

BEREC views on the European Parliament first reading legislative resolution on the European Commission's proposal for a Connected Continent Regulation

General remarks

In line with its statutory duty of promoting consistent and best practice regulation in the electronic communications sector throughout the EU, and in the exercise of its advisory role vis à vis the European Institutions, BEREC has previously provided views on the "Connected Continent" Regulation¹.

The adoption of the European Parliament's first reading position represents a key milestone in the legislative process and, as focus now turns towards the ongoing scrutiny of the draft Regulation in Council, BEREC takes the opportunity to comment on the general direction in which the Parliament text would take the various proposals.

In its views on the Commission's original proposals, BEREC had stressed the need for an evolutionary and comprehensive approach to defining any new legislative tools for the electronic communications sector. BEREC had also pointed out that such a holistic approach to a review of the regulatory framework should be based on the identification of specific regulatory problems, and the development of tailored solutions to them, with the aim of ensuring the continued proportionality, effectiveness and cohesiveness of the regulatory framework as a whole.

BEREC therefore broadly welcomes the approach adopted by the European Parliament in its first reading and most notably its recognition of the need for a wide-ranging consultation on and thorough assessment of the current legislative framework, with a view to its eventual review during the next Commission term.

General Authorisation regime

BEREC welcomes the European Parliament's removal of the complex ("Home NRAs – Host NRAs") authorisation regime proposed by the Commission and of the proposed Commission veto on remedies addressed to "European operators". As BEREC had stated in its previous statements, the former would generate a high degree of regulatory uncertainty and cost, while the latter represented an unwarranted shift in the regulatory balance of powers in the EU.

¹BEREC statement on the publication of a European Commission proposal for a Regulation on the European single market, available at http://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/1432-berec-statement-on-the-publication-of-a-0.pdf (Sept 2013), BEREC views on the proposal for a Regulation "laying down measures to complete the European single market for electronic communications and to achieve a Connected Continent" - http://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/2922-berec-views-on-the-proposal-for-a-regula-0.pdf (Oct 2013) - and BEREC Statement on European Parliament's vote on Telecoms legislative proposals - http://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/4357-berec-statement-on-european-parliament82-0.pdf (April 2014).

While BEREC sees merit in the European Parliament's proposal for a more harmonised set of notification requirements, BEREC would also emphasise the central role that NRAs should play in any notification process, given the national footprint of most operators as well as the need for NRAs to monitor their respective national markets. BEREC is concerned that the new notification system proposed by the European Parliament could undermine this role for a number of reasons:

1. The default no-notification approach and the proposed introduction of European Commission scrutiny over national choices to require a notification could limit the possibility to maintain a notification system at national level. Notification requirements apply in almost all of Member States and enable operators to enter the various EU markets without any prior approval or permission, while allowing NRAs to acquire necessary information about stakeholders acting in their respective markets.
2. Whatever choice of notification approach is adopted at Member State level, the European Parliament's proposal is that operators notify BEREC of the beginning of their activity. While there may be merit in giving BEREC a role, it will be necessary to ensure that NRAs retain the ability to monitor undertakings operating in their national markets. Whatever process is adopted should be designed to clearly allow that.
3. BEREC also has concerns over the European Parliament's proposal for the centralized supervision by BEREC of NRAs' decisions to prevent undertakings from continuing to provide electronic communications networks or services in cases of serious or repeated breaches of the general authorisation conditions (including decisions on relevant sanctions and penalties), as well as in cases of urgent interim measures justified by reasons of public safety, public security or public health. The benefit of the proposed procedure is unclear. It is enormously burdensome and would delay NRAs' enforcement action in their national markets, which would in turn hinder NRAs' ability to intervene swiftly and effectively, including in cases where public safety, public security, public health and other serious users or providers' interest are at stake, with serious potential for consumer detriment.

Spectrum

BEREC always seeks ways to improve current best practice and supports the European Institutions in this shared goal, particularly with a view to contributing to achieving the Digital Agenda targets, ultimately helping to strengthen the internal market and fostering greater innovation and investment. However, there is little evidence to support the Commission's claims that spectrum management across the EU is failing to the extent that such a radical set of proposals and significant transfer of powers to the Commission is necessary. BEREC has reservations about the tools proposed to meet these wider objectives and is also concerned about the European Parliament's additions to the Commission's proposals on spectrum management.

The European Parliament supports the original Commission proposals for a complex notification procedure for national spectrum awards and synchronized spectrum licensing. As BEREC has previously stated, it has significant concerns about these proposals for a number of reasons, not least as the introduction of such tightly defined parameters and detailed criteria to be taken into account when awarding spectrum, risks stifling the very innovation and regulatory advances that have led to significant progress so far and should continue to do so in the future. In addition, whereas one of the Commission's stated aims is to accelerate the awarding and licensing of harmonized spectrum across the EU, the proposed new layer of bureaucracy could slow down spectrum release, and would not necessarily lead to more efficient spectrum usage.

Finally, the European Parliament also proposes the introduction of minimum licence terms of 25 years for spectrum in harmonized bands, which would be retroactive, and also provisions to facilitate spectrum trading. While recognising the Parliament's wish to provide greater certainty to licence holders and increase spectrum trading across the EU, BEREC believes that further thought needs to be given to the consequences of the proposed measures. Indeed, changing licence durations retroactively risks distorting competition and creates legal uncertainty, as well as introducing inefficiencies and sterilizing the use of the scarce resources. The European Parliament also proposes that Member States may not refuse to allow a transfer or lease even when the transfer can be detrimental to competition, so undermining Members States' ability to manage eventual distortions of competition.

In conclusion BEREC believes that more targeted and simpler measures could be far more effective in promoting the more efficient release of spectrum in the short term, while the existing Framework and Radio Spectrum Policy Program reviews could be appropriate vehicles for a comprehensive review of spectrum management.

Wholesale Access Products

BEREC welcomes the European Parliament's approach of rejecting the European Commission's original proposal for three separate top-down standardised wholesale access remedies and of deferring their consideration to an overall review of the regulatory framework.

At the same time, BEREC is concerned by the European Parliament's assumptions about the requirements of undertakings supplying cross-border business services for business grade wholesale access products. BEREC believes that detailed ex-ante discussions with the industry are especially important when dealing with such complex wholesale broadband access products where the need for interoperability between operators is key and where end-user business needs tend to be specific and varied. BEREC would therefore suggest it be given a mandate to assess the actual (technical and operational) requirements for a business grade wholesale access product. If through this exercise, a clear level of demand for a harmonised wholesale product is found, BEREC could then be mandated to develop specifications for such a product.

Finally BEREC notes the European Parliament's proposal that NRAs assess whether or not to impose a reference offer obligation within one month of the adoption of this Regulation. BEREC believes this requirement risks introducing legal uncertainty, and that NRAs should carry out this assessment in the context of the market review relating to the provision of wholesale high-quality electronic communications services.

Net Neutrality

BEREC supports the promotion of and the clear commitment of the European Parliament to the principle of net neutrality. This is in line with BEREC's public position, and indeed BEREC has been deeply involved with the subject since 2010, since when it has developed a set of principles and guidelines that can be implemented and adapted by national regulatory authorities, under the existing framework. The internet has proven to be highly innovative, thanks to certain fundamental principles such as the separation of network and application layer, the best effort principle and

universal connectivity. This innovation should be safeguarded, both on the edges and within the network.

BEREC recognizes that guaranteeing an open internet is a challenging objective, not least given its complex and dynamic ecosystem. Yet, the Commission's original proposal would turn a flexible and progressive regulatory regime (under the 2009 Framework) into a rigid regulatory system and the European Parliament has generally retained this approach.

BEREC would instead prefer an approach based on principles rather than detailed rules and which provides NRAs with the necessary powers to ensure that those principles (such as the ones developed by BEREC on what constitutes reasonable traffic management and on the relationship between specialized services and internet access services) are respected. Under such an approach, national regulators would be pursuing the same objective and enforcing the same principles, but the specific triggers and thresholds for regulatory intervention in a given market could be adapted to address national circumstances.

If a rules-based approach is nonetheless to be pursued, then further work would be required to ensure that the definitions and rules were legally precise, future-proof and enforceable in practice. While some of the language in the text adopted by European Parliament draws upon BEREC previous publications on the subject, improving the original Commission's proposals, it does not yet meet these standards. A balanced approach to promoting net neutrality on the Internet in parallel to the provision of specialised services is a difficult challenge. BEREC considers that specialised services should be clearly separated (physically or virtually) from internet access services at the network layer, to ensure that sufficient safeguards prevent degradation of the internet access services. Therefore BEREC welcomes the European Parliament's acknowledgement of this principle. However, some inconsistencies in the proposed rules and definitions still raise legal and policy concerns.

End Users

BEREC has already expressed its concerns regarding the European Commission's "maximum harmonisation" approach to reviewing the current European provisions on consumer protection. Such concerns related to the fact that the type of legal vehicle, a Regulation, selected by the Commission to put forward its proposals, would not leave any room for targeted, more stringent legislative solutions by individual Member States around end users protection, where these might be necessary.

As a result, BEREC welcomes the European Parliament's reversal of the original proposal by amending the Universal Service Directive, instead of introducing directly applicable rules via a Regulation. This approach should ensure that Member States retain flexibility to decide how best to implement the provisions to protect consumers in their national markets, preserving their ability, where necessary, to legislate further, and the NRAs' capacity to continue to bring forward innovative regulatory solutions.

In terms of the provisions themselves, these are generally positive but their proportionality will need to be assessed in some cases.

International Roaming

The European Parliament's amendments in the area of international roaming replace the complex system proposed by the European Commission with a simpler proposal for the abolition of retail roaming surcharges, including fair-use criteria at the retail level and a review of wholesale measures, which may help reduce some domestic market distortions, as well as the maintenance of retail caps once fair use limits have been reached and accompanying transparency measures. Although these amendments represent an improvement on the Commission's proposal, some of the regulatory uncertainty problems identified by BEREC with respect to the Commission's original proposals remain, in view of the Parliament's suggestion to combine the abolition of retail roaming surcharges by 15 December 2015 ("roam like at home" RLAH) with the different regulatory model currently in place under the Roaming III Regulation. For example, the decoupling obligations (central to Roaming III) were introduced with two related objectives in mind: a) to encourage retail competition in the provision of roaming services and, through this increased competition, b) to reduce prices paid by all European citizens. Given the second objective would now be largely achieved through the introduction of RLAH, BEREC is sceptical as to whether the retention of both decoupling obligations is required, once RLAH is in place. More specifically, BEREC is of the view that the single-IMSI decoupling obligation is redundant, while there could be merit in retaining LBO.

Among the aspects that BEREC believes need further consideration to inform the policy debate are the following:

First, BEREC recognises that the set-up of a retail obligation should be carefully accompanied by the wholesale measures ensuring that this obligation can be met by the operators, without excessive competitive distortions or potential domestic retail price increases. BEREC is concerned at the deadline envisaged by Parliament for the Commission's report to Parliament and Council on wholesale charges and other arrangements (30 June 2015). Since the review and adjustment of those charges and arrangements might be necessary in order to enable a sustainable implementation of RLAH on retail market, coming as it does only six months before the introduction of "roam like at home" pricing (RLAH) (15 December 2015), BEREC is concerned this timetable would not provide legislators with enough time to consider these very important new legislative provisions. Operators would also need sufficient time to develop and introduce systems to implement the agreed fair use criteria, to adjust domestic tariff schemes and – if needed – to adjust their wholesale arrangements in line with what the legislators eventually adopt. BEREC would therefore urge legislators to carefully consider the timing of these various provisions, to ensure that both binding fair use criteria and relevant wholesale charges or other arrangements are in place by the time RLAH comes into effect.

Furthermore, on the basis of the European Parliament's proposal, the European Commission would be required to analyse mobile termination rates applicable to roaming. In this context, BEREC recognises that mobile termination rates are an important consideration when introducing RLAH. However, BEREC notes its reservations about any attempt to harmonize mobile termination via a Roaming Regulation.

In conclusion, BEREC would urge the legislators to ensure that all the necessary components of a final roaming package are carefully put together and that their introduction is synchronised.

Institutional aspects – BEREC and NRA's duties

BEREC has previously emphasized the value of NRAs' expertise, both in their respective national markets and pooled within BEREC. BEREC continues to believe that NRAs are best placed to assess the actual regulatory needs stemming from their national markets and to identify effective and proportionate regulatory solutions to them pursuant to the EU Framework, with a view to further promoting regulatory consistency in the EU. BEREC therefore welcomes the European Parliament's preservation of the current balance of power among the actors involved in the European regulatory processes, in line with the principles of subsidiarity and proportionality.

BEREC also appreciates the European Parliament's recognition of its role as a driver of regulatory consistency in the sector, by entrusting it with new tasks across several areas, in particular by involving it more closely in any Commission initiatives, and BEREC will begin to consider their possible impact on BEREC's workload and operational practice.

Linked to this, BEREC welcomes the Parliament's proposals around BEREC governance, which preserve the current headline feature of the BEREC platform, building on its independence from both Member States and the European Commission in order to ensure the effective promotion of regulatory consistency.

Finally, the European Parliament has proposed the establishment of a minimum set of sectoral duties to be entrusted to NRAs, in order to promote greater coherence in the remits of national regulators. Assigning such tasks enshrined in the electronic communications legislative framework to the independent NRAs would not only improve the effectiveness of their regulatory action in their respective national markets, but it would also help BEREC to operate as a more effective engine of regulatory consistency and best practice across all areas covered by the regulatory framework.

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