



BEREC

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Consultation on the evaluation of the application of Regulation (EU) 2015/2120 and the BEREC Net Neutrality Guidelines

BEREC has on March 8th 2018 invited stakeholders to participate in a public consultation on the evaluation of the application of the BEREC Net Neutrality Guidelines in the context of the Net Neutrality Regulation.

The Telecom Industry Association – Denmark (TI) supports a free and open Internet and the principles of net neutrality. It is TI's view that the rules on net neutrality must go hand in hand with telcos ability to develop new innovative services and business models.

With the current pace of innovation and the upcoming launch of 5G it is crucial for telcos investment in new technologies to have predictability and confidence in the regulatory environment and at the same time have the possibilities to develop new business models and explore new commercial models for consumers and businesses across sectors. It is therefore important that the Guidelines do not unduly limit possibilities – within the scope of the actual net neutrality rules – to develop new innovative services and to reach the full potential of gigabit networks (fixed) and 5G, including network slicing.

It is TI's view that the Net Neutrality Regulation and Guidelines shall focus on protecting the general quality of the Internet access service (IAS) while allowing the necessary flexibility for providing new innovative services.

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

TI finds that the BEREC's Guidelines have the potential to provide clarity regarding how NRA's shall apply the Net Neutrality Regulation, but it is important that the Guidelines do not go beyond what can be deduced from the net neutrality rules.

It is TI's view that the Guidelines on certain points goes beyond what can be deduced from the net neutrality rules. An example of this is tethering, which, according to BEREC, must not be limited. It is difficult to see, how the end-users right to choose terminal equipment also can include a right to share the internet connection of a phone or tablet with other end-users devices. Tethering can cause a significant increase in data activity due to the end-user can share the internet connection with other end-users.

There have been telcos on the Danish market that have found it necessary to withdraw free data offers due to BEREC's interpretation of the Net Neutrality Regulation on this point. Another example is zero rating, which BEREC has a number of reservations about.

B. Definitions (article 2 of the Regulation)

Article 2 of the current regulation defines: 1) "*Provider of electronic communication to the public*" and 2) "*internet access services*". The Guidelines explains how these definitions should be understood.

The Net Neutrality Regulation can also have an effect on other players. Today, the rules on net neutrality include only the ISP's, but not the players that, for example, produce terminal equipment. These players have the ability to restrict access to the open Internet via the equipment. The same applies to OTT providers, e.g. offering music streaming that can turn the sound quality up and down. The Guidelines must therefore in its interpretation of the Net Neutrality Regulation reflect the need to ensure a level playing field for all relevant players, including OTT providers.

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

As stated above it is TI's view that the Guidelines in relation to zero-rating goes beyond what can be deduced from the net neutrality rules. Despite the very detailed Guidelines on this point, NRA's have applied the Net Neutrality Regulation differently in regard to allow or ban zero-rating, thereby creating uncertainty about the deployment of new business models.

It is difficult to see, how a zero-rating practice can lead to a situation where the end-users' choice is materially reduced in practice in a way that infringes the Net Neutrality Regulation. The aim with the Net Neutrality Regulation is to establish common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users' rights. When assessing whether a zero-rating offer is lawful or unlawful, one should only look at whether discrimination of traffic/applications takes place.

D. Traffic management (article 3(3))

It is important that the Guidelines as a standard practice do not put undue limitations on the ISPs' access to optimize and build capacity in its network. Networks has to be adapted to end-users demand for services, including higher speed, lower latency and QoS etc. The Guidelines must not prevent ISPs from evolving their network.

Also, it is important that the national NRA's are able to have a flexible approach on how they supervise and ensures ISP's compliance with the Net Neutrality Regulation. The Guidelines must not limit NRA's ability to undertake case-by-case assessment of the ISP's behavior and decide, if they find it necessary to adopt specific measures.

It is important to stress that the Net Neutrality Regulation does not require NRA's to establish invasive measure to supervise and monitor ISP's compliance with the rules. TI is worried that a common net neutrality measurement tool will be misleading, since an indication of e.g. general IAS performance depends on variety factors. NRA's must avoid misleading conclusion based on bulk-data from such a measurement tool.

Furthermore, several NRA's have already implemented monitoring systems regarding broadband speeds, which make a BEREC net neutrality measurement tool unnecessary and could be misleading for the end-users, who as TI understands, can use the software even though the national NRA has chosen not to use the tool. This can also lead to an unnecessary burden on telcos customer services.

E. Specialised services (article 3(5))

It is of the utmost importance that the Guidelines does not unnecessarily limit NRA's possibilities to have a flexible approach, when they interpret and implement the net neutrality rules, so that telcos have the ability to develop new innovative services and to reach the full potential of 5G,

including network slicing. NRA's must have the possibility to interpret the net neutrality rules ex post on a case-by-case basis, adapted to national circumstances. National markets and market players can be very different in different member states.

Para 121 in the Guidelines states i.a. that "*IAS quality measurements could be performed with and without specialised services, both in the short term...and in the long term (which would include measurements before the specialised services are introduced in the market as well as after).*" It is TI's view that it is important that the NRA's are able to interpret the net neutrality rules ex post on a case-by-case basis, adapted to national circumstances. An environment where permission goes before innovation can create a barrier to efficient investment, especially in the dawn of 5G.

F. Transparency (article 4)

It is TI's view that NRA's must be able to have a flexible approach on how to monitor and enforce compliance with the transparency obligations set out in article 4, e.g. using market survey or meetings with ISP's. It shall be possible for a national NRA to organize its supervisory work in another way than it is organized in other member states, as national markets and market players can be very different in different member states. Most member states have already national specifications in relation to the different types of speeds. In Denmark the NRA has established such a service.

TI cannot find the sufficient flexibility in the current Guidelines.

TI's shall also refer to its comments to question D.

G. New technologies (horizontal)

5G will allow telcos to develop new innovative services and new business models to the benefit of consumers. To ensure the roll out of 5G network in Europe it is important that investment incentives are supported, that favorable framework conditions are in place and that net neutrality rules provides legal certainty as regards the deployment of 5G.

Today it is uncertain how Net Neutrality Regulation would apply in the context of 5G. A restrictive implementation of the regulation could hamper the roll-out of 5G, restricting the fundamental agility and elastic na-

ture of 5G, including network slicing. New business opportunities and the ability to satisfy future end-user needs will be at risk with a regulation not coherent with the market demand and evolution.

5

If BEREC's finds it necessary to clarify the current text in the Guidelines in regard to 5G and network slicing as a specialised service, it is important that this is done in a way that reflects the need to have flexibility in implementation of the net neutrality rules which enables telcos to develop new innovative services and business models in 5G environment.

H. Other comments

As stated above, it is important that national NRA's are able to have a flexible approach on how they will supervise and ensure ISP's compliance with the Net Neutrality Regulation. It is TI's view that the Guidelines on this point goes beyond what can be deduced from the Net Neutrality rules. Examples are article 4 and 5. It should be made clearer that the Guidelines on this point are only recommendations, which NRA's are not obliged to follow, if they assess it is not necessary due to national circumstances.

Yours sincerely,

A handwritten signature in black ink, reading "Jakob Willer". The signature is written in a cursive, flowing style.

Jakob Willer
Director

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