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BEREC Guidelines on the Implementation of the Open Internet Regulation

Response to the public consultation on draft BEREC Guidelines on the Implementation of the Open Internet Regulation (BoR (22) 30)[1]

Introduction

We thank BEREC for the opportunity to reply to the consultation on the updated draft BEREC Guidelines on the Implementation of the Open Internet Regulation (hereinafter: "Guidelines"). This submission is supported by eleven digital rights NGOs and builds upon our consultation response in this work stream from 19th October 2021[2].

General Remarks

The ECJ judgements in the three cases C-854/19, C-5/20 and C-34/20 from Germany (hereinafter: "judgements") that prompted this reform of the BEREC Guidelines are in line with the longstanding assessment of civil society that application-specific differentiated pricing practices (which include, but are not limited to, application-specific zero-rating) are a harmful practices which are prohibited by the obligation to "treat all traffic equally" in Article 3(3) subparagraph 1 of Regulation (EU) 2015/2120 (hereinafter: "Regulation"). Application-specific practices are practices that make distinctions among applications or classes of applications. An internet access provider engages in application-specific zero-rating if it does not count certain applications or classes of applications towards its subscribers' data caps.

Since 2015 we have communicated this reading of the Regulation to BEREC in several consultation responses[3], oral hearings[4] and open letters[5]. Sadly, to no avail. Given that zero-rating practices are a wide-spread phenomenon observable in all but two EU/EEA countries[6], enforcement based on the updated Guidelines has to be swift, thorough and appropriate to the harm the court has affirmed in its judgements.

Zero-Rating

The application-agnostic examples of typically admissible commercial practices in paragraph 35 are in line with our reading of the judgements. In particular, we welcome the example in the first bullet point as a useful addition, which benefits from the additional transparency in paragraph 138.

We recommend updating the definition of "application-agnostic" in paragraph 34a to clarify the new meaning based on the implementation of the judgements. Application agnostic in the context of differentiated pricing practices should be clearly defined as the pricing of traffic independent of application or classes of application.

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1 See https://berec.europa.eu/eng/news_consultations/ongoing_public_consultations/9342-public-consultation-on-draft-berec-guidelines-on-the-implementation-of-the-open-internet-regulation
2 See https://en.epicenter.works/document/3724
3 See https://en.epicenter.works/document/2275 and https://en.epicenter.works/document/1102,
4 See https://en.epicenter.works/document/363 and https://en.epicenter.works/document/2013
5 See https://en.epicenter.works/document/361
6 See page 20: https://en.epicenter.works/document/1522 (based on 2018 data)

In our opinion, BEREC is right in paragraphs 37, 37a, 40 and 49 to subsume application-agnostic treatment of traffic as an end-user right under Article 3(1) which cannot be violated by commercial practices according to Article 3(2).

We welcome changing the wording of the Guidelines from "zero-rating and similar offers" to "differentiated pricing practices", which clarifies the scope of the Guidelines and subsequently that all application-specific differentiations of price are prohibited by Article 3(3) subparagraph 1. In our opinion, BEREC is also right in making it very clear in paragraphs 54a and 55 that the court has found that technical and commercial differentiations are both subject to Article 3(3) subparagraph 1 and therefore have to adhere to the same standard of equal treatment; a failure to do so in the commercial respect cannot be remedied by equal technical treatment of traffic.[7]

In paragraph 40b, the word "likely" should be avoided since the ECJ judgements of 2021 have definitively resolved any legal uncertainty about differentiated pricing practices such as zero rating. The wording in paragraph 48, second bullet that such practices "are incompatible with the obligation of equal treatment of traffic as set out in Article 3(3)" is more appropriate, and should be used in paragraph 40b as well. Differentiated pricing practices in which CAPs subsidise their own data are among the most harmful practices for competition and consumer choice. The judgements explicitly prohibit all zero rating offers that zero-rate select applications or classes of applications; zero-rating programs that zero-rate applications whose providers have paid to be zero-rated fall squarely within this category. BEREC should use the same clear language in it's Guidelines that is found in the judgements.

We welcome in paragraphs 40b, 40c, 48 and 49 the clear assessment of differentiated pricing practices in line with the judgements that the obligation to "treat all traffic equally" according to Article 3(3) subparagraph 1 requires "application agnostic" structuring of the commercial practice.

The phrase "may also be taken into account" in paragraph 48 contains a high degree of ambiguity and suggests NRAs might diverge from the subsequent criteria when evaluating a concrete offer. This ambiguity not only deviates from the judgements, it also threatens the harmonised implementation in the single market and should be removed.

In the previous consultation of this work stream some stakeholders have argued that open-class based differentiated pricing practices that are open to all applications in a class should still be deemed admissible under the updated Guidelines.[8] The judgements reviewed offers of this type (StreamOn, Vodafone Pass) and the court found them in violation of the Regulation. BEREC is right in paragraph 48 point 2 to clarify this. But as this question will likely be relevant in subsequent regulatory proceedings, the Guidelines should reflect the clarity of the judgements and include language to disqualify class-based differentiated pricing practices irrespective of the criteria and effort required by CAPs to join.

7 Arguments to the contrary brought forward in the previous consultation of this work stream are trying to negate the judgements. See BoR PC09 (21) 08 https://berec.europa.eu/eng/document_register/subject_matter/berec/public_consultations/10082-contribution-of-etno-gsma-to-the-call-for-input-to-feed-into-the-incorporation-of-the-ecj-judgments-on-the-open-internet-regulation-in-the-berec-guidelines, BoR PC09 (21) 05 https://berec.europa.eu/eng/document_register/subject_matter/berec/public_consultations/10083-contribution-of-deutsche-telekom-to-the-call-for-input-to-feed-into-the-incorporation-of-the-ecj-judgments-on-the-open-internet-regulation-in-the-berec-guidelines and BoR PC09 (21) 02 https://berec.europa.eu/eng/document_register/subject_matter/berec/public_consultations/10084-contribution-of-a1-telekom-austria-to-the-call-for-input-to-feed-into-the-incorporation-of-the-ecj-judgments-on-the-open-internet-regulation-in-the-berec-guidelines

8 See BoR PC09 (21) 11 https://berec.europa.eu/eng/document_register/subject_matter/berec/public_consultations/10087-contribution-of-google-to-the-call-for-input-to-feed-into-the-incorporation-of-the-ecj-judgments-on-the-open-internet-regulation-in-the-berec-guidelines

More generally, translating the clear, unambiguous judgements into clear, unambiguous guidance for stakeholders will also help with enforcement of the guidelines, as internet access providers are more likely to adjust their practices on their own if it is obvious that they violate the Guidelines.

We welcome the deletion of the Annex, as it was no longer necessary and was based on a false reading of the Regulation.

Reporting Requirements

In light of this reform BEREC should update its guidance in paragraph 183 on annual reports by NRAs based on Article 5(1) subparagraph 2 to require from NRAs information about the enforcement of the judgements. Subsequently, BEREC's own Report on the implementation of Regulation (EU) 2015/2120 and BEREC Net Neutrality Guidelines should include particular information about the enforcement situation around differentiated pricing practices in EEA countries.

This is needed because of the scale of the task ahead. In our 2019 Net Neutrality Report on the Enforcement of the Open Internet Regulation[9] we have identified 217 offers that included zero-rating or application-specific data volume. The survey data of this report is likely outdated, but freely available[10]. It gives an indication about the scale of the enforcement task ahead of NRAs, which affects all but two EEA countries. We strongly encourage BEREC to be as transparent as possible in monitoring and reporting on the process ahead.

Sincerely,

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9 See page 16: https://en.epicenter.works/document/1522

10 See https://en.epicenter.works/document/1521