Body of European Regulators for Electronic Communications

BEREC

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BEREC views on Articles 12 & 16 of the draft Code "Notification Process" and "Administrative charges"

Notification Requirement (Article 12)

The draft Code introduces some changes as regards the procedure for notifications related to the general authorisation. According to the Commission's (EC) proposals, where a Member State (MS) considers a notification requirement to be justified, providers should submit notifications only to BEREC, which should act as a single contact point and forward the notifications to the relevant NRAs where the networks or services are provided. Both the EC and EP proposals maintain MS' flexibility to choose whether or not to adopt a notification scheme, though any notification requirement should not entail administrative costs for the providers. According to Article 2 (2) (d) of draft BEREC Regulation, BEREC should also establish a register at EU level. According to Article 12 (2) and recital (42) of the draft Code, number-independent interpersonal communications services (NI-ICS) providers however, are excluded from the general authorisation.

The ITRE Rapporteur[1] proposes to extend the scope of the general authorisation regime defined in Article 12 to all ECNS and ECS providers – including NI-ICS – but wishes to establish a threshold excluding small services from any unnecessary burden associated with a notification by applying the thresholds inspired by the competition law criteria of 'community dimension'. This would mean that providers with a limited EU presence and turnover would be excluded from the notification obligation, while at the same time allowing them to benefit from the general authorisation in MS in return for payment of a 10€ nominal fee (AM 44). The ITRE Rapporteur also proposes that MS provide a reasoned justification to the EC and other MS in case they intend to implement a notification requirement, with a EC power to prohibit it (AM 41).

Need to clarify the concepts of general authorisation and notification

Both the EC and ITRE Rapporteur's proposals do not clearly differentiate the concepts of general authorisation and notification. It should be stressed that the concepts are independent from each other: general authorisation refers to a framework of rights and obligations applicable to all ECNS and ECS providers in the market. The notification refers to the procedure that enables NRAs to keep a record of who is present in the market and it does not constitute a barrier to entry (and in fact, there are thousands of notified operators in the EU).

BEREC supports the inclusion of number-independent services in the general authorisation (Article 12 (2)) proposed by the ITRE Rapporteur's since, including NI-ICS in the definition of ECNS but excluding them from the general authorisation could be interpreted as meaning that these services freedom would not benefit from the protections afforded by the general authorisation, i.e. including the right to provide services unhindered by any other licensing or

[1] Draft Report on the proposal for a directive of the European Parliament and of the Council establishing the European Electronic Communications Code (EECC) (recast) (COM(2016)590 – C8 0379/2016 – 2016/0288(COD))

regulatory requirement (see Article 15(1))[2]. Member States should also have the flexibility to require notification in this case.

In terms of the notification procedure itself, BEREC's involvement as proposed seems to run counter to the objectives of simplification and proportionality. First, a centralised notification procedure would, in theory, only benefit a very small number of undertakings supplying their services in several MS.

Secondly, a centralised procedure would not prevent the need for each undertaking to deal with the local NRAs, regarding the allocation of rights of use or the supervision of their activity.

Thirdly, if the objective is to reduce bureaucracy, it would appear counterproductive to introduce a new middle-man. Any notifications and changes thereto (which could amount to thousands, if one considers, for example, the need to notify changes of contact details) would be 'travelling' to BEREC Office and then back to the NRAs, and would duplicate the number of registries – one in the BEREC Office and one at national level – and by extension the administrative burden, as well as the cost of operation for both the NRAs and BEREC. Assuming that the notifications would be submitted in the official EU languages and BEREC would also be responsible also for issuing the declarations under Article 14, this would demand additional resources from BEREC Office and would further increase administrative costs.

In any case, we should not lose sight of the fact that the current provisions already impose that any notification requirement is limited to the minimum of information necessary to enable the NRA to keep a register of providers in their territory. In this regard, BEREC suggests small amendment to Article 12 (4) to improve the quality of information provided.

The notification is needed to cover a broad range of regulatory objectives

BEREC has reservations about the ITRE Rapporteur's proposal to oblige those MS which deem that a notification is required, to provide a reasoned notification to the EC (which may then prevent the MS from implementing this obligation) and other MS.

In almost all MS the notification procedure is the main way for the NRAs to know who is active in the market. In this sense, the purpose of the notification is by no means exclusively linked to the recovery of administrative charges, but also helps NRAs in market monitoring, data collection and the definition of applicable rights and obligations. The proposal to include specific thresholds and for the EC to have the power to prevent the establishment of a notification regime runs against these objectives.

Furthermore, the ITRE Rapporteur's proposal to include a threshold based on the 'EU dimension' of a provider's business (i.e., an undertaking's presence in at least three MS and an aggregate turnover of (EUR [100] million)), lacks any justification.

[2] We understand the Commission's intention here was for undertakings to be free to provide number-independent services without having to notify and comply with the general authorisation (as per Recital (42)). However, given the extension of the ECS definition to include number-independent services, the legal effect of Articles 12 and 15 of the draft Code results in a risk that it could be given the opposite interpretation, i.e. as NI-ICS are a type of ECS, the freedom to provide ECS would only apply to those ECS which are authorised under Article 12, If NI-ICS were not subject to the general authorisation, the freedom to provide services would not apply to NI-ICS. There is a clear risk that these provisions would be interpreted differently by member states and by European institutions

On the one hand, the proposal seems to mix the concepts of general authorisation and notification. Abolishing the notification requirement would not affect the scope of the general authorisation, which would still apply to all undertakings regardless of the existence of a notification scheme.

On the other hand, the 'EU dimension' threshold would be hardly applicable in practice and would not be proportionate. First, it does not take into account the different sizes of national markets (e.g., a EUR 100 million turnover means something very different in the German market than the Maltese market).

Secondly, if the proposed threshold was adopted, only a very small minority of undertakings in each MS would be subject to the notification process, potentially undermining the NRAs supervisory functions, to the detriment of effective consumer protection, particularly against fraudulent practices. Eventually it could render communications between the NRAs and relevant undertakings more complex, actually increasing the burden also on the undertakings.

Furthermore, it is precisely the small operators which can be difficult to keep track of. Maintaining the notification requirement only for the (very) large operators would undermine the added value of the tool (knowing the market and the new entrants).

For the reasons stated above, BEREC does not agree with the ITRE Rapporteur's proposals around Article 12 (3). Any exemption from the notification procedure, based on differentiation between categories of electronic communication services or on the size and turnover of undertakings, would therefore have to be left to the discretion of each MS considering the specific characteristics of its market within the limits set out by the draft Code.

A better way forward

BEREC should be empowered to promote greater consistency between national notification templates. Indeed, BEREC has already done some work towards developing a template notification form – it is worth noting that the principal obstacle to full harmonisation of national notification obligations lies in differences between administrative law requirements in different MS, differences which are beyond the power of NRAs or BEREC to address.

BEREC could also act as an information sharing portal, making available information on the notification procedures as well as a list of undertakings operating in Europe based on an integration of the registries maintained by each NRA (like a portal to NRAs' individual registries), though we note that not every NRA maintains such a registry.

Administrative charges

Article 16 of the draft Code basically confirms the formulation of Article 12 of the current Authorisation Directive concerning administrative charges.

Against the background of the proposed exemptions from the notification requirement, the ITRE Rapporteur proposes to prohibit MS from collecting administrative charges of more than a one-off fee of 10€ on undertakings 'present in fewer than [three] Member States and with an aggregate Union turnover of less than EUR [100] million', i.e. the same undertakings that would be exempted from the notification requirement. Additionally, a 10€ fee could be imposed by MS to cover only the costs stemming from the registration of the notification.

Administrative charges should cover NRAs' general authorisation costs

The EC's proposal, on the other hand, would leave it up to MS, to decide whether and how to apply any exemptions to the payment of administrative fees for smaller undertakings, based

on their national circumstances. BEREC welcomes such approach and strongly opposes the ITRE Rapporteur's proposal, as recovering the costs of regulation from the marketplace (rather than relying on a national budget contribution) is an important means of ensuring political independence. The one-off fee of 10€ would come nowhere near covering the actual costs of regulating an undertaking, however small.

In order to remove any ambiguity around NRAs' activities whose costs would be eligible for sectoral funding, particularly given the read-across to the issue of NRAs independence, BEREC would propose to amend Article 16(1) (a) to make an explicit reference to the administrative costs incurred by NRAs in the exercise of all the tasks entrusted to them under the electronic communications framework. This would ensure that both the mandatory tasks assigned to the NRAs under the Code, and all the other tasks envisaged by the framework that MS might eventually entrust to NRAs, would be covered. The same principle could be applied to the national competent authorities that are not NRAs.

Administrative charges should be adapted to national market specificities to avoid discriminatory effects

As well as undermining NRAs' ability to secure adequate sectoral funding, a key enabler of their political independence, the ITRE Rapporteur's proposal would also have a discriminatory impact in two ways:

- NRAs in those MS with a higher number of multinational electronic communication providers would face fewer financing constrains than NRAs in those MS with smaller providers in their market, and
- Undertakings who might have similar turnover to each other within a particular MS might nonetheless face significantly different charges if one of them is present in three MS and the other in only one or two.

The current system enabling administrative charges to be set at the national level based on national turnover and/or other national market specificities is already progressive and should not be altered.

Proposed amendments[3]

General Authorisation (Article 12)

Amendments to Article 12 (1)

1. Member States shall ensure the freedom to provide electronic communications networks and services, subject to the conditions set out in this Directive. To this end, Member States shall not prevent an undertaking from providing electronic communications networks or services, except where this is necessary for the reasons set out in Article 52 (1) of the Treaty. Any such limitation to the freedom to provide electronic communications networks and services shall be duly reasoned and shall be notified to the Commission. ~~Member States shall provide the Commission and the other Member States with a reasoned notification within 12 months following the [transposition date] if they deem that a notification requirement is justified. The Commission shall examine the notification and, where appropriate, adopt a decision~~

[3] Amendments on the Commission plus ITRE Rapporteur's proposal

~~within a period of three months from the date of notification requesting the Member State in question to abolish the notification requirement.~~

Amendments to Article 12 (3)

3. Where a Member State deems that a notification requirement is justified, that Member State may only require undertakings to submit a notification to ~~BEREC~~ ***the national regulatory authority*** but it may not require them to obtain an explicit decision or any other administrative act by the national regulatory authority or by any other authority before exercising the rights stemming from the authorisation. ~~Member States requiring notification shall allow but may not require a provider of electronic communications services offered in fewer than [three] Member States and with an aggregate Union turnover of less than EUR [100] million to submit a notification.~~ Upon notification to ~~BEREC~~ ***the national regulatory authority***, when required, an undertaking may begin activity, where necessary subject to the provisions on rights of use pursuant to this Directive. ~~If a notification does not identify one or several Member States concerned, it shall be deemed to cover all Member States. BEREC shall forward by electronic means and without delay each notification to the national regulatory authority in all Member States concerned by the provision of electronic communications networks or the provision of electronic communications services. Information in accordance with this paragraph on existing notifications already made to the national regulatory authority on the date of transposition of this Directive shall be provided to BEREC at the latest on [date of transposition].~~

Amendments to Article 12 (4)

4. The notification referred to in paragraph 3 shall not entail more than a declaration by a legal or natural person to ~~BEREC~~ ***the national regulatory authority*** of the intention to commence the provision of electronic communications networks or services and the submission of the minimal information which is required to allow ~~BEREC and~~ the national regulatory authority to keep a register or list of providers of electronic communications networks and services. This information must be limited to:

   (1) […]

   (2) […] and registration number**s** […];

   (3) the geographical address of the provider's main establishment ~~in the EU~~ and, where ***applicable*** ~~existing~~, ***of its*** ~~any~~ secondary branch ~~in a Member State~~;

   (4) *the provider's website associated with the provision of electronic communications networks and/or services, where existing;*

   (5) ***the provider's*** contact person**s** and ***their*** contact details;

   (6) ~~a short~~ ***an informative*** description of the networks or services intended to be provided;

   ~~(6) the Member States concerned;~~ and

   (7) an estimated date for starting the activity.

Member States may not impose any additional or separate notification requirements, without prejudice to notification requirements regarding any change to ***the information previously provided, including any change*** or ~~cease~~ ***cessation*** of activity.

In order to contribute to the consistent application of this paragraph, BEREC shall make available the information on Member States notification requirements as well as a list of registered undertakings based on an integration of the registries maintained by each national regulatory authority.

Administrative Charges (Article 16)

Amendments to Recital (51) Administrative charges may be imposed on providers of electronic communications services in order to finance the activities of the national regulatory authority or other ***national*** competent authority incurred in ***the exercise of all the tasks pursuant to this Directive*** ~~managing the authorisation system and for the granting of rights of use~~. Such charges should be limited to cover the actual administrative costs for those activities ***which may include, among others, costs for the management, control and enforcement of the general authorisation scheme and of rights of use and of specific obligations, international cooperation, harmonisation and standardisation, market analysis, monitoring compliance and other market control, as well as regulatory work involving preparation and enforcement of secondary legislation and administrative decisions, such as decisions on access and interconnection***. For this purpose transparency should be created in the income and expenditure of national regulatory authorities and of other ***national*** competent authorities by means of annual reporting about the total sum of charges collected and the administrative costs incurred. This will allow undertakings to verify that administrative costs and charges are in balance.

Amendments to Article 16 (1)

1. Any administrative charges imposed on undertakings providing a service or a network under the general authorisation or to whom a right of use has been granted shall:
   a) in total, cover only the administrative costs which will be incurred ***in the exercise of all the tasks*** *entrusted to* national regulatory authorities or other ***national*** competent authorities ***pursuant to this Directive*** ~~in the management, control and enforcement of the general authorisation scheme and of rights of use and of specific obligations as referred to in Article 13(2), which may include costs for international cooperation, harmonisation and standardisation, market analysis, monitoring compliance and other market control, as well as regulatory work involving preparation and enforcement of secondary legislation and administrative decisions, such as decisions on access and interconnection~~; and

   b) be imposed upon the individual undertakings in an objective, transparent and proportionate manner which minimises additional administrative costs and attendant charges. Member States may choose not to apply administrative charges to undertakings whose turnover is below a certain threshold or whose activities do not reach a minimum market share or have a very limited territorial scope. ~~Member States may not apply any administrative charges on providers of electronic communications services present in fewer than [three] Member States and with an aggregate Union turnover of less than EUR [100] million over and above a one-off~~

~~charge not exceeding EUR [10], to cover any administrative costs incurred in the mere registration of any voluntary notification under Article 12.~~

Amendments to Article 16 (2)

2. Where national regulatory authorities or other ***national*** competent authorities impose administrative charges, they shall publish a yearly overview of their administrative costs and of the total sum of the charges collected. In the light of the difference between the total sum of the charges and the administrative costs, appropriate adjustments shall be made.