Body of European Regulators for Electronic Communications

BEREC

BoR (16) 213

BEREC high-level Opinion

on the European Commission's proposals for a review of the electronic communications framework

1. Introduction - Objectives and principles

BEREC welcomes the Commission's proposals for a comprehensive "digital package", as part of its wider Digital Single Market Strategy, aimed at achieving the Commission's connectivity goals as set out in its Communication "Towards a European Gigabit Society". It also supports the Commission's approach of consolidating the existing four Directives into a single European Directive (the European Communications Code), which should help ensure overall coherence, facilitate the forthcoming legislative debate at EU level, and make national transposition and implementation more straightforward.

The core regulatory objectives of the current Framework are the promotion of competition, the internal market, and the interests of end-users; these have served the sector well and BEREC is glad to see that they have been confirmed in the proposal. **BEREC also welcomes the Commission's proposal to raise the profile of the specific objective of promoting connectivity**, which has been present but less explicit in the current Framework. At the same time, **BEREC supports the Commission's aim not to prioritise one regulatory objective over another**, preserving the balance among them. Indeed, we note that over the last 15 years in Europe, competition has been the key driver for investment in communications networks, enabling demand-driven development of networks and services. Such balance recognized in Chapter II – Objectives - should be reflected throughout the Code. BEREC also appreciates that the draft Code carries forward the objective of the current framework for proportionate and progressively leaner regulation.

At the same time, we note some contradictions in the Commission's proposals. Whereas the Commission acknowledges the importance of subsidiarity and of allowing NRAs to choose the appropriate tools to address the specific circumstances of their national market, in practice several proposed provisions seem to constrain NRAs' flexibility, undermining their ability to do so. So, for example, while the Commission recognises the intrinsically local nature of networks and proposes provisions to facilitate the definition of sub-national geographic markets, in other places it ties the hands of NRAs, limiting the regulatory tools at their disposal. Similarly, it is contradictory that the Commission explicitly acknowledges that competition spurs investment, where the draft Code concurrently introduces some operative provisions which in practice restrict NRAs' ability to promote such competition, in the name of incentivising investment (but ultimately creating a risk that connectivity is pursued to the detriment of competition).

A central feature of the proposal is the **broadening of the scope** of the framework. BEREC welcomes the Commission's measured approach to extending the reach of sectoral rules and believes that, with a view to an effective monitoring of the electronic communications markets, NRAs should be able to thoroughly look into digital dynamics, even beyond the newly-defined scope of

electronic communication services. BEREC has also identified some areas where the proposed terminology, including certain defined terms, would benefit from clarification and simplification.

In relation to **end-user protection**, BEREC appreciates the Commission's approach aimed at streamlining the current sectoral norms and updating obsolete measures. Nevertheless, BEREC has concerns in principle over the concept of "full harmonisation ì" as proposed by the Commission. The current approach allows Member States and NRAs to flexibly adapt the applicable EU electronic communications framework to the specific national needs and technological evolution, defining solutions targeted to the specific commercial practices identified in national markets and setting reference benchmarks that help progressively improve sectoral end-user protection in the Union; this would not be the case under a fully harmonised framework.

With reference to the **provisions relating to access regulation**, BEREC welcomes the move from 3-year to 5-year market review cycles and the formal recognition of both the three criteria test and the Greenfield approach that, together, should bring greater regulatory certainty and stability. In relation to defining access remedies, BEREC also welcomes the introduction of the ability for NRAs to impose the obligation for SMP operators to provide access to civil engineering infrastructure as a standalone remedy. However, BEREC would like to point to the complex set of conditions for NRAs to meet in order to be able to apply ex-ante regulation, which in effect reduces the NRAs' capacity to impose appropriate remedies (both SMP and symmetric ones) based on specific market circumstances, risking not meeting the high-quality connectivity goals. Moreover, the consideration to be given within market analyses to the investment plans and to commercial agreements, as currently drafted, would likely undermine the NRAs' capacity to address any competitive problems, especially in an NGA context. BEREC notes that the draft Code is silent on the treatment of non-competitive oligopolies, which are likely to represent a standard feature of EU electronic communications markets in the future; this might put at risk the competitive functioning of such markets and ultimately investment in new, high capacity networks.

Turning to the **proposed new rules on spectrum management**, BEREC limits its comments to those provisions in the draft Code, which impact on BEREC's roles and functions. The current framework has provided a consistent approach to spectrum management throughout Europe, including through binding technical harmonisation decisions taken by the Commission and authorisation-related decisions issued by the Council and the Parliament, as well as through the development of best practices by spectrum authorities acting collectively through the RSPG. For this reason, in its 2015 Opinion, BEREC expressed the need for spectrum management not to be stiffened through inappropriate and potentially counterproductive centralisation solutions. Of course EU coordination and harmonization of spectrum use are important when they lead to greater socio-economic efficiency in spectrum use, when they are driven by clear demand and when they would contribute to necessary economies of scale. However, BEREC remains of the view that no evidence has been adduced in the draft proposals to warrant more detailed EU legislation or further regulatory centralisation (incl. e.g. extended power for the Commission to adopt implementing acts) would improve the effectiveness of spectrum management in the EU. As regards the proposed "peer review" system in particular, BEREC believes that such procedure, which would leave the final say to competent authorities, could work properly to support Member States in consistent spectrum assignment decisions. However, in order to ensure that the process does not contribute to any unnecessary delay in the award of spectrum, any review process should be strictly on a voluntary basis, be limited to assignments with higher impact on the market or on EU policy, and should focus on the implementation of principles foreseen in the framework. Moreover, the proposal should

specifically address the fact that consistent implementation of spectrum objectives would require coordination with third countries.

Around the proposals on **Universal Service**, BEREC welcomes the Commission's proposals on the US scope as it believes that Member States should retain flexibility in this regard. BEREC also understands the grounds for the Commission's proposal regarding the funding mechanism to be based on public resources, as in the digital environment digital services take on a key role which explains the room for a public intervention. However, flexibility should be retained for Member States in using the currently available funding alternatives. BEREC welcomes the Commission's proposed approach to the "availability" obligations, whereby US remains a safety net, ensuring that a functional internet access is available to everyone. However, given the focus o on the affordability of the services provided within the scope of the US, BEREC would like to raise some concerns about the potential market distortions and increased bureaucracy that might arise from expanding the affordability measures to include mobile services as well as to the practicalities of monitoring the situation of end users with respect to affordability.

Finally, regarding the **institutional layout for the regulation of the sector**, BEREC welcomes the Commission's proposal to harmonise a minimum set of competences for independent NRAs, which we have long argued should enhance regulatory harmonisation across the areas covered by the framework. This, together with the strengthening of provisions around the independence of NRAs, should make it easier for NRAs to participate fully in the work of BEREC. However, these gains risk being undermined by the Commission's proposals for BEREC's own institutional set-up, in particular in relation to its independence (from the Commission, as well as the other EU institutions) and its rootedness in its constituent members, the NRAs. These are the attributes of BEREC that guarantee the quality and value-added of its expert advice, and which are under threat in the Commission's proposal to convert it into an EU decentralised Agency. At the same time, the Commission has declined to make a series of improvements to the governance of BEREC and the BEREC Office, which would have reduced the bureaucratic and administrative burden of the current regulatory ecosystem: any proposals to develop BEREC should build upon its successes, rather than seeking to rebuild it on different foundations.

BEREC remains willing to take on any new duties that would effectively contribute to the further promotion of the internal market. However, we are concerned that many of the tasks which the Commission proposes to attribute to BEREC lack proper justification, and risk increasing the cost and bureaucracy of European regulation. For example, the proposal that undertakings providing electronic communications services and networks should notify BEREC (or the BEREC Office) of the beginning of their activity, rather than the NRA in their country of operation, would create an unnecessary and complex new bureaucracy for all parties involved, instead of materially reducing the regulatory burden for operators.

At the same time, the Commission has missed the opportunity to formalise BEREC's advisory role in relation to draft legislation, a role it played over the last year in relation to the draft Code and that it had suggested in its 2015 Opinion. Such a formal advisory role – also an element of the EP's proposal within the TSM legislative process – would help ensure that legislative proposals in the field of electronic communications are as robust and well informed as possible so that the legislative negotiations can be focused and progress quickly.

BEREC reiterates its concerns, expressed in relation to previous legislative proposals, that the introduction of a Commission's power to veto NRAs' proposed remedies, even if conditional upon a prior BEREC opinion, would constitute an unwarranted shift of powers towards the European

Executive in relation to defining the detailed regulation for national markets, in clear conflict with the subsidiarity principle.

Finally, BEREC recalls the importance of ensuring a coordinated regulatory approach throughout Europe, hence the need to ensure that NRAs from the EEA-EFTA countries are able to fully contribute to the pursuit of the internal market and that even NRAs from European countries outside the EEA/EFTA should be in a position to assist and contribute to BEREC work, in continuity with the current regulatory cooperation practice.

In the following pages, BEREC focuses on some of the key aspects of the Commission's legislative proposals that fall within its areas of competence, namely the scope of the framework/end user issues, access regulation, and the institutional layout. BEREC looks forward to a constructive exchange with the EU institutions throughout the legislative process, and remains available to provide any further advice on these and other themes covered by the proposals.

To this end, BEREC will continue its analysis of the legislative texts, with a view to a detailed assessment on all areas addressed by the proposal.

2. Scope, definitions and end user provisions

BEREC broadly welcomes the Commission's set of new definitions and the way they are used to define the scope of specific provisions. The new definitions seek to address two different problems with the current ECS definition (which was elaborated at a different moment in the technological evolution of the sector, when internet-based services were at a very early stage of development).

First, the new definitions address some of the ambiguities in the current **definition of ECS**, e.g. making clear that email is a number-independent interpersonal communications service. The new definitions also clarify the situation of OTT communication services, by making explicit that services that connect to the public switched telephone network (PSTN) fall within the scope of ECS as a number-based interpersonal communications service and, conversely, that interpersonal communications services that do not connect to the PSTN fall within the category of number-independent services.

Second, the definitions address the fact that an **end user** might be indifferent as to whether their provider conveys the signals itself or the communication is delivered via an internet access service.[1] This is achieved by the use of definitions that reflect the function and other relevant characteristics of the service rather than the technical means by which it is provided. Such functional definitions also determine a better level playing field between new voice services and traditional voice telephony services. BEREC notes that the clarification of the scope of the applicable regulation represents an incremental evolution of the current Framework. For example, the definition of number-based interpersonal communications service is consistent with the 2007 ERG common position on VoIP services. Relatively few rules (e.g. concerning privacy, security and potentially in future, interoperability) are extended to a broader range of services, i.e. number-independent communication services.

Against the backdrop of this positive assessment, BEREC considers that some work would be nonetheless needed to ensure there are no unintended consequences or remaining ambiguities as a result of the introduction of new definitions which are intended to capture existing services as well

[1] As also noted in Recital 16 of the proposed Directive.

as to be future-proof. An example is the proposed exclusion from the definition of interpersonal communications services of those services which enable interpersonal and interactive merely as a "minor ancillary feature" (that is, intrinsically linked to another – understood as principal – service). Some additional guidance could be provided as to how NRAs should assess the extent to which such services constitute a "minor ancillary feature" of the principal service. Further explanation could also be provided on why social networks are not a number-independent interpersonal communication service (as stated in Recital 18), since one could claim they satisfy the criteria of direct interpersonal and interactive (i.e. allowing the recipient to respond) exchange of information between a finite number of persons and that this is not a minor ancillary feature.

As regards the **end user obligations** which apply, to different degrees, to the newly defined ECS providers, BEREC appreciates the Commission's desire to streamline the current sectoral rules and update obsolete measures. Given the increasing consumption of communications services in triple or quad-play bundles, BEREC welcomes the extension of rules on transparency, contract duration, termination and change of provider to all the elements of bundles that include at least one ECS, and also looks favourably upon the proposed switch from an opt-in to an opt-out mechanism in relation to the application of contract information requirements to micro and small enterprises.

At the same time, BEREC notes that several end-user provisions are proposed to be "fully harmonised". As we already explained in our 2015 Opinion, it is important to ensure that Member States and their NRAs are able, as they are under the current Framework, to respond to technological change and changing consumer needs and priorities, defining regulatory solutions targeted to the specific commercial practices identified in their national markets – including on contract information, transparency obligations, comparison tools and switching provider's provisions - and setting reference benchmarks that help progressively improve sectoral end-user protection in the Union. BEREC will therefore closely examine the effect in practice of the Commission's proposals, so as to ensure that they do not entail any reduction in the protection currently afforded to end users, and that Member States and their NRAs are not unduly constrained in future.

Finally, BEREC notes that Article 20 of the draft Code provides **NRAs with powers to collect information** from ECN/S providers. Although the proposed definition of ECS is broader than the current one, NRAs should have legal powers to request information to carry out their duties from any undertaking, whether or not it is defined as ECN/S provider (for instance, online communication services beyond interpersonal communication services). Given current market and regulatory developments, this information is likely to be particularly relevant for market analyses. As BEREC stated in its OTT Report (BoR (16) 35), one solution would be to extend the scope of NRAs' power to request information to "all information from all relevant parties necessary for fulfilling the tasks of NRAs", thus removing the limitation to ECS providers.

3 Access

At the level of principle, BEREC welcomes the Commission's explicit acknowledgment that competition spurs investment, and that ultimately communications networks are local, resulting in NRAs being the best placed entities to address the regulatory challenges in their respective national markets, while applying harmonised regulatory principles. However, BEREC has some concerns about the operation of some of the proposed provisions, which risk undermining competition (in the name of promoting investment) and unduly constrain NRAs' ability to respond to the needs of their national markets.

In this context, it is worth noting that investment is a function of operators' business case, a key component of which is demand. While the Commission is attributing a new regulatory objective to NRAs to promote the take-up of very high-capacity networks, sector specific regulation can, on its own, neither incentivise investors nor end-users.

3.1 Competition vs Investment

The Commission has explicitly acknowledged, in the Explanatory Memorandum to the draft Code, that effective and sustainable competition drives efficient investment.

Indeed, recent sector reports show record levels of investment in those countries with the highest levels of competition, resulting in higher levels of innovation, greater choice and better quality of products for consumers, in turn enabling the demand-driven development of networks and services in a virtuous cycle**.**

However, a number of the Commission's proposals appear to start from the premise that **investment will be incentivised through the relaxation of regulation** and consequent dulling of competitive dynamics, in conflict with both the Commission's stated beliefs and the evidence of the last 15 years.

By way of example, the proposals seek to incentivise investment by restricting the circumstances when NRAs can impose price controls on access to newly built high-capacity networks.[2] While this could be effective where the retail market is effectively competitive, there may be circumstances where a cost-orientation remedy might be more appropriate (especially in cases where even a "demonstrable retail price constraint" is deemed to be a poor indicator of upstream pricing constraints and hence consumer surplus).

Considering this alongside the Commission's proposals for the relaxation of regulation of **"wholesale only" operators**, one could easily imagine a situation where (in the absence of competition at the wholesale level) the wholesale inputs are charged significantly above cost, resulting in unjustifiably higher retail prices across the board. If NRAs are to be prevented from imposing price control, transparency and non-discrimination[3] obligations on the SMP wholesale-only network operator on the one hand, and symmetric obligations on operators in areas with lower population density on the other hand, this would ultimately be to the consumer's detriment, undermining the demand-driven virtuous cycle of competition and investment described above.

The Commission has identified **co-investment schemes** as a potentially useful way for operators to share the costs and risk of the large-scale investments required for very high-capacity networks. BEREC agrees that co-investment presents a number of interesting features and could play an important role in the pursuit of high-speed connectivity, and notes that different forms of co-investment have been successfully used in three EU Member States (France, Spain and Portugal) as well as in Switzerland.

However, co-investment schemes are diverse, and some of them have the potential to create ineffectively competitive market outcomes. While BEREC acknowledges that the Commission's proposal includes criteria in Annex IV as well as conditions against which co-investment offers should

[2]Art. 72 – Price control and accounting obligations
Art. 74 – Regulatory treatment of new network elements
[3] Indeed the Commission itself acknowleges the potential for discriminatory behaviour in recital [192]

be judged (compliance with which would entitle the co-investment to effectively benefit from a regulatory holiday), these do not provide sufficient competition protections to warrant a relaxation of SMP regulation. It is also worth bearing in mind that co-investments by their nature can lead to coordinated behaviour, which in turn could produce uncompetitive outcomes[4].

As a consequence, the conditions for regulatory forbearance identified by the Commission should be supplemented with additional considerations drawn from the treatment of co-investment in the NGA Recommendation, the French experience on co-investment - embedded in a framework of symmetric regulation - the relative power/control of the investors in the co-invested network, compliance with competition law and the need for fair and reasonable access, both in technical and financial terms.

In addition, a distinction should be drawn between a co-investment "offer", and an offer that is taken up. The mere existence of an offer, even one compliant with the conditions set out in the draft Code, should not be a sufficient basis upon which to require regulatory forbearance – if it were, then the absence of take-up could result in a de facto unregulated monopoly.

Once again, the risk is that in seeking to incentivise investment through regulatory forbearance, the Commission's proposals could undermine competition, which in turn would impact on the virtuous cycle of competition- and demand-driven investment. The Commission's proposals would therefore undermine their own ultimate goal of increasing high-speed connectivity.

Two is not enough

While there is a well-recognised risk that oligopolies might generate non-competitive outcomes, it is surprising that the Commission has chosen not to clarify NRAs' powers in relation to **non-collusive non-competitive oligopolies**.

Oligopolistic market structures can occur as a result of consolidation. However, in a number of Member States, markets which were previously characterised by single dominance (which could be adequately remedied by access obligations within the SMP framework) are evolving into duopolistic or oligopolistic structures, in some cases because of the introduction or expansion of infrastructure competition where previously there was a monopoly.

While NRAs might no longer find single or joint dominance, such market structures can also give rise to competition problems as a result of unilateral effects. In these circumstances, the deregulation of access markets could drive existing and potential challengers to exit the market, with long-term negative consequences for investors' willingness to enter or re-enter. Ultimately, the resulting reduction in competition could lead to higher prices and less innovation and choice for end-users.

For this reason, BEREC argued, in its December 2015 opinion, that the revision of the Framework should include confirmation of NRAs' ability to intervene, proportionately and where competition

[4] See BoR (12) 41. In its "Report on Co-investment and SMP in NGA networks" BEREC identified a number of factors identified for a competitive outcome of a co-investment among them 1) the number of co-investors whereby a low number could support collusive behaviour, 2) parallel vs complementary roll-out, 3) whether the SMP operator is involved, 4) whether the co-investment is the outcome of a symmetric regulation, 5) whether access restrictions are included in the contract, 5) resale of IRU helps to ensure inventives to compete on wholesale access market, IRU for more than 20yrs. may allow for a high degree of independence unless otherwise restricted contractually whereas access at higher levels only may lead to a concern with regard to competition.

problems derived from unilateral effects are likely to occur, while at the same time being able to deregulate under the right circumstances.

BEREC looks forward to collaborating with the Commission on the imminent update of the SMP Guidelines, but notes that consequential amendments would also be needed to the Framework in order to put beyond doubt NRAs' ability to regulate non-competitive oligopolies. The revision of the Framework provides a timely opportunity to develop the ex-ante regulatory framework to address competition issues raised by unilateral effects[5]. The Commission could, for instance, take as a starting point its own analysis developed in merger cases, e.g. the SIEC test (significant impediment of effective competition).

3.2 Unjustified constraints in the use of the toolbox

BEREC welcomes the continued primacy of SMP regulation to address and remedy market failures. Over the past two decades, this core feature of the Framework has enabled NRAs to **promote effective and sustainable competition** in their national markets and thereby to foster investment, through the application of common EU competition and economic principles, and the use of a regulatory toolbox in the manner most appropriate to national circumstances.

Yet, while the Commission explicitly acknowledges the importance of enabling Member States and NRAs to continue to tailor regulation to their particular national and local circumstances, in practice its proposals significantly tie their hands and potentially prevent them from doing so.

The fact remains, that the deployment of networks is significantly influenced by the national and in some cases even local contexts. By way of illustration, there is a considerable variation in the status of NGA rollout across the different Member States, as well as in the coverage of different access technologies. These variations can, to a large extent, be explained by factors which are exogenous to the actions of NRAs, and indeed to regulation.[6]

As a consequence, NRAs have so far sought to impose, where necessary, the **remedies best suited to their national market contexts**, in the pursuit of the objectives set by the Framework. In that regard, while passive remedies (in particular duct access) work well in some markets, other remedies (in particular active wholesale access products) are needed in other markets (e.g. where ducts are not available).

But despite a positive narrative, many of the provisions proposed around access regulation undermine the flexibility ensured by the current Framework, significantly constraining NRAs' ability to choose the appropriate means of regulating their national markets. As explained above, the apparent expansion of the regulatory toolkit (through the inclusion of provisions on co-investment,

[5] If removing access regulation, this bears the risk of a structural change in the market (e.g. exit by challengers), it constitutes a delta on which a SIEC-test could be applied. In such situations, it seems logical to analyze whether the anticipated deregulation is expected to lead to a significant impediment to effective competition. BEREC acknowledges that a direct transposition of the SIEC test is not possible due to the differences between the process followed in mergers and acquisitions analysis and the market analysis applied in the ex-ante regulatory framework. However, with regard to the tight oligopoly scenario there are close similarities with the application of the SIEC test, since in both cases it is necessary to compare actual market structure and outcomes on the one hand, to an anticipated market structure and the corresponding hypothetical outcomes, on the other hand.

[6] BEREC report on the challenges and drivers of NGA rollout and infrastructure competition - BoR (16)171.

for instance) might actually lead to a restriction on the NRAs' ability to make the most appropriate regulatory choices for their markets.

Another example of the reduced NRAs' flexibility relates to the **provisions on symmetric regulation**. In its December 2015 opinion, BEREC stressed the growing importance of symmetric regulation and called for a reassessment of its relationship with asymmetric regulation. BEREC therefore welcomes the greater prominence which the Commission has given to symmetric regulation in the draft Code. However, BEREC has reservations about a number of aspects of the new provisions, which do not represent an expansion of the NRAs' regulatory toolkits, as claimed, but an unjustified restriction of NRAs' ability to apply symmetric regulation, and which risk creating opportunities for regulatory gaming by operators. .

Under the Commission's proposal[7], NRAs would be required to impose symmetric access obligations (access to the wiring or cable up to the first concentration point) when a reasonable request has been made to them (and provided that the conditions set out in Article 59(2) are met).

This tightly circumscribed obligation to regulate represents a significant shift from the current Framework, which empowers NRAs to intervene, reducing rather than expanding the regulatory toolkit, in contrast to the Commission's narrative. Given the variety of investment scenarios across Europe, such a limited and prescriptive approach is not justified, and it is important that NRAs retain the ability to decide whether and when, in the general context of the market structure and dynamics, it would be appropriate and justified to impose such obligations, rather than being compelled to intervene in response to a specific request, and being limited to intervening only when requested to do so.

Furthermore, if the Commission's objective is to facilitate access for the deployment of competing infrastructures, then it is also important that the symmetric access obligations are not limited to the provision of access to wiring and cables and civil infrastructures. In this regard, it is essential to clarify that NRAs have the ability to impose access to associated facilities and services (e.g. colocation at the access point or access to information related to network elements) and ensure that the access to network elements is effective. The range of admissible remedies under the draft Code remains unclear, in particular whether it includes unbundling of access network concerning dark fibre. In some cases, particularly in areas with lower population densities, it could also be necessary for an NRA to impose virtual access to these network elements.

Another example of the Commission's preference for top-down harmonisation is the proposal to reserve for itself powers to adopt binding harmonised technical specifications for wholesale access products capable of meeting transnational demand. There is no apparent appreciation of the need to take into account existing wholesale access products available in individual national markets, and the potential for a mandatory harmonised product to distort the effects of the pre-existing regulation. Nor does there appear to be any consideration of the differences in the technical capabilities of networks both across and within national markets, which could lead to both the under- or over-specification of such harmonised access products.

3.3 The importance of legal/regulatory certainty: migration, the 3-criteria test and mapping of current and planned infrastructure

[7] Article 59(2)

BEREC welcomes the proposed provisions clarifying and providing guidance on the management of the **migration from legacy infrastructure**. We note that network operators have already announced their intention to decommission legacy infrastructure[8], and the added clarity on the process in the draft Code should help enable a smooth transition to the new infrastructure. BEREC notes that, with regard to the obligation on undertakings to inform of their migration plans, it would be useful to envisage a concrete deadline in order to prevent litigation.

BEREC also welcomes the extension of **market review cycles** from 3 to 5 years, which should increase regulatory stability, reduce the regulatory burden on both operators and regulators, and enable longer investment horizons. We also welcome the explicit incorporation into the draft Code of the 3-criteria test (used to determine whether a relevant market is susceptible to ex ante regulation), and of the Greenfield approach (which presupposes the absence of regulation in the retail market in question, in assessing the case for imposing regulatory obligations on the relevant market), both of which should increase legal certainty.

However, the way in which the 3-criteria test is described in the draft Code differs from the version of the test that has been applied, successfully, by NRAs over the last 15 years and which is set out in Recommendation 2014/710/EU. In particular, in order to determine whether a market can be considered for regulation, the new test requires NRAs to take account of market developments which "*may increase the likelihood*" of a relevant market tending towards effective competition, ultimately making it difficult for NRAs to find that a market can be assessed for SMP.

Furthermore, the Commission is proposing to require NRAs to map current and planned broadband networks in their respective national markets. The stated objective of such a **national mapping exercise** is to help NRAs to appreciate subnational differences, including identification of areas which have no existing or planned network coverage. On the one hand, the more information, the better – indeed, many NRAs already collate network coverage information, which informs their regulatory decision-making. These geographical surveys could be relevant in designing national broadband plans, defining coverage obligations attached to rights of use for radio spectrum, verifying the availability of services falling within the universal service scope and applying State Aid rules. Indeed, a common approach to broadband network mapping could contribute to greater coherence between these different, and sometimes competing, public policies.

However, the Commission's proposals go well beyond simply mandating the collation of information and thereby ensuring that NRAs have a repository of data on which to draw. The proposals go on to require NRAs to take account of the surveys in the performance of a number of their duties, including the definition of markets for the purposes of SMP regulation. While this might well be reasonable in relation to current network coverage (and NRAs already do this as a matter of course), it is important to bear in mind that coverage forecasts[9], particularly when not based on concluded contractual agreements, are less reliable sources of information. There will always be a risk that deployment plans will be announced tactically, to condition, avoid or delay regulation, or to hasten public intervention through State Aid measures. The requirement that NRAs take account of 3-year investment plans in defining economic markets for the purposes of SMP regulation could in fact exacerbate this risk.

And while NRAs are given powers to sanction operators for deliberately providing misleading, erroneous or incomplete information, proving such tactical intent is very difficult, given the many

[8] See e.g. BoR (15) 196, p. 16 et seq.

[9] In this context it is not clear how to reconcile the planned exchange of information on planned investments between NRAs and between operators with confidentiality rules.

legitimate reasons why announced investment plans might be subject to change, including changes in corporate strategy, developments in financial markets, or technological advances.

BEREC would therefore strongly recommend clarifying that NRAs are not legally obliged to take into account 3-year investment plans in the performance of their regulatory duties where they consider that this information is not relevant or is insufficiently reliable.

4. Governance

4.1 NRA independence and harmonisation of minimum competences

The Framework has, from its inception, mandated the independence of national regulatory authorities. The revisions to the Framework adopted in 2009 strengthened the requirement that NRAs be independent (from both market players and any other source of external intervention or political pressure) and applied it to their roles in respect of their core missions: ex-ante market regulation and dispute resolution between undertakings. These requirements helped ensure impartial and predictable regulation, and the consistent application of the Framework across Member States. But NRAs' tasks under the Framework extend beyond market regulation and dispute resolution, and the EP has already argued that the fragmentation of functions, and the related incomplete regulatory independence, risk impacting on the effectiveness of both NRAs and BEREC in fulfilling their statutory duties[10].

BEREC therefore welcomes the Commission's proposals to strengthen the **independence requirements on NRAs**, including in particular NRAs' autonomy in respect of the implementation of their budgetary allocation. We also welcome that the proposals broaden the **minimum set of core competences** of those independent NRAs. We note the importance of NRAs' ability to ensure a coherent regulatory approach in their respective national markets, and that all NRAs around the table have the same set of competences, to enable BEREC to pursue coherent harmonisation initiatives. Independence is also affected by an NRA's ability to enforce regulation through the application of proportionate sanctions through penalties and orders, without having to resort to national courts, and the Code should be amended to confirm that this power should be given to the sectoral NRA.

4.2 BEREC

BEREC welcomes the Commission's desire to reinforce its effectiveness. Indeed, the proposals for harmonised minimum competences for NRAs will play an important role in this regard. However, BEREC is concerned that the majority of the Commission's proposals for a new BEREC Regulation will undermine its independence and rootedness in national markets, the two central attributes behind BEREC's value-added to the European regulatory system.

[10] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2013-0454+0+DOC+PDF+V0//EN
http://berec.europa.eu/files/document_register_store/2012/11/BoR_(12)_119_BEREC_statement_on_independence_of_NRAs.pdf, Such aspect has been already highlighted also by BEREC in its....
(.....http://berec.europa.eu/files/document_register_store/2012/11/BoR_(12)_119_BEREC_statement_on_independence_of_NRAs.pdf

Independence is central to BEREC's effectiveness and value-added, and it is critical that it be protected going forward.[11] As well as bringing together the collective expertise of its constituent members for the generation and convergence of regulatory practices, BEREC has an important advisory role to the European Institutions. But the governance rules for EU agencies set out in the Commission's proposals, based on the Common Approach, would undermine BEREC's independence from the Commission, e.g. via Commission role in the selection of BEREC's Executive Director (not drawn from NRAs), who would be its legal representative instead of BEREC's Chair (a serving NRA Head) and have a far-reaching role which would risk displacing the role of BEREC members themselves. The proposal that permanent staff of the EU agency (rather than NRA experts) chair BEREC's expert working groups would also potentially undermine BEREC's independence .and result in a loss of practical know-how. A reduction in BEREC's independence vis à vis the Commission would undermine the positive effects of the proposals to increase the independence of NRAs.

Transforming BEREC into an EU agency would also undermine its main strength and distinguishing attribute, i.e. its **rootedness** in its constituent national regulators. The European Parliament recognised this in its resolution, noting that "the completion of the internal market is a continual process best served by improving regulation across individual national markets, and … the most robust and sustainable way to achieve this … is through the 'bottom-up' approach currently represented by BEREC".

Furthermore, while the Commission would like to make BEREC and its NRA members "more European", the proposals would have the contrary effect, side-lining NRAs at both the governing and working levels. For instance, the replacement of the current "Troika" system of annual chairmanships with 4-year terms, and the replacement of NRA experts with Agency staff as chairs of expert working groups would both mean that fewer NRAs would gain exposure to the front line of BEREC work.

We believe that replacing the current structure with an EU agency would slow rather than hasten the pace of NRA cooperation and the development and dissemination of harmonised best practices, and by extension the pursuit of the single market.

As well as being inconsistent with the conclusions and recommendations of the Commission-sponsored assessment[12] and the European Parliament's resolution[13], the Commission's proposals do not build upon BEREC's strengths and assets, but rather purport to start from scratch and replace what has worked with an over-engineered, costly and bureaucratic structure which runs counter to Europe's broader "better regulation" agenda. In its December 2015 opinion[14], BEREC identified a number of reforms that would increase its efficiency and release NRAs' resource for policy work (reducing the burden of administrative and bureaucratic tasks). For instance, management oversight of the existing EU agency in the BEREC system, the BEREC Office, currently consumes a substantial amount of NRAs' time and resources, and could be streamlined (rather than significantly expanded by virtue of the proposed transformation of BEREC into an EU agency).

Indeed, no compelling reason is given for **transforming BEREC into a decentralised EU agency**. The Common Approach, cited by the Commission as the justification for the change, only sets out

[11] As the EP stated, "BEREC can only be effective if its independence from the Member States and the EU institutions is guaranteed", ibid, point E.
[12] 'Study on the evaluation of BEREC and the BEREC Office' by PwC (September 2012) http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=1403
[13] European Parliament resolution of 10 December 2013 containing its opinion on the evaluation report regarding BEREC and the Office (P7_TA (2013)0536)
[14] See in particular page 66 of the Opinion.

what the European Parliament and Council would like EU agencies to look like, it does not require bodies such as BEREC to be converted into EU agencies. Indeed, the model of the EU decentralised agency is predominantly used for the outsourcing of Community tasks from the Commission; but BEREC's purpose is the pooling and development of national regulatory expertise, and the provision of advice to the EU institutions. There is no function currently sitting with the Commission that should sensibly be delegated to BEREC, and which would therefore justify the application of the Common Approach.

BEREC's recent experience (the BEREC Office, which provides professional and administrative support to BEREC, is an EU agency) has clearly demonstrated the cost and bureaucratic burden of compliance with the vast set of EU rules and regulations that apply to all EU agencies. To date that burden has been contained and managed within the BEREC Office, and BEREC would regret an extension of this bureaucracy and cost. The cost implications of the newly proposed BEREC would be significant, involving a substantial increase in permanent BEREC Office staff numbers, and thereby representing a substantial increase in the cost of EU telecoms regulation.

Furthermore, the few **binding powers** proposed to be entrusted to BEREC, on which the Commission relies to allegedly justify the need to convert the BEREC into an EU Agency, lack proper justification, making unclear the goal they would serve. Many of the proposed tasks do little more than create unnecessary administrative burdens for both undertakings and NRAs (e.g. the proposed notification process for general authorisations).

Lastly, even were these or other powers to take binding decisions to be warranted, this would not necessarily require BEREC to be converted into an EU agency. For instance, the recently created European Data Protection Board (EDPB) has binding decision-making powers and is not an EU agency.

4.3 Regulatory harmonisation and the pursuit of the single market

It is worth bearing in mind that the current ecosystem is based on a **balance between the Commission** (pursuing the vision of the single market), **the NRAs** (individually, and acting collectively **through BEREC**, critically bringing their knowledge drawn from the day-to-day regulation of their respective national markets, to ensure that the pursuit of single market works on the ground, in practice), and the BEREC Office (providing administrative and professional support to BEREC). BEREC has a strong track record in informing European single market initiatives to help maximise their effectiveness in practice, most recently in relation to the net neutrality guidelines and currently on the implementation of the international roaming provisions under the TSM Regulation.

The **advisory function** assigned to BEREC under the old Article 19 of the Framework Directive (now Article 38 of the draft Code) reflects these complementary roles. Under this provision, the Commission can issue recommendations on regulatory principles, approaches and methodologies, and, subject to taking account of BEREC's opinion, "upgrade" these recommendations into binding decisions.

This complementarity is also reflected in what has been described as the "co-regulatory" procedure for the scrutiny of national regulatory decisions under Article 7/7a of the current Framework Directive (Articles 65 and 66 of the draft Code). The Commission currently has a power of veto over an NRA's market definition and assessment of SMP, both of which are based on the application of European competition law and economic principles. The Commission is now proposing to extend this power to the NRAs' choice of regulatory remedies, which is already limited by reference to a defined toolbox

set out in the Framework, and are the subject of a handful of Commission recommendations of which NRAs must already take the utmost account.

Under the Commission's current proposal, its **power of veto over NRA remedies** would only crystallise in the event BEREC agrees with the Commission's serious doubts. However, the proposal nonetheless represents an unwarranted attribution of decision-making powers to the Commission over the detailed regulation of individual national markets.,

Indeed, experience shows that harmonisation does not necessarily imply that the same measures should be applied everywhere, and indeed that the application of the same rules in different situations can yield quite different results. This is why BEREC objects to the proposed extension of Commission veto powers to NRA decisions on remedies, and why it considers Commission powers to make recommendations binding (whether under the market analysis notification regime, as currently proposed, or under Article 19/38) to be counterproductive and not in the best interests of the single market.

This is by no means to say that BEREC objects to any and all harmonisation initiatives. For example, BEREC has assisted in calculating the weighted average of maximum mobile termination rates in roaming. We consider it appropriate to pursue a common European approach for voice termination rates, as this is a stable market which is already similarly regulated across most Member States, and where a common approach can be expected to lead to the further convergence of termination rates. BEREC's role here is crucial. But we would not support a common cost methodology.

It is also for these same reasons that BEREC has argued that the Commission should formally consult it ahead of publishing legislative instruments such as Regulations or Directives. The informal collaboration between the Commission and BEREC which has led to the publication of the draft Code has been a positive and constructive experience for both sides. BEREC would therefore like to see this embedded into the draft Code as standard practice (much as the role of the RSPG in relation to the Radio Spectrum Policy Programme[15] was formalised in the current Framework Directive) or more recently the role of the European Data protection Board under the General Data Protection Regulation[16]**,** and for the Commission to explicitly demonstrate whether and how it has taken BEREC's advice into account, with a view to increasing the overall transparency of the policy-making process**.** This would clearly add value by helping ensure that legislative proposals were made on the basis of a full understanding of the problems they seek to solve and the implications of the proposed solutions.

[15] Article 8a, par. 3 of the Framework Directive.

[16] Under Article 70 of the GDPR (regulation (EU) 2016/679 of 27 April 2016), the European Data protection Board "*shall, on its own initiative or, where relevant, at the request of the Commission […] (b) advise the Commission on any issue related to the protection of personal data in the Union, including on any proposed amendment of this Regulation*."