



Commission for
Communications Regulation

Implementation of EU Open Internet Access Regulations in Ireland

2023 Report

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Information Notice

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1. Introduction

Background

1. Regulation (EU) 2015/2120¹ 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 Open Internet Access Regulations ("the Regulations") in August 2016² and subsequently published updates and clarifications to these guidelines³ in June 2020 and again⁴ in June 2022. 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. ComReg continued to monitor compliance with the Regulations within the reporting period and references to these are provided within this report.

¹ Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 ("Open Internet Access Regulations")

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

³ BoR (20) 112 - BEREC Guidelines on the Implementation of the Open Internet Regulation

⁴ BoR (22) 81 - BEREC Guidelines on the Implementation of the Open Internet Regulation. In 2022, the Guidelines were reviewed in light of the European Court of Justice (ECJ) rulings concerning the interpretation of specific Articles of the Regulation.

Publication of Reports

5. 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.
6. BEREC provided guidelines in relation to the required content of implementation reports, and these reporting requirements were further clarified by BEREC in a questionnaire issued to NRAs in April 2023. This report is guided by both.
7. This is the seventh Implementation Report published by ComReg in relation to the Open Internet Access 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 open internet access.
10. ComReg supports relevant BEREC workstreams related to open internet access and engages with its peer NRAs to ensure that its approach to open internet access is consistent with that being taken by regulators across the European Union.

3. Safeguarding of open internet access

Provisions of Article 3

11. 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 Council⁵. Traffic management measures shall also comply with Directive 2002/58/EC of the European Parliament and of the Council⁶ (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)

12. 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 requests from ISPs; and analysis of consumer complaints and end-user reports received by ComReg. In addition, ComReg is continuing to develop and deploy technical tools to facilitate regular and comprehensive network monitoring which will contribute to the detection of any non-compliance with the Regulations.
13. Therefore, ComReg is employing relevant approaches recommended by BEREC in monitoring commercial and technical conditions related to the provision of internet access services.
14. ComReg believes that analysis of complaints received by its Consumer Care helpdesk and support functions plays an important role in detecting issues and that this is being enhanced further as public understanding of the aims and provisions of the Regulations increases over time.
15. ComReg has not concluded 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.
16. ComReg continues to monitor for zero-rating practices in Ireland.
17. ComReg has not concluded any formal assessments of agreements on commercial and technical conditions and continues to monitor market activities in these areas.

⁵ 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).

⁶ 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).

Article 3(3)

18. ComReg continues to monitor traffic management practices by ISPs in Ireland. Analysis of end-user complaints and specific reports from members of the public are also important in this context.

Article 3(4)

19. 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)

20. ComReg has conducted normal market monitoring for the purpose of detecting specialised services and the terms and conditions on which they are supplied. Analysis of complaints and end-user reporting is highly developed already as a result of ComReg's monitoring of ECS products in the market.

4. Transparency measures for ensuring open internet access

Provisions of Article 4

21. 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)

22. ComReg continued to actively monitor compliance by ISPs within the reporting period. No formal enforcement actions were taken pursuant to this article within the period.

Article 4(2)

23. ISPs have established procedures to address end-user complaints in the context of existing obligations under the Universal Service Regulations. ComReg may assess whether these procedures are adequate for the purposes of the Open Internet Access Regulations.

Article 4(3)

24. ComReg is of the view that enforcement action and continuing engagement with ISPs has afforded sufficient guidance regarding transparency and information requirements with which ISPs are required to comply. ComReg will continue to monitor the situation and, should it be justified, may introduce additional information and transparency requirements, including possibly those concerning the content, form and manner of the information to be published.

Article 4(4)

25. Approximately 2% of all ECS complaints received by ComReg within the period relate to open internet matters, with speed issues predominating.

26. ComReg fully supported the previous work within BEREC to develop a tool which could be deployed by NRAs to facilitate an Internet Access Service (“IAS”) quality monitoring mechanism for consumers to use. ComReg continued to work with peer NRAs in this regard during the reporting period.

5. Supervision and enforcement

Provisions of Article 5

27. 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)

28. This is ComReg's seventh implementation report published in accordance with the requirements of the Open Internet Access Regulations.

6. Penalties

Provisions of Article 6

29. 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

30. Enforcement Regulations⁷ were signed into law on 9 July 2019. The penalties and procedures enabled by this legislation were at that time in line with other national legislation established pursuant to EU telecommunications law. The Communications Regulation and Digital Hub Development Agency (Amendment) Act 2023 updates⁸ the enforcement regime for the Open Internet Access Regulations bringing it in line with the overall architecture introduced by the Act.⁹

⁷ European Union (Open Internet Access) Regulations 2019 (S.I. No. 343/2019)

⁸ See, in particular, Section 134 of that Act.

⁹ See the provisions of Chapter 5 of Part 7 of the 2023 Act in terms of the administrative sanctions that may be imposed for a regulatory breach in respect of Regulations. The provisions of the Regulations were made regulatory provisions via SI 303/2023

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 findings¹⁰ and provide those reports to the Commission and to BEREC.”

¹⁰ Regarding compliance with Articles 3 and 4 of Regulation 2015/2120