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Net neutrality and the end of EU roaming charges – not there yet

Contents

A triumphant bang or an ambiguous whimper? 2

Net neutrality 2

Roaming surcharges 5

All still to play for 7

Key contacts 7

A triumphant bang or an ambiguous whimper?

Following years of debate and intense lobbying, a long awaited agreement has finally been reached on a proposed EU regulation on net neutrality and mobile roaming surcharges. This has its origins in the more ambitious Connected Continent Telecoms Reform Package from 2013, which also included the coordination of spectrum allocation between member states, a common definition of virtual access to next generation networks, and a single EU-wide authorisation to provide telecoms services. Much of that proved too difficult to agree, and following political stalemate during the last EU Commission, elimination of retail roaming surcharges and net neutrality is what survived.

The Commission sees this Regulation as an important step forward in the Digital Single Market, helping to ensure that Europe is a world leader in the digital economy. But the agreed text shows a desire for closure over certainty, and will leave industry uncertain when planning business models.

The Netherlands adopted strict net neutrality legislation some years ago, and recently the FCC in the U.S. reclassified internet access under Title II of the Communications Act, allowing significant regulatory intervention to treat internet access as a public utility. The draft EU Regulation starts from a less assertive policy basis than the U.S. and Dutch positions. Nonetheless, the EU rule is based on the principle of government intervention in the ability of the private sector to monetise its assets, and it goes well beyond the preservation of competition and freedom of expression.

There is a general rule which prohibits paid prioritisation of internet traffic, but the Regulation specifically preserves the freedom to provide “specialised services”, and we expect there will be opportunities to use this exception to devise comparable business models.

This combination of prohibition and permission moves the focus of the law to regulatory or judicial guidance and interpretation, and although the apparent scope to provide specialised services may be more welcome than some of the stricter proposals that were not adopted, clarity (which is essential to compliance) is lacking.

Eliminating roaming surcharges entirely is a policy response to consumer “bill shock”. However, the legislative conclusion reached in the compromise text of the Regulation leaves the substantive application still to be determined. This deferral shows that the EU had not been able to reach a reasoned compromise within the desired political deadline, but pressed ahead and issued the instrument to make progress.

Net neutrality

Net neutrality is the idea that “providers of internet access services shall treat all traffic equally, 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" (Regulation, Article 3(3)).

Will the EU have a new law providing for net neutrality?

Despite a lot of noise from various interested parties, as suspected the agreed compromise text is fairly close to the original Commission approach. The basic principle is a right for end users to access and distribute information and content, and to use and provide applications and services as well as use terminal equipment of their choice via their internet access services. "Internet access" is 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 technology and terminal equipment used". Corresponding to this right is a basic obligation on providers of internet access services in the EU to treat all traffic equally, without discrimination, restriction or interference.

These interventionist rules are subject to a number of key exceptions.

Traffic Management Measures

Internet access providers may apply "**reasonable traffic management measures**". To be "reasonable", these measures must be transparent, non-discriminatory and proportionate and must "not be based on commercial considerations but on objectively different technical quality of service requirements of **specific categories of traffic**". These last words are remarkable. They were included at the last minute, replacing "not constituting anti-competitive behaviour", which (being competition law) would apply to internet service providers in any case. The inability to manage traffic based on commercial considerations is a major policy change, constituting an unusual intervention into commercial models in the private sector. This last minute addition to the text could lead to significant differences in implementation. For example, could a national legislature or regulator seek to prohibit commercial benefit from the prioritisation of traffic streams, even where this is merely a happy by-product of a prioritisation based on objectively different Quality-of-Service requirements? Another concept that will no doubt be discussed at length is what the boundaries are for "specific categories of traffic".

Any **traffic management practices which go beyond this "reasonableness" requirement** are only permitted for as long as necessary to (a) comply with EU or national legislation (b) preserve the integrity and security of the network (eg blocking to counter a cyber-attack), or (c) prevent impending network congestion and mitigate the effects of exceptional or temporary network congestion (provided equivalent categories of traffic are treated equally). According to Recital 8, the traffic management exception should be subject to strict interpretation and proportionality requirements.

An exception relating to parental controls and blocking unsolicited communications has been deleted in the compromise text. This is of particular interest in the UK where blocking filters for adult content are currently allowed, in contrast, for example, to the Netherlands. Perhaps it is arguable that these practices already fall within the traffic management practices permitted by the draft text, but this does not seem to be the intention given the deletion of this controversial exception. The UK government plans to respond by proposing national legislation to ensure the option to block harmful content remains intact, exploiting the exception. This sets an interesting precedent which may undermine the single market. However, while it may be possible to use national legislation to compel traffic management in certain circumstances, if national legislation is more prohibitive than the Regulation, those rules will be subject to challenge by the ISP industry as inconsistent with the Regulation. There is also no room for national regulators to apply a stricter "national" interpretation of this exception. In deciding what is "reasonable" traffic management, national regulators must take utmost account of relevant guidance from the BEREC (the Body of European Regulators for Electronic Communications).

Specialised Services

Alongside the right to access, and the obligation to treat all traffic equally, internet access providers are "free to offer" certain specialised services of higher quality on a different, "optimised" basis to general internet traffic. These "services optimised for specific content, applications or services" are not internet access – examples given include internet TV, new innovative

applications, and high definition video conferencing. The optimisation must be necessary to "meet the requirements of the content, applications or services for a specific level of quality". Network capacity must be sufficient to provide these services in addition to any internet access services provided, and they must not be offered or usable as a replacement for internet access. They must also not be to the detriment of the availability of the general quality of internet access services for end users.

This particularly controversial exception has been greatly criticised as creating a two tier internet. Digital rights groups believe these provisions may be used to circumvent net neutrality and regard the text as weak and unclear. However, many view this exclusion as key to enabling innovation and digital growth in the EU, allowing flexibility for innovative services. To some this perhaps makes more sense for services which have implications for public safety (eg telemedicine or connected self-driving cars) as opposed to services that simply require a higher transmission quality to work properly (such as internet TV), but the reality is that both types of service need to be possible in order to support the vision of a digital Europe.

There may well be room in this exception for internet service providers to create comparable business models, including content-provider subsidies. For example an IPTV platform with subsidised access may qualify as a specialised service, and be bundled with lower-bandwidth internet access, the latter at a lower price than a simple offering of higher-bandwidth internet access. While the prohibition on managing traffic has an exception that is subject to a requirement of reasonableness, the freedom in Article 3(5) to provide specialised services is not qualified in this way, so this may be the easier exception for industry to use.

While not part of the Regulation itself, the Commission in its press release and Q&A document clearly shows that it intends that the freedom to provide specialised services should be allowed to operate on the basis of commercial controls. It states that while there shall be "no paid prioritisation of traffic in the Internet access services", specialised services are allowed, as they are "crucial for European start ups and will boost on line innovation in Europe" but as long as they do not harm the principle of open internet access.

Another issue is created by Recital 11 which explains that the "optimisation" must be objectively necessary to meet a specific level of quality. It falls to national regulatory authorities to verify what this means in practice. The requirement (set out in Recital 12) that national regulatory authorities should take utmost account of relevant guidance from BEREC is interestingly lacking in Recital 11. This leaves the text open to local interpretation and might allow fragmentation as different national regulatory authorities may take different positions. This was what the Regulation was trying to avoid and it is at odds with the vision of an unfragmented single digital market in the EU.

What is the position on "zero rating"?

Another controversial point has been whether zero rating is permitted. This is the practice of allowing a user to access certain sites or content without charge, or without using up data allowance (usually based on a partnership between an ISP and a content provider). The concern is that this allows content providers to subsidise internet access and therefore foreclose the ability of new content providers to get access to users. The Commission in its Q&A document acknowledges that the draft Regulation does not address zero rating, which the Commission believes "does not block competing content" and can promote more user choice, encouraging use of digital services. The Commission also makes a passing reference to the fact that if zero rating has an effect on the general right to choice in accessing information, national regulatory authorities might need to monitor and control it.

The Dutch government, which has historically taken a strict position on net neutrality, unsurprisingly considers the compromise text too weak as Dutch law prohibits zero rating. They are investigating whether member states can enforce stricter interpretations through their national regulators. However, the Recitals to the Regulation suggest that that member states do not have this flexibility, and we anticipate that the absolute prohibition in the Netherlands cannot be maintained.

Roaming surcharges

Will there be an end to all roaming fees?

The Commission has been working for many years to decrease charges for roaming within the EU (at the wholesale and, more recently, the retail level) and prices have already fallen significantly by the imposition of caps on roaming charges. These charges arise when a mobile subscriber from one member state travels to another member state and is hosted on a mobile network of the visited state. The host operator will charge the home operator a wholesale rate for the provision of the service to the roaming customer. This cost is passed on as part of the higher charges imposed by home operator for roamed calls. But EU policy is to eliminate these roaming costs so that there is no difference between charges for using a mobile service in the subscriber's own country, and for use in any other EU country, despite the fact that additional wholesale costs are incurred by the home operator to enable roaming.

While eye-catching headlines refer to the Regulation and say that there will be no roaming fees from mid-2017, this is an over-simplification. Firstly, there are key exceptions to this position. Secondly, this date is dependent on a Commission review of the wholesale roaming market and their proposal for a new law by 15 June 2016.

What exactly was agreed?

From 30 April 2016, home operators may apply a surcharge to a subscriber's use in another member state, but there is a cap which will significantly reduce what they can charge. **Until then**, roaming caps will remain as they have been since July 2014, as set out in the 2012 EU roaming rules.

From 15 June 2017 there will be no roaming charges – home operators may not levy any surcharge on their customers when they roam in the EU, in comparison to the retail price for messages, texts and services in their home country. The Commission has stated in its press release that it is "fully committed to implementing those conditions and making sure that the end of roaming charges is operational as of day one".

There are two key exceptions, but the detail of how these will work is a can that has been firmly kicked down the road:

(a) The home operator may have a "**fair usage policy**" relating to consumption of regulated retail roaming services by customers to prevent abusive or anomalous usage (which appears to mean use other than for periodic travel).

(b) In specific and exceptional circumstances, with a view to **ensuring the sustainability of the domestic charging model**, where a roaming provider cannot recover its costs when providing the services, it may apply (to its home regulator) for authorisation to apply a retail surcharge.

If an operator wishes to use one of these exceptions, it must apply to its national regulatory authority for authorisation to do so. The authorisation can only be granted based on a methodology that is yet to be devised – in negotiations between the Commission and BEREC, to be completed by December 2016. By this date, the Commission, having consulted BEREC, must adopt detailed rules on how these exceptions work, including a methodology for assessing sustainability. It is extraordinary that after years of policy debate and incremental EU legislation, a Regulation has been made which imposes a basic prohibition on retail roaming surcharges, but which also acknowledges on its face that this is likely to be economically unsustainable for some operators, and passes the implementation of this to an engagement between the Commission and BEREC, and ultimately to national regulatory authorities. Given BEREC has been very vocal about the fact that the removal of roaming surcharges is "not currently sustainable or feasible in practice" the real

commercial effect will only come out in the negotiations over what that model should be.

In addition, the absoluteness of the rule leaves the opportunity for cross-border arbitrage, with re-sale in higher-income countries of active SIMs from operators in cheaper countries. This would have unsustainable consequences for mobile operators in countries where services are cheaper. The compromise text does recognise this danger (in the fair usage exemption) but the application of that exemption (eg only occasional travel), is also to be determined by December 2016. The Commission will need good commercial input to ensure the legislation does not leave the door open to these arbitrage opportunities.

The doctrine of "no roaming surcharges" is an attractively simple consumer policy. But as the legislative result shows, it is overly simplistic. It assumes the wholesale costs between the home operator and the visited operator will be netted out, but in practice there is not a broad balance in traffic between EU operators.

Are the rules in force yet?

On 11 September 2013, the European Commission adopted a proposed legislative package for a "Connected Continent: Building a Telecoms Single Market" aimed at building a connected, competitive continent and enabling sustainable digital jobs and industries.

Nearly two years later, on 30 June 2015, the European Parliament and the Council reached a compromise agreement[1] on a draft Regulation addressing only two aspects of this package:

– Ending retail roaming surcharges in June 2017; and

– Delivering strong net neutrality rules.

This political agreement (the so-called "trilogue" process) is still not the end of the line for the Regulation. On 8 July, the Permanent Representatives Committee approved the draft, which will now be put to a ministerial meeting in the autumn for formal approval and adoption. In parallel, it will need to be ratified by the European Parliament and the text will go through technical checks. The Regulation will enter into force 20 days after its publication in the EU Official Journal and is likely to apply from 30 April 2016.

Meanwhile, the Commission has considerably more work on its plate to deliver on other promises from the 2013 telecoms package and the subsequent Digital Single Market Strategy. Activity in 2016 will focus on addressing:

– regulatory fragmentation;

– harmonised management of radio spectrum at EU level;

– incentivising investment in networks;

– the growing importance of online players that provide similar or equivalent services from traditional communication services without being subject to the same regulation; and

– governance and regulatory consistency.

1 http://www.europarl.europa.eu/meetdocs/2014_2019/documents/itre/dv/tsm_st10409_re01_/tsm_st10409_re01_en.pdf

All still to play for

While there are some vocal critics of the proposed Regulation, it is inevitable that the compromise between the EU institutions, to balance the conflicting interests of various players, will not please everyone.

The agreement on roaming certainly has political will behind it, but it is remarkable that such a rule has been agreed when the details of the (very significant) exceptions have not. It remains to be seen how this will work in practice.

The net neutrality position, while looking to prevent discrimination and interference, and maintain an open internet, clearly recognises the need to continue to enable those who provide the services to innovate in a harmonised and controlled way in order to keep the EU at the centre of the digital revolution. The real danger here is the likelihood of further fragmentation given the room for national regulatory authorities to interpret the scope of these provisions.

It is late in the EU legislative process, and there is a lot of political momentum behind this Regulation, so it seems unlikely that there will be further changes to the compromise text. Although it was difficult to reach even this stage, the real challenge will be how the various actions and guidance to be provided by the Commission, BEREC and the national regulatory authorities will turn these proposals into workable and balanced rules.

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