

The administrative and management structure of the BO: Management Board and Director

BEREC welcomes the Rapporteur's amendments to the administrative and management structure of the BEREC Office, notably:

- The improvements introduced by the Rapporteur regarding the membership in the MB retaining 1 voting member from the Commission, in line with the Regulation currently in force, rather than 2 as proposed by the Commission.
- The amendments to the processes for extending the appointment of and removing the Director (new art. 9a and relevant deletions in art. 22), which no longer involve a role for the Commission (in defining a short list of candidates from which the MB can select the Director and in relation to the decisions to extend the appointment of or remove a Director from office);
- The confirmation of the current BEREC Office's role as the provider of administrative and professional support to BEREC, and the clarification of its duties (for instance, by formalizing the BEREC Office's role in providing technical assistance to Working Groups, upon the decision of the co-chairs, as well as during public consultations).

Areas for improvement

- While we welcome the reduction from 4 mandatory MB meetings a year to 2 mandatory MB meetings a year, (art. 7.3), we would recommend this be further reduced to one MB meeting per year. This would reduce the administrative burden on BEREC in relation to its management and oversight of the BEREC Office; in this respect other institutional experiences would deserve to be looked into, e.g. by granting the MB the right to establish a sub group, entrusted with the MB's tasks. Further improvements could be achieved by further fostering the e-clearance tool to adopt documents under the MB's responsibility.
- Art. 6.3 anticipates the possible renewal of the term of office of the Chair and Vice Chair of the MB, which leads to an inconsistency with the term of office for the Chair and Vice Chair of the BoR. For the sake of efficiency, and given that the governing

bodies of BEREC and the BEREC Office are the same (with the exception of the Commission's full membership in the latter, the terms of office of the Chair and Vice Chair of the BoR and the Management Board should be coherent and aligned to Art. 2c1.

- While some MB competences could effectively be delegated to the Director (e.g. around HR issues), any decision by the Director in relation to the establishment of local offices should require the prior approval of the MB and of a multi-annual plan showing the impact of such a decision in terms of personnel allocation and budget.
- Related to that, an amendment is also required to art. 9.4 of the Commission's proposal which provides that the Director is the legal representative of BEREC. This would be inconsistent with the Rapporteur's restoration of the two-tier model.

The Rapporteur has empowered both BEREC and the BEREC Office to perform external communications (art. 27a.2) and external relations (art 26.3 and recital 24) functions, but these should be limited to BEREC (with the support of the BEREC Office), as the BEREC Office's sole purpose is to support the operation of BEREC.