Body of European Regulators for Electronic Communications: guidelines on EU net neutrality rules

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On 30 August 2016, the Body of European Regulators for Electronic Communications (BEREC) published its Guidelines on the Implementation by National Regulators of European Net Neutrality Rules. BEREC was established in 2010 under Regulation (EC) No 1211/2009 (see IRIS 2010-3/4), and one of its tasks under the recent Regulation on open internet access (2015/2120) is to issue guidelines to national regulators on their obligations concerning the safeguarding of open internet access (i.e. net neutrality).

Regulation 2015/2120 was adopted in November 2015, and Article 1 to Article 6 contain rules designed to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users' rights. In particular, under Article 5, national regulatory authorities are required to "closely monitor" and "ensure compliance" with the rules, and in this regard, BEREC's guidelines are designed to provide guidance to these national authorities. Importantly, Recital 19 of the Regulation states that national regulators "should take utmost account of relevant guidelines from BEREC."

The 45-page Guidelines provide detailed guidance on each of the six articles in the Regulation concerning open internet access. The Guidelines first elaborate upon Articles 1 and 2, which concern the subject matter and scope of the Regulation, noting that "BEREC understands a sub-internet service to be a service which restricts access to services or applications (e.g. banning the use of VoIP or video streaming) or enables access to only a pre-defined part of the internet (e.g. access only to particular websites)". The Guidelines state that regulators "should take into account the fact that an ISP could easily circumvent the Regulation by providing such sub-internet offers", and should "therefore be considered to be in the scope of the Regulation".

Next, the Guidelines turn to Article 3, which provides for the rights of users, and the obligations and permitted practices for internet service providers. Article 3(1) eshrines the right of users to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choosing via their internet access service. While Article 3(2) provides that agreements between providers of internet access services and end-users, on commercial and technical conditions and the characteristics of internet access

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services such as price, data volumes or speed, and any commercial practices conducted by providers of internet access services, shall not limit the exercise of the rights of end-users.

The Guidelines provide examples of acceptable commercial practices, such as "application-agnostic offers where an end-user gets uncapped access to the internet (and not just for certain applications) during a limited period of time", or offering "free subscription to a music streaming application for a period of time to all new subscribers". However, the Guidelines then discuss "zero rating", which is "where an ISP applies a price of zero to the data traffic associated with a particular application or category of applications (and the data does not count towards any data cap in place on the internet accesses service)". The Guidelines provide detailed considerations to be taken into account on how regulators should assess such agreements, and notes that "a zero-rating offer where all applications are blocked (or slowed down) once the data cap is reached, except for the zero-rated application(s), would infringe [the Regulation]. "

In addition, Article 3(3) of the Regulation provides that "providers of internet access services shall treat all traffic equally when providing internet access services, without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used". However, providers may implement "reasonable traffic management measures", and the Guidelines discuss what may be considered "reasonable", including being proportionate and not based on "commercial considerations". Importantly, paragraphs 108-115 of the Guidelines concern "specialised services", which are "services other than internet access services which are optimised for specific content, applications or services, or a combination thereof, where the optimisation is necessary in order to meet requirements of the content, applications or services for a specific level of quality". The Guidelines give examples of such specialised services, including "VoLTE and linear broadcasting IPTV services with specific quality of service requirements", and how regulators should ensure such services meet the requirements of the Regulation.

Finally, the Guidelines discuss Article 4, on the transparency requirements placed on providers of internet access services, and Articles 5 and 6 concerning supervision, enforcement and penalties under the Regulation.

Body of European Regulators for Electronic Communication, BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules, BoR (16) 127, 31 August 2016

http://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/6160-berec-guidelines-on-the-implementation-by-national-regulators-of-european-net-neutrality-rules

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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, L 310/1, 26 November 2015

http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2120&from=en

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