

Batura, Olga

**Conference Paper**

## Regulatory networks: the role of BEREC in regulation of the common market for electronic communications

23rd European Regional Conference of the International Telecommunications Society (ITS), Vienna, Austria, 1st-4th July, 2012

**Provided in Cooperation with:**

International Telecommunications Society (ITS)

*Suggested Citation:* Batura, Olga (2012) : Regulatory networks: the role of BEREC in regulation of the common market for electronic communications, 23rd European Regional Conference of the International Telecommunications Society (ITS), Vienna, Austria, 1st-4th July, 2012, International Telecommunications Society (ITS), Calgary

This Version is available at:

<https://hdl.handle.net/10419/60388>

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# Regulatory networks: the role of BEREC in regulation of the common market for electronic communications

*Paper presented at 23<sup>rd</sup> European Regional Conference of the International Telecommunications Society, Vienna, 1-4 July 2012*

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Olga Batura, PhD student at the University of Bremen

Universität Bremen

FB Rechtswissenschaft (ZERP)

Universitätsallee GW 1 (Room C2160)

28359 Bremen, Germany

[batura@zerp.uni-bremen.de](mailto:batura@zerp.uni-bremen.de)

Creation of Body of European Regulators for Electronic Communications (BEREC) was surrounded by a lot of controversies and debates regarding its necessity, precise institutional nature, competences and functions and influence on the institutional balance of power. Now, that all but the last of these issues are clarified in Regulation establishing BEREC and the Office<sup>1</sup> (BEREC Regulation) and BEREC is actively carrying out its tasks since January 2010, one can try once again to examine institutional balance of powers or, more broadly, to research what place BEREC actually takes in the European regulatory network.

Regulatory environment of electronic communications literally swarms with various authorities. Besides the Commission and national regulatory authorities (further – NRAs), there are comitology committees (Communications Committee, COCOM, and Radio Spectrum Committee, RSC), standard-setting organisations (most notably European Telecommunications Standards Institute), European Network and Information Security Agency (ENISA), competition authorities and some other. Where exactly does BEREC fit in this web?

At the Opening ceremony for the BEREC Office in Riga, Neelie Kroes, Vice-President of the European Commission responsible for Digital Agenda, spoke of BEREC's "crucial role" in development of digital Single Market.<sup>2</sup> Dr. Georg Serentschy, then BEREC's Vice-Chair, claimed at the conference of Florence School of Regulation in June 2011 that BEREC is a key player in development of the single market for electronic communications.<sup>3</sup> Such statements

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<sup>1</sup> Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of the European Regulators for Electronic Communications (BEREC) and the Office, OJ L 337/1 of 18.12.2009.

<sup>2</sup> SPEECH/11/666 of 14 October 2011, Riga, Latvia.

<sup>3</sup> See PowerPoint presentation of his contribution @: [http://www.florence-school.eu/portal/page/portal/FSR\\_HOME/COMMUNICATIONS\\_MEDIA/Policy\\_events/Annual\\_Conferences/2011/110624\\_Serentschy\\_Georg.pdf](http://www.florence-school.eu/portal/page/portal/FSR_HOME/COMMUNICATIONS_MEDIA/Policy_events/Annual_Conferences/2011/110624_Serentschy_Georg.pdf) (accessed on 09.02.2012).

are understandable coming from the EU high-ranking officials. Yet, they do raise doubts when one considers all the modifications that the Commission's project of an electronic communications agency has undergone during the negotiations of the third regulatory package. According to the research of the majority of scholars<sup>4</sup>, the watered down BEREC Regulation has become a compromise solution. Some researchers argue categorically that BEREC is "essentially the same as the ERG"<sup>5</sup> and "amounts only to an incremental modification of the ERG"<sup>6</sup>. Bearing in mind ERG's record as a rather inefficient and non-transparent body<sup>7</sup>, such comparisons do not flatter the young body and casts shadows on optimistic prospective of its central role in the regulatory network.

This paper represents a legal analysis of regulatory arrangements in electronic communications sphere undertaken in order to understand the role of BEREC within the regulatory landscape. It shall start with Section I briefly describing BEREC's organisational structure as well as its functions and tasks and paying special attention to the aspects distinguishing BEREC from ERG in order to determine those special features which may be decisive for BEREC playing a different role in the regulatory network. After this, BEREC's role within multinational regulatory network at the European level will be examined in detail (Section II) and then its involvement in and influence on regulation at national level will be studied (Section III). Section IV summaries the findings of the preceding Sections focusing on the controversies and blank areas of the relevant legislation. Where appropriate, BEREC will be compared to other agencies, especially to the Agency for Coordination of Energy Regulators (ACER)<sup>8</sup> which was established almost simultaneously with BEREC, but whose competences and institutional arrangements are rather advanced. The concluding section tries to answer the question whether BEREC possesses institutional and instrumental capacity to provide an interface between national and European levels of regulatory activity or even to become a driving force behind the creation of single European market for electronic communications and a hub for its regulation.

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<sup>4</sup> Especially telling in this regard is the empirical research by Saz-Carranza, Angel and Francisco Longo, *The Evolution of the Governance of Regulatory Networks: The Case of the European Telecommunications Regulatory Networks*, Jerusalem Papers in Regulation & Governance, Working Paper No. 41, January 2012.

<sup>5</sup> Renda, Andrea, *The Review of the Telecoms framework: Tale of Anti-commons*, in: *Monitoring EU Telecoms Policy*, Network for Electronic Research on Electronic Communications (NEREC), Madrid, September 2009, p. 15.

<sup>6</sup> Simpson, Seamus, *New Governance as Political Compromise in European Telecommunications: The Amended European Union Electronic Communications Regulatory Framework*, Paper presented at the 18<sup>th</sup> Biennial ITS conference, Tokyo, Japan, 27-30 June 2010, p. 21; also Sutherland, Ewan, *A Single European Regulatory Authority*, Paper presented at the 17<sup>th</sup> Biennial ITS conference, Montreal, Canada, 24-27 June 2008, p. 16.

<sup>7</sup> A rather full critical account of ERG's activity is given by Sutherland, Ewan, *A Single European Regulatory Authority*, Paper presented at the 17<sup>th</sup> Biennial ITS conference, Montreal, Canada, 24-27 June 2008.

<sup>8</sup> Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, OJ L 211 of 14.08.2009 (further – ACER Regulation).

To anticipate possible questions, the use of the term “agency” to address BEREC in this paper should be explained. *De jure* BEREC is not an agency, it has no legal personality and has replaced the ERG “as an exclusive forum for cooperation”. However, if understood as a single entity consisting of the Board of Regulators (BoR) and the Office and taking into account identical composition of the BoR and the Management Committee, BEREC does show similarities of an agency. The Office, created together with BEREC with the aim to support it in its activity, can be considered though not legally, but operationally and logically a part of BEREC. The Office established as an independent legal person shall act under guidance of the BoR exercising all the secretarial functions to BEREC, providing professional support and even carrying out some of BEREC’s tasks (gathering and distribution of information and best practices, for instance, see Art. 2(a) and 3 in conjunction with Art. 6 BEREC Regulation). Moreover, if compared to other existing European agencies (to remain with the scope of electronic communications, for instance, ENISA), BEREC has the same and even more significant powers. Most so-called regulatory agencies possess only advisory and informative powers and only three of them (Agency for Cooperation of Energy Regulators, Office of Harmonization for the Internal Market, European Medicine Agency) have power of binding individual decisions. Furthermore, on the EU webpage BEREC is listed among so-called decentralised agencies defined there as “bodies governed by European public law; they are distinct from the EU Institutions (Council, Parliament, Commission, etc.) and have their own legal personality”.<sup>9</sup> It seems therefore that BEREC can be studied as one of the most recent examples of agencification in the EU.<sup>10</sup>

### ***Section I: Brief description of BEREC (comparison to ERG in most significant aspects)***

Creation of BEREC and the Office was motivated by Commission’s urge to enhance the previously existed body – European Regulators’ Group for Electronic Communications Networks and Services (ERG) – which was established by the Commission to facilitate cooperation between NRAs and to ensure consistent implementation of the European framework with the aim to create a truly single market in electronic communications. Apparently, ERG’s contribution was not sufficient for development of the internal market due to lack of coordination between the NRAs and resulting discrepancies in regulation and

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<sup>9</sup> See [http://europa.eu/agencies/regulatory\\_agencies\\_bodies/index\\_en.htm](http://europa.eu/agencies/regulatory_agencies_bodies/index_en.htm) (accessed 22.06.2012).

<sup>10</sup> Similar view is advanced by Francesco Rizzuto, *Reforming the “Constitutional Fundamentals” of the European Union Telecommunications Regulatory Framework*, in: *Computer and Telecommunications Law Review*, Vol. 16 No. 2, 2010, p. 49.

application of European law at the national level.<sup>11</sup> In spite of a strong opposition and lobbying by NRAs, the new body was established by the Commission in 2009 in the course of legislative reform and adoption of the third regulatory package having replaced the ERG, but being far from a strong regulatory agency initially proposed by the Commission.

The most notable difference between BEREC and the ERG is the way they were established. BEREC was established by a Regulation of the European Parliament and the Council and not by a Commission decision.<sup>12</sup> This means of institutionalisation undoubtedly reflects the desire to accord an “elevated status” to the new body.<sup>13</sup> Differently from the ERG whose aim was to contribute to the development of the internal market and to consistent application of the regulatory framework across the EU (Art. 3 ERG Regulation), BEREC shall pursue the same objectives as the NRAs which include, besides the two mentioned for the ERG, promotion of competition and promotion of interests of the EU citizens (Art. 1(3) BEREC Regulation in conjunction with Art. 8 Framework Directive<sup>14</sup>). This too reflects the ambition to elevate the new body’s status beyond a purely consultative expert forum and, at the same time, leaves open a possibility to enhance its tasks and powers in the future. Furthermore, BEREC’s envisaged role is to promote cooperation both between the NRAs and between the NRAs and the Commission (Art. 1(4) BEREC Regulation). This is a valuable specification and recast of the ERG’s role that was described as “a body for reflection, debate and advice for the Commission” (Recital 7 ERG Decision) and provided therefore only a one-way vertical connection, namely from NRAs via ERG to the Commission.

Unlike in the case of the ERG, the tasks and role of BEREC are specified in great detail, its powers have been strengthened and the connection to the Commission and NRAs modified, as will be shown below. Advisory role of BEREC is much broader: while ERG’s advisory capacity was reserved for the Commission alone (Art. 1 (1) and (3) ERG Decision), BEREC can advise, consult and deliver opinions to the European Parliament, the Council and the Commission as well as NRAs, in some cases upon their request and sometimes on agency’s

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<sup>11</sup> Sutherland, Ewan, A Single European Regulatory Authority, Paper presented at the 17<sup>th</sup> Biennial ITS conference, Montreal, Canada, 24-27 June 2008, p. 3.

<sup>12</sup> The ERG was established on the basis of Commission decision of 29 July 2002 establishing the European Regulators Group for Electronic Communications Networks and Services, OJ L 200/38 of 30.07.2002 (further – ERG Decision).

<sup>13</sup> Francesco Rizzuto, *Reforming the “Constitutional Fundamentals” of the European Union Telecommunications Regulatory Framework*, in: Computer and Telecommunications Law Review, Vol. 16 No. 2, 2010, p. 49.

<sup>14</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, amended by Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community, OJ L 108 of 24.04.2002.

own initiative (Art. 1(4), 2 and 3 BEREC Regulation). BEREC's tasks are further rendered precise in Art. 3 BEREC Regulation and include, besides the mentioned opinions on a number of various draft legislative and regulatory measures and non-binding guidelines and recommendations, provision of expert assistance for analysis of electronic market development as well as gathering and dissemination of information and best practices. One of the important regulatory novelties is involvement of BEREC in proceedings under Art. 7 and 7a Framework Directive, where BEREC shall give its opinion on compatibility of certain decisions by NRAs with the European law.

BEREC, at first glance, has a rather simple structure: it has only one organ – the Board of Regulators (BoR) consisting of senior representatives of NRAs and a Commission representative (Art. 4(1) BEREC Regulation). The latter has only an observer status, but shall be invited to all plenary sessions of the Board (Art. 4 (2) and (8) BEREC Regulation). All BEREC's regulatory tasks, named in Art. 3 BEREC Regulation, as well as some administrative ones (for example, approval of voluntary financial contributions from Member States or NRAs, adoption of provisions on access to documents) are to be performed by the BoR (Art. 5(1) BEREC Regulation). Adopting the relevant acts, BoR has to vote by two-thirds majority of all members (Art. 4(9) BEREC Regulation), but in contrast to ERG its decisions do not require approval by the Commission (compare Art. 5(4) ERG Decision).

As mentioned above, BEREC is supported by the Office which consists of a Management Committee and an Administrative Manager who is the head of the Office and is appointed and guided by the Management Committee in execution of his tasks. The Management Committee is composed of senior representatives of NRAs and one Commission's representative. Obviously, membership in the Management Committee and in the BEREC's BoR is only a matter of hats, because both for the BoR and for the Management Committee heads or nominated high level representatives can be nominated. The only difference is that the Commission's representative, wearing a Management Committee hat, has voting rights. The Office fulfils secretarial functions for BEREC - by contrast, the Commission served as a secretariat for ERG (Art. 4(2) ERG Decision). Additionally, the Office takes over some BEREC's tasks, such as gathering information from NRAs and its distribution, dissemination of best practices (Art. 6(2) in conjunction with Art. 2(a) and 3 BEREC Regulation).

Interestingly, although BEREC Regulation contains a separate provision on transparency and accountability ("Transparency and accountability" being the actual title of Art. 18), it is absolutely not clear who BEREC and the Office are accountable to. The respective provision

establishes high transparency requirements to the activities of both bodies. Their accountability, except in the title, is mentioned by no word. In the rest of the document, a hint of accountability provisions can be found in Art. 5. In Art. 5 (4), it is stated that BoR shall transmit the annual work programme to the European Parliament, the Council and the Commission as soon as it is adopted, but what happens with the work programme afterwards remains undefined. A similar provision concerns annual report on activities of BEREC that is adopted by BoR and shall be transmitted to the same addressee and to the European Economic and Social Committee and the Court of Auditors (Art. 5 (5) BEREC Regulation). In the same breath it is stated that the European Parliament may request the BoR Chair to address it on relevant issues relating to the activities of BEREC. Some authors<sup>15</sup> interpret these provisions as right of scrutiny of BEREC's activity by the named EU institutions. It might well be so, but the fact remains that the scrutiny seems not to touch upon the substantial appraisal of BEREC's activity and its compliance with the objectives outlined, it has no consequences for BEREC (except, supposedly, in the budgetary sphere) and is therefore toothless. Nonetheless the described provisions can be considered a small progress in comparison to ERG Decision where both transparency and accountability questions were completely ignored.

Another curious fact about BEREC is that has no financial resources of its own. It relies completely on the budget of the Office<sup>16</sup>, but it has *de jure* no control over it because the Office's budget is drawn up and implemented by the Management Committee and the Administrative Manager (Art. 12-13 BEREC Regulation). The revenues of the budget consist of a subsidy from the EU (from the Commission's budget) and of voluntary contributions from Member States or NRAs (Art. 11(1) BEREC Regulation). The BoR controls only this latter revenue source: it shall give its approval before the contributions are made (Art. 5(2) BEREC Regulation).<sup>17</sup>

It shall be noted that although BEREC has worked only since January 2010, it has been very active in comparison to ERG if the number of documents adopted is regarded as an indicator. The number of various documents adopted by BoR in slightly more than 2 years almost

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<sup>15</sup> Francesco Rizzuto, *Reforming the "Constitutional Fundamentals" of the European Union Telecommunications Regulatory Framework*, in: Computer and Telecommunications Law Review, Vol. 16 No. 2, 2010, p. 51.

<sup>16</sup> Interestingly, the first budget approved by the Management Committee for 2011 referred to the Office's budget as the budget of the Body. In doing this, Art. 11 para. 1 BEREC Regulation is misquoted. See Amending budget 1/2011 of the Office of the Body of European Regulators for Electronic Communications (BEREC office), MC 11 (20), p. 2.

<sup>17</sup> The budget for 2011 foresaw no voluntary contributions. See Amending budget 1/2011 of the Office of the Body of European Regulators for Electronic Communications (BEREC office), MC 11 (20), p. 2.

equals to the number of all documents adopted by ERG during its 7-year existence.<sup>18</sup> Moreover, the majority of BEREC documents are not the ones that BEREC was obliged to adopt upon a request or within Art. 7 and/or 7a procedures. BEREC seems to be active mainly on its own initiative producing various studies, collecting and systematising information and issuing opinions. Thus, BEREC has been using all the powers conferred on it in order to assume an active expert position and to become a central and indispensable actor within the network of telecommunications regulation.

## **Section II: BEREC and EU level regulation**

BEREC stands out among other EU regulatory agencies whose institutional proximity to the Commission is widely criticised as intensifying the imbalance of powers in the EU.<sup>19</sup> BEREC stays more than at arm's length from the EU institutions and especially from the Commission possessing officially no agency status and being organisationally separated from the EU institutions and from the Office. Members of the BoR are appointed directly by the NRAs, circumventing both national governments and EU institutions. The Commission is represented at BEREC sessions as an observer. The Management Committee, main body of the Office, is also composed of NRAs representatives and a representative of the Commission who is not necessarily the chairperson. No Commission's approval or consent is necessary for BEREC's operation. Institutionally, Commission's influence on BEREC seems to be limited to budget determination and evaluation report (Chapter III and Art. 25 BEREC Regulation).

At the same time, BEREC seems to be more involved in the European level governance and regulation than its predecessor ERG. The greater involvement and potentially more noticeable influence on decision-making at the European level are provided by BEREC's right and sometimes obligation to deliver opinions, to assist and advise the European Parliament, the Council and the Commission on various matters relevant for electronic communications. However, the expert impact shall not be overestimated as BEREC's opinions, advice, recommendations are not binding. Art. 3(2) BEREC Regulation simply states that the Commission shall take them into "utmost account", what does not affect its discretion in taking decisions it regards appropriate.<sup>20</sup> However, nothing is said how and to what extent

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<sup>18</sup> Compare the list of documents adopted by ERG @: [http://www.erg.eu.int/documents/erg/index\\_en.htm](http://www.erg.eu.int/documents/erg/index_en.htm) and by BEREC @: [http://www.erg.eu.int/documents/berec\\_docs/index\\_en.htm#board](http://www.erg.eu.int/documents/berec_docs/index_en.htm#board) (accessed 29.06.2012). Both lists contain over 110 documents.

<sup>19</sup> See, for example, Stefan Griller & Andreas Orator, *Everything under Control? The "Way Forward" for European Agencies in the Footsteps of the Meroni Doctrine*, in: *European Law Review*, Vol. 35, 2010, p. 28.

<sup>20</sup> Francesco Rizzuto, *Reforming the "Constitutional Fundamentals" of the European Union Telecommunications Regulatory Framework*, in: *Computer and Telecommunications Law Review*, Vol. 16 No. 2, 2010, p. 50.



other European institutions shall take account of BEREC's opinions. Potentially, BEREC's influence on Council's and European Parliament's decisions could be rather significant, because these institutions possess less expert knowledge on and experience in dealing with complex and technology conditioned industry and market of electronic communications. Besides, independent access to the Council and the European Parliament may become handy for BEREC in the cases of disagreement with the Commission on sensitive national issues where the Commission might attempt a regulatory intervention at the European level.<sup>21</sup>

In this context it needs to be emphasised that BEREC is present, i.e. can provide input into and therefore influence decision-making both at the policy development stage and at policy implementation and regulation stage. Importantly, its subject areas are not exhaustively defined, while the focus is brought to the problem areas in which consistent and uniform implementation of the European regulatory framework on electronic communications is central for creation of a Single Market. BEREC shall be consulted prior to adoption of recommendations on relevant product and service markets and prior to adoption of a decision on transnational markets under Art. 15 Framework Directive and thus participates in establishment of the boundaries for later application of the sector-specific regulation. It delivers opinions on draft decisions and recommendations on harmonisation necessary in cases of divergences of national implementation according to Art. 19 Framework Directive. It also advises the Commission when adopting technical implementing measures for effective access to pan-European numbers 112 and 116 (Art. 26 and 27a Universal Service Directive<sup>22</sup>).

As mentioned above, BEREC's most significant tasks at the implementation and direct regulation stage lie refer to Art. 7 and 7a procedures. One may consider the content of BEREC's opinions adopted so far in these procedures in order to speculate about agency's proximity to the Commission, because BEREC has to state whether it shares Commission's serious doubts on compatibility of national decisions with Community law. In eight of nine opinions, adopted so far, BEREC agrees with the serious doubts expressed by the Commission over the notified national decisions. It might sound as no surprise because agencies, financially, organisationally and staff-wise dependent on the Commission, tend to agree with it. However, BEREC's agreement is not automatic and it does not use the same arguments and data as the Commission does. For every procedure a special Expert Working

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<sup>21</sup> Francesco Rizzuto, *Reforming the "Constitutional Fundamentals" of the European Union Telecommunications Regulatory Framework*, in: Computer and Telecommunications Law Review, Vol. 16 No. 2, 2010, p. 50.

<sup>22</sup> Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, OJ L 108 of 24.04.2002.

Group is established that examines anew the presented cases on their merits and in close cooperation with both parties (Commission and the respective NRA). For instance, in the most interesting and challenging case – Case NL/2012/1284-1285 on call termination on individual public telephone networks provided at a fixed location and on voice call termination on individual mobile networks in the Netherlands<sup>23</sup> – BEREC's opinion was based on well-researched materials and it took into consideration concerns of all three parties involved (Commission, Dutch NRAs and Dutch national court, representative for interests of national legal system and indirectly for operators interests because its decision was in favour of the operators). In its opinion, BEREC did not recommend either withdrawal or amendment of the NRAs decision, but pointed out several “windows of opportunity” for the NRAs to explore, thus treating with care national sovereignty and leaving the necessary discretion to the responsible jurisdiction. Such careful and balanced approach enhances legitimacy of the potential NRA decision by allowing for the inflow of foreign concerns, validating those concerns, explaining the necessity of their recognition and also by bringing them to the attention of the Commission.

BEREC's relations with other European bodies participating in regulation of electronic communications are, unfortunately, hardly specified. For instance, relations with the both comitology committees COCOM and RSC are addressed very superficially in Recital 10 BEREC Regulation: BEREC shall pursue its tasks in cooperation with them, but without prejudice to their role. If in the case of the RSC non-overlapping of competences can be easily ensured, because BEREC does not encroach on regulation of radio spectrum, and necessity of cooperation seems plausible, the case of the COCOM is not so straightforward.

The COCOM, established by Art. 22 Framework Directive and composed of national officials and a Commission's representative, shall assist and simultaneously control the Commission when the latter implements certain provisions of the third regulatory package on electronic communications. Therefore, the COCOM has both the structure and competences similar to those of BEREC and in absence of a clear delimitation of functions between the two overlappings of competences seem inevitable. For instance, Art. 23 Framework Directive imposes on the COCOM the obligation to foster exchange of information between the Member States (ultimately – NRAs) and between the Member States and the Commission on the situation and the development of regulatory activities regarding electronic communications (see additionally Recital 37 Framework Directive). Recital 15 Framework Directive requires the Commission to consult the COCOM in Art. 7 procedure prior to

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<sup>23</sup> BoR (12) 23 BEREC Opinion Phase II investigation Case NL/2012/1284-1285.

demanding a NRA to withdraw its draft measure on definition of relevant markets or on designation of undertakings with significant market power if such a measure would create a barrier to the single market or would be incompatible with Community law. BEREC participates in this procedure at a later stage, giving its opinion on compatibility of the national measure with Community law and stating whether it shares Commission's serious doubts (see Art. 7 Framework Directive). Where BEREC consults on draft recommendations and/or decisions according to Art. 15 and 19 Framework Directive, these documents shall be ultimately adopted by the Commission in a comitology procedure. The same is true for the subject of numbering under Art. 26 and 27a Universal Service Directive.

### ***Section III: BEREC's involvement in governance electronic communications at national level***

BEREC's proximity to the Member States' level is ensured institutionally because the whole agency is dominated by the NRAs. As mentioned above, BEREC in the narrow sense consists only of one organ composed of NRAs representatives and this organ is responsible for adoption of all BEREC's documents. The secretariat – the Management Committee of the Office – also comprises NRAs' representatives, most likely the very same individuals as in BoR. However, this type of relations between BEREC and NRAs is more of a bottom-up nature because by participating in preparation and adoption of various advisory and expertise documentation national representatives catapult to the transnational level their national interests and concerns. National implementation and regulatory practice and identified special features of national markets on electronic communications reflected in BEREC's surveys and opinions may be taken into account by European legislators when elaborating new rules and adopting guidelines and recommendations.

At the same time, BEREC exercises top-down influence on the activity of NRAs by using various soft law instruments. Of the soft law measures that can be employed by BEREC (for example, dissemination of information and best practices, consultation of NRAs on own initiative), the most intrusive and therefore potentially the ones with the greatest effect on national level regulation are BEREC's powers within Art. 7 and 7a procedures. To be reminded briefly, Article 7 procedure is the principal instrument of the EU regulation of electronic communications market (see Art. 7 Framework Directive). Under this procedure, a notification to the Commission shall be given where a NRA proposes a definition of a national market differing from the one in the respective Commission's recommendations or where it decides whether an undertakings shall be designated as having significant market

power. In the cases where the said measures may affect trade between Member States and/or be incompatible with Community law, the Commission issues a letter of serious doubts and can veto the national measure. Similar procedure, but without Commission's veto is foreseen under Art. 7a Framework Directive. The major difference is that this procedure refers to a particular set of national remedies<sup>24</sup> in relation to an operator with significant market power and intended to be imposed, amended or withdrawn.

BEREC's role differs to a considerable extent under Art. 7 and 7a procedures. In the first case the interplay between the Commission and the NRA in question is in the centre of attention. The Commission remains the dominant player deciding autonomously both on the compatibility of the notified national measure with the common market and on its fate (amendment or withdrawal or lifting the reservations altogether). BEREC and other NRAs are more or less bystanders: they only receive information on the notified measure and BEREC makes its comments first directly on the draft NRA measure and then gives an opinion to the Commission when the procedure reaches the so-called phase II (the Commission has established serious doubts on compatibility of the measure with the common market).

By contrast, in the phase II of Art. 7a procedure BEREC moves into the limelight when it adopts an opinion backing or not the Commission's serious doubts. BEREC's agreement with the Commission launches between the NRA, BEREC and the Commission a process of consultations and cooperation regarding the national measure in question. Moreover, in its opinion BEREC shall suggest whether the national measure should be withdrawn or amended. Upon BEREC's opinion and, if pertinent, cooperation process, the Commission either withdraws its doubts or issues a recommendation on withdrawal or amendment of the national measure. Arguably, BEREC's extended powers in Art. 7a procedure, which ultimately result in peer and expert pressure, shall compensate for the missing Commission's veto power over remedial national measures.

Yet, BEREC's support of the Commission's serious doubts and otherwise acting in its interest cannot be taken for granted (although the respective opinions available in the moment might lead to the opposite conclusion). As indicated above, BEREC undertakes a new independent investigation of each case of Art. 7a procedure within an ad hoc Expert Working Group, whose report is then heard and discussed at a BoR meeting. While doing so, BEREC

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<sup>24</sup> For example, such remedies as access and interconnection obligations, transparency and non-discrimination obligations, accounting separation, obligation to access to or use of specific network facilities, price controls, controls on retail services. For a detailed description see Art. 5, 9-13 Access Directive, Art. 17 Universal Service Directive.

considers all concerns involved and evaluates them, validating them and recognising their significance for the case at hand. This approach brings in both European and expanded national perspectives on the national measure and, at the same time, draws Commission's attention to the validity of various national concerns affected.

#### ***Section IV: BEREC as a hub of the multilevel regulatory network for electronic communications?***

Against the described background, a general statement on BEREC's role as a EU market regulator cannot be unequivocally and definitively made. There are too many inconsistencies in the picture which render the assessment of implications of BEREC's activity rather difficult.

On the one hand, BEREC possesses a number of strengths which may prove beneficial for completion of common market for electronic communications, effective and harmonious implementation of Community law and therefore place this agency in the centre of the regulatory landscape. BEREC can develop a significant authority in questions related to electronic communications industry and markets due to provision of independent expertise based on professionalism of its members and their balanced representation. In the context of common market creation, BEREC is well placed to raise NRAs' awareness of wider ramifications of their decisions as well as to feed national concerns in the EU policies and legal rules and in their implementation. In this sense, BEREC remains as ERG a forum for reflection, but also becomes a forum for deliberation and discussion. BEREC uses exclusively soft law instruments, but their creative use in Art. 7 and 7a procedure as a substitute for "one size fits all" solution provide for a greater flexibility of both national and European regulatory solutions, may facilitate compromises between the Commission and NRAs and represents an approach for further integration and harmonisation through expertise and information.

On the other hand, however, BEREC demonstrates a number of shortcomings which might to some degree outweigh the outlined benefits. The reverse effect of being independent from the European institutions, especially from the Commission, is a strong dependence on Member States or rather on NRAs. Particularly striking this dependence is in the field of expertise as all BEREC's experts come from NRAs, even those involved in the independent *ad hoc* examination of Art. 7 and 7a cases in Expert Working Groups. This renders the experts' pool and scope of experience and expertise rather narrow and predictable. By contrast, in comitology committees and Agency for Cooperation of Energy Regulators (ACER) any expert may be involved (see Art. 12, 16 (2) and 18 (1) ACER Regulation).

Linked to this point is unsatisfactory regulation – or rather its absence – on inclusion of stakeholders, other than NRAs, in BEREC’s activity. Art. 17 BEREC Regulation addresses this issue rather unsatisfactorily, stating the BEREC shall consult “interested parties” “where appropriate”. It is therefore unclear and completely at BEREC’s discretion, when consultations shall be held and what is meant under “interested parties”. Although in respect of telecommunications providers and infrastructure operators this unfortunate situation has been partially rectified this year, when BEREC launched the so-called “strategic dialogue” to be held for the next two years.<sup>25</sup> However, the invitation to the dialogue seems not to be a general one: BEREC simply states that it is going to meet large mobile, fixed and cable providers and does not explain who and how has been selected. Further unspecified user groups alongside with vendors, service providers and sector innovators are mentioned what hints at the primarily business and commercial nature of interests represented. Especially ignored are consumers, NGOs representing wider social interests (environment), small and medium enterprises as users of communications technology and representatives of regions. This is puzzling in the light of the fact that one of BEREC’s objectives is protection of citizens’ interests. Also, there is no explanation or statement whether and how the concerns expressed during the dialogue will be taken into account. As an example of good practice in this respect ACER is handy. ACER is engaged in an institutionalised dialogue with energy infrastructure operators within the framework of the associations called European Networks of Transmission Systems Operators (see Art. 6 ACER Regulation).<sup>26</sup> Moreover, in certain cases ACER is obliged to consult a number of various stakeholders; it has to publish reports on the results of such consultations and explain what observations received during the consultations have been taken into account and how and give reasons where those observations have not been followed (see Art. 10 ACER Regulation).

Besides the uncertainty about consideration of stakeholders’ interests in BEREC activity, uncertainty about consideration of BEREC’s own opinions and recommendations by the EU institutions exists. For the Commission this issue has been slightly clarified by the requirement to take BEREC’s advice into “utmost account”, but there is no similarly clear

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<sup>25</sup> The results of the dialogue are not known so far. See the announcement launching this dialogue in April 2012 and the first press release of 21 May 2012 @: [http://www.erg.eu.int/doc/2012/strategy\\_dialogue.pdf](http://www.erg.eu.int/doc/2012/strategy_dialogue.pdf) and [http://www.erg.eu.int/doc/whatsnew/pr\\_21\\_05\\_2012\\_en.pdf](http://www.erg.eu.int/doc/whatsnew/pr_21_05_2012_en.pdf) (accessed 10.07.2012).

<sup>26</sup> The role and composition of European Networks of Transmission Systems Operators as well as their relations with ACER and the Commission are described in detail in Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, OJ L 211 of 14.8.2009, and Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, OJ L 211 of 14.8.2009.

provision for the Council, the European Parliament or NRAs. Yet, potentially BEREC's impact on EU legislative and political decisions may be a significant one as they possess less special knowledge and expertise on electronic communications issues than, for instance, the Commission.

The absence of provisions on accountability and control over BEREC's activity has already been deplored. Here it shall be underscored by adding the following details. BEREC has no Board of appeal, presumably because it cannot take binding decisions. Due to this last fact it is also impossible to bring a case to the European Court of Justice against a BEREC document under the review of legality procedure (Art. 263 TFEU – but think of “intended to produce legal effects”), because the conditions of direct and individual concern and of intention to produce legal effect will be extremely difficult to fulfil. However, as indicated above, BEREC's opinions, consultations and other documents may have decisive influence on the content of legislation and policies.

The question of personnel and conflict of interests cannot be outruled for the members of BoR and COCOM, especially in the case of smaller Member States. In conjunction with the possibility of overlapping competences between the two bodies the institutional setting and decision-making at the EU level appears ever less transparent.

## **Conclusion**

Coming back to the statements on the BEREC's role in regulatory network for electronic communications mentioned in the introduction to this paper, one can argue that all of them are more or less correct if expressed in a more nuanced way.

BEREC's legal status shall not deceive a careful observer. As explained in the introduction, BEREC is not an agency *de jure*. However, its substantive analysis and comparison to other EU regulatory agencies shows convincingly that it fulfils institutional and operational criteria of an EU regulatory agency *de facto* if considered together with the Office. Arguably, BEREC cannot be regarded separately from the Office as the latter provides life support to it in terms of budget and administration and which is closely linked through the staff arrangements.

Comparisons of BEREC to ERG are justified from the historical perspective where ERG represents BEREC's predecessor. Scholars, claiming that BEREC is essentially the same as ERG, overlook its much more advanced institutional structure, its extended competences which allow the new agency to be very active, especially on its own initiative, and its potentially greater impact on law and policy making and implementation.

The fields of BEREC's involvement in regulation differ considerably at the EU and at national levels. If at the EU level BEREC participates mainly in the process of policy- and rule-making, at national level it is involved in their implementation and regulatory activity. However, BEREC's role in both constellations ultimately remains the same: it provides an interface arrangement between different levels of governance and different jurisdictions opening up decision-making processes to external concerns. Thus, national decisions might become more sensitive to concerns of other jurisdictions (national and the European one), and European decisions might be developed taking into greater account specific national features.

Notwithstanding its exclusively advisory functions, BEREC is rather well equipped and involved in key law-making and regulatory procedures in order to establish itself as an expert consultancy for both law development and implementation and, despite lack of formal regulatory competences and thanks to innovative use of soft law instruments, to become a successful example of "regulation by information"<sup>27</sup>. BEREC's unique expertise is based on two aspects. On the one hand, it is a body uniting highly skilled professionals who shall perform their tasks independently from any public or private entity. On the other hand, BEREC comprises representatives of different Member States and allows for regular exchange and deliberation between them uploading the results of these processes to the European level.

Therefore, crucial or key role of BEREC in regulation of electronic communications is beyond doubts. However, whether BEREC with all its capacity will indeed contribute to fast creation of single market remains to be seen. *Pelkmans and Renda*<sup>28</sup> demonstrate convincingly that absence of a body which can "reach into national markets deep enough or begin to erode the "national" market approach in the first place" is one of the main reason why European electronic communications market remains a patchwork of national markets. BEREC could become a necessary force coordinating national approaches and bringing consistency in decentralised regulation. However, it also could develop into a significant obstacle for the Commission's consistency policy by becoming a new hub of European regulation that protects and lobbies national interests.

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<sup>27</sup> Majone, Giandomenico, „The New European Agencies. Regulation by Information“, in: *Journal of European Public Policy*, 4:2, pp. 262-275.

<sup>28</sup> Pelkmans, Jacques and Andrea Renda, *Single eComms market? No Such Thing...*, CEPS Policy Brief No. 231, January 2011, p. 6.