



The Consumer Voice in Europe

BEREC DRAFT UPDATED GUIDELINES ON THE IMPLEMENTATION OF THE OPEN INTERNET REGULATION

BEUC response to public consultation



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Why it matters to consumers

Protecting net neutrality both by law and in practice ensures consumers can access and surf the internet in a non-discriminatory way. Safeguarding the right to access an open and neutral internet also preserves the internet as a decentralised engine of innovation. It allows for more competition and therefore more consumer choice. Following the latest rulings of the Court of Justice on the interpretation of the Open Internet Regulation, the guidelines related to the application of this regulation must be updated to reflect the Court's interpretation and ensure coherent and consistent application of the rules to the benefit of consumers.

Summary

BEUC very much welcomes BEREC's review of its Guidelines on the Implementation of the Open Internet Regulation to adequately reflect the latest rulings of the CJEU on net neutrality (C-34/20, Telekom Deutschland; C-854/19, Vodafone; C-5/20, Vodafone). Following the Court's interpretation, offers applying a 'zero-tariff' to specific apps - and therefore limitations that derive from the activation of these options - are illegal under EU law. We strongly welcome BEREC's decision to consider that "zero-rating" offers are a violation of net neutrality and the Open Internet Regulation, regardless of differentiated traffic management measures, although there is still room for differentiated billing practices when traffic is treated equally. Nonetheless, while the draft updated guidelines provide the necessary clarification regarding zero-rating and price discrimination, some improvements and clarifications could still be made, particularly regarding additional legal clarity and further alignment with the provisions of the European Electronic Communications Code (EECC).

Introduction

BEUC – The European Consumer Organisation welcomes the opportunity to respond to the Body of European Regulators for Electronic Communications (BEREC) public consultation on its draft updated Guidelines on the Implementation of the Open Internet Regulation.

BEUC welcomes the work of BEREC on net neutrality and supports its efforts to ensure an open and non-discriminatory internet for all consumers. As BEREC rightly states, the open Internet is “an important building block in the current EU telecom rules.”¹ Therefore, we support the present review and update of the Guidelines on the Implementation of the Open Internet Regulation, in light of recent rulings the Court of Justice of the EU, which have provided an authoritative interpretation clarifying that zero-rating offers are a violation of Regulation 2015/2120 on the Open Internet Regulation (C-854/19 Vodafone (roaming), C-5/20 Vodafone (tethering) and C-34/20 Telekom Deutschland (throttling) of 2 September 2021)².

We thank BEREC for having involved stakeholders in the preparation of the updated guidelines via the call for input launched in October 2021³, to which BEUC responded⁴. We welcome and share BEREC’s conclusions on the interpretation of the CJEU rulings and it is now our expectation that the final updated Guidelines will fully reflect the interpretation of the CJEU and clearly indicate zero-rating as a prohibited practice.

Given the limited scope of the present review, BEUC’s input necessarily has a focus on the provisions which have been amended, as well as on a limited number of provisions which we consider meriting further clarification under the current review. Therefore, some of our input is based on BEUC’s previous contributions to public consultations on net neutrality⁵. Regarding the remaining provisions on which we do not comment on, we kindly refer to BEUC’s previous responses⁷ as well as our consolidated positions⁸ on net neutrality.

For the purposes of this paper, Regulation 2015/2120 on the Open Internet Regulation will be hereafter referred to as “the Regulation”.

¹ BEREC 2022 Work Programme, page 14.

² ‘Zero tariff’ options are contrary to the regulation on open internet access , Press release, 2 Sep <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-09/cp210145en.pdf>

³ Call for stakeholder input to feed into the incorporation of the ECJ judgments on the Open Internet Regulation in the BEREC Guidelines, 6 October 2021, available at [https://berec.europa.eu/files/document_register_store/2021/10/BoR_\(21\)_149_Call_for_stakeholder_input_final.pdf](https://berec.europa.eu/files/document_register_store/2021/10/BoR_(21)_149_Call_for_stakeholder_input_final.pdf)

⁴ BEUC response, BEREC call for stakeholder input on Incorporation of CJEU judgments on Open Internet Regulation in BEREC Guidelines, 20 October 2021, available at: https://berec.europa.eu/eng/document_register/subject_matter/berec/public_consultations/10086-contribution-of-beuc-to-the-call-for-input-to-feed-into-the-incorporation-of-the-ecj-judgments-on-the-open-internet-regulation-in-the-berec-guidelines

⁵ Ibid.

⁶ BEUC response, BEREC public consultation on its Draft Updated Net Neutrality Guidelines Rules, 21 November 2019, available at: https://www.beuc.eu/publications/beuc-x-2019-075_berecs_public_consultation_on_its_draft_updated_net_neutrality_guidelines.pdf

⁷ Ibid.

⁸ BEUC position on BEREC’s Draft Guidelines on European Net Neutrality Rules, 14 July 2016, available at: https://www.beuc.eu/publications/beuc-x-2016-075_implementation_of_eu_net_neutrality_rules_berc_draft_guidelines_1.pdf

Article 1. Subject matter and scope

We welcome the introduction of an express mention on paragraph 1 detailing the review of these Guidelines in light of the latest CJEU rulings “concerning the interpretation of the specific Articles of the Regulation”, namely in cases *C-854/19 Vodafone (roaming)*, *C-5/20 Vodafone (tethering)* and *C-34/20 Telekom Deutschland (throttling)* of 2 September 2021, as well as in complementary cases *C-807/18* and *C-39/19 Telenor Magyarország* of 15 September 2020.

Moreover, we also welcome the update and clarifications introduced in paragraph 4, replacing the reference to Directive 2002/21/EC, “Framework Directive”, with an updated reference to the European Electronic Communications Code (EECC), and aligning the definitions of “user” and “end-user” with the CJEU ruling in *Telenor Magyarország*.

In addition, BEUC would like to reiterate its previous suggestion for BEREC to strengthen the wording of paragraph 6, by replacing “may” with “should” and by recommending national regulatory authorities (NRAs) to monitor developments in interconnection markets to address potentially anti-competitive and discriminatory practices.

Article 2. Definitions

Following the entry into force of the European Electronic Communications Code (EECC), the references in the Guidelines which still refer to Directive 2002/21/EC, the “Framework Directive”, required a necessary update. In particular, we welcome the clarification that where the Regulation makes reference to the definitions of Article 2 of Directive 2002/21/EC, which has been repealed by the EECC, these references “must now be read as references to the relevant parts of the EECC”. Nonetheless, on a basis of legal clarity, we would suggest adding a clarification of the relevant EECC provisions in the text of the Guidelines.

In addition, we would urge BEREC to further clarify paragraph 12, regarding the possible examples provided of “services or networks not being made publicly available”. BEUC would like to recall its position⁹ that services to “access the internet provided by cafés and restaurants” should not be considered under this paragraph, as such services are publicly offered to an undefined public, and are often open networks (i.e., not password protected). In such cases, they should be considered as publicly available services, which must also comply with EU rules on net neutrality.

We would also like to reiterate our considerations¹⁰ that paragraph 18 should be clarified to ensure that no connectivity services are excluded from the scope of the Regulation. In particular, the reference to “e-book readers” should be deleted, as these devices can still be used to access the internet. The provision is of particular importance in the framework of the emerging trends regarding Internet of Things and connected devices with a similar limited nature.¹¹

⁹ BEUC response, BEREC’s public consultation on its Draft Updated Net Neutrality Guidelines Rules, 21 November 2019, page 2, available at https://www.beuc.eu/publications/beuc-x-2019-075_berecs_public_consultation_on_its_draft_updated_net_neutrality_guidelines.pdf

¹⁰ BEUC position on BEREC’s Draft Guidelines on European Net Neutrality Rules - BOR (16) 94, 14 July 2016, page 2, available at https://www.beuc.eu/publications/beuc-x-2016-075_implementation_of_eu_net_neutrality_rules_berec_draft_guidelines_1.pdf

¹¹ See BEUC position paper on IoT and connected devices, Protecting European Consumers in the World of Connected Devices, 15 October 2021, available at: https://www.beuc.eu/publications/beuc-x-2021-091_protecting_european_consumers_in_the_world_of_connected_devices.pdf

BEUC recalls its earlier position that “it must be made clear that the Regulation does not foresee any other connectivity services beyond Internet Access Services (IAS) and specialised services. Therefore, where the number of reachable endpoints is limited by the nature of the terminal equipment used with a service, this service should be provided through or as an IAS, if possible. If this service requires a guaranteed quality of service, it can be provided as a specialised service, but it must then comply with the corresponding rules.”¹²

Article 3. Safeguarding of open internet access

Relationship between Articles 3(1), 3(2) and 3(3)

We very much welcome the clarification in paragraph 37, with a new paragraph 37a, which states that the core principles of net neutrality in Articles 3(1) and 3(3) cannot be bypassed by commercial agreements/practices.

Paragraph 37 now clearly states that “Article 3(3), first subparagraph mandates that, ISPs must treat all traffic equally”, in line with the “common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users’ rights as expressed in Article 1(1).”

Zero-rating offers are inadmissible

BEUC reiterates its position that zero-rating offers are prohibited under the Regulation. We strongly welcome that BEREC’s draft updated Guidelines integrate the CJEU interpretation of the Regulation that zero-rating violates EU law and should be considered inadmissible.

We also welcome the express mention of the Court’s conclusions, introduced via the new paragraph 54a, to clearly state that zero-tariff options violate the general obligation to treat all traffic equally in Article 3(3) of the Regulation, due to the fact that a *‘zero tariff’ option draws a distinction within internet traffic, on the basis of commercial considerations, by not counting towards the basic package traffic to partner applications.*”¹³. Moreover, we welcome the introduction of the Court’s reasoning that this violation is a *“failure, which results from the very nature of such a tariff option on account of the incentive arising from it”*¹⁴, which persists *“irrespective of the form or nature of the terms of use”*.¹⁵

Therefore, in accordance with BEUC’s longstanding position¹⁶, we welcome the deletion of the zero-rating specific guidance and examples in paragraphs 36, 37, 37a, 40-43 and 48, as well as the deletion of the Annex stating a step-by-step assessment for zero-rated offers under Article 3(2) of the Regulation. According to the Court’s interpretation, zero-tariff options are generally incompatible with Article 3(3) of the Regulation and its general obligation for equal treatment of traffic, and therefore no case-by-case assessment is

¹² BEUC response, BEREC Consultation on the Evaluation of Regulation 2015/2120 and the BEREC Net Neutrality Guidelines, page 2, available at https://www.beuc.eu/publications/beuc-x-2018-035_berec_consultation_on_net_neutrality_beuc_response.pdf

¹³ C-854/19 Vodafone (Roaming), para. 28; C-5/20 Vodafone (Tethering), para. 27; C-34/20 Telekom Deutschland (Throttling), para. 30.

¹⁴ C-854/19 Vodafone (Roaming), para. 29; C-5/20 Vodafone (Tethering), para. 28; C-34/20 Telekom Deutschland (Throttling), para. 31.

¹⁵ C-854/19 Vodafone (Roaming) para. 33; C-5/20 Vodafone (Tethering), para. 32; C-34/20 Telekom Deutschland (Throttling), para. 35.

¹⁶ See footnotes 2, 3.

needed under Article 3(2). Indeed, the previous case-by-case approach chosen by BEREC gave rise to several problems, which were widely reported by our members.¹⁷

Price differentiation when traffic is treated equally

BEREC rightly points out that the CJEU interpretation on zero-rating leaves room for differentiated billing practices under the scope of application of Article 3(2) of the Regulation.¹⁸

In its rulings, the Court placed its main concern on the incentives that may arise on account of the application of zero-rating offers, incentives created when differentially billed individual applications and services encourage consumers to make primary or exclusive use of certain applications, regardless of limitations. Zero-rating offers apply a price differentiation to categories of applications (not application-agnostic) and are therefore incompatible with the equal treatment of traffic obligation under Article 3(3) of the Regulation. However, there are certain differentiated billing practices may be considered in conformity with the letter of Article 3(2) of the Regulation, such as those agreements where such incentives to use specific applications or services or categories of applications or services do not inherently arise, such as application-agnostic differentiated billing.

We therefore generally welcome the replacement of guidance on zero-rating offers with a comprehensive guidance on differentiated pricing practices in paragraphs 40-40c, as new guidance was required for NRAs to assess differentiated pricing practices which may be considered admissible.

In particular, paragraph 40c clearly states that, unlike “(inadmissible) zero tariff options and similar tariff options, there are differentiated pricing practices that are typically admissible if all elements of the tariff are application-agnostic.”, while paragraph 35 now includes a list of examples of potentially admissible commercial practices (such as customized application-agnostic offers where the end-user, according to different price rates, is provided with different Quality of Service characteristics or with a service that takes an overall lower priority among all traffic in cases of congestion).

However, BEUC recommends BEREC to provide greater certainty in these provisions by replacing the references in paragraphs 40c and 35 to “typically” and “are typically admissible”, respectively, with the terms “potentially” or “may be admissible”, given that the assessment of agreements and commercial practices in light of such examples is to be carried out by the NRAs. This clarification would be especially relevant to ensure proper interpretation of the commercial practices exemplified in paragraph 35 (such as the not-counted data consumption during weekend or off-peak times).

¹⁷ See, for example, input provided by German BEUC member vzbv to BEREC, Nachbesserungsbedarf beim Zero-Rating, 7 June 2018, <https://www.vzbv.de/meldung/nachbesserungsbedarf-beim-zero-rating>. See also our Norwegian member Forbrukerrådet's take on zero-rating in the Norwegian mobile market, 9 November 2017, <https://fil.forbrukerradet.no/wp-content/uploads/2017/11/2017-11-09-brev-nulltaksering-eng.pdf>.

¹⁸ Explanatory Document on the Public Consultation on the draft BEREC Guidelines on the Implementation of the Open Internet Regulation, page 6, available at https://berec.europa.eu/eng/document_register/subject_matter/berec/public_consultations/10208-explanatory-document-on-the-public-consultation-on-the-draft-berec-guidelines-on-the-implementation-of-the-open-internet-regulation

Article 4. Transparency measures

Regarding transparency measures, BEUC recommends BEREC to introduce additional legal clarifications. In particular, we reiterate our previous suggestions¹⁹ for alignment with the provisions of the EECC, namely:

- **Paragraph 130:** amend the wording of the last bullet point, aligning it with Article 103, EECC. The comparison between different ISPs should always be possible, and not only “preferably”.
- **Paragraph 131:** introduce wording stating that providers shall be obliged to include a summary of the information required in Art. 4(1) of the Regulation in their contract summaries, in line with Article 102 of the EECC.

In addition, we recommend that paragraph 133 is amended to adequately reflect the legal wording used in Article 3(3) of Directive 93/13/EEC on unfair terms in consumer contracts (Unfair Contractual Terms Directive): the term “might” should be replaced with “may”.

Articles 5 and 6. Supervision, enforcement, penalties

BEUC has already raised concerns regarding the underenforcement of EU net neutrality rules²⁰, particularly in the case of zero-rating offers.

According to the European Commission report on the implementation of the Regulation on Open Internet Access, “[o]nly very few penalties have been imposed to date and all of them were well below the applicable maximum [...] effective, dissuasive and proportionate sanctions are crucial for the correct implementation of the regulation”.²¹ BEREC’s report on the implementation of the Regulation and the Open Internet Guidelines from September 2021 also indicates that only “six NRAs reported some progress in Open Internet Regulation related court proceedings in the past 12 months”.²²

We therefore thank BEREC²³ for the emphasis given to this issue on its 2022 Work Programme, especially on supporting “NRAs’ obligation to closely monitor and ensure compliance with the Open Internet Regulation”²⁴, including on cases related to zero-rating.

Nonetheless, following the recent developments on net neutrality, we would urge BEREC and NRAs for a renewed emphasis and added resources regarding the implementation and appropriate enforcement of the rules. We highlight the importance of BEREC’s efforts to step up enforcement and offering support to NRAs whenever needed. In this context, we suggest BEREC to consider amending paragraph 187, which establishes that “no guidance

¹⁹ BEUC response, BEREC’s public consultation on its Draft Updated Net Neutrality Guidelines Rules, 21 November 2019, page 8, available at https://www.beuc.eu/publications/beuc-x-2019-075_berecs_public_consultation_on_its_draft_updated_net_neutrality_guidelines.pdf

²⁰ Idem, pages 9-10.

²¹ COM(2019) 203 final, Report from the Commission to the European Parliament and the Council on the implementation of the open internet access provisions of Regulation (EU) 2015/2120, 30 April 2019, available at <https://ec.europa.eu/digital-single-market/en/news/commission-report-open-internet>

²² BEREC Report on the implementation of Regulation (EU) 2015/2120 and BEREC Open Internet Guidelines 2021, available at https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/10034-berec-report-on-the-implementation-of-regulation-eu-20152120-and-berec-open-internet-guidelines-2021

²³ BEUC response, BEREC 2022 Work Programme consultation, 5 November 2021, page 4, available at https://www.beuc.eu/publications/beuc-x-2021-102_berecs_2022_work_programme_consultation_beuc_response.pdf

²⁴ BEREC Draft 2022 Work Programme, page 21.

to NRAs is required” regarding penalties. BEUC also suggests that these provisions are updated with clear references to the latest CJEU rulings on net neutrality.

END



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