SQUIRE PATTON BOGGS

Open Letter to the European Commission and BEREC to Achieve Greater Harmonization across the EEA under the EU Electronic Communications Code

I. Introduction

1. Squire Patton Boggs welcomes the opportunity to write this open letter to BEREC and the European Commission in connection with the publication of BEREC's input to the European Commission's public consultation on the White Paper "How to master Europe's digital infrastructure needs?" ("White Paper").[1]

2. Our comments are based on our extensive practical experience with the application of the EU Electronic Communications Code ("EECC") and more than four decades of experience with regulations that have shaped the electronic communications sector around the world.

3. We note that Article 122 EECC requires the European Commission to carry out a review of the functioning of the EECC by the end of 2025, and that BEREC has reserved its option to develop "a fully-fledged assessment" "only once the high-level principles and the regulatory options in the White Paper are translated into actual legislative proposals".[2] We also note that the European Commission has received a record-breaking volume of responses to the White Paper and will be busy evaluating and summarising these responses. Therefore, in this open letter, we do not provide additional comments on the White Paper or on the input provided by BEREC; but we simply identify those measures that are already available today under the EECC to achieve greater harmonization.

4. The comments in this open letter are those of Squire Patton Boggs and do not necessarily represent the views of any of our clients.

II. Background

5. One of the fundamental principles of EU policy for the electronic communications sector is the so-called "sunset clause". Recital (29) EECC formalises this clause as follows: "This Directive aims to progressively reduce ex ante sector-specific rules as competition in the markets develops and, ultimately, to ensure that electronic communications are governed only by competition law." Unfortunately, ex ante sector-specific rules seem to have increased at national level in a fragmented manner over time instead of being progressively harmonised and reduced.

6. Leaving aside the potential causes of such increase of fragmented and divergent ex ante sector-specific rules at national level, to the detriment of the single market for electronic communications within the EEA (whether this is due to the implementation of the EECC general authorization regime, or to adjacent pre-existing national administrative law requirements that are outside the scope of the national laws transposing the EECC), it is common ground between the European Commission and

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[1] COM(2024) 81 final, *available at:* https://digital-strategy.ec.europa.eu/en/library/white-paper-how-master-europes-digital-infrastructure-needs.

[2] BoR (24) 100, *available at:* https://www.berec.europa.eu/en/document-categories/berec/others/berecs-input-to-the-ec-public-consultation-on-the-white-paper-how-to-master-europes-digital-infrastructure-needs.

BEREC that such a fragmentation exists and it represents a failure of one of the fundamental objectives of the EECC, as well as "a missed economic opportunity."[3]

7. In our experience, such a fragmentation creates barriers to entry that are particularly evident for those electronic communications services that would otherwise be inherently cross-border, such as:

    a. Network-independent number-based interpersonal communications services ("NB-ICS") for enterprise customers, such as soft phones, cloud-based VoIP, PBX and other managed enterprise communications;

    b. Number-independent interpersonal communications services ("NI-ICS"), such as online collaboration tools, conferencing solutions, voice or messaging apps for consumers and enterprise customers; and

    c. Transmission services including connectivity between machines ("M2M"), including Internet of Things ("IoT") devices, intelligent transportation systems, and cloud infrastructure as a service ("IaaS") or platform as a service ("PaaS").

8. These types of services are inherently cross-border: they are the same across the EEA, are purchased and supplied centrally through the same terms and conditions, rely on one or more network operators for global connectivity and numbering resources (where applicable), and compete with similar cross-border services. Despite all of this, they must comply with 30 different national regulatory regimes. This discrepancy between the centralised economic and technical reality of these services and the fragmented national regulatory regimes with which they need to comply creates unnecessary significant administrative costs, no corresponding benefits for their customers and puts them at a competitive disadvantage with pure national communications operators.

9. As such, by creating barriers to entry which inhibit innovative and cross-border market entrants, as well as eroding the business case for network investment in the EU which would provide the platform necessary for such innovative services, fragmentation deprives European customers (and particularly business customers) of the benefits of competitive innovation and fails to deliver the communications capability which would underpin growth and innovation in the wider economy.

10. An old study[4] estimated that the benefit of greater harmonization (and therefore the opportunity cost of the lack of a greater harmonization) for these types of services was EUR 90 billion per year in 2013. It is reasonable to assume that this estimated opportunity cost is likely to be significantly higher in 2024.

11. Against this background, the following sections identify the measures that are already available to the European Commission and BEREC today under the EECC to achieve greater harmonization but are not yet fully utilised. The case for immediate action is compelling.

III. Article 12(4) EECC – General Authorisation Notification

12. Article 12(4) EECC says:

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[3] IP/24/941, *available at*: https://ec.europa.eu/commission/presscorner/detail/en/IP_24_941.

[4] WIK Consult, "Business communications, economic growth and the competitive challenge" (2013).

"*4. The notification referred to in paragraph 3 shall not entail more than a declaration by a natural or legal person to the national regulatory or other competent authority of the intention to start the provision of electronic communications networks or services and the submission of the minimal information which is required to allow BEREC and that authority to keep a register or list of providers of electronic communications networks and services. That information shall be limited to:*

(a) the name of the provider;

(b) the provider's legal status, form and registration number, where the provider is registered in a trade or other similar public register in the Union;

(c) the geographical address of the provider's main establishment in the Union, if any, and, where applicable, any secondary branch in a Member State;

(d) the provider's website address, where applicable, associated with the provision of electronic communications networks or services;

(e) a contact person and contact details;

(f) a short description of the networks or services intended to be provided;

(g) the Member States concerned; and

(h) an estimated date for starting the activity.

***Member States shall not impose any additional or separate notification requirements**. **In order to approximate notification requirements, BEREC shall publish guidelines for the notification template and maintain a Union database of the notifications transmitted to the competent authorities. To that end, the competent authorities shall, by electronic means, forward each notification received to BEREC without undue delay.** Notifications made to the competent authorities before 21 December 2020 shall be forwarded to BEREC by 21 December 2021.*" (emphasis added)

13. As of today, only a few national competent authorities are using BEREC notification template and forwarding the notifications that they receive for inclusion in the EU database. The majority of national competent authorities are still using their own notification forms, requiring additional formalities as a condition for market entry, and ignoring the EU database. As a result, many of our clients had to invest significant resources in hiring local consultants to fill out multiple and different forms in multiple languages and to comply with diverging national bureaucratic requirements for the filing of those forms. Moreover, BEREC's EU database is incomplete, if not inaccurate, because using different notification forms containing different information, instead of one single template with exactly the same format, makes it difficult, if not impossible, to maintain a functioning EU database.

14. The national notification system as it is currently retains the features of a locally-licensed network operator as the model for providing electronic communications services. It often refers to definitions that do not tally with the new definitions contained in Article 2 EECC (e.g. many national notification systems still refer to "fixed telephone service" instead of "voice communications service"). It is poorly adapted to internet-based communications providers, which account for a great deal of the innovation in

communications services, who seek to provide the same service to consumers and business customers throughout the single market. Such communications providers generally use local network operators for local connectivity, so to the extent that there are particular local requirements governing network deployment, such as planning, these can be caught at the network operator level.

15. In our view, therefore, under Article 12(4) EECC, BEREC should adopt an opinion that all competent authorities should use its notification template and remind them to forward each notification to the EU database once received; and the European Commission should take enforcement action against those Member States that have failed to comply with the requirement not to impose additional administrative requirements or whose competent authorities have failed to use the BEREC notification template and failed to forward it to the EU database.

IV. Article 21(1) EECC – Reporting Requirements

16. In addition to ad hoc information requests, Article 21(1) EECC empowers the national competent authorities to "*require undertakings to provide information with regard to the general authorisation, the rights of use or the specific obligations referred to in Article 13(2), which is proportionate and objectively justified in particular for the purposes of:*

(a) verifying, on a systematic or case-by-case basis, compliance with condition 1 of Part A, conditions 2 and 6 of Part D, and conditions 2 and 7 of Part E, of Annex I and of compliance with obligations as referred to in Article 13(2);

(b) verifying, on a case-by-case basis, compliance with conditions as set out in Annex I where a complaint has been received or where the competent authority has other reasons to believe that a condition is not complied with or in the case of an investigation by the competent authority on its own initiative;

(c) carrying out procedures for and the assessment of requests for granting rights of use;

(d) publishing comparative overviews of quality and price of services for the benefit of consumers;

(e) collating clearly defined statistics, reports or studies;

(f) carrying out market analyses for the purposes of this Directive, including data on the downstream or retail markets associated with or related to the markets which are the subject of the market analysis;

(g) safeguarding the efficient use and ensuring the effective management of radio spectrum and of numbering resources;

(h) evaluating future network or service developments that could have an impact on wholesale services made available to competitors, on territorial coverage, on connectivity available to end-users or on the designation of areas pursuant to Article 22;

(i) conducting geographical surveys;

(j) responding to reasoned requests for information by BEREC.

The information referred to in points (a) and (b), and (d) to (j) of the first subparagraph shall not be required prior to, or as a condition for, market access.

BEREC may develop templates for information requests, where necessary, to facilitate consolidated presentation and analysis of the information obtained." (emphasis added)

17. To date, BEREC has not developed such templates. As a result, many of our clients had to invest substantial resources to change or set up new internal data systems to track and provide the data dimensions required by each competent authority on a country-by-country basis, because their data systems do not normally track data on a country-by-country basis in the way required by each national competent authority. Moreover, the online portals used to gather this information require national identifiers that are available only to national citizens or nationally incorporated entities, creating an additional artificial barrier to entry for cross-border communications services.

18. Tracking data on a country-by-country basis also makes it difficult for BEREC and the European Commission to reconcile the data on an EEA basis, because each competent authority uses its own methodology to slice and dice the data.

19. There is no corresponding benefit for end users in tracking the data in this incoherent and fragmented way: indeed, a single coherent view of the relevant data would be an enabler of future innovation and service development.

20. In our view, under Article 21(1) EECC, BEREC should develop one single template for information requests using the same methodology and data dimensions across the EEA and the European Commission should take enforcement action against those Member States that fail to use the BEREC template or make access to the online portals used to gather the harmonised data based on the nationality of the data submitter, as doing so would run against the statutory harmonization objectives of the EECC.

V. Article 93 EECC – Numbering Resources

21. Recital (250) EECC says: "*Access to numbering resources on the basis of transparent, objective and non-discriminatory criteria is essential for undertakings to compete in the electronic communications sector. Member States should be able to grant rights of use for numbering resources to undertakings other than providers of electronic communications networks or services in light of the increasing relevance of numbers for various Internet of Things services. All elements of national numbering plans should be managed by national regulatory or other competent authorities, including point codes used in network addressing.* ***Where there is a need for harmonisation of numbering resources in the Union to support the development of pan-European services or cross-border services, in particular new machine-to-machine-based services such as connected cars, and where the demand could not be met on the basis of the existing numbering resources in place, the Commission can take implementing measures with the assistance of BEREC.***" (emphasis added).

22. Many Member States have adopted or are currently adopting restrictions on the cross-border use of numbering resources from their national numbering plans to combat fraudulent use of such numbers, such as scam or phishing calls. However, such restrictions are very likely to impact on the ability of providing NB-ICS for enterprise customers on a cross-border basis, despite the fact that enterprise end users are less likely to be targeted by fraudulent or phishing calls. This applies both to interpersonal

communications and particularly to M2M communications, for which nationally based numbering restrictions greatly increase the cost and complexity of pan-European supply, and some of which, for example in the automotive and IoT sectors, rely on the ability to roam on a long-term or permanent basis.

23. In our view, under Article 93(8) EECC, the European Commission should adopt implementing measures with the assistance of BEREC to harmonise the allocation and use of numbering resources for cross-border NB-ICS for enterprise customers and, under Article 93(5) EECC, BEREC should work with its members to adopt an agreement to share a common numbering plan for specific categories of numbers for such types of cross-border services.

VI. Article 32 EECC – SMP regulation

24. Article 32 EECC provides for the procedure consolidating the internal market for electronic communications when the national authorities intend to impose significant market power ("SMP") regulation on designated undertakings. The European Commission and BEREC have peer review powers over the national authorities' proposals for SMP regulation.

25. The aim of the Article 32 EECC procedure is to contribute to the development of a single EU market for electronic communications by ensuring co-operation among national authorities, and between them and the European Commission.

26. Once a national authority notifies the European Commission of its proposed draft measure, the case is assessed by the European Commission within one month. At the end of this period and provided that the notified measure does not raise "serious doubts" as to its compatibility with EU law, the European Commission may decide to comment. NRAs should take these comments into "utmost account" before adopting the draft measure in question.

27. When the European Commission expresses serious doubts, it must open a "Phase II" investigation. Its investigation period is extended by two months in cases in which the European Commission's serious doubts relate only to the definition of the relevant market and SMP assessment, or by three months in cases in which the European Commission's serious doubts also relate to the proposed remedies. In Phase II cases, BEREC must issue an opinion on whether these serious doubts are justified. The European Commission must take utmost account of the BEREC opinion.

28. However, in several instances, this procedure has failed to achieve its objectives and there are still several national authorities that continue to regulate markets that are no longer in the European Commission's latest recommendation on relevant markets for ex ante regulation and that are based on market analyses that disregard the European Commission's most recent guidelines on significant market power. While it is accepted that the recommendation and guidelines are not legally binding and the national authorities could depart from them, they can do so only in justified circumstances. [5] For example, there are still national authorities that have designated hundreds of operators as having SMP in their national market for call termination, in complete disregard of

[5] Judgment of 15 September 2016, *Koninklijke KPN and Others* (C-28/15, EU:C:2016:692), paragraph 37.

the EECC recitals[6] and European Commission's comments letters in those cases. In some instances, such SMP designations also included network-independent interpersonal communications providers who rely on other operators to terminate their calls entirely. In those instances, it is imperative that the European Commission should veto such proposals and should not limit itself to timid comments letters.[7]

VII. Conclusion

29. Quoting from the White Paper: "*As we are at the crossroads of major technological and regulatory developments, it is of tantamount importance to debate these developments broadly with all stakeholders and like-minded partners.*"

30. The outcome of the EECC review in 2025 will shape Europe's future digital infrastructure. However, the European Commission and BEREC could and should take the measures that are available under the EECC today to achieve greater harmonisation, because without exhausting all the tools available under the EECC first, it would be difficult to make a persuasive case for change.

31. If you have any questions regarding this open letter, please contact Francesco Liberatore at francesco.liberatore@squirepb.com.

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[6] As set out in Recital 29 EECC, considering that the markets for electronic communications have shown strong competitive dynamics in recent years, including calls termination services, it is essential that ex ante regulatory obligations are imposed only where there is no prospective effective and sustainable competition on the markets concerned. Increasing the number of SMP operators on a relevant market that is no longer included in the list of markets eligible for ex-ante regulation is inconsistent with the general objective of the EECC to reduce ex-ante regulation.

[7] Judgment of 25 February 2021, *VodafoneZiggo v European Commission* (Case C-689/19 P ECLI:EU:C:2021:142).