European Economic and Social Committee

TEN/613
Body of European Regulators of Electronic Communications

OPINION

European Economic and Social Committee

Proposal for a Regulation of the European Parliament and the Council establishing the Body of European Regulators for Electronic Communications
[COM(2016) 591 final - 2016/0286 (COD)]

Rapporteur working alone: Jorge PEGADO LIZ
Consultation: European Parliament, 24/10/2016
Council of the European Union, 25/10/2016

Legal basis: Article 114 of the Treaty on the Functioning of the European Union

Section responsible: Section for Transport, Energy, Infrastructure and the Information Society

Adopted in section: 11/01/2017
Adopted at plenary: 25/01/2017
Plenary session No: 522
Outcome of vote: (for/against/abstentions) 118/0/4
1. **Conclusions and recommendations**

1.1 In several of its opinions, the EESC has consistently advocated increasing the responsibilities, competences and powers of the Body of European Regulators for Electronic Communications (BEREC) so as to give it the necessary capacity to perform an effective regulatory role for the sector at European level.

1.2 Broadly speaking, it thus supports the intention behind the Commission's proposal.

1.3 However, it regrets that the Commission did not go for what it calls option 4, which it gives no reason for excluding, preferring to confine BEREC to the area - albeit reinforced - of cooperation or coordination.

1.4 As it has already stated, the EESC is of the firm opinion that only one option, that of turning BEREC into a genuine regulatory authority, will be able to take a forward-looking approach and provide proper regulation of new pan-EU or global information services, currently largely unregulated or subject to unclear regulatory frameworks (M2M, OTT and other areas of great importance to the Union, such as roaming or transnational markets), or binding pan-European assignment procedures for specific bands.

1.5 A point which specifically deserves careful consideration and review concerns the composition, organisation and functioning of the Board of Appeal, in order to ensure in all cases genuine independence and impartiality and an adequate appeal system, especially when it comes to decisions relating to cross-border disputes.

2. **Very brief gist of the proposal**

2.1 In its May 2015 Communication on A Digital Single Market Strategy for Europe\(^1\) (the "DSM Strategy"), the Commission pointed out that the changing market and technological environment make it necessary to strengthen the institutional framework by enhancing the role of the Body of European Regulators for Electronic Communications (BEREC). In its Resolution on Towards a Digital Single Market Act\(^2\), the European Parliament called on the Commission to integrate further the digital single market by ensuring that a more efficient institutional framework is in place. It can do this by strengthening the role, capacity and decision-making powers of BEREC in order to allow it to foster the consistent implementation of the regulatory framework for electronic communications, to enable efficient oversight of BEREC regarding the development of the single market and to help it to resolve cross-border disputes.

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\(^1\) OJ C 13, 15.1.2016, p. 176.
2.2 This proposal should be seen in conjunction with the Proposal for a Directive establishing the European Electronic Communications Code\(^3\), which entrusts BEREC with additional tasks that will help to ensure that the regulatory framework is implemented consistently and foster the development of the electronic communications market throughout the Union. Furthermore, BEREC will also contribute to the promotion of access and take-up of very high capacity data connectivity and of competition in the provision of electronic communications services and networks, and to the promotion of the interests of the citizens of the Union.

2.3 The main aim of the proposal is thus to strengthen the institutional role of BEREC and enhance its governance structure by simultaneously turning BEREC and the BEREC office into a fully-fledged agency with a broader mandate making it fit to carry out its future tasks. This will make for continuity with the work accomplished by BEREC and continue the pooling of expertise from NRAs, aligning its structure and governance, operation, programming and accountability with the Joint Statement of the European Parliament, the Council and the Commission on decentralised agencies of 19 July 2012 ("the Common Approach")\(^4\). It also incorporates into the BEREC Regulation the tasks assigned to it in the recently adopted Regulation (EU) 2015/2120, which sets out rules for ensuring open internet and abolishing roaming surcharges\(^5\). However, the revision of the Directive on privacy and electronic communications\(^6\), which the Commission promised for the end of 2016, is not included.

2.4 To achieve this objective the Commission has considered four options: 1) no change; 2) merely an enhanced advisory role and strengthened competences; 3) advisory role with certain pre-normative powers and better market review process and spectrum assignment of right of use for the radio spectrum - the preferred solution which the proposal sets out in detail; and 4) setting up an EU regulator, as a reinforced agency with the necessary resources to accommodate a transfer of implementing powers, including supervision and enforcement powers, which can act with binding powers in areas in which it is necessary to ensure the uniform implementation of EU rules - an option excluded by the Commission from the outset.

2.5 The following points set out the legal aspects of the option selected, which are discussed below.

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\(^3\) COM(2016) 590 final, with regard to which the EESC issued opinion TEN/612 European Electronic Communications Code (not yet published in the Official Journal).


3. **General comments**

3.1 In several of its opinions, the EESC has advocated increasing the responsibilities, competences and powers of BEREC so as to give it the necessary capacity to perform an effective regulatory role for the sector at European level. Broadly speaking, it thus supports the intention behind the Commission's proposal.

3.2 However, the EESC has focused on a solution which is closer to the Commission's option 4, insofar as it believes that mere cosmetic changes to BEREC's status are not enough to turn it into a genuine regulatory authority.

3.3 As it explicitly stated in opinion TEN/534: "In the EESC's view, the proposed changes regarding the status of BEREC, e.g. a full-time post of chairperson of the Board of Regulators, may prove insufficient in the light of competitiveness challenges and the need to create investment incentives, particularly regarding broadband communications and the NGN/NGA network" (Point 4.7.1).

3.4 Indeed, for BEREC to be able to perform tasks in an area where the lack of proper regulation is already well known, such as the new pan-EU or global information services, currently largely unregulated or subject to unclear regulatory frameworks (M2M, OTT and other areas of great importance to the Union, such as roaming or transnational markets), or binding pan-European assignment procedures for specific bands, as well as to discharge the new responsibilities conferred upon it, not only by this proposal but to an even greater extent by the proposal for a European Electronic Communications Code, it does not seem acceptable to confine BEREC's level of intervention to the area - albeit reinforced - of cooperation or coordination.

3.5 What this proposal certainly fails to provide is a forward-looking approach, in the sense of greater integration of the single digital market, in that it continues to allow regulatory fragmentation by NRAs.

3.6 This may explain the discouraging results of the evaluation of BEREC reported in the proposal in terms of relevance, effectiveness, efficiency and the added value of the approach on which it insists despite everything.

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7 For example:

- EESC Opinion on the proposal amending Regulation (EU) No 531/2012 (COM(2016) 399 final), (point 4.7), **OJ C 34, 2.2.2017, p. 162**;
- EESC Opinion on the Commission’s proposals on new measures on the EU single market for telecoms (COM(2013) 627 final and COM(2013) 634 final), **OJ C 177, 11.6.2014, p. 64** (point 4.7.1);
- EESC Opinion on the Commission Communication on Promoting the shared use of radio spectrum resources in the internal market (COM(2012) 478 final), **OJ C 133, 9.5.2013, p. 22** (point 4.10);
- EESC Opinion on an inclusive digital single market, **OJ C 161/8, 6.6.2013, p. 8** (point 3.1.1.1);
- EESC Opinion on the Commission Communication – The open internet and net neutrality in Europe (COM(2011) 222 final), **OJ C 24, 28.1.2012, p. 139** (point 2.4.1);
4. **Specific comments**

4.1 In general, in terms of defining competences, organisation and operation, the text of the regulation follows the common approach for agencies of the same type defined in the Joint Statement of the European Parliament, the Council and the Commission on decentralised agencies and requires no particular comment.

4.2 However, some comment is called for on the Board of Appeal with regard to the guarantees of "the impartiality and independence of its members ... on the basis of transparent and objectively verifiable criteria to be defined by agencies"; in particular, where "recruitment of Board of Appeal's members" is "from among the staff of the Agency and/or the Agency’s Management Board", this "should not put into question the above-mentioned principles of impartiality and independence" (point 21 of the Joint Statement).

4.3 Compared with the arrangements in other, identical bodies such as the EUIPO\(^8\), the Community Plant Variety Office\(^9\), the European Aviation Safety Agency\(^10\) and the European Chemicals Agency\(^11\), to name but a few, the EESC is surprised at the sketchy nature of the provisions of Articles 11 to 14 of the proposal, which define the legal framework for the Board of Appeal.

4.4 The EESC notes that effectively all the regulations on the rules of organisation and procedure of the boards of appeal of the above-mentioned agencies set out in detail the procedures applied in these bodies and state that decisions issued are subject to actions for annulment before the Court of the European Union, whose judgments are then subject to appeal to the Court of Justice on points of law.

4.5 It transpires that, although in most cases its remit is purely advisory, there are cases where, taking the provisions of the proposal for a directive and the provisions of the present proposal together, BEREC ends up with decision-making power with legal implications for third parties; this will be the case of certain decisions listed in Article 2(1)(b) to (d) on:

- identification of transnational markets;
- contract summary templates;
- the economic model intended to assist the Commission in determining the maximum termination rates in the Union;
- opinions on the resolution of cross-border disputes;
- draft national measures on market regulatory remedies;
- draft national measures on the procedures for radio spectrum peer review;
- draft decisions and recommendations on harmonisation.

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4.6 A good example is the case of cross-border disputes, where "[a]ny party may refer the dispute to the national regulatory authority or authorities concerned", which must then "notify the dispute to BEREC in order to bring about a consistent resolution of the dispute, in accordance with the objectives set out in Article 3." In this case, "BEREC shall issue an opinion indicating to the national regulatory authority or authorities concerned to take specific action in order to solve the dispute or to refrain from action, in the shortest possible time frame and in any case within four months, except in exceptional circumstances".

4.7 In a situation such as this, it is difficult to see any appeal against the decision to an appeal body of the kind provided for in the proposal as providing guarantees of independence and impartiality.

4.8 Irrespective of the stipulation that it is still possible to appeal to the court, the procedure at administrative level does not appear to include appeal to a genuinely independent body.

4.9 The EESC hopes that this matter will be duly reconsidered when the final version of the proposal is drawn up.

Brussels, 25 January 2017

Georges DASSIS
The President of the European Economic and Social Committee