

## ANNEX IV: BRIEF ON EX ANTE REGULATION

### Brief on *ex ante* regulation and its application to the telecom sector

There is now a consensus about the need for an *ex ante* regulatory framework for digital gatekeepers in the EU, but the discussion about what this potential framework should look like is still open. While different models are possible, the **successful experience in the telecom sector represents a sound and valuable basis which can provide useful insights and concrete experience to build on.**

Indeed, over two decades, the telecom framework has opened monopolistic markets to new market players and constantly ensures that competition dynamics are effective and sustainable, and that efficient investments are made. Moreover, it combines several objectives: **creating the conditions for sustainable and effective competition, promoting connectivity, strengthening the internal market, fostering efficient investments, ensuring that the internet remains open, protecting end-users' rights, and empowering consumers and citizens.** Overall, by fostering competition, innovation and openness, this regime has allowed **electronic communications providers to become the backbone of the EU digital ecosystem.**

#### **Ex ante regulatory framework: Goals and principles**

**Ex ante regulatory framework has a preventive objective:** interventions are implemented when specific economic and market characteristics require so, with the aim of promoting competition towards an open and competitive market. This is justified for instance in markets tending to be highly concentrated, or when private actors can exert a significant market power or enjoy an exclusive control over a gateway. *Ex ante* regulation is thus **implemented before and independently of an actual abusive behaviour with the aim to minimise the market players' incentive and ability to engage in such practices given their potentially irreversible effects** on competition, innovation and users' freedom of choice.

While it comprises several legislative texts and regulations, **an *ex ante* regulatory framework cannot be reduced to a set of measures<sup>1</sup> and regulations<sup>2</sup> applied *a priori*.** Indeed, in order to effectively address the structural issues mentioned here-above, the National Regulatory Authority (NRA) does not simply apply and enforce a legislative regime but is given the mandate, tools and resources to reach a variety of different objectives. The NRA selects and fine-tunes the regulatory obligations<sup>3</sup> it will impose in order to reach and reconcile these objectives in a coherent and effective way. Moreover, by permanently gathering relevant

<sup>1</sup> E.g. *Interim* measures as enforced in *ex post* competition law

<sup>2</sup> E.g. Platform-to-Business Regulation

<sup>3</sup> E.g. Access, transparency, non-discrimination, price control or accounting separation. This is particularly true when in a market analysis a player is found to have significant market power (SMP) on a relevant market susceptible to *ex ante* regulation.

information about the market and nourishing a dialogue with the stakeholders and civil society, the NRA can reduce information asymmetries making its intervention fit for purpose for the benefits of businesses, consumers and society at large.

Any regulatory intervention must also be proportionate. In order to **create the conditions for the market to thrive and to strengthen the incentives to innovate, an NRA only intervenes where it is strictly necessary, and follows a clear and predictable timing and rationale**. Still, while predictable, the regulatory action can also be adjusted when market conditions require so (e.g. regulation is progressively lifted following the development of competition dynamics), under predefined rules and procedures.

Ensuring that markets remain open, fair and competitive for the benefits of consumers and citizens is one of the main objectives of NRAs. Thus, within the *ex ante* framework, **the regulator has the possibility to solve issues *ex officio* or after a request from a market player**. Indeed, in case of grievances by any players in the market, **dispute resolution mechanisms are available to easily seize the NRA who is bound to find a settlement within a very short timeframe (in general, four-six months)**.

Moreover, while markets and market players can be national in scope, a consistent application of the regulatory framework at the European level is key. Thus, in the telecom sector, **national market analyses, legal applications, regulatory decisions and interventions are harmonised within a strong European network of coordination and cooperation (BEREC<sup>4</sup>) and supervised by the European Commission (EC)**. BEREC is able to advise at all levels of the design (e.g., through opinions on review of the legislative framework), development (e.g., through guidelines) and implementation (e.g. through best practices) of the regulatory regime in Europe to foster the consolidation of the internal market.

Finally, in order to ensure that NRAs act within the perimeter determined by their legal framework, NRAs' processes and decisions are obviously **subject to democratic control** (e.g., by national parliaments) and to **review by national courts, the EC** (regarding market analysis) **and the EU judicial system**.

### **Ex ante regulation in practice: The telecom sector**

In the telecom sector, the regulatory regime consists of, among other regulatory measures, the European Electronic Communications Code (EECC)<sup>5</sup>, the Open Internet Regulation<sup>6</sup>, and the Roaming Regulation<sup>7</sup>. Such legislations are applied within the same legal framework, establish overarching objectives and provide the NRA with concrete means and tools to reach them in a predictable, consistent and effective manner.

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<sup>4</sup> The Body of European Regulators for Electronic Communications

<sup>5</sup> Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ L 321, 17.12.2018, p. 36–214)

<sup>6</sup> Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (OJ L 310, 26.11.2015, p. 1–18)

<sup>7</sup> Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union (OJ L 172, 30.6.2012, p. 10–35)

All relevant characteristics of this regulatory framework are presented here below and have inspired BEREC's proposal for a swift, effective and future-proof intervention towards digital gatekeepers.<sup>8</sup>

*Strictly necessary and with a clear rationale* – In the telecom sector, **asymmetric remedies are only implemented on the market player(s) with significant market power and when effective and sustainable competition would not spontaneously emerge**. Such markets are defined according to three cumulative criteria: (i) the presence of high permanent and non-transitory entry barriers, (ii) the lack of tendency towards effective competition within a relevant time horizon and (iii) the fact that competition law alone would not adequately address the identified market failures. If all these criteria are fulfilled, the market is presumed to need continuous regulatory intervention until competition becomes effective and sustainable. Moreover, **beyond creating/fostering competition, telecom NRAs are also responsible for ensuring that the internet access remains open**. The Open Internet Regulation clearly defines the scope and means for NRAs to guarantee the continued functioning of the internet ecosystem as an engine of innovation, and to safeguard the ability of end-users to access and distribute information or run applications and services of their choice on the internet.

*Predictable* – In the telecom sector, **the analysis and review of competition dynamics is submitted to a process which is known by all stakeholders and which is revised at least<sup>9</sup> every five years** to ensure that market dynamics and evolutions are taken into account. **Market reviews are subject to public consultations, are discussed with National Competition Agencies, reviewed by the European Commission and, in some cases, reviewed by other European NRAs to support the EC's investigations, in order to guarantee a sound analysis.**

*Proportionate* – All obligations imposed by NRAs follow the principle of proportionality, are implemented with the specific aim of reaching the defined objective, and **the least intrusive remedy is applied**. The remedies are designed to target either one, few, or all market players in the market according to the concern(s) to tackle. For instance, an **asymmetric intervention targets only one or very few operators** in order to create a level-playing field, address specific competition concerns and thus reach, the different objectives mentioned above (effective competition, efficient investment, developing the internal market for the benefit of European citizens). It allows for ambitious intervention while avoiding over-regulation. On the other hand, a **symmetric intervention targets all operators** if it is needed to tackle the issues at stake (e.g. the control over internet access by each provider as addressed by the Open Internet Regulation or interconnection remedies).

*Principle-based rules and tailored remedies* – **All regulatory interventions are framed in the law (i.e., in EEC) and include obligations such as transparency, non-discrimination, accounting separation, compulsory access or price control**. Other types of remedies can

<sup>8</sup> BoR (20) 138, "BEREC Response to the Public Consultations on the Digital Services Act Package and the New Competition Tool", See here [https://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/others/9411-berec-response-to-the-public-consultation-on-the-digital-services-act-package-and-the-new-competition-tool](https://berec.europa.eu/eng/document_register/subject_matter/berec/others/9411-berec-response-to-the-public-consultation-on-the-digital-services-act-package-and-the-new-competition-tool)

BoR (21) 34, "Draft BEREC Report on the ex-ante regulation of digital gatekeepers", see

[https://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/reports/9880-draft-berec-report-on-the-ex-ante-regulation-of-digital-gatekeepers](https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/9880-draft-berec-report-on-the-ex-ante-regulation-of-digital-gatekeepers)

BoR (21) 35, "BEREC Opinion on the Digital Markets Act", see

[https://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/opinions/9879-berec-opinion-on-the-european-commissions-proposal-for-a-digital-markets-act](https://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/9879-berec-opinion-on-the-european-commissions-proposal-for-a-digital-markets-act)

<sup>9</sup> They can be revised earlier if the market changed significantly

be added where appropriate. While self-executing rules are often too rigid and thus ineffective, **principle-based rules and tailored remedies can be designed to tackle the identified issue and adapted and adjusted to the characteristics of a specific market or market player**. This case-by-case assessment and enforcement is key to ensure that the intervention is proportionate, and effective.

*Constant and active monitoring* – **NRAs do not only define, apply and enforce rules, but have the ability to monitor them all along and in real time**. To monitor markets in an effective way, NRAs are empowered to systematically and periodically collect information from market players (e.g. prices, coverage, quality of services, financial information, etc.). Data collection can be done on a quarterly or annual basis and can in some cases be made publicly available. Through this dedicated data collection powers, NRAs design and monitor the enforcement and fine-tune highly-technical remedies in an effective and efficient way.

*Data-driven* – Regulators can rely on the **collection** (also via crowdsourcing), **storage, processing, usage and publication of data** to support their supervisory, analysis and detection activities and making stakeholders more accountable. Moreover, making valuable data available means **empowering users and citizens** to make well-informed choices and steer the market into the right direction.

*Participatory* – **NRAs nourish a continuous and repeated dialogue with all actors** of the sector (incumbent operators, alternative operators, consumers associations, local authorities, civil society, and so on). In highly-technical markets, **reducing information asymmetry** is key to build the necessary know-how for an appropriate and effective intervention.

*Expertise* – The regulators' decisions are based on the expertise and resources that support their day-to-day activities: **engineers, lawyers, economists, developers, data scientists that cooperate operationally**. Only dedicated skills, knowledge and resources can ensure the swift intervention needed in this context.

*Swift intervention* – NRAs offer a **dispute resolution mechanism** to solve grievances among operators. Operators can easily take the case to the NRA on a specific issue (e.g. denial of access to a specific product), and the NRA is bound to intervene in a tight timeframe (i.e. four-six months) to avoid letting potential negative effects on competition materialize. In this framework, relevant information and data can be collected by the NRA and they greatly contribute to reinforce its knowledge of the market.

*Sanctions* – The **ability of NRAs to impose penalties** in case of infringement is a key element of its toolkit. Beyond condemning wrongdoings, sanctioning procedures also play an important role for setting examples, providing deterrent effects and reputational incentives.

*A strong and harmonised implementation across the EU* – **The telecom ex ante regulation takes place within a harmonised European framework**. Since 2002<sup>10</sup>, BEREC, with its strong institutional statute, and following a long-term historical cooperation, brings together all European telecom NRAs, as well as the European Commission. Thanks to **continuous interactions** among national NRAs, BEREC allows for an effective and consistent application of the telecom regulatory framework throughout Europe. BEREC contributes to all levels of the

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<sup>10</sup> BEREC was established in 2010 by the Regulation (EC) No 1211/2009 which was part of the Telecom Reform package. It replaced the European Regulators Group for electronic communications networks and services which was established as an advisory group to the Commission in 2002. BEREC's functioning and missions were further reinforced by Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018.

design, development and implementation of the regulatory regime in Europe. Among other tasks (some of them being mandatory and fixed by the EU regulatory framework), BEREC:

- **issues guidelines and common positions** on several topics such as the application of the European framework by NRAs,
- **issues opinions** on internal market procedures for national measures. The Commission regularly requests BEREC to produce an opinion regarding the market analysis to nourish and inform its investigations. This procedure can lead to vetoing national decisions,
- delivers opinions on a variety of EU legal acts,
- **publishes reports** on technical matters,
- provides an active network to **share best practices**,
- **assists EU institutions** in its field of expertise,
- sets up and keeps registers, lists or databases.

In accordance with the BEREC regulation<sup>11</sup>, a work programme is established every year, after consulting the European Parliament, the Council and the Commission on their priorities, as well as other interested parties. Work-flows and topics are treated by specific and dedicated working groups where **experts from all European NRAs discuss, define and produce concrete deliverables**. These working groups cover all topics which are of relevance in the telecom sector and where **highly-technical knowledge** is needed. These include for instance the working groups on the regulatory framework, market and economic analysis, the open internet, statistics and indicators, fixed and wireless network evolution, remedies, planning and future trends, as well as sustainability. Eight official annual meetings are organised for these experts' WGs to regularly present the collective work to be voted and adopted by the NRAs' chairs.

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<sup>11</sup> Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009 (OJ L 321, 17.12.2018, p. 1–35)