

END-USER RIGHTS AND EN- FORCEMENT IN THE TELECOM MARKET

Comments by the Federation of German Consumer Organisations (vzbv) on the draft BEREC Net Neutrality Regulatory Assessment Methodology BoR (17) 112

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I. SUMMARY

The Telecoms Single Market Regulation 2015/2120 (TSM-Regulation) came into force on 30 April 2016 and since then was implemented by the German legislator, adapting the German Telecommunications Act (TKG) on 27 April 2017.

As many parts of the TSM-Regulation are phrased quite vague, the legislative process of amending the German Telecommunications Act was marked by strong differences of interpretation of the TSM-Regulation. Especially regarding the implementation of sector specific remedies on national level.

Verbraucherzentrale Bundesverband (vzbv) welcomes BEREC's draft "Net Neutrality Regulatory Assessment Methodology" and thanks BEREC for the possibility to comment the draft in order to assess the need for amendments from a consumer point of view. The draft laid out by BEREC can give legal certainty to all market players, including end-users and help to guarantee the continued functioning of the internet ecosystems.

II. PROPOSAL IN DETAIL

1. CHAPTER 7 - CERTIFIED MONITORING SYSTEM

According to Article 4 para. 4 (EU) 2015/2120, any significant discrepancy, continuous or regularly recurring, between the actual performance of the internet access service regarding speed or other quality of service parameters and the performance indicated by the provider of internet access services [...] shall, where the relevant facts are established by a monitoring mechanism certified by the national regulatory authority, be deemed to constitute non-conformity of performance for the purposes of triggering the remedies available to the consumer in accordance with national law.

Since 2015, the German Federal Network Agency (BNetzA) has been offering a measuring service that enables end-users to measure the speed of their internet access service.¹ The aim is to enable end-users to easily compare the scope and quality of telecommunication services and assess whether they actually get the contractually agreed bandwidths.

With the amendment of the German telecommunications Act (TKG) in April 2017, the BNetzA measuring tool was recognized as the certified monitoring mechanism according to Article 4 para. 4 (EU) 2015/2120.² Furthermore, BNetzA is currently specifying the indeterminate legal concepts laid out in Article 4 para. 4 in order to provide guide values for end-users, if they have to peruse judicial measures.

During the course of the legislative process amending the German Telecommunication Act, there have been intense discussions about the limits of legislative power for member states concerning remedies for end-users in the case of non-conformity of performance of their internet service. The German legislator concluded that the establishment of new sector-specific remedies, such as an exceptional right of termination or tariff adjustment, would mean a breach of provisions of European Union law and was thereby prohibited.

End-users therefore continue to lack legal certainty. In order to at least trigger civil law claims, courts still have to decide if a non-conformity of performance qualifies as substantial ground to enforce specific German Civil Code rules (BGB). End-users therefore depend on a certified monitoring mechanism to be able to enforce their rights, if the actual performance of the service significantly, continuously and regularly differs from the performance indicated in the contract.

As of now, the measurement information is the only evidence which empowers end-users to trigger remedies at all.

vzbv opposes BEREC's understanding that the implementation of such a monitoring mechanism by national regulators is not required but voluntary. Article 4 para. 4 (EU) 2015/2120 itself provides no basis to interpret it as a discretionary provision and must therefore be understood as mandatory.

¹ Available at: <https://breitbandmessung.de/>.

² Deutscher Bundestag 2017: Drucksache 18/11811.

CONCLUSION

To protect end-user rights and to lower the discrepancy between the bandwidth agreed in the contract and the actual delivered bandwidth, end-users must be empowered to trigger remedies. Without a mandatory certified measuring tool, end-users will still be depending on the information given by their providers. Moreover, they will not be able to gather evidence which qualifies as sufficient information in court. The certified monitoring mechanism must therefore be a mandatory tool, which national regulators have to establish. The content and design of this tool can be determined at the national level.