

# **BEREC Opinion on the draft Procedural Recommendation**

12 February 2021

## 1) Annexes follow the Recommendation

BEREC understands that the Annexes follow the Draft Recommendation. This implies that the Annexes do not require more detailed information than the Draft Recommendation itself. BEREC welcomes that the Commission is planning to provide further clarifications in the Q&A document supporting the Recommendation.

## 2) Recital 11 / Recommend 17 / Annex III

In its response to the public consultation (BoR (20) 51) on the proposed Recommendation for Internal Market Procedures under the European Electronic Communications Code (hereinafter also referred to as “the Code“), BEREC expressed the view that the short notification form is a useful tool which should be improved with an added value e.g. in terms of shortening the overall duration of the procedure and expanding the typologies that may fall under its remit. Until now, its usage was limited, because the difference to the standard notification form was not clear cut enough. BEREC therefore suggested to distinguish more clearly between the standard notification and the short notification form (including implications for both) and work towards a simplified short or no notification procedure that streamlines the process for all – NRAs, BEREC and the Commission. Furthermore BEREC suggested that for the following cases no or at least only the short notification should apply:

- Reference Offer (if the modifications only update the RO, but do not change the principles/obligations already defined and in proceedings where existing methodologies/principles are simply applied to another operator);
- Updates of e.g. Economic Replicability Test (ERT) decisions without change of the underlying methodology (only testing of new prices/offers);
- Subsequent notifications of other operators’ obligations using the same approach/methodology that was used already (e.g. for Termination Rates);
- Notifications in second instances (renotification);
- De-minimis services (e.g. with a low turnover, and thus no significant impact of the market etc. such as collocation electricity).

Unfortunately BEREC’s opinion was not applied to the current concept of the short notification proposed by the Commission in the Draft Recommendation. BEREC still maintains its opinion concerning simplicity and usability of the short notification. Whereas extending information required from NRAs and limiting the number of cases possible to be used with the short notification form seem to reduce the effectiveness of notifications processes. BEREC would like to note that it would be beneficial to more clearly distinguish standard and short notifications, giving NRAs a real possibility and tool to speed up notifications, where it’s justified by a repetitive or formal nature of a case. BEREC would also ask to clarify in the Draft Recommendation that it is not mandatory for an NRA to fill in every point in the template if there is no national legal requirement (e.g. to run a new national consultation).

Moreover, BEREC does not understand why the Commission removed from the list of the categories of draft measures to be notified using the short notification form the ones indicated in lit. a), b) and d) of Recommend 6 of the 2008 Procedural Recommendation (2008/850/EC), namely:

(a) *draft measures concerning markets which have been removed from or have not been previously listed in the Recommendation on relevant markets, either where the market is found to be competitive by the national regulatory authority, or where the national regulatory authority considers that the three cumulative criteria are no longer met;*

(b) *draft measures concerning markets which, while included in the Recommendation on relevant markets in force, had been found to be competitive in a previous market review, and remain competitive;*

d) *draft measures concerning a relevant market that has already been analysed and notified in relation to other undertakings, where the national regulatory authorities imposes similar remedies on other undertakings, without materially changing the principles applied in the previous notification.*

Also in the light of the new Recommendation on Relevant Markets of 2020 (2020/2245/EU) which removed from the list markets 1, 2 and 3b of the previous Recommendation (2014/710/EU), BEREC thinks that the rationale of the above mentioned rules is still valid. For example, in case an NRA found competitive market 3b or markets 1 and 2 of the previous Recommendation (2014/710/EU), it is not clear why the standard notification form needs to be used. Also in case an NRA has notified the termination markets (with standard notification form) as susceptible to ex-ante regulation, for the subsequent notification of additional operators, a short notification is sufficient. BEREC asks the Commission to consider not to remove these categories of draft measures from the list of cases eligible for the short notification form.

For comments related to the lit. b) of Recommend 17 see point 11 of this document.

### 3) Recital 18 / Recommend 8 / Annex IV (Section 2)

The Draft Procedural Recommendation foresees that, where an NRA adopts a draft measure, previously notified under Article 32(3) of the Code, after having received comments from the Commission, BEREC or another NRA, it should communicate to the Commission, BEREC and other NRAs both the adopted measure and the manner in which it took the utmost account of the comments made (cf. Recommendation 8 and Recital 18). In this context, the Draft Procedural Recommendation introduces a new obligation on NRAs, in order to increase transparency, and facilitate procedures for the communication of adopted measures, that NRAs should communicate to the Commission their adopted measures by completing and submitting the form set out in Annex IV, along with the adopted measure (cf. Recommendation 8, Recital 18 and Annex IV, Section 2).

BEREC disagrees with such an extra obligation on NRAs, in particular to use a standard form for notifying how the NRAs took the utmost account of the comments made by the EU Commission, for two reasons: Firstly, outside of a Phase II proceeding, there is no legal basis to make NRAs explain how exactly they considered the comments of the Commission, especially not in a standard form. The Code itself only asks NRAs to communicate the measures in which they took the utmost account of comments received from other national regulatory authorities, BEREC and the Commission after adoption (see Article 32 paragraph 8).

Secondly, BEREC strongly emphasizes again that prescribing in a specific way how the NRA dealt with the comments of the Commission in a special standard form is too burdensome for NRAs and amounts to an obligation rather than a recommend.

BEREC considers that a less burdensome way to enhance transparency could for example be for the NRA to simply refer to where in the final version of the adopted measures the NRA has dealt with the comments by the Commission. This would also improve transparency.

#### 4) Recommend 1

With regard to Recommend 1 and Recital 5 which concern pre-notification meetings, BEREC acknowledges the importance of pre-notification meetings and welcomes that this opportunity is laid down in the Draft Procedural Recommendation. However, BEREC notes that the wording of Recital 5 of the Draft Procedural Recommendation 2020 is more open concerning pre-notification meetings than the wording in Recommend 1 of the draft.

In this context, BEREC suggests to align the wording of Recommendation 1 with the one of Recital 5. Since there is no obligation laid down in the Code or other Union law to have pre-notification meetings at specific points in time during the notification process, the language of Recommend 1 should be aligned accordingly. Instead of recommending that “[i]n particular, for draft measures consisting of market reviews, these pre-notification contacts should preferably take place before the national consultation provided for in Article 23(1) of the Code”, BEREC would propose to the Commission to recommend that „NRAs should be encouraged to request pre-notification contacts as early as possible, before or/and after their national consultations”.

Furthermore, it seems advantageous to add that pre-notification meetings shall enable the NRAs to as appropriate have regard to the view of the Commission in their proposed draft measures as early as possible. Such clarification would give NRAs more certainty concerning the general direction of the Commission’s thinking already during the drafting of the proposed draft measures. BEREC therefore proposes to insert a passage like the one in Recital 4 of the 2008 Procedural Recommendation: “Where, pursuant to Article 7(4) of Directive 2002/21/EC, the Commission has indicated to the national regulatory authority that it considers that the draft measure would create a barrier to the single market or where it has serious doubts as to its compatibility with Community law, the national regulatory authority concerned should be given an early opportunity to express its views regarding the issues raised by the Commission.”

#### 5) Recommend 4

Recommend 4 concerns Requests for Information (“RfI”). BEREC notes that the wording of Recommend 4 is not sufficiently clear regarding the period for answering an RfI. The requirement that the NRA should immediately inform the Commission services, if it is not possible to meet the deadline, seems to shorten the period for answering an RfI or rather indicates that extra days will not be granted, if an immediate alert is not given. Therefore, it would be helpful to change the wording. BEREC proposes to get back to the less strict wording of the 2008 Procedural Recommendation, which states: “National regulatory authorities should endeavour to provide the information requested within three working days, where this is readily available”

instead of “NRAs should provide the information requested within three working days, where this is readily available. If it is not possible for the NRA to meet the deadline, the NRA should immediately inform the Commission services”.

In case the Commission does not wish to follow this proposal, a clearer wording bringing together the short internal deadlines of the Commission with the NRA’s need for time to answer the RfI would still be much appreciated.

While BEREC understands that it is difficult for the Commission to take certain factors such as national bank holidays into account automatically by calculating the deadline to provide further information, it is worth noting the Commission’s informal practice requesting NRAs not to notify draft measures during summer and Christmas holiday periods. Taking such factors automatically into account and disclose this publicly would expedite the process and create transparency as well as legal certainty for the NRAs. Therefore, it would be helpful to at least include examples where an extension of time will be guaranteed. It could be done by inserting a phrase like: “In cases of a bank holiday, illness or absence of the agent responsible for answering the RfI or high complexity of the questions and high effort to provide for the information requested the three day deadline will be extended after the NRA informed the Commission. In other cases the Commission will decide on a case by case basis.” The list of examples may be amended by the Commission regarding further standard reasons for granting an extension. Giving examples for when the deadline will be extended could as well serve to soften the wording of Recommendation 4 of the Draft Procedural Recommendation 2020.

#### 6) Recommend 5

BEREC is aware of legal aspects of using national languages within the EU, however for practical reasons and limited time frames of notifications it is preferable to deliver questions and feedback to an NRA or BEREC in English. BEREC therefore suggests using the standard wording “*preferably in English*” in Recommend 5 of the Recommendation or at least in the Q&A document supporting the Recommendation.

#### 7) Recommend 9

Following its concerns to Recommend 5 of the Draft Recommendation BEREC would like to propose to either keep the wording of the 2008 Procedural Recommendation (Recommend 4) or add “*preferably in English*” (at least in the Q&A document). This would be important especially considering that for many NRAs the fastest way to understand the content of a notified draft measure on CIRCABC is the notification form in English.

Moreover, BEREC points out that the wording used in Recommend 9 of the Draft Procedural Recommendation (“*should*”) goes beyond the provisions in the Code and the nature of the Recommendation (soft law). Therefore, BEREC suggests using instead of “*should*” a softer wording such as “it is desirable that” or “the Commission recommends”.

## 8) Recommend 11

Recommend 11 foresees that a notification by an NRA covering a market analysis should also include the remedies proposed by the NRA to address the market failures identified, where possible.

In this context, even if a joint notification of market analysis and remedies is in practice done by many NRAs, BEREC wants to point out that the wording used in Recommend 11 of the Draft Procedural Recommendation goes beyond the provisions in the Code and is too narrow. A softer and broader wording in line with the Code's provisions would still point out the Commission's request to minimize a possible gap between the notification of the market analysis and the remedies.

BEREC therefore strongly proposes a wording in line with the Code such as the wording in Recital 10 of the 2008 Procedural Recommendation stating "it is desirable that" or "the Commission would welcome if a notification by an NRA covering a market analysis also includes the remedies proposed by the NRA" instead of "a notification by an NRA covering a market analysis *should* also include the remedies proposed by the NRA" (emphasis added).

Moreover, the final Procedural Recommendation should also take into account that separate notifications of a market analysis and the remedies might also be provided for in national law. A corresponding wording might e.g. be as follows: "The Commission acknowledges that a joint notification of market analysis and remedies is not possible where national law provides otherwise."

## 9) Recommend 16 b) (2)

BEREC suggests the addition of the proviso '*where appropriate*' to the list of structural and behavioural indicators listed in Recommendation 16 (b) (2), as this depends to what extent an NRA has used/relied on these for its analysis:

*"the relevant geographic market, including a reasoned analysis of the competitive conditions on the basis of demand-side and supply-side substitutability. The draft measure should include information and data used in the geographic analysis, regarding the choice of the basic geographic unit, the structural and behavioural indicators used (that is to say, **where appropriate**, number of competing networks, market shares and shares trends, analysis of pricing behaviours or different prices at regional level, and behavioural patterns)".*

## 10) Recommend 16 c)

Recommend 16 (c) (1) states "*reference to any related previously notified draft measures including the results of the analysis of the relevant market as described in point (4) above*". BEREC would like to point out, that it could be more than one (e.g. market 3a and market 3b) relevant market or maybe even none at all. Therefore, BEREC suggests to change the wording and to refer to "**a relevant market**" instead of "*the relevant market*" as follows: "...the results of the analysis of a relevant market as described in point (4) above."

Recommend 16 (c) (2) uses the wording "*first concentration and distribution point (FCDP)*". However, Art. 61(3) of the EECC refers to "first concentration or distribution point" and the BEREC Guidelines on Art. 61(3) (BoR (20) 225) further clarify that the terms "concentration

point” and “distribution point” are used interchangeable. Therefore, BEREC suggests to use also in Recommend 16(c) (2) the wording “*first concentration or distribution point*”.

#### 11) Recommend 17 b)

Recommend 17 (b) of the Draft Recommendation states that NRAs should make available by Short Notification Form “*draft measures falling under the scope of Article 76(2) of the Code, only to the extent that they are limited to subsequent individual draft decisions under a previously notified and assessed co-investment scheme, and provided there was no material change in circumstances since the assessment of the co-investment scheme*”. BEREC would like to note that in case a new co-investor joins the co-investment agreement without changing the scheme of co-investment already approved by the NRA, there is no need to notify a new draft measure to the Commission as the previous measure about the regulatory treatment of the new VHCN remains unchanged.

In this regard, BEREC asks the Commission again for a further clarification on the meaning of Recital 201 of the Code and its impact on NRAs’ notifications. According to BEREC a notification is needed only in case of changes in circumstances which likely leads to a change in the regulatory treatment of new VHCN already approved.

#### 12) Recommend 19

Recommend 19 of the Draft Recommendation foresees five days for a form verification period. BEREC would like to ask the Commission to explicitly confirm that in case a standard notification form is required, this period does not extend the default 30 days of a notification, i.e. the clock is not stopped.

#### 13) Recommend 21

Recommend 21 concerns registration of notifications. BEREC notes that the completeness check and a notification thereof have been left out in Recommend 21 of the Draft Procedural Recommendation. BEREC would like to stress that it is very important for legal certainty and transparency to set out in writing clear-cut rules on the starting date and the deadline for reviewing a notification. BEREC therefore asks to include corresponding wording in the Procedural Recommendation or in the Q&A document confirming the upload notification will still be the starting point for the calculation of the deadline.

#### 14) Calculation of time periods to be added to Q&A document

The Draft Procedural Recommendation – contrary to the 2008 Procedural Recommendation – leaves out the provisions regarding the calculation of time periods. BEREC acknowledges that specifications on this cannot be included for legal reasons, since it is not possible to regulate applicable law in a recommendation.

However, for the sake of clarity and legal certainty it seems beneficial to add an explanation or reference to the Regulation in force in the Draft Procedural Recommendation. Alternatively, the provisions on the calculation of time periods, especially regarding the handling of bank holidays or the handling of situations where the last day of a deadline falls on a weekend, could be copied from the Regulation or information on the subject could be laid down in the Q&A document.

#### 15) Annex I /Section 4

Despite the fact that the wording is taken from the 2008 Procedural Recommendation BEREC notes that point 4.3 in Section 4 of the Annex I is not too clear. Also BEREC has doubts if Section 4 should be included in the standard form, since this information is not directly related to SMP regulation. If the Commission considers this section obligatory, then the kind of information which is asked for and in which cases it is needed should be further explained in the Q&A document.

#### 16) Annex I / Section 5

BEREC would like to express its concerns regarding Section 5 of Annex I. Besides introducing an extra obligation not covered by the Code, this kind of information may be both problematic and sensitive for NRAs. Ex ante regulation is based on the current market analysis and may not necessarily have any link to previous measures. Also additional questions may arise why changes were made, what is the justification for them and the possibility of legal risks for the NRA to arise. BEREC objects to the introduction of such an obligation and would like to avoid having NRAs to report and submit this kind of information in a formal way and therefore asks the Commission to remove Section 5 from Annex I.

#### 17) Annex II

Annex II point 1.6 states “The reasons for which the imposition, maintenance or amendment of obligations on undertakings is considered proportional and justified in the light the objectives laid down in Article 3 of the Code.” BEREC would like to point out that it does not seem to be very useful for the draft measures assessment to refer to “the objectives laid down in Article 3 of the Code,” as the provision of Art. 61 EECC sets out more detailed requirements for justification (which of course have to be in line with the objectives of Article 3 EECC).

Therefore, BEREC suggest to replace this text with “*of the legal provision they are based on*” which is an information which already needs to be provided under point 1.2 of the Annex II with regard to the exact provision in Art. 61(3) EECC. BEREC proposes to rephrase the entire sentence accordingly as follows: “*The reasons for which the imposition, maintenance or amendment of obligations on undertakings is considered proportional and justified in the light of the legal provision they are based on*”.

Annex II point 1.8 states “The date(s) of the public consultation on the proposed obligations and a brief overview of the results of the public consultation on the proposed market definition”. BEREC would like to stress that here in Annex II it is not about market definition/analysis, this would be the standard notification form subject to Annex I. Therefore, BEREC is of the opinion that “proposed market analysis” needs to be replaced by “*proposed obligation*” and suggests



to rephrase the entire sentence as follows: “*The date(s) of the public consultation on the proposed obligations and a brief overview of the results of the public consultation on the proposed obligation*”.

#### 18) Annex III

BEREC would like to emphasize again that a short notification is useful and should be an effective tool to speed up the notification process for repetitive and formal cases. Therefore BEREC is concerned that the Commission, rather than simplifying, has expanded the information requirements in Annex III (new points 1.3, 1.4, 1.5 and 1.7) and at the same time limited the scope of cases notifiable under the short notification form. BEREC therefore requests that the Commission reconsiders the drafting of Annex III and its intended use (e.g. it should not be mandatory for a NRA to fill in every point in the template). In order that NRAs can avail of the benefit of utilising the short notification form, it should be kept simple (literally short) in its form and substance.