



EU Telecoms Regulators Consult on Draft Net Neutrality Guidelines

The Body of European Regulators for Electronic Communications (“BEREC”) is consulting on [guidance](#) for the implementation of the rules in the EU Regulation on Open Internet Access (2015/2120/EU) (“Net Neutrality Regulation”), which came into force on April 30, 2016.

The Net Neutrality Regulation establishes common rules that are directly applicable throughout the EU Member States to safeguard net neutrality—“equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users’ rights.”

Although BEREC’s guidance is aimed at the national regulatory authorities (“NRAs”) of the EU Member States, it is of interest to any users of the internet as well as communications, content, and application providers who want to know how the NRAs are likely to enforce the Net Neutrality Regulation.

BEREC is consulting until 2:00 p.m. on July 18, 2016. It is required to publish final guidelines for the consistent application of the regulation by August 30, 2016.

What is the Scope of BEREC Draft Guidelines?

The draft guidelines set out BEREC’s proposed interpretation of the following provisions of the Net Neutrality Regulation:

- The rights for end users of internet access services, including content and application providers (e.g., web pages, video, search engines, cloud storage) (Article 3(1));
- The requirements on the contractual conditions that internet access service providers may and may not apply (Article 3(2));
- Certain limits to internet access service providers’ traffic management practices (Article 3(3));
- The conditions under which internet access service and content and applications providers may offer specialized services without being caught under the straightjacket of the Net Neutrality Regulation—“specialized services” are services other than internet access services that are optimized for specific content or applications (e.g., VoLTE and linear broadcasting IPTV services) (Article 3(5));

- The type of information that internet access service providers must include in their contracts with end users (Article 4);
- The monitoring and enforcement powers of NRAs (Article 5);
- The penalties that NRAs may impose for violations of the Net Neutrality Regulation (Article 6); and
- The entry into force and transitional provisions of the Net Neutrality Regulation (Article 10).

What is the Relevance of BEREC Consultation for Your Business?

The monitoring and enforcement of the Net Neutrality Regulation is delegated to the NRAs of each EU Member State. BEREC draft guidance is therefore of interest to any internet users as well as communications, content, and application providers who want to know how the NRAs are likely to enforce the Net Neutrality Regulation. In particular, the following three issues are likely to be key:

Does the Net Neutrality Regulation Apply to Your Business?

The regulation provides for (i) certain obligations on “internet access service” providers and (ii) certain rights to the “end users” of such services.

“Internet access service” is a defined term in the Net Neutrality Regulation as follows:

a publicly available electronic communications service that provides access to the internet, and thereby connectivity to virtually all end points of the internet, irrespective of the network topology and terminal equipment used.

According to BEREC’s proposed interpretation, this definition would exclude internet access services limited to individual devices (such as e-book readers) or offered to a predetermined group of end users (such as access to the internet provided by cafés and restaurants, including WiFi hotspots, and internal corporate networks connecting employees of the same business or organization). However, the lines become blurred when it comes to new applications providing certain elements of connectivity, such as certain cloud services, virtual private networks, and machine-to-machine communications.

In addition, the provision of specialized services requiring optimization of content or applications (such as VoLTE and IPTV) is permitted only subject to specific requirements.

“End user” is not defined in the Net Neutrality Regulation itself, but BEREC understands that this definition covers not only individual subscribers to an internet access service but also content and applications providers (“CAP”)—companies delivering content or applications over such service (e.g., web pages, video, search engines, cloud storage).

Thus, depending on whether whole or parts of your business can be categorized as an “internet access service” or a “CAP,” you may be able to rely on the Net Neutrality Regulation as a shield against, or as a sword in favor of, open internet access requests. Given the level of discretion given to NRAs in interpreting these definitions and the challenges posed by technology evolution, it is key to ensure that BEREC guidance on these definitions is clear and future proof.

What are the Compliance Requirements Applying to your Business?

BEREC’s interpretation of the Net Neutrality Regulation provisions is that certain practices will be prohibited *per se*, while others will likely fall in the grey area, and a case-by-case assessment will be needed.

Examples of practices that would be likely to fall in the *per se* prohibition category include any unjustified commercial or technical limitation of the end users’ rights, such as:

- Restricting “tethering” (allowing an end user to share the internet connection of a phone or tablet with other devices such as laptops);
- Blocking, slowing down, restricting, interfering with, degrading, or discriminating access to specific content or one or more applications (or categories thereof), except in justified circumstances (such as the need to comply with other legal requirements or preserve the integrity of the network);
- Restricting access to a limited set of applications or endpoints; and
- A zero-rating offer *only* where all applications are blocked (or slowed down) once the data cap is reached, except for the zero-rated application(s).

In all other instances (including other types of zero-rating offers) where a per se prohibition does not apply, the NRAs will need to conduct a case-by-case assessment. In those instances, BEREC proposes a complex analytical framework based on several factors. One of these factors is whether or not the internet access service provider (or a CAP or both) may be regarded as having market power. According to BEREC's proposed guidelines, a limitation of the exercise of end-user rights is more likely to arise where an internet access service provider (or a CAP or both) has a strong market position. In carrying out an assessment of the market, NRAs will need to apply EU competition law concepts. Although all of the NRAs ought to be familiar with the concept of market power under EU competition law (based on the [EU SMP Guidelines](#) and relevant case law), the assessment of market power in respect of internet access services raises particular issues, which are covered neither in the BEREC draft guidelines nor in the EU SMP Guidelines.

Additional guidance may instead be found in several EU and national merger and antitrust precedents to date, in which the European Commission and national competition law agencies were called upon to assess whether an internet access service provider and/or a CAP held market power.

How Does this Affect Your Business Elsewhere? Business is increasingly global, and this is even more so when it comes to internet-based services. Several other jurisdictions across the globe have adopted, or are considering the adoption of, net neutrality rules, despite much controversy.

For example, a federal U.S. court has just recently endorsed the U.S. Federal Communications Commission's net neutrality

policy by ruling that high-speed internet service is essentially a utility that should be equally accessible to all Americans, rather than a luxury that does not need close government supervision (see our previous [Alert](#), "[Third Time's a Charm for Net Neutrality: D.C. Circuit Upholds FCC's Reclassification of Broadband](#)").

A uniform global approach to compliance with net neutrality rules would be preferable to a localized approach, which might potentially lead to monitoring and implementation problems.

Therefore, comparing BEREC proposed guidance with the interpretation given to the applicable net neutrality rules elsewhere may be useful, with a view toward trying to find the lowest common denominator for all of the applicable compliance obligations.

Too Little, Too Late?

BEREC's draft guidance has been criticized for being too vague and too late. The draft guidance only provides NRAs with a nonbinding analytical framework to interpret the Net Neutrality Regulation on a case-by-case approach. It took years to negotiate and adopt the Net Neutrality Regulation, but BEREC has waited until now to launch a public consultation on how to implement these new rules with an aim to finalize its guidelines by August 30—nearly four months after the entry into force of the Regulation. Since then, the UK voted to leave the EU, and although this vote is unlikely to have an impact on the UK regulator's obligation to enforce the Net Neutrality Regulation until the UK and the EU agree on the terms of "Brexit," it remains to be seen whether the UK's regulator, Ofcom, will take account of BEREC's final guidance and, if so, to what extent.

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