

Implementing net neutrality rules

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Commercial analysis: The Body of Regulators for Electronic Communications (BEREC) recently published its Guidelines on Net Neutrality. Gianpaolo Gangemi, associate, and Daniel Preiskel, partner, at Preiskel & Co, explain the guidelines and consider their implications.

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Guidelines from BEREC on the implementation of European net neutrality rules are designed to provide guidance on the obligations of national regulatory authorities (NRAs) of EU Member States regarding the provision of internet access services and users' rights.

What's the background to the guidelines?

The Regulation (EU) 2015/2120 (the Regulation) which became applicable on 30 April 2016 contains provisions aimed at regulating the open access to internet by implementing the so-called principle of 'net neutrality'. The Regulation required BEREC to issue guidelines for the implementation of the obligations by NRAs concerning their monitoring and enforcement powers.

Following an extensive consultation, which involved almost 500,000 responses from individuals, consumer organisations, public bodies, internet service providers (ISPs) and other industry stakeholders, BEREC published on 30 August 2016 its Guidelines on the Implementation by National Regulators of European Net Neutrality Rules (Guidelines on Net Neutrality).

What common challenges arise in relation to advising on net neutrality? Is the publication of these guidelines a desirable development?

Advising on net neutrality rules represents a challenge for each practitioner, as the European legislator decided to intervene in the area of internet access, which until then had been kept free of any regulation.

The first challenges will certainly arise for those called to help NRAs and ISPs to implement the new rules. ISPs and mobile network operators (MNOs) have been making substantial use of traffic management tools for some years in order to address issues related to congested networks caused by the vast amounts of data being sent over their networks. It will be quite a challenge to draw the line as to when acceptable and reasonable traffic management crosses the line and is deemed to be a breach of the net neutrality Regulation.

If it becomes apparent that an ISP or MNO has crossed the line, a second set of challenges will be faced by the NRAs as to how they will enforce the Regulation. Any MNO or ISP found to be in breach may likely appeal to the European court, possibly claiming that the enforcement was contrary to the principle of proportionality.

In this context, the publication of the Guidelines on Net Neutrality is a most welcomed development, as it will certainly help businesses and practitioners in the interpretation of the EU rules. These are intentionally written in rather generic terms, in order to allow national regulators to easily implement the provision taking into account the technical features of each of the Member States. This is acknowledged to the extent that conflicting local Member State provisions may continue to apply until the end of 2016 provided they were notified to the Commission before the EU provisions came into force.

How helpful are the guidelines in clarifying what regulators need to do in order to ensure they comply with their obligations in this area?

NRAs have the strategic role of monitoring market developments. On the one side, they will have the powers and the obligation to assess traffic management, commercial practices and agreements and to effectively enforce the Regulation. On the other, NRAs will need to ensure that the quality of internet access services reflect the technological developments.

In this regard, the Regulation has empowered them to set minimum quality of service requirements on internet access providers and other appropriate measures to ensure that all end-users enjoy an open internet access service of good quality.

The guidelines provide a very detailed clarification for every article and paragraph of the Regulation that concern net neutrality. In drafting the text, BEREC often provide direct instructions to NRAs on how to implement the provisions contained in the Regulation. However, it is important to bear in mind that internet access regulation is unprecedented and its implementation is likely to be controversial and unlikely to be consistent among the different NRAs. Accordingly, the NRAs bear the burden, within a short period, of shaping the implementation in practice of the net neutrality principle and the opportunity to evaluate the effects of the new rules.

Has anything been missed or is anything in need of further clarification?

As mentioned, the guidelines appear to be complete in scope and detailed in providing guidance for each provision of the Regulation, subject to one missing element—fair use policy to allow MNOs to apply a ‘fair use policy’ to prevent abusive or anomalous usage of regulated retail roaming services. Having announced the Fair User Policy in early September 2016, these were almost immediately withdrawn, possibly on the basis that the EU Commission felt the exemptions from net neutrality in the Regulation coupled with additional fair use exemptions would provide too much room for internet providers to derogate from the application of net neutrality.

The unprecedented character of these rules makes it difficult to foresee which other areas have not been sufficiently covered by either the Regulation or the guidelines. Whether something is missing, or needs further clarification beyond fair use, is something that will be revealed in their application over time. Undoubtedly, it will be interesting to see how telecom operators will consider they have complied with the Regulation on the one hand and how NRAs will enforce net neutrality on the other hand.

What are the implications for practitioners? Any tips for best practice?

Practitioners will need not just to carefully review and understand the Regulations and guidelines, but to keep an eye out for any ‘fair use’ policies implemented as well to see how various Member States interpret and enforce them. Seeking guidance by directly contacting the relevant NRA can also help in understanding their interpretation of the guidelines.

What possible risk or pitfalls are there for practitioners advising in this area and how can they be avoided?

It is very important for practitioners to understand the technical aspects of how the data traffic is being ‘managed’ in particular scenarios before being able to provide advice as to whether the line has been crossed amounting to a breach of net neutrality. That, in turn, will require an analysis of how other NRAs have interpreted the principle plus reviewing any statements on fair use that may be issued in due course.

Are there any patterns or trends emerging in the law in this area? How does this fit in with other developments in this area?

The Regulation is part of the Digital Single Market (DSM) Strategy of the European Commission. It is one of the top priorities for the current Commission. This strategy aims at tearing down or reducing barriers that prevent the achievement of a single market for the digital economy across all the EU Member States. It includes a set of 16 key actions to be delivered by the end of 2016. In that regard, it can be seen as complementary to other recent legislative initiative of the European Commission, such as the proposed Regulation on geo-blocking and other forms of discrimination based on nationality or place of residence or the proposal for a Regulation ensuring the cross-border portability of online content services in the internal market.

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