

Comments on BEREC's Guidelines on the Implementation by National Regulators of European Net Neutrality Rules

by the C² Coalition, July 2016

The Communications & Connectivity (C²) Coalition welcomes the opportunity to comment on the BEREC's [Guidelines](#) on the Implementation by National Regulators of European Net Neutrality Rules (hereafter 'the Guidelines'). Launched in July 2015, the C² Coalition is the voice for Internet enabled innovation and the policy framework that enables it, and hence represents what is now commonly branded as 'over-the-top' (OTT) service providers.

INTRODUCTION

The Guidelines do not comprise specific questions, therefore we organise our comments by highlighting specific remarks that apply to the entirety of the Report.

C² would first like to highlight some statements in these Guidelines that we strongly support and consider crucial in the net neutrality debate, before addressing some of the issues we consider could benefit from further clarifications.

In general, we consider that the BEREC has done a good job in balancing all interest and ensuring that NRAs have enough guidance to act in case of abuses. However, it still remains up to the NRA to act: having a great toolbox but not using it would certainly be the worst outcome one can imagine.

In light of the preliminary remarks voiced by other stakeholders, C² would also like to stress that we do not consider the level of detail to be overly prescriptive but rather welcome the BEREC's thoroughness to try to increase the legal certainty required by market payers to function.

SPECIFIC REMARKS

1) TERMINOLOGY

- **Section 2 – CAP:** C² welcomes the use of the Content and Application Provider or 'CAP' terminology and hopes, for the sake of coherence and clarity, to see this approach repeated in other BEREC documents which currently still use the term 'OTT'.

2) SUBJECT MATTER & SCOPE

- **Section 4 – End-user:** C² fully agrees with the statement by the BEREC that it *“understands ‘end-user’ to encompass individuals and businesses, including consumers as well as CAPs.”* This statement is crucial in interpreting appropriately the scope of the Guidelines and should possibly be reinforced even more as an affirmation that *“understands end-users encompass ...”*.
- **Section 5 – Interconnection scope:** *“CAPs are protected under the Regulation in so far as they use an IAS to reach other end-users. However, some CAPs may also operate their own networks and, as part of that, have interconnection agreements with ISPs; the provision of interconnection is a distinct service from the provision of IAS.”* It is not clear to us if ‘interconnection’ includes Content Delivery Networks (CDN) platforms. C² considers it should be made clear that CDNs are excluded and are distinct from IAS. C² is aware that some broadband providers have asserted that CDNs are “non-neutral”, but we consider this argument to be incorrect. The function of a CDN is to enhance users’ overall Internet experience by hosting and serving content from a location closer to end users, thus avoiding points of possible congestion and reducing latency. By definition, they do not and cannot involve themselves or interfere with other traffic flows to end users. Only last-mile broadband access providers and in some cases those who own backhaul networks have such control.

Furthermore, unlike network prioritisation which is usually zero-sum (so that speeding some packets inherently means slowing others), there is no limit to the number of users that can enjoy the enhanced quality and speed that come from CDNs and similar content serving facilities. Moreover, CAPs invest in data centre infrastructure available to third parties: anyone, including broadband operators, is welcome to take advantage of this to develop their own services for users. C² therefore considers that broadband providers’ bottlenecks are still the *only* gateway users have to access the Internet and that is where harm to innovation and end-users can most likely occur and does take place at present. This is therefore the layer of the value chain which the European Commission and regulators should focus their current efforts on, and not be distracted by over-broadening the scope of their efforts far beyond the core issues around the open Internet.

- **Section 6 – Inclusion of interconnection:** C² supports the BEREC’s analysis that *“NRAs may take into account the interconnection policies and practices of ISPs in so far as they have the effect of limiting the exercise end-user rights under Article 3(1)”*. C² interprets this as meaning that interconnection agreements can be reviewed in light of the Guidelines and suggest that they **should** be reviewed by the NRAs in case of complaint (formal or informal) by an end-user. Moreover, in order to avoid any confusion in the interpretation, we suggest to slightly amend the sentence to read *“When assessing the respect of the net neutrality provisions by ISPs, NRAs can take into account ...”*.

- **Section 16 – IAS & IPv6:** *“BEREC considers that the term “virtually all end points” should, at present, not be interpreted as a requirement on ISPs to offer connectivity with both IPv4 and IPv6.”* C² does not necessarily disagree with this statement but would like to know how the BEREC intends to encourage IPv6 adoption.
- **Sections 25 – User terminal equipment:** C² applauds the explicit mention of tethering as a ‘restriction of choice’ that violates the Guidelines.
- **Section 39 & 40 – Framing zero-rating practices:** C² would like to suggest the following cumulative criteria to ‘frame’ these practices:
 - There should be no traffic prioritization;
 - The zero-rated services proposed by the ISP should be proposed under transparent, open & non-exclusive conditions: in other words, the possibility to be zero-rated should be available to any service of a given type (*e.g.* any music service) that wishes to come to a similar arrangement with the provider; and,
 - Zero-rating should not require CAPs to make a payment or provide other compensation in order to participate.

More generally, media pluralism and cultural diversity should always be taken into consideration when looking at such practices. Indeed, the amazing global wealth, dissemination and exchange of knowledge available through the Internet, are at risk in a world of several possible clustered ‘internets’ (subsets of the Internet).

- **Section 43 – Assessment of barriers:** When the NRA makes an assessment on *“the administrative and/or technical barriers for CAPs to enter into agreements with ISPs”*, C² recommends that regulators should take into consideration the use of open standards or APIs by these ISPs.
- **Section 59 – Reasonableness:** *“In assessing whether a traffic management measure is reasonable, NRAs should assess the justification put forward by the ISP. In order to be considered to be reasonable, a traffic management measure has to be based on objectively different technical QoS requirements of specific categories of traffic. Examples for technical QoS requirements are latency, jitter, packet loss, and bandwidth.”* C² considers it should be more clearly stated in the Guidelines that the burden of establishing the reasonable nature of a measure should be on the ISP. C² acknowledges the fact that the Guidelines establish that prioritisation and traffic management can be beneficial for certain (*e.g.* delay-sensitive) applications on the public internet.
- **Section 70 – Longer than necessary & trigger function:** *“Necessity can materialise several times, or even regularly, over a given period of time. However, where traffic management measures are permanent or*

recurring, their necessity might be questionable." While C² understands the balance the BEREC is trying to introduce, it is likely to be difficult in practice to differentiate between the trigger function (which is admissible) and a 'recurring' traffic management (which is not). It is likely to require regular measurements by the regulator and/or habilitated third parties on top of reporting requirements on the ISPs.

- **Section 156 – Complaints mechanism:** C² welcomes the principles set out by the BEREC as regards the complaint mechanisms, especially considering the interpretation of end-users as encompassing both consumers and CAPs. C² does however consider that the ambition of handling a complaint "*in a relatively short time, taking into account the complexity of the issue*" is not exactly comforting, and would suggest that additional language should be added to state that should a complaint require time to be investigated, regulators could take preventive measures to avoid harm continuing to take place during the investigation.

We thank you in advance for taking consideration of these views. Feel free to contact Caroline De Cock, C² Coalition's Executive Director, by phone (+32 (0)474 840515) or email (cdc@c2coalition.eu) should you need further information.

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About the C² Coalition

The Communications & Connectivity (C²) Coalition is the voice for Internet enabled innovation and the policy framework that enables it. Its current members are Google, Microsoft, Rakuten and Voxbone.

The C² Coalition believes that with the right public policies, Internet-enabled communications, services, applications and content, can benefit consumers, increase competition, provide a platform for innovation, drive broadband demand, and enable economic growth. The C² Coalition is [listed](#) in the Transparency Register.