

Position paper

ETNO Reflection Document on BEREC 2013 WP



October 2012

Executive Summary

- BEREC plays an important role in ensuring a consistent and sound regulatory regime for the telecoms sector in Europe. As such, BEREC's annual work programme should be relevant and focused on a set of core issues.
- The electronic communications sector continues to face pressure on revenues that increasingly restrict its network investment capacity. BEREC's work in 2013 should primarily focus on creating a stable regulatory framework that incentivises private investment in high-speed broadband networks.
- Against this background, ETNO welcomes the explicit objective of the draft work programme to boost the roll-out of next generation access networks (NGA). ETNO has equally supported the initiative of BEREC's 2012 Chairman for a high-level dialogue with stakeholders on how to improve the EU investment climate. ETNO would like to see a concrete implementation of these objectives in the 2013 work programme and its specific work streams.
- BEREC and the European Commission should cooperate to ensure the stability and clarity of regulatory guidance at EU level. For example, BEREC's recent consultations on Draft Common Positions on Best Practices for Markets 4, 5 and 6 lacked relevance and clarity due to a lack of alignment with ongoing Commission work.

I. General remarks

ETNO's 40 telecoms members are making long-term investments in the broadband networks of the future in order to help boost competitiveness, foster development of the Internal Market and benefit EU consumers and businesses. Europe's electronic communications industry is a key enabler of smart and sustainable growth and it is important to ensure that the appropriate regulatory environment is in place in order to ensure continued investment during difficult economic times.

BEREC is playing an important role in helping to ensure that Europe has a sound regulatory framework in place that both protects consumers and allows businesses to innovate and grow. The annual BEREC work programme and BEREC's management of it directly contribute to BEREC's success as an EU regulatory body and as such, deserves attention. ETNO welcomes the opportunity to respond to the draft work programme under consultation and to provide its input.

It is noted that BEREC intends to review its work programme mid-way through 2013. ETNO welcomes the proposed mid-year review point, as a means to ensure continued relevance and sufficient flexibility so that the work priorities remain in line both with the market and indeed the work plan of the European Commission.

BEREC and the European Commission should closely cooperate to ensure the stability and clarity of regulatory guidance at EU level. This is a pertinent issue in fields such as net neutrality and ex-ante remedies for next generation networks. With its recent consultation on Draft Common Positions on Best Practices for Markets 4, 5 and 6, BEREC has created uncertainty over future regulation because of a lack of alignment with the Commission.

ETNO supports the four themes mentioned in the draft BEREC work programme and considers them to be appropriate horizontal layers for the work items then listed. We note that the proposed work programme is already quite dense, notwithstanding the high number of Article 7/7a Phase II cases that BEREC anticipates, and so efforts should be made to prioritize the issues, streamlining where necessary. Given the ambitious workload that BEREC has identified, prioritisation is key and focus should be placed on those items that will help advance progress on achievement of the Digital Agenda.

ETNO would now like to comment upon selected items of the draft 2013 Work Programme.

II. Specific remarks on BEREC's Work Program in 2013

4. Boosting roll-out of next generation access networks

ETNO welcomes the commitment of BEREC to the Digital Agenda goals and the improvement of incentives for NGA roll-out. All BEREC activity contributing to these EU policy goals should have high priority in the next year.

4.1 Regarding the first work item proposed, the **monitoring of the application of the BEREC Common Positions on Markets 4, 5 and 6**, ETNO is concerned that the implementation of the remedies in the form in which they were put to public consultation effectively risks undermining, instead of boosting, NGA roll-out. The draft Common Positions (CPs) do not fully take into account the important readjustment in EU regulatory policy presented by Commissioner Kroes in her announcement on July 12, 2012 (s. ETNO consultation response, RD , Oct. 18 2012). They contain a number of best practice recommendations that would lead to the disproportionate imposition of obligations in national markets and that should be rephrased in a more proportionate manner. We urge BEREC to finalise the CPs after the adoption of Commission guidance on remedies to allow for full consistency of EU level guidance.

4.2 Regarding costing principles in the emerging NGA environment, ETNO welcomes BEREC's work on costing methodologies and encourages BEREC to work towards ensuring full cost recovery of access networks where cost-orientation is applied. For current generation broadband networks, it has been demonstrated that an approach based on replacement costs, as applied by a number of European NRAs, is suited to set the right incentives for investment in both fibre upgrades and other NGA platforms such as cable and LTE, therefore supporting sustainable competition and investment.¹

As regards the "*cost control of wholesale products in an NGN/NGA environment*" mentioned in the draft work program, ETNO considers this to become much less relevant in the future. In her statement on July 12, Commissioner Kroes has made it clear that price flexibility should apply in an NGA environment in almost all circumstances under the conditions laid out on several occasions by the Commission.² BEREC should therefore focus its work on ensuring price stability for current generation networks, thus supporting efficient investment in and migration to NGA platforms.

4.3 a) IP Interconnection

On this item we would like to refer to our detailed comments on the BEREC draft report on IP interconnection in the context of net neutrality where ETNO raised certain concerns with the underlying economic analysis.³

The Digital Agenda goals of providing EU citizens with widely available high-speed broadband demand a significant effort in private infrastructure investment. This objective is being challenged by the decline in the revenues of the telco sector over the last years. This decline has to be seen in the context of a lack of a regulatory level playing field with 'over the top' Internet players and between different world regions in important policy areas. ETNO believes that applying the same rules to operators that invest in infrastructure and players that do not will facilitate a new equilibrium for sharing the economic benefits derived from traffic carried over broadband

¹ Reference Plum and CRA

² presence of a pricing constraint from parallel infrastructures or a regulated anchor product such as ULL, and fully non-discriminatory access for competitors

³ Reference

networks. In this context, note is taken of the fact that BEREC intends to consider the consequences of any decisions taken at the World Conference on International Telecommunications [WCIT] in the context of IP interconnection and the distribution of revenues across the value chain between Telcos and OTT players. While IP interconnection is of course a relevant topic for our sector, ETNO would be interested to hear how BEREC sees its role insofar as addressing so-called “level playing field” issues more generally.

4.3 b) Effective regulation in an NGA environment

ETNO shares BEREC’s observation on an increasing variety of local market conditions across MSs in NGA roll-out with regard to an increased number and type of actors as well as technologies used. We share the analysis that in order to address possible local or even regional (e.g. cable) “monopolies” in very high-speed broadband, more geographically differentiated markets/ remedies in SMP regulation and increased application of symmetric regulation should be applied.

ETNO has encouraged BEREC in previous work programme consultations to take up this pertinent issue. We note that it will now be on the agenda and we encourage BEREC to consider formal deliverables on this point in cooperation with the European Commission.

4.4 Geographic Markets Segmentation

ETNO supports in principle a more in-depths analysis by BEREC on the geographic segmentation of markets and remedies. Indeed, as stated in the draft, “*geographic segmentation becomes more important as markets and infrastructures develop in an increasingly fragmented fashion.*”

ETNO notes that BEREC and several of its Member NRAs in the past have taken a clearer and more appropriate view on the importance of indirect constraints in market definition and remedy differentiation than the European Commission traditionally has in its Art. 7 decision-making process. ETNO encourages BEREC to further develop its views in order to achieve a more proportionate regulatory practice that does not lead to unjustified regulatory obligations that limit the ability of established operators to enter into competition with other platforms in highly competitive areas.

5.1 Consumer Empowerment and Protection: Net Neutrality

As pointed out in the draft work programme, BEREC has already addressed a number of issues relating to net neutrality, further to the publication of BEREC’s Transparency Guidelines and the QoS Framework Report in December 2011. ETNO has welcomed the opportunity to share views and information relating to the net neutrality debate with BEREC over the course of 2012, despite the fact that some information requests were felt to come at an early stage in the process of transposition and implementation and as such, the information that ETNO members could provide was limited.

We note with surprise that BEREC intends to undergo a second round of traffic management investigations, as this was not previously foreseen. The reason for this

repeat exercise is unclear – while BEREC states that it “*sees substantial value in repeating it*”, further clarification on the objective and the value of such a repeat exercise would be welcomed, particularly if no acute problems were identified in the first round and given that this exercise implied considerable resource constraints for BEREC.

In ETNO’s view, the heavy focus of BEREC on net neutrality issues in its 2013 work programme is unwarranted and risk inconsistent guidance emerging at EU level. The actions come in parallel with the European Commission’s intended Recommendation on certain aspects of net neutrality under the EU framework. Further, sufficient time must be allowed for national implementation of the legislation that was put in place in 2009 and the subsequent guidance by BEREC.

In times of economic crisis, the telecoms sector is looking for ways to innovate and develop new business models. A heavy handed regulatory approach will only serve to hamper innovation and does not fit with the broader vision views that have been expressed by the current BEREC Chairman, Georg Serentschy, on Regulation 2.0. What is important is legal certainty and regulatory predictability and everything should be done in order to avoid putting network investments at risk.

We would like to take this opportunity to reiterate that ETNO defends the principles of an open Internet and supports the right of citizens to have access to any content and applications of their choice. Our members are committed to providing a high degree of transparency to customers and facilitating consumer empowerment. However, we also see the need to be able to differentiate services on the basis of value and quality and so we urge regulators and policy makers to allow time to implement the rules already in place, leaving space for product and service innovation.

7.4 BEREC Strategic Dialogue

The draft WP notes that “*BEREC will continue the strategic dialogue with the Chief Executive Officers of European operators, which it started during 2012 in order to remain close to the market [...]*”.

ETNO has welcomed the initiative by BEREC’s 2012 Chairman G. Serentschy for a high-level dialogue with stakeholders on how to improve the EU investment and innovation climate. ETNO shares a number of the observations made by the 2012 Chair⁴ and invites the Chair for 2013, L. Kanellos, to continue and broaden the dialogue with industry.

ETNO would like to see, however, a stronger link between the high-level discussions with our company CEOs on the sector’s challenges and the daily work of BEREC’s Working Groups.

⁴ Cf. <http://www.key4biz.eu/etnodigital/newsletter/video/georg-serentschy.html>

Recent BEREC WG output, such as the consultation on a revision of a Common Position on best practices for remedies in markets 4, 5 and 6, appears detached from the need recognised in the past meetings of the dialogue to adjust regulatory practice in order to promote next generation access networks. If this [detachment] persisted, this unique dialogue between senior management and BEREC would be a missed opportunity. We invite the BEREC Chairmen and the BEREC Board of Regulators to give appropriate policy guidance to the Working Groups.