



EUROPEAN COMMISSION

Directorate-General for Communications Networks, Content and Technology

Electronic Communications Networks and Services

Radio Spectrum Policy Group

RSPG Secretariat

Brussels, 9 October 2019
DG CNECT/B4/RSPG Secretariat

RSPG19-027 FINAL

RADIO SPECTRUM POLICY GROUP

**Progress Report of the RSPG Working Group on
the “European Electronic Communications Code”**

Progress Report of the RSPG Working Group on “EECC”

The RSPG Working Group on “EECC¹” (hereinafter: WG) has held two meetings since the last RSPG plenary meeting (13 June and 12 July 2019 in Brussels, Belgium). Progress has been made also by correspondence between WG meetings.

The WG finalised the Report on the practical implementation of Art. 35 of the EECC and discussed the update of the Rules of Procedure (RoP) of the RSPG.

1. Peer Review Process

By finalising the Report on the practical implementation of Art. 35 of the EECC (hereinafter referred to as Impact Report), the WG elaborated positions on most of the remaining open questions and thereby solved all open issues except for the majority requirements to start the Exceptional Peer Review. (Peer Review at the RSPG’s initiative in exceptional cases). This process is named: “Exceptional Peer Review (EPR)” in the present report. Voluntary Peer Review (VPR) refers to a Peer review at the initiative/request of a given MS.

Chair of a Peer Review (EPR/VPR)

Consensus was reached within the WG that the EPR should be chaired by the RSPG Chair or a member of the RSPG “Troika” (consisting of the previous chairperson, current chairperson and vice-chairperson). Delegation of the chairmanship should be possible.

The WG discussed the chairmanship of the Voluntary Peer Review (VPR) more deeply. While some members wanted the notifying National Regulatory Authority (NRA) / Competent Authority (CA) to chair the VPR, other members as well as the European Commission (EC) preferred a more neutral solution. As a compromise, the WG concluded that it would be advisable that the RoP leave the decision on the chairperson of the VPR up to an agreement of the notifying NRA/CA and the chairperson of the RSPG. By this, a flexible approach is reached. In consequence, the Impact Report has been updated accordingly.

Procedure for the initiation of an EPR: two-step approach

The WG affirmed the position with regard to the initiation of an EPR and included a two-step approach in the Impact Report. The two steps are summarized below. The WG also

¹ Directive (EU/2018/1972) of the European Parliament and of the Council establishing the European Electronic Communications Code.

agreed to include after step 1 the possibility to opt out, which is also described in detail in the Impact Report.

Step 1: This step is triggered by a certain number of MS which have to request that a vote be taken within RSPG on the initiation of an EPR (so called “trigger”), based on their concerns that the draft measure would significantly prejudice the ability of the national NRA/CA to achieve the objectives set out in Art. 3, 45, 46 and 47 of the EECC.

Step 2: If a positive majority of the RSPG votes in favour of the initiation of the EPR, the EPR has to take place.

Possibility to opt out of the EPR process into a VPR:

The WG also agreed on the position that opting out of the EPR and entering into a VPR should be possible before the plenary decides on the initiation of the EPR (e.g. before step 2, but not later than when the result of the written procedure is known). To keep the process as confidential as possible, a two-step approach within the trigger mechanism (e.g. within step 1) is needed:

1. At first, the RSPG secretariat should inform the notifying NRA/CA that there is a MS wanting to trigger an RSPG decision on the initiation of an EPR.
2. In a second step, an exchange of views should be possible between the notifying NRA/CA and the triggering MS with regard to the draft measure concerned.

Required reasoning by the triggering MS

The WG came to the conclusion that the reasoning to be provided by the triggering MS should be simple and high level, keeping in mind that a more detailed reasoning will be possible at a later stage during the process, e.g. during the written voting procedure within RSPG. The RoP should only make reference to Art. 35 (2) of the EECC to state the required reasoning.

Majority requirements for the initiation of an EPR

After many days of debate, the WG put together a package consisting of the key elements of the RSPG decision-making process on EPR. The key elements are as follows:

- the number of MS required for triggering an RSPG decision on the initiation of an EPR
- majority requirements (number of votes in favour of; silence is not consent)
- opting out is possible.

All elements are closely related. Any change in any element will reopen the discussion again.

The WG requests that the RSPG decides on the exact number of MS to trigger (Step 1) and on the majority required to initiate the EPR (Step 2).

Modified written procedure

Nearly all of the members of the WG came to the conclusion that the RoP need to be changed with regard to the procedural provisions for written votes (Article 7 of the current RoP). At first - and contrary to the general provisions for written procedures according to Article 7 - any abstention from voting on the initiation of an EPR should not be considered a tacit agreement. In addition, the WG found the voting period of 14 calendar days for a written procedure to be too long when it comes to the initiation of an EPR and suggested a shorter timing in the report.

2. RSPG Rules of Procedure

In addition to the adoption of the EC decision establishing the RSPG (11 June 2019), the EC discussed with the WG about a possible update of the RoP.

At the WG level, the EC confirmed the information received during the last RSPG plenary about its aims to have the draft RoP approved by the plenary in the meeting on the 9th of October. The WG thanked the EC for the transparent process and for the possibility to informally comment on the draft RoP at an early stage.

The WG noted that there are important novelties in the RoP on the new provisions of the EECC for the Peer Review Process (Articles 9 to 11) and for cross-border coordination and good offices (Article 8).

In addition, the EC highlighted that the informal draft also reflects changes in the EC decision establishing the RSPG (C/2019/4147) as well as the provisions of the rules on horizontal expert groups (Commission decision establishing horizontal rules on the creation and operation of Commission expert groups, C/2016/3301) and the Regulation regarding public access to European Parliament, Council and Commission documents (EC/1049/2001). Therefore, the informal draft RoP entail rules on the minutes of RSPG meetings, transparency provisions as well as provisions with regard to access to documents.

The WG discussed these issues during its meeting in July and by correspondence. All WG members got the opportunity to submit comments to the EC.

Besides editorial suggestions/questions, comments and questions expressed by the WG members related mainly to the following issues:

- Clarification of the status of sub-groups;
- Clarification with regard to the new rules for the preparation of minutes and reports;
- Cross-Border Coordination and Good Offices:
 - Clarification with regard to the good offices process under the scope of Art. 28 of the EECC on the one hand and beyond the scope of Art. 28 of the EECC on the other hand,

- Leave some degree of flexibility with regard to the assignment of tasks within the good offices group (address the sub-group and not the chairperson of the sub-group);
- Request for clarifications with regard to some new transparency mechanisms in order to ensure that confidential information remains confidential
- Peer Review Provisions:
 - VPR: Stress the discretion of the RSPG to adopt opinions and reports on request of the notifying NRA/CA;
 - EPR: The proposed trigger number as well as the majority requirements for an RSPG decision to initiate an EPR do not reflect the position of most WG members and are too low.

The WG acknowledges that the EC answered all the questions of the WG and took all comments and suggestions carefully into account. The final proposal of the draft RoP to the plenary has to be awaited now. In particular the proposed threshold for the initiation of an EPR will be of high interest and in any case both deliverables (Impact Report and RoP) have to be coherent.

3. RSPP

In line with the current Work Programme, the WG intended to assess any impact on the current RSPP due to the new regulatory framework for electronic communications (EECC) and make relevant recommendations. No action has been taken due to a lack of time.

The co-rapporteurs warmly thank all WG members for their active contributions.

Proposed course of action

The RSPG Plenary Meeting #50 is invited:

- to take note of the progress report and,
- with regard to the initiation of the EPR, to decide on the trigger number for step 1 as well as the majority requirements for step two and
- to accordingly approve the RSPG report on the practical implementation of Art. 35 of the EECC.

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