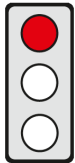


KEY ISSUES

Objective of the Regulation and the Directive: The telecommunications sector will be subject to more uniform supervision than has been the case until now.

Affected parties: Companies in the telecommunications sector, national regulatory authorities (NRAs).

Pro: –



Contra: (1) Extending the powers of the Body of European Regulators for Electronic Communications (BEREC) risks giving rise to the inappropriate centralisation of the telecoms regulation.

(2) In order to avoid this, BEREC decisions should be adopted by way of qualified majority rather than a simple majority.

(3) For the same reason, neither the Commission nor BEREC should have a right of veto against remedies of the NRAs. The right of veto is also in breach of the principle of subsidiarity.

CONTENT

Title

Proposal COM(2016) 591 of 14 September 2016 for a **Regulation** of the European Parliament and of the Council **establishing the Body of European Regulators for Electronic Communications** (BEREC) and **Proposal COM(2016) 590** of 12 October 2016 for a **Directive** of the European Parliament and of the Council **establishing the European Electronic Communications Code**

Brief Summary

Unless otherwise indicated, Article and page numbers refer to the Regulation. Article and page numbers followed by DIR refer to the Directive.

► Definition, context and objectives

- The Commission wants to revise the EU regulatory framework for the telecommunications sector – Framework (2002/21/EC), Authorisation (2002/20/EC), Access (2002/19/EC) and Universal Service Directive (2002/22/EC). For this purpose, these Directives will be combined into one new Directive. In addition, the Commission is submitting a Regulation to establish the Body of European Regulators for Electronic Communications (BEREC). The existing BEREC Regulation (EC) No. 1211/2009 is being repealed (Art. 40).
- Particularly relevant are the provisions on
 - the "asymmetrical" regulation of access to network infrastructure by TK network operators with significant market power (in the Directive, see [cepPolicyBrief](#)),
 - the "symmetrical" – i.e. independent of market power – regulation of access and the regulation of termination charges (in the Directive, see [cepPolicyBrief](#)) as well as
 - the supervision of the telecommunications industry (this [cepPolicyBrief](#)).

► Context and objectives

- The existing institutional EU apparatus for supervision of the telecommunications sector consists of the national regulatory authorities (NRAs), "other competent" national authorities, the Commission, BEREC and the BEREC Office which is an EU agency.
- According to the Commission, this apparatus has "significant weaknesses" (DIR p. 5). The Commission therefore wants to
 - use the proposed Regulation to merge BEREC and the BEREC Office into one fully fledged EU agency (p. 2 et seq.),
 - use the proposed Directive (DIR p. 5)
 - to entrust BEREC with additional tasks e.g. establishing transnational markets,
 - to create a joint right of veto for the Commission and BEREC against remedies of the NRAs ("double-lock system"),
 - to reinforce the political independence of the NRAs and "other competent national authorities",
 - to establish mandatory responsibilities for the NRAs.

► **BEREC as EU agency**

The Body of European Regulators for Electronic Communications (BEREC) and the BEREC Office will be merged into a single "Union body" with its own legal identity and the name "BEREC" (p. 3, Art. 1 in conjunction with Art. 24 (1), Art. 39, Art. 1 (1)).

Management Board

- The BEREC Management Board consists of one representative from an NRA of each Member State and two representatives of the Commission. The term of office for members is four years and may be extended. (Art. 4 (1) and (4))
- The Management Board generally takes decisions by majority of members (Art. 8 (1)).
- The Management Board elects a Chairperson from among its members representing the Member States, by a majority of two thirds. The term of office of the Chairperson is four years. It can be renewed once. (Art. 6 (1) and (3))

Executive Director

- The Executive Director manages BEREC and is its legal representative (Art. 9 (1) and (4)).
- The Executive Director is appointed by the Management Board, from a list of candidates proposed by the Commission. This requires a two-thirds majority. The term of office of the Executive Director is five years and may be extended on a proposal from the Commission by a maximum of five years. The Management Board can only remove the Executive Director from office on a proposal from the Commission. (Art. 22 (2) to (4), (7) and (8))
- The Executive Director shall be accountable to the Management Board (Art. 9 (1)). The Executive Director is independent in the performance of his/her duties; this does not apply as regards the powers of the Commission and the Management Board (Art. 9 (2)).

► **Tasks of BEREC**

- In particular, BEREC will ensure "consistent implementation" of the telecoms regulatory framework and thereby contribute to the development of the internal market (Art. 1 (3)).
- The BEREC Management Board can (Recital 12)
 - adopt binding decisions e.g. on the identification of transnational markets (Art. 2 (1) (b) in conjunction with Art. 63 DIR),
 - issue non-binding opinions on NRA drafts of market definitions, market analyses and remedies such as access requirements (Art. 2 (1) (d) in conjunction with Art. 32 (3) DIR).
- The BEREC Management Board must (Recital 12)
 - where the Commission rejects a planned remedy of an NRA, as a barrier to the single market or as incompatible with EU law, issue a non-binding opinion indicating whether it shares the Commission's doubts (Art. 2 (1) (d) in conjunction with Art. 33 (3) DIR),
 - issue non-binding opinions on the resolution of cross-border disputes between companies (Art. 2 (1) (d) in conjunction with Art. 27 (2) and (3) DIR),
 - issue non-binding guidelines inter alia on the implementation of NRA obligations as regards geographical surveys of broadband development (Art. 2 (1) (e) in conjunction with Art. 22 (7) DIR).
- Where Member States require telecommunications companies to give notice of the provision of electronic communications networks and services, this notice must be submitted to BEREC (Art. 12 (3) DIR). BEREC keeps a list of telecommunications companies (Art. 2 (2) (d) in conjunction with Art. 12 (4) DIR).

► **Joint right of veto for the Commission and BEREC against remedies of the NRAs ("double-lock system")**

- Before imposing a remedy upon a company, NRAs must make the draft measure accessible to the Commission, BEREC, and the other NRAs (Art. 32 (3) DIR).
- Where both the Commission and BEREC consider that the draft measure, such as an access requirement, of an NRA creates a barrier to the single market or that it is not compatible with EU law, the Commission can force the NRA to withdraw the draft measure. The NRA must then give re-notification of the measure. (Art. 33 (5) (c), DIR)

► **Mandatory responsibilities of NRAs**

- The independent NRAs must be responsible "at least" for the tasks listed in the Directive (Art. 5 (1) in conjunction with Art. 8 (1) DIR), including
 - ex ante market regulation of the telecommunications markets,
 - the resolution of disputes between companies and between companies and consumers,
 - ensuring consumer protection and end-user rights and
 - dealing with issues related to open internet access ("network neutrality").
- Where the Directive provides for the performance of another task by a "competent authority", the Member States can transfer this task to the NRA or another national authority (Recital 34 DIR).

► **Independence of the NRAs and "other competent national authorities"**

- The NRAs act "independently and objectively" and are not permitted to seek or take instructions from any other body apart from BEREC. Supervision of NRAs - e.g. by ministries - in accordance with national constitutional law is however permitted. (Art. 8 (1) DIR)

- The following applies to the NRAs and other national competent authorities:
 - They must be "legally distinct from and functionally independent of" all companies in the telecommunications sector (Art. 6 (1) DIR).
 - They must have "adequate financial and human resources" (Art. 6 (2) DIR).
- The following applies to NRAs only:
 - The heads of the NRAs are appointed for a term of office of at least four years. A maximum of two terms of office is permitted. (Art. 7 (1) DIR)
 - The heads of NRAs can only be dismissed during their term of office if they no longer fulfil the conditions of the Directive (Art. 7 (2) DIR).
 - The NRAs must report annually e.g. about their human and financial resources and the attribution of these (Art. 8 (2) DIR).

Main Changes to the Status Quo

- ▶ Until now, only the BEREC Office was an EU agency. In future, the whole of BEREC will be an agency. BEREC's responsibilities have been extended.
- ▶ The existing "Regulatory Board" of BEREC consists of one representative from each Member State; the Commission is just an observer. It generally decides based on a two-thirds majority of its members. The Chairman's period of office is one year. In the future Management Board, the Commission will send two additional members. It will decide based on a majority of its members. In future, the Chairman's period of office will be four years.
- ▶ Until now, the independence of the NRAs was only required for the areas of ex ante market regulation and dispute resolution between companies. In future, the NRAs will be independent in all tasks.
- ▶ The scope of the mandatory responsibilities of the NRAs is extended.
- ▶ Until now, neither the Commission nor BEREC - even by acting together - could force the NRAs to withdraw remedies. In future the Commission and BEREC will be able to do this jointly.

Statement on Subsidiarity by the Commission

According to the Commission, there are inconsistencies in the application of the EU legal framework, defects in the existing institutional apparatus and discrepancies in the distribution of responsibilities between national and EU level. In addition, market and technological development leads to more cross-border cases that can only be handled at EU level.

Policy Context

The Commission already published a Communication, in May 2015, announcing the revision of the EU legal framework for the telecommunications sector [COM(2015) 192, see [cepPolicyBrief](#)].

Legislative Procedure

14 September 2016	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Directorates General:	DG Communications Networks, Content & Technology
Committees of the European Parliament:	Industry, Research, Energy, Rapporteur: Pilar del Castillo Vera (EVP, ES) and Evžen Tošenovský (ECR, CZ); Internal Market and Consumer Protection, Rapporteur: Dita Charanzová (ALDE, CZ)
Federal Ministries:	Federal Ministry for Economic Affairs
Committees of the German Bundestag:	Economic Affairs (leading); Transport, EU
Decision-making mode in the Council:	Qualified majority (adoption by 55% of the Member States making up 65% of the EU population)

Formalities

Legislative competence:	Art. 114 TFEU (Internal Market)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (Ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Establishing BEREC as an EU agency and **extending the powers of BEREC risks giving rise to the inappropriate centralisation of the telecoms regulation**. Whilst with some issues - such as the resolution of cross-border conflicts - coordinated action by the NRAs within BEREC certainly provides added value, this is not the case in other regulatory areas. With regard to asymmetrical (see [cepPolicyBrief](#)) and symmetrical access regulation (see [cepPolicyBrief](#)), the Regulation and the Directive harbour the risk of counter-productive

regulatory convergence because there is a danger that national characteristics in relation to network structure and markets will receive insufficient consideration. The EU Commission should recognise that the NRAs are better than a central authority in their ability to take account of national differences. This gives rise to the following minimum requirements: **BEREC decisions should be adopted by way of qualified majority rather than a simple majority in order to reduce the likelihood of unnecessary harmonisation.** In similar EU agencies, national representatives also decide on the basis of a qualified majority (cf. cepAnalysis on the European Supervisory Authorities, p. 6 and 16). **For the same reason, a right of veto for BEREC against the remedies of the NRAs should be rejected.**

The future balance of power within BEREC between the representatives of the NRAs, who form the majority of the BEREC Management Board, and the two Commission representatives, remains open. It is doubtful whether the representatives of the NRAs have the necessary means, time and expertise to examine, with the required level of precision, the remedies of their colleagues in other Member States. For this reason, they risk being dependent on the "preliminary work" of the EU Commission. **Political influence on regulation by the Commission is however absolutely unacceptable.** Two changes are **therefore** crucial in order to prevent this: Firstly: As an institution with a - legitimate - political agenda, **the Commission** - like BEREC - **should have no right of veto against remedies of the NRAs.** Secondly: The Commission should also have to respect the independence of the NRAs - which it is in fact aiming for - in its work within BEREC. It should not therefore have a vote in the BEREC Management Board; or it should be expressly provided that the Management Board, as an institution, is independent.

The consequences of the planned institutional realignment are also uncertain, particularly for the Commission's envisaged network deployment. It is not improbable that the duration of regulatory procedures will increase as a result of the additional consultation process. This may weaken the foreseeability of regulation and thus ultimately also the incentive to invest in network deployment.

Establishing mandatory responsibilities for the NRAs will bring about greater coherence between the tasks of the NRAs and those of BEREC. This will tend to mean that the representatives of the NRAs within BEREC will have the necessary competence for the decisions made there. The required independence of the NRAs is also essential for ensuring that regulatory decisions are as objective as possible.

Legal Assessment

Legislative Competency

The Regulation setting up the new EU agency is rightly based on the internal market competence (Art. 114 TFEU). As early as 2006, the European Court of Justice decided that EU agencies, with coordinating and advisory responsibilities, can be established on the basis of the internal market competence (ECJ, Case No. 217/04, ECLI:EU:C:2006:279, Judgement dated 2 May 2006, ENISA). In 2014, the ECJ ruled that the establishment of an EU agency with its own decision-making powers can also constitute a suitable harmonisation measure within the meaning of the internal market competence (ECJ, Case No. C-217/12, ECLI:EU:C:2014:18, Judgement dated 22 January 2014, ENISA). The Directive regulating the powers of the national authorities is also rightly based on the internal market competence (Art. 114 TFEU) because it facilitates the exercise of the freedom of establishment and freedom to provide services and reduces distortions of competition.

Subsidiarity

The joint right of veto for the Commission and BEREC against remedies of the NRAs is in breach of the principle of subsidiarity because the NRAs are in a better position to take account of the differences between the national network structures and telecommunications markets when making regulatory decisions.

Proportionality with respect to Member States

Unproblematic. A Regulation is the only appropriate basis for setting up an EU agency.

Compatibility with EU Law in other respects

Unproblematic.

Impact on German Law

In Germany, the provisions of the Directive will probably be transposed in particular by an amendment to the Telecommunications Act (TKG).

Conclusion

Extending the responsibilities of BEREC risks giving rise to the inappropriate centralisation of the telecoms regulation. In order to avoid this, BEREC decisions should be adopted by way of qualified majority rather than a simple majority. For the same reason, neither the Commission nor BEREC should have a right of veto against remedies of the NRAs. The right of veto is also in breach of the principle of subsidiarity.