

BEREC input to the European Commission on the BEREC and BEREC Office Evaluation Exercise

1. General introduction

BEREC welcomes the opportunity to contribute to this evaluation exercise. Although relatively early in the life of BEREC (as a result of the requirement in the BEREC Regulation for a review within 3 years), this exercise nonetheless provides us with a useful opportunity to critically reflect on the first 2-3 years of the BEREC system in action, to capitalise on what has worked well and identify early on what could be improved.

BEREC welcomes the overall positive picture described by the Commission's consultants, PWC, even while we may not necessarily agree with all of PWC's characterisations and recommendations. In particular, we agree with PWC's assessment "that BEREC is nowadays the most adapted and balanced organisational structure to regulate electronic communications in the EU: promoting the harmonisation of the Single Market as well as adapting BEREC outputs to each national market and its specificities". Still, we believe there remain some areas of misunderstanding by PWC, and have submitted our comments to them directly. While we are proud of our achievements to date, we do not intend to become complacent.

In this paper, we will consider a selection of key policy areas and regulatory functions, highlighting challenges/areas for improvement as well as areas we feel have gone well, providing a view "from within" which we hope will be useful to the Commission in its own evaluation of BEREC. We will of course remain available to elaborate further on any issues raised here, and to work closely with the Commission as it finalises its evaluation report, since we share the objective of making BEREC, the BEREC Office and the regulatory system within which they operate, a success.

2. BEREC, its members, and the single market

At the heart of many of PWC's recommendations appears to be the belief that BEREC and its members have different (and potentially conflicting) objectives. PWC appears to believe that the internal market is best and most sustainably served by the imposition "from above" of a "European" way of seeing the world onto NRAs, and that this way of seeing the world is somehow at odds with NRAs' own individual regulatory objectives, even when they are acting collectively through BEREC.

We feel this is an illusory dichotomy:

- PWC recommends that “BEREC should be more focused on missions that do not directly concern NRAs, such as harmonisation of the internal market and empowerment of EU consumers” (page 7, Draft Final Report).
- PWC also recommends that BEREC should be more independent by having a “European vocation that transcends national interests”.
- In support of this, PWC recommends that the BEREC Office should be more involved in the drafting and delivery of BEREC outputs, as this would “offer a more EU dimension in the outputs delivered by BEREC...”

Harmonisation and the development of the internal market do in fact directly concern NRAs – any harmonisation initiatives directly affect NRAs’ day-to-day work and their ability to effectively regulate national markets. They will therefore have strong and informed views on the impact of such initiatives in practice. Furthermore, it is already both BEREC’s and its component NRAs’ role to promote the internal market (as per Article 1(3) of the BEREC Regulation), in addition to which Article 7(2) of the Framework Directive requires that NRAs “contribute to the development of the internal market by working with each other and with the Commission and BEREC ... so as to ensure the consistent application, in all Member States, of the provisions of this Directive and the Specific Directives...” The absence of any conflict between the goals pursued by NRAs and those of BEREC and the European Commission is further reflected in Article 8.3 of the Framework Directive, which clearly includes the development of the internal market among the policy objectives that NRAs are called on to pursue. BEREC believes that the internal market is a continual project, best served by increasing the quality of regulation across individual national markets, and the most robust and sustainable way of achieving this (ensuring that regulatory decisions are seen as having legitimacy within the national markets) is through the “bottom up” approach currently represented by BEREC.

Indeed, evidence that this approach is working is provided by PWC itself, when it notes that industry representatives mostly use BEREC work in support of discussions with individual NRAs (page 47, Draft Final Report). And BEREC has not hesitated to find against its own members on Article 7/7a cases. Indeed, PWC has acknowledged that BEREC’s role in Article 7/7a cases, and in generating common positions, guidelines and similar documents, drives harmonisation. We believe this is thanks to the legitimacy of the “bottom up” BEREC process and BEREC work in the eyes of its members, and look forward to pursuing the continued development of BEREC on this basis.

In terms of the role of the BEREC Office, while the expertise of its highly qualified staff should be exploited as much as possible, its function is not, and should not, be to overlay an “EU dimension” to BEREC outputs (indeed, and as explained above,

this represents a misunderstanding of BEREC's and its members' own duties in law). Furthermore, it is important to note that the BEREC Office cannot legitimately be entrusted with the achievement of BEREC's regulatory objectives without distorting both the letter and the spirit of the relevant provisions of the BEREC Regulation – it is therefore important that, however much the BEREC Office might legitimately become involved in the preparation of regulatory outputs, BEREC itself should remain the engine for the delivery of those outputs.

3. BEREC's experience with the Article 7/7a process

Prior to the establishment of BEREC, when Europe's NRAs met as the European Regulators' Group (ERG, a network without a formal role in the Framework), Article 7 "ad hoc expert working groups" would be triggered upon the request of the notifying NRA, when it desired the views of its peers. The resource was under-used, and pursuant to the "Madeira Declaration" of October 2006, ERG members agreed to automatically triggering the creation of Article 7 expert working groups, upon the launch by the Commission of a Phase II case. While notifying NRAs found these useful, the resulting ERG opinions had no formal legal status (whether in relation to the Commission's decision-making process, or in national courts). The current system has embedded this peer review procedure in the Framework, and given their output formal legal status (i.e. both the Commission and the notifying NRA must take utmost account of the resulting BEREC opinions).

BEREC agrees with PWC that the Article 7/7a process has been operating successfully. BEREC has always managed to generate an opinion within the incredibly tight statutory timeframes. We are encouraged to see that the expert working groups have operated independently and robustly – BEREC has not been shy to disagree with its members (the notifying NRAs) where this has been warranted. To BEREC members, the genesis of these expert working groups is as important an explanation of their success as their current formal status – they work well because they are the product of the gradual deepening of mutual trust and cooperation between European regulators over time.

At the same time, the large volume of Article 7/7a Phase II cases (in part as a result of the extension of the procedure to remedies) has presented BEREC and its members with a significant challenge. Notifications can be very long and complex (they take months to produce after all), and the timeframes for digesting and opining on them set out in the Framework are very tight. Notifications and supporting documents have not always been available in English at the point at which a Phase II case is launched – with precious time spent awaiting translations.

These (statutory) time constraints of the Phase II process cannot be changed in the absence of a review of the Directive itself, and BEREC has been trying to save time at the front end of the process (the establishment of the expert working group) in order to increase the time for substantive consideration by BEREC members of the draft opinions. We have also asked NRAs to communicate with the BEREC Office swiftly when they anticipate a Phase II case being opened, and to copy the BEREC Office on their quarterly forward-look market review timetables updates to the Commission. We would welcome a discussion with the Commission to try to identify any further efficiencies and/or flexibility within our respective time-tables. We hope these measures will help ensure appropriate NRA experts/rapporteurs are available to staff the expert working groups going forward, given that the rationale for giving BEREC this role was the fact that the relevant expertise lies with those who are in the practice of regulating those markets on a day-to-day basis.

4. Cooperation on net neutrality

Over the last few years net neutrality has become a focal point for policy discussions in our sector, in Europe and around the world. BEREC has provided an important forum for NRAs to reach a consistent understanding of the regulatory framework in this area, and to implement its powers and duties in a consistent manner. This is very much a continuation of the kind of information-sharing and development of regulatory best practices that already took place under the ERG, but improved voting rules within BEREC have helped to ensure its documents represent more than a “least common denominator” position.

Furthermore, some of BEREC’s other work in this area, was made easier by virtue of BEREC’s explicit role as advisor to the Commission, enshrined in European law. Indeed, the traffic management investigation exercise, carried out jointly with the Commission, is a good example of how both BEREC and the Commission can be more effective working together than on their own. This was an ambitious and unprecedented exercise, which ultimately drew detailed responses from 400 ISPs across Europe, and it was made possible thanks to the combined forces of the Commission (with the compulsion of its political authority), and BEREC (with its members’ national information-gathering powers, and close contacts with national market players), with the support of the BEREC Office. This evidence-gathering exercise was critical to inform what is otherwise an intensely political debate. We look forward to capitalising on these comparative advantages and once again working closely with the Commission on any future EU-wide surveys of this nature, extending this model of cooperation into other areas (see below).

5. Input into the legislative process – International Roaming

International roaming has been an important area of activity for the network of European regulators for many years, well before the establishment of BEREC. It was the ERG which originally made the case to Commissioner Viviane Reding that the regulation of international roaming posed a collective action challenge, which would be best addressed through a Commission legislative initiative. During the development of the first two Roaming Regulations, the ERG produced opinions addressed to the Commission, but which did not have any status in relation to the legislators (the European Parliament and Council). The ERG implementation guidelines also had no legal force in national courts.

The formalisation of the regulatory network and the integration of BEREC into the regulatory framework have enabled Europe's NRAs to play a more central role in the development of European policy, contributing directly to the legislative process as an advisor not only to the Commission, but to the European Parliament and Council as well. For example, in the context of the third Roaming Regulation, BEREC was asked to provide evidence to both Council Working Group and the European Parliament. During the course of this, it was able to provide pan-European data which directly impacted on the level of the wholesale price caps ultimately adopted. BEREC members' proximity to their respective national markets and operators has enabled BEREC (working in close cooperation with the Commission) to advise authoritatively on the cost estimates for wholesale services, as well as the levels of the price caps, to analyse the prospects and difficulties of potential retail competition via different structural "decoupling" solutions, to publish guidelines on wholesale access (including the requirements for the reference offer), and to provide the Commission with robust recommendations on the implementation of "decoupling" of roaming services from domestic services. BEREC's challenge going forward is to continue to develop its relationship with the legislators in order to be in the best position to contribute its expertise and practical experience in future legislative and policy agendas in the sector, as a neutral and objective expert advisor to the European Institutions.

6. Early engagement in Commission initiatives

The ERG had been created by the Commission as an advisory body, which the Commission could consult at will for advice. One of the significant improvements of BEREC over its predecessor is the embedding of the regulatory network in the Commission's decision-making process – the Commission is now required to seek BEREC's views on a variety of draft decisions and other draft measures, to help ensure those measures are workable and effective. We are pleased to note that the Commission has not taken an overly formalistic view of this requirement, and has more recently looked to BEREC as an early partner in the development of its thinking, on these occasions seeking BEREC inputs into its decision-making at the

very early stages of policy development. BEREC very much appreciates this early involvement, which to date has ranged from issues around universal service to costing methodologies, to name but a few.

The area of net neutrality provides good examples of the benefits of such early engagement, and as is often the case, this is particularly well illustrated by exception. Despite productive early engagement on certain other policy areas, the Commission contracted external consultants to produce a pan-European report on actual vs advertised broadband speeds, without seeking any input from BEREC at the scoping stage. The survey design and methodology, therefore, did not benefit from the collective experience of the various BEREC members who had already undertaken this work at a national level, and the resulting data is consequently less robust and comparable than it could have been. We have since provided the Commission with our views on the draft report, and have had direct contact with the consultants. While BEREC would have expected to have been involved by the Commission prior to the survey launch, we are encouraged by the more recent cooperation with the Commission and the consultants on this project, and their recognition of the value of reinforcing this cooperation going forward.

Similarly, when designing a notification procedure for NRA QoS remedies under the new article 22(3) of the Universal Service Directive, the Commission sought BEREC's views at the working level in parallel to its consultation of Member States through COCOM. Unfortunately, this meant that the Commission's first draft (considered by COCOM) did not take account of BEREC's work in this area, and COCOM itself directed the Commission to work closely with BEREC. The subsequent engagement has ensured that the procedure will avoid duplication with, and operates consistently with, BEREC's own minimum QoS guidelines.

It must be said that the Commission's growing reliance on BEREC, while welcomed, has also posed some challenges. The Commission's ambitious policy agenda, combined with the fast pace of change within the sector, have generated around 10-12 ad hoc Commission requests for BEREC advice since the start of 2012. While we have responded to all of them in some way (sometimes requiring the reprioritisation of our work programme), these requests have at times been disruptive. We therefore welcome the Commission's recent efforts to share its own forward-looking calendar with BEREC (recognising, of course, that things may change, delays may occur, and new issues may arise needing urgent attention), and hope that our respective work programmes can be increasingly aligned going forward. We have also proposed a "spring clean" mid-way through the BEREC work programme year, to provide an opportunity for the reprioritisation of BEREC projects should the need arise to respond to an urgent request. We hope that these two initiatives will help smooth out some of the peaks, and enable BEREC to commit appropriate resources to Commission requests going forward. We will monitor the functioning of this system

closely during 2013, with a view to discussing with the Commission any further adjustments that might be required for subsequent years.

7. The BEREC Office

When Commissioner Viviane Reding first proposed to replace the ERG with a European Agency (i.e. a body with legal personality founded in European law), the ERG and its members sounded an alarm over the undesirable bureaucratic burden that such a body would imply. The compromise adopted by the European Parliament and Council, enshrined in the BEREC Regulation, sees the preservation of the regulatory network (BEREC) as independent and without a legal personality, and so free of such a burden, and the creation of a “secretariat” to provide BEREC with professional and administrative support (the BEREC Office), a body with legal personality founded in European law, and therefore subject to the raft of EU rules and regulations that apply to all Community bodies.

Despite only being declared “autonomous” in September 2011, the BEREC Office has already been significantly affected by this burden. The situation is particularly acute for the BEREC Office (as compared to full-scale agencies with hundreds of staff members) given that the same set of rules and procedures apply regardless of the size of the entity involved. The result is a disproportionate overhead (particularly visible in terms of the number of staff members required by law to fulfil administrative functions resulting from the BEREC Office’s legal status, as opposed to staff carrying out the core functions of the BEREC Office). Particular difficulties have been experienced in relation to procurement (delaying the contracting of mobile telephony services, the provision of an office intranet and, most critically, the development of an Article 7 database, the BEREC Office’s key tool for support of the Article 7/7a process) and recruitment (where staff policy plans are incredibly inflexible). The application of the Financial Regulations is also unduly onerous (requiring as many staff roles, back-ups, and administrative controls as apply to agencies managing far greater budgets and disbursing far greater sums than the BEREC Office). The cumulative effect of this bureaucratic burden is to deprive the BEREC Office of the relative nimbleness that should result from its small size.

We understand that there is an interest among some elements in Brussels to streamline the burden on European agencies generally, an initiative which we would generally support. In the meantime, we would be keen to ensure that any flexibility that might exist in the application of the existing rules and procedures is fully brought to the attention of the BEREC Office, and duly exploited, perhaps with the identification of a Commission liaison officer who could serve as an advisor and reference point to the Administrative Manager and his staff. We would be grateful for

the opportunity to discuss these challenges with the Commission at greater depth, in order to identify any mitigating steps that might be taken.

8. Conclusion

BEREC's first three years have been an education for all of us, and we are pleased to be able to draw more positive conclusions than negative ones. At the same time, we are determined not to become complacent - not only in regulatory terms (the recent strategy workshop in Cyprus illustrating our commitment to continually challenge regulatory assumptions, while recognising the importance of a stable regulatory framework) but also institutionally/organisationally (we continue to focus on ensuring our work methods and internal rules are efficient, as well as flexible and adaptive to changing demands).

In the meantime, there is one issue we felt it worth highlighting explicitly to the Commission, which we believe is key to a sustainable future for BEREC. Despite recommendations from PWC and requests from stakeholders for a streamlined/reduced work programme, the sector is fast changing and the policy and regulatory areas requiring BEREC attention will not diminish. While BEREC is working to prioritise and manage the work programme, as described above, BEREC members also need to be adequately resourced in order to ensure the success of BEREC. We are experiencing a particularly challenging economic period, when national budgets are under pressure and sectoral regulators are not exempted from national budget cuts. At the same time, we note that Member States are required under Article 3 of the revised Framework Directive to ensure their NRAs are adequately resourced to carry out the tasks assigned to them and to fulfil their obligations in respect of BEREC. We understand the Commission is already looking into this issue, and we look forward to combining our efforts on this front.

BEREC has already made provisions in the draft work programme for 2013 to address any recommendations that arise from this evaluation exercise, and we look forward to continuing to work closely with the Commission to further embed and strengthen BEREC, and on the policy and regulatory agendas going forward.

BEREC
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