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EDRi's response to the public consultation on the BEREC Medium-Term strategy 2018-2020

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. EDRi welcomes this opportunity to comment on the [Stakeholder consultation](#) on the review of the Body of European Regulators for Electronic Communications (BEREC) Medium-Term Strategy for 2018-2020.

We thank BEREC for giving the opportunity to respond to the consultation via e-mail, as we consider it to be more inclusive. In order to facilitate BEREC's work, we used the question numbers referred to in the BEREC online [public consultation tool](#) (Discuto). The questions can also be accessed via pdf [here](#).

1) Do you have any comments on the elements presented above?

EDRi has no comments.

Section 1 - Market and Technological Developments

A. The end-user experience

2) Of the issues listed above, which do you consider to be the most important in shaping the end-user experience? Please explain your answer in detail.

Most important issues:

- Performance of the networks
- Devices
- Data protection, privacy and network security

Explanation:

- Performance of the networks: the end-user experience of network performance depends to a large extent on net neutrality, which should be a key priority for BEREC's strategy for the coming years. BEREC's work will be immensely important in ensuring a consistent application and good enforcement of the net neutrality rules in Regulation (EU) 2015/2120 throughout EU/EEA Member States. In this regard, we encourage BEREC to develop tools that can assist National Regulatory Authorities (NRAs) in monitoring and enforcing the Regulation, including Quality of Service (QoS) assessments of the networks, as mentioned in the draft BEREC medium term strategy for 2018-2020. We refer to our [recent comments](#) regarding measurement methodology and tools.
- Devices: the market for mobile devices (e.g. smartphones and tablets) is dominated by 2-3 manufacturers which have a large element of control over the software running in these devices. In this respect, devices can play a gate-keeper role which has some similarities

with the gate-keeper role that providers of internet access services (IAS) would have in the absence of net neutrality rules.

- Data protection, privacy and network security: there are distinct differences between platform neutrality and net 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, such as Nokia. 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. There are also competition and freedom of communication issues that are very important.

3) How can the interests of digitally disengaged citizens be best protected?

A strong focus on net neutrality will ensure that every internet user can access content of her or his own choice. The open nature of the internet has the potential to offer services to every citizen, but this will only be achieved if:

- end-users (including, but not necessarily in their capacity as consumers) have unrestricted access to all Content and Application Providers (CAPs); and if
- CAPs are able offer their services to all interested consumers.

If BEREC and, in particular, NRAs do not have a strong focus on net neutrality, there is a risk that end-users will only be offered a limited set of choices for content which caters to the majority of end-users. If a minority of end-users cannot find content that they like/want/need, and if relevant CAPs cannot reach these end-users because IAS providers act as gate-keepers that block or slow down the access, these end-users may easily become digitally disengaged.

4) What can be done by BEREC to improve the end-user experience by providing more and easier-to-use information?

BEREC and competent NRAs can inform end-users that the European Union now has strong rules on net neutrality. This should empower end-users to access the content that they are willing to impart, receive and seek. BEREC should also inform end-users of the potential impediments to free choice of content and applications, such as zero rating and content bundling strategies. We also refer to our [previous comments](#).

5) Are there any other significant trends/developments that BEREC should consider in relation to the end-user experience?

BEREC should pay close attention to vertical integration strategies between IAS providers and CAPs, as well as content bundling and other marketing strategies for "branding" otherwise relatively homogeneous IAS. These practices can create economic incentives to violate key net neutrality principles and discriminate against services from other CAPs.

B. Competitive dynamics in the digital ecosystem

6) What aspects of the issues listed above do you believe to be most important? Please explain your answer in detail

Most important issues:

- Interaction between ECS operators and other sectors
- Co-opetition (competition and cooperation) between ECS and OTT providers
- Ongoing popularity of bundled services

Explanation:

All of the issues listed by BEREC seem relevant to consider, among which net competition plays an important role. In terms of prioritisation, EDRi recommends focusing on the three above. Some providers of electronic communication services (ECS) will consider vertical integration strategies with acquisitions or strategic partnership with CAPs that would otherwise provide their services to end-users "over the top" (OTT). BEREC should closely monitor these interactions in the digital ecosystem since 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.

7) Are there any other significant trends/developments that BEREC should consider in relation to the digital ecosystem?

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 CAPs; and CAPs must be able offer their services to all interested consumers.

Any technological, economic, business or strategic/marketing development that could create incentives to interfere with net neutrality should be monitored closely by BEREC. The purpose should, of course, not be to block or discourage any interaction between ECS operators and other sectors, but only to ensure that these interactions do not create economic benefits at the expense of other CAPs or OTT operators, the free choice of content by end-users, or fundamental rights such as freedom of expression and opinion or media pluralism. The principle of net neutrality, as enshrined in the Regulation and further particularised in the [BEREC Guidelines of August 2016](#), is the best yardstick for ensuring that the digital ecosystems is accessible for all end-users and CAPs, and that the digital ecosystem serves the European citizens. If BEREC identifies issues related to privacy, data protection and network security, it should inform and cooperate with

competent authorities, without taking over the competences of relevant authorities, such as Data Protection Authorities.

C. Evolution of networks

8) What aspects of the issues listed above do you believe to be most important? Please explain your answer in detail

Most important issues:

- 5G Deployment and the emergence of associated new business models and regulatory challenges
- Technological changes which have the potential to impact on regulation, including new ways to handle network resources such as Software Designed Networking (SDN) and Network Function Virtualisation (NFV)
- Networks generated and operated by end-users

Explanation:

The intrinsic technical details of 5G networks, SDN and SFV are outside the natural scope of EDRi's work, but the concept of 5G network slices (together with SDN and SFV) 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 to ensuring that the final standard will not be technically incompatible with the non-discrimination principles in the net neutrality Regulation. This is of utmost importance.

On the other hand, networks generated and operated by the end-users is an interesting development which should be supported by BEREC to the greatest extent possible, for example by identifying additional frequency bands for unlicensed spectrum use. Coordination among Member States is important in this area since the practical implementation of user-operated networks, for example mesh networks, will depend on the availability of networking hardware. Without standardised frequencies for unlicensed use, it is highly unlikely that such equipment will be developed and offered for sale to citizens in the EU. [Community networks are essential in providing affordable internet access](#). We refer to the [letter](#) that EDRi and several of its members co-signed on the need to sustain community networks.

9) Are there any other significant trends/developments that BEREC should consider in relation to evolution of networks?

The overarching objective of BEREC should be to ensure that the next generation of networks, whatever mobile or fixed network technology will be used, continues to be and is open and competitive. Particular attention should be paid to technological developments which can potentially interfere with the current net neutrality framework, as enshrined in the net neutrality regulation.

D. Over-arching Questions

10) Are there any market or technological trends that have not been addressed above? Please explain your answer in detail.

While not directly a "market" issue in the traditional economic sense, BEREC should be aware that the net neutrality Regulation has brought a new task to the NRAs, namely ensuring respect and protection of fundamental rights of internet users in Europe. 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 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.

11) Over the next three years, which market or technological trends do you anticipate having the most significant impact on the ECS markets? Please explain your answer in detail.

Predicting technological trends is generally outside the scope of EDRI's work. No matter what technological or market development takes place, they need to respect fundamental rights and the core principle of the internet, net neutrality, in line with the Regulation.

12) Do NRAs and BEREC have the appropriate tools to deal with anticipated market changes and associated regulatory challenges over the next three years? Please explain your answer in detail, and, if possible, outline potential solutions.

As mentioned above (see question 10), the new task entrusted to NRAs, i.e. of ensuring citizens' fundamental rights through net neutrality, will undoubtedly require new tools and competences among many NRAs in the EU.

In EDRI's opinion, good enforcement and a consistent application of the net neutrality regulation throughout the EU will be one of the main regulatory challenges for NRAs over the next three years. This will require specific guidance from BEREC as well as network measurement tools to investigate and assess potential violations of net neutrality by IAS providers. This work should build on, as well as further expand and particularise, the BEREC implementation Guidelines of August 2016. 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.

13) In which ways can technological and market developments impact upon promotion of the single market?

In EDRi's opinion, the best way to promote the Digital Single Market is to ensure that all ECN markets are open and competitive for all participants (whether end-users or providers of online content or services), which is best ensured through a dedicated focus on enforcing the net neutrality provisions of Regulation 2015/2120.

Section 2 - How BEREC works and engages with stakeholders

A. BEREC's work with the regulatory objectives

14) Do you have a concrete example where better coordination/harmonisation between NRAs would be or has been particularly beneficial for your activity, either directly or indirectly?

Net neutrality and its role in supporting fundamental rights of citizens is very important for EDRi's work. A consistent application of the Regulation 2015/2120 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 in other Member States. This type of fragmentation would be highly damaging to developing the Digital Single Market in the European Union, besides the obvious negative implications for citizens' fundamental rights.

15) How do you consider that BEREC could further contribute to the development of a Digital Single Market (e.g best practice dissemination)?

A good implementation and a consistent application of the net neutrality rules throughout the EU will ensure that CAPs can offer their services on similar terms in all Members States. With a fragmented implementation of the net neutrality rules, CAPs may be forced or economically incentivised to offer their online services as specialised services in some Member States. This will create additional costs for these online services, and it may mean that smaller online service providers are unable to access the entire Digital Single Market. This will be detrimental to competition.

B. Towards a BEREC stakeholder engagement strategy

16) Which of the above described practices can be used in order to increase BEREC's transparency and accountability? Are there any additional proposals for BEREC to increase its transparency and accountability?

Public consultations and thematic workshops with participation of all relevant stakeholders, including civil society, are best suited for increasing BEREC's transparency and accountability since these practices involve direct interaction with stakeholders.

17) Do you consider that BEREC's current engagement with stakeholders provides the opportunity to engage in the work of BEREC at the right time and at the right level?

Are there any particular areas where you believe BEREC could improve or do things differently?
EDRi is very interested and committed to contributing to an increased interaction between BEREC and civil society stakeholders. We are very pleased with the greater focus by BEREC on direct interaction with civil society stakeholders over the last couple of years, and we encourage BEREC to continue and expand this effort.

18) How can BEREC improve its communication to stakeholders and to the public? More specifically, which instrument(s) (press releases, public debriefings, information on the website, etc.) do you consider to be particularly useful and why? Do you have any proposals for new channels of engagement or for the improvement of the existing ones?

Besides being an organisation with its own agenda and tasks, BEREC is also a network of NRAs from all EU/EEA Member States. BEREC should encourage NRAs in Member States to increase their interaction with the public and civil society organisations. Finally, it would be good that BEREC and NRAs are transparent about the meetings they take part in. If new communication channels are set up, these need to be of a multistakeholder nature and be done in a transparent and open way.