

The Consumer Voice in Europe

TELECOM MARKET DESIGN

BEUC position paper



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Why it matters to consumers

In an ever more interconnected world, consumers spend increasing amounts of time and money online, connecting with others and leading digital lives. Access to affordable, high-quality internet connections and communication technologies have become a prerequisite for all consumers to be able to participate in the digital society.

Summary

Telecom markets remain an important sector of concern for all European consumers, as general satisfaction with telecom services remains very low. The European Commission's proposed reform of Europe's telecom rules is a unique opportunity to ensure consumers' interests in the sector are protected and promoted.

European consumers need vibrant, competitive telecom markets, where telecom providers of all sizes and natures continuously compete against each other to earn consumers' trust and satisfaction with high quality, affordable services.

The current regulatory framework for telecommunications is based on principles that have enabled some degree of competition in many markets across Europe, both in fixed and mobile markets alike. The regulatory framework should continue to protect and strengthen competition in telecom markets. Unfortunately, the proposed Directive to establish a European Electronic Communications Code (EECC)¹ departs from these principles in practice and must be corrected.

To strengthen competition and consumer protection in the sector, EU co-legislators should:

1. Competition in wholesale markets is necessary: remove the focus on competitive conditions in retail markets.
2. Give regulatory authorities the necessary tools to deal with oligopolies.
3. Make the use of separation of network and service a viable regulatory tool.
4. Ensure *ex ante* regulation is applicable to new and old networks where necessary
5. Make physical access to networks a preferred solution over virtual access
6. Strengthen market analysis rules to avoid gaming by big players
7. Guarantee that symmetric regulation of all players does not increase the dominance of big players.

The updated telecom regulatory framework in Europe will not be successful in achieving its public policy objectives if it is not accompanied and supported by the right institutional governance model. Empowered and well-resourced National Regulatory Authorities and a fully independent BEREC are essential requirements for the adequate functioning of Europe's telecom markets.

¹ Proposal for a Directive establishing the European Electronic Communications Code - COM/2016/0590 final - http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=comnat:COM_2016_0590_FIN

1. Introduction

Telecom markets remain an important sector of concern for all European consumers, as general satisfaction with telecom services remains very low. For example, the European Commission's latest Consumer Market Scoreboard found that from all 29 surveyed markets, telecom markets (fix and mobile telephony, internet access and TV) are the worst performing markets in Europe with the highest share of consumers that have experienced problems and have suffered detriment².

The European Commission's proposed reform of Europe's telecom rules is a good opportunity to ensure consumers' interests in the sector are protected and promoted. We welcome the Commission's overall strategic objective of getting Europe to the forefront of connectivity, deploying the latest technologies and making sure nobody gets left behind. The reform of the rules is also important in shaping telecoms markets and will determine whether there is healthy competition.

To achieve these important public policy objectives, it is necessary to modernise the regulatory framework. The EU has a unique experience in using telecom regulation to achieve all these public policy objectives and must continue to draw from its own lessons to do so. The EU must therefore strategically use regulation to promote competition in markets, as it has been demonstrated time and again that it is competition that drives increasing consumer welfare and investments into new connectivity networks.

2. New connectivity targets

To get Europe to the next level in terms of deployment of connectivity technology, the European Commission has coined the term "the Gigabit Society" and laid out a strategy with a series of action points to be completed by 2025 or 2030, depending on each case³.

While the intention behind the public policy goal is laudable, we are concerned with the public policy tool that has been chosen – again – for this to happen. Like it did with the Digital Agenda for Europe targets⁴, the European Commission has decided to set concrete broadband deployment targets.

For example, by 2025 all urban areas and all major terrestrial transport paths must have uninterrupted 5G coverage, and all European households, rural or urban, should have access to Internet connectivity with speeds of at least 100 Mbps, upgradable to Gigabit speeds. These targets are not legally binding on Member States but they carry significant political weight and the European Commission will follow-up over the coming years to make sure Member States deliver on these targets.

Although this policy approach is well-intended, BEUC is concerned that setting concrete numerical targets will predetermine EU and national public policy decisions that will have to be decided later on. Decisions that might have to be taken even against consumers' genuine interests at the time.

BEUC demand: EU co-legislators should make sure that the public interest objectives of promoting competition and protecting consumers' short and long term interests guide all

² Consumer Market Scoreboard, 12th edition - European Commission 2016 - http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/12_edition/index_en.htm

³ "Connectivity for a Competitive Digital Single Market – Towards a Gigabit Society", European Commission September 2016 - <https://ec.europa.eu/digital-single-market/en/news/communication-connectivity-competitive-digital-single-market-towards-european-gigabit-society>

⁴ <https://ec.europa.eu/digital-single-market/en/digital-agenda-europe-key-publications>

policy actions across the EU and are never traded off against the achievement of concrete connectivity deployment targets.

3. Regulatory objectives matter, but are they really born equal?

The EU telecom framework has three general objectives that guide the action of national governments and regulatory authorities:

- the promotion of competition,
- the defence of consumers' interests and,
- the development of the internal market.

The combination of these three objectives is the right choice to develop competitive markets and make sure consumers are the ones benefiting from greater choice and prices across service providers in the EU.

Regulatory objectives matter. They tell national governments and regulatory authorities what public policy goals should inform their actions when intervening in markets.

The European Commission has initiated a far-reaching reform of EU telecom rules⁵ and has reaffirmed the importance of the existing three objectives. It has also proposed to add a fourth general objective to the framework: the promotion of access to and take-up of high-speed data connectivity.

Paving the way for the next wave of connectivity services and the underlying infrastructure to be rolled out in Europe can never happen to the detriment of any of the other objectives, and in particular not at the expense of competition in the market. Like BEREC highlights⁶, it is competition in the market that creates the incentive for demand-driven investments into new connectivity networks and services.

Therefore, the EU legislator must ensure that all regulatory objectives are on an equal footing. In principle, this should be the case according to the explanatory statement of the Directive, but unfortunately it is not the case in practice. Throughout different detailed provisions, the European Commission's proposal mandates NRAs to observe the accomplishment of the connectivity objective specifically, without reference to the other three objectives. In practice, this can be interpreted by NRAs in a way in which they should accomplish that specific objective (connectivity) over all others, in case they come into conflict.

The new objective is defined as "promote access to, and take up of, very high capacity data connectivity (...)". The purpose of EU regulation should not be to create consumer demand but to ensure markets work efficiently, transparently, and fairly for all participants, and in particular for consumers, and that they deliver increasing consumer welfare. Promoting the *take up* of new connectivity services should not be a regulatory goal.

In a market economy where consumers can leverage their collective power, it should always be them (and not governments, regulators or companies) who freely decide whether they want to take up a new service or not. The objective of EU telecom regulation has always been to guide regulatory intervention towards the offer side of the market, ensuring wholesale and retail competition, and the availability of services and networks. If regulation

⁵ <https://ec.europa.eu/digital-single-market/en/news/proposed-directive-establishing-european-electronic-communications-code>

⁶ http://berec.europa.eu/eng/document_register/subject_matter/berec/press_releases/6617-berec-publishes-opinion-on-draft-electronic-communications-code-and-appoints-its-board-for-2017

would aim to guide the demand side of the market too, it could condition the promotion of efficiency, transparency and fairness in markets, and of consumer protection.

BEUC demands:

1. The equality of the regulatory objectives in the Directive needs to be strengthened. All specific references to the connectivity objective throughout other parts of the Directive should be deleted so there is no preference of one objective over the other. For example, Articles 71, 72 and 74 contain references to the new objective.
2. The connectivity objective in Article 3 should not include “and take up of” connectivity.

4. Telecom markets need regulation that enables competition

European consumers need vibrant, competitive telecom markets, where telecom providers of all sizes and natures continuously compete against each other to earn consumers’ trust and satisfaction with high quality, affordable services.

The current regulatory framework for telecommunications is based on principles that have enabled some – but often not enough - degree of competition to develop in many markets across Europe, both in fixed and mobile markets alike. Any modification to the regulatory framework should continue to protect and strengthen competition in telecom markets. Unfortunately, the proposed Directive departs from these principles in practice which would be very problematic if the Directive is not adequately corrected.

Many market players should create competitive pressure and real choice

In some countries, such as France, Germany, Belgium and the Netherlands, the existence of multiple alternative providers in both fixed and mobile markets have created some downward pressure on prices and an increase in quality and choice. Incumbent operators have had to reduce their market shares and adapt to new competitive realities, which in many cases has delivered significant benefits to consumers. This should be the reality in all EU countries.

Unfortunately, in other countries such as Portugal and Spain, market concentration and the lack of effective remedies to boost competition results in a continuous increase of prices for consumers.

Although it is often alleged that European markets are too fragmented with too many operators present, the fact remains that the four main European mobile operators hold over 60% of the market. The top two players had a combined subscriber base of 221 million consumers, which is even more than their US counterparts⁷. These numbers confirm that the number, size and market power of alternative operators is not as significant as it should be to create sufficient pressure on incumbent operators and, as a result, more competitive pricing, innovation and consumer choice.

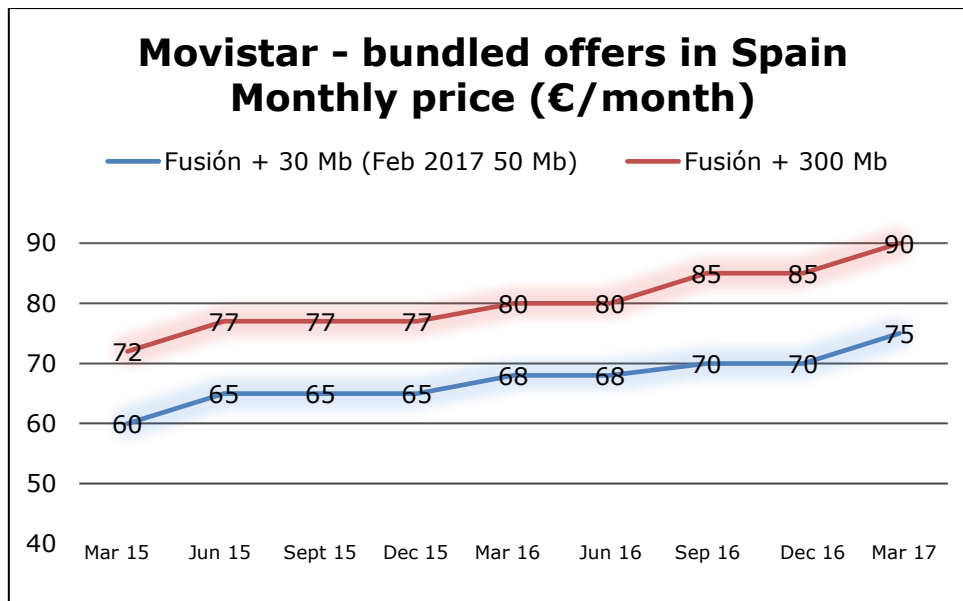
Many markets are further consolidating, pushing prices upwards

Even though in many European countries there is not enough efficient competition in telecom markets, multiple mergers and acquisitions continue to take place, further

⁷ BEREC BoR (13) 142 - http://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/2922-berec-views-on-the-proposal-for-a-regulation-8220laying-down-measures-to-complete-the-european-single-market-for-electronic-communications-and-to-achieve-a-connected-continent8221

consolidating them. This in turn often results in an increase in prices for consumers, as can be observed in countries such as Portugal, Spain or Denmark.

For example, in Spain there have been many acquisitions and mergers (Vodafone-ONO, Orange-Jazztel, Movistar-Canal +, MásMovil-Yoigo) which have resulted in less choice for consumers and an increase in prices over the past two years. The following graph shows the steady increase in prices in Spain's dominant operator Telefónica on its two-leading high speed broadband products bundled with Digital TV, mobile subscription and fix telephony.



The degree of competition between telecoms providers has a direct impact on other markets

The degree of competition in telecommunications markets can significantly impact media and content pluralism in Europe, reducing consumers' ability to access the content and services of their choice.

If market power is further concentrated on large operators, some of which are commercially or structurally linked to media conglomerates or large content providers, it is likely that specific media outlets or content platforms will be commercially prioritised and their competitors discriminated against.

In countries such as France, Denmark, the Netherlands, Belgium and Spain, telecommunication companies have acquired media companies, started producing their own content, or acquired exclusive licenses to demanded content.

The inclusion of football retransmissions and other exclusive content in Digital TV packages has become a key factor in consumers' purchasing decisions. Large telecommunication and media companies are in a better position to acquire the necessary licenses, thereby consolidating their position as market dominants. In Spain for example, the regulator has had to intervene to make sure other telecom companies can have access to the exclusive content.

Considering all these potential challenges, we are concerned that the impact of changes to the regulatory framework on competition in downstream or neighbouring markets has not been thoroughly analysed. EU institutions must evaluate the link between telecom markets and other markets and ensure there is no undue impact on price evolution and consumer

welfare and importantly, on freedom of expression, net neutrality, media pluralism and the right to access content and services across the EU.

The proposed reform amounts to a considerable deregulation of telecom markets

As BEREC⁸ and the European Commission⁹ rightly point out, sustainable competition drives efficient investment. Where competition is at its highest levels, investments are high and in turn generate higher levels of innovation, greater choice and better quality of products for consumers. The key objective of the EU's regulatory framework should be to foster and strengthen competition across EU markets.

Unfortunately, the EEC Directive proposes numerous rules that amount to a deregulation of telecom markets and which erect barriers that will leave new markets unregulated in the future. This will in turn worsen the situation with regards to the competitive healthiness of telecom markets and has to be amended.

We therefore recommend the following improvements to be made to the proposed Directive in Parts I (Framework) and II (Networks).

4.1. Retail competition should not determine whether regulatory intervention is necessary

The proposed Directive puts the focus of regulatory intervention on competitive conditions in retail markets. Before intervening in wholesale markets to solve a problem or to enable future competition on networks, NRAs would have to demonstrate that there is a present lack of competition in retail markets.

This approach is problematic because it is wholesale competition that creates retail competition, although often not immediately. In addition, the re-defined objective of protecting consumers' interest now specifies "including in the long term".

To defend consumers' long term interests EU regulation must continue promoting access to competitive markets, where new generation networks (and in particular fiber) are not run as virtual monopolies by a single operator. Competition in the long term too is enabled by competition in wholesale markets, just as it is today.

The rules that create competition today are focused on wholesale markets for a reason: retail competition and differentiation between operators exists thanks to the capacity to compete at wholesale level. For example, if there is only one network available it is impossible to have competition on the retail level without access to that network.

The focus on retail markets would lead to the automatic de-regulation of wholesale markets in many cases, and would ultimately lead to the monopolisation or "duopolisation" in countries/regions with a strong cable footprint.

BEUC demand: Remove the focus on competitive conditions of retail markets throughout the Directive. In particular, the following articles have to be modified: 3.3.f (delete), 65.2, 65.4, 66.4, 70.1, 71.1, 71.2, and 72.1.

4.2. Significant Market Power is not the only problem – rules on oligopolies are also necessary

The tools that NRAs are given by telecom regulation are mainly focused on situations where Significant Market Power (SMP) is demonstrable. This is an important barrier for regulatory intervention that is not easy for NRAs to overcome. Importantly, as BEREC rightly points

⁸ http://berec.europa.eu/eng/document_register/subject_matter/berec/press_releases/6617-berec-publishes-opinion-on-draft-electronic-communications-code-and-appoints-its-board-for-2017

⁹ Explanatory Statement, proposed European Electronic Communications Code

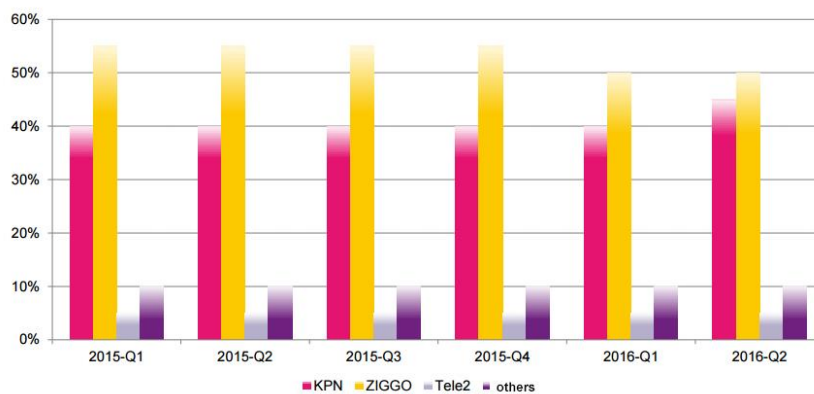
out, situations of Significant Market Power are not the only threats to competition. Oligopolistic structures where the market is dominated by not one but a reduced number of players are also problematic and increasingly commonplace as a result of market consolidation.

In some countries, such as Belgium, the Netherlands and Denmark, this is already the case, and consumers suffer from the lack of sufficient competition. The lack of competitive dynamics in these markets allows operators to increase their prices at the same time and often even by the same percentage. These same worrying dynamics can be observed in other markets such as in Portugal.

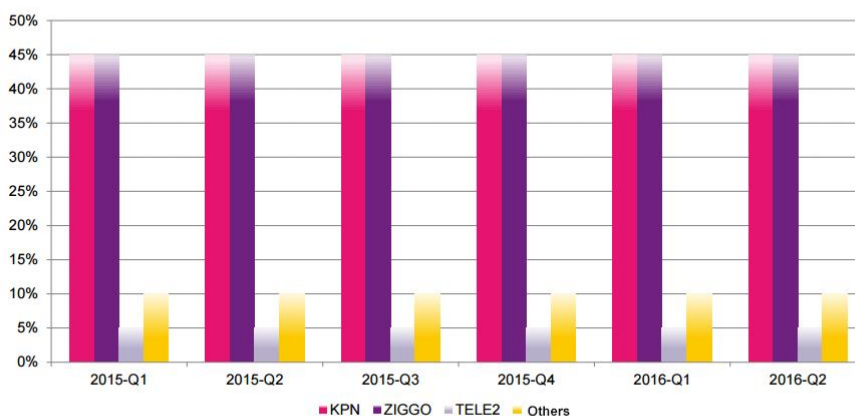
In Belgium, its two dominant players (Telenet and Proximus) continue increasing their prices every year and push their customers to larger service bundles.

In the Netherlands, the most important telecom markets are clearly dominated by two players (KPN and Ziggo). The below graphs show the market shares for the broadband and triple/quad play markets in the Netherlands, demonstrating what a duopoly looks like in practice.

BUNDLED SERVICES Retail market share



BROADBAND Retail market share



source:  Autoriteit Consument & Markt

BEUC demand: ensure Member States can empower their NRAs to intervene also in cases where no SMP can be easily demonstrated to solve situations of duopolies or oligopolies. This is likely to require additional regulatory tools in the Directive plus a significant modification or complete deletion of the proposed Recital 175.

4.3. Separation of network and services can be the right solution

The draft Directive includes several rules that allow the separation of the provision of network and retail services using different regulatory techniques. We agree that this separation can in many cases be the best way to guarantee a competitive ecosystem where the strategic interests of the dominant network manager are not dependent on its retail business interests. This allows the network owner to focus on delivering high quality wholesale network access services, and retail players to focus on delivering competing, innovative services to end consumers.

The experience in countries such as the United Kingdom suggests that under certain conditions, separating the provision of network and services into the hands of different market players could be the best solution to create retail competition.

In other countries where competition is not at optimum levels, separating network and service is a regulatory tool that could prove very useful. Unfortunately, there seems to be insufficient political willingness to explore the possibility of using these regulatory tools.

BEUC demands:

1. It must be ensured that it is not unjustifiably difficult for NRAs to apply the remedies contained in the provisions regarding functional and voluntary separation of undertakings. Articles 75, 76 and 77 should therefore be carefully reviewed.
2. Member States and NRAs should consider whether using these regulatory tools would be the most adequate solution to promote retail competition.

4.4. Competition on the networks of the future is key

As Europe moves away from its legacy networks, new promising technologies such as fiber optics are being rolled out. It is important that, in principle, the same access regulation regime applies to both new and old networks. It would be against consumers' long term interest if these new networks would be rolled out in a way in which markets were put back into the control of one or several dominant players.

The proposed provisions on "new network elements" in Article 74 are problematic firstly because the concept remains undefined. Secondly, Article 74 impedes NRAs from intervening on "new network elements" if there are co-investment offers. This could be problematic because SMP operators can use their market position to the detriment of smaller companies. All in all, this article could pave the way for the existence of new fiber networks without allowing NRAs to intervene efficiently where it becomes necessary.

BEUC demands:

1. Ensure NRAs have the adequate tools to impose wholesale access conditions on fiber networks so alternative service providers can offer retail services to consumers.
2. Article 74 is unnecessary and should be deleted entirely.

4.5. Physical access allows better, more efficient competition than virtual access

The proposed Directive sets a principle that requires regulators to consider on equal footing physical access and virtual access obligations. Moreover, when taking the decision on those remedies, regulators are told to make sure that they impose the less intrusive obligation with respect to retail markets.

This would mean that instead of granting access to physical lines, regulators could just oblige dominant operators to allow their competitors to resell connectivity instead of allowing them to compete on quality and with innovative services.

This approach is worrisome for consumers' short and long term interests. Giving competing service providers physical access to networks enables competitors to offer technically differentiated, customized and innovative products without interference from the dominant players.

In addition, using virtual access products as the intervention technique in wholesale markets creates the perverse incentive for network owners not to invest into new networks and technologies, but rather continue looking for optimization techniques over legacy networks such as copper.

BEUC demand: Article 71 should be modified to ensure physical access remedies are preferred over virtual. Only when they are not technically or economically feasible, physical access remedies can be substituted by an effective and functionally equivalent virtual access.

4.6. Market analysis rules need to be strengthened

The proposed Directive codifies the 3-criteria test that NRAs must follow to determine whether a market can be regulated *ex-ante*. As BEREC points out, the rules included in the draft do not entirely reflect the same rules that NRAs have been applying for the past 15 years and should be amended.

The proposed Directive also requires regulators to lift access obligations in case of existing or prospective commercial access or co-investment agreements with other market players. Such agreements are in many occasions unlikely to be meaningful in the absence of regulation due to the bargaining power of incumbent operators. The proposed provisions that mandate NRAs to deregulate or not intervene in markets where commercial offers or co-investment proposals are on the table run the risk of leaving dominant operators with the freedom to pick winners and dictate the conditions of the agreements.

The proposed Directive also mandates NRAs to take into account operators' announced deployment plans when deciding whether to intervene in a market. As BEREC rightly points out, there is a risk that deployment plans will be announced tactically to condition, avoid or delay regulation. NRAs should therefore not be legally mandated to take future deployment plans into consideration when deciding whether intervening in the market is necessary.

BEUC demands:

1. Remove the requirement for regulators not to impose obligations in case of existing or prospective commercial access or co-investment agreements in articles 65.2, 66.6, 71.2, and 74.
2. Delete all references to Article 22 in articles 62 and 65.

4.7. Symmetric regulation needs to be used wisely

Symmetric regulation allows NRAs to impose access obligations on any type of market player, regardless of whether it is considered an SMP operator or not. While this is an important toolset for NRAs, it is crucial to ensure the use of symmetric regulation does not aggravate existing situations of dominance or generate new ones.

Like BEREC points out, a mere request for access to a non-dominant player's network should not automatically trigger the intervention of the regulator to grant that access. NRAs should instead have the sufficient flexibility to analyse the concrete market situation and determine whether such access is to be granted.

BEUC demand: Article 59 needs to be carefully reviewed to ensure that symmetric regulation cannot be used to create or aggravate existing situations of dominance.

5. An institutional governance model fit for purpose

The updated telecom regulatory framework in Europe will not be successful in achieving its public policy objectives if it is not accompanied and supported by the right institutional governance model. The European Commission has therefore proposed numerous important changes to NRAs (Articles 5 to 11 of EECC Directive) and to BEREC¹⁰.

The proposed EECC Directive includes provisions on National Regulatory Authorities that are important for the market and for consumers, such as for example harmonising a minimum set of powers that all NRAs should have.

This measure is in principle welcome to guarantee that no consumer is left stranded because the NRA that oversees the market is not adequately tasked or insufficiently equipped. In particular, it is welcome that the proposal specifies that as part of their tasks, NRAs will have to:

- implement *ex ante* market regulation, including imposing access and interconnection obligations.
- ensure consumer protection and end-user rights in the electronic communications sector.
- deal with issues related to net neutrality rules.
- Ensure number portability.

Telecom NRAs will have a crucial role to play in the markets of the future where new technologies are already being designed and deployed. A case in point is the Internet of Things, where all new products and services that will be interconnected will include an electronic communication service. It is therefore important that telecom NRAs are tasked and empowered to look after the fulfilment of all regulatory objectives in these new market developments too.

In telecom markets, many problems are of a very local nature and need local solutions. The updated institutional design needs to allow NRAs to maintain a sufficient degree of autonomy so they can react swiftly when national problems arise using an adequate set of tools at their disposal.

¹⁰ Proposal for a new BEREC Regulation 2016/0286(COD) - <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0591>

The proposed Directive includes rules to secure the financial and political independence of NRAs, two important aspects of the institutional design of NRAs that cannot be overlooked. Establishing EU rules that guarantee the independence of NRAs from private market players and from national governments (who may own or indirectly control high shares in private market players) is a welcome move to help NRAs take independent action in the defence of the public interest.

Importantly, NRAs must have the sufficient powers to carry out those tasks and fulfil their mandates. It must be carefully analysed whether and what kind of sanctions and/or fines NRAs could use to achieve accomplish their tasks.

The proposed reform also aims to change BEREC's institutional status into that of an Agency. In the same way that it is important to ensure that NRAs are independent from national governments and private market players, it is also crucially important to guarantee that BEREC is independent from the European Commission and the Member States governments so it can fulfil its mandate adequately.

BEUC demands:

- 1.** Strengthen Article 5 of the proposed EECC Directive to make sure consumer-related supervisory and enforcement powers are clear and effective.
- 2.** The list of minimum competences should also include for example, oversight of the Internet of Things, machine-to-machine communications, etc.
- 3.** Regardless of the institutional set up decided for BEREC, its complete independence from EU Institutions and national governments must be ensured.

END