

The Consumer Voice in Europe

BEREC CONSULTATION ON THE EVALUATION OF REGULATION 2015/2120 AND THE BEREC NET NEUTRALITY GUIDELINES – BoR (18) 33

BEUC response



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Introduction

An unrestricted, neutral internet allows consumers to participate in today's online communities by accessing news and cultural content, for example, or to shop without restrictions. Protecting the right to access an open and neutral internet is preserving the internet itself, its openness, innovative and decentralised character, and importantly, consumers' right to access the best-efforts internet without discriminations.

Protecting the principles of openness and neutrality of the internet is the way to protect the interests of European consumers. It also means protecting the internet's innovative character, the economic growth opportunities it offers and the enhanced access to knowledge and freedom of speech that all Europeans are entitled to.

The EU law is a good starting point and must be maintained

Enshrining the fundamental principle of net neutrality into EU law¹ was the right decision. It eradicated harmful practices by telecom operators where they unduly blocked or throttled the access to certain content and services online. It also helped establish a common framework applicable across the EU and importantly, it set a global example. The EU should be proud of its achievements on net neutrality and use its economic diplomacy efforts to incentivise other regions in the world to do the same².

The EU's net neutrality law is now part of the EU's legislative acquis and represents a fundamental pillar of the Digital Single Market. It must therefore be maintained, and any future potential revision should only seek to strengthen the net neutrality principle by including more specific provisions on potentially harmful practices such as zero rating, for example.

The BEREC Net Neutrality Guidelines: good on many key points, improvements needed on others

The fate of protecting net neutrality through the enforcement of the EU's net neutrality law was put in the hands of the Body of European Regulators for Electronic Communications (BEREC) and National Regulatory Authorities (NRAs). To fulfil their role, they developed Guidelines³ on the implementation of the EU rules.

BEREC's Guidelines were a political compromise that interpreted many things in the EU law correctly, but other things remained too imprecise or unambitious in our view⁴.

¹ Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union.

² The European Parliament recommends largely the same idea for when the EU undertakes trade negotiations – see European Parliament resolution of 12 December 2017 on "Towards a digital trade strategy" (2017/2065(INI)) <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2017-0488>

³ Guidelines on the Implementation by National Regulators of European Net Neutrality Rules, BEREC BoR (16) 127

⁴ For more details on BEUC's positions on the guidelines and the EU net neutrality law, please [see here \(X/2016/075\)](#) and [here \(X/2016/049\)](#).

As BEREC's prepares for the review of its Guidelines, BEUC would like to provide the following considerations to some of the questions asked:

1. In your view – have the Guidelines helped NRA's apply the Regulation in a consistent, coherent and correct way? Please explain.

Regarding the general principles of the Regulation (no blocking, no throttling, general rules on traffic management) the Guidelines have allowed a consistent application. On the other hand, on the contentious issue of zero rating of content, the guidelines are not sufficiently clear on the fact that these practices should not be allowed, and instead BEREC proposed a case by case analysis, hence opening the door to divergent approaches.

Like we argue here, zero rating of content is contrary to the principle of net neutrality and is not permitted by the EU rules. In our view, BEREC should adopt that interpretation and through its new guidelines, tell all NRAs that zero rating is not allowed.

2. Did the Guidelines provide additional clarity regarding how to apply the Regulation?

As explained above, the Guidelines provided much needed clarity on how to interpret the Regulation on many key areas.

In other areas, the Guidelines have remained too vague and should be improved, namely with regards to zero rating and to connectivity services with a limited reach (paragraph 18).

3. On which subjects would you expect the Guidelines to be more explicit or elaborated? How should the text of the Guidelines be adapted on these points, in your view. Please explain.

Please see questions 2 and 3 above.

7. Do you think that the Guidelines should provide further clarification in relation to the definitions in the Regulation? If yes, please provide concrete suggestions.

Paragraph 18 should not mention e-book readers and must be removed. These devices can still be used to access the web.

It must be made clear that the Regulation does not foresee any other connectivity services beyond Internet Access Services (IAS) and specialised services. Therefore, where the number of reachable end-points is limited by the nature of the terminal equipment used with a service, this service should be provided through or as an IAS, if possible. If this service requires a guaranteed quality of service, it can be provided as a specialised service, but it must then comply with the corresponding rules.

8. Does the current assessment of zero-rating as recommended in the Guidelines, offer sufficient protection of end-users' rights as referred to in article 3(1) of the Regulation? Please explain.

As we explain here, zero-rating of content is a violation of the net neutrality principle. As markets for online content and applications and markets offering access to the internet evolve, more and more innovative commercial practices arise.

It is important to note that there can only be offers with zero-rated content where data caps are present. Consumers would prefer no data caps, or larger data caps to smaller data caps. But importantly, if there were no data caps at all, zero-rating could not take place. There is no evidence suggesting that consumers prefer offers with data caps. In fact, research in the US shows that network operators use data caps as a means to extract additional revenue from its customers, rather than for purely technical reasons⁵. As shown by BEREC's own research⁶, data caps are a determining factor in consumers' purchasing decisions. Therefore, policy-makers and regulators should discourage the use of lower data caps and encourage upwards competition towards higher data caps. By allowing zero-rating of content to become a commercial norm, regulators will not be pushing for more competition in the data market.

Although data caps are more common on mobile offers, it is important to note that they are not used only on mobile offers. In many European countries, it is a standard practice to use data caps also in fix Internet Access Services, and therefore the practice of zero-rating can also become problematic in fixed markets.

Though attractive to consumers at first sight, zero-rating practices amount to a reduction in consumer choice, as it is not the consumer who will freely choose what services or applications to use once the data cap is exhausted. Rather the company providing internet access decides what services would still be available once the data cap has been reached.

Zero-rating can also have an undesirable impact on online innovation and competition across the internet value chain, and that it is a powerful incentive for operators to continue maintaining low data caps. The lower the data cap, the more interesting zero-rating becomes. If they are not allowed to zero-rate specific traffic, network operators get an incentive to offer higher data caps, or no data caps at all.

With such discriminatory practices, network operators also have the chance to squeeze out competitors who do not have the capacity to negotiate with big content, service and application providers to make deals to zero-rate their apps. These big online providers get the chance to squeeze out the newcomers in their own markets. With zero-rating, competition and innovation are affected both online and offline.

⁵ Artificial Scarcity, reference https://static.newamerica.org/attachments/3556--129/DataCaps_Layout_Final.b37f2b8fae30416fac951dbadb20d85d.pdf

⁶ BEREC ECODEM report, 2013.

For example, by zero-rating Facebook, the dominant player in the social network market in Europe, a network operator such as Orange solidifies its position, as smaller operators do not have the same bargaining power to negotiate with Facebook. And Facebook consolidates its dominance in the online market, as competing, innovative social networks will not have the capacity to negotiate with network operators. And last but not least, a customer of Orange who is considering what social network to use will have powerful economic incentives to join Facebook as a result of the zero-rated offer.

Even if network operators zero-rated entire categories of traffic and not a specific provider, this would still raise concerns as it can impact online innovation. This type of zero-rating would let operators zero-rate a category of content/service that is not in competition with one of their own specialised services and keep the data cap low to ensure competitors to their specialised service are not preferred by consumers.

Importantly, in our view the Regulation 2120/2016 treats zero-rating as a violation of net neutrality. Although it does not refer to the concept of zero-rating as such, our interpretation is that the Regulation does not allow such practices. First, the Regulation says that commercial practices between providers of IAS and providers of online content or services cannot undermine the end-user rights established in Article 3.17, which means that when traffic is managed to zero-rate content, the operator prevents the consumer from exercising his or her right to freely choose what content, services and applications he or she wants to use or access. Second, the Regulation clearly states that traffic management cannot be based on commercial considerations of the network manager⁸.

In this context, it is important that BEREC clarifies that any commercial agreement that curtails end-users' ability to exercise their rights established in this Regulation should not be allowed. Similarly, BEREC should clarify that traffic management based on "commercial considerations" means any traffic management that cannot be justified by objectively verifiable technical needs. Any practice that involves traffic management and which does not respond to a technical justification has a commercial motivation behind it and should therefore not be allowed in accordance with the principles laid out in the TSM Regulation.

9. How could the assessment methodology for commercial practices in the Guidelines (ref. in particular to paras 46-48) be improved? Is there a need for more simplification, flexibility and/or more specification? Please provide concrete suggestions.

Beyond the fact that zero-rating practices should not be allowed, the Guidelines could be made clearer for other commercial practices. Supervising other commercial practices, as laid out by the current Guidelines, requires having telecom NRAs analyse the online market positions of different apps and services in a timely manner, which seems impractical.

11. Do you think that the current application of the Regulation and the Guidelines concerning commercial practices, such as zero-rating, sufficiently takes account of possible long term effects of such practices? If not, how could BEREC further facilitate this?

⁷ Article 3.2 and Recital 7 of the TSM Regulation.

⁸ Recital 9 of the TSM Regulation.

By not being categorical enough with zero rating, BEREC's Guidelines allow telecom operators to play around with the rules in an effort to test its limits. As they do this, the practice of zero rating consolidates as a market practice that is in the long run is contrary to consumers' interests. Rather, BEREC's Guidelines should be oriented towards giving telecom companies incentives to enlarge their data caps – or eliminate them altogether.

12. Is there a need for improvement of the Guidelines concerning reasonable traffic management (ref. in particular to paras 49-75)? If yes, how could this text be improved? Please provide concrete suggestions.

BEREC lays out a clear reasoning process that NRAs should follow to analyse traffic management measures, as well as criteria to assess the different conditions for the measures to be legal. The principles of legitimacy, suitability, and the obligation to choose the less intrusive option are adequate to the purpose of the rules.

It should nonetheless be made clear that application-agnostic traffic management measures are to be preferred over traffic management measures based on categories of traffic, like BEREC points out in other paragraphs. Providers of IAS should only apply measures based on categories of traffic when application-agnostic traffic management are not sufficient.

It is welcome that NRAs will not bear the burden of proving that a traffic management measure is based on commercial grounds, but it will rather suffice to establish that the measure is not based on objectively different technical Quality of Service (QoS) requirements.

END



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