



21.9.2018

NOTICE TO MEMBERS

Subject: Petition No 0210/2018 by Simona Levi (Spanish), on behalf of Xnet, on alleged violation of Net neutrality provisions in Spain

1. Summary of petition

The petitioner is concerned about alleged improper implementation by Spain of the Net neutrality rules. In view of the petitioner, Spain improperly implemented EU Open Internet Regulation (Regulation (EU) 2015/2120) adopted on 25 November 2015 by the European Parliament and the Council and the implementing guidelines adopted in August 2016 by the Body of European Regulators for Electronic Communications (BEREC). The petitioner states that according to the EU legislation, the enforcement of the open internet rules is an important task of national regulatory authorities. In Spain, however, the body responsible for the implementation, which is the Secretariat of State for the Information Society and the Digital Agenda under the jurisdiction of the Minister of Energy and Digital Agenda, is not an independent one. The petitioner claims that Spain is in violation of the Regulation as it has not set up a separate complaint channel on net neutrality and is not implementing the Net neutrality provisions efficiently.

2. Admissibility

Declared admissible on 2 July 2018. Information requested from Commission under Rule 216(6).

3. Commission reply, received on 21 September 2018

The Commission's observations

Regulation (EU) 2120/2015 concerning open internet access attributes certain tasks to national regulatory authorities. The Regulation is silent as to whether those authorities should be independent from the government. Nevertheless, as pointed out by the petitioner, in most Member States (26 out of 28) the authority responsible for implementing the open internet rules is the politically independent national regulatory authority, i.e. the authority responsible for ex ante market regulation. Spain is indeed one of two Member States which attributed the

competence to apply those rules to a service under the hierarchical control of the government.

This situation is not without consequences. As mentioned by the petitioner, it may lead to confusion and duplication. Indeed, the authority responsible for resolving disputes between undertakings on issues related to net neutrality should, according to Union law, be independent from the government. In Spain this competence is attributed to the CNMC, which is however not competent for policy or implementation of net neutrality rules. Furthermore, at Union level, the Body of European Regulators for Electronic Communications (BEREC) has competences in the area of net neutrality, in particular with respect to guidelines for the implementation of the obligations provided in the Regulation. Members of BEREC are the National Regulatory Authorities of the Member States which are responsible for ex ante market regulation. While CNMC is a member of BEREC, it lacks key competence in the net neutrality field.

This situation will be addressed to some degree in the near future. The recently politically agreed Directive establishing the European Electronic Communications Code clarifies that it is the politically independent national regulatory authority which should be competent for assessing and monitoring closely market shaping and competition issues, also regarding open internet access. The new rules are expected to be transposed by the Member States by the end of 2020.

Article 5(1) of Regulation (EU) 2015/2120 requires national regulatory authorities to closely monitor and ensure compliance with the net neutrality rules. While there is no legal obligation to set up a separate complaints procedure for net neutrality issues, the effective application and enforcement of the net neutrality rules requires an effective possibility for end-users to file complaints on net neutrality issues where their interests are affected¹. With regard to the issues specifically raised by the petitioner, the Commission agrees that zero rating and transparency requirements for internet speeds and for traffic management are issues that the national regulatory authorities should closely monitor and regarding which they should ensure compliance. According to the information provided by the Spanish Ministry of Industry, Trade and Tourism, there have been no complaints from users on zero-rating offers so far². In its role as Guardian of the Treaties, the Commission monitors the effective enforcement of the net neutrality rules in all Member States, including Spain.

Conclusion

Without prejudice to the Commission's position as to compliance with EU law of the implementation of net neutrality rules in Spain, the attribution of competences in the area of net neutrality in Spain could potentially lead to inefficiencies and result in an unsatisfactory protection of end-users' rights related to net neutrality. Moreover, while there is no legal requirement to set up a dedicated complaints procedure specifically for net neutrality, the effective application of the net neutrality rules requires the possibility to bring complaints to the attention of the national regulatory authority, irrespective of the question whether or not this authority is independent from the government. The Commission is closely monitoring the situation.

¹ Cf. also paras 171 and 177 of the BEREC Guidelines, references to “collecting information and complaints received directly from end-users or other information sources such as news, blogs, forums and other discussion groups”, and “collecting information on complaints related to infringements of the Regulation” respectively.

² <https://ec.europa.eu/digital-single-market/en/scoreboard/spain>