BoR PC 01 (16) 019

The Consumer Voice in Europe

BEREC DRAFT GUIDELINES ON EUROPEAN NET NEUTRALITY RULES - BOR (16) 94

BEUC position

Contact: Guillermo Beltrà – digital@beuc.eu

BUREAU EUROPÉEN DES UNIONS DE CONSOMMATEURS AISBL | DER EUROPÄISCHE VERBRAUCHERVERBAND
Rue d'Arlon 80, B-1040 Brussels • Tel. +32 (0)2 743 15 90 • www.twitter.com/beuc • consumers@beuc.eu • www.beuc.eu
EC register for interest representatives: identification number 9505781573-45

Co-funded by the European Union

Ref: BEUC-X-2016-075 - 14/07/2016

Why it matters to consumers

Keeping internet access open and neutral is essential if we are to exercise our fundamental freedoms and democratic rights to participate in today's interconnected online societies. It is also a precondition to benefit from eCommerce. Consumers need an unrestricted and neutral internet to access news and cultural content or to shop without restrictions.

We need net neutrality to protect the internet's open and innovative character, where any start-up can reach any internet user across the globe, without having to worry which internet service provider their target consumers use. It means that the companies that provide access to the internet don't get to become gatekeepers of what can be accessed online, or kingmakers of what services win consumer's attention.

BEUC very much welcomes BEREC's draft guidelines on the implementation of the net neutrality rules[1]. The draft guidelines have thoroughly covered the important aspects that required interpretation in order for consumers to be adequately protected, for market actors to have legal certainty, and for National Regulatory Authorities (NRAs) to be able to enforce the rules.

Many of the rules laid out by BEREC in the draft guidelines are very clear: strongly safeguarding consumers' interests and simultaneously protecting the internet as an ecosystem of innovation, the two main objectives of the EU's net neutrality rules. Importantly, the guidelines strike the right balance to accommodate both objectives on most of the key issues which, if properly enforced, will make net neutrality a reality in Europe. A few interpretative rules still require some improvement from a consumer perspective.

The table below provides a detailed guide on the most important paragraphs for consumers, and how they adequately protect – or not – consumers' interests. If a paragraph is not on the list it means we agree with the approach and do not have anything to add. Where a paragraph is marked as **green** it means we fully agree with BEREC's approach and language and strongly urge you to leave the paragraph untouched. Where a paragraph is marked as **yellow** or **red**, it will indicate varying degrees of improvements to be made.

For additional details on BEUC's views on many of the issues addressed by the guidelines, please see our position paper "Net Neutrality – Time for clear rules of the game"[2].

[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] http://www.beuc.eu/publications/beuc-x-2016-049_qbe_net_neutrality_in_eu-time_for_clear_rules_of_the_game.pdf

Paragraph	BEUC Comment
3	The second sentence of Recital 1 complements Article 1 too and is of crucial importance. The entire Regulation aims to "guarantee the continued functioning of the internet ecosystem as an engine of innovation". This should be made clear throughout the guidelines.
6	Although interconnection is not covered by the Regulation, BEREC is right to point out that interconnection policies can amount to a limitation of the rights of consumers. The paragraph should therefore say "NRAs should take into account (…)". BEREC should also encourage NRAs to monitor developments in interconnection markets and look out for anticompetitive and/or discriminatory practices.
12	Services to access the internet provided by cafés and restaurants are offered to an undefined public, and are often open networks (ie: not password protected). They should therefore be considered as services being made publicly available which must also comply with the EU's net neutrality rules.
15	Good explanation of "connectivity to virtually all end-points" and clear rule on how the definition of Internet Access Service (IAS) should be understood.
17	Sub-internet offers fall within the scope of the Regulation and would constitute an infringement. Good BEREC rule.
18	This paragraph needs to be substantially improved. The way in which it is drafted and the examples that are mentioned may lead to confusion, and it should not exclude connectivity services from the scope of the Regulation in any case. First, it is important to recognise that the TSM Regulation does not foresee any other type of connectivity service beyond an IAS and a non-IAS, or a specialised service. Therefore, like the guidelines clearly state in other paragraphs, regardless of whichever two types of connectivity service it is, the rules contained in the TSM Regulation and these guidelines must be complied with. This implies that if the connectivity service associated to the device or service with limited functionalities can be provided through or as an IAS, that should be given preference. On the other hand, if it requires a guaranteed quality of service, it can be provided as a specialised service, and it must then comply with rules associated to this type of connectivity service. This paragraph is important not just for e-book readers and other similar limited devices, but in particular with regards to emerging trends such as the Internet of Things, Connected Cars, Smart Homes, etc. We look forward to continuing our cooperation with BEREC with regards to the Internet of Things to continue identifying the key consumer areas that need to be thoroughly studied and addressed.
21	Correct interpretation of what "access and distribute" and "information and content" should mean.

22	Correct interpretation of what "use and provide" and "applications and services" should mean.
24	Good rule for NRAs: they need to evaluate whether consumers are forced to use the terminal equipment of the choice of the provider.
25	If the provider imposes the choice of terminal equipment without any objective technical reason (and the burden of proof should lie on the provider), BEREC is right to point out this would amount to an infringement of the Regulation. Terminal equipment should be understood broadly and not necessarily limited to the consumer's own physical devices. Consumers should therefore have the option to choose any type of terminal equipment and network services that provide added value, including for purposes of guaranteeing additional security, blocking invasive or dangerous advertising, etc. As regards tethering, consumers should always be allowed to enable this feature if they so wish. BEREC's rule should be made clearer on this point.
32	BEREC is right to point out that the use of speed and volume limitations (data caps) should always be done in an application-agnostic way.
33	Good BEREC interpretation: bundling of Internet Access Services with an internet app (such as a premium subscription to a music streaming platform) is acceptable as long as this commercial practice does not entail any preferential management of the app's traffic and is not priced differently than the rest of the traffic.
34	Good BEREC interpretation of how Article 3(2) should be applied, ie: by taking into account also Article 3(3). This solves an inconsistency in how the Regulation was made, and should now provide legal clarity and ensure consumers are protected against potential abuses.
35	Good, clear rule on contractual restrictions, and how they would amount to an infringement as they would constitute a "sub-internet offer".
36	This paragraph is unclear and should be improved. BEREC implies that it would be acceptable if different categories of traffic (eg: video, web, voice) were priced differently, which is contradictory with paragraph 45. Price differentiation applied to categories of data traffic are not acceptable.
37	Zero-rating does not amount to applying a price of zero to the traffic of a specific application/s. There is always a price the consumer pays to enable the Internet Access Service to function, an underlying condition without which the app could not then have its traffic not count against a data cap.
38	BEREC is right to clearly specify that zero-rating of a specific application/s is an infringement of the net neutrality rules. Yet this paragraph creates the impression that zero-rating of content *before* the

	data cap is reached would be acceptable, and that cannot be the case. Zero-rating of content, whether it happens *within or beyond* the data cap, is a discriminatory practice that contravenes article 3.3 as BEREC rightly argues elsewhere.
39	Good explanation of why zero-rating of specific apps can amount to a reduction of consumers' choice. Importantly, they also impact the innovation ecosystem of the internet, as new entrants will have increased barriers to reach a wider user-base. BEREC should make this point clear to NRAs too. In addition, it is unclear whether BEREC considers that zero-rating of entire categories of applications is to be considered acceptable or not. The conditions under which these practices would be considered acceptable are explained in the following paragraphs, and that should be made clear in this paragraph.
40 - 43	These paragraphs rightly outline the objectives that NRAs should pursue when addressing commercial agreements and practices, including (but not limited to!) zero-rating. While the distinction made between factors that *affect* end-user choice as opposed to factors that *limit* it is reasonable, it would be better if BEREC provided concrete examples. Paragraph 43 contains a good list of criteria that NRAs should use to analyse commercial practices and agreements. However, BEREC's decision to leave the assessment of whether zero-rating deal restricts the freedom and rights of end-users to the NRAs on a case-by-case basis could lead to different regulatory decisions across Member States, thus provoking the fragmentation of the Digital Single Market and creating legal uncertainty for providers of IAS, providers of online apps and consumers. According to Article 5.3 of the TSM Regulation the goal of the guidelines is "to contribute to the consistent application of this TSM Regulation". This would not be possible with a case-by-case approach with weak rules on zero-rating that are open for interpretation.
44	BEREC is right to point out that any of the factors outlined in paragraph 44 can contribute to a material reduction in end-user choice.
45	Good additional criteria that NRAs should look into when assessing commercial practices. In particular, BEREC is right when it says that higher prices for a specific app or category of apps unreasonably impacts consumers' choice and should therefore not be allowed. BEREC is also right to highlight the link with the level of data caps, and the fact that the lower the data caps are, the higher the potential negative impact of zero-rating practices of a specific or several apps, or of an entire category.
46	BEREC is right to state that infringements of Article 3(3) would constitute an infringement of the consumer right established in Article 3(1)

47	BEUC regrets that the EU rules do not apply to interconnection markets. It is therefore very important that BEREC and NRAs closely monitor these markets and evaluate whether anti-competitive and/or discriminatory practices are taking place and need being resolved.
50	Good explanation by BEREC that treating traffic equally means treating it agnostically to sender and receiver, content access or distributed and to the application or service used or provided.
52	Good rule pointing out that any technical discrimination amounts to an unequal treatment of traffic and thus an infringement of Article 3(3). Helpful set of examples that would involve technical discrimination without any justification and thus be an infringement of the rules: Blocking and throttling, zero-rating of specific apps, and sub-internet offers.
53	Like BEREC says, NRAs must undertake a comprehensive assessment of IAS offers and their commercial and technical characteristics to assess their compatibility with the entire Regulation.
54-65	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.
66-67	BEREC is right to clarify that the rule establishing that reasonable traffic management measures should not monitor the specific content means that these measures should only look into packet headers and transport layer protocols. BEREC should clarify that these measures must always be in compliance with Regulation 2016/679 and Directive 2002/58/EC, in particular the provisions related to traffic data.
72	BEREC is right to clarify that "categories of traffic" cannot be interpreted as a specialised service.
73-77	BEREC sets out clear principles for the application of Article 3(3) and is right to clarify that the list of prohibited practices is not exclusive, while the list of specific exceptions to the rules is exclusive. When specifying that specific content can be monitored if one of the exceptions of Article 3(3) applies, BEREC should not only refer to Directives 95/46/EC and 2002/58/EC but also to Regulation 2016/679.

82	There is a vague reference to "recognised security organisations" without specifying which organisations are meant or at least providing a set of indicative criteria or examples as to how to determine whether a security organisation is trustworthy and independent enough to be considered a "recognised security organisation".
83	BEREC is right to point out that the exception can be used to circumvent the Regulation and NRAs must therefore carefully assess whether the requirements are met and request that providers justify the measures.
84-89	Good set of principles and criteria that should inform how NRAs must analyse and apply the exception provided for network congestion. In particular, it is good that BEREC points out that discriminatory traffic management cannot be used as a replacement of structural solutions such as the expansion of network capacity.
94	Telecom NRAs are not empowered with enforcing data protection legislation (Directive 95/46/EC and Regulation 2016/679), and it is unclear who will enforce Directive 2002/58/EC once it is reviewed. BEREC should call on its members to work closely with Data Protection Authorities (DPAs) on those matters that relate to the application and enforcement of data protection rules.
99-101	BEREC sets out 3 important principles: specialised services cannot be misused to circumvent or infringe net neutrality rules, the safeguards of the rules exist to protect the quality and availability of IAS, and NRAs must verify whether the specialised service could be provided over the IAS or whether it truly needs a committed level of quality.
104	This paragraph should say that NRAs "should" request the relevant information about specialised services from providers.
108	BEREC is right to highlight that applications and services will evolve over time, and that a service that qualifies as a specialised service today might not do so tomorrow when the state of the art of internet networks evolves. Specialised services must therefore be analysed on a case by case basis.
112-116	BEREC rightly clarifies that specialised services can only be provided if there is sufficient network capacity such that IAS will not be degraded. It also establishes that achieving sufficient network capacity might entail additional infrastructure investments, which is the right signal to market actors that capacity should primarily be dedicated to services providing internet access. BEREC rightly points out that the Regulation aims to protect IAS and prevent their degradation.
118	We agree that it should be the consumer who decides how the capacity is to be allocated between the IAS and any specialised service provided over the same broadband link. We are concerned that setting the threshold at the "minimum speed" will create an incentive for providers to set the IAS at the minimum contractually agreed speed by default, which is not in consumers' best interests. The paragraph should instead say that when the specialised service is switched on, the consumer should still get the maximum speed possible on the IAS, unless it is

	objectively technically not possible. This rule should apply to *any* end-user, and not just to those who are not the subscribers of both services.
119	While it is understandable that guaranteeing quality in mobile networks is more complicated than in fix networks, the guidance provided by BEREC in this paragraph is unsatisfactory. The criteria to understand whether the impact of specialised services is acceptable (unavoidable, minimal and limited to a short duration) need to be further explained and developed. All 3 concepts are vague and undefined.
122-123	Good paragraphs clarifying that specialised services cannot be used as a replacement of IAS.
126	The last bullet point should clearly say that comparability between different ISPs must be possible, and not "preferably".
127	Establishing a two-layered mechanism of information provision can be the adequate way to ensure consumers have easy access to understandable information in an immediate manner, and can dive into more details if they wish so. BEREC and NRAs could consider developing standard templates that providers could use to disclose this information in similar ways.
129	The paragraph should say "may" instead of "might" which would put it in in line with the language used in Directive 93/13/EEC on Unfair Contract Terms and the indicative nature of the Directive's annex that is cited. The use of one or the other word has concrete legal implications.
134-135	Speeds and data volumes need to be specified in concrete numerical values, and not undefined adjectives such as "fast" and "ultrafast" for speeds or equivalent undefined terms for data allowances. Beyond a data cap, consumers should be able to choose whether to have the speed decreased or pay for additional volumes of data. Importantly, BEREC should specify that providers should not use words such as "unlimited" in combination with an unclear "fair use" policy. If an internet access is unlimited in the amounts of data that is allowed to be used (within a certain limited speed), then it should be truly unlimited.
136	BEREC should include more details about what information regarding specialised services is to be published.
140-141	If minimum speeds are defined as the lowest speed at any point in time, this would create an incentive for providers to define very low minimum speeds. To avoid this potential misuse, there should be a relationship between the minimum and the normally available (or maximum) speeds, for instance by establishing a percentage, in the same way that it has been done for the normally available and maximum speeds (paragraph 145).
142-143	Maximum speeds should not be something that consumers can get once a day, but the speed that consumers can expect under normal circumstances throughout the day.

145	It would be preferable if BEREC worked out its own criteria on how to define what is to be considered the normally available speed, and how to relate it to the maximum and minimum speeds. If BEREC only provides some examples of approaches that can be followed, this will inevitably lead to fragmentation across Member States and can result in confusion for consumers.
152	The paragraph should say that "estimated maximum download and upload speeds *should* be made available in a geographical manner (...)".
154	NRAs should establish requirements on estimated maximum speeds. Importantly, if providers advertise higher speeds than what has been contractually defined as the estimated maximum speed could amount to an unfair commercial practice and be sanctioned as such under Directive 2005/29/EC on Unfair Commercial Practices. BEREC should clearly explain this in the guidelines.
156	Good requirements on complaint handling. In addition, BEREC and NRAs should encourage ISPs to join the relevant Alternative Dispute Resolution schemes available to them.
158-160	While these paragraphs are helpful to interpret Article 4(4), BEREC should explain that the article does not have a preclusive effect on the application of other legislation that relates to cases where non-conformity of the service occurs in a "non-significant" manner.
168	NRAs could also insert their own technical monitoring tools on the networks themselves.
174-177	Good enforcement requirements.
178-180	Good provisions on reporting of NRAs and information disclosure by ISPs.

This publication is part of an activity which has received funding under an operating grant from the European Union's Consumer Programme (2014-2020).