

**In Response to the
Body of European Regulators of Electronic Communications Consultation on
Draft Guidelines on the Implementation of the Open Internet Regulation
BoR 19(180)**

**Comments of the Center for Democracy & Technology and Public Knowledge
27 November, 2019**

The Center for Democracy & Technology (CDT) and Public Knowledge (PK) thank BEREC for the opportunity to provide input on this issue. Preserving an open internet is a central part of

CDT is a nonprofit public interest group that seeks to promote free expression, privacy, individual liberty, and technological innovation on the open, decentralized internet. CDT supports laws, corporate policies, and technical tools that protect the civil liberties of internet users. CDT represents the public's interest in an open internet and promotes the constitutional and democratic values of free expression, privacy, and individual liberty.

Public Knowledge is a nonprofit technology policy organization that promotes freedom of expression, an open Internet, and access to affordable communications tools and creative works.

Overall

CDT and PK support BEREC's continued efforts to guide national regulatory authorities (NRAs) as they implement the Open Internet Regulation.¹ CDT provided feedback during BEREC's initial consultation and believes the resulting guidelines have embodied the spirit of the strong, user-focused regulatory approach of the Regulation.²

In general, the amendments and step-by-step assessment proposed in this draft build on this solid foundation.³ In particular, we appreciate that BEREC provides additional guidance for the assessment of commercial agreements like zero rating. These agreements can vary widely and their impact on consumers and relevant markets can depend on many interdependent factors. Therefore, a case-by-case approach, is the best way to ensure that potentially anti-competitive, content-discriminatory, or otherwise harmful arrangements are prohibited while still allowing

¹ Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and retail charges for regulated intra-EU communications and amending Directive 2002/22/EC and Regulation (EU) No 531/2012, <https://eurlex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02015R2120-20181220>.

² Draft BEREC Guidelines on implementation by National Regulators of European net neutrality rules, BoR (16)94; CDT's comments in response <https://cdt.org/insights/cdt-responds-to-berecs-draft-net-neutrality-guidelines/>.

³ Draft BEREC Guidelines on the Implementation of the Open Internet Regulation, BoR (19) 179 ("BEREC GL").

arrangements that provide more choice and benefits to consumers without impacting users' rights.

We also appreciate that BEREC's guidelines anticipate some of the new network use cases and capabilities that may emerge in conjunction with 5G networks, such as Quality of Service guarantees. Although predicting the practical realities of these developing technologies is difficult, BEREC's proposed guidance would help NRAs address some of the biggest concerns associated with new capabilities like "network slicing."

While we support BEREC's draft proposals to update the Open Internet guidelines, we offer additional feedback on the following provisions:

Specific sections

32(a)

Paragraph 32(a) of the draft guidelines adds guidance on when NRAs should assess end point-based services offered by an ISP under Art. 3(2).⁴ CDT and PK agree with the premise of BEREC's guidance, but suggest that a slightly different articulation of the relationship between internet access service and end point-based services could provide additional clarity. In particular, we suggest that the phrase " If such additional end point-based services are part of the agreement or are offered in addition to the agreement between the ISP and the end-user,..." could be amended to read:

"If such additional end point-based services are part of the agreement, *whether listed explicitly or included by default, or if the customer's subscription to either service impacts the price or terms of the other service provided by the ISP to the end-user,...*"

This change would preserve the intent of the guidance in cases where ISPs offer bundled services (where they are part of the agreement) and add clarity in cases where ISPs offer end point-based services separately, but offer economic incentives for customers who use an ISP's internet access service and an end point-based service. We believe this is what BEREC intended to capture with the phrase "or in addition to" but suggest further clarification to more fully articulate the aspects of such offers from a competition perspective. Specifically, we believe that ISPs may wish to offer bundled or linked offers at discounts as a method of affecting the market for end point-based services. This issue can apply to all ISPs, with particular concern for vertically-integrated companies (or those with contractual relationships with providers of end point-based services). We read the draft guidance as intending to limit ISPs' ability to distort markets by enticing customers with bundled or linked offers.

Inclusion of the phrase "whether listed explicitly or included by default" explicitly captures the DNS resolution services provided by ISPs, which are often the default options for end-users. CDT and PK suggest that DNS resolution is best viewed as an end point-based service in all

⁴ BEREC GL at para. 32.

contexts and that DNS should be assessed in the same way as other end point-based services. We will discuss this in more detail with respect to paragraph 78.

32(b)

Paragraph 32(b) appears to offer guidance on the assessment of ISP-provided end point-based services under Art. 3(1) and Art. 3(3). To that end, the proposed draft includes criteria to consider, explaining that if any of them are NOT met, an ISP is deemed to be infringing the Regulation. However, we note that the first of the bullet points merges two separate considerations, making the assessment confusing. We also note that one of the proposed considerations seems to contradict the intent of the Regulation, as currently written. As a solution, we propose separating the two considerations in the first bullet and rephrasing the second of those to align with what we believe the Regulation and BEREC intend. Specifically, we suggest replacing the word “vary” with the phrase “remain constant,” as follows (change noted in bold italics):

- whether the IAS remains application-agnostic
- whether the commercial and technical conditions of the IAS ***remain constant*** depending on any choice of end point-based blocking, for example by affecting the price or QoS of the IAS.
- whether end-users remain in full control of the IAS and may, on the basis of informed consent, activate and deactivate end point-based blocking by changing the setting on the end-user computer, e.g. by configuring the client application software.

In our understanding the commercial and technical conditions, such as price or QoS, of the IAS should *not* vary depending on the choice of end point-based services but should instead remain constant regardless of which end point-based service is used and which entity provides that service. Based on this understanding the changes suggested above would preserve the rule “if [any] of these conditions is not met, the ISP is deemed to be infringing the Regulation” while also adding clarity for NRAs considering these criteria.

34(a,b,c)

CDT and PK generally support the proposed language addressing offerings of different QoS levels. We note, however, that the benefits of different QoS parameters other than bitrate are unlikely to benefit all applications equally. For example, a low latency QoS could improve the performance of certain applications like real-time video chats, but would not significantly impact the performance of other applications like web browsing or video streaming.

We also note that providing a guaranteed level of service for some parameters may require configuring the service for a particular application, or for a class of applications, and that applications outside of this design component may not be compatible with the service. For example, a QoS level assuring no lost packets likely would require using particular transport protocols, such as TCP (transmission control protocol), which are not supported for all applications. Likewise, a low latency QoS may involve the use of in-network computing and the

cooperation of CAPs to integrate their services with the ISP's content distribution network or its computing nodes. If BEREC finds evidence of the need for CAPs to reconfigure their products to be compatible with an ISP's QoS-based offerings, we suggest that an assessment framework similar to that used for other commercial arrangements like zero rating would be appropriate to determine whether such an offering infringes the Regulation.

78a

CDT and PK agree that when ISPs provide DNS resolution, that service should be assessed under the Regulation. But DNS should be considered as an end point-based service, assessed under Art. 3(2), because it is accessed from the end-user's computer, operates at the application layer, and can be provided by third-parties without impacting the function of the IAS.. We suggest that BEREC restructure the proposed guidelines accordingly.

We also propose a change in the language of paragraph 78a. We acknowledge that for the vast majority of internet users, their ISP provides DNS resolution, likely because it is set as the default.. However, we disagree with the proposition that DNS is "an inherent part of the IAS" because it is not strictly necessary to send or receive information across the internet and because of the emerging market for third-party DNS providers. To reflect this change, we suggest changing the first two sentences in paragraph 78a to read:

"DNS queries, regardless of which entity provides the resolution service, are a crucial aspect of the usability of IAS for many users. To the extent the ISP provides DNS resolution, whether by default or by the end-user's affirmative choice, it should be evaluated according to para 32(a)."

We take no issue with the remainder of paragraph 78a, but note that paragraph 78b further supports the treatment of DNS resolution as an end point-based service because it discusses third-party DNS providers in the same category of services as other end point-based services offered by CAPs.

Assessment of Specialised Services

CDT and PK support BEREC's proposed guidelines for assessing specialised services on a case-by-case basis, as described in paragraphs 108-115.⁵ We note, however, that some such services may require integration of CAPs' content and delivery mechanisms with ISPs' network architecture. For example, services that integrate "edge computing" nodes to provide very low latency QoS may require hosting and operating some element of the CAP's service from the ISP's edge computing nodes, which are a limited resource. Where provision of a service requires such integration and use of limited network resources, BEREC may wish to provide additional guidance for the assessment of integrated offerings. We suggest that such assessments could take a similar form to those performed for other commercial offerings, like the step-by-step assessment BEREC proposes for zero rating programmes.

⁵ BEREC GL at paras. 106-115.

Step-by-step assessment for Zero Rating

CDT and PK support BEREC's proposed assessment framework for zero rating programmes. We share BEREC's concerns that some zero rating arrangements can negatively impact the competitive landscape, but also believe that some forms of zero rating can be beneficial to end users. CDT offered a similar type of assessment framework in our comments in BEREC's initial consultation on the Guidelines.⁶ While we believe that a case-by-case approach makes sense, we note that this should not be read to prevent an NRA from adopting rules proscribing specific kinds of zero-rating (e.g., an ISP zero-rating its own affiliated content or services) if those are appropriate for its market.

We believe the implementation and consistency of the proposed step-by-step assessment could benefit from additional guidance to help regulators understand how the elements in the framework impact the overall assessment. In the proposed draft, it is not clear how regulators should weigh the elements in the assessment (whether they favor or disfavor a particular outcome), nor is it clear to what degree any particular element should impact the overall assessment. Additionally, we suggest reformatting the "Main assessment of zero-rating and similar offers" slightly to visually isolate the individual questions and considerations. We also include (*in parentheses*) examples of the kinds of additional guidance we believe would help regulators perform this assessment more consistently.

- A. Impact/effects on consumer and business end-users:
 - a. Relation of zero-rated data volume compared to included data-cap and data used.
 - i. Is there a change in included data volume or price compared to the situation prior to the zero-rating offer being introduced? (*If data volume goes down or price goes up after introducing the zero-rating offer, this weighs in favor of a finding of circumvention.*)
 - ii. How does this compare to the development of price level over time?, since subscribers usually receive larger data quotas over time for the same price due to cost reduction/technology development. (*If prices increase while data quotas remain constant, this weighs in favor of a finding of circumvention.*)
 - iii. How do prices per GB compare between offers with and without a zero-rating component? (*If prices per GB are different for the metered portions of zero-rated and standard plans, this weighs in favor of a finding of circumvention.*)

⁶ See Erik Stallman and R. Stanley Adams IV, *Zero Rating: A Framework for Assessing Benefits and Harms*, CDT (Jan. 2016) https://cdt.org/wp-content/uploads/2016/01/CDT-Zero-Rating_Benefits-Harms5_1.pdf.

- b. The scale of the practice: for example, the number of end-users who subscribe to the zero-rated service compared to the total number of subscribers of the ISP; and/or the number of end-users that subscribe to zero-rated offers in the national market. *(It is not clear how regulators should weigh this element.)*
- c. Is transparency for consumers and business end-users ensured, e.g. is it clear which content of a service is zero-rated and which is not? *(A lack of transparency weighs in favor of a finding of circumvention.)*

B. Impact / effects on CAP end-users:

- a. Is the offer open to all interested CAPs on equivalent fair and reasonable non-discriminatory terms or is it an exclusive zero-rated scheme or only open to a limited number of CAPs? *(Exclusive schemes or discriminatory terms weigh in favor of a finding of circumvention.)*
- b. Are the terms of the offer sufficiently transparent?
- c. How easy is it for CAPs (including smaller CAPs and start-ups) to join? *(The more difficult it is to join, the more strongly this weighs in favor of a finding of circumvention.)*
- d. What are the conditions (legal, technical, economic, procedural)? *(It is not clear how regulators should weigh this element, but we suggest that more rigorous conditions may weigh in favor of a finding of circumvention.)*
- e. Is this information publicly available? *(Publicly available information weighs against a finding of circumvention.)*
- f. Are there any entry barriers (administrative, commercial, technical, uncertainty, etc.) involved and how high are they? *(Higher barriers to entry weigh in favor of a finding of circumvention. BEREC could clarify the distinction between this question and the one above, addressing legal, technical, economic, and procedural conditions.)*
- g. Does the definition of the application category constitute a barrier for providers of similar applications? *(Definitions resulting in exclusivity weigh in favor of a finding of circumvention.)*
- h. Does the ISP report back to the CAP on the processing of their request to join the programme within a reasonable time period? *(It is not clear what impact this should have on the assessment.)*

- i. Does the ISP treat all CAPs equally? (*Unequal treatment weighs strongly in favor of a finding of circumvention. BEREC may wish to clarify the distinction between non-discriminatory offers, as discussed in (a.) and equal treatment.*)
 - j. Is the offer provided by a vertically integrated ISP/CAP, i.e. an ISP which zero-rates its own content? The stronger the market position of a vertically integrated ISP/CAP and the more attractive the product, the bigger the potential limitation of the end-users' rights as laid out in art. 3(1) of the Regulation of the product. (*We suggest that vertically integrated offers weigh strongly in favor of a finding of circumvention.*)
- C. To the extent that it is relevant to the individual case under consideration, NRAs may also need to assess:
- a. the market position of the ISP
 - b. the market position of CAPs whose content is zero-rated compared to CAPs that are not covered by the zero-rating scheme. (*When CAPs included in zero-rating schemes have stronger market positions than those not covered, this weighs in favor of a finding of circumvention.*)
 - c. the different tariff-plans eligible for the offer noting the price difference between offers with and without zero-rating, and the extent of this price difference (*Larger price differences may weigh in favor of a finding of circumvention.*)
 - d. any potential circumvention of the aim of the Regulation that is not covered by the points above.

In conclusion, CDT and PK appreciate BEREC's thoughtful and thorough approach to the Guidelines and support the proposed updates. We thank BEREC for its efforts to facilitate a harmonised approach to the implementation of the Open Internet Regulation and are grateful for the EU's commitment to preserving and open internet.

Respectfully submitted,

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