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

The Finnish Consumer Ombudsman is a supervisory authority with a general jurisdiction over consumer protection laws. The Consumer Ombudsman supervises the consumer protection laws to ensure that consumer interests are implemented and enforces those legal provisions which guarantee collective consumer protection. Particular attention is paid to ensuring that marketing activities, contractual terms and customer service and other after sales practices conform to the laws (including EU directives 2005/29/EC on unfair business-to-consumer commercial practices and 93/13/EEC on unfair terms in consumer contracts).

General remarks

The Finnish Consumer Ombudsman welcomes the BEREC guidelines which give clear ground rules for interpretation. Many of the rules and principles laid out in the guidelines safeguard consumers' interests and further the EU Regulation's aim to safeguard end-users' rights.

The EU Regulation promotes the end-users' ability to access and distribute information over Internet.¹ We support the view that this *ratio* of the Regulation should be the ground rule and guiding principle in interpretation. Any commercial arrangements or exceptions should be assessed from the view point that they should not limit the end-users' access right. If this *ratio* is not respected and given primacy, it is easy to circumvent the Regulation, since some of the articles are vague and open for argumentation.

Moreover, if the end-users' access right is bypassed, this affects the fundamental rights and freedoms of consumers. The interpretation should follow the Regulation and respect the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, notably the protection of personal data, the freedom of expression and information, the freedom to conduct a business, non-discrimination and consumer protection.²

Sub-internet services (17, 35 and 52)

BEREC rightly states that sub-internet services are in the scope of the regulation. We agree that they constitute an infringement of Articles 3(1), 3(2) and 3(3) of the Regulation.

In fact any other interpretation would ultimately lead to a situation where consumers would have to buy separate 'access service' to different

¹ Recital 1, 3, 6 and 7, Article 3(1).

² Recital 33.

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websites, since this will guarantee an increased revenue for ISP's. Instead of one 'all inclusive' IAS subscription the consumers would end up buying bundles of mixed contracts with limitations.

It is important to remember that those consumers, who are not active Internet users and want to get extra cheap IAS, may choose a low speed or low data gap subscription. Limiting access is not the only way to offer cheaper connections. However, limiting access does affect the way consumers learn and use digital services. Since nobody can predict the future needs or the new services Internet innovates, it makes sense to preserve consumers' choice.

Zero-rating (38 and 52)

We agree that a zero-rating offer where all applications are blocked (or slowed down) once the data gap is reached except the zero-rated application(s) would infringe Article 3(3).

However, we would prefer a more technology neutral wording "applications or services". Apps like Spotify are often used as an example, but in some countries zero-rating is also used in connection to for example online banking sites.³

Traffic management (54-65)

What constitutes 'reasonable' traffic management needs to be clarified and BEREC succeeds in creating a framework for interpretation. We consider especially important that the traffic management measures should be based on objective criteria and not commercial considerations.

Specialised services (95-101, 104 and 108)

The definition of 'specialised services' is very abstract and still not clear to us. If a service is 'specialised' only when the delivery requires special optimisation and a connection that is logically separated from the IAS, the context needs to be explained. The Guidelines could provide clear examples.

For example would it be possible to describe more precisely when "machine to machine communications services" are 'specialised services'? And why IPTV services would be 'specialised'? In Finland IPTV services are delivered over the IAS and there are no special conditions for consumers (as receivers).

³ More examples Erik Stallman – R Stanley Adams: Zero Rating: a framework for assessing benefits and harms (Jan 2016) https://cdt.org/files/2016/01/CDT-Zero-Rating_Benefits-Harms5_1.pdf

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We support the view that the 'specific level of quality' should be specified and it should be demonstrated that this 'specific level of quality' cannot be assured over the IAS. Open Internet is a driving force for innovation and if services escape to closed networks or platforms this limits consumers' choice. Moreover, special optimisation often means special equipment and devices which makes it even more expensive for consumers to get 'specialised services' and increases the risk of tying and lock-in effects.

BEREC rightly states that a service once deemed to be 'specialised' may not qualify as such in the future. In the fast moving technical environment 'specialized services' need to be assessed on a case-by-case basis and guided by technology neutral and time-lasting principles.

Transparency measures (127 and 140-154)

BEREC suggests that the information referred to in Article 4 would preferably be presented in two parts: high-level general information and more detailed technical parameters. We welcome this approach which clearly fulfills the purpose of the Article.

Consumers are not a homogeneous group when using the Internet, but their needs and skills differ a lot. When the purpose of the Article is to give consumers information on how the quality of the IAS could impact their use, the 'two-tier approach' is a good way to guarantee that the information is understandable and matches the needs of different consumers.

Any information on speeds needs to be as accurate as possible and not misleading. In this context it needs to be beard in mind that also the UCPD (2005/29/EC) applies.

We support the view that minimum speed should be the absolute minimum and normally available speed should be available most of the time.

Any speed should be specified in such a way that it can be achieved under realistic usage conditions. Looking from the consumer's point of view achieving maximum speed "once a day" does not meet the expectations, especially if that moment can be at any given time and for example during the low-peak hours of the night. The 'realistic usage conditions' criteria should apply also fixed networks, since the technical quality of the networks varies. As to the mobile networks, we agree that the realistic usage conditions mean usage in different locations.

It is our opinion that it would be misleading to advertise only the maximum speed, since most of the time the maximum is not available to the consumers. In order to give the consumers a realistic picture of the quality of the IAS also in mobile IAS offers a realistic achievable speed level needs to be defined.

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Complaint handling (156)

It is our experience that businesses need guidance on compliance with the law on customer service and other after sales practices, especially regarding complaints handling. Therefore we welcome BEREC's suggestion that NRA's should ensure that ISP's adhere to good practices regarding procedures for addressing complaints. However, we would like to point out that if the guidelines are set too tight on the EU level, this may hinder emerging good practices. NRA's need a margin of discretion because on the national level there are differences in for example digitalization of processes and in consumer expectations.



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