BoR (17) 85

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[1]), 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

[1] Recommandation 2014/710/EU

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.

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.