

## **Executive Summary of the BEREC Opinion on the Review of the EU Electronic Communications Regulatory Framework**

### **Connectivity for all through pro-competitive regulation**

#### **Introduction**

This European regulatory Framework for electronic communications, first introduced in 2002 aimed at the progressive opening to competition of electronic communications markets, with a progressive harmonisation of regulation in support of the creation of a single market for electronic communications, as well as at fostering both investment and innovation.

To this end, the Framework is designed around a set of common regulatory objectives and principles, as well as common procedures at EU level, with a central implementation role for independent national regulators. It is based on a balance between mandatory European rules and regulators' discretionary powers, and between binding hard-law and non-binding soft-law instruments (including Commission recommendations and guidelines, and more recently, BEREC common positions and opinions). This balance of competences has helped to ensure that Member States and their regulators all push in the same direction towards the single market, while ensuring that they are able to effectively address the specific, different challenges raised in their respective national markets.

Thirteen years after its inception, and considering the significant changes in technology, market structures, consumption patterns and expectations, the Framework has proven successful. Its strength has lain in the wide consensus around its regulatory objectives, the clarity of its regulatory principles and its flexibility. While the Framework should preserve what is at the root of its success, it will benefit from a second periodic refresh that responds to new market developments and consumer needs.

Looking ahead, convergence will continue to increase the complexity of communications markets (with new players and new business models), as well as the risks of premature or overly complex intervention (in particular on innovation). This requires regulators to be able to carefully target their interventions within a clear framework, and to do so in a proportionate manner. At the same time, the rolling out of NGA networks may call for adequate and timely regulation in order to avoid monopolisation in the future. This review should therefore build upon the track record of the Framework, leveraging its successes, while addressing with a fresh look those areas where it might need to be adapted to reflect new and emerging challenges and ensure connectivity and an open digital environment. If we want it to remain future-proof, it is vital that the Framework remains principles-based and technology neutral, in order to be flexible enough to cope with the fast-changing digital ecosystem.

It is also worth bearing in mind that the review of the Framework is part of the wider Digital Single Market strategy, which includes a variety of other Commission initiatives around the

digital economy. It will be important to ensure a consistent and coherent approach between these various initiatives.

This is the starting point of the BEREC Opinion.

### **Effective competition will remain key to meeting Europe's high-speed broadband connectivity ambitions**

The vision of ubiquitous high-speed networks as a condition for Europe's global competitiveness lies at the heart of the Commission's Digital Single Market strategy. BEREC shares this goal, and is committed to helping to realise it, including through working closely with the Commission over the coming years.

It is important to bear in mind that achieving these European connectivity targets presents a different set of challenges in different Member States. The best technological solution (e.g. the choice between fibre-to-the-premises (FTTP) and fibre-to-the-cabinet (FTTC)), and the best model of competition (e.g. the balance between infrastructure- and service-based competition) will both depend on a market's structural characteristics, such as the degree of urbanisation and proportion of multi-dwelling units, the national demand features, network topographies and the physical terrain, the extent of legacy cable network footprints, the length of the local loop and the availability and quality of ducts.

These factors, which inform the investment case and the potential for competitive distortion in each market, cannot simply be regulated away. It is therefore important that the Framework enables regulators to support both competition and rollout in the forms most appropriate to their national circumstances. The promotion of efficient investment is already one of the guiding objectives of the Framework, which requires regulators to take investment risk into account and allow for reasonable rates of return. At the same time, and as the Commission has acknowledged on several occasions, the evidence shows that the promotion of investment and the promotion of competition are not mutually exclusive. Rather, effective and sustainable competition remains the best assurance of efficient investment.

The review of the Framework also provides an opportunity to consider whether anything is missing from the regulatory toolkit or if anything might be clarified, in order to ensure that regulators can tackle the challenges of technological and market developments in a way that supports and encourages investment, and ultimately achieve the longed-for high-quality connectivity at fair prices for European end-users.

For instance, among the areas which the Framework review should consider is the ability of regulators to address competition concerns that might arise in oligopolistic markets and to use the available regulatory instruments (such as symmetric regulation) in a sufficiently flexible manner in order to ensure their regulatory interventions are targeted and proportionate.

**The promotion of the interests of end users should continue to orient European regulatory policy**

Ultimately, the effectiveness of competitive markets and sufficiency of network deployments should be measured against the extent to which they respond to the needs of Europe's end users (both consumers and business users). This should be borne in mind when considering the scope of sector-specific end user regulation, the form of harmonisation, as well as the European approach to defining the scope of the universal service.

This should guide the decisions on the extent to which new services provided over the internet (often referred to as "over the top" or OTT services) should be subject to regulation under the Framework. Indeed, it is important to consider the policy objectives of each obligation and the proportionality of imposing that obligation on a specific service or service type.

As further discussed in the BEREC Opinion, while recognising the importance of general consumer law, some sector-specific end-user regulation will remain critical (such as the recently adopted rules on open Internet access). This is not only to ensure end-users are protected from the specific harms to which they might be subject in this technologically fast-changing sector, but also because of the important role of demand-side interventions to support the Framework's pro-competitive, supply-side interventions (e.g. rules to facilitate switching between providers, which support competitive friction in retail markets).

Similarly, it will be important to ensure that Member States and regulators are able to respond to the consumer harms that arise in their markets based on their particular consumption patterns, customer preferences and commercial practices, and to continue to experiment with new regulatory solutions (which often become the source of new best practices). With its minimum harmonisation approach (based on a common set of regulatory principles and a harmonised minimum level of protections) the current Framework allows this and is therefore more future-proof than a full- or maximum-harmonisation approach would be. Indeed, the latter approaches would risk bringing the level of end user protection down to the lowest common denominator.

For this same reason, Member States should retain the discretion to define the scope of a universal service obligation that reflects the specific needs of their national market, including setting the particular technical parameters of a broadband access universal service obligation.

**European (and global) spectrum harmonisation is already a reality, and further harmonisation should be approached with caution**

Broadband access is key for EU citizens and EU companies, and in rural areas wireless broadband is an important means of providing connectivity alongside fixed network access. The current Framework has worked well: some parts of the EU are world leaders in delivering consumer value, effective competition, and investment in and fast roll-out of new 4G networks. In fact, more harmonised spectrum for mobile broadband is available in Europe than in all other parts of the world, including the US, Australia and Japan, and the first 4G networks in the world were rolled out in Europe, under the current regulatory

Framework. While some parts of Europe were slower at rolling out 4G than others, this was partly due to the legacy uses of the spectrum (and their impact on band clearance and re-farming), and on how well the previous networks and technologies met end user demand.

Connectivity objectives and spectrum capacity requirements for electronic communications services will vary from one Member State to another, thus European connectivity objectives will not always translate into identically defined spectrum allocations for each Member State.

In this context, top-down harmonisation runs the risk of sterilising spectrum and resulting in inefficient use of this scarce resource, hampering rather than supporting innovation.

The existing framework already recognises extensive tools to harmonise spectrum for electronic communication services, set timelines for the availability and enforcing them. BEREC would recommend that the Commission draw upon the bank of experience and best practices of NRAs and spectrum authorities, promoting harmonised approaches to spectrum management from the bottom up.

**BEREC should continue to evolve, and its value-added, its rootedness in the realities of the national markets for which its members are responsible, must be preserved**

Last but not least, as we embark upon this review of the Framework, it is important that any institutional change is not pursued for the sake of change, but rather that the future institutional landscape reflects the regulatory functions that are required to be carried out, and the entities best placed to carry them out. Indeed, the current sectoral institutional set-up has worked well so far, striking an appropriate balance among all institutional objectives and actors involved, and any intervention should be therefore carefully considered.

In this respect, the “co-regulatory” partnership between the Commission (as ultimate guardian of the single market) and national regulatory authorities (anchoring European policy in the reality of the national markets) should remain the orienting principle for considering the future of BEREC.

This means that the rootedness of BEREC in its member regulators must remain at the heart of the regulatory system, not only in relation to its governance (which should remain in the hands of its members) but also in relation to the technical work carried out by its expert working groups. While there is scope for improving the operation of the BEREC Office, it is important to remember that there is no substitute for the full involvement of NRAs, which will remain at the heart of BEREC’s future resource needs.

Indeed, BEREC’s ability to meet the challenges of the next 10 years will rely on its continued ability to draw upon the collective expertise of its members. As discussed in detail in the BEREC Opinion, BEREC would urge the Commission to align the minimum competences of national regulators to those of BEREC, to ensure the work of BEREC reflects the experience of all 28 national markets. This includes ensuring all independent NRAs have competences in relation to end-user protection, which would enhance harmonisation and regulatory efficiency. BEREC would also urge the Commission to strengthen the obligations on Member States to ensure the financial and operational independence of their national regulators, including ensuring that they are adequately resourced to fully participate in the work of BEREC.

But this is only half the picture. For BEREC to make a meaningful impact on the single market project it has to have a voice in the debates. Over the last year the Commission and BEREC have engaged constructively in an open dialogue, both formally in BEREC Plenary meetings and more informally in the handful of brainstorming sessions that have taken place during the course of the year.

In this spirit of collaboration, BEREC would urge the Commission to consider amendments to the Framework whereby it would be required to formally seek BEREC's advice ahead of tabling draft legislation in order to help ensure that any new rules will address a clearly identified problem or challenge and will work in practice, thereby maximising the chances of a swift and successful legislative process. Furthermore, were the Commission to be required to provide reasoned justifications for departing from BEREC's opinion (much as regulators are required to do when they depart from the Commission's opinion), this would result in a greater degree of transparency in European decision-making, which would be of benefit to all involved.

## **Conclusion**

BEREC hopes the Commission will continue to draw upon its expertise as it continues to develop its legislative proposals, and looks forward to continuing to engage with the Commission as its thinking evolves.

BEREC notes that its opinion is only one part of BEREC's contribution to the regulatory debate on the review of the Framework, and would point the Commission towards the work it has carried out to date. Many of the key issues of this review have already been the subject of BEREC work over the past year, and over the coming weeks and months BEREC will publish its work on the regulatory treatment of OTTs, on enabling the Internet of Things, on the challenges of regulating non-competitive oligopolies, and on the challenges to NGN roll-out and migration to all-IP networks.

Finally, against the background of the studies and public consultations that the Commission is currently carrying out, BEREC would appreciate being involved in the next steps of the Commission's legislative preparations, providing its input and expert opinions on specific drafting proposals in the hope that what is eventually tabled will be more robust and enable swifter negotiations.