



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

COMMENTS FROM: Sveriges Television AB, SVT

SVT, a public service broadcaster is the leading investor in original audiovisual content in Sweden, and its services are used by 9 out of 10 swedes every week. Its play service SVT Play is the most popular national audiovisual OTT service.

GENERAL COMMENTS

Free access to services online, or net neutrality, becomes more important each year for the general public, and for the functioning of a democratic society. For media, net neutrality is essential to take full advantage of the great opportunities of the digital world. For the modern media market to function, we need to secure an open Internet with equal treatment for everyone. All traffic on the open Internet should therefore be treated equally, no traffic should be prioritised, blocked or corrected. If the Internet becomes a place where only companies like Facebook and Google have priority and set the terms, it will be extremely difficult for local media as well as start-ups to reach an audience.

A limitation of the open Internet will have direct effects and limit the diversity in the media as we now know it. To support a continued fully open internet is also to support fundamental democratic values.

Comments are made only to paragraphs that are especially important for SVT to highlight.

SVT generally supports the BEREC guidelines on Net Neutrality. Nonetheless, the guidelines would benefit from being shorter and focusing on debated issues. Many clarifications are basically a repetition of statements that are laid down in the regulation as such and do not need further clarification. Shorter guidelines would increase a clearer framework, certainty for NRAs/stakeholders and generally be more easy to understand.

ARTICLES:

Article 1 and Article 2

SVT generally believes that the subject matter as well as the definitions relating in the article 1 and Article 2 are functional.

Article 3

P 32-33: SVT agrees with the conclusion in p 32, that tariffs on data volumes and/or speeds do not constitute any infringement on net neutrality.

We support the conclusion in p 33, that products such as apps or specialised services in certain instances can be bundled with an IAS. However, there might be cases where such practices will have a strong impact on competition, thus creating the same problems as would be the case without net neutrality. This is particularly true as IAS today is a basic necessity for many people. One apparent example of where this practice might constitute a problem is when in a specific geographic area there is only one provider of broadband, and this provider only sells the access bundled with a specific application or with a reduced price for the bundled offer compared with an unbundled offer for the IAS. Such a situation would create a negative competition and might cause an extensive negative effect on media pluralism, also (because of network effects) in other areas where more offers are available. This example shows that in some instances, only using the national level when analysing competition among IAS providers might be insufficient. In many cases there might be a local de facto monopoly with significant barriers to entry for other IAS providers.

P 34-45: Concerning price differentiation and zero rating, which are the topics of paragraph 36-45 SVT would like to make the following remarks:

We strongly agree with the conclusion in p 37, that a situation where a few applications are zero rated while others are effectively blocked once the data cap is reached, would be a clear infringement of Article 3. It makes in principle no difference whether the data cap is 1GB or 0GB, in SVT's opinion it would be completely clear already from the direct wording of the regulation that it would be an infringement. As this is the general working model of zero-rating offers, it should be made clear that zero rating in general is prohibited under the framework of the regulation.

A situation where zero-rating in general is allowed might among other things lead to that CAPs that are not zero rated would find it very hard to introduce new offers that would compete with already established, leading platforms. This is particularly true as the economic network effects for platforms are very strong (as analysed in the recent EU commissions staff working paper on platforms. The effect on the general public would be a decline in media offerings and lack of media plurality. It might also force consumers to accept terms that they would not normally accept, for example giving up more privacy than what is reasonably required.

The guidelines could be made clearer by stating, as a presumption, that in general zero rating is prohibited, as this constitutes an infringement of Article 3 (3).

If however zero rating or price discrimination should be allowed under certain circumstances, it should be clearly defined as a narrow exemption. If certain exemptions are to be allowed, it is absolutely necessary that the effect on media pluralism is taken into account.

P 43: In that context the notion of “market position” to be analysed in line with competition law principles” in p 43 is particularly questionable. IAPs are already under sector-specific regulation which puts them under rules that aims to prevent a situation where competition is harmed, so it is already a market where normal competition law principles do not always apply. Also, if competition law is given priority over principles of media pluralism, it might mean that the democratic reasons for net neutrality are not taken fully into account by national regulators.

The underlying operating model of platforms which is addressed in the recent Commission staff document on the functioning of platforms are based on network effects. Once a platform has a market leading position, it would be hard to compete already from a start for new outlets and services. When such platforms adds zero rating schemes, it would be almost impossible. This could lead to a situation where only services with sufficient resources can negotiate preferential deals, distorting competition, impeding innovation and reducing user choice. This would in turn have important effects further down the value chain and in the end for consumers in terms of media freedom and pluralism.

One such example is Sweden where the incumbent telecom operator, Telia is promoting a zero rating offer together with Facebook. The offer means the Facebook’s service (and Facebook owned services) together with a few other offers from selected CAPs are delivered and available to consumers at no cost for data – i.e. zero rated. The practice has been questioned by many individuals as well as media companies in Sweden. The agreement between Facebook and Telia leaves other media companies with three bad choices: Either to move into similar agreements with Telia (but without the negotiating power of Facebook), publish the content on Facebook, and thus losing the control over how the material is presented to its customers or to keep the media services as “normal” internet services, thus delivered at a higher price for customers. The actors involved are combining their respective dominant positions on the market in a way that in the long run hampers competition and poses a real threat to media pluralism.

The example underlines a common problem for the media market, which is how to define it. In this context, Facebook is defined by Telia as as “social media”. If this is seen as a market separated from the media market, the very important effects of Facebook entering a gatekeeper position might not be duly considered. This is very important as it would be perfectly possible for a platform to have a proportionate but not dominant size of the advertising market but still in practice control the media consumption for a large portion of the population of a country. Facebook, is a social media application, but at the same time a platform where many media actors are present with content. In their current zero rating offer with Telia in the Swedish market, content that is inked within the Facebook app is not included in the zero rating while content that is uploaded on Facebook is. This might lead to a situation where media outlets use Facebook as their primary outlet to benefit from the zero rating schemes, and while doing so have to adhere to the editorial (and other) policies of Facebook.

Article 3(3) first subparagraph

P. 52: SVT supports the conclusions in point 52. It should be noted that positive discrimination of one or certain groups of CAPs would have the same effect as negative discrimination. See also example in p. 43.

P. 59: In order to make oversight effective, it might be an idea to have a template or fixed procedure how the evaluation will be done.

P. 63: From a consumer standpoint, application type differentiation is much more relevant than application protocol. Preferably that should be the evaluation criteria. And categories should be broad considering the media convergence.

Article 3(3) second subparagraph

P. 65: It is important that an ISP can justify any unnormal traffic management, as it would be impossible for most NRAs to define what motive a ISP had when managing traffic.

P 71: SVT supports the list of prohibited traffic management measures and would like to add that also *positive* discrimination of for example a particular application could amount to discrimination.

P 73-77: Traffic management practices by network operators are only justified in certain specific cases, which need to be clearly identified and defined. SVT supports the three exceptions set out in Article 3 (3) and further defined in p. 73-77, and the principle of proportionality in terms of applying them to traffic management.

P. 79-83: In particular, it is important that ISPs are allowed to use means necessary to prevent harmful attacks on the network or on the CAPs. SVT supports the traffic management measures to prevent integrity and security situations. Nevertheless, we would like to point to the responsibility of NRAs to carefully and systematically assess that the requirements of exceptions are met and that adequate justifications to use exceptions are provided by ISPs, to make sure the regulation is not circumvented under the broad concept of security.

P. 84-89: It is important that extreme traffic measures still are based in application types or application protocols, so that for example video from public service broadcasters is not blocked while Youtube is still available. If the effect is not marginal, it might be better to have full loss of specific services than part loss, unless overruled by legal requirements.

Article 3 (4)

P 90-94: The sharing of personal information might be used to circumvent the rules on traffic monitoring in the context of zero rated offers. Mainly for the reason of identification of an individual and his/hers contract. If personal data is traded between an CAP an IAP for the purpose of providing a zero rating offer, this might actually be part of a circumvention of the regulation, effectively infringing on Article 3 (3).

Article 3 (5)

SVT in general supports the guidelines for specialised services.

Article 4

SVT in general supports the principle of making information more accessible to consumers through the approaches in the guidelines. It is, however, important to underline that this cannot in any way imply that information to consumers is sufficient in order to create a functioning net neutrality regime for two reasons in particular. Consumers cannot reasonably be expected to understand what traffic management is, how it functions and its consequences, and neither can they be expected to fully consider the consequences on *others* of individual choices. If, for example, one consumer decides to buy a prioritised service, this will automatically risk degrading other the IAS of other consumers, as the traffic travels over the same network.

Article 5

SVT would like to underline the importance of effective supervision and enforcement.

P 169: It is extremely important that the NRAs do this, as it would be impossible for most CAPs to have any oversight over how an IAS handle their traffic after the point of delivery. No CAP have access to the information needed and very few have the technical skills necessary, in particular not smaller companies or start-ups.

Article 6

There should certainly be sanctions for infringements on net neutrality. Member states might be encouraged to adopt sanctions that at the very least makes it more costly for the ISP to breach the rules than not to.