

FINAL CA10

Internal market procedures

The CA covers Art 32-34 and related recitals. All relevant AMs, including AMs 59, 510-535, as well as IMCO xx, CULT ~~yy~~[35-36](#), ~~LIBE-zz~~, fall.

Recitals

- (74a) *Transparency in the application of the Union mechanism for consolidating the internal market for electronic communications should be increased in the interest of citizens and stakeholders and to enable parties concerned to make their views known, including by way of requiring **the** national regulatory authorities to publish any draft measure at the same time as it is **communicated** ~~made accessible~~ to the Commission, BEREC, and the national regulatory authorities in other Member States. Any such draft measure should be reasoned and **should** contain a detailed analysis .¹*
- (75) The Commission should be able, after taking utmost account of the opinion of BEREC, to require a national regulatory authority to withdraw a draft measure where it concerns definition of relevant markets or the designation or not of undertakings with significant market power, and where such decisions would create a barrier to the single market or would be incompatible with Union law and in particular the policy objectives that national regulatory authorities should follow. This procedure is without prejudice to the notification procedure provided for in Directive 2015/1535/EU and the Commission's prerogatives under the Treaty in respect of infringements of Union law.
- (76) The national consultation provided for under Article 24 should be conducted prior to the Union law consultation provided for under Articles 34 and 35 of this Directive, in order to allow the views of interested parties to be reflected in the Union law consultation. This would also avoid the need for a second Union law consultation in the event of changes to a planned measure as a result of the national consultation.
- (77) It is important that the regulatory framework is implemented in a timely manner. When the Commission has taken a decision requiring a national regulatory authority to withdraw a planned measure, national regulatory authorities should submit a revised measure to the Commission. A deadline should be laid down for the notification of the revised measure to the Commission under Article 34 in order to allow market players to know the duration of the market review and in order to increase legal certainty.
- (78) The Union mechanism allowing the Commission to require national regulatory authorities to withdraw planned measures concerning market definition and the designation of operators having significant market power has contributed significantly to a consistent approach in identifying the circumstances in which ex ante regulation

1 To reflect AMs 510-511. [DLA input](#).

may be applied and those in which the operators are subject to such regulation. The experience of the procedures under Article 7 and 7a of Directive 2002/21/EC (Framework Directive) has shown that inconsistencies in the national regulatory authorities' application of remedies under similar market conditions undermine the internal market in electronic communications. Therefore the Commission and BEREC should participate in ensuring, within their respective responsibilities, a higher level of consistency in the application of remedies concerning draft measures proposed by national regulatory authorities. In addition, where BEREC shares the Commission's concerns, the Commission should be able to require a national regulatory authority to withdraw a draft measure. In order to benefit from the expertise of national regulatory authorities on the market analysis, the Commission should consult BEREC prior to adoption of its decisions and/or recommendations.

- (79) Having regard to the short time-limits in the Union consultation mechanism, powers should be conferred on the Commission to adopt recommendations and/or guidelines to simplify the procedures for exchanging information between the Commission and national regulatory authorities, for example in cases concerning stable markets, or involving only minor changes to previously notified measures. Powers should also be conferred on the Commission in order to allow for the introduction of a notification exemption so as to streamline procedures in certain cases.
- (80) National regulatory authorities should be required to cooperate with each other, with BEREC and with the Commission in a transparent manner to ensure the consistent application, in all Member States, of the provisions of this Directive.
- (81) The discretion of national regulatory authorities needs to be reconciled with the development of consistent regulatory practices and the consistent application of the regulatory framework in order to contribute effectively to the development and completion of the internal market. National regulatory authorities should therefore support the internal market activities of the Commission and those of BEREC.
- (82) Measures that could affect trade between Member States are measures that may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in a manner which might create a barrier to the single market. They comprise measures that have a significant impact on operators or users in other Member States, which include, inter alia: measures which affect prices for users in other Member States; measures which affect the ability of an undertaking established in another Member State to provide an electronic communications service, and in particular measures which affect the ability to offer services on a transnational basis; and measures which affect market structure or access, leading to repercussions for undertakings in other Member States.

Articles

Article 32

Consolidating the internal market for electronic communications

1. In carrying out their tasks under this Directive, national regulatory authorities shall take the utmost account of the objectives set out in Article 3, including in so far as they relate to the functioning of the internal market.

2. National regulatory authorities shall contribute to the development of the internal market by working with each other and with the Commission and BEREC in a transparent manner so as to ensure the consistent application, in all Member States, of the provisions of this Directive. To this end, they shall, in particular, work with the Commission and BEREC to identify the types of instruments and remedies best suited to address particular types of situations in the marketplace.

3. Except where otherwise provided in recommendations or guidelines adopted pursuant to Article 34 upon completion of the consultation referred to in Article 23, where a national regulatory authority intends to take a measure which:

- (a) falls within the scope of Articles 59, 62, 65 or 66 of this Directive; and
- (b) would affect trade between Member States;

it shall **publish** the draft measure **and make it²** accessible to the Commission, BEREC, and the national regulatory authorities in other Member States, at the same time, together with the reasoning **and detailed analysis** on which the measure is based, in accordance with Article 20(3), and inform the Commission, BEREC and other national regulatory authorities thereof. National regulatory authorities, BEREC and the Commission may make comments to the national regulatory authority concerned only within one month. The one-month period may not be extended.³

4. Where an intended measure covered by paragraph 3 aims at:

- (a) defining a relevant market which differs from those defined in the Recommendation in accordance with Article 62(1); or
- (b) deciding whether or not to designate an undertaking as having, either individually or jointly with others, significant market power, under Article 65(3) or (4);

and would affect trade between Member States, and the Commission has **notified⁴** the national regulatory authority that it considers that the draft measure would create a barrier to the single market or if it has serious doubts as to its compatibility with Union law and in particular the objectives referred to in Article 3, the draft measure shall not be adopted for a further two months. This period may not be extended. The Commission shall inform **BEREC and** national regulatory authorities of its reservations in such a case **and simultaneously make them public.⁵**

4a. Within six weeks from the beginning of the two month period referred to in paragraph 4, BEREC shall issue an opinion on the Commission's notification referred to in paragraph 4, indicating whether it considers that the draft measure should be amended or withdrawn and shall, where appropriate, provide specific proposals to that end. The opinion shall be reasoned and made public.⁶

5. Within the two-month period referred to in paragraph 4, the Commission may:

- (a) take a decision requiring the national regulatory authority concerned to withdraw the draft measure; and/or
- (b) take a decision to lift its reservations in relation to a draft measure referred to in paragraph 4.

2 AM 510 Kumpula-Natri et al and 511 Borrelli et al (adjusted)

3 DR AM 59. Justif: *It follows from the internal logic of the text that the reasoning on which the measure is based also should include the underlying detailed analysis.*

4 Consequence of poss 32(4a)

5 AM 514 Kumpula-Natri et al and 515 Borrelli (adjusted)

6 AM 519 Kumpula-Natri et al. [DLA input](#).

The Commission shall take utmost account of the opinion of BEREC before issuing a decision. The decision shall be accompanied by a detailed and objective analysis of why the Commission considers that the draft measure should not be adopted, together with specific proposals for amending the draft measure.

6. Where the Commission has adopted a decision in accordance with paragraph 5, requiring the national regulatory authority to withdraw a draft measure, the national regulatory authority shall amend or withdraw the draft measure within six months of the date of the Commission's decision. When the draft measure is amended, the national regulatory authority shall undertake a public consultation in accordance with the procedures referred to in Article 23, and shall re-notify the amended draft measure to the Commission in accordance with the provisions of paragraph 3.

7. The national regulatory authority concerned shall take the utmost account of comments of other national regulatory authorities, BEREC and the Commission and may, except in cases covered by paragraphs 4 and 5(a), adopt the resulting draft measure and, where it does so, shall communicate it to the Commission.

8. The national regulatory authority shall communicate to the Commission and BEREC all adopted final measures which fall under paragraph (3)(a) and (b) of this Article.

9. In exceptional circumstances, where a national regulatory authority considers that there is an urgent need to act, in order to safeguard competition and protect the interests of users, by way of derogation from the procedure set out in paragraphs 3 and 4, it may immediately adopt proportionate and provisional measures. It shall, without delay, communicate those measures, with full reasons, to the Commission, the other national regulatory authority, and BEREC. A decision by the national regulatory authority to render such measures permanent or extend the time for which they are applicable shall be subject to the provisions of paragraphs 3 and 4.

9a. A national regulatory authority may withdraw a draft measure at any time.⁷

Article 33

Procedure for the consistent application of remedies

1. Where an intended measure covered by Article 32(3) aims at imposing, amending or withdrawing an obligation on an operator in application of Article 65 in conjunction with Article 59 and Articles 67 to 74, the Commission may, within the period of one month provided for by Article 32(3), notify the national regulatory authority concerned and BEREC of its reasons for considering that the draft measure would create a barrier to the single market or its serious doubts as to its compatibility with Union law. In such a case, the draft measure shall not be adopted for a further three months following the Commission's notification.

In the absence of such notification, the national regulatory authority concerned may adopt the draft measure, taking utmost account of any comments made by the Commission, BEREC or any other national regulatory authority.

2. Within the three month period referred to in paragraph 1, the Commission, BEREC and the national regulatory authority concerned shall cooperate closely to identify the most appropriate and effective measure in the light of the objectives laid down in Article 3, whilst taking due account of the views of market participants and the need to ensure the development of consistent regulatory practice.

3. Within six weeks from the beginning of the three month period referred to in paragraph 1, BEREC shall, acting by a **two-thirds** majority of ~~its component~~ members **of the Board of Regulators**,⁸ issue an opinion on the Commission's notification referred to in paragraph 1, indicating whether it considers that the draft measure should be amended or withdrawn and, where appropriate, provide specific proposals to that end. This opinion shall be reasoned and made public.

4. If in its opinion, BEREC shares the serious doubts of the Commission, it shall cooperate closely with the national regulatory authority concerned to identify the most appropriate and effective measure. Before the end of the three month period referred in paragraph 1, the national regulatory authority may:

(a) amend or withdraw its draft measure taking utmost account of the Commission's notification referred to in paragraph 1 and of BEREC's opinion and advice;

(b) maintain its draft measure.

5. The Commission may, within one month following the end of the three month period referred to in paragraph 1 and taking utmost account of the opinion of BEREC if any:

(a) issue a recommendation requiring the national regulatory authority concerned to amend or withdraw the draft measure, including, **where relevant**, specific proposals **for amending the draft measure**⁹ and providing reasons justifying its recommendation, in particular where BEREC does not share the serious doubts of the Commission;

(b) take a decision to lift its reservations indicated in accordance with paragraph 1.

(c) take a decision requiring the national regulatory authority concerned to withdraw the draft measure, where BEREC shares the serious doubts of the Commission. The decision shall be accompanied by a detailed and objective analysis of why the Commission considers that the draft measure should not be adopted, together with specific proposals for amending the draft measure. In this case, the procedure referred to in Article 32 (6) shall apply *mutatis mutandis*.

6. Within one month of the Commission issuing the recommendation in accordance with paragraph 5(a) or lifting its reservations in accordance with paragraph 5(b) of this Article, the national regulatory authority concerned shall **withdraw the draft measure or adopt, publish and**¹⁰ communicate to the Commission and BEREC the adopted final measure.

This period may be extended to allow the national regulatory authority to undertake a public consultation in accordance with Article 23.

7. Where the national regulatory authority decides not to amend or withdraw the draft measure on the basis of the recommendation issued under paragraph 5(a), it shall provide a reasoned justification.

8. The national regulatory authority may withdraw the proposed draft measure at any stage of the procedure.

Article 34

Implementing provisions

8 BEREC alignment point (ECR)

9 AM 529 Kumpula-Natri et al (adjusted)

10 AM 534 Kumpula-Natri et al (adjusted)

After public consultation and consultation with national regulatory authorities and taking utmost account of the opinion of BEREC, the Commission may adopt recommendations and/or guidelines in relation to Article 32 that define the form, content and level of detail to be given in the notifications required in accordance with Article 32(3), the circumstances in which notifications would not be required, and the calculation of the time-limits.