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Conference Paper

Single market considerations in the practice of BEREC: Study of BEREC opinions in Article 7/7a cases

24th European Regional Conference of the International Telecommunications Society (ITS):
"Technology, Investment and Uncertainty", Florence, Italy, 20th-23rd October, 2013

Provided in Cooperation with:

International Telecommunications Society (ITS)

Suggested Citation: Batura, Olga (2013) : Single market considerations in the practice of BEREC: Study of BEREC opinions in Article 7/7a cases, 24th European Regional Conference of the International Telecommunications Society (ITS): "Technology, Investment and Uncertainty", Florence, Italy, 20th-23rd October, 2013, International Telecommunications Society (ITS), Calgary

This Version is available at:

<https://hdl.handle.net/10419/88477>

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Single Market considerations in the practice of BEREC: study of BEREC opinions in Article 7/7a cases

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It is a matter of common knowledge that one of the economic rationales behind the creation of the European Economic Communities and later the European Union (EU) was the establishment of the internal market (Single Market) – an area without barriers to free circulation of goods, services, people and capital (Art. 3 (3) TFEU). The competitive Single Market is considered one of the main factors for economic growth, innovation and investment and a foundation of well-being of European citizens and further improvement of their quality of life.

Yet, 20 years after the declaration of the common market in the EU, the Single Market has not been achieved. The “costs of non-Europe” are perceived to be crucial at times of the financial crisis and to the success of the Europe 2020 Strategy.¹ The missing single market for electronic communications² remains a serious handicap in the process of the successful implementation of the Europe 2020 Strategy being one of its 7 flagship initiatives³ presented by the Commission.

While the reasons for non-Europe in electronic communications are manifold⁴ and cannot be fully grasped in legal terms, law can address such essential factors as reduction of regulatory uncertainty and regulatory barriers by developing a proper uniform regulatory framework and by providing for mechanisms ensuring its homogenous implementation across the EU.

This paper intends to study the latter issue and focuses in particular on the contribution of the Body of the European Regulators for Electronic Communications (BEREC) to the minimisation of heterogeneous implementation of the European rules by the national regulatory authorities (NRAs).⁵ To render the subject of the research even more precise, this paper limits itself solely to the legal analysis of BEREC practice within Article 7/7a procedures in order to determine whether and how various considerations of promotion of the Single Market are taken into account as required by Art. 1 (3) BEREC Regulation⁶.

¹ See Communication from the Commission “Europe 2020: A strategy for smart, sustainable and inclusive growth”, COM(2010) 2020 final of 03.03.2010.

² See an analysis by Pelkmans, Jacques and Andrea Renda, Single eComms market? No Such Thing..., CEPS Policy Brief No. 231, January 2011; most recently confirmed by the Vice-President of the European Commission Neelie Kroes on the 15th of March 2013 in her blog <http://blogs.ec.europa.eu/neelie-kroes/european-council-ict-single-market/> (accessed 02.05.2013).

³ See http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/flagship-initiatives/index_en.htm.

⁴ See Study for the DG Information Society and Media by Ecorys „Steps towards a truly Internal Market for e-communications: In the run-up to 2020“ of 14 November 2011.

⁵ Regulation (EC) 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of the European Regulators for Electronic Communications (BEREC) and the Office, OJ L 337/1 of 18.12.2009.

⁶ In conjunction with Art. 8 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, amended by

Considering the fact that BEREC has been effectively operating for almost 3 years and has issued opinions on sixteen Article 7/7a cases so far, the time seems ripe for some initial review of the results of BEREC's activity.

Against the initially perceived trend to agree with the serious doubts expressed by the Commission in Article 7/7a proceedings, BEREC has adopted several opinions supporting partially or completely the draft decisions of the NRAs. Of great interest, therefore, is to examine what role, if any, Single Market considerations have played in elaboration of these opinions. While Single Market concerns could be assumed in the cases where BEREC sided with the Commission, they still need to be examined as BEREC conducts its own investigations and adopts its own reasoning on each of the cases.

For this part of the research, legal analysis of BEREC opinions shall be carried out, focusing in particular on the following:

- BEREC Opinion on Phase II investigation pursuant to Article 7a on Case NL/2012/1299: Wholesale broadband access (Market 5) and wholesale terminating segments of leased lines (Market 6) in the Netherlands;
- BEREC Opinion on Phase II investigation pursuant to Article 7a on Case NL/2012/1284: Call termination on individual public telephone networks provided at a fixed location in the Netherlands and Case NL/2012/1285: Voice call termination on individual mobile networks in the Netherlands;
- BEREC Opinion on Phase II investigation pursuant to Article 7 on Case CZ/2012/1322: Wholesale broadband access (Market 5) in the Czech Republic.

An institutional setting allowing to bring to the fore Single Market considerations during the investigations and elaboration of opinions in Article 7/7a cases is a necessary, enabling requirement. Therefore, the legal arrangements for the functioning of Expert Working Groups, established on an *ad hoc* basis for each case, the Board of Regulators as well as legally established possibilities for cooperation between the Commission and BEREC and NRAs and BEREC shall be studied. The main reference sources in this regard are:

- Regulation (EC) 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of the European Regulators for Electronic Communications (BEREC) and the Office, OJ L 337/1 of 18.12.2009;
- Rules of procedure of the Board of Regulators, BoR(11)23.

The paper is intended to shed some light on BEREC's capacity to contribute to the creation of the Single Market as well as – hopefully – on BEREC's partisanship (proximity to the NRAs v influence by the Commission) within the European governance network for electronic communications.

The paper will draw on scholarly research on EU agencies in general and on BEREC in particular (e.g. Francesco Rizzuto, Reforming the “Constitutional Fundamentals” of the European Union Telecommunications Regulatory Framework, in: Computer and Telecommunications Law Review, Vol. 16 No. 2, 2010, pp. 44-56; Laurent De Muyter, Does Europe Need a Single European Telecom Regulator? In European Competition Journal, Vol. 4 No. 2, December 2008, pp. 561-578) in order to gain a theoretical perspective on new modes of governance in the EU. It will also use the valuable insights provided by the Study on the Evaluation of BEREC and the BEREC Office of 2012 in order to evaluate institutional arrangements.