



**Body of European Regulators for
Electronic Communications (BEREC)**

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**Response to the BEREC consultation
on the draft Guidelines on implementation
of net neutrality rules**

Estonian Association of Information Technology and Telecommunication (hereinafter: ITL) analysed draft BEREC Guidelines on the Implementation by National Regulators of European Net Neutrality Rules (hereinafter: the Guidelines), published by BEREC on 6th June 2016 and we hereby submit our feedback.

ITL is in opinion that the Guidelines are in general terms reasonable and helpful to national regulators and operators as the articles about net neutrality in the Regulation (EU) 2015/2120 (hereinafter: the Regulation)¹ are very broad and vague. The Guidelines ensure that the Regulation is understood similarly by all concerned parties.

At the same time, ITL's position is that the Guidelines should not extend or amend the Regulation. For instance, the Guidelines should not create new sector-specific rules and procedures for consumer protection. In addition, we see some signs of overregulation and interference to normal business conditions in the Guidelines.

We also noticed the situations where Guidelines are reversing the burden of proof in illicit way. As an example, according to the Regulation (recital 17) is stipulated that for services other than internet access services, that are allowed to be provided, it is the national regulatory authorities (hereinafter: the NRAs) that shall demonstrate when a practice is in breach with the Regulation. In the Guidelines (paragraph 59) the burden is completely shifted and internet access service provider shall justify that it is not violating the rules. Such reverse of the burden of proof in the Guidelines is very clearly against general principles of law and must be avoided.

Considering the above, ITL presents its opinion about different issues discussed in the Guidelines by pointing out the most problematic questions and making its suggestions as follows.

¹ Regulation 2015/2120/EU 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.



1. **Zero rating** (paragraph 38 and 45 of the Guidelines)

Paragraph 38 of the Guidelines states that “a zero-rating offer where all applications are blocked (or slowed down) once the data cap is reached except for the zero-rated application(s) would infringe Article 3(3) first (and third) subparagraph (of the Regulation).” Paragraph 45 sets also negative standards towards zero rating.

We cannot agree with such absolute prohibition. In our opinion, zero rating should be always assessed case-by-case and by considering all relative aspects of the service.

For example, in Estonia it is common practice not to block the essential governmental webpages like digital prescription (for example e-prescribing medications for patients). This applies also for the web pages of operators to access additional information and internet banks so the customers can pay their debts in order to continue using their services in ordinary volume.

We hereby suggest that in the question of zero rating the Guidelines should give NRAs more power to decide whether the concrete practise infringes Article 3(3) of the Regulation or not. NRA knows local situation and can take into account all relevant subjective aspects while making this decision.

Therefore Guidelines paragraphs 38 and 45 should be completely deleted in Guidelines.

2. **Scope of application of the transparency measures** (paragraph 130 of the Guidelines).

Paragraph 130 of the Guidelines states the following: “*Articles 4(1), 4(2) and 4(3) apply to all contracts regardless of the date the contract is concluded or renewed. Article 4(4) applies only to contracts concluded or renewed from 29 November 2015.*”

We are in the opinion that BEREC has hereby wrongly and illegally interpreted the Regulation and therefore paragraph 130 should be deleted. Although the last sentence in Article 4(4) of the Regulation says that the paragraph shall apply only to contracts concluded or renewed from 29 November 2015, it does not mean that the rest of the paragraph applies to all contracts regardless of the date the contract is concluded or renewed. Article 4(4) of the Regulation explains the implementation of Article 4(1) points (a) to (d) by saying when shall a significant discrepancy between the actual performance of the internet access service regarding speed or other quality of service parameters and the performance indicated by the provider of internet access services be deemed to constitute non-conformity of performance.

It follows that the providers of internet access services shall ensure that any contract which includes internet access services specifies the information listed in Article 4(1) points (a) to (d) in all agreements concluded or renewed from 29 November 2015.

There is absolutely no need to specify this kind of information in old agreements if non-fulfilment of indicated parameters and the performance shall not be deemed a non-conformity of performance in the meaning of the Regulation.

All in all, since the Regulation does not state that the Articles 4(1) - 4(3) shall enter into force from different date than the rest of the Regulation, such interpretation as in the paragraph 130 of the Guidelines shall be considered illegal. If legislators aimed to have these rules apply retroactively, the Regulation would have used the same wording as in Article 4(4) where is explicitly stated that the earlier date of entry into force is applicable.



3. Proportions between minimum and maximum speed (paragraph 141 of the Guidelines)

Paragraph 141 of the Guidelines gives NRAs the power to set a requirement that the minimum speed should be in reasonable proportion to the maximum speed. We are in opinion that this is pure business condition and therefore should remain in the scope of commercial agreements. As this is not related to the net neutrality, we hereby make a proposal to take paragraph 141 out of the Guidelines.

Furthermore, we kindly ask you to overlook the Guidelines and to take out all paragraphs that grant NRAs power to intervene in normal business conditions of telecom operators.

4. Procedures for addressing complaints (paragraph 156 of the Guidelines)

BEREC sets a long list of good practices regarding procedures for addressing complaints in paragraph 156 of the Guidelines. We see no need to add such a long list of consumer protection measurements into the Guidelines as this is a question of consumer protection regulation and not directly related to net neutrality.

Moreover, we think that this kind of list of complaint management measures is overregulation as consumer protection regulation does not establish such a specific procedure requirements.

In addition, we do not understand why BEREC sees the need to impose such measurements of consumer protection in so specific field as net neutrality. In our opinion this will create another sector specific overregulation which is on the contrary to the aims of Digital Single Market strategy.

Therefore, we propose to leave the list of procedures for addressing complaints out of the Guidelines.

ITL considers it to be fully enough if the service providers specify in their agreements and conditions how the complaints are solved, refer to national consumer protection regulation and give guidelines where to submit claims if the consumer wants to appeal.

5. Methodology for monitoring IAS performance (paragraph 163 of the Guidelines)

In paragraph 163 of the Guidelines BEREC states that the measurements should be performed beyond the ISP leg.

We are in opinion that the standards and terms of specific equipment should be always taken into account while performing measurements. It cannot be said so straight that the measurements should always performed beyond the ISP leg. It depends on the specific end user equipment.

Therefore, we propose to reword this sentence as follows:

“Measurements should be performed according to reasonable standard and based on the terms of the equipment before the ISP leg.”

6. Information requested by NRAs (paragraph 180 of the Guidelines)

In paragraph 180 of the Guidelines there is a non-exhaustive list of information that different NRAs could request from providers of electronic communications to the public.



We are in opinion that the list contains too wide reporting obligations and should not be imposed this way.

For example, the third bullet point states that NRA may request “requirements for specific services or applications that are necessary in order to run an application with a specific level of quality.” This information is related to the content service provider and not to the internet service provider as the last may not know this kind of information.

In addition, we do not see the need to provide such a detailed information about the complaint management measures as stipulated in the Guidelines.

Paragraph 180 of the Guidelines contains powers that different sector-specific NRA’s already have in accordance with existing electronic communication legislation. For example competition authorities have the right to ask information about commercial agreements and practises and data protection authorities have the right to ask details about the processing on personal data by internet service providers.

We are in opinion that all NRAs should not have such wide range of powers to ask so specific information. Only those NRAs who deal with these very specific issues should be entitled to ask such information as. It would be very confusing to give more powers to NRA’s using the Guidelines which is not binding document. It would be on the contrary of established rules and practises to give different NRA’s all those specific powers.

Therefore, we propose to make this paragraph shorter and more general and leave out all subclauses that are related to specific powers of different NRA’s who are not related to net neutrality questions.

ITL is thankful for the opportunity to participate in this consultation on the draft review of the BEREC Guidelines. We hope that BEREC considers our feedback by reviewing the Guidelines in order to provide guidelines that are strictly related to the topic of net neutrality and do not intervene in normal business conditions or create a new sector specific consumer protection regulation.

Estonian Association of Information Technology and Telecommunications (officially abbreviated as ITL) is a voluntary non-profit organisation, whose primary objective is to unite the Estonian information technology and telecommunications companies, to promote their co-operation in Estonia's development towards information society, to represent and protect the interests of its member companies and to express their common positions.

Yours sincerely,

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