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EDRi's response to the public consultation on BEREC's draft Work Programme 2019

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I. INTRODUCTION

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 rights to privacy, personal data protection and the freedom to seek, receive and impart information.

EDRi welcomes the [opportunity to comment](#) on BEREC's draft work programme 2019. We also welcome BEREC's openness and constructive engagement with civil society. In the interests of transparency, we feel that it is better to reply in this format rather than the rather user and data protection online tool provided in the context of the consultation.

We congratulate BEREC on its 10-year anniversary and on the value it has delivered for European citizens and businesses throughout its existence.

II. BACKGROUND

BEREC is rightfully emphasising its successful bottom-up approach to over guidance and analysis to lawmakers based on the practical experience and technical expertise that regulators have developed on the ground and in their role as arbiters between different stakeholders. This insight is essential for upcoming policy debates, particularly around 5G.

We strongly welcome BEREC's continuing support for net neutrality as a core strategic priority. We would, however, prefer to see this fundamental principle recognised as a cross-cutting, horizontal priority, as well as being a strategic priority on its own, in line with past [recommendations](#).

EDRi welcomes BEREC's ongoing commitment to timely and transparent consultations. Nevertheless, we would encourage BEREC to implement longer consultation periods when undertaking consultations that are likely to involve civil society.

While BEREC is exemplary in terms of transparency, this good practice could be further developed with, for example, summaries of the work of each EWG being published after their meetings.

In a similar vein, we would appreciate more impact assessments and ex-post evaluations. Again, BEREC is already exemplary in this regard, but it is not clear if or how it plans to develop a more comprehensive and consistent *ex post* evaluation strategy. Certain issues relating to the digital single market fall outside the scope of national regulators, but would benefit from a technical analysis that BEREC is perfectly positioned to conduct.

We would also welcome more independent research focusing on the empowerment of citizens and research focusing on detrimental effects of certain business practices.

III. BEREC WORK IN 2019 & 2020

In the following lines, we respond to BEREC's consultation questions in its draft work programme 2019 that fall within EDRi's scope of work. We follow the same structure of the work programme to facilitate the adequate incorporation of EDRi's comments.

1. Comments on BEREC's strategic priority 1: Responding to connectivity challenges and to new conditions for access to high-capacity networks

- **Identification of the network termination point**

Q1.3: It is important to ensure a solution that end-users should have autonomy over their own devices. This will enable end-users to use more privacy-friendly solutions (while using standards-compliant devices), be in charge of the security of their own home networks and will facilitate the growth of the market for terminal equipment. Particularly in light of the right of end-users to provide services and the growing IoT market, the architectural freedom of users to create a home network suitable for their particular needs is an essential precondition for interoperability and innovation. The identification of the network termination point should not interfere with the requirements in Article 3(1) of the Open internet Regulation, which establishes that end-users shall have the right to use terminal equipment of their choice.

- **Determination of the first concentration point**

Q1.4: We recognise the importance of this issue, particularly for smaller ISPs which are an essential part for a competitive telecom market.

- **Evaluation of the roaming market**

Q1.5: The evaluation should consider the possible interplay between net neutrality and roaming. If a large fraction of the available bandwidth for mobile internet access services is "reserved" for roaming customers from other Member States which pay per megabyte traffic (via the wholesale market), while domestic customers have prepaid volumes, this should be viewed as passive discrimination under the EU Open Internet Regulation. We reiterate the comments made last year in this regard: <https://epicenter.works/sites/default/files/berecstakeholdermeeting2017-03.pdf> (see page 4).

- **Minimum criteria for a reference offer (obligation of transparency)**

Q1.10: We very much welcome this effort by BEREC because it contributes to much needed transparency and non-discrimination in the field of inter-connection. This approach can lead to better comparisons between Member States and help identify persistent inter-connection disputes in the Digital Single Market.

2. Comments on BEREC's strategic priority 2: Monitoring potential bottlenecks in the distribution of digital services

- **Harmonised data collection: Authorised Undertakings & OTTs**

Q2.1: EDRi urges BEREC to approach data collection with caution. In particular, the data collection should:

- not lead to more personal data being collected or generated by operators than otherwise would have been the case;
- aggregate and depersonalise all personal data to the greatest extent technically possible;- ensure effective cooperation with competition and data protection authorities in all activities falling under Strategic Priority 2.

We question whether this work can be undertaken without a public consultation, not least due to the changes that have happened since 2015, when BEREC assessed the possibility of benchmark indicators.

- **Carry-over work on the data economy**

Q2.4: There are very significant issues regarding the anti-competitive use of personal data in the electronic communications services market. National Regulatory Authorities (NRAs) have particular experience, resources and powers, which means that there is potential for very effective and beneficial activities to be undertaken. For maximum benefit to be gained from such activities, it is important for BEREC to ensure:

- careful coordination with data protection and competition authorities;
- careful, narrow problem definitions that fall clearly within the legal the competence of NRAs;
- that full respect be given to the principle that markets need trust even more than they need data.

Taking a purely market-driven approach will lead to problems, as this can lead to free-riding and breaches of trust that undermine confidence, take-up of services and, ultimately, innovation. This is clear from research undertaken both [in the EU](#) and [in the US](#).

On the other hand, there are clear market and regulatory failures related to how personal data are monetised in the electronic communications services market that could be effectively addressed by cooperation between BEREC and the European Data Protection Board.

EDRi will provide further recommendations in our response to the BEREC consultation on the data economy.

3. Comments on BEREC's strategic priority 3: Enabling 5G and promoting innovation in network technologies

- **The impact of 5G on regulation**

Q3.1 Due attention should be given to ongoing standards-setting work, in order to ensure that the rollout of 5G is not "discriminatory-by-default", both in terms of net neutrality and also in relation

to excessive data generation and further processing. The latter topic should be addressed in cooperation and coordination with national data protection authorities and the European Data Protection Board.

We welcome the previous BEREC consultation on net neutrality and look forward to the evaluation of the responses, including [ours](#). In particular, the questions about 5G business models and potential incompatibilities with the existing regulatory framework should provide important guidance. It is foreseeable that aspects of 5G technology (in particular network slices) will be used to challenge existing provisions on traffic management and specialised services. We strongly believe the existing net neutrality regulation and the current BEREC net neutrality implementation guidelines provide enough protection and flexibility when it comes to 5G. It is vital that BEREC does not base its assessment on marketing promises or simple commercial interests of certain stakeholders, but instead provides evidence-based guidance on concrete use-cases of 5G accordingly to existing legislative requirements. In this sense, we welcome BEREC's chair and regulators' recent [findings](#) concluding there is no evidence on the table that would demonstrate that current net neutrality rules are not flexible enough for 5G.

We reiterate what we have previously highlighted in [our response](#) to the consultation on the 2017 BEREC Work Programme:

"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."

In addition, EDRi also supports the position taken by our member organisation Article 19, which we replicate here, for reference:

"The European Union recognises the political and economic nature of standards setting through the very incorporation of the [Harmonised Approach to Standards in European Policy](#) and it is in fact the case that technical standards which prescribe vertical or horizontal integration by design, will be very difficult to mitigate by regulatory means.

In line with this observation, as BEREC deems that effective competition in vertical applications and removing switching barriers continue to be important for the welfare of EU consumers, it should not ignore standards setting bodies' activities that are circumventing these priorities.

Particularly in mobile networks, it is the case that the design of the technology as such lends larger power to a single operator, vertically integrated over OSI layers 1 through 4. In technical standards setting bodies BEREC could consider requesting a more flexible technical architecture, such that authentication functions allowing access to a network by MVNOs would be more autonomous of the MNO.

In relation to BEREC's obligations to ensure robust and secure networks and its proposed obligations to empower consumers under its Strategic Priority 5, BEREC must pay close attention to the proposed security enhancements in the 5G standard. We are concerned in particular with the apparent difficulties 5G standards bodies are having in prioritising and adopting reasonable security features such as end-to-end encryption. At the same time, we are concerned that emerging 5G standards bodies have focused on finding ways of circumventing encryption introduced at higher layers, for instance in applications such as web browsers. Ensuring robust security throughout the network is imperative to ensure consumer welfare and trust in the network, and standards body participants should be encouraged to work towards this goal in line with EU law and regulatory frameworks.

BEREC should consider whether the technological standardisation that is being undertaken by industry-driven bodies is indeed undertaken with a view to enable vertical separation. It or its members should consider capacity building in the field of technical standards development in the same way that they are committing, for example, to capacity building in ex ante margin squeeze. BEREC and its members should also consider monitoring more closely the work of standard setting fora by attending meetings and stimulating debate on the impact of technological standards on competition and users' rights."

4. Comments on BEREC's Strategic priority 4: Fostering a consistent approach of the net neutrality principles

- **Update to the Guidelines on Net Neutrality**

Q4.1: EDRi welcomes the ongoing importance that BEREC accords net neutrality for freedom of expression, competition and innovation in Europe.

We would also request particular attention to be given to the issue of zero-rating. According to BEREC's own [analysis](#), right now 27 EU countries have Zero-Rating offers in their markets while not a single regulator has issued a remedy against any of these offers. The regulation clearly prohibits harmful types of commercial practices and agreements. This issue needs further attention and study. To this end, it is important that BEREC proactively publicise the consultation among relevant market players that are the victims of this practice.

- **Implementation of Net Neutrality regulation**

Q4.2: EDRi welcomes the attention that will be accorded to zero-rating. We request that the activity be broadened, however, in order to conduct a study about the current situation on commercial practices and agreements (zero-rating and application-specific data volumes) and their impact on the cross-border provisioning of content, application and services. Such a study should create an open data set about such commercial offerings, similar to the Mobile Broadband Monitor of the European Commission.

It would be very insightful to all parties involved to proactively seek information from the commercial victims of zero-rating, the technical barriers imposed in order to be allowed into zero-rating schemes, the cost of being allowed to participate in zero-rating schemes and the barriers to

cross-border provision of services created by zero-rating. This information could be done by means of, for example, a Eurobarometer-like survey of attitudes to discrimination imposed by operators, awareness of this discrimination, perceived costs in terms of loss of business, etc.

In addition, one fundamental aspect that was so far mostly overlooked is an examination of the privacy impact of certain zero-rating products which rely on Deep-Packed-Inspection technology to identify participating CAPs via URLs or SNI. These intrusive measures would fall under Article 3(4) of regulation 2015/2120.

Finally, we refer to [previous comments](#) on the application of the net neutrality rules and BEREC's guidelines.

- **Carry-over work on BEREC Net Neutrality measurement tool**

Q4.3: We welcome the BEREC Net Neutrality measurement tool and look forward to its deployment. This tool closes one important gap in the enforcement and supervision of net neutrality. Only with an open source, open data and open methodology measurement infrastructure will end-users be able to assess the quality of their internet access service and proof potential unreasonable traffic management practices they experience. The open nature of the tool allows independent parties to evaluate the results and also look for discrepancies among data sets from different countries, ISPs and classes of applications. We hope BEREC will continue to advertise the take-up of this tool among its members and observers. The interest of the Indian regulator TRAI and the increasing interest of municipalities in the USA about this tool proves the correct decision of BEREC to lead the way.

To build on this success story, BEREC should ensure the scalability of the measurement tool. This would not only be economically more feasible than having 28 measurement tools, but also contribute to an EU wide open data pool about measurements that would allow independent researches and public interest groups to conduct comparative analysis throughout Europe.

Finally, we recommend BEREC to also think about ways in which this measurement tool can be tied into complaint and enforcement procedures. Users that measure potentially unreasonable traffic management behaviour on a tool from a regulatory authority are important stakeholders for the fulfilment of the mandate of every NRA. Transparent and comprehensive complaint procedures would greatly benefit from such integration.

5. Comments on BEREC's strategic priority 5: Exploring new ways to boost consumer empowerment

- **Quality of service parameters**

Q5.4: Regarding this point we want to highlight a statement on the last public debriefing on the outcomes of the [36th BEREC plenary meeting](#) according to which "in almost half of the countries, ISPs have not yet included required speed information in their contracts". The enforcement of Article 4 of the Open Internet Regulation is devastating and needs to be urgently addressed.

- **The definition of adequate broadband internet access service**

Q5.5: Particularly in relation to mobile services, any data cap should be carefully considered, particularly if combined with zero-rating services. As is clear from all relevant research, socially-disadvantaged users are very concerned about predictable costs. As a result, zero-rating (even if combined with a high data cap) will have the practical impact of preventing the consumer's full social and economic participation in the digital economy. With the mere fact that almost all EU countries now contain mobile internet offers which include some form of zero-rating or application-specific data volume – with some countries like Portugal having almost no offer without these commercial practices – any European-wide study conducted on mobile access offerings which does not evaluate this particular aspect severely lacks accuracy.

- **A vision for Europe's telecoms consumers**

Q5.6: EDRi warmly welcomes this initiative. Insofar as any such discussions would touch on fundamental rights issues (personal data protection, privacy and freedom of expression, for example), we would be happy to provide complementary support for these discussions.

- **The effectiveness of public warning systems transmitted by alternative means to mobile NB-ICS**

Q5.7: EDRi believes that there should be no privacy cost in such a system. In particular, the location of an identified or identifiable user should not be collected by the provider of the public warning system. Privacy by design requirements are instrumental in ensuring this. The text describing this priority provides no insights into what the perceived benefits of an app would be and it also fails to mention any perceived benefits of a registration system.

We recommend BEREC to approach this question from the opposite perspective – what are the limitations of an SMS-based system that would justify financial and other costs of any other measures that may be considered?

6. Comments on BEREC obligatory work and stakeholder engagement

Q6.13: EDRi applauds BEREC's efforts to ensure maximum participation in stakeholder dialogue and its openness to taking all stakeholder perspectives into consideration.

Due to the particular constraints faced by civil society in responding to consultations, we request that BEREC allows adequate time for the consultation to be completed by all stakeholders.

We once again would like to thank BEREC for the opportunity to contribute to its work programme and hope that you find our comments useful.