Body of European Regulators for Electronic Communications

BEREC

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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[1] 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.

[1] 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.

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.

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.