

ETNO Reflection Document commenting on BEREC Work Programme 2010



March 2010

Executive Summary

ETNO welcomes this opportunity to comment on the draft BEREC Work Programme 2010.

We, however, have serious concerns that this first ever BEREC consultation is setting a precedent for unreasonable period for public consultations in contravention of Article 17 of the Regulation establishing the Body of European Regulators for Electronic Communications (BEREC) and the Officeⁱ (the “BEREC Regulation”) which mandates a “reasonable period.”

ETNO also has serious concerns about BEREC’s reliance on “reports” to develop preliminary positions – and in particular, about the fact that for such reports it is decided on a case-by-case basis whether to organise a public consultation and/or a public hearing.

In light of economic and market developments since the consultation on the ERG Work Programme 2010 in autumn 2009, among others increasing inter-platform competition in the deployment of next-generation access networks (NGA) and the continuingly difficult NGA investment case, we do not believe that BEREC should simply adopt the 2010 IRG/ERG Work Programme as its own. We call upon BEREC to reconsider the scope of its draft Work Programme and to consider devoting effort to other areas, such as:

- **Symmetric access obligations:** a work stream on the implementation of Article 5(1) of the Access Directiveⁱⁱ and the transposition and eventual implementation of amended Article 12 of the Framework Directiveⁱⁱⁱ for the imposition of symmetric access obligations to encourage co-location and sharing of

network elements and associated facilities, assisting the deployment of NGA;

- **Impact of platform competition on market definition and remedies:** a work stream on the definition of markets, such as 'markets 4' and 'market 5,'^{iv} and the possible imposition of regulatory remedies in light of the impact of competing access platforms.

Concerns about BEREC public consultation procedures

As ETNO has expressed in previous communications, we believe that a key success factor for the BEREC will be its transparency and accountability.

In the BEREC Regulation, Article 17, "Consultation," states,

"When appropriate, BEREC shall, before adopting opinions, regulatory best practice or reports, consult interested parties and give them the opportunity to comment within a reasonable period. BEREC shall, without prejudice to Article 20, make the results of the consultation procedure publicly available." [emphasis added]

This is followed by Article 18 on "Transparency and accountability" which states:

"BEREC and the Office shall carry out their activities with a high level of transparency. BEREC and the Office shall ensure that the public and any interested parties are given objective, reliable and easily accessible information, in particular in relation to the results of their work."

Transparent and well-informed position-taking and decision-making processes, underpinned by public consultation, will help to increase the quality of BEREC's opinions and regulatory guidance and their acceptance in the market place. This openness will contribute to a consistent and proportionate implementation of the Revised Regulatory Framework for electronic communications.

Reasonable period

ETNO has serious concerns that this first ever BEREC consultation is setting a precedent for unreasonable period for public consultations in contravention of Article 17 which mandates a “reasonable period.”

In the introduction to this consultation document, it is explained that, given the details of the Work Programme has been publicly consulted upon previously and the issues raised by stakeholders have been considered by the national regulatory authorities (NRAs) which comprise BEREC,

“it is proposed on this occasion to have a short public consultation to enable an early formal adoption by BEREC of the 2010 Work Programme.” [emphasis added]

Accordingly, the consultation period runs from 9 February 2010 to 2 March 2010 -- approximately 15 working days.

While ETNO can accept a “short” public consultation in this current context, we do not believe that such a brief period represents a reasonable period for matters which have not been consulted upon previously – especially when they involve critical and/or complex issues, such as guidance on access obligations and price control measures.

We were thus dismayed to learn that the period being deemed as “short” in this current consultation has been deemed the rule in the “Rules and Procedures of the Board of Regulators”^v for BEREC, which were adopted without consultation at the Extraordinary Meeting of the BEREC Board of Regulators held on 28 January 2010.

Article 16(7) of these Rules and Procedures states:

“The time-scale for responses will in principle be a minimum of 15 working days and a maximum of 20 working days.”

ETNO finds a rule of 15-20 working days unacceptable as a “reasonable period” in accordance with the BEREC Regulation. It deviates from previous ERG practice, from that of its member NRAs and from that of the European Commission.^{vi} For example, the following is an extract from the “Consultation Guidelines – November 2007”^{vii} of the U.K. Office of Communications:

“Category 1: Consultations which contain major policy initiatives and/or of interest to a wide range of stakeholders (especially those who may need a longer time to response); we will consult for 10 weeks.”

Category 2: Consultations which, whilst containing important policy proposals, will be of interest to a limited number of stakeholders who will be aware of the issues; we will consult for 6 weeks.

Category 3: Consultations which fall within one or more of the following

- i. detailed technical issues;*
- ii. where there is a need to complete the project in a specified timetable because of market developments or other factors which require the project to be concluded within a short period;*
- iii. the issue has already been the subject of a consultation;*
- iv. a proposal will have a limited effect on a market;*
- v. a proposal is only a limited amendment to existing policy or regulation.*

The time period for consultations in this category is one month.

Under the law we must allow at least one month for consultation on many issues relating to electronic communications networks and services. We think this period will be long enough for most of these consultations, but we will extend this period in some cases if needed.

*We will usually also make allowances for holiday periods in setting our timetable, adding 2 weeks to the usual timescales for consultation issued during July and August and the Christmas/New Year period.”
[emphasis added]*

Ofcom thus allows in most instances for a public consultation period of 30 working days (or 6 calendar weeks), with a minimum 22 working days (in a calendar month) and for a maximum 55 working days (or 10 calendar weeks) for other issues.

ETNO believes calls upon the BEREC to establish similar objective consultation period guidelines and then to apply them consistently in practice.

The institution of paragraph 7 and the rest of Article 16, “Public Consultations,” in the “Rules and Procedures for the Board of Regulators” would appear to pre-empt and preclude the “Establishment of BEREC public consultation procedures” deliverable in the draft BEREC Work Programme 2010 scheduled for later in the first half of 2010.

Case-by-case decisions for public consultation

In paragraph (2) of Article 16 “Rules and Procedures of the Board of Regulators,” we also note with concern the following:

“Subject to Article 16.3 of these Rules of Procedure, the Board of Regulators shall agree on a case-by-case basis, whether to organise a public consultation, by a written procedure, and/or a public hearing, to gather either comments on a draft document and/or opinions in a preliminary phase of analysis.”

This subjective and non-transparent case-by-case approach of determining whether to consult upon an issue or not is witnessed already in the draft BEREC Work Programme 2010.

Similar to the ERG, the BEREC intends to issue several “reports,” an ill-defined category of document which comprises both descriptive reporting and preliminary assessment and substantive guidance on regulatory matters, which often posits recommendations and so-called ‘best practice’ for NRAs.

ETNO maintains that a public consultation with a reasonable period of consultation should be conducted on any report with substantive recommendations which potentially could influence the decisions by its member NRAs – and thus have potential material effect on industry stakeholders.

This, unfortunately, was not the ERG’s practice in 2008 and 2009, where on a number of occasions the ERG issued a position paper labelled a “Report,” containing substantive guidance to its member NRAs, and evaded public consultation and scrutiny.

If BEREC decides not to consult on a report, ETNO calls upon the BEREC Board of Regulators to present its justification for the decision not to consult in that case.

Again, ETNO notes that the institution of paragraph 2 and the rest of Article 16 in the BEREC “Rules and Procedures of the Board of Regulators” would appear to pre-empt and preclude the “Establishment of BEREC public consultation procedures” deliverable in the draft BEREC Work Programme 2010 scheduled for later in the first half of 2010.

Comment on proposed work streams and deliverables

ETNO has doubts as to the relevance of some of the work streams and deliverables in the draft BEREC Work Programme 2010 for BEREC's internal market mandate – namely, as per Recital 8 of the BEREC Regulation:

“BEREC should continue the work of the ERG, developing cooperation among NRAs, and between NRAs and the Commission, so as to ensure the consistent application in all Member States of the EU regulatory framework for electronic communications networks and services, and thereby contributing to the development of the internal market.”

A number of work areas, such as “Convergence” work stream, have been on the ERG agenda for several years without resulting in any – or at least any broadly accepted – policy guidance (i.e., only reports without public consultation or other consideration).

ETNO also encourages a re-evaluation of the priorities in the field of harmonisation and, more generally, of the approach of BEREC with respect to harmonisation. ETNO wonders, for example, whether the pending draft proposal, or Common Position, for the non-coordinated introduction of a ‘Bill&Keep’ (BaK) charging mechanism for termination rates is an indication of BEREC's ambitions about harmonisation. In this context, we also note^{viii} that the draft Common Position (ERG (09)34) does not address the multiple shortcomings of a mandated BaK regime and that the proposed timeline for the introduction of BaK conflicts with the implementation of the Commission Recommendation on termination rates^{ix}.

In line with the Revised Regulatory Framework^x, a flexible, targeted and proportionate regulatory framework for NGA deployment which fosters investment and competition should continue to feature high on the BEREC agenda. Therefore it is hoped that the forthcoming BEREC report on “NGN Wholesale Products” will not advocate a ‘one-size-fits’ imposition of a portfolio of access obligations at cost-oriented prices as per the “NGA ladder of investment” forwarded in the ERG “Report on Next Generation Access - Economic Analysis and Regulatory Principles,” ERG(09)17.

ETNO would like to highlight that certain elements of the proposed BEREC activity may fall out of the scope of the EU framework:

Link of spectrum policy to competition policy

ETNO welcomes the cooperation between RSPG and BEREC and considers that this cooperation is essential to achieve a consistent implementation of spectrum policy. There are undoubtedly links between spectrum policy and market structure. In fact, the inclusion of technological neutrality as an element of spectrum policy will contribute to diversify access technologies and to introduce new competitive elements in the access markets.

We would be concerned, however, if such cooperation would introduce criteria into spectrum policy which are not proper to the provisions of the revised EU regulatory framework. Competition can best be ensured by applying transparent and non-discriminatory criteria for allocation, based on the principle of efficient use of the spectrum. Restrictive criteria for spectrum allocation, for example, could be a step toward inefficiency and limit the development of new services, as well as technological diversity.

Business connectivity services

While the competition conditions for large business customers are *per se* covered by the Framework, any investigation of potential market failures should carefully establish:

- the markets under the Commission Recommendation on relevant markets in question – in many markets, wholesale products used for serving multi-site business clients are partly subject to *ex ante* regulation and partly unregulated. A complaint claiming a problem on what is named a market for communications service to multi-site business customers does not mean that such a market / a corresponding wholesale market exists and should be subject to regulation under the three criteria;
- The exact geographic scope of any problem observed and the proportionality of regulation. If problems exist in certain selected geographies, no across-the-board regulation should be recommended, which would distort competition in areas where unfettered competition exists.

ETNO maintains that the draft “ERG Report on the regulation of access products necessary to deliver business connectivity services,” ERG(09)51, does not establish either of the above. It fails to provide evidence of a lack of effective competition on business services markets across EU member states; thus its findings on market

definition and remedies are inconclusive. We thus question BEREC's continued commitment to this work stream.

Net neutrality

We note that the BEREC plans to look into the implementation of the rules of the Revised Regulatory Framework as concerns quality of service and access to Internet applications and content. We welcome the proposed scope of the assessment, which focuses on the implementation of the rules of the revised framework. ETNO believes that the implementation of these provisions should be cautious of preserving incentives for developing smart, managed networks and quality of service differentiation, which will drive innovation and consumer choice.

Proposals for additional work streams

In light of economic and market developments since the consultation on the ERG Work Programme 2010 in autumn 2009, among others increasing inter-platform competition in the deployment of NGA and the continuingly difficult NGA investment case – especially where fibre is involved, ETNO would like to propose two additional work streams and deliverables for the BEREC.

Symmetric access obligations

As ETNO has argued in its responses to previous ERG consultations and to the consultations on draft "Commission Recommendation on regulated access to Next Generation Access Networks (NGA)"^{xi} there is an important and appropriate role for symmetric regulation in the access network under the EU Regulatory Framework of electronic communications.

Article 5 (1) of the Access Directive states,

"National regulatory authorities shall, acting in pursuit of the objectives set out in Article 8 of Directive 2002/21/EC (Framework Directive), encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, and gives the maximum benefit to end-users.

In particular, without prejudice to measures that may be taken regarding undertakings with significant market power in accordance with Article 8, national regulatory authorities shall be able to impose:

(a) to the extent that is necessary to ensure end-to-end connectivity, obligations on undertakings that control access to end-users, including in justified cases the obligation to interconnect their networks where this is not already the case; [. . .]”

Amended Article 12 of the Framework Directive^{xii} “Co-location and sharing of network elements and associated facilities for providers of electronic communications networks,” now reads:

“1. Where an undertaking providing electronic communications networks has the right under national legislation to install facilities on, over or under public or private property, or may take advantage of a procedure for the expropriation or use of property, national regulatory authorities shall, taking full account of the principle of proportionality, be able to impose the sharing of such facilities or property, including buildings, entries to buildings, building wiring, masts, antennae, towers and other supporting constructions, ducts, conduits, manholes, cabinets. [. . .]”

We thus call upon the BEREC to include in its 2010 Work Programme a work stream on the implementation of Article 5(1) of the Access Directive and the transposition and eventual implementation of the amended Article 12 of the Framework Directive for the imposition of symmetric access obligations to encourage co-location and sharing of network elements and associated facilities, facilitating the deployment of NGA and ensuring choice for consumers – irrespective of whether they are connected to the high-speed broadband network of an operator with or without significant market power (SMP).

To date the draft Commission Recommendation, unfortunately, has been limited to a discussion of asymmetric remedies imposed on operators with SMP in current markets 4 and 5, with a particular focus on fibre access instead of considering all relevant access network platforms. However, deployment of NGA by industry players across various local areas (e.g., a street, a multi-dwelling unit, a district) lead to increasingly symmetric competition challenges. The sharing of certain elements of the access infrastructure may be required to facilitate deployment of NGAs regardless of an SMP-position in current market 4^{xiii}. This may, for example be the case where a utility provider, an entrant or a cable operator^{xiv} deploys fibre to the premises and the provision of a full alternative infrastructure is not viable. Such facilities would represent a true ‘bottleneck’, resulting in a need for symmetric access, particularly in the ‘terminating segment’.

The amended Article 12 of the Framework Directive enables NRAs to take appropriate measures for the sharing of facilities, such as ducts and in-house wiring, by all operators installing access networks. Accordingly, a number of obligations foreseen in the draft Commission Recommendation (e.g., that access be provided to the terminating segment of the fibre infrastructure deployed) should, if at all, apply in a symmetric manner and respecting the principle of technological neutrality.

The BEREC therefore should develop guidance which takes into account the application of Article 12 Framework Directive and defines proportionate regulation of markets 4 and 5 accordingly, especially in view of an adequate gradation of regulatory remedies on SMP operators.^{xv} The application of symmetric measures can be an important tool for addressing competition concerns, in particular in the terminating segment and its exclusion from the Recommendation's scope significantly reduces the value of the Recommendation as a comprehensive reference for NGA regulation in the internal market.

Impact of platform competition on market definition and remedies

The maintenance of existing networks and the deployment of NGA confront investors with the choice of several access technologies and network architectures as well as deployment scenarios. Investors can adopt different high-speed broadband technologies suiting different market needs, including: fixed access technologies (xDSL, fibre (point-to-point, BPON, EPON, GPON, WDM-PON), hybrid fibre coaxial (HFC) cable, cable upgraded to the DOCSIS3.0 standard, Ethernet); wireless access technologies (mobile broadband, fixed wireless access, WiMAX and Wi-Fi); and others.

For example, EU member states with high cable penetration -- Belgium, Hungary, the Netherlands and Portugal to name a few, cable operators have their migration to the DOCSIS3.0 standard well underway. These cable-based NGA are covering most urban and suburban areas and are able to deliver the very-high-speed data service. Accordingly, in many cases the 'traditional' SMP operator on markets 4 and 5 is not the first-mover in NGA and may no longer be deemed have SMP when markets are re-defined, for example, to take into account geographic segmentation.

At the same time, market definition where NGA is taken into consideration should take full account of the potential for the emergence of new services markets. As multiple-play service offerings

include TV distribution, content will play an increasingly important role in the differentiation of the various offers with a potential for creating new market boundaries.

ETNO thus calls upon the BEREC to include in its 2010 Work Programme a work stream on the impact of platform competition on the definition of relevant markets and the justified and proportionate imposition of regulatory obligations.

ⁱ Regulation (EC) No 1211/2009 of the European Parliament and Council of 25 November 2009.

ⁱⁱ Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive).

ⁱⁱⁱ Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services.

^{iv} 'Market 4': "wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location"; 'market 5': "wholesale broadband access" as per Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

^v BoR (10) 03, "Rules and Procedures of the Board of Regulators," 28 January 2009.

^{vi} European Commission, COM(202) 704final, "Communication from the Commission - Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission," 11 December 2002.

^{vii} http://www.ofcom.org.uk/consult/consult_method/ofcom_consult_guide

^{viii} For more on this and other concerns, see ETNO, "Reflection Document on Bill & Keep for IP interconnection charging" RD312, December 2009.

^{ix} Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU.

^x For example, see Recitals 42, 43, 52-55, 57 and 60 of Directive 2009/140/EC.

^{xi} Last issued 11 June 2009.

^{xii} Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).

^{xiii} For a more detailed discussion of this point, see ETNO RD 295 (2008/11), p. 10 f.

^{xiv} Any of the investors listed may have SMP on markets 4 or 5. However, under the current regulatory practice with regard to product and geographic market definition, a SMP-designation in these cases may remain a rare exception.

^{xv} See end note viii.