



Commission for  
**Communications Regulation**

# **Implementation of EU Net Neutrality Regulations in Ireland**

2019 Report

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# 1. Introduction

## Background

1. Regulation (EU) 2015/2120<sup>1</sup> of the European Parliament and of the Council, adopted on 25 November 2015, laid down measures concerning open internet access and amended Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) 531/2012 on roaming on public mobile communications networks within the Union.
2. The Body of European Regulators for Electronic Communications (BEREC) published guidelines on the Net Neutrality Regulations ("the Regulations") in August 2016.<sup>2</sup> The BEREC Guidelines, drafted in accordance with Article 5(3) of the Regulations, are designed to provide guidance on the implementation of the obligations of National Regulatory Authorities ("NRAs"). Specifically, this includes the obligations to closely monitor and ensure compliance with the rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users rights as laid down in Articles 3 and 4. These Guidelines constitute recommendations to NRAs, and NRAs should take utmost account of the Guidelines. The Guidelines should contribute to the consistent application of the Regulations, thereby contributing to regulatory certainty for stakeholders.
3. Article 5(1) of the Regulations provides *inter alia* that NRAs shall publish reports on an annual basis regarding their monitoring and findings, and provide those reports to the European Commission ("EC") and to BEREC.
4. On 30 April 2019, the European Commission published its "Study on the implementation of the open internet provisions of the Telecoms Single Market Regulation"<sup>3</sup>. The study makes a number of observations regarding the situation in Ireland:

*"All NRAs have the power to start formal investigations and to issue enforcement orders, except for the NRA in Ireland."* (p122)

*"All NRAs, except for the NRA of Ireland, have the power to start formal investigations and to issue enforcement orders."* (p125)

*"There are two Member States (Ireland and Portugal) in which Article 6 has not (yet) been implemented because no one is competent to impose penalties for infringements of the Regulation."* (p139)

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<sup>1</sup> Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 ("the Net Neutrality Regulations")

<sup>2</sup> BoR (16) 127 - BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules

<sup>3</sup> Available at: <https://ec.europa.eu/digital-single-market/en/news/study-implementation-open-internet>

*“In the absence of the power to issue periodic penalties and fines, which is the case in Ireland and Portugal, the effectiveness of the Regulation may be hindered as Article 6 requires rules on effective and dissuasive (and proportionate) penalties.” (p141)*

5. The country-specific chapter of the same report observes<sup>4</sup> that:

*“Because national enforcement legislation has not yet been adopted in Ireland, there is no provision for criminal sanctions, no provision to seek remedies from the civil courts and no provision allowing ComReg to impose a penalty. Furthermore, the transparency obligations from the Regulation, which go further than the Universal Services Directive,<sup>5</sup> have not been implemented in Ireland.*

*In the absence of enforcement powers, ComReg has not commenced formal assessments of agreements on commercial and technical conditions, of commercial practices such as zero-rating, of price discriminations practices, of port-blocking, of traffic management and other relevant ISP practices.” (p289)*

6. In the Digital Economy and Society Index (“DESI”)<sup>6</sup> 2019, the Ireland chapter notes that *“delays, specifically in laying down rules on the penalties for breaching the net neutrality rules [...] as well as the absence of dissuasive, direct sanctioning power of ComReg as regards market monitoring and regulation, might also undermine legal certainty and the further development of the electronic communications sector.”*
7. The continuing absence of enforcement powers is an issue reflected in the Ireland-specific Telecoms chapter of the same publication<sup>7</sup> with the authors noting that *“In the absence of enforcement powers, ComReg has still not commenced any formal assessment of practices that might infringe the Regulation”<sup>8</sup>*

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<sup>4</sup> Enforcement legislation is a matter for the Department of Communications, Climate Action and Environment (DCCAE).

<sup>5</sup> Universal Service Directive, 2002/22/EC

<sup>6</sup> Ireland country chapter available [here](#)

<sup>7</sup> Ireland Telecoms chapter available [here](#)

<sup>8</sup> Section 4.a.

**Publication of Reports**

8. The BEREC Guidelines state that reports must be published on an annual basis, and NRAs should publish their annual reports by 30 June for the periods starting from 1 May to 30 April. As well as being published, the reports should be provided to the Commission and to BEREC.
9. BEREC provided guidelines in relation to the required content of implementation reports and these reporting requirements were further specified by BEREC in a questionnaire issued to NRAs in April 2019. This report is guided by both.
10. This is the third Implementation Report published by ComReg in relation to the Net Neutrality Regulations.

## 2. Overview

### General

8. ComReg is the national regulatory authority for the purposes of Regulation (EU) 2015/2120 in Ireland.
9. ComReg continues to employ specialist staff to support its responsibilities in respect of net neutrality.
10. ComReg devotes considerable resources to relevant BEREC workstreams related to net neutrality and to engage with its peer NRAs to ensure that its approach to net neutrality is consistent with that being taken by regulators across the European Union.
11. ComReg's priorities regarding Open Internet Access remain as advised in the last two reports and entail a focus on (i) general monitoring tools; (ii) a certified measurement technique and (iii) publicly available QoS checking solutions.
12. A preliminary version of (i) is in the process of being tested. A solution to (ii) has also been developed for use in enforcement cases when ComReg receives the anticipated enforcement powers. Regarding (iii), ComReg has committed resources to the development of a reference system measurement tool which is expected to be delivered to BEREC in Q3 2019.
13. ComReg maintains its preliminary view that Net Neutrality is primarily a compliance matter. However, as a result of initial enquiries, ComReg is aware that Internet Service Providers ("ISPs") are developing policies relevant to the NN obligations and has engaged with Internet Service Providers ("ISP") in that regard.
14. Further detail on ComReg's monitoring of the implementation of the net neutrality regulations is set out below. For ease of reference the details are ordered according to the Articles of the Regulations.

## 3. Safeguarding of open internet access

### Provisions of Article 3

15. Provisions are as follows:

*1. End-users shall have the right to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end-user's or provider's location or the location, origin or destination of the information, content, application or service, via their internet access service.*

*This paragraph is without prejudice to Union law, or national law that complies with Union law, related to the lawfulness of the content, applications or services.*

*2. Agreements between providers of internet access services and end-users on commercial and technical conditions and the characteristics of internet access 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 laid down in paragraph 1.*

*3. 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.*

*The first subparagraph shall not prevent providers of internet access services from implementing reasonable traffic management measures. In order to be deemed to be reasonable, such measures shall be transparent, non-discriminatory and proportionate, and shall not be based on commercial considerations but on objectively different technical quality of service requirements of specific categories of traffic. Such measures shall not monitor the specific content and shall not be maintained for longer than necessary.*

*Providers of internet access services shall not engage in traffic management measures going beyond those set out in the second subparagraph, and in particular shall not block, slow down, alter, restrict, interfere with, degrade or discriminate between specific content, applications or services, or specific categories thereof, except as necessary, and only for as long as necessary, in order to:*

- (a) comply with Union legislative acts, or national legislation that complies with Union law, to which the provider of internet access services is subject, or with measures that comply with Union law giving effect to such Union legislative acts or national legislation, including with orders by courts or public authorities vested with relevant powers;*
- (b) preserve the integrity and security of the network, of services provided via that network, and of the terminal equipment of end-users;*
- (c) prevent impending network congestion and mitigate the effects of exceptional or temporary network congestion, provided that equivalent categories of traffic are treated equally.*

*4 .Any traffic management measure may entail processing of personal data only if such processing is necessary and proportionate to achieve the objectives set out in paragraph 3. Such processing shall be carried out in accordance with Directive 95/46/EC of the European Parliament and of the Council<sup>9</sup>. Traffic management measures shall also comply with Directive 2002/58/EC of the European Parliament and of the Council<sup>10</sup> ( 2 ).*

*5 .Providers of electronic communications to the public, including providers of internet access services, and providers of content, applications and services shall be free to offer 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.*

### **Articles 3(1) and 3(2)**

16. ComReg's approach to monitoring compliance with the Regulations is to make use of all the tools and methods it has adopted in relation to other aspects of its remit. These include such tasks as market surveillance of information published by ISPs; specific information request from ISPs; and analysis of consumer complaints received by ComReg and end-user reports. In addition, ComReg is developing technical tools to facilitate regular and comprehensive network monitoring which will contribute to the detection of any non-compliance with the regulations.
17. Therefore, ComReg is planning to employ relevant approaches recommended by BEREC in monitoring commercial and technical conditions related to the provision of internet access services.
18. ComReg believes that analysis of complaints received by its Consumer Care helpdesk and support functions is likely to play an increased role in detecting issues as public understanding of the aims and provisions of the Regulations increases over time.
19. ComReg has not commenced any formal assessment of ISP restrictions on the use of technically compliant terminal equipment which may be contrary to Article 3(1) of the regulations, at this time.
20. ComReg is aware of zero rating practices in Ireland which may mirror those deployed in other EU member states. These include special provisions for music streaming services, video streaming/IPTV services and social media services. Neither ISPs nor the public should assume that ComReg is satisfied that such offers in the Irish market are necessarily compliant with the Regulations.
21. Furthermore, ComReg is aware that a number of European NRAs have published analyses in which they set out arguments for not intervening in market practices or

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<sup>9</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

<sup>10</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).



specific packages within their jurisdictions. In some cases these are quite detailed in nature. ComReg will consider whether it should publish such analyses in the future.

22. In the absence of enforcement powers, ComReg has not commenced formal assessments of agreements on commercial and technical conditions or of commercial practices such as zero rating or traffic price discrimination practices. Nevertheless ComReg is monitoring market activities in these areas.

### **Article 3(3)**

23. ComReg has made initial information requests regarding traffic management practices by ISPs in Ireland. ComReg also surveys market information for evidence of such practices with analysis of end-user complaints and reports providing further detail in this area.

24. As planned, ComReg's modular network monitoring tool monitors port blocking, traffic management, and other relevant practices by ISPs. This monitoring will be supported by further research and market surveillance. Practices relevant to the Regulations have been detected and ComReg is keen to investigate these.

25. However, in the absence of enforcement powers, ComReg has not commenced formal assessments of these ISP practices.

### **Article 3(4)**

26. The the Data Protection Commission (DPC) is responsible for enforcing the data protection obligations referred to in Article 3(4). ComReg has some specific responsibilities in accordance with the provisions of the ePrivacy Directive. There is a statutory obligation for the two bodies to co-operate in the context of the ePrivacy Regulations.

### **Article 3(5)**

27. ComReg has conducted normal market monitoring for the purpose of detecting specialised services and the terms and conditions on which they are supplied. Network monitoring tools have been designed such that they will support investigations in this area. Analysis of complaints and end-user reporting is highly developed already as a result of ComReg's monitoring of ECS products in the market. However, no formal investigation of the provision of such services has commenced at this time.

## 4. Transparency measures for ensuring open internet access

### Provisions of Article 4

28. Provisions are as follows:

*1. Providers of internet access services shall ensure that any contract which includes internet access services specifies at least the following:*

*(a) information on how traffic management measures applied by that provider could impact on the quality of the internet access services, on the privacy of end-users and on the protection of their personal data;*

*(b) a clear and comprehensible explanation as to how any volume limitation, speed and other quality of service parameters may in practice have an impact on internet access services, and in particular on the use of content, applications and services;*

*(c) a clear and comprehensible explanation of how any services referred to in Article 3(5) to which the end-user subscribes might in practice have an impact on the internet access services provided to that end-user;*

*(d) a clear and comprehensible explanation of the minimum, normally available, maximum and advertised download and upload speed of the internet access services in the case of fixed networks, or of the estimated maximum and advertised download and upload speed of the internet access services in the case of mobile networks, and how significant deviations from the respective advertised download and upload speeds could impact the exercise of the end-users' rights laid down in Article 3(1);*

*(e) a clear and comprehensible explanation of the remedies available to the consumer in accordance with national law in the event of any continuous or regularly recurring discrepancy between the actual performance of the internet access service regarding speed or other quality of service parameters and the performance indicated in accordance with points (a) to (d).*

*Providers of internet access services shall publish the information referred to in the first subparagraph.*

*2. Providers of internet access services shall put in place transparent, simple and efficient procedures to address complaints of end-users relating to the rights and obligations laid down in Article 3 and paragraph 1 of this Article.*

*3. The requirements laid down in paragraphs 1 and 2 are in addition to those provided for in Directive 2002/22/EC and shall not prevent Member States from maintaining or introducing additional monitoring, information and transparency requirements, including those concerning the content, form and manner of the information to be published. Those requirements shall comply with this Regulation and the relevant provisions of Directives 2002/21/EC and 2002/22/EC.*

*4. Any significant discrepancy, continuous or regularly recurring, between the actual performance of the internet access service regarding speed or other quality of service parameters and the performance indicated by the provider of internet access services in accordance with points (a) to (d) of paragraph 1 shall, where the relevant facts are established by a monitoring mechanism certified by the national regulatory authority, be deemed to constitute non-conformity of performance for the purposes of triggering the remedies available to the consumer in accordance with national law.*

*This paragraph shall apply only to contracts concluded or renewed from 29 November 2015.*

**Article 4(1)**

29. While the lack of enforcement powers has continued to be a serious impairment for ComReg this year, we have reminded ISPs of their obligations and of the necessity that they comply with them.

**Article 4(2)**

30. ISPs have established procedures to address end-user complaints in the context of existing obligations under the Universal Service Regulations. Whether these procedures are adequate for the purposes of the Net Neutrality Regulations will be assessed by ComReg when we receive enforcement powers.

**Article 4(3)**

31. ComReg has not been in a position to provide binding guidance or to impose additional transparency or information requirements on ISPs following the coming into force of the Regulation. Feedback from industry players suggests that such guidance would be welcome.

**Article 4(4)**

32. Approximately 3% of total ECS queries to ComReg within the reporting period related to Net Neutrality matters. Of these, approximately two thirds concerned speed issues.

33. ComReg fully supports a tool being developed by BEREC which facilitates Internet Access Service ("IAS") quality monitoring mechanism for consumers to use. ComReg has contributed significant resources to that project which is expected to deliver later this calendar year.

34. The BEREC project will develop, implement, test and validate a Net Neutrality (NN) Measurement Tool that is designed to assist monitoring within the context of the NN provisions the associated BEREC Guidelines, as well as support the NRAs in enforcing Net Neutrality Regulations in each member state.

## 5. Supervision and enforcement

### Provisions of Article 5

35. Provisions are as follows:

*1. National regulatory authorities shall closely monitor and ensure compliance with Articles 3 and 4, and shall promote the continued availability of non-discriminatory internet access services at levels of quality that reflect advances in technology. For those purposes, national regulatory authorities may impose requirements concerning technical characteristics, minimum quality of service requirements and other appropriate and necessary measures on one or more providers of electronic communications to the public, including providers of internet access services.*

*National regulatory authorities shall publish reports on an annual basis regarding their monitoring and findings, and provide those reports to the Commission and to BEREC.*

*2. At the request of the national regulatory authority, providers of electronic communications to the public, including providers of internet access services, shall make available to that national regulatory authority information relevant to the obligations set out in Articles 3 and 4, in particular information concerning the management of their network capacity and traffic, as well as justifications for any traffic management measures applied. Those providers shall provide the requested information in accordance with the time-limits and the level of detail required by the national regulatory authority.*

*3. By 30 August 2016, in order to contribute to the consistent application of this Regulation, BEREC shall, after consulting stakeholders and in close cooperation with the Commission, issue guidelines for the implementation of the obligations of national regulatory authorities under this Article.*

*4. This Article is without prejudice to the tasks assigned by Member States to the national regulatory authorities or to other competent authorities in compliance with Union law.*

### Article 5(1)

36. This is ComReg's third implementation report published in accordance with the requirements of the Net Neutrality Regulations.

## 6. Penalties

### Provisions of Article 6

37. Provisions are as follows:

*Member States shall lay down the rules on penalties applicable to infringements of Articles 3, 4 and 5 and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify the Commission of those rules and measures by 30 April 2016 and shall notify the Commission without delay of any subsequent amendment affecting them.*

### Article 6

38. As noted in the introduction to this report, Ireland has not laid down rules on penalties applicable to infringements of Articles 3, 4, and 5 pursuant to Article 6 of Regulation (EU) 2015/2120.

## 7. Legal Basis

37. Article 2 of Regulation 2015/2120 provides that:

*“For the purposes of this Regulation, the definitions set out in Article 2 of Directive 2002/21/EC apply.”*

38. Article 2(g) of Directive 2002/21/EC provides as follows:

*“(g) national regulatory authority means the body or bodies charged by a Member State with any of the regulatory tasks assigned in this Directive and the Specific Directives;”*

39. Section 10(1)(a) of the Communications Regulation Act 2002 (as amended) lists among the functions of ComReg:

*“to ensure compliance by undertakings with obligations in relation to the supply of and access to electronic communications services, electronic communications networks and associated facilities and the transmission of such services on such networks...”*

40. Article 5 of Regulation 2015/2120 provides that:

*“National regulatory authorities shall publish reports on an annual basis regarding their monitoring and findings<sup>11</sup> and provide those reports to the Commission and to BEREC.”*

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<sup>11</sup> Regarding compliance with Articles 3 and 4 of Regulation 2015/2120