BEREC And NRAs’ Role In Making Net Neutrality Implementation A Success In Europe

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- Regulation (EU) 2015/2120 of 25 November 2015 laying down measures concerning open internet access [...]  
  - common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users’ rights (Art 1 § 1)  
  - It aims to protect end-users and simultaneously to guarantee the continued functioning of the internet ecosystem as an engine of innovation (Rec 1)
- NRAs are required to promote “the ability of end users to access and distribute information or run applications and services of their choice” (Art 8 § 4(g) Framework Directive 2002/21/EC)
- Transparency requirements vis-à-vis consumers (Art 21 Universal Service Directive 2002/22/EC)
- NRAs – after consulting the EC - have the power to intervene by setting minimum quality of service requirements for network transmission service (Art 22 § 3 USD)
Thesis 1: The unclearer the law, the more guidance is welcomed

- The Regulation (EU) 2015/2120 is a political compromise
  - “We have found a compromise. But better this solution than no solution.” (G. Oettinger, Oct 2015)
  - Remember EC’s proposal for a regulation to achieve a Connected Continent, COM (2013) 627, Art 23 ff
- But also the regulation’s wording is sometimes vague and unclear
  - NRAs shall “closely” monitor compliance (Art 5 § 1)
  - “zero-rating” was intensively discussed during legislative process, but no clear answer has been given in regulation
  - Discrepancies between recitals and enacting part of the regulation
- This leads to leeways in decision-making by NRAs
- Case-by-case-decisions are likely to follow
- Legal uncertainty until CJEU
Thesis 2: The Regulation is aware of its own shortcomings

- For the consistent application of the Regulation it is necessary for BEREC to make a contribution by guidelines
  - Art 5, § 3: “By 30 August 2016, in order to contribute to the consistent application of this Regulation, BEREC shall [...] issue guidelines for the implementation of the obligations of national regulatory authorities [...]”
  - Rec 19: National regulatory authorities should take utmost account of relevant guidelines from BEREC.
  - Rec 18: [concerning significant and continuous or regularly recurring difference between the actual performance of the service and the performance indicated in the contract] The methodology should be established in the guidelines of BEREC and reviewed and updated as necessary to reflect technology and infrastructure evolution.

- See also: BEREC guidelines on Roaming
- For the Legal Personality of BEREC: see COM (2016) 591
Thesis 3: BERECE and NRAs have already assumed responsability

- High expectations in BERECE Guidelines
  - Public consultation of draft guidelines (June/July 2016)
  - More than 480,000 responses from various types of stakeholder
  - “Guidelines should amend or correct the regulation” – Overestimation of the nature of guidelines
- BERECE Strategy 2018 – 2020: Fostering a consistent approach of the net neutrality principles
  - BERECE will work actively to support NRAs in applying the Regulation in a consistent way throughout Europe.
  - Strategic priority to investigate the ways in which net neutrality is affected by changes in markets and new technologies.
  - Encourage NRAs to share experience on the practical implementation of the Regulation and the BERECE guidelines.
Thesis 4: BEREC and NRAs are committed to make their contributions to consistent application

- BEREC Work Programme 2018: 3 workstreams dedicated to net neutrality
- Development of a net neutrality measurement tool
  - to develop a common opt-in net neutrality measurement tool providing practical guidance regarding the technical implementation of a net neutrality monitoring system (tender Q1/2018; implementation starting Q3/2018);
  - consisting of 3 elements: open source software, a reference system, a BEREC portal.
- Implementation of the Net Neutrality Regulation
  - Monitoring the implementation of the net neutrality provisions.
  - Developing an annual European-level net neutrality report.
  - Set up a forum to discuss national cases and questions relating to the consistent application of the Regulation, also covering cases of zero-rating.
- Input to an evaluation
  - EC shall submit a review-report by 30 April 2019. BEREC will provide an Opinion in which it will evaluate the experiences and address upcoming technologies (such as 5G, specialised services, IoT/M2M services, etc) and their relationship to the Regulation.
  - Open consultation in the first half of 2018.
Antithesis: Lack of followership of NRAs?

- NRAs remain legal entities responsible for the enforcement of net neutrality rules
- NRAs can not be compelled to take actively part in BEREC work
  - Despite Art 3, § 3b, § 3c Framework Directive
- Weak legal ground for taking utmost account of BEREC Guidelines (rec 19)
- Harmonized application of the regulation might be challenged, if NRA
  - is too less enthusiastic,
  - has a lack of resources,
  - is not enough courageous,
  - is not independent in its decision making

- But these are not net-neutrality-specific shortcomings
Synthesis/Conclusion: BEREC and NRAs have the potential to make the implementation a success

- **Success would be:** consistent application of Net Neutrality Regulation throughout the EU by NRAs
  - Common view on services/technologies whether they infringe regulation or not
  - No different economic areas within the European Single Market

- **Net Neutrality:** A more harmonized approach among NRAs (under BEREC’s guidance) seems to be more likely than in other fields of telecommunications
  - No long national “net-neutrality-history”
  - No big legacy issues
  - Observation: High commitment of NRAs to BEREC Guidelines
  - Due to EU-wide market players: (new) services/technologies are introduced sometimes simultaneously in different Member States; thus, different NRAs are faced with the same phenomena at the same time

- **BEREC’s way to push on close and common considerations of net neutrality cases among NRAs shows first results**
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