

November 2016

ETNO Contribution to Draft BEREC Work Programme 2017 – BoR (16) 169

ETNO welcomes the opportunity to provide its views on the BEREC draft Work Programme (WP) for 2017 (BoR (16) 169).

ETNO and its members support all initiatives aimed at fostering the dialogue between BEREC and stakeholders, such as the Stakeholders' Forums that BEREC has organized in the past four years. We encourage BEREC to continue engaging in open discussions and increase the transparency of its work, in particular by subjecting its foreseen activities to public consultation.

In this respect, we believe that there is substantial scope for progress, in particular with regard to the activities of BEREC Expert Working Groups (EWGs). Public workshops and exchanges between the EWGs and stakeholders, to be envisaged since the beginning of the formulation of BEREC's reports and positions, would represent a substantial step forward.

With the same spirit, we invite BEREC to envisage public consultations for the items of this draft WP which do not foresee it yet. In our specific remarks below, we outline which items would particularly benefit from an open exchange with all stakeholders.

Adhering to the structure of the draft WP, we would like to propose the following comments, encouraging the Body of Regulators to take them into account when revising the draft, and in general in the continuation of BEREC's work.

Introduction

ETNO members are committed to enable Europe become a leader in the development of 5G and of the Gigabit Society. An innovation and investment-friendly framework for electronic communications is required to turn the ambition into reality, as fast as possible and in the most inclusive way. The debate on the recently adopted European Electronic Communications Code ("the Code") should be informed by this overarching priority.

ETNO takes note that the work related to the Code will take a key part of BEREC's activities for the coming year. From ETNO's point of view, the Code provides a once-in-a-decade opportunity to reshape the rules governing the electronic communications sector in a forward-looking, user-oriented and innovation-friendly way.

In this respect, we encourage BEREC to think boldly beyond current practices and models. The new framework should prioritise the wide availability of state of the art connectivity services, permanently integrating innovative technologies by promoting sustainable investment, the competitiveness of the EU industry and the alignment of the industry policy with regulatory goals.

To achieve this overarching vision we should focus on the following key priorities:

- Foster investments and take-up of very high-speed connectivity, through a technology-inclusive and market-led approach;
- Promote innovation and quality of services, focusing on sustainable benefits for EU citizens and businesses by maximising availability, quality and choice of communication networks and digital services;
- Promote sustainable investment and innovation, ensuring the good functioning of competitive markets, through a stronger focus on infrastructure-based competition over service-based competition;
- Address converging technologies and services, also in this case through a technology-neutral approach, and ensure a level playing field across the whole digital value chain, maintaining competition between all digital market players, based on non-discrimination and light-touch regulation;
- Ensure that consumer protection standards for EU citizens are consistent, proportionate and effective across the digital single market.

We also note that some of BEREC's foreseen activities for 2017 go beyond the legislation and policies that the European Commission has been proposing in the context of the DSM Strategy, and attempt to look at new technological, market and regulatory issues. In this context any regulatory reflection on market-driven, technology-intensive and fast-evolving issues needs to be done under the general principle of limiting regulatory intervention as much as possible, in order not to undermine innovative developments in the digital sector. Proper consultation with market players will help avoid unintended consequences of regulatory initiatives/proposals.

BEREC Work in 2017 – Strategic Priorities

A) Promoting Competition and Investment

1. Market analysis

1. The impact of content markets (incl. premium audiovisual) and devices on fixed and mobile Electronic Communication Services (ECS) markets

ETNO takes note of this item. We will detail our views in the relevant consultation. However, we also invite BEREC to consult with stakeholders in a thorough way from the outset, to collect relevant views from market operators.

We also take the opportunity to make some general remarks, as follows.

ETNO welcomes BEREC's ambition to assess the interaction of electronic communication service providers within increasingly complex and dynamic markets. Indeed, legacy service categories become blurred, new business models evolve, and different kind of providers increasingly bundle a variety of services into single offerings. Against this background, ETNO takes note of BEREC's planned analysis of bundles, which need to encompass not only Electronic Communication and Audiovisual Media Services but also Digital Content, Information Society Services and the role of platforms. Equally relevant

is BEREC's intention to assess the relevance of openness and non-discrimination with regard to devices. More broadly, BEREC should consider the relevance of these principles for digital services at large.

We also note that the relevance of online platforms in the digital world is increasing day by day. In the light of this, and in view of the EC being expected to take a decision in 2017 on whether further actions on this topic are needed, we believe that it would be helpful if BEREC opened a specific workstream to study the role of platforms and their impact on competition and consumer choice. The findings could be used to provide inputs and comments to help the EC adopt a better informed decision.

2. Convergence of fixed and mobile networks

ETNO takes note of BEREC's willingness to develop a report on the state of fixed-mobile convergence across Europe, including relevant developments occurred at Member State level. We invite BEREC to foresee consultation with stakeholders for the purposes of this report.

We would also like to underline that fixed-mobile convergence is one of the most important market developments occurred over the past years, and one that has made the sector evolve towards higher levels of competition and dynamism (in addition to infrastructure competition in fixed markets, among the others). In the light of this, regulatory scrutiny should be wary of leading to conclusions that would hamper the development of positive dynamics in the market. This includes the market for access to backhaul, which the European Commission proved being competitive in the latest revision of the Relevant Markets Recommendation (2014) and does not require ex-ante regulatory scrutiny.

3. Input on implementation of symmetric obligations: description of existing practices and consideration of future challenges

ETNO also takes note of BEREC's intention to conduct a survey on the implementation of symmetric obligations across the EU, in the context of the developments related to the Code. We invite BEREC and NRAs to thoroughly consult with the industry in the implementation of this survey.

We also underline that symmetric obligations have had a positive impact in some countries where competition is infrastructure-based (e.g.: France,

Portugal, Spain) and these kinds of measures have been used¹. Evidence shows that, in those cases, symmetric regulation for in-building wiring and ducts has been instrumental in promoting infrastructure-based competition.

4. A comprehensive assessment of the need to review the Common Positions relating to Markets 3a, 3b and 4.

ETNO takes note also of this important agenda item. For reasons of transparency and the need to undertake a well-grounded analysis, we urge BEREC to consult with stakeholders in a thorough way before finalizing the report, to collect the relevant views from market operators.

5. New forms of sharing passive optical networks based on wavelength multiplexing

ETNO takes note that BEREC is willing to analyse new forms of sharing passive optical networks. We invite BEREC to consult with stakeholders in a thorough way before finalizing the report, to collect the relevant views from market operators.

BEREC's analysis should be very pragmatic and closely linked to what is concretely sensible with respect to the market circumstances at hand. It should not be biased towards conferring NRAs additional regulatory tools. We do not believe commercially viable wavelength sharing use cases are a realistic scenario in the near and medium term.

Moreover, before discussing the possibility to impose specific remedies, the discussion on technical and costing requirements needs to be finalized in order to avoid situations where technically and economically unfeasible remedies are imposed (e.g. GPON in Germany).

2. Favours investment and connectivity

1. Implementation of the Broadband Cost Reduction directive

¹ We also note that the effectiveness of symmetric obligations has often been related to symmetry in terms of price obligations. This has not happened in some contexts, e.g. Italy, where TIM is obliged to provide access to the terminating segment (i.e. in-building fibre) and to the building entry segment at cost-oriented prices, while non-SMP operators only have to provide access to such segments at fair and reasonable prices .

ETNO notes with particular interest this item of the draft WP. The Broadband Cost Reduction Directive can be a useful tool to cut the costs and incentivize the roll out of high-speed electronic communications networks. We invite BEREC to assess how the Directive has been implemented in Member States after its entry into force, and whether implementation across the EU has been consistent. To this end, we would be keen on collaborating by providing the views of electronic communications operators in this regard.

Next to an overview of the legal implementation, we suggest BEREC to also enquire for best practices and success stories of the actual use of access to physical infrastructure as allowed by the Directive. This will allow to inspire both operators and policymakers in other countries to assess the possibilities for concrete benefits brought about by this legislation.

Finally, more clarity and information on the following aspects of the implementation would be particularly useful: the “inventory” of physical infrastructures to be available via a single information point; the information requested to operators (telcos and non-telcos); the prices and access conditions applied (in particular by utilities); and dispute resolution measures.

2. Analysis of individual NRAs’ current work around access conditions to State Aid funded infrastructure

Regarding this item, we would like to reiterate ETNO’s position on State Aid/public funding for network infrastructures:

- a) Investments needed to deploy broadband and very high-speed broadband infrastructures should come primarily from the private sector and from private investors wherever commercially viable, to avoid any distortion of competition.
- b) Public funding should never crowd out private investments in areas where private investors are operating or intend to operate.
- c) State Aid rules should be designed in a way which ensures adequate protection against inappropriate cherry-picking, especially on open access conditions. Improperly applied open access conditions could have adverse impacts on the wider infrastructure providers market.
- d) Finally, public funding measures should not try to determine technology choices but rather remain technology-neutral and support the market’s choice of the most appropriate and efficient technologies and services.

3. Facilitating mobile connectivity in ‘challenge areas’

ETNO takes note of this item, welcoming the intention of BEREC to consult with stakeholders before producing the Report.

As a general remark concerning connectivity in “challenge areas”, we believe it is important to identify what are the sources of the investment gaps and in which way regulation could have an influence on them. If regulatory action is to be foreseen, this should focus on:

- a) Primarily making Europe an attractive place to invest private money. Providing better return prospects and allowing operators to differentiate amongst themselves and compete to extend their coverage and services should be the overarching principles to overcome this challenge in Europe;
- b) Limiting the role of public funding exclusively to address the specific reasons of a market failure, i.e. for example lack of sufficient demand, lack of skills, high costs, elements hampering the investment process – i.e. in-building wires or other elements in low density areas, etc. – without which investment would not have taken place. In these cases, it is of the utmost importance to ensure that public support takes place in a competitive neutral manner, i.e. avoiding at all costs distorting competition amongst market players and crowding out private investments. Finally, we believe it is crucial not to pick up winners and losers by selecting particular business models or players.

4. IP interconnection practices in the context of net neutrality

ETNO takes note of this item of the WP. We will be detailing our views in the related public consultation.

As a preliminary remark, we reaffirm the validity of the general thrust of our contribution to the 2012 BEREC’s report (see [here](#)). As a general principle, competitive interconnection markets should not be subject to regulation.

3. Supporting innovation (IoT/Spectrum sharing)

1. Follow up of ongoing work on IoT and its impact on the EC Regulatory Framework

ETNO would be very interested in participating in the related workshop.

ETNO is strongly committed to support the further development of IoT as strategic technology. In this context, telecom operators are key not only to provide connectivity but also to foster innovative solutions across markets. Accordingly, ETNO is highly engaged in various policy initiatives, in close

alignment with other relevant stakeholders. BEREC should facilitate the further development of IoT and related services, and refrain from an early intervention which may impose burdens that deter innovation.

ETNO urges BEREC to consider and not underestimate, within the assessment of the obstacles to the development and take-up of IoT services, the impact of existing sector-specific rules that already apply to these services, as there is no distinction between human and M2M services in the legislation.

2. Spectrum needs to foster innovation in Europe

Also regarding this item of the draft WP, ETNO would be very interested in actively participating in the workshop that BEREC aims at organizing.

For reference, our views on how spectrum management in Europe should be reformed can be found [here](#).

B) Promoting the internal market

1. Framework Review

1. Inputs to legislative proposals in the context of the EC Regulatory Framework review

Regarding this specific and crucial area of activity, we urge BEREC to make its work and input to the Code as well as to the new proposal for a Regulation establishing the Body of European Regulators for Electronic Communications as public and transparent as possible, also involving stakeholders in this context.

2. Collaboration with the Commission's consultant on its study on the review of SMP guidelines (to be determined with the European Commission)

ETNO believes that, in the context of the Commission's study on the review of the SMP guidelines, consultation should be extended not only to BEREC but to all relevant stakeholders.

We also want to reiterate our views on BEREC's past proposal to extend the scope of regulatory intervention to "tight oligopolies". The review of the framework should be driven by the aim of substantially simplifying regulation, and should not be accompanied by a new tool to perpetuate regulation.

ETNO reaffirms that broadening the scope of regulatory intervention, in addition to enhancing complexity, would be both ineffective and inefficient and would send a wrong message to investors.

For more information on ETNO's position on BEREC Report on oligopoly analysis and regulation, see [here](#).

3. Review of Termination Rates (TR) Recommendation

Regarding this agenda item, our position is contained in the response to the public consultation that the EC launched last Spring. ETNO's response can be accessed [here](#). We invite BEREC to take it into account in its reflections around this issue.

4. Update of the internal qualitative report on Phase II cases (multiannual work line)

ETNO urges BEREC to give visibility to the report, once finalized, by publishing it on its website.

C) [Empowering and protecting end-users](#)

1. [Promoting end-user choice, accessibility and affordability](#)

1. Current definition and provision of Universal Service

Regarding the review of the Universal Service regime, which is purely related to the consumer market, it is of utmost importance that Universal Service remains an instrument to provide a social safety net and ensure inclusion to the digital society. Because of this general societal goal, its costs should be borne by the society as a whole through public funding, and not by the electronic communications sector only. Furthermore, the scope of the Universal Service regime should be limited to policies which ensure affordability, and not go beyond to solve other policy problems. Otherwise, the risk would be to create significant inefficiencies and market distortions. We generally believe that the setup proposed in the Code by the European Commission goes in this direction.

2. [Safeguarding an Open Internet](#)

1. Implementation of Regulation 2015/2120 and Guidelines on net neutrality

ETNO takes note of the internal activities that BEREC intends to undertake on this crucial issue.

In this context, we would like to remind that user-friendly and innovation-conducive implementation of the Regulation 2015/2120 is essential to the quality and development of present and future services. In ETNO's view, implementation should be harmonised, user-centric and unequivocally pro-innovation. It is essential to avoid restrictive interpretations that would deviate from the spirit of the dispositions of the Open Internet Regulation.

2. Regulatory assessment of QoS in the context of net neutrality

BEREC's highlighted principles of "accuracy and comparability" are indeed crucial for the development of reliable toolkits. In this regard, we believe that some of our remarks already expressed in the consultation for the 2016 WP are still relevant, as follows.

ETNO believes that monitoring QoS can be a positive and fruitful exercise both for European citizens and for European market players operating along the broadband value chain. Beyond legal obligations stemming from the Universal Service Directive and further best practice at national level, ETNO supports cost-effective and appropriate steps to increase transparency to enable consumer choice and, by this, support network competition.

We reiterate our viewpoint that only reliable measurement tools can provide such transparency. Non-reliable measurement tools (e.g. online web portals) often erroneously report low network performance and increase end-user complaints and therefore can foster a feeling of mistrust. Indeed, the growing availability of non-reliable tools is a negative incentive to invest in high-speed networks and may unduly affect end user trust towards network operators.

According to ETNO, the development of reliable measurement tools needs to be carried out cautiously and be preceded by a thorough analysis of the goals that BEREC wishes to achieve to avoid considerable costs in the deployment of new systems/processes and their maintenance (including human resources). Such a tool may be used (1) to validate transparency compliance with regards to Net Neutrality, (2) to inform the end-user after contract conclusion on the speed of his/her personal broadband connection or (3) to serve as a support mechanism before contract conclusion for those customers searching for objective information on what can be generally expected from different broadband

offerings in the market. The overall objective has an important impact on the design of the tool.

As to the concepts and parameters inherent to measurement tools, ETNO also would like to highlight that close attention must be given, for the sake of accuracy, to the characteristics of the technology platform whose quality is measured and to the specificity of national broadband markets. The possible definition of a single Europe-wide system designed to monitor and measure the quality of broadband on all national levels must be sufficiently flexible to allow an adjustment to the individual national characteristics.

Finally, ETNO believes that European network operators should be involved, from the very beginning of the process, in the definition of a possible European opt-in system of monitoring.

3. Net neutrality supervision tools and methods

ETNO invites BEREC and NRAs to consult with stakeholders at European and national level before producing the final report.

D) Quality and efficiency

1. Benchmarks

1. Procedures for collection and standardisation of statistical and market information on OTT services, in cooperation with Eurostat

Digital services markets have dramatically changed over the last decade, with a broad variety of new providers that often compete for the same customers as telecom providers. Against this background, ETNO welcomes BEREC's plans to increase market intelligence regarding OTT services and related business models. This exercise should not be limited to better understanding of penetration rates. It should be more comprehensive, encompassing impacts on end-users and competition. In this scope, BEREC should also gain competencies to actively seek information from OTTs and OTTs should be obliged to notify their market activities, at least when providing electronic communication services.

2. Business market indicators for the Digital Scoreboard (elaborate a survey and harmonise practices)

The business market is critical to economic growth in the EU and its Member States. It would therefore be very helpful to have consistent and robust market data across the EU, underpinned by a common and shared definition of a business that is within that market. BEREC should take every opportunity to review with stakeholders its proposals to establish a workable definition of a business that is clearly differentiated from that of residential customers at the bottom end. Wider consumer policy should focus on residential customers and not be used to define small businesses. The use of the number of employees as part of the definition of a business is not robust and may lead to confusion.

2. Communication and cooperation

With regard to BEREC's last strategic priority, ETNO reiterates the need for BEREC to continue improving the transparency and quality of its work, also by engaging with stakeholders through dedicated workshops and public consultations. ETNO is looking forward to continue contributing to BEREC's activities.

About ETNO

ETNO (European Telecommunications Network Operators' Association) represents Europe's telecommunications network operators and is the principal policy group for European e-communications network operators. ETNO's primary purpose is to promote a positive policy environment allowing the EU telecommunications sector to deliver best quality services to consumers and businesses.

For questions and clarifications regarding this position paper, please contact Francesco Versace, Director of Regulatory Affairs, at versace@etno.eu