

Review of the Electronic Communications Regulatory Framework

Executive Summary 6: NRAs and BEREC

1. General context and objectives

An **efficient governance with modernised institutions** is essential in order for the new Electronic Communications Regulatory Framework to function efficiently and to be implemented in a timely manner across the EU. The proposals for a European Electronic Communications Code and BEREC Regulation should ensure the appropriate balance of powers, including the reinforced competences of national regulatory authorities (NRAs) and the Body of European Regulators of Electronic Communications (BEREC) as well as the necessary coordination procedures at EU level.

1.1 NRAs

The effective application of the electronic communications rules relies on the existence of independent authorities, vested with the legal and financial means to carry out their tasks and to enforce their decisions. The previous review strengthened the independence of NRAs in order to increase their authority and the predictability of their decisions. In addition to the requirement of structural and functional independence from the parties, it added specific requirements of political independence for NRAs responsible for *ex ante* market regulation and resolution of disputes between undertakings.

While the enhancement of the independence guarantees was undoubtedly a success, it has nevertheless created **NRAs of different "independence speeds"**. There is ambiguity as to whether the independence guarantees could be different depending on the task exercised by the politically independent NRA outside the fields of market regulation and dispute resolution. The implementation of the current rules and the development of the case-law have also brought to light other areas where further **improvement of the independence and accountability guarantees** is necessary, such as for instance the need for a minimum period for the mandate of the members of the board or to limit the reporting obligations.

The current framework harmonises **very few competences assigned to NRAs** responsible for *ex ante* market regulation (politically independent NRAs) and allows Member States to assign most regulatory tasks to ministerial bodies or other authorities. The lack of definition of *ex ante* market regulation has led to a patchwork, with wide variation in the tasks conferred on the politically independent NRA in addition to market analysis and imposition of regulatory remedies. However, *ex ante* market regulation is not confined to market review; the exercise of a number of tasks provided in the framework directly or indirectly influences competition and the shape of the markets. And this is not only a national issue, but an EU one to ensure that national markets are open and function following a set of common principles, based on competition law.

The most obvious example concerns tasks which are closely related to the **market analysis process**, such as for instance the geographic survey of networks and the dispute resolution between operators. A second category includes tasks which are related to **market entry**, such as the general authorisation or the management of numbering resources. Confining the task of ensuring the openness of the markets to politically independent authorities reassures the investment community. This also concerns those conditions for the assignment of spectrum, such as spectrum floors or caps, the type of assignment procedure or the reserve price, which have a direct impact on the structure of the market.

A third category encompasses tasks or powers aiming at the **protection of end-users**. Sector-specific consumer protection rules, in particular those on number portability or net neutrality, have a significant impact on competition and market structure, as does the resolution of disputes between undertakings and consumers. Likewise, assessing the unfair burden and calculating the net-cost of the provision of the Universal Service influences the financial exchanges between providers and affects the viability of competitors and ultimately of competition. Politically independent NRAs, with the knowledge and expertise they have acquired from the oversight of their national markets, are the authorities best placed to assess the impact of decisions taken in the above areas on markets and thus to undertake these functions.

Harmonising the minimum competences that NRAs should have at national level necessarily implies corresponding changes at EU level. BEREC, as a body charged with pursuing regulatory consistency, should be the forum where NRAs endowed with a common set of competences exchange best practice, find guidance and review the way their peers exercise these tasks. Indeed, peer pressure is a powerful complement to more formal legal enforcement tools. Hence the tasks of BEREC should mirror those of the NRAs in the areas where an EU angle is necessary (cross-border dimension, need for internal market procedure, etc.).

In order to build the Digital Single Market, the rules should be applied consistently throughout the EU. And for this to happen, BEREC should cater not for the lowest common denominator of the national interests of its members, but for the EU interest and should therefore have the necessary powers to protect this.

The aim of the current proposals is to **enhance the independence and the regulatory capacity of NRAs** and to ensure that they are vested with competence in all the interacting, market-shaping aspects of the regulation of the electronic communications sector.

1.2 BEREC

In the last years, BEREC has made an increasingly important contribution to the efforts to develop a true single market for the telecoms sector. It has delivered some valuable technical expertise and has been called by co-legislators to play a stronger role, working closely with the Commission, in areas such as net neutrality and roaming.

However, as was signalled during the public consultation, instead of focusing on a more harmonised approach for the single market, the current institutional set-up of BEREC results in it often opting for greater flexibility or the lowest common denominator. At a moment in time when it is critical to advance towards the Digital Single Market, the proposal for a new BEREC Regulation should ensure the necessary EU focus and strategic steer.

During the preparatory work for the telecoms review, the Commission identified the need to:

- grant BEREC an increased role in the EU context with a governance set-up fit for purpose: a legal personality, decision-making powers, financial and human resources, accountability and autonomy;
- streamline the current complex and bureaucratic structure encompassing BEREC and the BEREC Office in order to increase efficiency and coherence and avoid duplications;
- achieve progress towards an alignment with the structural and operational framework for EU agencies;
- overcome the challenges and respond to the criticism of having an EU agency – namely the BEREC Office – with a limited mandate to provide support to an intergovernmental body – BEREC.

The European Parliament called on the Commission to ensure a more efficient institutional framework strengthening the role, capacity and decision-making process of BEREC, as well as improving its financial and human resources and further enhancing its governance structure.

The current proposal **enhances BEREC's role working towards the Digital Single Market**. It represents an evolution of the existing set-up, building on the experience so far, and guaranteeing the rootedness of BEREC in the experience and expertise of independent NRAs. In this regard, the Commission has launched the debate on modernisation of BEREC by adhering in its proposal to the principles of the Common Approach on decentralised agencies, as agreed by the European Parliament, the Council and the Commission in 2012.

The objective is to achieve an EU-legitimate institutional set-up which will efficiently support the policy goals in the telecoms sector by designing an **appropriate and balanced governance structure**, which should allow for better streamlined decision-making processes and ensure the EU added value of BEREC's enlarged work.

2. Proposed solutions

The Commission is proposing to reinforce the role of national telecoms regulators (NRAs), both at national and EU level, to ensure consistent and predictable application of the rules throughout the Digital Single Market. At national level the proposals aim at establishing a common harmonised minimum set of competences for NRAs and at reinforcing their independence and regulatory capacity; at EU level, the proposals aim at enhancing the role of BEREC and establishing an efficient and EU-legitimate governance structure. The NRAs and BEREC will have common objectives of enhancing end-users' access to and take-up of very-high capacity connectivity, promoting a competitive internal market and safeguarding end-users' overall interests (Article 1(3) of the Code).

2.1 National level

2.1.1 NRAs' competences

The new proposed rules provide for the **minimum harmonisation of the competences of the NRAs** (Article 5 of the Code) and end the ambiguity of the independence regime for NRAs. They provide for a list of tasks that Member States may assign only to the politically independent NRAs, as opposed to other regulatory tasks that they may choose to assign either to the NRAs or to other competent authorities.

The minimum tasks of the NRAs could be bundled into three categories: i) market review related tasks (*ex ante* market regulation, geographic survey of networks and dispute resolution between undertakings); ii) ensuring market entry (general authorisation, market-shaping, competition and regulatory elements of spectrum assignments, numbering); and iii) end-user related tasks (dispute resolution between undertakings and consumers; sector specific consumer protection rules, net neutrality, number portability and assessing the unfair burden and calculating the net-cost of the provision of the universal service). As a consequence, the use of the term 'national regulatory authority' (NRA) will be reserved for the bodies which are responsible for market regulation, including the market shaping and economic aspects of spectrum assignment, and not any more for Ministerial bodies. This will end a source of terminological confusion.

Lastly, the minimum list of competences would guarantee the **alignment of the competences of BEREC with those of the NRAs** and make sure that BEREC may rely on the expertise developed at national level by its members and, at the same time, that the members of BEREC are in charge of applying in the national markets the guidelines provided by it.

2.1.2 NRAs' independence

As a direct consequence of the clarification of competences, the independence regime of NRAs and of other competent authorities is also clarified. National regulatory and other competent authorities should be independent from the parties (Article 6 of the Code). In addition, NRAs should, in the exercise of any task assigned to them, be structurally and functionally independent from any other body (Article 8 of the Code). As a consequence, the **impartiality and political independence of NRAs**

is ensured, while other competent authorities would be required to be independent from the parties and not necessarily politically independent.

In addition, the rules propose the establishment of a **minimum term of mandate** – 3 years – for the members of the board of the NRAs, with the view to allowing them a sufficient period of time to carry out their function independently from any political pressure jeopardising their independent decision making (Article 7 of the Code). Lastly, the rules propose to **reinforce the accountability of NRAs** by framing their reporting obligations and ensuring the transparency of the financial control exercised on them (Article 8(2) of the Code).

2.2 EU level

2.2.1 BEREC competences

The reformed BEREC will have **significantly enlarged competences** for matters with cross-border dimension and where BEREC can assist the NRAs in carrying out their tasks consistently (Article 2 of the BEREC Regulation).

The revamped BEREC will have *inter alia* a significant role in ensuring that consistent access-inputs are available to meet demand for the provision of cross-border services and defining any transnational markets that may emerge in the future. It will play a key role in contributing to the determination of a single EU termination rate, in developing a contract summary template for consumer contracts and maintaining EU-level registries of telecoms providers and numbers with extraterritorial use.

Furthermore, BEREC will be entrusted with the provision of guidance for NRAs in a wide range of areas, e.g. on geographical surveys of network deployments, and will deliver opinions on draft national measures on radio spectrum assignments (radio spectrum 'peer review') as well as on cross-border disputes between operators. Finally, BEREC will have an enhanced role in the EU consultation mechanism for draft market regulatory remedies notified by NRAs, as the Commission could veto such measures only if BEREC – which guarantees subsidiarity and respect for national market specificities through its NRA membership - shared its serious doubts.

2.2.2 BEREC governance

Following the proposed role for BEREC in the EU institutional framework and its enlarged scope of tasks (including decision-making powers), it is necessary to ensure that BEREC operates in an effective, transparent and accountable manner. The Commission has therefore applied the Common Approach on decentralised agencies which provides a legal and effective set-up for EU agencies. As a result, BEREC will have **legal personality** (currently only the BEREC Office has legal personality), autonomy from the EU institutions and Member States, while its **rootedness will continue to be built on NRAs**.

The agency will maintain the current pooling of valuable technical expertise from NRAs and the experts of the NRAs will continue to play a fundamental role by participating in working groups which prepare BEREC's 'deliverables'. The **'bottom-up approach'** of BEREC is well preserved and the proposal contains detailed provisions in relation to the role and composition of such working groups (Article 10 of the BEREC Regulation).

In view of the additional tasks assigned to BEREC and the need to build a long-term strategy, it is essential that the **Chairperson and Deputy Chairperson** would benefit from longer and extendable mandates (currently appointed for a term of office of one year only). The proposal envisages a more stable governance structure by establishing that the Chairperson and Deputy Chairperson of the Management Board should be elected from among the representatives of Member States for a four-year term of office, renewable once (Article 6 of the BEREC Regulation).

An **Executive Director** would be appointed to be its legal representative and ensure the performance of the tasks assigned to BEREC (Article 9 of the BEREC Regulation). He/she will participate in the deliberations on BEREC's decisions but will have no voting rights (Article 8 of the BEREC Regulation). The Executive Director will also have a longer term of office of five years renewable (currently three years renewable) to ensure the necessary continuity and stability (Article 22 of the BEREC Regulation).

The proposal reflects on BEREC's increased regulatory role in order to ensure an **efficient, stable and fit-for-purpose system** to help BEREC deliver timely and consistently on its very important tasks (for example, by ensuring that a single Management Board takes all the relevant decisions – currently this is done by two separate Boards). It also makes sure that the mandates of EU agencies are aligned with EU policy priorities, therefore ensuring the EU added value of BEREC's work.

2.2.3 BEREC as an accountable EU actor

BEREC, as an EU agency, will become an **autonomous legal entity** which would be solely responsible and accountable for its actions and decisions. The Executive Director would be accountable to the Management Board and report to the European Parliament and the Council on the performance of his/her duties (Article 9 of the BEREC Regulation), in particular as regards the management of the agency's budget.

The Commission would ensure the lawful work of the agency. In this regard, the Management Board will be composed of one member per Member State (i.e. the respective NRA) and two members from the Commission with voting rights (Article 4 of the BEREC Regulation). Also in line with the Common Approach, the Commission will propose a list of qualified candidates from which the Management Board will appoint the Executive Director or the members of the Board of Appeal (Articles 11 and 22 of the BEREC Regulation). The proposal specifies the role of BEREC as regards international activities, where the Commission will approve the working arrangements of the agency with competent EU bodies, authorities of third countries and international organisations (Article 26 of the BEREC Regulation).

The activities of BEREC will be subject to the inquiries of the European Ombudsman, investigations by the European Anti-fraud Office and audits by the European Court of Auditors (Articles 32 and 34 of the BEREC Regulation).

2.2.4 Resources

BEREC will be given a number of new tasks which aim to ensure a consistent implementation of the regulatory framework, thus contributing to the development of the electronic communications market throughout the EU, the promotion of access to and take-up of very high capacity data connectivity by all EU citizens and businesses, of competition in the provision of electronic communications networks and services and of the interests of the citizens of the EU.

The implementation period for the reformed BEREC should **start in 2019 and continue until 2022** under the next Multiannual Financial Framework (MFF). The total financial resources (BEREC and DG CNECT appropriations) necessary to fulfil the new mandate under the current MFF amount to € 14.135 million for the 2-year period 2019-2020.

In addition to the existing number of staff members, BEREC should calculate 18 additional full time equivalent (FTE) to make up a total of 44 FTE by the end of the period 2019-2020. Without prejudging the next MFF, it was estimated an overall staff figure of 60 FTE at the end of the implementation period 2019-2022.

The Digital Single Market Strategy is one of the 10 priorities which the new Commission set out in 2014. That is why, despite the current context of constraints for EU agencies' resources, the **necessary human and financial resources** are foreseen in order to make sure that the agency is

successful in its enlarged mission. These figures should be understood in the context of the considerably increased mandate of BERC and the fact that the agency will still rely to a significant extent on the expertise provided by the NRAs.