

# SAFEGUARDING THE OPEN IN- TERNET

Comments by Verbraucherzentrale Bundesverband (vzbv)  
on the draft BEREC guidelines on implementation of net  
neutrality rules

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## **Impressum**

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# I. EXECUTIVE SUMMARY

Verbraucherzentrale Bundesverband (vzbv) welcomes BEREC's draft "Guidelines on the implementation by National Regulators of European Net Neutrality Rules". Since many parts of the Telecoms Single Market Regulation 2015/2120 (TSM) as it came into force on 30 April are phrased in quite a vague and imprecise way, it is now BEREC's difficult but important task, to provide clarification and guidance on the provisions of the TSM Regulation.

But although BEREC interprets most of the provisions of the TSM Regulation very strongly and clearly in the draft guidelines, vzbv sees three mayor issues that need to be improved to truly safeguard the open internet:

Firstly, the guidelines ban zero-rating, but only once the data cap of the consumer's Internet Access Services (IAS) is reached. Until then the Internet Service Provider (ISP) could apply zero-rating to certain applications. This still could lead to distortion of competition between Content and Application Providers (CAP), especially when ISPs are allowed to decide, which content gets zero-rated or when they're allowed to charge a fee for zero-rating. Furthermore, BEREC's decision to leave the assessment of zero-rating deals to the National Regulatory Authorities (NRA) on a case-by-case basis could lead to different results in the member states, fragmentation of the digital single market and legal uncertainty for ISPs, CAPs and consumers.

Secondly, BEREC provides good guidelines setting out under which conditions traffic management measures are legal under the TSM Regulation. However, traffic management measures that are based on different "categories of traffic" include the risk that ISPs discriminate against competing offers and provide themselves a competitive advantage. Therefore vzbv strongly recommends, that in principle application-agnostic traffic management measures should be preferred over traffic management measures based on categories of traffic. It must be clear that only in exceptional cases when application-agnostic traffic management is not sufficient it should be allowed for ISPs to apply measures based on categories of traffic.

Thirdly, BEREC provides a clear definition of specialised services and sets out strong principles for the application of such services. However, the guidelines fall short in one point though: The TSM Regulation states clearly that ISPs are only allowed to offer specialised services if the network capacity is sufficient to provide them in addition to any IAS. The TSM Regulation should be interpreted as follows: An IAS of an end-user should only be impacted by a specialised service he uses, if it is technologically unavoidable. If there is no unavoidable technological reason the user should still experience the maximum possible speed when he uses a specialised service.

## CONCLUSION

The draft guidelines laid out by BEREC now, are an important step to safeguard net neutrality in Europe and to protect end-users rights. If the above issues are solved, the guidelines will give legal certainty to all market actors, will lead to a harmonised enforcement by the NRAs all over Europe and help the TSM Regulation reach its key goals: To protect end-users and simultaneously guarantee the continued functioning of the internet ecosystem as an engine of innovation.

## II. THE PROVISIONS IN DETAIL

### 1. ARTICLE 2 DEFINITIONS

(1) vzbv welcomes that BEREC clarifies the scope of the TSM Regulation in paragraphs 17, 35 and 52 and includes sub-internet services, which only offer access to a limited set of endpoints or practices like contractually banning the use of specific content / applications / services. vzbv welcomes that BEREC considers such services and practices an infringement of Articles 3.1, 3.2 and 3.3 of the TSM Regulation. Sub-internet services enable consumers to use only a certain part of the Internet, which is determined by the offer of the ISP. Therefore, ISPs could use such offers easily to circumvent the TSM Regulation.

(2) E-book readers are a bad example in paragraph 18, since it is often possible for consumers to use a web browser on such readers with connectivity to virtually all endpoints in the internet.

Furthermore, it must be clear, that the TSM Regulation does not foresee any other connectivity services beyond IAS and specialised services. Therefore, where the number of reachable end-points is limited by the nature of the terminal equipment used with a service, this service should be provided through or as an IAS, if possible. If this service requires a guaranteed quality of service, it can be provided as a specialised service, but it must then comply with the corresponding rules.

### 2. ARTICLE 3 SAFEGUARDING OF OPEN INTERNET ACCESS

#### 2.1 Article 3.1

(3) vzbv agrees with BEREC's view in paragraph 25 that it is an infringement of the TSM Regulation when ISPs limit - without objective technological reasons – the choice of terminal equipment of the consumer. Consequently, the guidelines should clearly state that tethering by the user should always be allowed since there is no objective technological necessity to prohibit it.

#### 2.2 Article 3.2

(4) Paragraph 36 seems not to be in line with paragraph 45 that says that higher prices for data associated with specific applications are likely to limit end-users' rights. Therefore, price differentiation applied to categories of data traffic should not be acceptable. BEREC should revise paragraph 36.

(5) BEREC is right to point out in paragraph 38, that it would infringe Article 3.3 of the TSM Regulation, when ISPs block or slow down all applications except certain zero-rated applications once a data cap is reached.

But as BEREC recognizes in paragraph 39, any zero-rating applied to certain applications (e.g. zero-rating of the ISP's own services, a specific social media application, the most popular video or music applications) before the data cap is reached creates an economic incentive for the consumer to use that application instead of competing ones.

Such economic incentives could lead to distortion of competition between different CAPs. The barriers to enter the market for small and innovative CAPs would increase especially when ISPs are allowed to decide, which content gets zero-rated or when they're allowed to charge a fee for zero-rating CAPs' content. In fact, such practices limit end-users' rights regardless of the size of the affected market participants and the volume of the data.

Furthermore, BEREC's decision in [paragraphs 40 to 43](#) to leave the assessment if a zero-rating deal (or another commercial agreement or practice) restricts the freedom and rights of end-users to the NRAs on a case-by-case basis, could lead to different results in the member states, fragmentation of the digital single market and legal uncertainty for ISPs, CAPs and consumers. This could hamper investments and harm the continued functioning of the internet ecosystem as an engine of innovation which would lead to a reduction of consumer's choice, quality of service and indirectly to higher prices due to decreased competition.

According to Article 5.3 of the TSM Regulation the goal of the guidelines should be "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. As a consequence, BEREC should provide legal certainty by prohibiting all forms of harmful commercial practices, especially zero-rating applied to certain applications and charging fees for zero-rating.

### 2.3 Article 3.3

(6) In [paragraphs 54 to 62](#) BEREC provides good guidelines under which conditions traffic management measures are legal. Especially the criteria, to assess whether traffic management measures are non-discriminatory and proportionate are very helpful. vzbv also welcomes that encrypted traffic should not be treated less favourably by reason of its encryption than other traffic. Consumers should not be deterred to use encryption as it is a valuable tool to safeguard the confidentiality of their communication, which is their fundamental right under the EU Charta of Fundamental rights and the ECHR.

(7) vzbv is skeptical about traffic management measures that are based on different "categories of traffic" as proposed in [paragraph 63](#), since those traffic management measures carry the risk that ISPs discriminate against competing offers and provide them with a competitive advantage. For example, this might be the case when an ISP decides to prioritise some time sensitive categories of traffic, like gaming applications, but not VoIP since these services compete with his own telephony products.

vzbv therefore strongly recommends, that in principle application-agnostic traffic management measures should be preferred over traffic management measures based on categories of traffic, like BEREC pointed out in [paragraphs 71 and 87](#), too. It must be clear that it should be allowed for IPSs to apply measures based on categories of traffic only in exceptional cases when application-agnostic traffic management is not sufficient.

(8) vzbv agrees with BEREC's decision to clarify in [paragraph 65](#) that NRAs don't have to prove that traffic management measures are based on commercial grounds but that

it will be sufficient to establish that traffic management measures are not based on objectively different technical quality of service requirements.

(9) To assure the protection of the personal data of the end-users BEREC should make clear in paragraphs 66, 67 and 77 that all traffic management measures have to be in line with Directive 95/45/EC resp. Regulation (EU) 2016/679 and Directive 2002/58/EC when personal data is processed.

(10) It is welcome that BEREC gives a clear interpretation of Article 3.3 of the TSM Regulation in paragraphs 73 to 77 and especially clarifies in paragraph 74, that the list of prohibited traffic management measures is non-exhaustive but that there are only three specific exceptions.

(11) BEREC rightly recognizes in paragraph 83 how the broad concept of security could be used easily by ISPs to circumvent the provisions of the TSM Regulation. Therefore, it is important to give clear guidelines to the ISPs and to the NRAs. In this regard the reference to reports / complaints from “recognised security organisations” is too vague. It not clear by whom these organisations should be recognised and on what criteria.

#### **2.4 Article 3.5**

(12) BEREC is right to point out in paragraphs 101 and 107 that specialised services are likely to circumvent the provisions of the TSM Regulation, if these services require a level of quality that can also be assured over an IAS. This rule is very important to ensure that the provisions of the TSM Regulation are not circumvented. But BEREC should point out more clearly, that quality assurances given to end-users by ISPs are by themselves no criteria to implement specialised services.

(13) Article 3.5 second subparagraph of the TSM Regulation states clearly that ISPs are only allowed to offer specialised services if the network capacity is sufficient to provide them in addition to any IAS. Therefore, paragraph 118 should stipulate that an IAS of an end-user should only be impacted by a specialised service he uses, if it is technologically unavoidable.

If there is no unavoidable technological reason the user should still experience the maximum possible speed when he uses a specialised service. Otherwise this would be an incentive for ISPs to reduce the speed of the IAS of the end-user to the contractually agreed minimum every time when the consumer uses a specialised service.

(14) Paragraph 119 is too vague. The conditions under which the aggregated negative impact of specialised services in mobile networks is too high and when it is acceptable need to be explained more clearly and need to be better defined.

### **3. ARTICLE 4 TRANSPARENCY MEASURES FOR ENSURING OPEN INTERNET ACCESS**

(15) BEREC should give more detailed guidelines in paragraph 136 what information ISPs should publish about how specialised services might impact the IAS of the end-users. This would also help end-users to compare different offers and foster competition.

(16) To improve transparency, paragraphs 141, 143, 145, 148, 151, 154 should say that NRAs “should” set criteria for defining the available speeds (minimum / normal / maximum / advertised) in relation to Article 5.1 of the TSM Regulation. Minimum speed and normal speed should be expressed by a percentage of the maximum speed.

(17) BEREC should clarify in paragraphs 142-145 that the goal of the ISPs should be to reach the maximum speed of the IAS all the time and not just once a day. At the best the maximum speed is the same as the normal available speed.