



ARD/ZDF RESPONSE TO THE PUBLIC CONSULTATION ON DRAFT BEREC GUIDELINES ON IMPLEMENTATION OF NET NEUTRALITY RULES

15.07.2016

INTRODUCTION

ARD and ZDF welcome the opportunity to provide BEREC with feedback regarding its draft guidelines on the implementation of new net neutrality rules. As it will be easily seen, our reply is fully in line with that of our European umbrella organisation EBU (European Broadcasting Union), which's view on net neutrality we wholly share.

ARD and ZDF – the two public service broadcasters of Germany – are strong supporters of an open, neutral and transparent public Internet. The open Internet has allowed us to reach out to audiences with our online offers (and without payment for carriage). To be able to fulfill our public service remit, it is necessary that Internet access offerings across Europe continue to offer citizens access to a broad and diverse range of content via all relevant platforms. The open internet remains key for diversity and pluralism.

We welcomed the publication of a single set of rules at EU level last November as a first step in the right direction but believe that the role of national regulatory authorities (NRAs) – under consistent guidance by BEREC – is as critical to getting the Regulation to work in practice (as recognised in recital 19 of the Regulation). NRAs must be highly proactive in Article 5 and other responsibilities, their monitoring and in maintaining dialogue with industry. We would also encourage them to cooperate with all other competent NRAs and particularly monitor the effects of commercial practices (not only regarding IAS offers but also specialised services) on

cultural diversity and media pluralism. In doing so, NRAs should take utmost account of relevant guidelines from the BEREC.

In short, we strongly support BEREC's work in so far it aims at supporting monitoring practices by NRAs axed around the following principles:

- a. Prevent blocking of content and tackle discriminatory practises against specific content based on commercial considerations
- b. Ensure respect for the provided reasonable traffic management principles and ensure that equivalent types of traffic are treated equally in case of traffic management dealing with congestion
- c. Ensure that the development of specialised services does not impair the quality and availability of IAS
- d. Ensure that clear and meaningful transparency requirements and mechanisms for ISPs traffic management policies are in place.

We consider a robust net neutrality EU policy to be a key pillar for the development of an open and interoperable 5G technology platform¹ and therefore we reject the proposal by the European telecoms companies to water down the implementation of EU net neutrality rules in order to accelerate 5G deployment.² These demands have not yet been supported by evidence as to the case for reviewing the approach by the EU legislators or EU regulators (through BEREC). The implementation of net neutrality rules must not result in the creation of an internet 'slow lane' alongside internet "toll roads" which are prohibitively expensive or restricted on the basis of the network's strategic interests.

We believe that, once adopted, the BEREC guidelines will be a valuable tool for putting into place effective national systems monitoring the quality of Internet access in order to achieve net neutrality in Europe.

¹ http://www.ebu.ch/files/live/sites/ebu/files/Publications/Policy%20sheets/5g_flyer_final.pdf

² "5G Manifesto for timely deployment of 5G in Europe", 07.07.2016.

SPECIFIC COMMENTS TO BEREC DRAFT GUIDELINES

Article 1 – Subject matter and scope

1. We welcome BEREC's wide interpretation of the notion of end-user. It rightly encompasses different types of end-users, including content and applications producers (CAPs). This is indeed consistent with the definition of Article 2(n) Framework Directive (BEREC, paragraph 4).
2. In principle, we agree with BEREC that the provision of interconnection is a distinct service from the provision of an IAS (BEREC, paragraph 5). However, IP interconnection arrangements (between network operators, ISPs, transit providers and/or content providers) have a direct impact on the quality of the best effort Internet offer. PSM are committed to optimize data traffic in best efforts networks to maximize the quality of experience of the end-user relying on the open Internet. They secure the delivery of their content to the end-user with a range of intermediaries at interconnection level. In fact, they pay for hosting, connectivity and content delivery networks (CDNs) and engage in peer-to-peer communication for enhanced network architecture for high capacity best efforts. In the UK for instance, Internet Service Providers (ISPs) and BBC have reached own-cost peering arrangements for delivery of large volumes of data which is mutually beneficial to content providers, ISPs and IAS subscribers.
3. We believe though that there is a case for NRAs to be sufficiently proactive in taking into account the interconnection policies when detecting possible infringements to the Regulation. **We therefore invite BEREC to strengthen paragraph 6 and amend its first sentence of paragraph 6 by adding at the end: “NRAs should have particular regard to interconnection practices by ISPs which predominantly sell connectivity to content and applications users at retail level (“Eyeball ISP”) and also deploy their own transit capacities and long distance networks.”** In some cases, such an ISP has such a comprehensive network that it never needs to purchase transit agreements from other providers (“Tier 1 provider”). In this case, the

Eyeball ISP's market power at interconnection level increases and provides the opportunity to use traffic management or even block traffic in order to pursue its own commercial interests at the expense of services competing with the ISP's own services.

Article 2 – Definitions

4. According to BEREC paragraph 10, electronic communication services (ECS) or networks (ECN) that are offered only to a predetermined group of end-users could be considered to be not publicly available, which implies that these services are not subject to net neutrality rules. **ARD and ZDF would invite BEREC to shed further clarity on the difference between the notion of “a predetermined group” and “services or networks being made publicly available”.**
5. We particularly see a certain danger in concluding (BEREC, paragraph 12) that the example of Wi-Fi hotspots are qualified as services or networks which are not being made publicly available. Telecoms providers are increasingly deploying Wi-Fi hotspots to enhance end-users' connectivity possibilities. Globally, total public Wi-Fi hotspots (including homespots) will grow sevenfold from 2015 to 2020, from 64.2 million in 2015 to 432.5 million by 2020 (Maravedis, Cisco VNI Mobile, 2016). The key point is that the deployment of these hotspots is not limited to cafés and restaurants but also hotels, airports, planes, and trains and other semi-public or public venues. In most cases, these venues are accessible to the general public, which implies that the networks and services are being made publicly available and thus deserve monitoring by NRAs. **NRAs should be aware of the risk that the clause of Wi-Fi-hotspots could be used to circumvent the rule on sub-Internet services.** The latter fall in the scope of the Regulation and constitute infringements of Article 3(1), 3(2) and (3) (see BEREC, paragraph 17). **We would very much welcome a clarification by BEREC which addresses the risk mentioned above.**

6. Furthermore, **in so far BEREC would conclude that Wi-Fi hotspots are not be considered as publicly available, it should also be clarified that these offers cannot be marketed as an IAS offer.**

Article 3 – Safeguarding of open Internet access

7. We take note of the fact an ISP can in principle bundle the provision of the IAS with an application but **we strongly support BEREC’s clarification that such commercial practices are only acceptable in the light of the Regulation if there is no preferential traffic management practice with regard to the application and no price differentiation compared to the rest of the traffic** (BEREC paragraph 33).
8. Commercial practices, such as zero-rating, require active monitoring by NRAs to assess the harm to end-users rights, innovation and pluralism. While transparency in marketing and consumer awareness of the practices is a first key step, we strongly support BEREC’s contribution to making NRA backstop powers to tackle problematic practices as robust as possible. We welcome BEREC’s detailed listing of a comprehensive set of criteria against which commercial and technical conditions limiting the exercise of end-users’ rights needs to be assessed. **We call upon BEREC not to water down paragraphs 43 to 45 at the final adoption of BEREC guidelines.**
9. We agree that the market positions of the ISPs and CAPs involved requires careful analysis “in line with competition law” (paragraph 43) but we would like to reiterate that **competition law alone cannot be relied upon to safeguard an open internet** given that it requires a long and costly *ex post* investigation. By the time they are implemented, ex-post measures cannot always undo the harm already done. The network effects of the open Internet and the ability to scale fast are important for successful market participation by CAPs. The threat of discrimination or actual discrimination could discourage market participation by CAPs at an early stage. It would raise the entry barriers to the open internet and thus be a disincentive to invest

or innovate by CAPs while giving the network operator the opportunity to seek to dominate the market. Furthermore, the “Significant Market Power” (SMP) threshold may be unsuited to assess the impact of traffic differentiation practices and to secure the open Internet because ISPs may have "gatekeeper" power without having SMP in the conventional sense. **A network operator could indeed have an incentive to exclude a market rival and hamper end users’ access to new services and content without necessarily being able to profitably raise prices above some competitive level. We therefore welcome the particular mentioning of the effects on CAP end-user rights in paragraph 43, particularly the effects on the range of and diversity of content and the effect on freedom of expression and media pluralism.**

10. The zero-rated offer practice by Swedish Telecoms operator Telia with regard to the Facebook application is just one particular example of a commercial practice which raised concerns in the public arena. In a recent joint statement, the Swedish media industry voiced its concerns over the risk that practices of this kind 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 also have an important impact on freedom of expression and media pluralism.³ This is not a standalone case and similar zero rating offerings are provided throughout Europe by Telecoms Operators. Another example is T-Mobile (Deutsche Telecom) providing zero-rated streaming music offerings only for specific brands but relates the usage to the data CAP applied for the overall internet use.⁴ In our opinion all zero rating offerings are specialised services.

³ In November 2015, T-Mobile, the third largest provider of mobile Internet access in the U.S., for instance launched a new service called Binge On that offers “unlimited” – that is: exempt from data caps - video streaming from selected providers (such as Netflix, HBO Go, ESPN, Showtime). Some argue that **the «Binge On» service is likely to violate the FCC’s general conduct rule because it limits user choice, harms innovation, distorts competition and stifles free speech online:**

<https://cyberlaw.stanford.edu/downloads/vanSchewick-2016-Binge-On-Report.pdf>

⁴ T-Mobile Germany changes their policy with regard to zero-rating a Spotify service to be more compliant with Net Neutrality by reducing the streaming quality of the Spotify offering when the data cap of the Internet offering was reached:

<https://netzpolitik.org/2016/telekom-deutschland-eu-und-netzneutralitaet-fuehren-zu-drosselung/>. Another

11. A traffic management measure has to be based on objectively different technical QoS requirements of specific categories of traffic and not on commercial considerations. We welcome BEREC observations in paragraph 59-65 but we reiterate our call made during earlier consultations that **a key tool for NRAs in this respect would be the availability of specific and real time information about the status of the traffic traveling over the Internet.** Providing actual traffic management practices in combination with actual provided actual quality of service should be neither technical difficult nor expensive. Without this information consumers will not know if the service they contracted is available as promised in their contract.
12. We support what BEREC says about traffic management in case of network congestion (paragraphs 84-89). In paragraph 87, BEREC seems to suggest that NRAs have some discretion to consider traffic management under Art 3 (3)c “when application agnostic congestion management is not sufficient”. According to ARD and ZDF it should be clear that equivalent categories of traffic must be treated equally when applying Traffic Management for congestion under Art 3 (3) c. **ARD and ZDF would invite BEREC to shed further clarity on this article and the discretion under with traffic management can be applied.**
13. **ARD and ZDF welcome BEREC’s endorsement of the specific requirements which need to be met for offering specialised services** (paragraphs 96-97). PSM are not against specialised services. As matter of fact, in some member states, specialised services already exist for audiovisual media services. See e.g. channels offered through IPTV in Belgium, Germany and the Netherlands. In the UK, BT and TalkTalk offer managed services. But we strongly support a robust case-by-case assessment by NRAs which can tackle the risks associated with the commercial incentive for ISPs to promote specialised services to the cost of IAS. We particularly endorse the requirements that specialised services should be offered “only if the network capacity is sufficient to provide them in addition to any internet access
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services provided”, that they «shall not be usable or offered as a replacement for internet access services» (i.e. no false marketing, transparency and separation of the two) and that they « shall not be to the detriment of the availability or general quality of internet access services for end users» (i.e. they cannot result in a lessening of IASs offer available in the market; and even if IASs have sufficient network capacity as under condition 1, their quality cannot be diminished in any other way too). **We call upon BEREC not to water down the rules on specialised services included in paragraphs 95-123.** We also invite BEREC to clarify that it is up to the provider of a specialised service to demonstrate that the optimisation for specific content is necessary. **Thus, we suggest amending the last sentence of paragraph 104 as follows [change in bold]: “... and it should be demonstrated by the provider of a specialised service that this specific level of quality cannot be assured over the IAS.”**

14. We take note of BEREC’s statement in paragraph 118 that “NRAs should not consider it to be to the detriment of the general quality of IAS when activation of the specialised service by the individual end-user only affects his own IAS” and “that detrimental effects should not occur in those parts of the network where capacity is shared between different end-users.” **We call upon BEREC to acknowledge that the IAS providers should be transparent about their offering and any detriment of their IAS offering if this occurs as a general rule. In this case the consumers should be able to know what actual IAS-capacity is available at a certain time.**

Article 4 – Transparency measures for ensuring open Internet access

15. Last but not least we would like BEREC to clarify the definition of peak time as mentioned in paragraph 145. We are missing a definition of peak hours with for example 90% availability.

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