



A New Authority Emerging out of Harmonization Needs: Is BEREC the right solution for European eCommunications Market?

Turgut Ayhan BEYDOĞAN*

Abstract

Since the foundation of European Community, creating of an effective eCommunications single market has been a matter of highest political priority. As a result of certain technological development and enhanced competition as well as keeping with the principle of 'better regulation needs, the EU Commission has reviewed 2002 Regulatory Framework which preliminarily aimed at shedding light on a number of important problems that remain to be solved, in particular the lack of consistency in the application of EU rules and the regulatory fragmentation of the internal market. However, due to several reasons, the Union has not become so successful in constituting such a harmonized eCommunications market mainly stemming from different applications applied in different member states. To overcome these obstacles, the Commission is therefore, at the end decided to establish a new Body of European Regulators for Electronic Communications (BEREC) which has the responsibility to work in close cooperation with NRAs and the Commission. It is understood that the Authority has an advisory role vis-à-vis the Commission as regards market regulation issues and could issue non-binding guidelines, recommendations and binding decisions in specific circumstances to promote and disseminate good practices among the NRAs. However, there are also some hesitations about the power of BEREC and its capability with regard to ensure consistency of NRAs' approaches and/or implementations. In this paper, it is discussed as to whether the creation of the BEREC is the right solution for the intended results of a harmonized eCommunications market and elimination of inconsistency in the application of EU rules.

Keywords: BEREC, eCommunications, Harmonization, EU Commission, 2002 Regulatory Framework

* PhD, He is the Member of Board in the Information and Communications Technologies Authority of Republic of Turkey since 2004.

INTRODUCTION

The EU telecommunications sector, which is seen as an essential public service, has historically been dominated by a strong public service monopoly tradition.¹ This structure has begun to change in the early 1980s, with privatisation and the introduction of limited competition in certain Member States. From the historical perspective, it can be said that the first stage of common telecommunications policy of the Community has commenced in the early 1980s aimed at moving the sector forward to establish common mainstreams of development. The second stage started in 1987² and climaxed in the liberalisation of all telecommunications services and networks by the end of 1997. During this term, the main direction of the common telecommunications policy of EC has been set by the Commission's White Paper on 'Growth, Competitiveness and Employment'³ which has placed the Union's telecommunications policy at the core of the EU's general policies.

Later on, the liberalisation directives were complemented by a series of harmonisation directives adopted by the European Council and Parliament (EP). The rationale behind these measures was to put in place detailed harmonised regulation to ensure that the aims and principles set out in the Article 86 and Directives were to be adopted across the EU.⁴ The 1990 Framework Directive established the principle of Open Network Provision (ONP).⁵ It set a timetable for legislative action identifying the need for a series of harmonisation directives and recommendations. Second Part of the Commission's Green Paper on liberalisation of infrastructure also stressed the need to adapt the existing ONP Directives to a competitive environment and to develop a further specific Directive on Interconnection. Together with the Licensing Directive, these measures constituted the so-called "1998 package" of legislation.⁶ The 1998 Package was primarily designed to implement the transition from monopoly to competition and was therefore focused on the creation of a competitive market and the rights of new entrants. However, rapid technological development, convergence and the new challenges of the liberalised markets forced to make a new and coherent framework covering the whole range of electronic communications. As a result of consultations and negotiations, a new regulatory

¹ Ian S. Forrester and Sandra Keegan, 'The Tension between Regulation and Competitive Market Forces in Europe', *Tulane European and Civil Law Forum*, Vol. 21, No. 125, 2006, p.1.

² In 1987, the Commission issued the Green Paper, whereby it proposed to initiate and undertake a process of liberalisation in telecommunications sector. It allowed for only public voice telephony to be left under monopoly.

³ 'Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21st Century' - *White Paper* COM(93) 700, December 1993.

⁴ Herbert Burkert, 'The Post-Deregulatory Landscape in International Telecommunications Law: A Unique European Union Approach?' *Brooklyn Journal of International Law*, Issue. XXVII, No: 3, 2002, p. 3.

⁵ The basic principles of ONP are the opening and harmonization of conditions of access to the network infrastructure, for new service providers or for users-a goal complementary to market-opening and fundamental to the development of the services market.

⁶ J. H. Erik Andriessen and Roe A. Robert (ed.), *Telematics and Work*, (Sussex: Hove Publications, 1994), p. 46.

framework has been agreed and enacted in 2002 so as to be applied from 25 July 2003 onwards.

Since its entry into force, the new regulatory regime has aimed to reduce the lack of consistency and legal uncertainty in field of regulation. In 2002 Package, to replace the concept of telecommunications, the notion of electronic communications (eCommunications)⁷ was introduced to put forth a wider perspective by covering all the networks, including for the purpose of IT and broadcasting while content services remained outside of the scope. Under these circumstances the Commission,⁸ taking an open, forward-looking approach, has decided to examine the 2002 Framework's principles and its implementation thoroughly with the help of expert studies.⁹

During the review process it has been understood that the Union has not become so successful in constituting a harmonized communications market mainly stemming from different applications in different member states. To overcome these obstacles, the Commission proposed to establish a new independent Authority (EECMA-European Electronic Communications Markets Authority) which would work in close cooperation with National Regulatory Authorities (NRAs) and the Commission. The new entity would provide advices to the Commission, particularly in preparing regulatory decisions under the so-called 'Article 7' procedure, and to further the internal market by improving consistency in the application of EU rules.

Although this kind of initiatives, creating a European regulatory authority for communications market, has been voiced several times by the Commission in the past years. However, its creation was quite firmly resisted by Member States and there emerged no significant industry support for a single regulator. The lack of support is in relation to fact that the member states feared against the possible loss of influence over the national markets on their parts, and NRAs feared for losing their powers or their own existence. Not only policy makers but also the operators fears regarding increased regulation affected the process. Hence, Commission sought to find a new solution which on the one hand would enable consistency in the application of EU rules and on the other hand attract a fully support from Member States. The name of the new solution was to set up the Body of European Regulators for Electronic Communications (BEREC).

⁷ The eCommunications sector accounted for around 44,5% of the whole ICT sector of EU, which is valued at 649 billion in 2006, according to the Commission's 12th Implementation Report.

⁸ The Commission has adopted a Communication on the Review of the EU Regulatory Framework for electronic communications networks and services (See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the Review of the EU Regulatory Framework for Electronic Communications Networks and Services, Brussels, 29.6.2006, COM(2006) 334 final, http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0334en01.pdf, (accessed: 16.09.2010).

⁹ http://ec.europa.eu/information_society/policy/ecommlibrary/ext_studies/index_en.htm#2006, (accessed: 16.09.2010).

REASONS FOR REVIEW

The main aim for review is to remove any bottlenecks that are hindering the provision of faster, innovative and competitive services. Although having not had any intention to change the fundamentals of the EU's telecom rules, the Commission paid attention in some areas to render them more effective, considering the evolution of markets and services. In June 2005, the Commission's "i2010 Initiative: European Information Society 2010",¹⁰ was adopted revealing a milestone in setting out the contribution of the Information and Communications Technology (ICT) sector to the EU's renewed Lisbon Strategy¹¹ to promote growth, competitiveness and employment. The i2010 Initiative was built on three main pillars involving a Single European Information Space offering affordable and secure high bandwidth communications, rich and diverse content and digital services; world class performance in research and innovation in ICT by closing the gap with Europe's diverse regions whereby an Information Society that is inclusive of high quality eCommunications services would be created.¹²

The framework of eCommunications falls under the Single European Information Space. The review of the framework therefore was intended to provide a significant opportunity to modernise and update the existing framework to support the i2010 policy and the renewed Lisbon Strategy. In addition, there were stakes via other specific objectives of the review including examining:

- the impact of the regulatory framework on investment and growth, by exploring alternative approaches to strengthen incentives for investment through competition;
- how to improve spectrum management in the EU, with an emphasis on introduction of greater flexibility of use;
- whether the current model of devolving responsibilities to NRAs, with Community procedures to ensure consistency of approach, are sufficient to deliver the i2010 objectives;
- how to reduce the administrative burden associated with the market review procedure;
- the adequacy of current provisions on consumer protection, in particular those concerning universal service; and

¹⁰ European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions 'i2010 – A European Information Society for Growth and Employment'* COM(2005) 229, Brussels, 1.6.2005, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0229:FIN:EN:PDF>, (Accessed: 16.09.2010).

¹¹ The Lisbon Strategy, also known as the Lisbon Agenda or Lisbon Process, is an action and development plan for the EU. It was set out by the European Council in Lisbon on March 2000.

¹² Impact Assessment (IA), COM(2006) 334 Final, SEC(2006) 817, Brussels, 28.06.2006, http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/public_consult/review/impactassessment_final.pdf, (accessed 16.09.2010), p. 8.

- how to improve network security.¹³

The last decades have witnessed rapid developments in every aspect of the telecommunications sector including digitalization; introduction of new products, especially internet based services, and convergence¹⁴ associated with the coming together of the information technology, broadcasting and telecommunications services.¹⁵ At this juncture, it is widely accepted that there is a need to assess the impact of convergence on the regulations dealing with telecommunications and broadcasting services. Where similar services are regulated differently on the basis of the platform on which they were transmitted, market inefficiency that may prevent development and artificially distort prices would occur. In other words, if a service is subject to more than one regulatory regime, then this may cause an extra regulatory burden to certain services.¹⁶

Nonetheless, when the directives are comprehensively analysed, it can be said that the current framework is based on regulation of markets, not regulation of technologies. These markets are defined and analysed in accordance with competition law principles. Where a given market is susceptible to ex ante regulation and a NRA finds one or more undertakings to have Significant Market Power (SMP) on that market, it must impose appropriate regulation. In other situations, namely in markets where no undertaking is found to have SMP regulation must not be imposed or must be withdrawn if have been imposed before.¹⁷ Taking into account the significant changes in EU communications markets led by rapid technological developments and convergence, all shareholders involving the Commission, NRAs and operators seriously affirmed that there must be, more or less, a need to review the framework so as to change or remove previous regulations.

On the other hand, although there were many claims that the current framework represents a bold and innovative response to the challenges of convergence¹⁸ by avoiding the technology-specific regulation and ensuring

¹³ *Ibid*, p. 8.

¹⁴ The word "convergence" is broadly used to denote the ongoing effects of digital technology in media and communications. In precise terms, "convergence" can be viewed as the coming together of one or more of the following three activities: 1- information technology (hardware and software used in conjunction with communications networks); 2- telecommunications and 3- broadcasting.

¹⁵ Martin E. Cave, Sumit K. Majumdar and Ingo Vogelsang (ed.), *Handbook of Telecommunications Economics, Volume 1*, (Amsterdam: NH Elsevier Science B.V., 2002), p. 3.

¹⁶ Niloufer Selvadurai, 'The Regulation of The Information Society in The European Union', *Computer and Telecommunications Law Review*, Vol. 10, No. 4, 2004, p. 4.

¹⁷ 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 ("Framework Directive"), *OJ* 24.4.2002, L 108/33, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:108:0033:0050:EN:PDF>, (Accessed: 16.09.2010), Article 16.

¹⁸ J. Scott Marcus, 'The Potential Relevance to the United States of the European Union's Newly Adopted Regulatory Framework for Telecommunications', *Journal on Telecommunications & High Technology Law*, Vol. 2, Issue 1, Fall 2003, http://www.jthtl.org/content/articles/V2i1/JTHTLv2i1_Marcus.PDF, (accessed: 16.09.2010), p. 3.

inter-platform competition, others argued that the framework was not adequately predictable when it comes to access regulation. Critics argued that the competition-based approach to access regulation means that the access rules applied by NRAs should depend on the degree of competition on the relevant market, and this would lead to uncertainty for operators trying to evaluate the regulatory risks several years in advance of any new product.¹⁹

Commission's evaluations over emerging markets can be given as another perspective against such a debate. According to the Commission, 'emerging markets' were deemed as the markets that are so new and changeable that it is impossible to determine whether or not the 'three criteria'²⁰ test has been met. Only markets that satisfy the three criteria could be considered for ex-ante economic regulation. Despite the fact that many undertakings, particularly new entrants, strictly criticise this consideration, the Commission claimed that framework was flexible enough to handle new and changeable markets, allowing the regulators to take account of the need for risky investments to generate an adequate return on capital when imposing pro-competitive access obligations. Moreover, the relevant Recommendation²¹ identified 18 markets (7 retail and 11 wholesale markets) on which ex-ante regulation was required in presence of significant market power by one or several operators. As a result of major steps taken by NRAs and the Commissions in way of establishing a pro-competitive environment, the Commission considered that certain ex-ante regulations should be removed for a number of retail or wholesale markets since they are already ensuring sufficient competition.

Finally, in current and upcoming years, the main technological trends are expected to change from traditional ways to the Next Generation Network (NGN)²² or IP-based networks in parallel to growing use of wireless communications as well as deployment of fibre in the local access networks. Boundaries between eCommunications products and services will continue to blur; new forms of mobile and portable devices will appear with interactive and broadcasting features. Privacy and security will continue to be a concern for users. These trends unavoidably do have impacts on existing network architectures, services and consumer devices and market structures. In other words, today's market players face new competitors and seek new business models in order to adapt these rapid changes occurring in the eCommunications market. Therefore, the former framework was found by the

¹⁹ European Commission, *Staff Working Document*, COM(2006) 334 Final, SEC(2006) 816, Brussels, 28.06.2006, p. 10. http://ec.europa.eu/information_society/policy/ecom/doc/info_centre/public_consult/review/staffworkingdocument_final.pdf, (accessed: 16.09.2010).

²⁰ The so-called three criteria are as follows: 1- the presence of high and non-transitory barriers to entry; 2- no tendency towards effective competition (in the absence of regulation); and 3- the insufficiency of competition law to address the market failure.

²¹ European Commission, *Recommendation of 11/02/2003 on Relevant Product and Service Markets within the eCommunications Sector Susceptible to ex ante Regulation*, http://ec.europa.eu/information_society/topics/telecoms/regulatory/maindocs/documents/recomen.pdf, (accessed 16.09.2010).

²² The general idea behind NGN is that one network transports all information and services (voice, data, and all sorts of media such as video) by encapsulating these into packets, like it is on the Internet.

Commission to unavoidably encounter a different market structure in forthcoming years, by concluding that it would be beneficiary to overview some existing regulations.

THE REVIEW

The review of the framework has taken up most of the year 2006, while preliminary work started at the end of November 2005 with a Call for Input enabling stakeholders to give their views on possible changes to the five directives,²³ and to the Recommendation²⁴ on relevant markets. Until the end of July 2007, as a result of an extensive public consultation²⁵ and contribution of all stakeholders, the framework for eCommunications networks and services' review process which officially started with the Communication was finalized. The Commission has also taken advices of European Regulators Group²⁶ (ERG) into consideration.²⁷ In the review process, criticisms concentrated on extended Commission's powers, i.e. broadened veto right, authorisation of pan-European services, and many of the comments emphasised varying needs of national markets and the need for flexible measures rather than an 'one-size-fits-all' approach. Among them, some drew attention to the current drift to IP-networks for which they considered proposed changes incapable to respond to future developments, while some others criticised Commission's proposals on the ground of Treaty principles, i.e. 'proportionality' and 'subsidiary'. In December 2009, the EU Commission published its legislation including;

- European Parliament and Council Directive amending the 2002 Package's Framework Directive, Access Directive and Authorisation Directive (Better Regulation Directive 2009/140/EC),²⁸

²³ The five Directives are as follows:

- Framework Directive (2002/21/EC), OJ L108/33
- Authorisation Directive (2002/20/EC), OJ L108/21
- Access Directive (2002/19/EC), OJ L108/7
- Universal Service Directive (2002/22/EC), OJ L108/51
- Directive on Privacy and Electronic Communications (2002/58/EC), OJ L 201/37

²⁴ European Commission, *Recommendation of 11 February 2003 on Relevant Product and Service Markets within the eCommunications Sector*, http://ec.europa.eu/information_society/topics/telecoms/regulatory/maindocs/documents/recomen.pdf, (accessed: 16.06.2010).

²⁵ See EU official web page more information over public consultation. http://ec.europa.eu/information_society/policy/ecomm/library/public_consult/past/index_en.htm#review, (accessed: 16.09.2010).

²⁶ The European Regulators Group for electronic communications networks and services has been set up by the Commission to provide a suitable mechanism for encouraging cooperation and coordination between NRAs and the Commission, in order to promote the development of the internal market for eCommunications networks and services, and to seek to achieve consistent application, in all Member States, of the provisions set out in the Directives of the new regulatory framework. (See <http://erg.eu.int>, Accessed: 16.09.2010).

²⁷ See EU web page for more information: http://ec.europa.eu/information_society/policy/ecomm/tomorrow/index_en.htm.

²⁸ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0037:0069:EN:PDF>, (Accessed: 16.09.2010).

- European Parliament and Council Directive amending the 2002 Universal Service Directive and e-Privacy Directive (Citizens' Rights Directive 2009/136/EC),²⁹
- European Parliament and Council BEREC Regulation (Regulation (EC) No 1211/2009).³⁰

The new legislation included the following elements:

- liberalisation of management of the radio spectrum, including provision for spectrum trading,
- Introduction of the remedy of functional separation.
- strengthening the independence and enforcement powers of NRAs, introducing a new independent European agency, the BEREC
- in cooperation with BEREC, the Commission would have the power to oversee NRA remedies, recommend NRAs to amend or withdraw remedies that would create a barrier to the single market or be incompatible with the Community law in order to ensure a more consistent and efficient implementation of the rules.

The Commission Recommendation reduced the number of electronic communications markets susceptible to *ex ante* regulation from eighteen to seven. This was a relatively uncontroversial measure, which the Commission justified by arguing that in most retail markets, effective wholesale regulation had created competition, obviating the need for *ex ante* regulation. However if a NRA could demonstrate a need, they could continue to regulate them. The Recommendation was adopted by the Commission on 13 November 2007, entering into force with immediate effect. The rest of the Commission's proposals needed to be negotiated before enactment in the European Council and the European Parliament according to the co-decision procedure.

REASONS FOR THE BODY OF EUROPEAN REGULATORS FOR ELECTRONIC COMMUNICATIONS (BEREC)

The development of an effective eCommunications single market is a matter of highest political priority in the EU. ICTs, including the telecommunications sector account for quarter of the Europe's total growth. As a result of great technological progress, cross-border business activities and growing consumer demand for electronic communications services, achieving a true internal market in field of electronic communications becomes essential for Europe's competitiveness across the globe. Without a competitive and efficient

²⁹ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0011:0036:En:PDF>, (accessed: 16.09.2010).

³⁰ See Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0011:0010:EN:PDF>,(accessed: 16.09.2010).

telecommunications infrastructure, there is a little chance to develop pan-European services. The fully opening of national electronic communications markets to competition in 1998 served to stimulate investment and innovation by both new entrants and incumbents, and this has yielded very tangible advantages to Europe's citizens in the form of more choice, lower prices, better quality and a growing range of new fixed and mobile services.

After completion of the review, the Commission seemed to be determined to complete more consistent EU single market so as to attract investment and reap the benefits of the internal market, despite critics of ERG and some MSs concerning giving more power to central authority in application. The Commission also believed that a more unified and harmonised single market will offer EU suppliers a large home base for the development of innovative products, which is particularly important in areas like next generation communications where economies of scale count. Although a noteworthy progress has been made in creation of a single European eCommunications market so far, the Commission paid particular emphasis to update 'Article 7' procedure'³¹ specifically concerning remedies. The Commission has voiced concerns regarding remedies that solved only part of the competition problems identified, remedies that appeared to be inadequate and remedies that might have produced effective results too late. According to the Commission's documents³² there has been relative consistency among MSs' markets analysis, particularly in regard to the definition of SMP and the choice of appropriate remedies³³ which constitute key elements in determining market conditions and creating competitive conditions for new entrants. Adding that NRAs have not always applied similar sets of remedies to similar market failures and even where the same remedies have been applied, the implementations of those remedies have differed from one MSs to another, the Commission has stressed in its SWD³⁴ that greater consistency in the application of remedies was needed.

However, the regulatory model in the current framework has two sides. On the one side, as a reflection of "subsidiary principle", NRAs are delegated to regulate markets on the grounds that they are closest to their markets and therefore placed to regulate them. On the other side, in order to avoid the fragmentation that such decentralisation could bring out, regulatory framework gives the Commission power to ensure consistency of NRAs' measures in certain well-defined areas. But it is a reality that, in the past years, market players have complained about differences regarding approaches of NRAs in different countries, and pointed to the increased cost for business of handling 27 different regulatory approaches. Taking these problems into considerations, the Commission has decided to take several steps on the grounds that the reviewing of the framework should find the best model for delivering a single

³¹ Article 7 of the Framework Directive is meant by the reference to 'Article 7 procedure'.

³² See *supra* note 19.

³³ Commission subdivides inconsistent remedies into three: (i) remedies that solved only part of the competition problem identified, (ii) remedies that appeared to be inadequate or (iii) remedies that might have produced effective results too late (*Supra* note 19, p. 18).

³⁴ *Ibid.*

market in the light of prevailing political and institutional context. In other words, now it is a stark reality that the Commission has wanted to strengthen its role to achieve internal market objectives on the way of creating a single "European Information Space", and therefore, under the support of the European Parliament, the Commission established the body of European Regulators for Electronic Communications (BEREC).³⁵

BEREC

In order to overcome certain obstacles with particular regard to lack of consistency in creating single market, the Commission, established a new independent body, BEREC, with a full range of advisory powers to work in close cooperation with NRAs and the Commission. The new entity, having been created to replace the ERG, includes a board of regulators comprising the heads of the NRAs of all MSs.

It mainly deliver opinions on draft measures of NRAs concerning market definition, the designation of undertakings with significant market power and the imposition of remedies, in accordance with Articles 7 and 7a of Framework Directive 2002/21/EC.

With the establishment of BEREC, firstly it is targeted to provide a framework for national regulators to cooperate and create a synergy for critical regulatory options and approaches to be brought out. One of the factors stimulating this process is to improve the handling of cross-border aspects of e-Communications market regulation and network integrity. The Body provides procedures for cooperation between NRAs, in particular as regards the exchange of information, provision of advice and technical support. Secondly, it provides advices with regard to regulatory oversight of market definition and implementation of remedies. It seems clear that the BEREC has an advisory role vis-à-vis the Commission as regards market regulation issues and can issue non-binding guidelines to promote good practices among the NRAs. Thirdly, to help in definition and creation of trans-national markets: the BEREC provides for an efficient and proportional mechanism to respond to growing cross-border markets stemming from rising mobility and increased penetration of internet-based services as well as convergence between fixed and mobile services. Moreover, it is remarkable that the BEREC will play an important role by providing advice on radio frequency harmonization including making analysis and reporting, identification of the potential and means for development of new services, maintenance of a register of spectrum use across the EU, advice on common procedures for granting authorizations, etc. It is obvious that such a development will make significant changes in terms of the NRAs' consistent implementation whole over the EU.

Instead of creating a single supra-national regulatory authority for eCommunications whose creation has been quite firmly resisted by Member

³⁵ See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32009R1211:EN:NOT>.

States who never supported a single regulator (such as EECMA), BEREC is the only organization enabling an exclusive forum for cooperation among NRAs, and between NRAs and the Commission in terms of providing opinions on draft measures of NRAs concerning market definition and market analysis, in accordance with Articles 7 and 7a of Directive 2002/21/EC.³⁶ The advantage of BEREC is to give a freedom to NRAs to regulate markets on the grounds that they are closest to their markets and therefore placed to regulate them. However, disadvantage of BEREC has not a power to impose remedies.

According to Article 2 of BEREC Regulation (No 1211/2009), BEREC shall:

- a) develop and disseminate among NRAs regulatory best practice, such as common approaches, methodologies or guidelines on the implementation of the EU regulatory framework;
- b) on request, provide assistance to NRAs on regulatory issues;
- c) deliver opinions on the draft decisions, recommendations and guidelines of the Commission, referred to in this Regulation, the Framework Directive and the Specific Directives;
- d) issue reports and provide advice, upon a reasoned request of the Commission or on its own initiative, and deliver opinions to the European Parliament and the Council, upon a reasoned request or on its own initiative, on any matter regarding electronic communications within its competence;
- e) on request, assist the European Parliament, the Council, the Commission and the NRAs in relations, discussions and exchanges with third parties; and assist the Commission and NRAs in the dissemination of regulatory best practices to third parties.

With the power of BEREC to deliver opinions on the draft decisions regarding identification and definition of markets and market analysis and the Commission's power not to oblige Member states to impose remedies, there remains some hesitations about the power of BEREC which regard to ensure consistency of NRAs' approaches or implementations.

³⁶ Notably, according to amended Article 19 of the Framework Directive, the Commission may issue a recommendation (non-binding) or a *decision (binding)* on the harmonised application of the EU regulatory framework. Under Article 19(3)(a) the Commission can issue a binding harmonisation decision only after:

- (a) at least two years following a Commission recommendation dealing with the same matter; and
- (b) taking utmost account of an opinion from BEREC on the case for adoption of such a decision, which shall be provided by BEREC within three months of the Commission's request.

While such binding Commission decisions are envisaged to address "the inconsistent implementation of *general regulatory approaches* by national regulatory authorities on the regulation of electronic communication markets in the application of Articles 15 and 16, where it creates a barrier to the internal market", it is not so clear whether the remedies are included within the referred general regulatory approaches of NRAs'.

CRITICS OVER BERECA; SOLUTION OR PROBLEM?

As implied above, the Commission firstly proposed to establish a new central supra national regulator (EECMA) and then a fierce resistance came from Member States to set up EECMA, finally the Commission decided to set up a BERECA instead of EECMA.

Generally speaking, both Member States and ERG were unconvinced to agree with increased veto power over remedies and establishing a powerful single authority.³⁷ Their common reasoning was that NRAs are best placed to define and implement measures necessary to achieve the policy objectives of regulatory framework. In addition, reliance on 'accountability' as well as concerns surrounding 'proportionality' and 'subsidiarity' principles guided commentators in constituting their counter-arguments.³⁸ Therefore, a number of Member States, including France, Germany and the UK, have voiced their firm opposition. The UK government and Ofcom have argued that, the existing NRAs' network, the ERG, should be allowed to continue its work to improve the exchange of best practice among national regulators.³⁹

The Commission's proposal to extend its veto power to remedies under the Article 7 market analysis procedure also has not received support from the Member States, except Denmark and the UK. Member States emphasized that specific national circumstances should be taken into account when implementing regulation.⁴⁰

Under the light of the above criticisms, it can be affirmed that EECMA would not be a right solution for the problems of single market. First and foremost, EU countries were not ready to overcome certain national discretions in terms of eCommunications. Although dealing at the EU level with the persistent regulatory problems seems sensible, it is a fact that, "commitment made to any European project – and in telecommunications this has been significant – requires the development of a European outlook and a set of practices commensurate with this".⁴¹ According to Simpson, this essential problem for EU Member States stems from the deep historical national-centricity of the sector and its governance which yielded 'neo-liberal dilemma': to gain the opportunity to benefit from international petition, domestic markets must be opened and made as competitive as those of potential competitors. He also argued that "though a detailed and complex system of regulation has been developed through the EU, the result is predominantly 'intergovernmental' in nature,

³⁷ Single Member State seeing an advantage in extending Commission's veto power is Sweden. (Reply of Sweden, p. 4), http://ec.europa.eu/information_society/policy/ecom/doc/info_centre/public_consult/review_2/comments/swedish_input_e_com_review.pdf, (accessed: 16.09.2010).

³⁸ Response of UK, p. 9; Reply of Poland, p. 11, http://ec.europa.eu/information_society/policy/ecom/doc/info_centre/public_consult/review_2/comments/poland_en_ministry.pdf; Response of ERG, p. 15-16.

³⁹ Simon Taylor, 'London calling the shots on network rules', *European Voice*, 6-12 December, 2007: 19.

⁴⁰ Cullen International, Flash message 63, 16 June 2008.

⁴¹ Simpson S., 'Review of the EU's electronic Communications regulatory Framework: The significance of a possible European Electronic Communications Market Authority', p. 15.

including those elements constituted at the EU level. The legislative framework, and the institutional apparatus for producing and refining it, is European but the operational control of the telecommunications markets of EU states is overwhelmingly still in the hands of national level interests. Therefore, any effort to broaden the regulatory apparatus beyond legislative at EU level within the EU institutional framework was viewed suspiciously".⁴²

As a matter of fact, main issue creating concerns for the Member States was oversight and accountability of EECMA. According to the legislative proposals, creating EECMA would mean an establishing a supranational authority. A core issue in the proposed system was undoubtedly the power to be afforded to the Commission. This is perceived by the NRAs as a way for the Commission to get its intention of veto power on remedies by the back door.

In this respect, not Commission having veto power regarding remedies but allowing Member States to implement measures necessary to achieve the policy objectives of regulatory framework is the right solution within the meaning of establishing a new EU-based institution.

However, although BEREC provides effective and efficient cooperation among the Member States and disseminates best practice across EU, assists NRAs, advises the Commission, the European Parliament and the Council, as it does not have veto power, it will be very difficult and a complicated process to ensure consistency among the Member States.

CONCLUSION

Although the EU's 2002 Package has been evaluated as a success story, it is clear that the existence of 27 different regulatory authorities makes it hard for the industry to deliver pan-European or cross-border services as electronic communications regulation varies considerably from country to country. There is no doubt that different degrees of independence of national regulators as well as divergences in mandate and staffing capabilities play an important role in this context. As a reflection of this situation, there are currently only a few pan-European telecom operators operating in more than one Member State.

The current structure of EU electronic communications system therefore constitutes an obstacle for improving the competitiveness of the whole sector as well as the full exploitation of the economies of scale of the single market. Since NRAs have different approaches to similar competition problems and lack resources and expertise against many cases, BEREC, who was established by the European Parliament and Council, would be deemed a chance to improve the single market.

Although there has been several attempts to strengthened single market so far such as establishing ERG which brings together the heads of national regulatory authorities since 2002, such steps and attempts have fallen

⁴² *Ibid.*

inadequate. In fact, ERG has had many difficulties in ensuring consistent implementation of the EU regulatory rules within the 27 Member States, despite many efforts and good intentions it has revealed so far. Following the establishment of BEREC, bad experiences in relation to inconsistency among the EU Member States and the task of BEREC leads to some hesitations about its future performance whether it will ensure consistency between NRAs' approaches and/or implementations.

The hesitation is about BEREC's performance without having veto power how to ensure consistency in the EU member states. When we examine EU Member States' historical practices, especially after 12 new Member States joining the EU, the regulatory diversity among the national markets has remarkably increased. In addition, new Member States have a rather new electronic communications sector where incumbent operators are still very dominant and where independent, well-equipped national regulators are still the exception to the rule. Therefore, BEREC's performance is highly important for EU Member States to have single and harmonized eCommunications market.

It is believed that BEREC will help national regulators and the Commission in coordinating and, where necessary, harmonizing electronic communications regulations by allowing Member States to regulate their national markets and stimulating them to cope with the essential competition problems which they are capable to solve being the closest to the national market.

However, to be a best solution, it would be more appropriate in cases BEREC would unavoidably be equipped with a veto power regarding remedies to ensure consistent application among Member States.

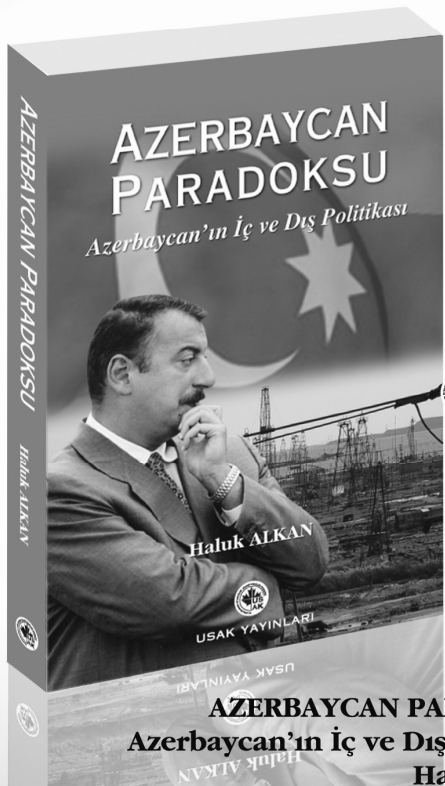
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Azerbaycan Paradoksu: Azerbaycan'ın İç ve Dış Politikası kitabı Sovyet sonrası dünyada siyasal rejimlerin nasıl bir deđişim geçirdiđi konusunda yapılan tartışmaları okuyucuya sunmak, bu çerçevede Azerbaycan'da siyasal sistemin gelişimini incelemek ve yine bu ülke örneğinde siyasal sistem dış politika ilişkisini açıklamak suretiyle karşılaştırmalı siyaset ve uluslararası ilişkiler alanında çalışan uzmanlar ve konu ile ilgilenenler için yol gösterici bir çalışmadır.

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ULUSLARARASI STRATEJİK ARAŞTIRMALAR KURUMU
USAK, AYTEN SOKAK, No: 21 MEBUSEVLERİ, TANDOĐAN, ANKARA
TEL: 0312 212 28 86 FAKS: 0312 212 25 84 WWW.USAK.ORG.TR