

BEREC

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Consultation on the draft BEREC Guidelines on the Implementation of the Open Internet Regulation

BEREC has on October 10th 2019 invited stakeholders to participate in a public consultation submitting their observations and contributions regarding the draft BEREC Guidelines on the Implementation of the Open Internet Regulation.

The Telecom Industry Association – Denmark (TI) welcomes that BEREC in certain instances has provided clarity on how NRA's shall apply the Net Neutrality Regulation and at the same time has created more flexibility in the interpretation of the Guidelines to accommodate development of new innovative services and business models. Regarding the provision that specialised services shall not be to the detriment to the general IAS, BEREC has clarified that NRA's should intervene if persistent and *perceptible* decreases in performance are detected (paragraph 125).

TI also welcomes that BEREC has clarified that a logical separation of traffic between specialised services and IAS, typically when the two services are provided over at common infrastructure, may be with fixed or dynamic or without reservation of capacity for IAS vs. specialised services (paragraph 110b). BEREC has also clarified that the requirement that traffic management "*shall not be maintained for longer than necessary*" does not prevent ISP's from running measures on an ongoing basis as long as the measure is not in effect permanently (paragraph 73).

In Denmark net neutrality has so far been the subject of voluntary industry cooperation under the auspices of TI, which among other things has resulted in a set of net neutrality principles that were in force until the

Regulation came into force in 2016. A voluntary Net Neutrality Forum (“NN Forum”) was formed by the Danish telecom sector in 2011. The Forum is an open forum, where relevant stakeholders from the commercial sector, digital rights and consumer NGO’s meet and can present both questions of principle and concrete examples of problems related to net neutrality. The Danish NRA participates as observers and provides guidance on the implications of the new rules for existing self-regulatory mechanisms.

NN Forum has shown to be a successful way in Denmark to promote net neutrality. The NRA has in its annual report from 2019 on the implementation of the Open Internet Regulation concluded that there still haven’t been any significant issues with net neutrality in Denmark.

TI finds it important that the Regulation and the Guidelines do not become too descriptive trying to regulate lowest common denominator. The Guidelines must be sufficiently agile to accommodate future technologies and market developments enabling national NRA’s to have a flexible approach on how they supervise and ensure 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.

A. Commercial practices such as zero-rating

BEREC has in its draft Guidelines included more guidance to NRA’s on different factors to be taken into account in the assessment of zero-rating cases and provided a step-by-step assessment for zero-rating and similar offers in annex to the Guidelines.

The aim of 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-user rights. When assessing whether zero-rating and similar offers are lawful or unlawful, the NRA’s should only look at whether discrimination of traffic/applications takes place.

While there can be a need for clarification, it is the view of TI that it is important that the Guidelines do not become unnecessary detailed.

An overly detailed text about zero-rating and similar offers in the Guidelines can result in a very prescriptive interpretation of the Regulation and an unnecessarily limitation of NRA’s possibilities to have a flexible approach, when they interpret and implement the net neutrality rules. Na-

tional markets and market players can be very different in different member states.

The Danish NRA has assessed zero-rating in the Danish Market and found that the existing zero-rating offers are in line with the regulation.

B. Net neutrality measurement tool

BEREC has in paragraph 121a. added following text "*BEREC is working on developing a net neutrality measurement tool and will seek to leverage that work to further develop the measurement methodology regarding measuring of the general quality of internet access services. NRAs are invited to participate in this collaboration and to consider the results of this work when available. NRAs could also collect information from ISPs in order to assess and measure the impact on general IAS quality.*"

When BEREC is mentioning the measurement tool, BEREC should at the same time emphasize that the tool cannot be used based on single measurement. Measurement data can only be used to monitor the general quality of the IAS if they are based on several measurements and all factors that might affect the measurement results are considered.

As stated in TI's response to the consultation on the evaluation of the application of Regulation and the BEREC Net Neutrality Guidelines, the Net Neutrality Regulation does not require NRA's to establish invasive measures 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.

Several NRA's have already implemented monitoring systems regarding broadband speeds, which makes 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.

NRA's must be able to have a flexible approach on how to monitor and supervise the net neutrality provisions of the Regulation, 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 al-

ready national specifications in relation to the different types of speeds. In Denmark the NRA has established such a service.

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In TI's view reference to the net neutrality measurement tool should be removed from the Guidelines to avoid misunderstandings regarding the use of the measurement tool.

C. Questions regarding paragraphs 69 and 70

Regarding BEREC's questions in paragraphs 69 and 70 TI shall refer to GSMA – ETNO Response to Public Consultation on the draft BEREC Guidelines.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Jakob Willer', followed by a period.

Jakob Willer
Director

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