



AUTORITÀ PER LE  
GARANZIE NELLE  
AGCOM COMUNICAZIONI

# Monitoring the application of the “Net neutrality” rules

## AGCOM experience

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# Overview of European NN rules Regulation (EU) 2015/2120

The **Regulation (EU) 2015/2120** was adopted in November 2015 and came into force on 30 April 2016

This Regulation aims to establish common rules to **safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users' rights**

**NRAs play an essential role** in ensuring that end-users are able to exercise effectively their rights under this Regulation by monitoring and ensuring compliance with

- «safeguarding of open internet access » (**art. 3**), and
- «transparency requirements» in the provision of the Internet access services (**art. 4**)

NRAs have also **reporting obligations**:

- the reports must be published on an annual basis (by 30th June)
- the reports should be provided to the Commission and to BEREC

In line with this, BEREC adopted in August 2016 **Guidelines on net neutrality** in order to provide guidance to NRAs on their implementation of the rules regarding:

1. «**commercial practices**»
2. «**traffic management practices**»
3. «**specialised services**»
4. compliance with the rules in this Regulation on «**transparency measures**» for ensuring open internet access

# Overview on international activities

## Regulation (EU) 2015/2120

AGCOM actively contributed to the work of the BEREC expert groups for the implementation of the Net Neutrality rules

### Next step

- Run a public consultation of a draft of the new BEREC Open Internet Guidelines (October 2019)
- Finalise and publish updated Open Internet Guidelines
- **Adoption of the new BEREC Open Internet Guidelines (P1/2020)**

### The BEREC Strategy 2018-2020 with a keen focus on the following five strategic priorities:

- i. responding to connectivity challenges and to new conditions for access to high-capacity networks;
- ii. monitoring potential bottlenecks in the distribution of digital services;
- iii. enabling 5G and promoting innovation in network technologies;
- iv. **fostering the consistent application of the net neutrality principles;** and
- v. exploring new ways to boost consumer empowerment.

# Overview on national activities

## Regulation (EU) 2015/2120

Since the entry into force of the Regulation, AGCOM has engaged a combination of activities

1. reviewed publicly available information from ISPs
2. requested information from ISPs concerning the general terms and conditions of their contracts and conducted interviews with those ISPs
3. performed assessments of ISPs general terms and agreements on commercial and technical conditions to establish the presence or the absence of a possible violation of Article 3
  - ✓ monitored and supervised zero-rating offers that came on the market
  - ✓ monitored traffic management practices by sending a questionnaire to ISPs
  - ✓ monitored specialised services offers by sending a questionnaire to ISPs
4. acted upon complaints regarding the compliance with the Regulation
  - ✓ AGCOM has received approximately 30 complaints related to possible infringements of Articles 3(1) and 3(2) of the Regulation
5. stimulated self-assessment or internal compliance by ISPs
  - ✓ ISPs have changed commercial practices
6. drafted national guidelines on enforcement policy
7. adopted administrative orders/decisions or imposing administrative fines

## Regulation – art. 3

### The Regulation does not contain a specific ban on zero rating

The Regulation requires NRAs to **assess on a case-by-case basis** whether zero rating practices violate net neutrality rules and harm end users by significantly reducing their choice

The rules

- require ISPs to **treat all traffic equally** (art.3, para. 3), and
- establish **the right of all end-users to access and distribute legal content, applications and services of their choice** (art. 3, sub-paras 1 and 2)

## BEREC Guidelines 2016 (§§ 40 – 48)

### Definitions

- Zero-rating' is when an ISP applies a price of zero to the data traffic associated with a particular application or class of applications («zero-rated»)
- Zero-rating' is when the data does not count towards any data cap in place on the internet access service.

### **Zero-rating is possible only when zero-rated apps are treated equally to all other data traffic when the user's data cap is reached**

There are different types of zero-rating practices which could have different effects on end-users and the open internet

Some practices are clearly prohibited – those where all applications are blocked or slowed down once the data cap is reached except for the zero-rated application(s)

### **Criteria for assessing zero rating offers**

- i. the risk that the practice could circumvent the aims of the Regulation
- ii. the market position of the ISPs and CAPs involved
- iii. the risks of negative impacts on end users' choice
- iv. the risks of negative impacts on market competition in general
- v. the effects on freedom of expression and media pluralism

# 1. Commercial practice - «zero-rating» offers

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## PROS

Zero rating practices could enhance end-user benefits (e.g. assuring free access to the zero-rated app)

## CONS

But zero-rating practices could have potential negative effects on competition (e.g. unfair competition for other apps which are not zero-rated)



## **All MNOs have *zero-rating* offers**

The most frequently mentioned types of applications being zero-rated are:

- i. Music streaming services
- ii. Video streaming/IPTV services
- iii. Social media services
- iv. Voice and short messages
- v. Cloud services
- vi. Email services
- vii. Other : maps and navigation services, audio books, e-book subscription service, radio channels, cloud storage services, the ISPs own apps and services, gaming, antiviruses

## **MVNOs do not offer *zero-rating***

### **AGCOM verified that all offers were compliant with the Regulation**

- Few ISPs voluntarily withdrew zero-rated offers as soon as AGCOM started investigations in 2016
- The most part of offers at the time of our review do not appear to infringe the rules
- In 2017 AGCOM took decision against two zero-rating plans

# 1. Decision 123/17/CONS – «Wind Tre zero-rating case»

AGCOM took enforcement **actions against two zero-rating plans offered by Wind Tre**

- i. Music by 3
- ii. Veon

**These zero-rated plans only allowed certain zero-rated apps/services to continue connecting to the internet after the plan's internet allowance was used up** while all other internet traffic is slowed or blocked

According to this, AGCOM

- concluded that “Music by 3” app and “Veon” instant messaging/VoIP app are discriminatory, and
- ordered the ISP to cease the offering of its zero-rated music and communications app or to object to the Resolution n. 123/17/CONS

The decision was based on Article 3(3) of the Regulation which sets out that: *“Providers of internet access services... 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...”*

\* Because Wind Tre was late in complying with the aforementioned Resolution, AGCOM initiated a sanctioning procedure never finalised because Wind Tre paid a fine of € 20,258 without awaiting the final sanction. The sanctioning procedure was initiated before the introduction of the new sanctioning system for violations of the rules on net neutrality set out above.

## 2. Decision 68/18/CONS – «Vodafone tethering case»

### **AGCOM has opened an investigations concerning with Vodafone's practice of prohibiting tethering**

Tethering means letting other devices connect to the internet via a mobile phone, effectively sharing its data allowance with the other devices. The connection can be made with a wire (e.g. USB) or wireless (e.g. WiFi or Bluetooth)

AGCOM initiated enforcement actions against an offer by Vodafone which involved users being obliged to pay an extra daily internet connection fee (€6 per day) for tethering. This additional payment was charged on top of regular payments for a data bundle, as well as if end-users only consumed data (in tethering mode) included in their subscription. Vodafone users that subscribed to the 'Vodafone Exclusive' option (at an extra cost of €1.90 per month), could tether without additional costs

Vodafone's practice breaches articles 3.1 and 3.2 of the Regulation safeguarding:

- end users' freedom to use terminal equipment of their choice (e.g. end users cannot use a laptop to use the internet access available in their mobile bundle), and
- the use of the terminal equipment itself (e.g. end users cannot use their mobile phone as a Wi-Fi hot spot) without paying an additional fee

AGCOM published a warning against Vodafone for improperly charging end users using their phones to connect other devices to the internet (decision n 68/18/CONS)

Vodafone did not appeal this decision

## 3. Decision 348/18/CONS - Terminal equipment

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### **Article 3(1) of the Regulation grants end-users the right to use the terminal equipment of their choice**

In line with this, AGCOM launched a public consultation in January 2018 concerning the right of end-users to use the terminal equipment of their choice and the prohibition of ISPs to enter into agreements with end-users or to adopt commercial practices that restrict that right.

In August 2018, **AGCOM published a decision clearly stating that end users have the right to have a free choice over which broadband router they use** (decision n. 348/18/CONS)

According to AGCOM, ISPs cannot require end-users to rely exclusively on the router supplied by the ISP itself

### **ISPs' obligations**

ISPs supplying broadband routers free of charge and/or against payment must update their contractual conditions and the information provided to end users

ISPs supplying broadband routers against payment must make an alternative commercial offer so that the customer can obtain a broadband router free of charge; or provide customers with the right of withdrawal from the contract without additional charge, except that the end user must return the broadband router.

**This decision was appealed and the appeal proceeding is pending**

### 3. Decision 348/18/CONS - Terminal equipment

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ISPs' obligations	provided free of charge	provided against payment
Provide information to end users on access and configurability	Y	Y
Include in the terms of the offer information on installation costs and the form of payment (e.g. buy-back price and/or hire-purchase)	N.A.	Y
Where an operator makes an offer that includes the broadband router, it must make either: •an alternative offer excluding the router; or •the supply of the router optional for the end user	N.A.	Y
Unlock the broadband routers at the end of the subscription period when the end users own the device	N.A.	Y
Specify the technical and economic conditions applying (e.g. assistance and maintenance)	Y	Y
Clearly distinguish those contractual conditions that refer to connectivity services from those referring to the broadband router	Y	Y
No early termination fees or decommissioning fees related to the broadband router if the end user does not renew his contract or exercises his right of withdrawal	Y	Y

### 3. Decision 348/18/CONS - Terminal equipment

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#### FTTH offers

Given the current technological and market scenario conditions, for offers in FTTH technology, **the restriction on the choice of ONT is allowed on condition that the same is not integrated with the router**

If the offer includes an ONT integrated with the router, it must be always possible for the user to request the supply and installation of an external ONT. In this case the willingness of the user to have an external ONT (functional to the free choice of the terminal) must be explicitly established at the time of conclusion of the contract

Furthermore, if the user during the execution of the contract decides subsequently to use its own apparatus, the installation of the external ONT should be timely (in particular, within 5 working days)

AGCOM will monitor the technological development of the provision of Internet access services

# 4. Other issues

## 1. Monitoring activities are going on for investigating «traffic management practices»

- the Regulation allows for alternative traffic management under limited circumstances
- **Reasonable traffic management practices** between categories of traffic are allowed thereof, there should be:
  - no blocking,
  - no slowing down,
  - no alteration,
  - no restriction,
  - no interference with,
  - no degradation, and
  - no discrimination
- the Regulation describes three **specific exceptions only for as long as necessary** under stricter conditions:
  - compliance with other laws
  - preservation of integrity and security
  - congestion management measures

**No formal assessment has been completed yet. AGCOM is currently analysing information provided by ISPs**

## 2. Monitoring activities are going on for investigating so-called «specialised services»

- to be permitted, SpS would have to be objectively necessary to meet technical requirements, such as latency, jitter and packet loss
- NRAs should assess whether the specific level of quality cannot be assured instead over the internet. If not, these services would not be allowed and whether sufficient capacity is provided by performing measurements of the internet access service

**No formal assessment has been completed yet. AGCOM is currently analysing information provided by ISPs**  
**AGCOM is currently analysing information provided by ISPs also relating 5G issues**

# Penalties

**According to art. 6, 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.

**In November 2017 Italy adopted the "European Law" whose Article 4 amends Article 98 of the Italian Electronic Communication Code introducing a new sanctions system for breaches of the Net neutrality provisions included in Regulation (EU) 2015/2120**

**New penalties range from €120 000 to €2 500 000** which increased the applicable sanctions for indirect infringements of Articles 3, 4, 5 of Regulation (EU) 2015/2120, i.e. the sanctions apply if the operators refuse to provide the information requested by the NRA or does not implement or execute NRA's orders