

BEREC GUIDELINES ON THE IMPLEMENTATION BY NATIONAL REGULATORS OF EUROPEAN NET NEUTRALITY RULES

COMMENTS FROM: NORDIC PUBLIC SERVICE BROADCASTERS

NRK- Norwegian Broadcasting cooperation, YLE - Yleisradio, SVT – Swedish Television, SR – Swedish Radio, UR – Swedish Educational Radio, RUV – Icelandic Broadcasting cooperation, DR – Danish Broadcasting Corporation.

The companies are national Public Service media organizations from Sweden, Finland, Denmark, Island and Norway. The Companies are members of the European Broadcasting Union (EBU). We support the response submitted by the EBU to consultation of the guidelines. In addition to this, we wish to highlight specific areas that are of special interest and significance to the Nordic Public Service Broadcasters.

GENERAL COMMENTS:

Free access to services online, or net neutrality, is for every year more important for the general public in order to take part in the democratic society. For media, net neutrality is essential to take full advantage of the great opportunities of the digital world. For the modern media market to function, we therefore need to secure an open Internet with equal treatment for everyone based on a non-discrimination approach online. All traffic on the open Internet should be treated equally, no traffic should be prioritised, blocked or corrected. If the Internet becomes a place where only companies like Facebook and Google have priority and set the terms, it will be extremely difficult for local media as well as start-ups to reach an audience.

A limitation of the open Internet will have direct effects and limit the diversity in the media as we now know it. To support a continued fully open internet is also to support fundamental democratic values. The rights guaranteed offline today should also be guaranteed online, today and in the future.

The Nordic Public Service Broadcasters (Nordic PSBs) generally supports the BEREC guidelines on Net Neutrality. Nonetheless, the guidelines would benefit from being made shorter by focusing on debated issues. Many clarifications are basically a repetition of statements that is laid down in the regulation as such and do not need further clarification. Shorter guidelines would increase a clearer framework, certainty for NRAs/stakeholders and generally be more easy to understand.

Comments to the BEREC guidelines are made only to paragraphs that are especially important for the Nordic public service Broadcasters to highlight.

ARTICLES:

Article 2

Para 12 (with a reference to para 17): Nordic PSBs sees a certain risk in the conclusion that Wi-Fi hotspots are qualified as services or networks which are not being made publicly available. Telecoms providers are increasingly deploying Wi-Fi hotspots to enhance end-users' connectivity possibilities. The key point is that the deployment of these hotspots is not limited to cafés and restaurants but also hotels, airports, hospitals, trains and other semi-public or public venues. In most cases, these venues are accessible to the general public, implying that the networks and services are publicly available and thus merit monitoring by NRAs. NRAs should be attentive of the risk that the clause of Wi-Fi-hotspots could be used to circumvent the rule on sub-Internet services. The latter falls under the scope of the Regulation and constitute infringements of Article 3(1), 3(2) and (3) (reference BEREC, para 17). We see a need to clarify the BEREC guidelines on the risks mentioned above. Furthermore, in so far BEREC would conclude that Wi-Fi hotspots are not be considered as publicly available, it should be clarified that these offers cannot be marketed as an IAS offer.

Article 3

Para 32-33: The conclusion in para 32, that tariffs on data volumes and/or speeds, does not constitute any infringement on net neutrality. This simply addresses the price for provision, but should be neutral if end-user's rights are to be protected.

We agree on the conclusion in para 33, that products such as apps or specialised services in certain instances can be bundled with an IAS. However, there might be cases where such practices will have a strong impact on competition, thus creating the same problems as would be the case without net neutrality. This is particularly true as IAS today is a basic necessity. One apparent example of where this practice might constitute a problem is when, in a specific area, there is only one provider of broadband, and this provider only sells the access bundled with a specific application or with a reduced price for the bundled offer than for only the IAS service. Such a situation would create negative competition and might have a wide-ranging effect on media pluralism, also (because of network effects) in other areas where more offers are available. This example shows that in some instances, only using the national level when analysing competition among IAS providers might be insufficient. In many cases there might be a local de facto monopoly with significant barriers for entry to other IAS providers.

Para 37: We strongly agree with the conclusion that, in a situation where a few applications are zero rated while others are effectively blocked once the data cap is reached, would be a clear infringement of Article 3. It makes in principle no difference whether the data cap is 1GB or 0GB, in the opinion of the Nordic

Public Service Broadcasters, it is completely clear already from the direct wording of the regulation that it would be considered as an infringement. As this is the general working model of zero-rating offers, it should be made clear that zero rating in general is prohibited under the framework of the regulation.

- A situation where zero-rating in general is allowed might, among other things, lead to a situation where CAPs that are not zero rated would find it very hard to introduce new offers that could compete with the already leading platforms. This is particularly true as the economic network effects for platforms are very strong (as analysed in the EU commissions staff working paper on platforms ([ref](#)). The effects on the general public would be a decline in media offerings generally and a lack of media plurality. It might also force consumers to accept terms that they would not normally accept, for example giving up more privacy than what is reasonably required.
- The guidelines could be made explicitly clearer by declaring that, in general, zero rating is prohibited, as this constitutes an infringement of Article 3 (3).
- If however zero rating or price discrimination should be allowed under certain circumstances, it should be clearly defined as a narrow exemption. If certain exemptions are to be allowed, it is absolutely necessary that the effect on media pluralism is taken into account.

Para 43: In this context, the notion of “Significant market power” to be analysed in line with competition law principles” in p 43 is particularly questionable. IAPs are already under sector-specific regulation which puts them under rules that should prevent a situation to appear where competition is harmed. Meaning, it is already a market where the normal competition law principles do not always apply. Also, if competition law principles are given a stronger role compared to for example media pluralism, it might mean that the democratic reasons for net neutrality are not taken fully into account by the national regulators.

The underlying operating model of platforms which is addressed in the recent Commission staff document on the functioning of platforms are based on network effects. Once a platform has a market leading position, it would be hard to compete already from a start for new outlets and services. When adding the zero rating scheme, it would be almost impossible. This could lead to a situation where only services with sufficient resources can negotiate preferential deals, distorting competition, impeding innovation and reducing user choice. This would in turn have important effects further in the value chain and in the end for consumers in terms of media freedom and pluralism.

One such example is Sweden where the telecom operator Telia is promoting an offer together with Facebook among others. The offer means that Facebooks service together with a few other offers from selected CAPs are offered zero rated. The practice has been questioned by consumers as well as media companies. The agreement between Facebook and Telia leaves other media companies with three negative choices: Either to move into similar agreements with Telia (but without the negotiating power of Facebook), publish the content directly on Facebook, and thus losing the

control over how the material is presented to the audience/consumers, or to keep the media services as “normal” internet services, thus delivered at a higher price for consumers.

The example underlines a common problem for the media market, which is how to define the actual market. In the context of the above example, Facebook is defined by Telia as “social media”. If this is seen as a market separated from the general media market, the very important effects of Facebook entering a gatekeeper position might not be duly considered. This is important, as it would be perfectly possible for a platform to have a proportionate but not dominant size of the advertising market but, still in practice, control the media consumption for a large portion of the population of a country. Facebook, is a social media application, but on whose platform many media actors are existing with content. In their current zero rating offer with Telia in the Swedish market, linked content (leading back to the media outlet) within the Facebook app is not included in the zero rating scope, while content being uploaded directly on Facebook is. This might lead to a situation where media outlets use Facebook as their primary outlet to benefit from the zero rating schemes, and while doing so have to adhere to the editorial policies of Facebook.

Article 3(3) first subparagraph

Para 52: Nordic PSBs supports the conclusions in point 52. It should be noted that positive discrimination of one or certain groups of CAPs would have the same effect as negative discrimination. See also example in p. 43.

Para 59: In order to make evaluation effective, it should be considered to develop a template or fixed procedure how the evaluation will be done.

Para 63: From a consumer standpoint application type differentiation is much more relevant than application protocol. Preferably that should be the evaluation criteria. And categories should be broad considering the media convergence.

Article 3(3) second subparagraph

Para 65: It is important that and ISP can justify any abnormal traffic management, as it would be impossible for most NRAs to define what motive a ISP had when managing traffic.

Para 71: Nordic PSBs supports the list of prohibited traffic management measures and would like to add that also *positive* discrimination of for example a particular application could amount to discrimination.

Para 73-77: Traffic management practices by network operators are only justified in certain specific cases, which need to be clearly identified and defined. Nordic PSBs supports the three exceptions set out in Article 3 (3) and further defined in p. 73-77, and the principle of proportionality in terms of applying them to traffic management.

Para 79-83: In particular, it is important that ISPs are allowed to use means necessary to prevent harmful attacks on the network or on the CAPs. Nordic PSB supports the traffic management measures to prevent integrity and security situations. Nevertheless, we would like to point to the responsibility of NRAs to carefully and systematically assess that the requirements of exceptions are met and that adequate justifications to use exceptions are provided by ISPs, to make sure the regulation is not circumvented under the broad concept of security.

Para 84-89: It is important that extreme traffic measures still are based in application types or application protocols, so that for example public service broadcasting content/video is not blocked while for example YouTube is still available. If the effect is not marginal, it might be better to have full loss of specific services than part loss, unless overrule by legal requirements.

Article 3 (4)

Para 90-94: The sharing of personal information might be used to circumvent the rules on traffic monitoring in the context of zero rated offers. Mainly for the reason of identification of an individual and his/hers contract. If personal data is traded between an CAP an IAP for the purpose of providing a zero rating offer, this might actually be part of a circumvention of the regulation, effectively infringing on Article 3 (3).

Article 4

Nordic PSBs in general supports the principle of making information more accessible to consumers through the approaches in the guidelines. Nevertheless, it is important to underline that this cannot in any way imply that information to consumers is sufficient in order to create a functioning net neutrality regime for two reasons in particular;

- Consumers cannot reasonably be expected to fully grasp the concept of traffic management, functions and consequences.
- Neither can they be expected to fully consider the consequences on *others* when making individual choices. If, for example, one consumer decides to buy a prioritised service, this will automatically risk degrading other consumers IAS, as the traffic travels over the same network.

Article 5

Nordic PSB would like to underline the general importance of effective supervision and enforcement of the regulation and the guidelines from national NRAs, under the guidance of BEREC, as getting the regulation to work in practise. NRAs must be highly proactive in Article 5 and other responsibilities, in their monitoring and in maintaining a constant dialogue with the industry.

Para 169: It is of vast importance the national NRAs are responsible for the supervision, as it is impossible for most CAPs to have any oversight over how an IAS provider handle their traffic after the point of delivery. No CAPs have access to the information needed and very few have the necessary technical skills, in particular not smaller companies or start-ups.

Article 6

There should certainly be sanction for infringements on net neutrality. Member states might be encouraged to adopt sanctions that at the very least makes it costlier for the ISP to breach the rules than not to.