

Body of European Regulators for Electronic Communications (BEREC)
Zigfrīda Annas Meierovica bulvāris № 14, 2nd floor
LV-1050 Rīga
Republic of Latvia

Amsterdam, 14 July 2016

Subject: Public consultation on draft BEREC Guidelines on implementation of net neutrality rules

Dear sir or madam,

Regulation (EU) 2015/2120¹ (the Regulation) includes new Net Neutrality rules to safeguard equal and non-discriminatory treatment of traffic in the provision of Internet Access Service. It specifies that BEREC lay down guidelines on the implementation by national regulatory authorities (NRAs) of their obligations to monitor and ensure compliance with the rules. BEREC states that the Guidelines aim to contribute to the consistent application of the Regulation, thereby contributing to regulatory certainty for stakeholders.

NDP Nieuwsmedia, the Dutch News Media Association, welcomes the fact that BEREC has produced draft Guidelines which are both comprehensive and concrete, and as such also offer necessary clarification on essential parts of the Regulation. We would like to take the opportunity to comment on the draft BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules² (the Guidelines), which was approved for public consultation at the BEREC Board of Regulators meeting in Vienna, Austria on 3 June 2016.

Introduction: the Dutch situation

In 2013 The Netherlands was the first country in Europe to protect the principle of net neutrality by law. Defending freedoms on the Internet has always been a priority to our Ministry of Economic Affairs.

The Dutch Parliament approved a new national law to implement European rules on net neutrality in May 2016. This law is currently discussed by our Senate. The new Dutch law regulates a number of important issues: the Netherlands Authority for Consumers and Markets (ACM) was appointed as supervisor on the compliance of net neutrality rules. The new Dutch law also prohibits zero rating explicitly. Again Netherlands is the first country to prohibit all forms of price discrimination on the Internet. Furthermore, the Ministry of Economic Affairs is drafting additional rules to protect net neutrality firmer.

Net neutrality will be enshrined in European legislation soon. It is of great importance that national regulators will defend freedoms on the Internet. The Dutch Ministry of Economic Affairs explained the Dutch rules properly. NDP Nieuwsmedia hopes that this explanation of the rules will be taken over by other national regulators within the European Union.

¹ Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015.

² BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules.



Starting point of the Regulation

The Regulation states the following³:

"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. It aims to protect end-users and simultaneously to guarantee the continued functioning of the internet ecosystem as an engine of innovation. The measures provided for in this Regulation respect the principle of technological neutrality, that is to say they neither impose nor discriminate in favour of the use of a particular type of technology."

According to NDP Nieuwsmedia, it is of vital importance that the Regulation and the Guidelines protect net neutrality as described in the quote.

The Internet is today's most important platform for information sharing, and therefore of central importance for democracy, media and media users. The Internet is also of key importance to the business community. Internet is, in short, a central part of the necessary infrastructure of society.

Media companies are both regular businesses and something more. By virtue of being businesses media companies need the Internet to be an open and non-discriminatory platform, as do all types of businesses that rely on the Internet in their business.

By virtue of having a central role in newsgathering and dissemination, facilitating commentary and debate, an open and non-discriminatory Internet is just as important. Only an open and non-discriminatory Internet can facilitate innovation and development in the media industry, and provide better products and services for people. Discriminatory practices will lead to less innovation and poorer media products and media services. A free and open dissemination of news, commentary and debate depends on a free and open Internet.

The Guidelines

NDP Nieuwsmedia generally welcomes the fact that BEREC has produced draft Guidelines which are both comprehensive and concrete, and that they as such also offer necessary clarification on essential parts of the Regulation.

NDP Nieuwsmedia would particularly like to draw attention to the following observations, with regard to principles and elements in the draft, which we believe it is essential that BEREC keep in the final Guidelines:

- The general approach whereby the rules laid down in Articles 3 and 4 of the Regulation are interpreted in light of the general aim of the Regulation, as expressed in Article 1 and as elaborated on in the Recitals.
- The general emphasis on net neutrality with regard to ISPs provision of services.
- The general application of necessity and proportionality tests, both with regard to the interpretation of the exceptions from the Regulation's main rules regarding *inter alia* Specialized Services and Traffic Management, and with regard to the assessment of individual cases under the same exceptions.
- The underlining of the principle that the exceptions from the Regulation's basic principles should, as exceptions, be interpreted in a strict manner.

³ Paragraph 1.



- The wide interpretation of “Commercial Practices”, which according to the draft (paragraph 31) “may consist of all relevant aspects of ISPs’ commercial behaviour, including unilateral practices of the ISP”. On this point NDP Nieuwsmedia also agrees with BEREC, in that the aim of the Regulation is different from that of the Unfair Commercial Practices Directive (UCPD), so that although UCPD’s definition of “commercial practices” could provide NRAs with some guidance, the Regulation may call for a wider definition of the term.
- The lists of factors to be taken into account by NRAs in their assessments of whether ISPs commercial and technical practices are compatible with the Regulation (e.g. as in the draft’s paragraphs 43-45).
- The clarification of what can be regarded as “reasonable traffic management” and “specialized services”, and how NRAs should assess this in individual cases, including BEREC’s emphasis in this regard on identifying practices and measures which are, in reality, attempts at circumventing the Regulation.

NDP Nieuwsmedia would urge BEREC to uphold the above-mentioned principles and elements in the final guidelines.

The basic net neutrality principles are essential for general freedom of expression and information as protected by the EU Charter on Fundamental Rights Article 11 and the European Convention of Human Rights Article 10. These are freedoms upon which NDP Nieuwsmedia’s members rely in their role as public watchdogs, and upon which the public relies, in order to receive the information and ideas which are conveyed by NDP Nieuwsmedia’s member – increasingly via the Internet.

NDP Nieuwsmedia considers it relevant, in this connection, to draw attention to the recent Council of Europe *Recommendation CM/Rec(2016)1 of the Committee of Ministers to member States on protecting and promoting the right to freedom of expression and the right to private life with regard to network neutrality*.⁴ This recommendation expressly stresses the importance of net neutrality for the media and for media pluralism, with reference to a number of previous declarations and recommendations from the Committee of Ministers.⁵

The recommendation also obliges the member states to, *inter alia*:

“- take all the necessary measures, in co-operation with all relevant stakeholders, to safeguard the principle of network neutrality in their policy frameworks having due regard to the guidelines set out in the appendix to this recommendation;

- promote these guidelines in other international and regional fora that deal with the issue of network neutrality.”

The net neutrality principles are, therefore, recognized and promoted as crucial to the effective protection of fundamental rights, also in the wider Council of Europe political and legal context.

⁴<https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec%282016%291&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

⁵ Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration (31 January 2007), Recommendation CM/Rec(2007)3 on the remit of public service media in the information society, Recommendation CM/Rec(2007)16 on measures to promote the public service value of the Internet, Recommendation CM/Rec(2008)6 on measures to promote the respect for freedom of expression and information with regard to Internet filters, the Declaration of the Committee of Ministers on network neutrality (29 September 2010), the Declaration by the Committee of Ministers on Internet governance principles (21 September 2011) and Recommendation CM/Rec(2014)6 to member States on a Guide to human rights for Internet users.



Finally, and although BEREC is most certainly already aware of it, NDP Nieuwsmedia would point to the June 14th decision of the United States Court of Appeals for the District of Columbia Circuit, in which the court upheld a series of new net neutrality regulations for ISPs.⁶ This decision illustrates that US legislators and courts are moving in the same direction on the issue as we are in Europe.

The new Regulation, supplemented with BERECs guidelines, which NDP Nieuwsmedia hopes will contain what is already in the present draft, is an important step towards maintaining an open Internet.

Conclusion

NDP Nieuwsmedia welcomes the fact that BEREC has produced draft Guidelines which are both comprehensive and concrete, and as such also offer necessary clarification on essential parts of the Regulation.

The basic net neutrality principles are essential for general freedom of expression and information as protected by the EU Charter on Fundamental Rights Article 11 and the European Convention of Human Rights Article 10.

The principle and enforcement of net neutrality is of crucial importance, not only for media companies and media users, but also for innovation and healthy competition in general. The Guidelines must therefore seek to prevent different forms of practices that are contrary to the general legal and political considerations stated in the Regulation and the wider political and legal context.

Net neutrality will be enshrined in European legislation soon. It is of great importance that national regulators will defend freedoms on the Internet. The Dutch Ministry of Economic Affairs explained the Dutch rules properly, including a prohibition on zero rating. NDP Nieuwsmedia hopes that this explanation of the rules will be taken over by other national regulators within the European Union.

Kind regards,

Tom Nauta
managing director

⁶ United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT, case no. 15-1063: UNITED STATES TELECOM ASSOCIATION, ET AL. (PETITIONERS) v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA (RESPONDENTS) and INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE, ET AL. (INTERVENORS) - [https://www.cadc.uscourts.gov/internet/opinions.nsf/3F95E49183E6F8AF85257FD200505A3A/\\$file/15-1063-1619173.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/3F95E49183E6F8AF85257FD200505A3A/$file/15-1063-1619173.pdf)