European Commission

Study on the implementation of the open internet provisions of the Telecoms Single Market Regulation

EXECUTIVE SUMMARY

A study prepared for the European Commission
DG Communications Networks, Content & Technology
by:

Bird & Bird ECORYS

Digital Single Market

This study was carried out for the European Commission by

Internal identification

Contract number: LC-00677585

SMART number 2017/0011

DISCLAIMER

By the European Commission, Directorate-General of Communications Networks, Content & Technology.

The information and views set out in this publication are those of the author(s) and do not necessarily reflect the official opinion of the Commission. The Commission does not guarantee the accuracy of the data included in this study. Neither the Commission nor any person acting on the Commission's behalf may be held responsible for the use which may be made of the information contained therein.

ISBN: 978-92-76-01644-1
doi: 10.2759/09091

Luxembourg: Publications Office of the European Union, 2019

Executive summary

Introduction

On 25 November 2015, Regulation (EU) 2015/2120 ("**the Regulation**") was adopted, introducing uniform rules on net neutrality for the European Union.[1] The Regulation is applicable since 30 April 2016. The subject matter and the scope of the Regulation are set out in Article 1, paragraph 1:

> *This Regulation establishes common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users' rights.*

The Regulation aims to protect end-users and simultaneously guarantee the continued functioning of the internet ecosystem as an engine of innovation.[2]

Guidance on the Regulation is provided by the Body of European Regulators for Electronic Communications ("**BEREC**"). On 30 August 2016, after a six month period of consultation, first within BEREC and then with all external stakeholders, including almost 500 000 individual comments,[3] BEREC issued guidelines on the basis of Article 5(3) of the Regulation ("**BEREC Guidelines**") to contribute to a harmonised interpretation and implementation of the obligations by the National Regulatory Authorities ("**NRAs**").[4]

The Regulation contains a provision calling for evaluation of its implementation. Article 9 stipulates that by 30 April 2019, the European Commission ("**Commission**") shall review the implementation of Articles 3, 4, 5 and 6 (the net neutrality provisions) and shall submit a report of the review to the European Parliament and the Council. This Study supports the required assessment by providing the Commission with a facts-based overview of the implementation and effectiveness of the different rights and obligations introduced by Articles 3, 4, 5 and 6 of the Regulation. The Commission intends to use the findings of this Study in its report to the European Parliament and the Council.

For a proper evaluation, the effects of the Regulation should, in our view, be measured against the pre-existing situation where Member States and Norway[5] (hereinafter referred to as **"Member States+"**) were treating net neutrality very differently.[6] However, a particular challenge in the identification of the impact of the Regulation has been that the interpretation and implementation of the Regulation is to some extent work in progress due to the relatively limited time elapsed since its adoption and since the adoption of the BEREC Guidelines.

---

[1] Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (hereafter: Regulation).

[2] Regulation, Recitals 1-3.

[3] BEREC (2016), Report on the Outcome of the Public Consultation on Draft BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules, BoR (16) 128.

[4] BEREC (2016), Guidelines on the Implementation by National Regulators of European Net Neutrality Rules, BoR (16) 127 (hereafter: BEREC Guidelines (2016)).

[5] A selection within EEA countries was made based on the quality and quantity of data that could realistically be collected, mindful of time constraints. We selected Norway, since the country plays a leading role in net neutrality policy discussions (in particular its NRA Nkom holds the Co-Chair of the BEREC Net Neutrality Expert Working Group).

[6] Scott Marcus, Network neutrality Revisited: Challenges and Responses in the EU and in the US, Study for the IMCO Committee, December 2014, para 6.1.

In our effectiveness analysis, we have *inter alia* assessed whether the BEREC Guidelines did and could (further) contribute to the objectives of the Regulation. However, a full-fledged evaluation of the BEREC Guidelines as such is outside the scope of this Study.

It must also be recalled, at the outset, that the aforementioned Articles of the Regulation cannot be analysed in isolation. The effectiveness of the Regulation is influenced both by existing EU legislation and by forthcoming EU legislation such as the Proposal for a European Electronic Communications Code ("**Code**").[7] Where we have come across such (potential) influences during our research, we have pointed them out in this Study.

In order to achieve a comprehensive evaluation across the European Union, we followed a two-step approach in our analysis. First, we analysed the implementation and the application of the net neutrality provisions in each of the Member States+. Subsequently, we used the country-specific findings, which can be found in Part II – to analyse each of the Articles and carried out some additional research (the Article-by-Article analyses).

In this Executive Summary, we limit ourselves to the main conclusions. Our overall findings regarding the net neutrality provisions are set out in Chapter 7 of this Report.

Conclusions

Our main conclusion is that the Regulation, in combination with the BEREC Guidelines, has significantly contributed to a more harmonised approach to the establishment, implementation and enforcement of net neutrality rules within the EU and Norway.

On balance, all stakeholders appreciate the benefits of the Regulation and the harmonised framework that it has created regarding the provision of and access to internet services within the single market. The Regulation is generally considered to be effectively principles-based, balanced and future-proof. During our research no stakeholder has indicated that the Regulation should be abolished or even (significantly) amended.

Our conclusions with respect to the effectiveness of Articles 3 – 6 of the Regulation are the following.

Article 3

Article 3 has clearly contributed to safeguard open internet access.

On the basis of Article 3(1), greater consistency was achieved regarding the free choice of terminal equipment. An important aspect is whether routers and modems are qualified as terminal equipment or belonging to the Network Termination Point. This depends on the definition of Network Termination Point which is not included in the Regulation.

The assessment of zero-rating (or sponsored data) offers – both on the basis of Article 3(2) and Article 3(3) – has become significantly more coherent and effective. Courts in **Slovenia** and the **Netherlands**[8] have ruled that Article 3 of the Regulation does not contain a total prohibition of price differentiation by way of zero-rating offers.[9]

[7] Final text of the proposal for a Directive establishing the European Electronic Communciations Code (EECC) as adopted by the European Parliament on 14th November 2018; https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=IMMC:P8_TA(2018)0453.
[8] Lawyers of the Consortium are representing the mobile operator in the zero-rating cases in the Netherlands.
[9] Part II, Chapters 21 and 27.

NRAs are assessing zero-rating as a commercial offer on the basis of Article 3(2) and/or as a traffic management measure on the basis of Article 3(3) with possibly different outcomes. However, the Regulation does not prescribe priorities in enforcement by the NRAs.[10]

Article 3(2) requires a comprehensive assessment of the commercial terms. Sofar zero-rating offers have not been prohibited by NRAs on the basis of such a comprehensive assessment. In **the Netherlands** the NRA-decision not to enforce on the basis of Article 3(2) is challenged in appeal by the complainant.[11] Enforcement decisions that have been taken in the Member States+ on the basis of Article 3(3) (traffic management measures) relate to unequal treatment beyond the data cap and throttling of zero-rated components. The appeal against such a decision in **Sweden**[12] was rejected. Appeals against enforcement decisions on the basis of Article 3(3) are still pending in **Austria**, **Germany**,[13] **Hungary** and **Slovenia**.[14]

With respect to the assessment of traffic management measures other than zero-rating; we have come across a few divergent approaches by NRAs in relation to the assessment whether the blocking of specific ports is allowed or not pursuant to Article 3(3). Furthermore, the question was raised by various groups of stakeholders (ISPs and some CAPs) as to whether Article 3(3) leaves enough room for traffic management measures to the extent that these would be necessary for the development and offering of new/specialised services.

Article 3(4) regarding privacy and the protection of data is rarely applied in view of the applicability of the General Data Protection Regulation ("**GDPR**")[15] and the ePrivacy Directive,[16] and has not given rise to interpretation issues.

There is concern amongst certain groups of stakeholders (Internet Service Providers ("**ISPs**") and some Content, Applications and Services Providers ("**CAPs**")) that Article 3(5) regarding specialised services may hamper 5G roll out and the development of new services whilst other stakeholders (Consumer Organisations (**"COs"**), Civil Society Organisations (**"CSOs"**) and other CAPs) take the view that 5G should not affect net neutrality. Furthermore, concerns have been raised by ISPs stating that they need more flexibility and certainty for their future investment. Although there are no commercial 5G services available yet and hence no practical application, there is uncertainty amongst stakeholders about the future interpretation of Article 3(5) by NRAs. The BEREC Guidelines are providing less guidance than for instance in relation to zero-rating offers. Appeal proceedings are pending in **Austria** in relation to the interpretation of Article 3(5) with respect to a Video-on-Demand service. This legal proceeding has not yet been concluded and may result in a referral to the European Court of Justice.

Article 4

Article 4 has improved transparency of internet access services offerings.

---

[10] Reference is made to our findings in relation to Article 5.
[11] Part II, Chapter 21.
[12] Part II, Chapter 29; Stockholm Administrative Court 28 September 2018, case no. 4207-17.
[13] The Administrative Court of Cologne rejected in a preliminary procedure the motion of Deutsche Telekom for temporary relief on 20 November 2018. This decision in the preliminary procedure is open for appeal. Besides that a final decision on the case is still expected.
[14] Part II, Chapters 2, 12, 14 and 27.
[15] Regulation (EU) 2016/679 of the European Parliament and the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC, (hereafter: General Data Protection Regulation or "GDPR").
[16] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L201/37, (hereafter: ePrivacy Directive, , 2002/58/EC).

NRAs have generally focused on supervision and enforcement of this Article. Especially in relation to additional transparency requirements by Member States+ pursuant to Article 4(3) and additional requirements by NRAs pursuant to Article 5(1), we still find a certain divergence. However, there is greater consistency compared to the situation prior to the adoption of the Regulation. Moreover, additional harmonisation of transparency requirements will be achieved once the Code enters into force.

The handling of complaints is nationally driven on the basis of Article 4(2) and on the basis of pre-existing national complaint handling procedures. However, no concerns amongst stakeholders have been raised because of this.

Article 4(4) regarding certified monitoring tools in order to demonstrate significant discrepancies is not yet effective on a broad basis as – strictly speaking – it only serves a purpose in countries where there actually is a certified monitoring mechanism to detect significant discrepancies (and such discrepancies are specified). This is currently only the case in five Member States+. However, Article 4(4) may become more effective over time, also in view of the development of a monitoring tool by BEREC.

Article 5

Article 5 relating to supervision and enforcement has enhanced coherence to some extent, but there are still significant differences in priorities and approaches by NRAs (apart from some remaining differences in the interpretation of individual provisions). However, in our view, Article 5 did not aim to fully harmonise priorities and approaches.

Moreover, there is a lack in consistency and transparency regarding the publication of decisions and court rulings including translations thereof while this is crucial to enhance a coherent interpretation and application of the Regulation across the Member States+.

With respect to Article 5(3), which obliges BEREC to issue guidelines in order to contribute to consistent application, all stakeholders had reservations, but of a varying nature (some considered them too strict whereas others considered them to be too liberal). Nevertheless, the BEREC Guidelines have undoubtedly contributed to a more harmonised application of parts of the Regulation, such as zero-rating and the prohibition of tethering.

In our view, the balance that has been found between the principle-based approach of the Regulation and the BEREC Guidelines to ensure consistent application in the Member States+ is right. However, there is currently legal uncertainty in particular in the application of Articles 3(3) and 3(5). We consider it important that more clarity is provided by the Commission (in conjunction with BEREC) in relation to the interpretation of these Articles. This is particularly important when it comes to obligations, which are debated in the technical community and which may impact the key objectives of the Digital Single Market strategy such as the roll-out of 5G networks and the introduction of new/innovative services via such networks.

Article 6

Penalty provisions in the Member States+ are very different, e.g. in some Member States+ penalties are linked to the turnover of an entity and in others it is a fixed maximum amount or a combination of the two. For similar violations of for instance Article 3 the fixed maximum amounts range from approximately €15 000 to €3 million and turnover related fines range from 0.5% to 10%. Also the type of penalties (fines and/or periodic penalty payments with or without the possibility to impose other

sanctions such as suspension of activities) differ amongst Member States+. The penalty provisions are not (fully) implemented (yet) in three Member States.

To date only very few penalties have been issued and all of them were well below the maximum. Apparently the NRAs did not consider it necessary to impose maxium penalties to prevent or terminate violations of the Regulation. The reason might be that there is almost always a further measure that can be taken in case of violation (higher or repeated fines in the event of repeated offences and/or additional threatening sanctions such as suspension of activities in the event the violation is continued). Based on our findings to date we consider it too early to draw conclusions whether the penalty provisions in the Member States+ are effective, dissuasive and proportionate.

Recommendations

In view of the above and, on balance, our conclusion is that the Regulation has led to a significantly more coherent and effective approach of the net neutrality rules in the Member States+. At the same time, we find that there are some issues that the Commission could consider when evaluating the Regulation.

1. The definition of Network Termination Point creates uncertainty, especially in relation to routers and cable modems. The interpretation within the European Union is not coherent.

   Although a definition of Network Termination Point is not included in the Regulation, the effectiveness of the Regulation may be influenced by whether, for example, routers and cable modems are considered as either part of the network or, in the alternative, as terminal equipment. We therefore recommend that the impact of a diverging interpretation of the term Network Termination Point be further investigated, e.g. in the context of the transposition of the Code and the development of BEREC guidelines in this respect as foreseen in the BEREC Work Programme 2019,[17] in particular in relation to the following provisions:

   - the scope of the right of free choice of terminal equipment as laid down in Article 3(1);
   - the extent to which commercial agreements relating to equipment are covered by Article 3(2) of the Regulation;
   - the scope and interpretation of the rules relating to traffic management measures in Article 3(3);
   - the applicability of the transparency rules on equipment and the effects on quality/speed parameters referred to in Article 4(1);
   - the impact on the development and the results of monitoring tools referred to in Article 4(4) and whether measurements should include routers/modems or not; and
   - the applicability of enforcement measures and penalties pursuant to Articles 5 and 6.

2. The objectives of the Regulation are: (i) to protect end-users; and (ii) simultaneously to guarantee the continued functioning of the internet ecosystem as an engine of innovation. Given the ambitions in relation to the roll out of *inter alia* 5G networks and the development of new/innovative services, which are core

[17] According to the BEREC Work Programme 2019, BEREC will prepare guidelines on the identification of the network termination point, BoR (18) 240, paragraph 1.3.

to the Digital Single Market initiatives and the Code, it is important that the provisions of the Regulation are interpreted in accordance with both objectives.

However, the BEREC Guidelines are providing less guidance to support the case-by-case approach with respect to the second objective and the introduction of new networks and services.[18] The pending Court case in **Austria** is adding to the legal uncertainty.[19] According to the BEREC Work Programme 2019, BEREC will commence an assessment on the impact of 5G on regulation and how regulation could influence the pace at which innovative services are brought to market in parallel with the review of the BEREC Guidelines. [20]

Further clarification might in particular be considered regarding the following parts of Articles 3(3) and 3(5):

- Article 3(3)(2nd) – the references to '*reasonable*' traffic management measures which should be '*proportionate*' and the phrase that '*such measures shall not monitor the specific content and shall not be maintained for longer than necessary*'; and
- Article 3(5)(2nd) - the references to '*where the optimisation is necessary*', '*if the network capacity is sufficient*' and *'to the detriment of the availability of general quality of internet access services*'.

3. With respect to the exception in Article 3(3)(a), the question has come up whether a civil court ruling by which an ISP is ordered to block a certain website (for instance at the request of a right owner), can be invoked by other ISPs as well given the fact that such other ISPs will normally not intervene in the proceedings and the civil court ruling does not have *erga omnes* effect. If this were disallowed, the alternative would be that each time a range of similar legal proceedings would have to be conducted against individual ISPs regarding the same content or the same website. A possible interpretation might be that blocking on the basis of a legal precedent could be covered by the exception referred to in Article 3(3)(a), although this would be an option and not an obligation for other ISPs which have not participated in the court proceedings as a party. We assume that in such a case the usual safeguards regarding procedural justice will continue to apply.

4. It could be considered to make a distinction between consumers and business users when evaluating the effectiveness, efficiency and proportionality of the Regulation in particular in relation to the transparency rules.

5. Consistency in the interpretation of the Regulation and in the approach to supervision and enforcement would be enhanced by additional transparency of adopted measures and court rulings in that field. Although this topic is not limited to the supervision and enforcement of the Regulation, we recommend considering how greater transparency could be achieved. e.g. by publication of (summaries

[18] The BEREC Guidelines only refer to the second objective in paragraphs 43 and 46 in relation to the comprehensive assessment on the basis of Article 3(2).
[19] TKK Decision of 18 December 2017 discussed in para 3.5.4 and in Part II, Chapter 2.
[20] According to the BEREC Work Programme 2019, BEREC will prepare a report on the impact of 5G on regulation and the role of regulation in enabling the 5G ecosystem, BoR (18) 240, paragraph 3.1. Footnote 8: *"Concerning the net neutrality aspect of this project, coordination is foreseen in 2019 between the BEREC Open Internet Expert Working Group and the BEREC Planning and Future Trends Expert Working Group."*

of) national enforcement decisions/national court rulings and by providing English translations of annual net neutrality reports by all NRAs.[21]

We believe that it would be useful for the Commission to take these topics into account in its evaluation of the Regulation and of the current coordination with BEREC.

Finally in light of the ongoing debates amongst technical experts in relation to some of the key topics referred to above, it is in our view important to ensure that not only policy making but also application and amendment of the BEREC Guidelines is evidence based. Moreover, in view of the ongoing developments on the market there will be a need for continued evaluation.

[21] Consideration 74 of the Code explains that a mechanism should be set up for collecting information on appeals and decisions to suspend decisions taken by the competent authorities in all MSs and for the reporting of that information to the Commission and BEREC. This mechanism should ensure that the Commission or BEREC can retrieve from Member States the text of the decisions and judgements with a view to developing a data-base.

European Commission

Study on the implementation of the net neutrality provisions of the Telecoms Single Market Regulation

Luxembourg, Publications Office of the European Union

2019 – 11 pages

ISBN: 978-92-76-01644-1
doi: 10.2759/09091

KK-04-19-288-EN-N

doi: 10.2759/09091 ISBN: 978-92-76-01644-1