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The European Electronic Communications Code and the Body of European Regulators for Electronic Communication (BEREC)

Impact Assessment (SWD (2016) 303 final, SWD (2016) 304 (summary)) of a Commission proposal for a directive of the European Parliament and of the Council establishing the European Electronic Communications Code (recast) (COM (2016) 590) and a regulation of the European Parliament and of the Council establishing the Body of European Regulators for Electronic Communication (COM (2016) 591)

Background

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's [impact assessment](#) (IA) accompanying the above proposals, which were submitted on 14 September 2016 and referred to Parliament's Committee on Industry, Research and Energy. The proposals are part of the wider [regulatory framework](#) in electronic communications and have been developed on the basis of the Commission's related evaluation.¹ The evaluation concluded that the current rules have considerably improved competition in the electronic communications sector, increased the comprehensiveness of consumer protection, and brought national regulation practices in this area in line with the best models across the EU. However, the Commission argues, improvement is still necessary, since regulatory inconsistencies remain an issue for the cross-border provision of electronic communication services (IA, p. 12). Furthermore, the Commission also argues that competition has been delivered more at service than at network level, that investments in very high capacity networks have been uneven across the Member States, and that progress in spectrum management and achieving the single market has been below expectations (IA, pp. 12-13). In addition, even though the framework has furthered protection of end-users and availability of universal services, progress in terms of consumer satisfaction is relatively slow.

In this respect, the proposal to establish the European Electronic Communications Code would amend the four existing directives covered by the evaluation, namely the Framework Directive, the Access Directive, the Authorisation Directive and the Universal Services Directive, and integrate them into a single legal text by means of horizontal recasting (recast). The proposal concerning BEREC replaces the existing BEREC Regulation (EC) No 1211/2009 and would transform BEREC into a fully-fledged EU agency, as well as make changes to its governance structure.²

¹ The [evaluation](#) of the regulatory framework for electronic communications covers the following instruments: the Framework Directive 2002/21/EC as amended, the Authorisation Directive 2002/20/EC as amended, the Universal Service Directive 2002/22/EC as amended, the Access Directive 2002/19/EC as amended, the BEREC Regulation 1211/2009, the Radio Spectrum Decision 676/2002/EC, the Radio Spectrum Policy Group Decision 2002/622/EC, Decision 243/2012/EU establishing a multiannual radio spectrum policy programme (RSPP).

² For analysis of the proposals, see Szczepański Marcin, [The New European electronic communications code](#), EPRS Briefing, November 2016 and Karakas Cemal, [Body of European Regulators for Electronic Communications \(BEREC\)](#), EPRS Briefing, November 2016.

Problem definition

The IA identifies three general problems, resulting from both regulatory and market failure (considered to be the main drivers): (i) obstacles to unrestricted connectivity with Very High Capacity (VHC) networks; (ii) the poor capacity of the current framework to adapt to market and technological changes in the electronic communications sector; (iii) regulatory redundancy, inefficiencies, and lack of coherence of regulation in the single market (IA, pp. 14-15). The IA report includes a problem tree where eight specific problems (for example, low coverage and take-up, sub-optimal investment, gaps in consumer protection, unnecessary administrative burden), are identified and presented (IA, p. 16). The report provides ample evidence for the problems and briefly discusses who is affected (for example, citizens and small business in rural areas or with areas without competition) (IA, pp. 43-44). However, the problem section appears excessively long (40 pages) and repetitive in places.

Objectives of the legislative proposal

The IA defines the *general* objective as being to ensure that the pro-competitive framework provides ubiquitous access to connectivity in support of a digital single market (DSM) (IA, p. 57). Furthermore, three *specific* objectives are identified: a) to contribute to ubiquitous VHC connectivity; b) to strengthen competition and user choice in the DSM; c) to simplify regulatory intervention and DSM coherence. The IA links the objectives to the corresponding policy areas (IA, p. 57).

The formulation of the objectives nevertheless lacks clarity and can seem somewhat confusing. For example, the IA includes three objectives first established in Article 8 of the Framework Directive³ that remain valid for this proposal (IA, p. 57). The IA does not mention these objectives when discussing the options, however (IA, pp. 60-63). As for *operational* objectives, they are included in the IA but are not option-specific as the Commission's own better regulation guidelines require.

Range of options considered

Essentially, the IA is composed of five problem-specific IAs for the five policy areas: i) access, ii) spectrum, iii) universal services, iv) services and end-user protection, and v) institutional governance. These policy areas correspond to the four directives covered under the recasting proposal (mentioned above) and the BEREC proposal. The preferred options for the five policy areas are analysed in terms of their impact and match with the objectives. Discarded options are also mentioned for each issue-specific IA and explanations for discarding the options are presented.⁴ The following table presents all the options considered.

Establishing the European Electronic Communications Code (recast)

1. Policy Area: Access

Policy options (*preferred option marked in italics*):

- **Option 1 - Baseline:** No change.
- **Option 2 - Continuity and simplification:** The introduction of measures to foster continuity and simplification based on the current framework through minimal changes, such as longer market review periods or focus on retail market competition.
- ***Option 3 - NGA + (Next Generation Access) focusing regulation on high-quality connectivity (preferred option):*** Extending the reach of commercially viable areas for VHC connectivity by obliging National Regulatory Agencies (NRA) to conduct a geographical survey of current network deployments,

³ See [Framework Directive 2002/21/EC](#).

⁴ A more detailed account of the reasons can be found in Annex III of the IA and in the [support studies](#) for the impact assessment of the telecoms review.

reinforcing/adjusting the existing Significant Market Power rules, allowing longer contracts for provision of infrastructure,⁵ definition of criteria for standardised EU-wide access product.

- **Option 4 - Significant reduction of sector-specific regulation:** A significant reduction of sector-specific regulation by transitioning from ex-ante telecom regulation to ex-post competition law control and limited market supervision by the NRAs.

2. Policy Area: Spectrum

- **Option 1 - Baseline:** No change.
- **Option 2 - Non-binding rules for enhancing consistency of spectrum management in the EU:** Introducing spectrum-related objectives and principles accompanied by a separate non-binding Commission recommendation, a voluntary pan-EU or multi countries assignment procedure, provisions on deployment of small cells, and a coordination mechanism.
- **Option 3 - Binding and enforceable rules for enhancing coordination of spectrum management in the EU with greater focus on adapting spectrum rules to the future 5G challenges (preferred option):** Building on the provisions under Option 2 by making it binding and enforceable.
- **Option 4 - EU harmonisation of spectrum management and establishment of an EU regulator:** Full EU harmonisation of the spectrum management and establishment of an EU regulator.

3. Policy Area: Universal Service

- **Option 1 - Baseline:** No change.
- **Option 2 - Minimum adaption to trends:** The provision of Publicly Access Telephony Services (PATS) and functional internet access is mandatory, Member States can add further services if they wish to but have to fund them from the public budget.
- **Option 3 - Incremental adaptation to trends with the focus on broadband affordability (preferred option):** The Universal Service Obligation at the EU level would be limited to the affordability of voice communication and basic broadband.
- **Option 4 - Significant adaptation to trends and connectivity objectives:** The Universal Service Obligation would be considerably altered to include the affordability and availability of broadband access, but to exclude the affordability and availability of PATS.

4. Policy Area: Services and End-User Protection (*Services, Numbering, Must Carry Obligations*)⁶

Policy options services:

- **Option 1 - Baseline:** No change.
- **Option 2 - Streamlining of current provisions and addressing certain new challenges without modifying the scope of the regulatory framework:** Current Electronic Communication Services (ECS) sector-specific provisions would be streamlined with regard to horizontal legislation (e.g. the Consumer Rights Directive) by keeping necessary provisions, repealing redundant provisions and adapting the regulatory framework to respond to new challenges, thereby not expanding the current regulatory framework.
- **Option 3 - Internet Access Service (IAS) only:** Limiting the application of sector-specific legislation to the IAS and exempting any other communications service that is not data-based from sector specific rules.
- **Option 4 - IAS and regulatory obligations for electronic communications services mainly linked to the use of numbering resources (preferred option):** Including the provision of Option 3 but with the addition of sector-specific regulation for number-based, functionally substitutable services used for inter-personal communications;⁷ over-the-top player (OTT) services would be excluded on the grounds of proportionality.

⁵ The longer contract duration would only apply to 'the payment by instalments of the higher connection costs required to connect remote households' while 'the maximum contract duration for provision of the services would remain unchanged' (IA, p. 72).

⁶ Must Carry Obligations aim at ensuring 'privileges to general interest channels, with the view of fostering media pluralism and freedom, as well as safeguarding fair competition between channel providers.' (IA, p. 49).

⁷ The services enable the direct interactive communication between two, or several, determined numbers of natural and some legal persons (Machine-to-Machine (M2M) communication excluded), regardless of which technical means are used to facilitate the communication (IA, p. 123).

- **Option 5 - Functional approach to communications services:** All interpersonal communication services would be subject to sector-specific provisions, regardless of the technology used to facilitate communication.

Policy options *must carry obligations*:

- **Option 1 - Baseline:** No change.
- **Option 2 - Phase-out must carry obligations:** Phase-out by 2020-2025, with exceptions for Member States that have not reached sufficient coverage with broadband to support ubiquitous online TV distribution.
- **Option 3 Extend must carry obligations:** Include platform that provides a significant share of TV or radio channels regardless of its form of transmission (directly via electronic communication networks or via specialised services provided over electronic communication networks).

Policy options *numbering*:

- **Option 1 - Baseline:** No change.
- **Option 2 - No change in the EU framework on numbering with repeal of redundant rules:** The current numbering rules and frameworks applicable for the communication sector would remain the same; rules redundant since the elimination of the European Telephone Numbering Space (ETNS) would be abolished.
- **Option 3 - Adapting the EU framework on numbering to address the competition issue on the M2M (Machine-to-Machine communication) market (preferred option):** Allow NRAs to assign mobile numbers (E.212) to non-Mobile Network Operators (MNO) and the option for NRAs to establish a range of non-geographical numbers for non-interpersonal communications services (e.g. for M2M or IoT providers) in the EU.

Establishing the Body of European Regulators for Electronic Communications (BEREC)

5. Policy Area: Institutional Governance

- **Option 1 - Baseline:** no change.
- **Option 2 - Agency with enhanced advisory role and strengthen competences:** BEREC/Radio Spectrum Policy Group (RSPG)⁸ would serve in an enhanced advisory role to independent NRAs; NRAs would be granted significant competences by defining a minimum set of competences in order to facilitate a more efficient implementation of BEREC's advice through NRAs.
- **Option 3 - Agency with certain normative powers for BEREC and improved process for market review and spectrum assignment (preferred option):** Option 2 + BEREC would receive certain legally binding powers towards the Member States (e.g. on access, numbering, services, and spectrum) and additional advisory duties; the creation of a common EU approach to governing spectrum consisting of BEREC, the RSPG, NRAs and the Commission.
- **Option 4 - Agency as an EU regulator with certain implementation/execution powers:** The transfer of implementing powers to a newly established EU regulatory agency that is equipped with supervision and enforcement powers.

The various options regarding policy areas 1 to 4 appear to lack consistency; not all baseline scenarios are discussed to the same extent, and it is difficult to identify the differences between the baseline scenario and the policy options. Additionally, all options given for the reform of BEREC, apart from the baseline, would establish BEREC as an agency with differing levels of responsibility. Furthermore, these three policy options represent sub-options of a separate one, according to which BEREC would become a fully-fledged agency, rather than three distinct policy options.

⁸ The RSPG represents an advisory body to the European Commission on radio spectrum policy, established under Commission decision [2002/622/EC](#).

Scope of the Impact Assessment

The assessment focuses on economic and social impacts. The report considers employment as the main social impact, although others, such as social cohesion or effects on rural migration, are also mentioned (IA, p. 75). When comparing the policy options under 'services and end-user protection' (IA, pp. 128-136), particular attention is paid to social impacts relating to consumer rights and end-user protection due to their relevance for this specific policy area.

Environmental impacts are examined together with social impacts, but some policy options do not feature any environmental analysis. Where the report mentions environmental impact, it refers to energy savings and subsequent reduction in greenhouse gas emissions. However, with some exceptions, the evidence appears rather vague.⁹

The IA does not explicitly cover territorial impacts, but distributional impacts are analysed in terms of the differing financial burden of VHC capacity, or the impacts on jobs and growth, among Member States. Poland, for example, would face €1.3 billion in additional costs if universal services were to be extended to the affordability and availability of broadband access (IA, p. 117). The assessment of the preferred options identifies three categories of countries in terms of development. It finds that 'given their current economic structure, less digitally and economically advanced economies are now estimated to benefit to a smaller extent from the expected improvements in the e-communication services' (IA, p. 182). The IA does not, however, follow up on these acknowledgments of distributional impacts.

Subsidiarity / proportionality

The legal basis for the proposals is Article 114 of the Treaty on the Functioning of the European Union (TFEU).

The IA includes a specific subsidiarity check for policy areas that would increase the harmonisation of regulation among Member States. This is the case for some parts of the proposed regulations on access, spectrum, services and institutional governance. It concludes that there is no violation of the subsidiarity principle regarding the aforementioned policy areas (pp. 52-54). This conclusion is repeated in the explanatory memorandum of each proposal.

The IA provides a comprehensive check on the subsidiarity and proportionality of the policy options by drawing direct comparisons between the options for each of the policy areas.

The [Swedish Riksdag](#) and the [French Senate](#) have each issued a reasoned opinion regarding possible infringements of the subsidiarity principle. The Swedish Riksdag voices concern about the proposed peer review for the increased harmonisation of spectrum management and subsequent decrease of national influence on spectrum management. The French Senate states that the Commission's increased influence on BEREC, due to the proposed changes to the composition of the board, the appointment process for BEREC's director, and the proposed period in office of the director, would encroach on the subsidiarity principle.

Budgetary or public finance implications

The report informs about the budgetary and financial implications for EU and Member State finances. Although both proposals (for the directive and for the regulation) are jointly assessed in one IA, it is important to distinguish between them as far as budgetary implications are concerned. According to the analysis, actions proposed under two of the policy areas, namely: universal services (COM (2016) 590) and the new institutional governance of electronic communication (COM (2016) 591), could potentially lead to significant changes in

⁹ The preferred options for the policy areas of 'access' (IA, p. 97) and 'universal service' (IA, p. 117) are supported by some quantitative evidence, provided by external expertise, on the positive environmental impacts.

financial or budgetary contributions and responsibilities. The preferred policy options for universal service provision in the Member States could alter the amount and distribution of costs for stakeholders, as they include the re-organisation of funding obligations between the Member States and the electronic communications sector (IA, pp. 118-119). Apart from mentioning the possible budgetary impacts in the area of universal services, the IA lacks detail on the distribution of the burden between public and other sources of funding. According to the explanatory memorandum of the recast proposal, there are no budgetary implications for the EU budget.¹⁰

According to the IA, budgetary implications for both the EU and the Member States are most substantial in association with elevating BEREC to the status of an EU agency. The IA provides a comprehensive overview of the changes in costs as well as the detailed distribution of the financial burden for the policy options under the new framework (IA, Annex XII). As stated in the explanatory memorandum of the BEREC proposal, the financial contributions via the EU's budget would amount to €14.135 million for the period 2019-2020. Everything after that period would depend on the staffing needs of BEREC, which will be indicated under the post-2020 Multiannual Financial Framework.¹¹

SME test / Competitiveness

The report provides a comprehensive analysis of the impacts of the policy options in all five policy areas on small and medium-sized enterprises (SMEs). Each comparison of options is accompanied by a table indicating the impact on SMEs in the respective policy area. The IA provides a more extensive discussion of the impact of the preferred policy options on SMEs in Annex II. According to the IA, SMEs will not be adversely affected by the proposals; rather, they will generally benefit from better access to electronic communication infrastructure (especially in rural areas), and harmonisation of legislation across Member States (IA, Annex IV, pp. 247-251).

Simplification and other regulatory implications

The proposals are both part of the REFIT initiative and 'the legal obligation to periodically review' the current directives (IA, p. 4). Opportunities for simplification are identified and listed according to policy area. They mainly involve the extension of market review periods and the replacement of sector-specific regulation by harmonised, horizontal legislation across Member States (IA, pp. 34-39).

The attention to simplification and regulatory implications is also reflected in the comparison of the options for each policy area. The policy options are discussed in the light of their coherence with other regulations and the objectives of the regulatory framework for electronic communications, as well as their coherence with general regulations and objectives of the EU. The explanatory memorandum of each proposal provides an overview of areas where simplification will be achieved.¹²

Quality of data, research and analysis

The impact assessment is based on extensive research conducted by outside experts. Most of the policy options, their comparison and evaluation, are based on the results of the SMART 2015/0005 study,¹³ which includes a macro-economic framework, as well as econometric estimates. The IA also points out limitations of the data or methodology applied (p. 179), which are most notable in the macro-economic modelling (Annex XIII). The main body of the IA, however, provides relatively little scientific evidence when assessing the impacts of the options, although the support studies in particular do underpin the arguments with more detailed data and analysis.

The external studies provide a very extensive insight and considerable expertise. Overall, the assessments made in the IA seem reasonable, and are based on sound research. The IA acknowledges the external expertise to a

¹⁰ COM (2016) 590, p. 14.

¹¹ COM (2016) 591, p. 13.

¹² COM (2016) 590, p. 13; COM (2016) 591, p. 11.

¹³ External [support study](#) by WIK-Consult, ECORYS and VVA, carried out for the European Commission.

high degree, by relying on the results, but in some cases neglects to provide a clear reference to the sources concerned.

Stakeholder consultation

A twelve-week, online, public stakeholder consultation was held from 11 September 2015. Furthermore, numerous workshops were held, including with specific groups of stakeholders, as well as a public hearing (IA, Annex II, pp. 202-203). In addition to providing a summary of the stakeholder consultation in the IA (Annex II), a separate 'synopsis report' of the public consultation was also published. The consultation drew 244 replies online from stakeholders in all Member States and from outside the Union, including businesses, consumer/user associations, electronic communications network or service providers, government authorities, internet content providers, national regulatory agencies, and private individuals.

Stakeholder views are presented throughout the IA, in particular in the discussion and comparison of the impacts of policy options. However, the online consultation only appears to have consulted stakeholders on the efficiency and effectiveness of the current Framework Directive, and not on the specific content of the proposed policy options. This approach would presumably have resulted in the authors of the IA and related studies basing themselves on assumptions about the impact of the policy options on the stakeholders, rather than on the stakeholders' own evaluation of the likely impact. The online consultation therefore appears to serve the purpose of reviewing the status quo, rather than the proposed future policies. This impression is supported by the explanatory memorandum of the recast proposal, which describes the public consultation process mainly as a review process of the current framework.¹⁴ At the same time, this form of consultation is certainly able to foster a very good understanding of the problems faced by stakeholders under the current Framework Directive.

When drawing on the results of the stakeholder consultation, the IA uses rather unspecific terms, such as 'many', 'most' or 'some', instead of providing a more precise analysis of responses, such as the relative share of stakeholders agreeing or disagreeing.

Monitoring and evaluation

While the IA does identify monitoring and evaluation instruments and processes, these could be more precise. Firstly, most of the monitoring indicators are not time-specific. Secondly, the monitoring of the governance structure appears too general. The IA only provides vague suggestions on monitoring duties; it does not identify the institutional actors responsible for the oversight, nor does it establish clear responsibilities between the EU institutions (IA, p. 197). Given the central character attributed to the institutional governance aspect (IA, p. 151), and its role as a distinct part of the framework, it is somewhat surprising that the IA devotes so little attention to the discussion of its monitoring and evaluation.

Most of the indicators will be provided through reporting tools already established for the electronic communications sector, such as the European Digital Progress Report (EDPR), Eurostat, or the Eurobarometer annual household survey (IA, pp. 189-190). The data will be analysed by the Commission's in-house telecom experts, who will receive additional input from Member State experts. Whenever possible, the indicators will be compared against a country representing the most advanced development of the benchmark in order to evaluate progress across the EU (IA, pp. 191-194).

Commission Regulatory Scrutiny Board

The Regulatory Scrutiny Board (RSB) issued a negative [opinion](#) on the IA report on 7 July 2016, including several points of substantive and specific criticism. On 29 July 2016, the RSB adopted a second, positive [opinion](#) on a revised version of the IA, still including recommendations for further improvement. Contrary to the

¹⁴ COM (2016) 590, p. 8.

requirements of the Commission's better regulation guidelines, the IA report does not appear to indicate where improvements have been made in response to the RSB's opinions.

Some important criticism made by the RSB in its second opinion remains valid for the final version of the IA. The RSB identified two main areas as being unsatisfactory. Firstly, it considered that the potential for regulatory simplification and reduction under the preferred options needed to be elaborated upon; secondly, it felt that the sources and distribution of funding for necessary investments between stakeholders was insufficiently discussed. The RSB also maintained its view that the IA offered somewhat limited use as an 'accessible information base for policy makers', due to the complex language and inadequate explanation of terms and concepts referred to in the IA.

Coherence between the Commission's legislative proposal and IA

According to the explanatory memorandum the legislative proposals appear to follow the recommendations of the IA. The preferred options constitute the basis for the proposals.

Conclusions

Overall, the IA presents a comprehensive and well-researched explanation of the evidence base of the legislative proposals. However, the nature of the proposals (one of them being a recast of four existing directives) has posed an obvious challenge in terms of keeping the report concise and readable. The IA clearly exceeds the length recommended in the better regulation guidelines. The report presents stakeholder views well, although the consultation itself focused more on the review process in general than on the specific options for future policy. Finally, the overly general presentation of monitoring instruments represents a significant shortcoming of the report, especially given the importance of effective monitoring mechanisms in assessing the implementation of legislation.

This note, prepared by the Ex-Ante Impact Assessment Unit for the European Parliament's Committee on Industry, Research and Energy (ITRE), analyses whether the principal criteria laid down in the Commission's own impact assessment guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

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