



2 November 2016

## Public Consultation on draft BEREC Work Programme 2017

### EDRi's response

European Digital Rights ([EDRi](#)) is an association of [civil and human rights organisations](#) from across Europe. We defend rights and freedoms in the digital environment, including the right to privacy and the freedom to seek, receive and impart information.

This document represents EDRi's response to the public consultation on [BEREC's draft Work Programme 2017](#).<sup>1</sup>

#### SUMMARY

EDRi recommends BEREC to focus on:

1. ensuring an open and competitive environment;
2. technical issues, notifying data protection authorities about issues identified with regard to lack of compliance with the E-Privacy Directive. Privacy rules cannot be undermined in the context of IoT. On the contrary, the E-Privacy reform should strengthen them and create a trustworthy environment that facilitates competition and growth. As the core regulatory function falls outside of the competence of BEREC, it should look to develop a supporting role for data protection authorities;
3. net neutrality monitoring and enforcement. In particular:
  - ensuring that the implementation of 5G does not breach net neutrality rules;
  - providing practical guidance to NRAs to assess the implications of regulatory net neutrality decisions on fundamental rights;
  - achieving a consistent application of Regulation (EU) 2015/2120, which upholds the core net neutrality principles.

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<sup>1</sup> EDRi is thankful for IT-Pol's contributions to this response.

## DETAILED RESPONSE

### III.A.1.1 The impact of content markets and devices on fixed and mobile ECS markets

We welcome BEREC's plans to analyse the impact of content markets and devices on fixed and mobile Electronic Communications Network (ECN) markets. It is important that Electronic Communication Networks are open and support a competitive and innovative environment for the different types of online service providers. The markets supported by these networks are inherently two-sided:

- the free choice of content by consumers requires unrestricted access to Content and Application Providers (CAPs); and
- CAPs must be able offer their services to all interested consumers.

The net neutrality rules in Regulation (EU) 2015/2120, together with BEREC's Implementation Guidelines, play and must continue playing an important role in supporting an open and competitive environment, but there can still be impediments in sectors other than providers of electronic communications services. Some providers of electronic communication services will consider vertical integration strategies with acquisitions or strategic partnership with CAPs, whereas others will focus on their core role as connectivity providers. This is perfectly natural, and the choice should be left to the marketplace. However, it should also be recognised that vertical integration strategies and content bundling can create economic incentives to violate key net neutrality principles and discriminate against services from other CAPs. This can happen through zero rating (price discrimination) or through "services other than internet access services" (the so-called "specialised services"). EDRi encourages BEREC to consider this issue carefully in the analysis of the interactions between providers of traditional telecommunication services and adjacent markets.

As noted by BEREC, device manufacturers are not subject to the net neutrality rules in Regulation 2015/2120. The market for mobile devices (smartphones and tablets) is dominated by 2-3 manufacturers which have a large element of control over the software running in these devices, and the device manufacturers have the ability to restrict access to services or discriminate by prioritising certain services over others. While these challenges for platform or device neutrality share many similarities with the net neutrality debate, there are also important differences between net neutrality and platform/device neutrality. A significant part of the challenge with regard to platform/device neutrality relate to the data collection practices by platforms, such as Facebook, and device manufacturers. These questions should be within the competences of the Data Protection Authorities. We strongly encourage BEREC to focus on the technical issues that complement the legal protection of personal data, such as privacy by design, to ensure that personal data is not collected in the first place. NRAs should always notify data protection authorities about non-compliance of the E-Privacy Directive.

### III.A.3.1 Follow-up on the work on IoT and its impact on the EC Regulatory Framework

EDRi notes that BEREC intends to consider consumer trust (security and confidentiality), privacy and (non-defined) "data ownership" in the ongoing work on Internet of Things (IoT). Since privacy and data protection fall outside the scope of BEREC's work, we encourage BEREC to co-operate with national Data Protection Authorities, the Article 29 Working Party or the European Data Protection Supervisor in ensuring privacy and security rules are not overlooked in the ongoing work on IoT.

There are important issues to consider that span network design and data protection, and co-operation with DPAs can be particularly fruitful in this area. Determining what constitutes personal data in the IoT context should be left solely with the DPAs. Taking into consideration the current rules are going through a review process, it would be inappropriate for BEREC to interfere in the legislative process. The upcoming review of the e-Privacy Directive or other legislative proposals from the Commission in its Digital Single Market strategy may bring further clarification to this important issue. Instead, we suggest that BEREC in its work on IoT focuses on issues where a technical competence for privacy by design is needed to complement the legal protection offered by ordinary data protection rules. As the number of IoT devices increases, more personal data about citizens will be collected, and especially in the IoT context, it will be difficult to handle issues surrounding consent and transparency. If privacy by design can ensure user virtualisation instead of identification and data anonymisation at source, more flexible approaches to regulation could be envisaged. This will require, among other things, network connectivity that supports genuine privacy by design. We believe that BEREC can play an important part in forming and supporting this development.

### III.A.3.2 Spectrum needs to foster innovation in Europe

The next generation mobile network (5G) is currently being designed. It is very important that the 5G network is not designed in a way that makes it technically impossible for mobile operators (MNOs as well as MVNOs) to comply with the current net neutrality rules in Regulation 2015/2120. The intrinsic technical details of 5G networks are outside the natural scope of EDRi's work, but the concept of 5G network slices is sometimes presented to the public as a functionality with built-in network discrimination which may very well be incompatible with the current regulatory framework on net neutrality. We encourage BEREC to monitor the ongoing development of the 5G standard with a view towards ensuring that the final standard is not be technically incompatible with the non-discrimination principles in the net neutrality regulation. This is of utmost importance.

EDRi also encourages BEREC to give increased consideration to identifying additional frequency bands for unlicensed spectrum uses. Even though European mobile operators have invested substantially on 4G network-rollouts, WiFi using the unlicensed 2.4 GHz and 5 GHz frequency bands is still the dominant source of network connectivity, at least in terms of data volumes.

Because the frequency bands are unlicensed, connectivity through WiFi networks can be offered by everyone, and the connectivity capacity can easily be adapted to local demands. The availability of unlicensed frequency bands is, of course, an inherent limitation for the continued success of WiFi connectivity (as with 3G, 4G and 5G mobile networks) which underlines the importance of considering new frequency bands for unlicensed spectrum use.

### **III.A.2.4 IP interconnection practices in the context of net neutrality**

#### **III.C.2.1-3 Safeguarding an open internet**

EDRi is very pleased with BEREC's continued focus on net neutrality and the implementation of Regulation 2015/2120 by NRAs in Member States.

Interconnection agreements can be important for the net neutrality of end users, as recognised by paragraph 6 of the BEREC Implementation Guidelines [BoR (16) 127]. We encourage BEREC to consider the potential impact on net neutrality of content delivery networks (CDNs) hosted within or close to the ISP's own network infrastructure in the update of the 2012 report.

With the net neutrality rules in Regulation 2015/2120, European national telecom regulators have become responsible for ensuring the fundamental rights of their citizens. Regulatory decisions to safeguard open internet access will have implications for freedom of expression and media pluralism, as noted in footnotes 12 and 13 of the BEREC implementation guidelines for net neutrality. Some NRAs may be unfamiliar with the requirements of this new task, but we believe that BEREC can and should play an important role in developing the necessary competences for the NRAs. We encourage BEREC to devise a plan to provide practical guidance to NRAs on assessing implications of regulatory net neutrality decisions on fundamental rights. This could for example be facilitated through workshops for NRAs organised in cooperation with either the Article 29 Working Party or the European Data Protection Supervisor, as well as with civil society experts. Having a dedicated fundamental rights competence within BEREC is instrumental in ensuring that NRAs integrate fundamental rights assessments in their supervision of domestic net neutrality practices by ISPs.

The detailed implementation guidelines for net neutrality adopted by BEREC in August 2016 will be important in ensuring a consistent application of the Regulation through the EU and EEA member states. Even though the market for internet access services is currently largely segmented by national borders, a consistent application which upholds the core net neutrality principles is important for ensuring that NRAs do not "compete" in relaxing the net neutrality requirements, and for ensuring that some CAPs are not forced or incentivised to offer their online services as specialised services in some Member States because the national regulator has set a lower standard for net neutrality than most other Member States. This type of fragmentation would be highly damaging to developing the Digital Single Market in the European Union. Therefore, EDRi encourages BEREC to closely monitor the implementation of the net neutrality rules by NRAs with a clear view towards promoting a consistent application in practice. This applies, in particular, to zero rating and specialised services where the Guidelines specify a case-by-case assessment by



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NRAs. However, the intention of the legislators, as publicly stated at the [Press conference following the adoption of the Regulation](#) was to exclude zero rating from the scope of the Regulation. Member States are therefore allowed to ban zero rating in full, as the Netherlands has recently done. Consequently, EDRi urges caution on BEREC's work in this regard.

Finally, we commend BEREC's intention to develop net neutrality supervision tools and methods which NRAs can use in the ongoing assessment of compliance by ISPs at the national level. The tools for technical measurements of compliance with net neutrality requirements should be documented and made available to the public. Transparency with regard to standards for compliance with net neutrality rules can be highly useful for setting citizens' expectations about the performance of their internet access services and potentially reduce the number of complaints submitted to ISPs and NRAs. EDRi will strongly encourage BEREC to develop the technical tools for network measurements and reporting tools for citizens to use in co-operation with ISPs, civil society organisations and other relevant stakeholders besides the NRAs. EDRi invites BEREC and the NRAs to resort to, use and promote <https://respectmynet.eu>.