Body of European Regulators
for Electronic Communications
BEREC

BEREC Papers on the review

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Explanatory note

On 14 September 2016, the European Commission published its Connectivity package which included notably a proposal for a European Electronic Communications Code and for a new BEREC Regulation.

On December 2016, BEREC first published a high-level opinion[1] providing a general evaluation of the Commission's proposals and assessing some key subjects more in-depth (scope of the regulation, definition of the ECS and end-user provisions, access regulation and governance issues). In a two-step approach, BEREC then focused on a comprehensive analysis of the proposals to provide its technical contribution in the legislative process.

Meanwhile, the discussion of the Commission proposals made its way at the European Parliament and the Council. During the last six months, the Council has proceeded, at an expert level, with an article by article analysis of the draft Code.

At the European Parliament, the two rapporteurs Ms Pilar del Castillo and Mr Tošenovský released the draft ITRE reports on the Code and BEREC Regulation respectively. In addition, nearly two thousands amendments have already been tabled on the draft Code and draft BEREC Regulation. At this stage, compromise amendments will be elaborated and tabled before the end of June. The ITRE Committee is expected to adopt its reports on the Code and BEREC Regulation on 11 July.

In order to provide its contribution to the legislative debate, BEREC is now releasing a series of short papers focusing on the following specific review-related topics:

- The forced step-back of regulation
- Non-competitive oligopolies
- Market analysis
- Symmetric regulation
- Co-investment
- Vertically separate undertakings
- Double lock
- Duration of spectrum rights
- Implementing acts on spectrum
- Peer review
- Information requests (notably on OTTs)
- Notification process and administrative charges
- BEREC views on ITRE draft report on BEREC Regulation

Each paper puts into contrast the current framework and the changes proposed by the Commission's draft and by the ITRE draft reports, ending up with proposals for amendments to the Commission's proposal.

As an expert body, BEREC is pleased to provide the co-legislators with any further support and expertise they may need. In this respect, it remains fully available to them and may proceed with further analyses within the legislative process.

[1] http://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/6615-berec-high-level-opinion-on-the-european-commissions-proposals-for-a-review-of-the-electronic-communications-framework

Promoting investment, protecting competition, and preserving the integrity of the SMP framework

Competition drives investment

BEREC welcomes the Commission's explicit acknowledgment that competition promotes investment. The regulation of national markets by NRAs remains important in ensuring fair competition, ultimately to the benefit of European consumers.

However, the draft Code contains a series of restrictions on NRAs' ability to promote competition, in the name of incentivising investment, which creates a risk that connectivity is pursued to the detriment of both competition, and, ultimately, investment. This is exacerbated in the draft ITRE report. BEREC's analysis of these proposals is collected in four papers on access regulation[2] together with an earlier BEREC paper on non-competitive oligopolies, which address the high-level concerns described in this paper and also include drafting amendments. In brief, competition and investment are equally important objectives which can be pursued jointly, and should not be pursued at each other's expense.

Making it harder to pass the 3 criteria test (paper on market analysis, point 1)

The restrictions begin with the steps NRAs must follow to determine whether or not a market is susceptible to ex ante regulation. The Commission's proposals make it harder for NRAs to pass the so-called "3 criteria test" by raising the evidentiary bar for finding a market susceptible to ex ante regulation (Article 65), and the draft ITRE report goes further still (AM 117), removing the presumption on which NRAs can rely that the 3 criteria are met even for markets identified by the Commission as being susceptible to regulation. This would also risk rendering the Commission's Recommendation on Relevant Markets meaningless, and contributing the fragmentation of the European market.

Lack of clarity around NRA powers to regulate non-competitive markets (paper on market analysis, point 2)

Neither the Commission's proposals nor the draft ITRE report have seen fit to put beyond a doubt NRAs' power to address consumer harm where there are non-competitive non-collusive oligopolies (as explained in the paper on non-competitive oligopolies in the Electronic Communications Code), and both the Commission and the ITRE drafts propose to remove NRAs' power to regulate non-competitive retail markets altogether (deletion after Article 91), even where wholesale remedies are insufficient to address retail competition concerns.

The forced stepping back from regulation (papers on co-investment; vertically separate undertakings; symmetric obligations)

A number of provisions proposed by the Commission and sanctioned by the draft ITRE report would require the removal of or forbearance from regulation based not on robust economic analysis but on rigid assumptions defined in the draft Code. For example:

- The proposal to limit NRAs' ability to effectively regulate "wholesale only" undertakings under Article 77 (even when they are potential monopolies which could be charging inefficient prices) (paper on vertically separate undertakings),

[2] see papers on co-investment; market analysis; vertically separate undertakings; symmetric regulation.

- The deregulation of certain co-investments under Article 74 (on the basis of "offers" whether or not they are taken up, and without regard to the nature of the co-investment, the extent to which it creates new monopolies or extends existing ones, or whether it contains effective competitive guarantees similar to the ones ensured by ex ante regulation) (paper on co-investment), and
- The effective narrowing of existing NRA powers to impose symmetric regulation under Article 59 (paper on symmetric regulation), which could prevent NRAs from intervening effectively to avoid localised service bottlenecks, or in some cases inefficient network element duplication.

Despite explicitly recognising the importance of the integrity of the SMP framework in public statements and in its explanatory memorandum to the draft Code, the Commission contradicts this principle in the draft Code by proposing deregulation outside of the market analysis process. The draft ITRE report seems to follow the same line, and to want to create a separate framework for the regulation of "very high-capacity networks" as an exception to the SMP framework. BEREC disagrees with this approach, which undermines the principle of technology neutrality and introduces substantial regulatory uncertainty by anchoring legal provisions to a vague and aspirational definition of "VHC" networks.

While the overarching goal of the Framework remains to gradually rein back ex ante regulation as competition becomes established across national markets[3], in practice these proposals risk setting the clock back by reinforcing market power and making it more difficult for NRAs to tackle it, and extending the lifetime of ex ante regulation rather than hastening its removal. In any event, there are likely to remain permanent bottlenecks in the market, and technological change will always have the potential to generate new competitive distortions (e.g. the effect of fibre in some Member States on the competitive environment developed under LLU[4]). The proposed forced stepping back from regulation would pose a risk not only to competition and investment but to end users who could see a reduction in choice and quality, and an increase in prices.

Regulation is not the enemy of investment - but regulatory uncertainty is

Regulation is not the enemy of investment, and deregulation is not the panacea that will unleash the significant sums of capital needed to meet the Commission's ambitious political targets for a Gigabit society. In fact, just as over-regulation or disproportionate regulation can undermine investment incentives for both incumbents and new entrants, so can the reduction of competitive pressure and targeted pro-competitive regulation undermine the very incentives and opportunities for investment the Commission wishes to promote.

Unpredictable market review timetables (paper on market analysis, points 3, 5, 6 and 7)

Regulatory stability is key to incentivising investment, and the Commission's proposals to extend the period between market reviews from 3 years to 5 years, which BEREC supports, is evidence of the importance it gives to regulatory stability. However, the draft ITRE report

[3] The idea was for the 2002 Framework to provide an intermediate phase towards an anticipated future situation where the telecommunications market would be sufficiently mature to allow it to be governed solely by general competition law: see Council's statement of reasons of 20 July 2001, OJ [2001] C337/15.

[4] In France, regulated physical access to FTTH networks has been in place since 2008. While building on the competitive heritage of physical LLU (ongoing geographical extension of physical access, constitution of backhauling networks assets…), it has enabled co-investment in physical access to new networks.

(AM 118, 119) pull in the opposite direction, by removing the predictability of market review timetables, allowing regulatory obligations to be amended without a market review, and causing regulatory obligations to automatically lapse at the end of a market review cycle. These proposals would unpick regulatory certainty in ways that would ultimately undermine the stability of the regulatory landscape, acknowledged by industry and regulators as a key pre-requisite for investor confidence.

Regulatory uncertainty would ultimately hurt competition, and, by extension, investment, undermining the very connectivity objectives to which all three EU Institutions have agreed.

Tying the hands of NRAs is not the answer

Restrictions on choice of remedies (paper on double lock, and paper on market analysis, point 4)

The regulatory compact of the Framework is based on the notion that national markets need national regulation, albeit based on a common set of EU-wide regulatory principles. Thus, NRAs follow principles of EU competition law, supplemented by EU-level guidance from the Commission, in carrying out the economic assessments of their national markets. The Framework provides a menu of regulatory remedies, and these are complemented by Commission recommendations and BEREC common positions, aimed at ensuring consistent high-quality regulation across Europe, and addressing unwarranted variations in regulatory responses between national markets.

But despite acknowledging the importance of subsidiarity and of equipping NRAs with the appropriate tools to address the specific circumstances of their national markets, the Commission (in Articles 3(3)(f), and 71(1)) is seeking to restrict NRAs' ability to select appropriate remedies, by proposing to hardwire the principle (which BEREC otherwise supports) of the hierarchy between "physical" access and other access remedies, and by over-prescribing the application of the proportionality test. This over-prescription is also picked up by the draft ITRE report (e.g. in AM 120). Furthermore, the Commission (in Article 33) (supported by the draft ITRE report) is also proposing to subject NRAs' choice of remedies to further scrutiny and, ultimately, to a Commission veto.

These proposals risk undermining the successful promotion of competition across Europe, which has delivered real benefits to consumers and has been a major driver of new investment.

BEREC views on non-competitive oligopolies in the Electronic Communications Code

In this paper, BEREC proposes amendments to the Electronic Communications Code aimed at ensuring NRAs can address consumer harm arising from non-competitive oligopolies. This paper is without prejudice to BEREC´s future positioning on other elements of the legislative proposal, and to other articles which might be relevant to the regulation of wholesale access. Also not addressed further in this paper is the topic of numerous subnational markets, which is relevant in several member states and deserves attention.

Not all oligopolies are competitive

In the draft Code proposals, the Commission has preserved the general principle of addressing and remedying market failures through SMP regulation. However, in several Member States, fixed markets once characterized by single dominance are evolving towards oligopolistic or duopolistic market structures. Indeed, recently senior EU official Anthony Whelan publicly acknowledged that most EU countries will soon have a duopoly in the fixed-broadband market.[5]

As was mentioned in the BEREC report on oligopoly analysis and regulation[6], not all oligopolies raise competition issues, and therefore oligopolies are not necessarily problematic. Oligopolistic market settings are only of concern when they risk resulting in consumer harm/welfare loss, thus requiring regulatory action to address evident or potential market failures. Non-competitive oligopolies are either characterized by joint dominance, where tacit collusion is taking place, or other situations where there is no such coordination and where the market structure might not result in effective competition. The latter situation corresponds to those oligopolistic markets characterized by unilateral effects arising in the absence of explicit collaboration or tacit collusion. Unilateral effects arising from non-competitive oligopolies can lessen competition and translate into prices that are consistently and significantly above the competitive level, ultimately to the detriment of the end-user.

The draft Code does not address non-competitive oligopolies of this sort and the Commission has argued that as a matter of principle access regulation in oligopolistic markets should be minimal. However, this blanket approach creates the risk that NRAs will not have adequate tools to address competition concerns in concentrated markets. Ultimately this leads to higher prices and lower investment, innovation and consumer welfare.

In the related area of merger assessments, the Commission has already recognized that single and joint dominance are not the only forms of competitive harm that might arise. Indeed, in 2002 it adapted its merger assessment methodology to take into account any significant impediment to effective competition (SIEC) likely to result from the proposed merger, including through considering unilateral effects which are not captured under joint dominance. While a direct application of the SIEC test to the market review process might not be appropriate, it

[5] Mlex market insight (2017), ”Beware attempts to curb telecom oligopolies in EU, Whelan warns”, 25 January 2017.

[6] BEREC (2015) BoR (15) 195 Report on oligopoly analysis and regulation. http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/5581-berec-report-on-oligopoly-analysis-and-regulation

nonetheless signals the recognition of a broader range of causes of non-competitive market outcomes.

Regulators need clear powers to address non-competitive oligopolies

As telecommunication markets evolve from monopolies to oligopolies, it might no longer be possible to find SMP within the current SMP framework. Despite the absence of an SMP finding based on single or joint dominance, competition might nonetheless be ineffective, leading to inefficient market outcomes. In such cases NRAs might be unable to impose remedies. This situation should be prevented from occurring under the Code.

For example, where each of two or more firms have a position of unilateral market power (UMP), these undertakings have the ability and incentive to behave in a way which creates a self-sustaining reduction in competition and prevents the development of competitive outcomes. This is likely to be detrimental to consumers in the long term, through higher prices, restricted choice, low quality and lower innovation. In contrast to joint dominance there is no tacit collusion and this market outcome does not require any form of stability mechanism such as retaliation. The market is non-cooperative and stable and the market outcome results from each undertaking's individual best reaction to the other undertaking's behavior. UMP leads to inefficient market outcomes, from both static and dynamic points of view.

The Commission has acknowledged that competition drives investment and strengthens both the internal market and consumer welfare. BEREC agrees, and notes that non-competitive oligopolistic markets undermine investment and are to the detriment of consumer welfare. For this reason, we believe it is important that NRAs have the power to regulate in non-competitive oligopolistic markets.

BEREC is therefore proposing that the draft Code is amended to give due consideration to competition issues raised by unilateral effects in oligopolistic markets. There are various means of achieving this. BEREC sets out two possible approaches below. In both cases, the rationale and purpose of each set of proposed amendments would also need to be reflected in the relevant recitals. BEREC does not express a preference for either option, nor does it wish to imply that there are no other ways to address non-competitive oligopolies in the framework. The rules on symmetrical access obligations remain relevant for this subject, although they are not further explored in this paper.

Proposals for amending the draft Code

Option 1: define Unilateral Market Power (UMP) *to be part of* SMP

One possible approach is to broaden the scope of the definition of significant market power (SMP) to encompass unilateral effects arising from non-competitive oligopolies. There already exists an economic theory of harm based on inefficient outcomes in non-competitive oligopolies resulting from economic strength arising from unilateral effects. This acknowledges the possibility of unilateral effects arising from non-competitive oligopoly scenarios.

Article 61

SMP is defined in Article 61(2) of the draft Code. Added to this section could be a sentence introduction a legal fiction which considers the situation of a non-competitive oligopoly as equivalent to SMP:

„2. An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.

In particular, national regulatory authorities shall, when assessing whether two or more undertakings are in a joint dominant position in a market, act in accordance with Union law and take into the utmost account the guidelines on market analysis and the assessment of significant market power published by the Commission pursuant to Article 62.

Two or more undertakings are each deemed to enjoy a position equivalent to having significant market power when they might significantly impede effective competition."

The SMP Guidelines would have to be updated to provide guidence on the assessment of « significant impediments to effective competition ».

Option 2: introduce Unilateral Market Power (UMP) *in addition* to SMP

Another possibility would be to introduce a new definition in the draft Code of 'Unilateral Market Power (UMP)' alongside the concept of SMP, though SMP would remain the primary focus, with UMP playing a complementary role. As explained in relation to Option 1 above, there already exists an economic theory of harm based on inefficient outcomes in non-competitive oligopolies resulting from unilateral market power. Option 2 involves amendments to the draft Code to specifically deal with market failures in UMP situations, separate from SMP situations, whereby NRAs would analyze whether UMP can be derived from weak competitive constraints in the oligopolistic market. The concept of UMP could be introduced in Articles 61, 62 and 65.

Article 61

SMP is defined in Article 61(2) of the draft Code. A similar approach to that definition could be adopted to the definition of UMP, in a new Article 61(3) of the draft Code:

"*An undertaking shall be deemed to have unilateral market power where, in the absence of significant market power, it enjoys a position of economic strength by virtue of the weakness of competitive constraints in an oligopolistic market, enabling it to act in a manner which is detrimental to consumer welfare*."

Importantly, this definition does not contain a direct link to the competition law concept of dominance, so it does not disturb the integrity of the SMP framework.

Article 62

To complement the introduction of a definition of UMP, guidelines could usefully be developed on the assessment of UMP (e.g. through a revision to the SMP Guidelines). Since there is no competition case law on the concept of UMP, it is necessary to amend the Code to enable the Commission to go further than competition law in the SMP Guidelines. Article 62(2) of the draft Code could be amended as follows:

"*2. The Commission shall publish, after consulting with BEREC, at the latest on the date of entry into force of this Directive, guidelines for market analysis and the assessment of significant and unilateral market power (hereinafter "the*

SMP guidelines") which shall be in accordance with the principles of competition law and the objectives of the Code.""

Article 65

Having defined UMP, it would then be necessary to make provision for the imposition of remedies. This could be done by amending Article 65(4) of the draft Code to allow the imposition of regulation to address UMP:

> "*4. Where a national regulatory authority determines that the imposition of regulatory obligations in accordance with paragraphs 1 and 2 of this Article is justified, it shall identify:*
>
> *(a) any undertakings which individually or jointly have a significant market power on that relevant market in accordance with Article 61(2); or in case of the absence thereof:*
>
> *(b) undertakings which enjoy a position of unilateral market power on that market in accordance with Article 61(3).*
>
> *The national regulatory authority shall on such undertakings impose appropriate specific regulatory obligations referred to in paragraph 2 of this Article or maintain or amend such obligations where they already exist*."

This amendment would have the effect of placing a finding of UMP on the same footing as a finding of SMP and allow the imposition of the same remedies to address the competitive concerns identified. The Code should also clarify that NRAs should assess the appropriateness and proportionality of any remedies, taking into account the specificities of the particular UMP market situation. Applying the principle of proportionality will remain a case by case exercise in which all circumstances should be considered.

Additional consequential amendments would be required to other articles of the draft Code, including in relation to remedies. Also, changes in the SMP Guidelines would have to be introduced.

BEREC views on the market review process in the Commission's proposal and ITRE draft Report

The current Framework

The 2002 Framework introduced a competition-law based framework for the regulation of the telecoms sector. It requires national regulatory authorities (NRAs), every three years, to

1. define economic markets (taking utmost account of Commission guidelines and recommendations),
2. assess the market power of the operators in those economic markets (to determine which ones have significant market power – SMP, taking utmost account of Commission guidelines), and then
3. remove any previous SMP remedies (where the market is effectively competitive) or impose, maintain or amend SMP remedies (where the market is not effectively competitive) drawn from a defined list set out in the Framework itself (or, exceptionally, seek the Commission's prior approval for other non-listed remedies), and taking utmost account of Commission recommendations and BEREC common positions.

NRAs must notify the Commission of their analyses, and under Article 7 of the Framework Directive (Article 32 of the draft Code), the Commission has the power to veto the NRA's market definition and/or SMP assessment. Under Article 7a of the Framework Directive (Article 33 of the draft Code), the Commission has the power to scrutinise an NRA's choice of remedy, and to delay the NRA's final decision pending a review of its plans by BEREC.

As the Commission itself recognises in its Explanatory Memorandum, this regulatory framework has been instrumental in opening up the sector to competition, and competition remains the best means of pursuing the regulatory objectives set in Article 3 of the draft Code.

The draft Code

The Commission has proposed to reduce the frequency of market reviews, from every 3 years to every 5 years, recognising the importance of regulatory stability to a positive investment climate. But it has also proposed to extend its veto powers to cover NRAs' choice of remedies (albeit subject to a prior BEREC opinion). It has also proposed to remove outright NRAs' ability to define and find SMP in retail markets (regardless of the effectiveness of wholesale regulation to address competition problems that might exist in retail markets).

The ITRE Rapporteur has proposed a number of additional amendments to the market review process, including reversing in part the Commission's proposal to reduce the frequency of market reviews for rapidly changing markets (every 3 years up from every 5), and going further by proposing that any previous SMP remedies should automatically lapse where NRAs have not completed their market reviews within the allotted time period.

This paper provides BEREC's views on the Commission's and Rapporteur's proposals. In summary, BEREC believes that the current SMP framework already contains the appropriate safeguards to ensure that regulatory interventions are sound and proportionate, and that, beyond the proposed reduction in the frequency of market reviews, the market review provisions do not require substantial modifications. Many of the proposed amendments would limit NRAs' ability to respond to market developments and would reduce, rather than increase, regulatory certainty and

predictability, just at a time when considerable investment is required from the market to achieve European connectivity objectives.

1. Applying the 3 criteria test

Where a market has not already been identified by the Commission as being susceptible to *ex ante* regulation (and included in the Commission's Recommendation on Relevant Markets[7]), NRAs must apply what are known as the "3 criteria" to determine whether they may proceed to a market analysis of the market in question.

- The Commission is proposing to incorporate the 3 criteria test into the Code (it currently sits in the Recommendation on Relevant Markets), which BEREC welcomes. However, the description of the test in Article 65(2) of the draft Code differs from the version that has been applied, successfully, over the last 15 years. In order to determine whether a market can be considered for regulation, the new test requires NRAs to take account of market developments which "*may* increase the *likelihood*" (emphasis added) of the market tending towards effective competition. This threshold would require two degrees of speculation, reducing rather than increasing regulatory certainty . The original wording should therefore be restored.

- The ITRE Rapporteur goes further, in AM117, by requiring NRAs to demonstrate that the 3 criteria are met every time they conduct a market review, regardless of whether the Commission has included that market in Recommendation on Relevant Markets. This could significantly increase the regulatory burden, with a greater impact on small NRAs in particular. Thus, BEREC supports the Commission's approach in the draft Code, i.e. providing that the 3-criteria-test is deemed to be met for markets included in the Recommendation on Relevant Markets, unless the relevant NRA determines that this is not the case given its specific national circumstances. It is important to note that this presumption does not lead to over-regulation – even where the 3 criteria-test is deemed to be met, the NRA will nonetheless have to establish that one or more undertakings has significant market power (and this decision will be subject to Commission scrutiny). In any case, the Recommendation on Relevant Markets itself is regularly reviewed by the Commission in order to progressively reduce ex ante sector-specific regulation as competition in the markets develops.

2. Removal of power to regulate retail SMP

The Commission is proposing to delete Article 17 of the Universal Services Directive (the proposed deletion currently appears after new Article 91 of the draft Code). This would remove NRAs' ability to define and assess market power, and ultimately to regulate, retail markets. BEREC agrees with the principle that regulation should be imposed at the deepest level possible in order to address competition concerns that arise in the downstream markets. However, there may be situations where there is significant market power found at the retail level which cannot be resolved by an intervention at the wholesale level, or not quickly enough to avoid serious consumer detriment.

[7] Recommendation 2014/710/EU

It is worth noting that the retention of this power would not mean that NRAs would be able to regulate retail markets without scrutiny. As retail markets are no longer on the list of Relevant Markets, NRAs would first have to demonstrate that the 3 criteria test is met. NRAs would also still be required to notify the Commission under Article 7 (the new Article 32 of the draft Code), and the Commission would still have the power to exercise its veto on the proposed market definition (of the retail market) and SMP assessment (of SMP at the retail level). The power would therefore not go unchecked. Given that the Commission would still have control over the exercise of this power were it to be retained in the Code, we would strongly urge the retention of this power in the draft Code.

3. Market review timetables

BEREC welcomes the Commission's proposed reduction in the frequency of market reviews from every 3 years to every 5 years. This should increase regulatory stability, reduce the regulatory burden on both operators and regulators, and enable longer investment horizons.

However, the ITRE Rapporteur (in AM118) proposes to increase the frequency back to every 3 years for so-called "highly dynamic markets" (i.e. "characterised by rapid change in technology and demand patters at the retail level"). BEREC strongly objects to this proposal. NRAs are already able to conduct market reviews prior to the expiry of the previous review where circumstances have changed materially, including where they judge that changes in technology or demand patterns result in material changes to competitive conditions. This offers far greater flexibility and responsiveness than the proposed mandatory fixed review period, and also recognises the fact that regulatory certainty is in fact most important in markets subject to investment-based change.

4. Proportionality and NRAs' ability to choose the appropriate remedies

Article 3(3)(f) of the draft Code, carrying over the principles set out in Article 8 of the Framework Directive, describes the principle of proportionality, requiring NRAs to "impose regulatory obligations only to the extent necessary", and Article 66(4) explicitly requires SMP remedies to be proportionate. Proportionality is a well understood concept and is determined on a case by case basis.

The Commission is proposing to qualify the principle of proportionality described in Article 3(3)(f) by prescribing that regulation should only be imposed to secure competition "on the retail market concerned". The ITRE Rapporteur (in AM120) retains this qualification.

It is already clear in Article 65(4) that NRAs should impose SMP obligations where they consider that one or more retail markets would not be effectively competitive in the absence of those obligations. In Article 66(4), it is clear that SMP obligations imposed must be based on the nature of the problem identified, with the ultimate aim always being optimizing retail outcomes in the long term. However, the newly proposed qualification goes significantly beyond this and would risk precluding NRAs from imposing SMP remedies to address competition problems in relevant wholesale markets which cannot necessarily be easily demonstrated to offer a proportionate contribution to competition in the relevant downstream retail markets. The design of wholesale remedies frequently involves a large number of detailed regulations to ensure interventions address the competition problem

identified. Indeed, the simplistic drafting in Article 3(3) overlooks the complexity of the relationship between wholesale and retail markets – the use of the singular ("the market concerned") does not take into account the fact that in many cases a wholesale market can provide upstream inputs for a variety of retail markets, as acknowledged by the Commission in Recital 157. This qualification is therefore ill-judged. It would constitute an unjustified fettering of NRAs' ability to regulate for competition across both retail and wholesale markets, and should therefore be removed.

In Article 71(1) of the draft Code, the Commission once again is seeking to unnecessarily limit the parameters of a proportionality assessment, where it proposes that NRAs should only be able to impose access remedies described in Article 71 where access to civil engineering (described in Article 70) "would not on their own" lead to the achievement of the relevant objectives. While NRAs will generally seek to regulate as far upstream as possible, it is possible that a particular national market will require access to the other kinds of access described in Article 71 instead of (not necessarily in addition to) access to civil engineering under Article 70 (though we note that there is currently an overlap in what is captured under Articles 70 and 71, which also requires the legislators' attention). NRAs are already subject to an obligation to be proportionate in their choice of remedies, and in general seek to impose access obligations as far upstream as possible (which has been good regulatory practice for many years). This should provide sufficient comfort, while allowing NRAs the flexibility to choose the appropriate remedies to address the competition problems assessed in their market.

5. Automatic lapsing of obligations

The ITRE Rapporteur (in AM119) proposes that all regulatory obligations applicable to the SMP operator(s) should automatically lapse at the end of a market review period. BEREC strongly disagrees, and believes this proposal could seriously damage competitive conditions in national markets (ultimately to the detriment of end users). More broadly, it could also seriously undermine the competitive gains from years of ex ante regulation by allowing operators to regain market power during the regulatory "hiatus" periods.

The scale and complexity of market reviews mean that NRAs do not always meet the 3-year requirement with precision, and there might be legitimate reasons for the delay. For instance, they might be prevented from adopting a new decision if the Commission launches a Phase II procedure. Or, the launch of an appeal in national courts might result in the suspension of the new decision pending a resolution of the appeal, or a significant change in the market structure might occur during the market review process, requiring the process to restart. The same could occur even if the cycle were increased to 5 years, as proposed by the Commission.

Currently, all SMP remedies (i.e. non-discrimination, transparency, access remedies, price controls) remain in place (whether by an extension of the regulation or through voluntary agreement with the regulated operator) until a new market review is carried out, and a decision is reached (and adopted). While BEREC understands the ITRE Rapporteur's desire to increase the discipline of NRAs, this cannot be at the expenses of competition and consumer welfare. Moreover, this proposal could seriously undermine regulatory certainty, particularly for competing operators who rely on the regulation remaining in place. The risk of periodic, even if transitory, deregulation could have a chilling effect on

investment by those operators and, by extension, on competition. Indeed, it would undermine the principle that regulatory obligations are imposed following a market analysis in order to address the competition problem identified (which competition problems might well persist despite the delay in the new market review decision). It could also create incentives for regulated operators to delay market reviews. Furthermore, market conditions might change following the lapsing of remedies, and the NRA might have to re-start its (already delayed) market analysis from scratch, further delaying the review (and the duration of the regulatory hiatus).

Ultimately, in the long run, the undermining of competition would only delay the eventual removal of ex ante regulation, which is the overarching goal of the Framework.

6. Revisiting all market analyses within 6 months of the adoption of the Code

The ITRE Rapporteur (also in AM119) proposes that all NRAs assess the impact of the Code on their SMP and remedy decisions within 6 months of the adoption of the Code, and that they be able to amend an SMP designation and/or regulatory remedy without necessarily going through a further market analysis (this is also picked up in AM121).

This would constitute an unwarranted disregard for the competition-law based SMP framework (according to which these decisions are taken in the first place), which has been the core of the Framework since 2002. It is a central tenet of the regulatory framework that remedies should always be designed to address the competition problem in question, which is ascertained by the market review. To allow otherwise would severely undermine regulatory certainty and the investment climate.

In any event, any attempt to comply with this requirement would pre-empt an NRA's established market review schedule, undermining regulatory certainty (and by extension investment conditions), not in response to significant market changes but simply to the fact of the transposition of new legislation. This would run counter to the regulatory objective in Article 3(3)(a) that NRAs should "promote regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods." Nor would it be feasible, either for the NRAs (who have a programme of ongoing market reviews and anywhere from 4 to 8 regulated markets at any given time) or for the Commission (who would have to scrutinise a substantial number of NRA decisions at the same time).

7. Triggers for new market reviews, including operator-initiated market reviews

The ITRE Rapporteur (in AM121) proposes to allow an operator to request (and pay for) a new market review at any time where it believes market developments are reasonably likely to affect competitive dynamics. While NRAs would have the right to decline the request, the consideration of the request (and the fact that any decision must be fully justified and is subject to appeal) would make this a substantial piece of work, which would divert substantial NRA resources away from ongoing market reviews (and, ultimately, the meeting of statutory market review deadlines). Even where the NRA declines to launch a new market review, the amendment would require it to reconsider the appropriateness of the regulation in place – an exercise which cannot be properly done without a substantial amount of market analysis in any event. The prospect of such requests, and of their

granting, would also undermine regulatory certainty (and ultimately the investment climate) for other operators.

The ITRE Rapporteur also proposes to widen the range of factors an NRA must take into account in deciding whether to amend an SMP finding or remedy (whether or not it intends to conduct a market review) to include “planned” market developments “which are reasonably likely to affect competitive dynamics”. It is important to remember that NRAs already take a robust forward-look when they carry out a market review, including considering the prospects for competition in the forward-look period. As noted above, they also already have the power to conduct an earlier market review where changes to competitive conditions warrant it.

These amendments underestimate the value of regulatory stability (particularly for access seekers, who are more often than not those providing the competitive pressures in a national market) and should be rejected.

Ensuring continued NRA powers to impose symmetric access obligations

Amendments to Article 59, Article 13, Annex I of the European Electronic Communications Code

The draft Code and the draft ITRE Report

The Commission proposes to merge Article 5 of the Access Directive and Article 12(3) of the Framework Directive into Article 59 (paragraphs 1 and 2) of the draft Code, bringing together the provisions on symmetric regulation. The Commission is also proposing to further develop and specify the conditions under which symmetric regulation can be applied. The ITRE draft Report makes limited changes to the Commission's proposal.

As highlighted by BEREC in its Opinion of December 2016[8], we welcome the greater prominence the Commission has given to symmetric regulation in the draft Code. However, rather than expand NRAs' regulatory toolkit, as claimed, these amendments risk unjustifiably restricting NRAs' ability to apply symmetric regulation in practice.

The importance of existing (non-SMP) access powers

In a growing number of Member States, NRAs have imposed, or are considering imposing, symmetric regulation alongside the SMP rules, with a view to driving NGA investment and promoting competition. Symmetric regulation complements (but does not substitute for) SMP remedies – while SMP regulation allows NRAs to address specific competition problems identified via a market analysis, access obligations imposed under Article 5 of the Access Directive (Article 59(1) of the draft Code) are aimed at goals such as securing end-to-end connectivity or the interoperability of services. Access obligations under Article 12(3) of the Framework Directive (Article 59(2) of the draft Code) are aimed at addressing issues such as inefficient network element duplication and localised service bottlenecks which can arise in the normal course of infrastructure roll-out regardless of the overall market power of a specific network owner.

These symmetric powers are particularly relevant where there are multiple operators deploying NGA networks, a market structure which is developing in many Member States where local initiatives are incentivised as a means of promoting connectivity. One advantage of symmetric regulation in such markets is that the access to the infrastructure (which might be owned or managed by one or more operators other than an SMP operator) can be ensured from the start of deployment, rather than await an assessment of the market power of the undertakings, allowing NRAs to promote effective infrastructure-based competition from the start.[9] In some countries, network operators other than the SMP operator might have infrastructure in certain geographic areas to which access is required for rolling out NGA networks. In all such cases, it is important to ensure that NRAs have the ability to efficiently

[8] http://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/6615-berec-high-level-opinion-on-the-european-commissions-proposals-for-a-review-of-the-electronic-communications-framework

[9] Some countries, such as Sweden, already have a fragmented wholesale fibre market structure, with a profusion of municipal networks and smaller private operators. Regulating for competition in Sweden might involve over 200 market analyses.

secure adequate access in order to open up relevant bottlenecks. This does not mean that the powers should be unconstrained, as further described below.

- **Article 59(1)**
  Article 59(1) recasts (with some amendments) the provisions of the current Article 5 of the Access Directive, which the ECJ has confirmed is a broad power including the right to regulate prices[10].

  Such powers to impose access-related conditions under Article 59(1) are broad but they are constrained by the cumulative objectives that need to be secured by its intervention:

  - the promotion of efficiency,
  - the promotion of sustainable competition,
  - the promotion of efficient investment,
  - the promotion of innovation and
  - the giving of maximum benefit to end-users.

  Those objectives essentially reflect the criteria that condition the imposition by NRAs of price controls by means of SMP remedies (see Article 13(1) and (2) Access Directive), so they provide an important safeguard in ensuring coherence with SMP regulation and preventing NRAs from acting unaccountably. At the same time, these powers (and the criteria for their use) provide important tools for NRA to ensure that they are able to intervene in circumstances that are not envisaged or catered for under the SMP framework, with its clearly-defined process requiring regular reviews to address competition problems associated with SMP.

  Furthermore, for the exercise of NRA powers under both the symmetric and the SMP regimes, the European Commission (with BEREC) retains oversight through the 'Article 7 process' (Article 32 of the draft Code).

  This combination of a broadly defined power to impose access obligations combined with a clear set of criteria for its use and an oversight mechanism, provides a highly valuable set of regulatory tools both in its occasional application but also, importantly, in a 'reserve' power role, i.e. in encouraging commercial resolution (to avoid the need for a regulatory intervention) in a wide set of circumstances.

- **Article 59(2)**
  Article 59(2) recasts (with substantial amendments) the provisions of the current Article 12(3) of the Framework Directive. These powers enable NRAs to impose appropriate symmetric access obligations where undertakings lack access to viable alternatives to non-replicable assets.

[10] It is now settled case law that the means by which NRAs are to ensure adequate access and interconnection, and also interoperability of services, are not exhaustively listed in Article 5: see Case C-192/08 *TeliaSonera Finland* (November 2009); C-556/12 *TDC v Teleklagenaevnet* (June 2014); C-85/14 *KPN v ACM* (September 2015); and C-397/14 *Polkomtel v PUKE* (April 2016).

BEREC proposed amendments to the draft Code

The annexed proposed amendments seek to restore NRAs' powers under the current Framework. As well as amending Article 59(1) and Article 59(2) to ensure the Commission's drafting does not inadvertently have the effect of calling into question the existing broad nature of the access powers under Article 59(1), BEREC is also proposing to amend Article 59(2) in order to ensure that NRAs retain the discretion to impose appropriate access obligations where undertakings lack access to viable alternatives to non-replicable assets. To give full effect to these amendments, we are also proposing changes to the related recitals, and to Article 13 of the draft Code and its Annex 1.

Proposed amendments

Amendments to Article 59(1)

1. National regulatory authorities shall, acting in pursuit of the objectives set out in Article 3, encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and the interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, the deployment of very high-capacity networks ***where relevant*****,** efficient investment and innovation, and gives the maximum benefit to end users. They shall provide guidance and make publicly available the procedures applicable to gain access and interconnection to ensure that small and medium-sized enterprises and operators with a limited geographical reach benefit from the obligations imposed. ***Member States shall ensure that national regulatory authorities have the powers to impose such obligations.***

In particular, without prejudice to measures that may be taken regarding undertakings with significant market power in accordance with Article 66, national regulatory authorities shall be able to impose:

(a) to the extent that is necessary to ensure end-to-end connectivity, obligations on those undertakings that are subject to general authorisation and that control access to end-users, including in justified cases the obligation to interconnect their networks where this is not already the case;

(b) in justified cases and to the extent that is necessary, obligations on those undertakings that are subject to general authorisation and that control access to end-users to make their services interoperable;

[(c) in justified cases, obligations on providers of number-independent interpersonal communications services to make their services interoperable, namely where access to emergency services or end-to-end connectivity between end-users is endangered due to a lack of interoperability between interpersonal communications services;[11]]

(d) to the extent that is necessary to ensure accessibility for end-users to digital radio and television broadcasting services specified by the Member State, obligations on operators to provide access to the other facilities referred to in Annex II, Part II on fair, reasonable and non-discriminatory terms.

[11] In this paper BEREC does not address any concerns it might have on this provision in relation to interpersonal communications services.

The obligations referred to in point (c) of the second subparagraph may only be imposed:

(i) to the extent necessary to ensure interoperability of interpersonal communications services and may include obligations relating to the use and implementation of standards or specifications listed in Article 39(1) or of any other relevant European or international standards; and

(ii) where the Commission, on the basis of a report that it had requested from BEREC, has found an appreciable threat to effective access to emergency services or to end-to-end connectivity between end-users within one or several Member States or throughout the European Union and has adopted implementing measures specifying the nature and scope of any obligations that may be imposed, in accordance with the examination procedure referred to in Article 110(4).

Justification

The inclusion of the new wording at the end of the paragraph is intended to provide an opportunity for those Member States who transposed Article 5 of the Access Directive (of which Article 59(1) is, broadly, the transposition) narrowly to revisit their national transposition in light of the ECJ case law (cited in Recital 143).

The insertion of "where relevant" is to ensure that NRAs are able to continue to use these powers other than in relation to the deployment of very high-capacity networks.

Amendments to Article 59(2)

2. ***Without prejudice to the generality of the first paragraph, na***tional regulatory authorities ***may*** ~~shall~~ impose obligations ~~upon reasonable request~~ to grant access to wiring and cables inside buildings or up to ~~the first~~ **a** concentration or distribution point ***close to the end users, as determined by the national regulatory authority*** ~~where that point is located outside the building,~~ on the owners of such wiring and cable or on undertakings that have the right to use such wiring and cables, where this is justified on the grounds that replication of such network elements would be economically inefficient or physically impracticable. The access conditions imposed may include specific rules on access ***to such network elements and to associated facilities and services***, transparency and non-discrimination and for apportioning the costs of access, which, where appropriate, are adjusted to take into account risk factors.

Where the obligations imposed in accordance with the previous subparagraph are insufficient to ensure adequate access to the networks elements mentioned therein, n~~N~~national regulatory authorities may ***impose additional obligations on*** ~~extend to~~ those ~~owners or~~ undertakings ***to grant access, including active or virtual access, upon reasonable request, to relevant network elements*** ~~the imposition of such access obligations,~~ on fair and reasonable terms and conditions~~, beyond the first concentration or distribution point to a concentration point as close as possible to end-users~~, ***and*** to the extent strictly necessary to address ~~insurmountable~~ economic or physical barriers to replication***, particularly*** in areas with lower population density.

National regulatory authorities shall***, in considering the appropriateness and proportionality of imposing*** ~~not impose~~ obligations ~~-~~in accordance with the second subparagraph, ***take into account in particular*** ~~where~~:

(a) ***the existence of*** a viable and functionally similar alternative means of access to end-users made available to any undertaking, provided that the access is offered on fair and reasonable terms and conditions to a very high capacity network ~~by an undertaking meeting the criteria listed in Article 77 paragraphs (a) and (b); and~~

(b) in the case of recently deployed network elements, ~~in particular by smaller local projects,~~ the ***impact of*** granting ~~of~~ that access ~~would compromise~~ ***on*** the economic or financial viability of their deployment.

Justification

The "without prejudice" language is intended to put beyond a doubt that the powers described in Article 59(2) do not have the effect of narrowing the scope of the powers described in Article 59(1).

The remaining changes seek to ensure NRAs are not restricted in their ability to apply symmetric regulation where undertakings lack access to viable alternatives to non-replicable assets, where appropriate and justified in their respective national markets.

- **Power vs duty.** The current Framework *empowers* NRAs to intervene, whereas the Commission's proposal limits this to a *duty* to intervene and *only* when a reasonable request has been made to them. BEREC proposes to restore the NRA discretion, replacing "shall" with "may" in the first sentence.

- **"Size" of access point.** The "size" of the concentration/distribution point where access is provided (i.e. the number of lines accessible from it) is critical to the economic and technical viability of the symmetric access regime. It is therefore important to ensure that the symmetrically regulated operator cannot determine this unilaterally, so as not to risk undermining the pro-competitive and pro-investment objectives of the access obligation.

  Under the Commission's proposal, NRA powers are defined by reference to the "first concentration or distribution point" but neither term is defined in the draft Code. As the proposed definition for "very high capacity networks" refers to the distribution point as a point located "at the serving location", it is particularly important to ensure that the Code does not inadvertently restrict the scope of symmetric access powers in respect of such networks. BEREC therefore proposes to clarify that NRAs have the power to set the location and the size of the access point (distribution/concentration), taking into account the economic viability of the connection for access seekers in order to ensure effective access to the network. This would bring Article 59(2) into line with the Commission's own approach, as set out in the NGA Recommendation.

- **Remove unjustified restrictions to symmetric regulation beyond the concentration point.** In some cases, and in particular in areas with lower population

density, access at the concentration point (determined in accordance with the first subparagraph of Article 59(2)) might not be technically possible or economically viable. Where the NRA can demonstrate that the obligations which may be imposed under the first subparagraph of Article 59(2) would be insufficient to ensure adequate access, it should be empowered to impose additional conditions, under defined conditions.

In the Commission's text, the exceptions defined in subparagraphs 3 to 5 of Article 59(2) introduce unjustified and unclear differences of treatment based on the business model of the operator (e.g. reference is made to the wholesale-only model in exception (a)) or their size (e.g. reference to the "small operators" in exception (b)). In practice, these factors should be taken into account by the NRA in assessing the appropriateness and proportionality of *any* obligation that it might consider imposing.

- **Meaning of "access."** If the objective is to facilitate access for the deployment of competing infrastructure, then it is important to ensure that the symmetric access obligations are not limited to the provision of access to wiring and cables and civil infrastructures, but that they may include access to associated facilities and services (e.g. colocation at the access point or access to information related to network elements) in order to ensure that access to the network elements is effective, as well as active or virtual access (where access to dark fibre at the concentration/distribution point would be insufficient to ensure adequate access to the networks elements). We note the definition of "access" in Article 2(28) includes all such forms of access.

Amendments to Recitals (139) and (140)

(139) In situations where undertakings are deprived of access to viable alternatives to non-replicable assets up to ***a*** ~~the first~~ distribution point, national regulatory authorities should be empowered to impose access obligations to all operators, without prejudice to their respective market power. In this regard, national regulatory authorities should take into consideration all technical and economic barriers to future replication of networks. The mere fact that more than one such infrastructure already exists should not necessarily be interpreted as showing that its assets are replicable. The ***size of the*** ~~first~~ distribution point should be ~~identified~~ ***determined by the national regulatory authority*** by reference to objective criteria***, with the aims of maximising the scope for infrastructure-based competition and avoiding inefficient duplication of relevant infrastructure.***

(140) ***Where it is demonstrated that these obligations are not sufficient to ensure adequate access, ~~I~~it*** could be justified to ~~extend~~ ***impose additional*** access obligations***, in particular*** ~~to wiring and cables beyond the first concentration point~~ in areas with lower population density~~., while confining such obligations to points as close as possible to end-users, where it is demonstrated that replication would also be impossible beyond that first concentration point.~~ ***This can include the obligation to provide virtual or active access to the infrastructure, where for instance the passive access to the wiring and cables up to the distribution point would be economically unviable, or technically impossible due to the technical characteristics of the infrastructure.***

Justification

These amendments reflect the changes to the operative provisions.

Amendment to Recital (143)

(143) While it is appropriate in some circumstances for a national regulatory authority to impose obligations on operators that do not have significant market power in order to achieve goals such as end-to-end connectivity or interoperability of services, it is however ~~necessary to ensure that such obligations are imposed in conformity with the regulatory framework and, in particular, its notification procedures.~~ ***settled case law[12] that the means by which national regulatory authorities are to ensure adequate access and interconnection, and also interoperability of services, are not exhaustively listed under the first subparagraph of Article 5 of Directive 2002/19/EC (Article 59 in this Directive), and this position shall remain under Article 59(1) of this Directive. National regulatory authorities are therefore empowered under Article 59(1) to impose on undertakings providing or authorised to provide electronic communications networks or services access obligations in circumstances other than those listed, such as obligations to grant access to wiring and cables inside buildings or up to the first concentration or distribution point or beyond it to a concentration point as close as possible to end-users, obligations in relation to the sharing of passive or active infrastructure, and obligations to conclude roaming access agreements. [Such obligations must only be imposed where justified in order to secure the policy objectives of Article 3 of this Directive, and where they are objectively justified, transparent, proportionate and non-discriminatory for the purpose of promoting efficiency, sustainable competition, efficient investment and innovation, and giving the maximum benefit to end-users, and imposed in conformity with the relevant notification procedures.]***

Justification

These amendments clarify the intention of the changes to the operative provision (Article 59(1), including an explicit reference to the ECJ jurisprudence which has confirmed the scope of the powers in that Article. The wording in square brackets at the end of the recital is intended to make clear the conditions and procedures which apply to the use of Article 59(1). All of this already applies anyway (because of combination of Art 59(1), (4) and (5), and Article 3), so is not new.

Amendments to Article 13(2) and to Annex I, Part A, point 7

Article 13

2. Specific obligations which may be imposed on providers of electronic communications networks and services under Articles ~~13,~~ ***59(1),*** 36, 46(1) 48(2) or on those designated to provide universal service under this Directive…

[12] See, in particular, Case C-192/08 *TeliaSonera Finland*; C-556/12 *TDC v Teleklagenaevnet*; C-85/14 *KPN v ACM*; and C-397/14 *Polkomtel v PUKE*.

Annex I, Part A (General conditions which may be attached to an authorisation)

7. Access obligations other than those provided for in Article 13**(2)** of this Directive applying to undertakings providing electronic communications networks or services***, including, for the avoidance of doubt, under Article 59(2).***

Justification

Article 13 is largely a copy-out of Article 6 of the Authorisation Directive, which is a gateway for all regulatory obligations imposed under the Code. Article 6(2) of the Authorisation Directive expressly empowers NRAs to impose specific obligations on providers of networks and services under Article 5 of the Access Directive, which obligations shall be legally separate from the rights and obligations under the general authorisation.

Thus, as the specific obligations in Article 5 of the Access Directive are now transferred (with amendment) to Article 59(1) of the draft Code, Article 13(2) of the draft Code should set out that specific obligations which may be imposed on providers of networks and services under Article 59(1) of the draft Code shall be legally separate from the rights and obligations under the general authorisation.

Reference to Article 59 is currently missing from Article 13, which is an oversight in the drafting of the Code. The inclusion of a reference to Article 59(1) in Article 13(2) is intended to correct this omission.

Article 59(2) is a symmetrical obligation (as currently under Article 12 of the Framework Directive) and therefore a condition to be attached to general authorisations (as currently under point 14 of Part A of the Annex to the Access Directive). This has been put beyond a doubt here by the explicit reference to Article 59(2) in the equivalent place – i.e. point 7 of Part A of Annex I to the draft Code.

Article 13(2) also includes an unnecessary reference to Article 13 itself, which should be deleted.

BEREC views on Article 74 of the draft Code
Co-investment and "very high-capacity (VHC) networks"

The Commission's proposals

The Commission is seeking to encourage co-investment as a means of mitigating high risks and high costs of network rollout, by offering a potential route to unregulated network expansions where co-investment offers meet certain broad criteria. Article 74 prevents NRAs from imposing SMP remedies in relation to the new network elements in such circumstances.

BEREC agrees that co-investment could play an important role in the pursuit of high-speed connectivity. Different forms of co-investment have been successfully used in three EU Member States (France, Spain and Portugal) as well as in Switzerland. So we are sceptical of the need to include a specific provision enabling co-investment (given the absence of obstacles to this business model), and indeed of the Commission's apparent preference for one business model over others.

Moreover, the proposed criteria for what would qualify as co-investment for regulatory forbearance are too weak to ensure a competitive environment, and offer a wide scope for tactical gaming by any operator investing in NGA or VHC network rollout, including the incumbent (e.g. co-investment offers issued only to avoid regulation, and not taken up). This is particularly concerning given that there is no contingency planning (i.e. clarity on NRAs' ability to regulate) where the co-investment results in a continued or new monopoly.

The risk is that co-investment does not ensure sufficient competition in the provision of services to consumers in the geography covered by the new network, reinforcing or extending the market power of SMP operators, potentially allowing the co-investors to foreclose the market. This, in turn, would impact on the virtuous cycle of competition- and demand-driven investment, undermining the Commission's ultimate goal of increasing high-speed connectivity.

The draft ITRE Report

The draft ITRE Report introduces additional areas of concern – it introduces substantial regulatory uncertainty by anchoring legal provisions to a vague and aspirational definition of "VHC" networks, and seeks to carve out an exceptional regulatory framework for such networks:

- The draft ITRE report proposes to limit the application of Article 74 to "VHC" networks, and proposes to move Article 74 into a separate chapter dedicated to such networks, ostensibly separate to the SMP framework (AM135, 139). BEREC does not see any merit in distinguishing between regulatory approaches based on the speed of the network in question, which would seriously undermine the principle of technology neutrality.

- This concern is exacerbated by the draft ITRE report's proposal for a new and vague definition of VHC networks (defined as providing "sufficient capacity to allow unconstrained use of the network in terms of bandwidth, resilience, error-related parameters, and latency and its variation") (AM136). This vagueness is not mitigated by the proposal that BEREC should issue guidelines on how a network might "meet demand for unconstrained use by all categories of users". There is no such thing as

unconstrained capacity, and while networks can be over-engineered to exceed any expected demand, the ITRE proposals would incentivise inefficient investment through the promise of regulatory forbearance.

Option 1

Article 74 is not necessary in order to enable co-investments to take place. Indeed, there is nothing in the current Framework which prevents co-investments from taking place – and there have been successful commercial co-investments in several European countries, as noted above. Where it makes commercial sense, they will happen (assuming there are no other, non-sectoral regulatory obstacles).[13] BEREC would be concerned about the introduction of provisions intended to "incentivise" co-investment, If the incentives are at the expense of competition.

NRAs already take into account co-investments and are required to take a prospective view of market developments, when carrying out their market analysis. NRAs are also already required to reflect the risk of investments when setting any access or price regulation.[14] Furthermore, NRAs are required under Article 3 of the draft Code to impose only such SMP remedies as are necessary and proportionate for achieving the objectives set out in this Article, including the promotion of very high capacity data connectivity, as well as the promotion of efficient investment in new and enhanced infrastructures that takes account of the risk of investors under cooperative arrangements. **As NRAs must already take into account the existence of sustainable co-investment schemes in their market analysis and in assessing the proportionality of remedies, Article 74 serves no practical purpose in positively encouraging co-investment as a means of mitigating the high risks and high costs of network rollout.**

It is also worth bearing in mind that co-investment schemes will not necessarily reduce the complexity and regulatory burden for NRAs or the undertakings concerned. The implementation of Article 74 would require highly detailed specifications for a large number of aspects of the co-investment agreement between the contracting parties, together with clear and precise rules for co-investors who might potentially join the scheme at a later date. These rules, in turn, would need to allow for differentiating between co-investors, depending on a variety of factors such as the value and timing of their commitment.

BEREC suggested amendments under Option 1

Given the risks of "automatic" and broad regulatory forbearance, as explained above, together with the risks posed to regulatory certainty, **we would therefore recommend that Article 74 be deleted. This would have no impact on the existing permissibility of co-investment**

[13] In some Member States, co-investment schemes have even developed as result of a regulatory obligation, demonstrating that regulation can be an enabler for, rather than an obstacle to, co-investment.

[14] Indeed, this is described in Recital 173 of the draft Code: "NRAs should, when imposing obligations for access to new and enhanced infrastructures, ensure that access conditions reflect the circumstances underlying the investment decision, taking into account, *inter alia*, the roll-out costs, the expected rate of take up of the new products and services and the expected retail price levels… " as well as Recital 174: "Mandating access to network infrastructure can be justified as a means of increasing competition, but NRAs need to balance the rights of an infrastructure owner to exploit its infrastructure for its own benefit, and the rights of other service providers to access facilities that are essential for the provision of competing services." Regarding access obligations, cf. Article 71(2)(c) and (d).

schemes under the Framework, or on the development of this business model going forward.

Option 2

While there is no regulatory obstacle to co-investment, we recognise that there might nonetheless be a legitimate desire to explicitly signal "openness" to this particular business model. If Article 74 is to be retained, then it would be necessary to ensure that the Code contains appropriate guarantees to enable NRAs to prevent the creation of new monopolies, and to continue to promote effective competition (which the Commission agrees is the key driver for investment). We would therefore seek amendments to address the following issues:

- NRAs should be *empowered* to forbear, rather than being *required* to forbear ("may" vs "shall"). This is consistent with Recitals 173 and 174 (see footnote), and indeed with the SMP framework more broadly. To prohibit NRAs from regulating new network elements where it would be reasonable and proportionate to do so in light of competition problems identified and the objectives of the Code, would represent and unwarranted limitation of NRAs' ability to fulfil their functions. This is not to say NRAs should have a "carte blanche" to regulate. Indeed, their exercise of regulatory discretion in the case of co-investment (and the deployment of new network elements) would remain subject to the regulatory principles and disciplines/processes of the Framework (and retained in the draft Code).

- Greater clarity would be needed on what is intended to be covered by the term "new network elements" (in respect of which the regulatory forbearance would apply). As things stand, this could be interpreted as anything from new ducts to network upgrades (including fibre). Is "new" the same as "future" as in "not yet built"? Or does it refer to network elements that are existing but, e.g., less than five years old (as would undoubtedly be argued by operators)? And for how long would they remain "new"?

- It should not be enough for there to be a qualifying offer – regulatory treatment should depend on whether the offer is taken up.

- "Co-investment" in the context of this article could mean anything from opening up ducts and offering co-location to actually co-owning active equipment, and these different scenarios can generate very different competitive outcomes. The outcomes could depend on a number of factors including the number of co-investors (where a low number could make the scheme more vulnerable to collusive behaviour), population density, parallel versus complementary roll-out, and whether access restrictions are included in the contract. Co-investment could mean that two operators co-own equipment and compete with each other, or it could also mean that the SMP operator offers anyone the ability to install their own equipment on transparent and reasonable terms. If there is no economic case for more than one operator, the incumbent (or those involved in/planning the co-investment) could claim that any new network elements which they themselves installed should nonetheless be exempt from regulation, which would only cement the bottleneck problems in that area.

- Regulatory treatment should also depend on who takes the offer up. For instance, in order to prevent the investors from "gaming" (abusing) the system (e.g. by the lead investor bringing on board a financial investor who "co-invests" but otherwise leaves the lead investor to run the new network as a monopoly), the criteria for qualifying co-investments should be strengthened to include reference to the following (proxies to an SMP assessment):

    - the relative control of the investing parties in the new network (so that they effectively constrain each other). For instance, preferential access would not necessarily constrain the lead investor in the same way as an indefeasible right of use (IRU) might.

    - whether there is a reasonably likely prospect that the co-investor would compete (or, if intending to be a wholesale-only company, successfully promote competition) with the incumbent investor in the same retail market (to mitigate the risk of competition concerns such as cartel behaviour or insufficient competitive constraint).

- By making the forbearance discretionary, it should be made explicit that NRAs may intervene after an initial (transitional) period of no regulation. In the longer term, it would be problematic if competition problems were allowed to remain unchecked, resulting in practices detrimental to end-users such as over-pricing, lack of innovation and investment.

- Finally, while the Commission's proposal focuses on operators with the capacity/incentive to co-invest, there will be other operators who will legitimately choose not to engage in co-investment, for example because they operate in niche markets (such as a business market), or because they are new entrants. The Commission's proposals could have the effect of foreclosing the market to those who cannot climb the last rung of the ladder, as the only guarantee they would have would be to "benefit from the same quality, speed, conditions and end-user reach as was available before the deployment…" (Article 74(1)(c)), rather than access to the new network (even at prices reflecting the fact that they had not taken on the costs or risks of the investment). This would amount to a diluted form of wholesale access as compared to what would be available to the co-investors, thus further reducing the competitive constraints from these operators on the retail market. In the longer run, this could significantly restrict competition on the market, either when the legacy network ceased to provide a competitive constraint, or if the SMP operator were to decide to shut down the legacy network (at which point the safeguards set out in Article 78(2) (*Migration from legacy infrastructure*) would not apply since the SMP operator would not have been subject to any form of obligation).

  For these reasons, the NRA should be able to ensure that third-party operators can obtain access to the infrastructure under fair, reasonable and non-discriminatory terms (taking appropriate account of the risks incurred by the co-investors).

BEREC suggested amendments under Option 2

Article 74

1. ***When*** ~~A~~ ***a*** national regulatory authority ***is considering the appropriateness of imposing*** ~~shall not impose~~ obligations ~~as regards~~ ***in respect of*** new network elements that ~~are~~ ***form*** part of the relevant market on which it intends to impose or maintain obligations in accordance with Articles 66 and Articles 67 to 72 and ~~that~~ ***where*** the operator designated as ***having*** significant market power on that relevant market has deployed or is planning to deploy ***new network elements***, ***it shall take into account, inter alia,*** ~~if~~ the following ~~cumulative conditions are met~~ ***factors***:

   (a) ***the extent to which the deployment of the new network elements is to be funded through an existing co-investment agreement the terms of which were negotiated through*** ~~... the deployment of the new network elements is open to co-investment offers according to~~ a transparent process and on terms which favour sustainable competition in the long term including inter alia fair, reasonable and non-discriminatory terms offered to potential co-investors; flexibility in terms of the value and timing of the commitment provided by each co-investor; possibility to increase such commitment in the future; reciprocal rights awarded by the co-investors after the deployment of the co-invested infrastructure;

   (ab) the extent to which the co-investors to the SMP operator are or intend to be service providers in the relevant retail market, and have a reasonable prospect of competing effectively with the SMP operator or, where the co-investors to the SMP operator intend to be wholesale-only providers, whether they are reasonably likely to host service providers that have a reasonable prospect of competing effectively with the SMP operator.

   (b) ***the extent to which*** the deployment of the new network elements contributes significantly to the deployment of very high capacity networks;

   (c) ***the extent to which*** access seekers not participating in the co-investment can benefit from ***fair, reasonable and non-discriminatory access conditions, taking appropriate account of the risk incurred by the co-investors*** ~~the same quality, speed, conditions and end-user reach as was available before the deployment~~, either through commercial agreements based on fair and reasonable terms or by means of regulated access maintained or adapted by the national regulatory authority;

   If an NRA determines that one or more such factors sufficiently addresses the nature of the competition problems analysed in relation to such network elements, it shall not be required to impose any of the abovementioned obligations on the SMP operator.

   BEREC shall, after consulting stakeholders and in close cooperation with the Commission, issue guidelines on the criteria for considering co-investment agreements for the purposes of this Article. When assessing co-investment ***agreements*** ~~offers and processes~~ referred to in point (a) of the first subparagraph, national regulatory authorities shall ***take utmost account of BEREC guidelines and shall*** ensure that ***such co-investment agreements are open to any undertaking over the lifetime***

of the network built under a co-investment agreement on a non-discriminatory basis ~~that those offers and processes comply with the criteria set out in Annex IV~~.

For the purposes of this Article, references to new network elements are references only to such elements of an electronic communications network, or of its associated facilities, where the physical transmission medium of the broadband service is newly provided at least up to the building and its deployment is linked to significant specific investment risks. This shall not include network elements deployed before the entry into force of an NRA's most recent decisions under Article 66, or upgrades to such elements by raising them to higher standards or by adding or replacing components.

Justification

The proposed amendments provide that NRAs should have the discretion, not the obligation, to forbear from regulation, and, by implication, that they are able to intervene ex ante (following a market review) where justified. In exercising their discretion, they should take into account factors whose satisfaction should mean that NRAs would not have a competition concern. As noted above, in exercising their discretion, NRAs would remain subject to the regulatory principles and disciplines/processes of the Framework, retained in the draft Code.

The proposed amendments include the introduction of a new paragraph (ab) which is intended to ensure there is a real co-investment (not just an offer) and that the co-investment partners will have a realistic prospect of ensuring competition, addressing the risk of foreclosure by the co-investors. BEREC is also proposing the deletion of Annex IV (while incorporating some of its relevant components into the operative provision) and its replacement by a reference to BEREC guidelines. The amendments also include new language clarifying the meaning of "new network elements".

BEREC views on Article 77 of the draft Code
Vertically separate undertakings

In Article 77 of the draft Code, the European Commission has proposed changes to the regulatory treatment of vertically separate undertakings, exempting them from *ex ante* regulation other than access obligations with a view to increasing investments in and roll-out of very high-capacity (VHC) networks (leaving NRAs able to intervene only on an *ex post* basis).

However, as drafted, the provision would not only affect new investments and roll-out, but also existing high-capacity networks in many Member States.

By preventing NRAs from intervening *ex ante* to regulate the price of access, or impose non-discrimination or transparency obligations, the proposal risks preventing NRAs from safeguarding and promoting competition. This includes the risk of inefficient pricing on wholesale products, which would in turn be transferred onto retail markets, leading to an increase in consumer prices, reducing demand and ultimately slowing down the take-up of digital services.

While the challenges of regulating vertically separate undertakings might not affect all Member States today, the prevalence of networks with a significant local footprint, active on the wholesale level, is likely to increase across Europe over time.

Both the Commission's proposals and the ITRE draft report seems to assume that regulatory forbearance will unleash new investment, and that the curtailing of competition for these purposes is a price worth paying. BEREC disagrees, bearing in mind that evidence shows that competition is a key driver of investment and, ultimately, the benefit of European consumers. The ITRE draft report only hastens the risks of these proposals, as it proposes to expand the definition of vertically separate undertakings qualifying for this regulatory regime to include those which are merely "functionally" separated from their retail arms (AM 28 - to recital 190).

For these reasons, and as further explained below, BEREC would urge the legislators to delete Article 77 altogether.

Article 77 blurs the line between *ex ante* and *ex post* regulation

Traditionally, *ex ante* regulation is built on the concept of a *potential* abuse of market power. If a market player is considered by the NRA to have significant market power (SMP), it is because that market player is *able* to abuse its market power; it is not constrained by customers or competitors. Any *actual* abuse of market power (which is not considered a breach of regulation) falls within the realm of general competition law. It is dealt with *ex post* and falls within the jurisdiction of competition authorities and competition courts. Article 77, as worded, partially turns the regulation tables from *ex ante* to *ex post*. For instance, Article 77(4) requires proof of actual damage to end-users as a precondition for price regulation in accordance with Article 72 (rather than potential damage, which is the essence of *ex ante* regulation). In this case, *actual* abuse of market power and the consequential end-user harm must be proved, much like under regular competition law.

The Commission's proposal therefore assumes that *ex post* intervention would be sufficient. However, it does not provide any evidence to support this assumption and in fact the main factors which create the risk of abuse of market power and non-competitive market dynamics

do not depend on the vertical integration or separation of an undertaking. As is further explained below, while wholesale-only operators do by definition have incentives to grant access to service providers, it is by no means certain that this business model would lead to significantly lower retail prices, consumer choice and/or higher quality of services, since the upstream bottleneck problem would remain unaddressed and since vertical separation brings with it other potential inefficiencies[15].

Regulatory uncertainty and reduced investment incentives

The Commission's proposal would create significant practical problems and significantly increase regulatory uncertainty, ultimately to the detriment of the achievement of the shared connectivity objectives.

In Member States with numerous relevant markets, each with similar potential competition problems (such as monopoly pricing), providing regulatory certainty and securing investment incentives require the possibility of imposing the necessary regulation, especially price regulation where appropriate, in a transparent and predictable manner. A system where the imposition of price regulation under Article 72 requires comprehensive investigation in every single instance, and where the regulatory process is lengthy, will result in differences in the application of price regulation on different national markets that might be similar and actually require similar regulation. Such a system would not create a stable and predictable investment climate.

In some Member States there are potentially hundreds of relevant sub-national geographic markets, most or all of which have SMP operators. It would be a daunting task for any NRA to gather the information needed (actual offers from network owners) and for national service providers operating in many sub-national markets to provide the information, in order to demonstrate actual competition problems and end-user harm. While the information is gathered and analysed, the markets would potentially be under-regulated for a long time. This system of de-regulation (as a result of the implementation of the Article 77 presumption against regulation) and re-regulation (once the NRA is able to demonstrate end-user harm), and the potential for different regulatory responses in seemingly similar markets, would create substantial regulatory uncertainty, which is an impediment to investment and ultimately to the detriment of end-users.

The imposition, from the start, of proportionate remedies which take into account the competitive environment in which wholesale-only players operate, is far more favorable to investment (from all types of market players) than the unstable regulatory environment where the NRA might need to intervene in a "heavy-handed" way after collecting evidence of actual consumer harm.

End-users pay for excessive pricing on the wholesale market

Finally, there is the question of how exactly NRAs can "prove" that the conditions in Article 77(4) are met. The suspension of *ex ante* regulation suggests that the Commission believes

[15] Notably foregone economies of scope and double marginalisation. Double Marginalisation occurs in vertically related markets where upstream and downstream firms have their respective market powers and hence apply markups in their prices. Due to these markups a deadweight loss is induced at each vertical level, and the resulting sum of deadweight losses is larger than the single deadweight loss that would be induced by a vertically integrated firm with a comparable degree of market power. In a sense, double marginalisation is an externality between producers that makes everyone (producers and consumers) worse off.

that general competition law could deal with monopoly pricing, in the absence of regulation. But given that a market, in order to be regulated, must already have passed the third criteria (namely that competition law would not be sufficient to address the competition issue identified), this seems highly unlikely.

Article 77, as it stands, is therefore inconsistent with the current Framework's long-term goal of protecting end-users as it restricts NRAs from imposing remedies other than access to civil engineering and network facilities on "wholesale-only" SMP operators. In practice, the imposition of access to civil engineering and specific network facilities without a definition (through regulation) of a fair and reasonable wholesale price, could lead to reduced demand for such access.

ANNEX – proposed amendments

BEREC would recommend the deletion of Article 77.

Justification

The proposed Article 77 aims to promote the development of undertakings targeting wholesale markets for VHC networks. The potential effects of any such incentivisation must be considered against the potential harm it would cause to competition and consequently to end-users. As competition is a key driver for investment, and given the risks posed by this proposal to competition, the net effect of the proposed Article 77 is likely to be negative, in a number of existing market situations across Europe.

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 notifications[16], 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 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

[16] As of December 2016.

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.

BEREC's views on duration, on renewal of rights and on coordinated timing of assignments[17]

Articles 49, 50 and 53

BEREC takes note of the Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (EECC). As far as spectrum is concerned BEREC would like to express its view on Articles 49, 50 and 53 on the market related aspects below.

This does not preclude either BEREC´s future positioning regarding other elements of the proposal, nor does this mean other articles are supported or are of less importance, nor the necessity of a horizontal examination of the spectrum provisions in their entirety. Rather – as already expressed in its Opinion on the Framework review proposal – the specific proposals on duration and renewal of rights together with co-ordinated timings needs to be examined holistically.

Proposals of the Commission

The European Commission (hereinafter: Commission) is seeking to enhance consistency in Member States regarding key aspects of spectrum authorisation, in particular by proposing a minimum licence term of 25 years for all ECS[18] harmonised spectrum (30 years in the recently published ITRE draft report on the EECC). The Commission argues that this is sufficient time to allow operators to recoup their investment and will pave the way to a more fluid secondary market of spectrum rights.

In conjunction with this, the Commission also proposes to introduce a harmonised process around the renewal and expiry of rights, where Member States and/or NRAs must take a decision on the renewal between 3 and 5 years prior to the expiry of those rights according to a set of prescribed conditions.

Finally, the Commission seeks powers to set a binding timetable for coordinated spectrum awards, together with powers to limit or extend existing national licences to bring them into line with their deadline. These could – in the Commission's view – improve consistency and predictability for operators.

Analysis of BEREC

Duration of rights (Article 49)

BEREC agrees with the principles embedded in Article 49 (1) of the proposed Directive that a licence duration should take into account "the need to ensure effective and efficient use" of spectrum "and promote efficient investments" in order to allow operators to recoup their investment. However, this will vary from band to band and from Member State to Member State. There is no one period that is suitable to all circumstances – what is appropriate for one Member State may not be appropriate for the national circumstances in another Member State and what is appropriate for mobile broadband in one country will not be appropriate for PMSE[19]

[17] BEREC deals with these three issues combined since they are inter-related and closely connected.
[18] electronic communications services
[19] Programme making and special events

in another. Further to this, it is BEREC's view that any harmonised duration of rights in a directive exceeds the limits set by Article 288 of the TFEU[20].

Under the Radio Spectrum Decision[21] technical implementing measures have not only been established for spectrum used for mobile broadband wireless access but also for other applications such as SRDs and RLAN, and could in the future cover other services and applications. The current proposal of Article 49 within the draft Directive means that a minimum licence duration could also apply for frequency usages other than mobile broadband wireless access, which would in most cases be inappropriate.

A minimum licence duration for all harmonised spectrum risks constraining competition, stifling innovation and stagnating spectrum management. While we recognise that the Commission is trying to achieve a pan-European norm, harmonisation *per se* should not be the objective. The primary objective of the draft Directive should be to ensure that spectrum is effectively and efficiently managed and used in a way that maximises the benefit to EU citizens and consumers, while promoting competition. Setting a harmonised minimum licence duration across Member States risks hindering the achievement of the primary objective: efficient and effective spectrum management and use.

BEREC is of the opinion that the Impact Assessment provides no evidence to support the proposed intervention of the Commission to, firstly, set a harmonised minimum licence duration and, further, to set this at 25 years. In addition, the Impact Assessment fails to assess the problems that could arise with setting a minimum licence duration, noting what could have happened within the market if such an intervention was introduced 25 years ago, a period akin almost to the entire life of the World Wide Web.

BEREC sees the following draw-backs in setting minimum licence duration in all harmonised bands throughout Europe:

- The award of spectrum is a tool for Member States and/or NRAs to structure their market. BEREC believes that setting a minimum licence duration may result in entrenching market structures and limit the potential for market entry. For example, the process of re-awarding spectrum at regular intervals can allow for the possibility of new entrants to enter the market, which is particularly important if markets across the Union face structural competition problems. Even the "threat" of new market entry has positive impacts on competition. This is especially the case in markets where the number of operators is limited or where there is no longer effective competition.
- Spectrum licences establish technical parameters, such as requirements to avoid harmful interference with users in the adjacent bands. These conditions already reflect appropriate harmonised technical conditions in Radio Spectrum Committee Decisions and CEPT studies. This includes criteria such as bandwidth, channelling arrangements and duplexing systems (e.g. FDD, TDD, SDL band plans). These technical conditions will evolve over time, especially where technologies change and new technologies take their place. Consequently, it is not appropriate in the long-term to set a minimum licence duration which could potentially hinder innovation. For example, 3.5 GHz licences were awarded between 2000 and 2010 with 15 MHz duplex (FDD) often on

[20] (…) A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. (…)
[21] Decision No 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision)

regional basis. Today, some years since these licences were awarded, nationwide 80 MHz or 100 MHz simplex (TDD) licences are now needed to facilitate new technologies such as 5G in this band. In order to use new and innovative technologies like 5G in this band, the reassignment of the spectrum may be required in order to guarantee efficient use. The re-award of spectrum provides an opportunity for existing licensees to adapt their spectrum assignments in anticipation of new technologies and changing demand/market shares, as well as providing for the possibility of new market entry.

- Spectrum awards or re-awards are very useful and efficient tools for Member States and/or NRAs to promote their national policy objectives. For example, when awarding spectrum, Member States and/or NRAs design licence conditions, including coverage and quality of service obligations, to promote the connectivity needs of their citizens throughout the licence duration.

The Commission argues that setting a minimum licence duration of 25 years will contribute to reinvigorating the secondary market for spectrum rights of use. Spectrum trades which have taken place across Member States have mostly been as a consequence of mergers among operators and so far a spectrum trade has not resulted in a new market entrant. Spectrum markets are extremely “thin” markets with only a few potential buyers and sellers who are also already competitors in their own right on the downstream markets. For example, a licence-holder who plans to remain in the market is unlikely to trade harmonised spectrum to its potential competitors: indeed, the incentives are the exact opposite, particularly in a highly concentrated market with a finite supply of the essential resource: radio spectrum. BEREC believes that setting a pan-European minimum licence duration risks cutting-off the supply of radio spectrum.

BEREC considers spectrum trading as an important complementary, market-based spectrum management tool. It allows the market itself to correct potentially inefficient results of spectrum awards and it can support – to a certain extent – dynamic efficiency as market conditions change over time. However, spectrum trading should not be a spectrum management objective. The pursuit of efficient and effective spectrum management which will ensure the supply of spectrum to meet the ever-growing demand across the European Union should be the primary objective of the draft Directive. Delivering on this objective – while safeguarding conditions for a competitive market – will ensure that European citizens and consumers will be able to access goods and services at competitive prices. Spectrum trading is one of many such tools we now have to enable Member States to deliver on this objective.

Member States should be given sufficient flexibility to adjust the duration of licences issued in the context of national circumstances. This should not prevent Member States setting a minimum licence duration – where national circumstances allow and justify same. There are inevitably compromises between harmonisation and flexibility and Member States and/or NRAs need to find the right balance on a case-by-case basis to achieve the overall objective: effective and efficient spectrum management and use. Moreover, to achieve this objective, it is necessary to ensure that NRAs have the ability – where necessary and proportionate – to modify and/or withdraw the spectrum rights. This can ensure that spectrum is used effectively and efficiently throughout the license duration.

Renewal of rights (Article 50)

In BEREC's view, the reassignment of rights of use that are due to expire is a complex and legally demanding matter. Further to this, the possibility to withdraw or limit the duration of rights to those rights holders which do not fulfil properly their obligations, with a view to its reassignment is a key tool for effective spectrum management. The best mechanism to reassign spectrum rights of use depends on the specific national circumstances and not only on trying to encourage new market entrants. Furthermore, BEREC is of the opinion that the framework should be flexible enough so that Member States could take specific national circumstances into account when deciding about renewals of rights of use and their modalities.

A strict provision in the Framework, that a public consultation must take place several years before the expiry of a licence may not be an appropriate mechanism to have a reliable indication on the potential demand for spectrum. There are information asymmetries between incumbents and potential new market entrants. Consulting too early on the possibility of the renewal of spectrum rights may also open the field for speculation and gaming.

Greater certainty should be fostered for all stakeholders and spectrum rights holders. In the absence of a clear review clause well in advance of the expiration of a licence, opportunities for new entrants to enter the market would be reduced which in turn would also dampen potential competition and increase the probability of collusion (walled garden). The legal framework should not prevent Member States and/or NRAs from running a licence regime with clear and rigid licence durations (fixed terms and re-awards only by means of an open, objective, transparent and non-discriminatory award procedure) in order to ensure the efficient use of spectrum and minimise uncertainties and legal risks.

The time frame of 3 and 5 years, as proposed in the draft Directive, where a Member State and/or an NRA is to take a decision on a licence renewal is not appropriate in all cases and runs the risk of introducing uncertainty with respect to the licence renewal process and has the potential to undermine the licence itself. It should also be clarified whether Articles 50.3 and 50.4 are only applicable to harmonised radio spectrum.

BEREC shares the objectives regarding providing greater certainty and transparency to rights holders. However, BEREC does not believe the Commission's proposed mechanism is practical. In summary, BEREC is of the opinion that there should be enough flexibility for Member States and/or NRAs with regard to the renewal of rights of use. BEREC suggests that a clause enabling Member States and/or NRAs to be more explicit at the point of issuing a licence about the process for expiry/renewal would be a better solution not only for Member States and/or NRAs, but would give certainty to spectrum rights holders, potential new market entrants and other stakeholders.

Coordinated timing of assignments (Article 53)

The establishment of maximum dates of assignments for spectrum across the European Union may be particularly relevant where authorising the use of harmonised spectrum that has recently been cleared to be made available for electronic communication networks and services.

However, this is already achieved under the current Framework through the ordinary legislative procedure, e.g. for the 800MHz band, where a deadline for carrying out the

authorisation process was set in the EU RSPP Decision[22] and for the 700MHz band a deadline to allow the use of the band for wireless broadband services is proposed and expected to be adopted shortly in an EU Decision. Further to this, the Commission has not provided evidence to support such an intervention as set out in Article 53. Therefore, BEREC sees no need to further extend the Commission's powers in this area.

[22] Decision No 243/2012/EU of the European Parliament and of the Council of 14 March 2012 establishing a multiannual radio spectrum policy programme

BEREC paper on the Commission's proposals for an EECC Spectrum Provisions - Implementing Acts

Commission proposals and analysis

Over 10 years ago the EU addressed the challenges of rigid, command and control style spectrum management through its WAPECS[23] work and in the 2009 revision of the regulatory framework. WAPECS sought to introduce a new way to manage spectrum, aimed at paving the way to a more flexible approach to spectrum management. It was recognised that spectrum management across Europe needed to adapt to allow spectrum users to make timely decisions on how to use available spectrum, responding to market evolution and new technology opportunities. The WAPECS approach was predicated on the lifting of regulatory restrictions and rigid usage conditions to allow improved technological and economic efficiencies in the market. Market mechanisms, such as trading and leasing, were also part of the WAPECS package as it was widely accepted that the market is better placed than regulatory authorities to decide on the best use for a specific spectrum band.

Throughout its proposals in the draft Code, the Commission introduces a series of new tasks and requirements on Member States, each of which individually might seem like sensible spectrum management tools. However, when considered collectively, they risk creating significant regulatory and legal uncertainty. Additionally, in a number of cases the Commission seeks for itself the power to issue implementing acts to stipulate exactly how the competent national authorities must interpret, balance and implement these new tasks and requirements.

Together, the Commission's proposals seriously risk undermining Member States' ability to apply the EU spectrum management framework to meet their specific national needs in a manner which would achieve the overarching European objective, shared by all, of ensuring efficient spectrum use providing the greatest benefit to EU citizens and consumers. The Commission already has significant powers of oversight and intervention, specifically in relation to technical harmonisation measures necessary for the effective and efficient use of radio spectrum for various services such as ECS. Its proposals to extend this oversight and control into areas such as assignment, award, competition assessment, licence duration and spectrum utilisation risk hindering national spectrum authorities from ensuring the most efficient use of spectrum, rather than encouraging faster release or the more efficient use of spectrum across Europe.

Article 45 - Management of radio spectrum

The Commission may adopt an implementing act setting out whether spectrum harmonised under a Radio Spectrum Committee (RSC) decision shall be subject to a general authorisation or an individual right of use.

[23] WAPECS Opinion: http://rspg-spectrum.eu/wp-content/uploads/2013/05/rspg05_102_op_wapecs.pdf.
The Commission and the Member States worked together to develop the WAPECS approach and recognised that "a move to more flexibility would serve market needs in the wireless electronic communications sector, where an increasing number of wireless technologies serve a growing number of convergent services. Flexible spectrum management is therefore a key enabling factor for investment in innovation as well as for facilitating market entry for new businesses in a competitive environment" https://ec.europa.eu/digital-single-market/en/wapecs-flexible-approach-spectrum-use.

There is already a presumption, in Article 5(1) of the Authorisation Directive, in favour of general authorisations. The reasons for overriding this presumption in favour of an individual right remain the same (see Article 46(1) of the EECC proposal), but the Commission is seeking the power to harmonise their application by determining whether a specific band shall be subject to a general authorisation or to individual rights of use. There is no need for such harmonisation – there might be some instances where the choice of authorisation regime, including whether to make a band available via general authorisations or by individual rights, needs to be based on specific national circumstances, for example where there are existing users in the band or where adjacent band use differs. If the Commission mandates the use of individual rights in Member States where this is not necessary, it will sterilise valuable spectrum resources.

Article 46 - Authorisation of the use of radio spectrum

The Commission may adopt an implementing act on how Member States apply the criteria relating to deciding upon the most appropriate regime for authorising the use of spectrum, including issues relating to sharing, receiver resilience and protecting against harmful interference

A clear, transparent and stable authorisation is a prerequisite of good spectrum management and the provision of a robust central framework (such as the current Framework) is key to that. However, within this framework there needs to be a balance between consistency (of national approaches) and the accommodation of legitimately different authorisation requirements across the Member States. The Commission already has significant harmonising powers in relation to the specific technical characteristics of the radio spectrum, the need to protect against harmful interference and requirements for sharing arrangements. Moreover, receiver resilience is covered by Radio Equipment Directive, whose final provision explicitly refer to general interest objectives as defined by Member States, making clear that receiver resilience is by its very nature a national matter. If the Commission not only harmonises the criteria but also mandates the most appropriate regime across Europe, Member States would not be able to make spectrum authorisation decisions aimed at fostering the most efficient use given their particular national circumstances.

Article 47 - Conditions attached to general authorisation and to right of use for radio spectrum

The Commission may adopt implementing acts regarding the application of conditions that Member States attach to authorisations (excluding fees but including level of use required) including all conditions listed in Annex 1 Part D, inter alia, coverage, QoS, specific technology or service, technical and operational conditions, max duration, transfer or leasing, any commitment untaken in the authorisation process, pooling & sharing. The implementing act may also cover sharing of passive or active infrastructure or of spectrum, commercial roaming agreements, coverage. Any implementing act in relation to coverage would be limited to specifying criteria to be used to define and measure coverage obligations.

This proposal is a substantial additional transfer of competence from Member States to the Commission. As mentioned above, the Commission can already achieve much of the desired harmonisation through the RSC (i.e. harmonisation of technical and operational conditions and specific technology or service). Beyond this, issues of coverage, quality of service, and commercial roaming agreements remain necessarily national issues as they depend on the specific set of market dynamics in each Member State. Attempting to harmonise these

potentially removes the scope to innovate on a national or local level and risks undermining the principle that the least restrictive criteria should be applied when authorising spectrum use.

While the provisions relating to coverage in this article cover only the criteria to define and measure coverage, when read in conjunction with other provisions relating to coverage (Article 35(1)(g), Article 45(2)(a) and Article 54(2)(a)) they represent a significant restraint on Member States' ability to define, apply and measure coverage as might be necessary to reflect and accommodate unavoidable differences between them (e.g. in terms of population density and distribution, topology etc.).

Article 53 - Coordinated timing of assignments

The Commission may adopt an implementing act to establish a common deadline for harmonised spectrum to be authorised and may limit or extend those licences falling under Article 49 (25 year licence proposal) to bring them into line with the harmonised deadline.

The initial part of this proposal can already be achieved (e.g. 800MHz and 700MHz) through a co-decision of Council and Parliament. This process has worked well and Parliament and the Council should continue to be involved to ensure that legitimate national public policy objectives are met and to ensure that the timetable adopted reflects a realistic assessment of what is technically feasible (e.g. in relation to the clearance of bands).

The proposal for the Commission to be able to extend or reduce licence duration in individual Member States brings into question the value of a licence issued by a Member State, undermining security of tenure for the rights holder, thereby undermining investment (i.e. the Commission's own overarching objective).

Additionally, it is worth bearing in mind that there already exists a degree of harmonisation on timetables for spectrum release, namely deadlines in RSC Decisions which dictate when harmonised spectrum must be designated and made available. Therefore, if demand is present (such that an RSC decision is adopted), this in effect also harmonises the authorisation of that spectrum within a period of a few years amongst Member States, thereby meeting the Commission's objective in most cases.

Article 54 - Procedure for limiting the number of rights of use to be grated for radio spectrum

The Commission may harmonise how Member States go about limiting number of rights, the objectives a Member State may set out in designing a selection procedure including coverage, QoS, promoting competition and ensuring fees promote optimal use of the spectrum.

As previously considered in relation to Article 45, when a Member State limits the number of rights of use, this is usually as a result of national circumstances and detailed knowledge of the national market (including in terms of how neighbouring bands might be used, and therefore the scope for interference). The objectives that a Member State then articulates through the selection process will reflect its legitimate (and legitimately differing) national public policy objectives, not least in relation to coverage and promoting competition. These elements are dependent on national topologies and geographies and the structure of the national market in any given country, not things that can be harmonised away. It is sufficient to empower and enable Member States to take these into account. Going further to harmonise exactly how they must be balanced and applied will simply prevent Member States from meeting their national needs, preventing them from ensuring an efficient use of this scarce resource and ultimately undermining the value of European spectrum.

BEREC View

We do not support the proposed new implementing powers of the Commission. Spectrum harmonisation and coordination already happen on numerous levels and involve an intricate balance of competence and responsibility between Member States, regional groups, the EU and the ITU. The existing mechanisms already bring many potential benefits including economies of scale in equipment manufacturing, leading to competitive services and prices being available for consumers; greater technical efficiency; and international mobility. Any consideration of further harmonisation must be measured against the loss of flexibility that harmonisation potentially introduces and the constraints placed on the way in which that spectrum may be used at the national level, thereby potentially foreclosing activities that could yield greater economic benefit and possibly leading to under-utilisation of spectrum if the envisaged demand does not materialise. This is a real risk.

Through the current mix of co-ordination, technical harmonisation and deadlines (whether in RSC decisions or through co-decision), Europe has achieved an environment of regulatory certainty and efficient spectrum management. The Commission's proposals seem to discount the significant advances made by the introduction of the WAPECS principles and point to a return to centralised, rigid spectrum management as the answer to the spectrum challenges of the next 10 – 20 years.

Harmonisation in itself is not, and should not be, the objective. It is one of many tools which the Commission and the Member States can use to achieve their shared objectives. In some cases it might be the best tool, while in others it might not. In many cases coordination through guidance by means of Guidelines or even Common Positions might be more effective. In particular, and in view of the Commission's proposals on NRA competences, BEREC could have an important role to play in relation to market-shaping aspects of spectrum management, helping to promote flexible coordination across Europe The sharing of best practice, peer pressure and the emergence of a critical mass travelling in a certain direction can be more effective than the centralised mandating of single solutions, which are necessarily based on a snapshot of circumstances at a specific moment in time.

We support a principles-based framework built upon technology and service neutrality, facilitating spectrum trading and promoting spectrum sharing. Such a principles-based approach is the best way to promote the efficient use of spectrum across Europe. There are considerable benefits to be derived from the continued, and increased, sharing of best practice across the EU, striving to deliver consistency and uniformity of approach without unnecessarily fettering the discretion of Member States to address their national needs and without squeezing innovation and flexibility with rigid rules narrowly applied. The Commission's proposals risk destabilising what has been a successful framework, increasing uncertainty and undermining investment in the sector.

Peer review process (Article 35)

1.1 Description of the Commission's proposal

The Commission is proposing to introduce a mandatory peer review procedure for national spectrum assignments aimed at achieving a more coordinated approach to spectrum assignment procedures and licence conditions at Union level.

The proposal requires first of all that all National Regulatory Authorities (NRAs) are entrusted with a harmonised set of competences relating to the management of radio spectrum (Article 35 (1)). This includes, inter alia, responsibilities for the selection process (in the case of individual rights of use), eligibility criteria for bidders, the duration of the rights of use, renewal conditions and conditions related to assignment and transfer (including trading and leasing) of rights of use for radio spectrum, as well as the parameters of coverage conditions reflecting Member State public policy objectives.

NRAs would be required to make any draft measure relating to the areas described above accessible to BEREC, the Commission and other NRAs for peer review. Within one month, BEREC would have to issue a reasoned opinion stating whether the draft measure should be amended or withdrawn. In addition, other NRAs and the Commission would also have the opportunity to comment. The NRA concerned would have to take utmost account of the BEREC opinion and of any comments made by the Commission and other NRAs before adopting its final decision. Furthermore, the NRA in question would have to provide a reasoned justification, where it decided not to amend or withdraw the draft measure based on the BEREC opinion.

The proposal would not lead to a binding decision requesting amendments to, or to a veto of, an NRA's draft measure. However, it would require the NRA concerned to provide a reasoned justification where it decided not to follow the BEREC opinion, and to formally cooperate with BEREC and the Commission to identify the most appropriate and effective solution.

1.2 Description of the ITRE Rapporteur's proposals

The draft ITRE Report maintains the peer review procedure as proposed by the Commission but extends the time given to BEREC to produce an opinion from 1 month (with a possible extension if the NRA agrees) to 3 months. The RSPG would be given a role in the peer review procedure (AM 65 and 66).

1.3 BEREC analysis

BEREC welcomes the Commission's objective to achieve ubiquitous connectivity for all citizens across Europe, and agrees that effective spectrum management is critical to the Digital Single Market. BEREC also welcomes and agrees that NRAs should have an important role to play in relation to market shaping aspects of spectrum management with a harmonised minimum set of tasks.

However, BEREC has serious concerns that the Commission's proposal for a more centralised approach towards national spectrum assignment procedures and licence conditions at Union level would not lead to achieving the aims, shared by all, of improving spectrum assignment mechanisms across the EU and promoting regulatory best practice in this area.

- The Commission's proposal would undermine effective and efficient spectrum assignment procedures across Europe, adding bureaucracy and delay to an already lengthy and complex process.

- The scope of the notification requirement encompasses *all* spectrum management measures (award, conditions, renewal, etc.) and measures relating to *all* ECS uses of spectrum. This represents a substantial number of measures to be considered, quite possibly with multiple proposed national spectrum award assignments coming under review at the same time. This would be impractical at best, if not unfeasible.

- The proposed peer review process would occur too late in the process of award design. Given how complex the process of designing an award can be and how long the process can take (up to 2 years), it is not realistic to subject a final design to scrutiny and expect the Member State to make substantial alternations so late in the day without subjecting any amended proposed award to the full range of stakeholder consultation. The delays described above become much longer than just the one month that BEREC would have to issue a reasoned opinion, and could run into many months of multiple rounds of further consultation. Any review would therefore have to take place in relation to an early draft decision, potentially when the NRA first seeks the views of stakeholders on its proposals.

- The proposed peer review process is not practicable, and raises the risk of litigation (and by extension, further delay in spectrum release). Draft licence award designs are long and complex documents often reaching thousands of pages. Whether BEREC is given one or three months to assess a draft award, it is simply not a feasible task, particularly considering that the draft will often only be available in the Member State's national language. Any written opinion, therefore, would necessarily be based on a limited appreciation of the proposal.

The draft ITRE report does little to address BEREC's concerns.

Against this background, any alternative to the Commission's proposal should be based on the following criteria:

(1) a deepened exchange of best practices. This would support awarding authorities in making consistent spectrum assignment decisions and foster the creation of a collective bank of knowledge and expertise that could be called upon by all those involved in designing, planning and executing spectrum assignments.

(2) a limitation of any review to assignments in harmonised ECS spectrum bands that have substantial impact on the markets. The scope of the procedure should be limited to market shaping aspects of the awarding conditions (as listed in Article 35.1.)

(3) the involvement of all relevant experts from competent European bodies and national authorities, in which respect, BEREC and RSPG have already expressed their will to strengthen their cooperation.[24] It is important to acknowledge that both BEREC, with its role in the functioning of the electronic communications markets, and the RSPG, concerned with spectrum management in general, have a part to

[24] Joint BEREC/RSPG News Release on Spectrum and the Framework Review, 3 February 2016. It should also be noted that other EU organisations may also be involved in such matters, in particular COCOM/RSCOM.

play based on their respective roles. Therefore, RSPG should be associated to this process at an appropriate level respecting the independence of BEREC and its members.

(4) timeliness – scrutiny of planned awards should take place early enough in the process to enable the Member State in question to take account of comments received in finalising its licence award.

(5) pragmatism – any scrutiny process must take into account the length and complexity of national award designs (often available only in the official language of the Member State), and be designed in such a way to maximise the understanding of those providing feedback on the award, so as to enable them to contribute positively. A sensible process should be measured by reference to the value it adds to the awarding Member State.

BEREC would therefore recommend replacing the Commission's proposal for a mandatory peer review. Based on the previous analysis, two options should be considered:

- a voluntary peer review taking into account the criteria set above, where the national regulatory authority would have the discretion to decide whether or not to submit its draft measure to BEREC. In this process, BEREC would collect inputs from the RSPG.

- a different and more effective mechanism, which would also meet the criteria described above. This could take the form of a workshop co-organised by BEREC and the concerned NRA, where it would be required to share its draft measure with all relevant experts at EU level, at the stage of its national public consultation or equivalent. Concretely, the NRA would be required to convene a meeting of competent experts from at least [5] Member States. The meeting would be open to all other members of NRAs and European bodies, including in particular the RSPG and the Commission and would take the form of a presentation followed by a "challenge session"/Q&A, led by the [5] experts (but potentially with the participation of all attendees). The objective would be to stress test the draft measure, sharing experiences and lessons learned and exposing for consideration potential deficiencies in the draft award in a confidential, professional environment ("stress test").

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 point~~s~~ ***(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.

BEREC views on Articles 12 & 16 of the draft Code "*Notification Process*" and "*Administrative charges*"

Notification Requirement (Article 12)

The draft Code introduces some changes as regards the procedure for notifications related to the general authorisation. According to the Commission's (EC) proposals, where a Member State (MS) considers a notification requirement to be justified, providers should submit notifications only to BEREC, which should act as a single contact point and forward the notifications to the relevant NRAs where the networks or services are provided. Both the EC and EP proposals maintain MS' flexibility to choose whether or not to adopt a notification scheme, though any notification requirement should not entail administrative costs for the providers. According to Article 2 (2) (d) of draft BEREC Regulation, BEREC should also establish a register at EU level. According to Article 12 (2) and recital (42) of the draft Code, number-independent interpersonal communications services (NI-ICS) providers however, are excluded from the general authorisation.

The ITRE Rapporteur[25] proposes to extend the scope of the general authorisation regime defined in Article 12 to all ECNS and ECS providers – including NI-ICS – but wishes to establish a threshold excluding small services from any unnecessary burden associated with a notification by applying the thresholds inspired by the competition law criteria of 'community dimension'. This would mean that providers with a limited EU presence and turnover would be excluded from the notification obligation, while at the same time allowing them to benefit from the general authorisation in MS in return for payment of a 10€ nominal fee (AM 44). The ITRE Rapporteur also proposes that MS provide a reasoned justification to the EC and other MS in case they intend to implement a notification requirement, with a EC power to prohibit it (AM 41).

Need to clarify the concepts of general authorisation and notification

Both the EC and ITRE Rapporteur's proposals do not clearly differentiate the concepts of general authorisation and notification. It should be stressed that the concepts are independent from each other: general authorisation refers to a framework of rights and obligations applicable to all ECNS and ECS providers in the market. The notification refers to the procedure that enables NRAs to keep a record of who is present in the market and it does not constitute a barrier to entry (and in fact, there are thousands of notified operators in the EU).

BEREC supports the inclusion of number-independent services in the general authorisation (Article 12 (2)) proposed by the ITRE Rapporteur's since, including NI-ICS in the definition of ECNS but excluding them from the general authorisation could be interpreted as meaning that these services freedom would not benefit from the protections afforded by the general authorisation, i.e. including the right to provide services unhindered by any other licensing or

[25] Draft Report on the proposal for a directive of the European Parliament and of the Council establishing the European Electronic Communications Code (EECC) (recast) (COM(2016)590 – C8 0379/2016 – 2016/0288(COD))

regulatory requirement (see Article 15(1))[26]. Member States should also have the flexibility to require notification in this case.

In terms of the notification procedure itself, BEREC's involvement as proposed seems to run counter to the objectives of simplification and proportionality. First, a centralised notification procedure would, in theory, only benefit a very small number of undertakings supplying their services in several MS.

Secondly, a centralised procedure would not prevent the need for each undertaking to deal with the local NRAs, regarding the allocation of rights of use or the supervision of their activity.

Thirdly, if the objective is to reduce bureaucracy, it would appear counterproductive to introduce a new middle-man. Any notifications and changes thereto (which could amount to thousands, if one considers, for example, the need to notify changes of contact details) would be 'travelling' to BEREC Office and then back to the NRAs, and would duplicate the number of registries – one in the BEREC Office and one at national level – and by extension the administrative burden, as well as the cost of operation for both the NRAs and BEREC. Assuming that the notifications would be submitted in the official EU languages and BEREC would also be responsible also for issuing the declarations under Article 14, this would demand additional resources from BEREC Office and would further increase administrative costs.

In any case, we should not lose sight of the fact that the current provisions already impose that any notification requirement is limited to the minimum of information necessary to enable the NRA to keep a register of providers in their territory. In this regard, BEREC suggests small amendment to Article 12 (4) to improve the quality of information provided.

The notification is needed to cover a broad range of regulatory objectives

BEREC has reservations about the ITRE Rapporteur's proposal to oblige those MS which deem that a notification is required, to provide a reasoned notification to the EC (which may then prevent the MS from implementing this obligation) and other MS.

In almost all MS the notification procedure is the main way for the NRAs to know who is active in the market. In this sense, the purpose of the notification is by no means exclusively linked to the recovery of administrative charges, but also helps NRAs in market monitoring, data collection and the definition of applicable rights and obligations. The proposal to include specific thresholds and for the EC to have the power to prevent the establishment of a notification regime runs against these objectives.

Furthermore, the ITRE Rapporteur's proposal to include a threshold based on the 'EU dimension' of a provider's business (i.e., an undertaking's presence in at least three MS and an aggregate turnover of (EUR [100] million)), lacks any justification.

[26] We understand the Commission's intention here was for undertakings to be free to provide number-independent services without having to notify and comply with the general authorisation (as per Recital (42)). However, given the extension of the ECS definition to include number-independent services, the legal effect of Articles 12 and 15 of the draft Code results in a risk that it could be given the opposite interpretation, i.e. as NI-ICS are a type of ECS, the freedom to provide ECS would only apply to those ECS which are authorised under Article 12, If NI-ICS were not subject to the general authorisation, the freedom to provide services would not apply to NI-ICS. There is a clear risk that these provisions would be interpreted differently by member states and by European institutions

On the one hand, the proposal seems to mix the concepts of general authorisation and notification. Abolishing the notification requirement would not affect the scope of the general authorisation, which would still apply to all undertakings regardless of the existence of a notification scheme.

On the other hand, the 'EU dimension' threshold would be hardly applicable in practice and would not be proportionate. First, it does not take into account the different sizes of national markets (e.g., a EUR 100 million turnover means something very different in the German market than the Maltese market).

Secondly, if the proposed threshold was adopted, only a very small minority of undertakings in each MS would be subject to the notification process, potentially undermining the NRAs supervisory functions, to the detriment of effective consumer protection, particularly against fraudulent practices. Eventually it could render communications between the NRAs and relevant undertakings more complex, actually increasing the burden also on the undertakings.

Furthermore, it is precisely the small operators which can be difficult to keep track of. Maintaining the notification requirement only for the (very) large operators would undermine the added value of the tool (knowing the market and the new entrants).

For the reasons stated above, BEREC does not agree with the ITRE Rapporteur's proposals around Article 12 (3). Any exemption from the notification procedure, based on differentiation between categories of electronic communication services or on the size and turnover of undertakings, would therefore have to be left to the discretion of each MS considering the specific characteristics of its market within the limits set out by the draft Code.

A better way forward

BEREC should be empowered to promote greater consistency between national notification templates. Indeed, BEREC has already done some work towards developing a template notification form – it is worth noting that the principal obstacle to full harmonisation of national notification obligations lies in differences between administrative law requirements in different MS, differences which are beyond the power of NRAs or BEREC to address.

BEREC could also act as an information sharing portal, making available information on the notification procedures as well as a list of undertakings operating in Europe based on an integration of the registries maintained by each NRA (like a portal to NRAs' individual registries), though we note that not every NRA maintains such a registry.

Administrative charges

Article 16 of the draft Code basically confirms the formulation of Article 12 of the current Authorisation Directive concerning administrative charges.

Against the background of the proposed exemptions from the notification requirement, the ITRE Rapporteur proposes to prohibit MS from collecting administrative charges of more than a one-off fee of 10€ on undertakings 'present in fewer than [three] Member States and with an aggregate Union turnover of less than EUR [100] million', i.e. the same undertakings that would be exempted from the notification requirement. Additionally, a 10€ fee could be imposed by MS to cover only the costs stemming from the registration of the notification.

Administrative charges should cover NRAs' general authorisation costs

The EC's proposal, on the other hand, would leave it up to MS, to decide whether and how to apply any exemptions to the payment of administrative fees for smaller undertakings, based on their national circumstances. BEREC welcomes such approach and strongly opposes the

ITRE Rapporteur's proposal, as recovering the costs of regulation from the marketplace (rather than relying on a national budget contribution) is an important means of ensuring political independence. The one-off fee of 10€ would come nowhere near covering the actual costs of regulating an undertaking, however small.

In order to remove any ambiguity around NRAs' activities whose costs would be eligible for sectoral funding, particularly given the read-across to the issue of NRAs independence, BEREC would propose to amend Article 16(1) (a) to make an explicit reference to the administrative costs incurred by NRAs in the exercise of all the tasks entrusted to them under the electronic communications framework. This would ensure that both the mandatory tasks assigned to the NRAs under the Code, and all the other tasks envisaged by the framework that MS might eventually entrust to NRAs, would be covered. The same principle could be applied to the national competent authorities that are not NRAs.

Administrative charges should be adapted to national market specificities to avoid discriminatory effects

As well as undermining NRAs' ability to secure adequate sectoral funding, a key enabler of their political independence, the ITRE Rapporteur's proposal would also have a discriminatory impact in two ways:

- NRAs in those MS with a higher number of multinational electronic communication providers would face fewer financing constrains than NRAs in those MS with smaller providers in their market, and
- Undertakings who might have similar turnover to each other within a particular MS might nonetheless face significantly different charges if one of them is present in three MS and the other in only one or two.

The current system enabling administrative charges to be set at the national level based on national turnover and/or other national market specificities is already progressive and should not be altered.

Proposed amendments[27]

General Authorisation (Article 12)

Amendments to Article 12 (1)

1. Member States shall ensure the freedom to provide electronic communications networks and services, subject to the conditions set out in this Directive. To this end, Member States shall not prevent an undertaking from providing electronic communications networks or services, except where this is necessary for the reasons set out in Article 52 (1) of the Treaty. Any such limitation to the freedom to provide electronic communications networks and services shall be duly reasoned and shall be notified to the Commission. ~~Member States shall provide the Commission and the other Member States with a reasoned notification within 12 months following the [transposition date] if they deem that a notification requirement is justified. The Commission shall examine the notification and, where appropriate, adopt a decision~~

[27] Amendments on the Commission plus ITRE Rapporteur's proposal

~~within a period of three months from the date of notification requesting the Member State in question to abolish the notification requirement.~~

Amendments to Article 12 (3)

3. Where a Member State deems that a notification requirement is justified, that Member State may only require undertakings to submit a notification to ~~BEREC~~ ***the national regulatory authority*** but it may not require them to obtain an explicit decision or any other administrative act by the national regulatory authority or by any other authority before exercising the rights stemming from the authorisation. ~~Member States requiring notification shall allow but may not require a provider of electronic communications services offered in fewer than [three] Member States and with an aggregate Union turnover of less than EUR [100] million to submit a notification.~~ Upon notification to ~~BEREC~~ ***the national regulatory authority***, when required, an undertaking may begin activity, where necessary subject to the provisions on rights of use pursuant to this Directive. ~~If a notification does not identify one or several Member States concerned, it shall be deemed to cover all Member States. BEREC shall forward by electronic means and without delay each notification to the national regulatory authority in all Member States concerned by the provision of electronic communications networks or the provision of electronic communications services. Information in accordance with this paragraph on existing notifications already made to the national regulatory authority on the date of transposition of this Directive shall be provided to BEREC at the latest on [date of transposition].~~

Amendments to Article 12 (4)

4. The notification referred to in paragraph 3 shall not entail more than a declaration by a legal or natural person to ~~BEREC~~ ***the national regulatory authority*** of the intention to commence the provision of electronic communications networks or services and the submission of the minimal information which is required to allow ~~BEREC and~~ the national regulatory authority to keep a register or list of providers of electronic communications networks and services. This information must be limited to:

   (1) […]

   (2) […] and registration number**s** […];

   (3) the geographical address of the provider's main establishment ~~in the EU~~ and, where ***applicable*** ~~existing~~, ***of its*** ~~any~~ secondary branch ~~in a Member State~~;

   (4) ***the provider's website associated with the provision of electronic communications networks and/or services, where existing;***

   (5) ***the provider's*** contact person**s** and ***their*** contact details;

   (6) ~~a short~~ ***an informative*** description of the networks or services intended to be provided;

   ~~(6) the Member States concerned;~~ and

   (7) an estimated date for starting the activity.

Member States may not impose any additional or separate notification requirements, without prejudice to notification requirements regarding any change to ***the information previously provided, including any change*** or ~~cease~~ ***cessation*** of activity.

In order to contribute to the consistent application of this paragraph, BEREC shall make available the information on Member States notification requirements as well as a list of registered undertakings based on an integration of the registries maintained by each national regulatory authority.

Administrative Charges (Article 16)

Amendments to Recital (51) Administrative charges may be imposed on providers of electronic communications services in order to finance the activities of the national regulatory authority or other ***national*** competent authority incurred in ***the exercise of all the tasks pursuant to this Directive*** ~~managing the authorisation system and for the granting of rights of use~~. Such charges should be limited to cover the actual administrative costs for those activities ***which may include, among others, costs for the management, control and enforcement of the general authorisation scheme and of rights of use and of specific obligations, international cooperation, harmonisation and standardisation, market analysis, monitoring compliance and other market control, as well as regulatory work involving preparation and enforcement of secondary legislation and administrative decisions, such as decisions on access and interconnection***. For this purpose transparency should be created in the income and expenditure of national regulatory authorities and of other ***national*** competent authorities by means of annual reporting about the total sum of charges collected and the administrative costs incurred. This will allow undertakings to verify that administrative costs and charges are in balance.

Amendments to Article 16 (1)

1. Any administrative charges imposed on undertakings providing a service or a network under the general authorisation or to whom a right of use has been granted shall:
   a) in total, cover only the administrative costs which will be incurred ***in the exercise of all the tasks*** *entrusted to* national regulatory authorities or other ***national*** competent authorities ***pursuant to this Directive*** ~~in the management, control and enforcement of the general authorisation scheme and of rights of use and of specific obligations as referred to in Article 13(2), which may include costs for international cooperation, harmonisation and standardisation, market analysis, monitoring compliance and other market control, as well as regulatory work involving preparation and enforcement of secondary legislation and administrative decisions, such as decisions on access and interconnection~~; and

   b) be imposed upon the individual undertakings in an objective, transparent and proportionate manner which minimises additional administrative costs and attendant charges. Member States may choose not to apply administrative charges to undertakings whose turnover is below a certain threshold or whose activities do not reach a minimum market share or have a very limited territorial scope. ~~Member States may not apply any administrative charges on providers of electronic communications services present in fewer than [three] Member States and with an aggregate Union turnover of less than EUR [100] million over and above a one-off~~

~~charge not exceeding EUR [10], to cover any administrative costs incurred in the mere registration of any voluntary notification under Article 12.~~

Amendments to Article 16 (2)

2. Where national regulatory authorities or other ***national*** competent authorities impose administrative charges, they shall publish a yearly overview of their administrative costs and of the total sum of the charges collected. In the light of the difference between the total sum of the charges and the administrative costs, appropriate adjustments shall be made.

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.[28]

[28] '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.[29]
- 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.

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

[29] 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 .

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 BEREC[30] 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.
- 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).

[30] Concerning the identification of transnational markets and the definition of a contract summary template.

- 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 Groups[31].

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 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 State[32] and

[31] 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.
[32] Art 5.1 changes the plural in the current art 3FD for the singular: "the national regulatory authorit**y** shall be responsible of the following tasks". Also, art 8.1 establishes that any entity defined as NRA shall be politically independent.

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 h[33] 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 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

[33] 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.

- 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.