



TDC Group response to the BEREC consultation paper on the evaluation of the application of Regulation (EU) 2015/2120 and the BEREC Net Neutrality Guidelines

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Executive Summary

TDC Group welcomes the opportunity to respond to this consultation on the evaluation of the application of BEREC's net neutrality guidelines.

Public discourse around net neutrality is characterized by a high degree of activism, which entails a risk of biased, disproportionate or unbalanced policy making. In order to facilitate a free and open internet through fact-based analysis and discussion and practical solutions, the Danish telecom sector has established a Danish Net Neutrality Forum ("NN Forum"), which gathers the relevant commercial sector stakeholders, digital rights and consumer NGOs, along with the Danish government as observers. TDC Group would like to promote this approach as a constructive solution to an often temperamental, highly important policy area.

In general, the net neutrality Regulation and BEREC's Guidelines are focused on public access to a free and open internet. BEREC should ensure that the net neutrality guidelines are sufficiently agile to accommodate technological and market developments of services other than internet access services, in order to establish the optimal framework conditions for innovation and investments.

Furthermore, the regulation instrument aims to deliver regulatory consistency throughout the European Union, but both Guidelines and Regulation must take into account the significant divergences in European broadband market setups, geographic circumstances, consumer demand and varying levels of national digitization and consumption of digital services. As an underlying principle, Guidelines should encourage national regulators to act based on market failure, where this is verifiable, and have sufficient discretion to allow for innovative new products in well-functioning national markets.

BEREC should also distinguish between the main strands of the net neutrality discussion, where blocking, throttling and specialized services are significantly different issues, which have a tendency of getting lumped together in public discourse. Concern for a free and open internet should obviously extend to internet platforms, OTTs, web-based services, operating systems and apps - the entities that actually conduct blocking and throttling.

The Danish NRA has conducted oversight of net neutrality compliance on the Danish market, and found that while minor adjustments were warranted in individual cases, the sector was in general compliance with the EU net neutrality regulation.

A. General experience with the application of the Regulation and BEREC NN Guidelines

The European telecom sector and NRAs have looked to the guidelines for clarification of the principles behind net neutrality regulation. On one hand, there is a need for consistent application of the EU regulation throughout Europe, in order to ensure the foundation for a digital single market. On the other,

it is crucial to take into account the significant disparities between European markets and consumers. When comparing the relative household cost of connectivity, national digital infrastructure rollout, consumer adoption of eGovernment, eLearning, eHealth platforms, and general market conditions across EU member states, the gap between national indicators is very broad. The EU Commission has verified this point in the EU Commission's Digital Scoreboard, Digital Economy and Society Index and the Digital Progress Report.

These factors are highly relevant for operators seeking to develop next-generation products, where operators in highly digitized countries will have a higher degree of innovation and find market opportunities at an earlier stage than others. The de facto status of the digital single market is varied across EU member states, and BEREC's NN guidelines must be sensitive to these disparities, and sufficiently agile to encompass variation in national setups. A rigid, one-size-fits-all adoption is unsuitable for dynamic and divergent markets, and would benefit neither consumers, commercial interests or regulators.

Furthermore, blocking and throttling aspects of net neutrality are specifically relevant to internet platforms, OTTs, app providers, operating systems and other non-ISPs, and yet, net neutrality Regulation and Guidelines impose requirements only on Internet Access Service (IAS) providers, which makes no logical sense, and established an uneven playing field for IAS providers that wish to develop digital services.

1. In your view – have the Guidelines helped NRA's apply the Regulation in a consistent, coherent and correct way? Please explain.

In general, TDC has experienced a good dialogue with the Danish NRA around the net neutrality regulation and guidelines, and in the few instances where questions or concerns have arisen, these have been dealt with reasonably and expeditiously. TDC would like to applaud the Danish NRA's implementation of both the NN regulation and guidelines.

2. Did the Guidelines provide additional clarity regarding how to apply the Regulation? Please explain.

No. The Guidelines increase uncertainty in proposing regulatory measures beyond the scope of the net neutrality regulation. The regulation focuses on Internet Access Services (IAS), while Guidelines extend the focus to services other than IAS (SoIAS). Under the Regulation, ISPs are allowed to offer services beyond IAS, and it is up to NRAs to demonstrate that any such offers violate the Regulation. For instance, in the examples of zero rating and specialized services, the guidelines suggest ex-post assessments, which are not based on the letter of the regulation.

The technical evolution of SoIAS is expected to advance significantly over the coming years, in innovative and inherently unpredictable ways, and therefore it would be counter-productive to limit the options, narrow innovation, and stymie consumer choice through an unjustified extension of the Guidelines, beyond the intended legislative mandate.

3. On which subjects would you expect the Guidelines to be more explicit or elaborated? How should the text of the Guidelines be adapted on these points, in your view. Please explain.

The Guidelines should include an explicit principle that regulatory intervention should only occur in the event of market failure or demonstrable risk of harm against specific end-users. If these criteria are not demonstrated, regulators should not intervene.

The Guidelines should be explicit about when, how or why regulatory actions may be applied to innovative SoIAS development, and establish the burden of proof with NRAs.

Seeing as BEREC has already opened a tender for an internet speed measurement tool, the Guidelines have to clearly define how a certified speed measurement system will be established, in order to guide NRAs, consumers and operators, when confusion foreseeably arises over the results/data provided by a future speed measurement tool.

4. For ISPs: Did you discontinue certain products or services following the adoption of the Regulation and/or the Guidelines?

TDC Group acquired a smaller MVNO in 2017, which turned out to have a product capping data used for specified termination equipment. This product was subsequently brought into compliance with the net neutrality regulation and guidelines, once it was discovered.

5. Did the application of the Regulation, or the implementation of the Regulation by the Guidelines, prevent you from launching certain products or services?

No.

6. Do you have any additional comments on the application of the Regulation and Guidelines?

The “sub internet” concept should be more clearly defined, in order to facilitate development of innovative eGovernment, eHealth or eLearning platforms.

B. Definitions (article 2 of the Regulation)

7. Do you think that the Guidelines should provide further clarification in relation to the definitions in the Regulation? If yes, please provide concrete suggestions.

Definitions belong in the Regulation, not the Guidelines. Definitions of ‘zero-rating’, ‘sub-internet’ and other relevant issues would benefit from greater clarity, but if the objective is to provide a consistent application of rules, definitions should derive from the regulation itself, and established through the co-legislative process.

C. Commercial practices such as zero-rating (articles 3(1) and 3(2))

8. Does the current assessment of zero-rating as recommended in the Guidelines, offer sufficient protection of end-users’ rights as referred to in article 3(1) of the Regulation? Please explain.

The Danish telecom market is characterized by a very high level of competition, so consumer choice is a premise, both in terms of available offers and consumer-friendly pricing.

The Danish NRA has assessed zero-rating in the Danish market, and found sufficient competition to be present. In this scenario, zero-rating is a net-positive for consumers, who get even more value for their digital subscriptions.

The Guidelines would benefit from greater clarity around consumer choice in terms of opting for higher service speeds, lower latency, or other characteristics that may suit their specific needs. For users with specific needs, the Guidelines narrow end-users’ options, rather than improve or protect them. It is

important to remember that end-users benefit from innovation, and the Guidelines should be amenable towards future technological evolution.

9. How could the assessment methodology for commercial practices in the Guidelines (ref. in particular to paras 46-48) be improved? Is there a need for more simplification, flexibility and/or more specification? Please provide concrete suggestions.

The Guidelines should make it clear that enterprise customers can obtain higher speeds or differentiated quality for their internet access service, as long as this does not disadvantage other users. Since differentiated services are allowed in the Regulation, the BEREC guidelines should clearly stipulate the conditions under which such differentiation can be offered.

10. In your view, did the assessment methodology for commercial practices in the Guidelines influence the development of new content and applications offered on the internet? Please explain.

The Guidelines in some instances go beyond the remit of the Regulation, as outlined above.

11. Do you think that the current application of the Regulation and the Guidelines concerning commercial practices, such as zero-rating, sufficiently takes account of possible long-term effects of such practices? If not, how could BEREC further facilitate this?

Seeing as zero-rating as a commercial practice is allowed under the net neutrality regulation, and NRAs have articulated the circumstances under zero-rating can reasonably be offered, it seems disproportionate for BEREC to revisit this topic.

D. Traffic management (article 3(3))

The Regulation provides opportunity for IAS operators to implement reasonable traffic management, but the Guidelines restricts certain types of plans that would add to consumer choice. This type of restriction in the Guidelines, going beyond the Regulation (i.e. paragraph 55), does not serve the long-term interest of consumers.

Rollout of IoT services or other, as yet undeveloped, mobile network services should be encouraged, but Guidelines do not provide a stable framework to develop these within, going forward.

E. Specialised services (article 3(5))

Future network generations are expected – by both governments, consumers and operators, to include advanced features that will necessitate network slicing- or virtualization, in order to deliver on the promise of 5G high-speed, low latency connectivity, for instance.

As more sectors digitize and develop customized services, for instance in the realm of IoT, innovative use cases and network connectivity characteristics will appear. Many will be beyond the scope of traditional internet access services, and the Guidelines (as well as the Regulation) should be open to such innovation.

Guidelines advocate for criteria such as internet connectivity or logical separation of traffic from IAS, which have to be assessed by NRAs, who may feel forced to increasingly scrutinize innovative specialized services, for no reason.

The Guidelines would benefit greatly from a clear delineation that specialized services are welcomed by both the NN Regulation and Guidelines.

16. Is there a need for improvement of the Guidelines concerning specialized services (ref. in particular paras 99-127)? If yes, how could this text be improved? Please provide concrete suggestions.

Paragraphs 112, 114, 119, 120 create confusion about NRA discretion beyond the letter of the Regulation, and should be removed from the Guidelines.

Guidelines should clearly outline that ISPs have commercial freedom to innovate and offer a rich variety of offers to consumers, while NRAs should meet a strict requirement to demonstrate that offers jeopardize internet access services.

17. Does the text of the Guidelines concerning specialized services influence the development of specialized services offered on the market? Please provide concrete examples.

Guidelines should encourage commercial plans open to development and innovation. Guidelines should take into account that the pace of technological evolution is faster than regulatory developments, establishing a need for flexible language and within the Guidelines.

The development of specialized services entails business-sensitive information, which is not well suited for elaboration in public consultations.

18. Do any terms used in article 3(5) concerning specialized services need further explanation in the Guidelines? If yes, please specify.

F. Transparency (article 4)

19. What has been your experience regarding the application of the transparency measures in the Regulation and the Guidelines, particularly in relation to speed of mobile internet access services? Is there a need for improvement? If yes, how could this be improved by BEREC? Please provide concrete suggestions.

The Danish service www.tjekditnet.dk is a valuable resource for consumers, regulators, policy makers and media, in terms of fulfilling the transparency objectives from the net neutrality Regulation and Guidelines. In TDC Group's view, this service is not only sufficient in terms of transparency obligations, but helps to eliminate misunderstandings that sometimes arise when consumers gather highly technical data from web measurement tools.

20. How could BEREC further assist consumers, ensuring that they get the internet access service that they pay for?

This question does not appear to apply to the Danish broadband market, where consumers are provided with the internet access service they have paid for.

In cases where disputes might arise, the Danish telecom sector has agreed to participate in a voluntary, private dispute-settlement scheme, the Telecommunications Complaint Board, in collaboration with the Danish Consumer Council. The Telecommunications Complaint Board is approved by the Danish Ministry of Industry, Business and Financial Affairs, to process complaints concerning telecommunication services.

In terms of Danish consumer affairs, further measures from BEREC therefore seem unnecessary.

G. New technologies (horizontal)

21. Do you think the Regulation and the Guidelines provide sufficient flexibility to adopt new technologies which are likely to be used in 5G? Please explain, preferably with examples.

No. The impending rollout of 5G technologies will require significant flexibility in terms of for instance network slicing, in order to deliver very high data traffic, low latency and optimal service for emerging technologies.

It is important to note that network slicing and specialized services in the context of 5G does not indicate any intention to block or throttle general internet access service customers, but to provide cutting-edge technologies through new and not-yet developed products.

Hybrid models of IAS and SolIAS are expected to be deployed within next-generation network slices, and both the net neutrality Regulation and Guidelines should be open towards this development, in order to facilitate 5G deployment. In this regard, Guideline paragraphs 110 and 111 are too restrictive, and not conducive to 5G investment, innovation and deployment in the European Union.

22. Considering the rules for traffic management and specialized services in the Regulation, are the Guidelines providing sufficient clarity to the adoption of new network technologies such as “network slicing” and “edge computing”? Please explain in detail.

BEREC’s endorsement of “Network-slicing in 5G networks may be used to deliver specialized services” should be elevated to paragraph-level, instead of the current footnote level (footnote 26). As mentioned above, this is an important factor for ISPs’ ability to deploy 5G technologies.

23. If not, which specific points are unclear in the Guidelines and how could BEREC improve this? Please provide concrete suggestions.

See above regarding clarification of network-slicing.

H. Other comments

24. Do you want to share any additional comments?

As a minimum requirement for transparency of an EU regulatory cooperation body, the minutes and participants of BEREC’s net neutrality working group should be made available in full on the BEREC website, in order to ensure sector, NRA, NGO and general stakeholders insight into the policy making and regulatory processes.

For any questions or clarifications, please feel free to contact regulering@tdc.dk.