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## Access Now submission to the public consultation on draft BEREC Guidelines on the implementation of net neutrality rules

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### Key recommendations

- Carefully consider the implementation of so-called specialised services;
- Further specify the implementation of traffic management measures, and;
- Implement a ban on zero rating offers.

## Introduction

Access Now is an international organisation that defends and extends the digital rights of users at risk around the world.<sup>1</sup> We defend and extend the digital rights of users at risk around the world. By combining innovative policy, user engagement, and direct technical support, we fight for open and secure communications for all. We are a team of 40, with local staff in 10 locations around the world. We maintain four legally registered entities - Belgium, Costa Rica, Tunisia, and the United States - with our tech, advocacy, policy, granting, and operations teams distributed across all regions.

Access Now's policy team works at the intersection of human rights and technology, furthering Access Now's mission by developing and promoting rights-respecting practices and policies. We defend Net Neutrality globally. Access Now provided comments on the development and implementation of the Net Neutrality and zero rating rules in the Brazilian Marco Civil,<sup>2</sup> to the Telecom Regulatory Authority of India,<sup>3</sup> and to the US Federal Communications Commission (FCC) 2015 Open Internet Order.<sup>4</sup> Access Now helps coordinate the Global Net Neutrality coalition, a global platform for cooperation and the advancement of Net Neutrality protection worldwide.<sup>5</sup>

In the European Union, we were involved in the negotiation process of the Telecoms Single Market Regulation (TSM) since its tabling by the European Commission in September 2013,<sup>6</sup> have provided comments to the EU Parliament,<sup>7</sup> Council of the EU,<sup>9</sup> and have provided input to the Body of European Regulators for Electronic Communications' (BEREC)

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<sup>1</sup> Access Now, <https://www.accessnow.org/>

<sup>2</sup> Access Now submission on zero rating and the Marco Civil da Internet, [https://www.accessnow.org/cms/assets/uploads/archive/Access\\_ZeroRating\\_Marco\\_Civil.pdf](https://www.accessnow.org/cms/assets/uploads/archive/Access_ZeroRating_Marco_Civil.pdf)

<sup>3</sup> Joint letter and counter-comments on the TRAI's consultation paper on differential pricing for data services, [http://trai.gov.in/WriteReadData/ConsultationPaper/Document/201601180327042420938Access\\_Now\\_n\\_Ors.pdf](http://trai.gov.in/WriteReadData/ConsultationPaper/Document/201601180327042420938Access_Now_n_Ors.pdf)

<sup>4</sup> Access Now comments on the FCC Notice of Proposed Rulemaking on protecting and promoting the open internet, <https://www.accessnow.org/cms/assets/uploads/archive/docs/NPRMFinal.pdf>

<sup>5</sup> Global Net Neutrality coalition, <https://www.thisisnetneutrality.org/>

<sup>6</sup> Access Now opinion on the European Commission proposal for a Regulation on a single market for electronic communications, [https://s3.amazonaws.com/access.3cdn.net/eb2b4943583975dddc\\_wem6ivd90.pdf](https://s3.amazonaws.com/access.3cdn.net/eb2b4943583975dddc_wem6ivd90.pdf)

<sup>7</sup> Access Now Q&A on traffic management in the Telecoms Single Market Regulation, [https://www.accessnow.org/cms/assets/uploads/archive/docs/Traffic\\_management\\_in\\_the\\_Telecoms\\_Single\\_Market\\_Regulation.pdf](https://www.accessnow.org/cms/assets/uploads/archive/docs/Traffic_management_in_the_Telecoms_Single_Market_Regulation.pdf)

<sup>8</sup> Access Now, the importance of Net Neutrality for investment in high speed broadband deployment, [https://www.accessnow.org/cms/assets/uploads/archive/docs/Factsheet\\_Investment.pdf](https://www.accessnow.org/cms/assets/uploads/archive/docs/Factsheet_Investment.pdf)

<sup>9</sup> Access Now and EDRi analysis of the Italian Presidency proposal on the Telecoms Single Market, [https://www.accessnow.org/cms/assets/uploads/archive/docs/Access\\_EDRi\\_analysis\\_of\\_Italian\\_Presidency\\_proposal\\_on\\_TSM.pdf](https://www.accessnow.org/cms/assets/uploads/archive/docs/Access_EDRi_analysis_of_Italian_Presidency_proposal_on_TSM.pdf)

stakeholder dialogue on Net Neutrality.<sup>10</sup> Furthermore, we are members of the SaveTheInternet.eu coalition since its creation in January 2014.<sup>11</sup>

In the final stages of the establishment of Net Neutrality rules in the EU, we welcome the the opportunity to provide feedback through this public consultation. We commend BEREC for the high quality of the draft guidelines on the implementation of the Net Neutrality rules and will dedicate our submission to provide recommendations on three specific issues which we believe could be further clarified in the final guidelines:

- **Carefully consider the implementation of so-called specialised services;**
- **Further specify the implementation of traffic management measures; and**
- **Implementing a ban on zero rating offers.**

## **1. Specialised services**

The debate around the so-called specialised services has been at the core of the Telecoms Single Market discussion over the past three years. With the potential to impact the freedom of communication, innovation and competition in the digital single market, it was of the utmost importance for legislators to get this definition right. To that end, Article 3(5) of the TSM authorises “providers of electronic communications to the public” to offer “services other than internet access services” under specific conditions and requirements further established in Recital 16.<sup>12</sup> The delivery of these services must also be in line with Article 3(1) safeguarding end-users right to access and distribute information and content over the internet, no matter where the type of content, its location or the type of equipment used. This means that internet access providers can develop and provide access to innovative specialised services such e-health services or connected cars, while at the same time ensuring access to the unfettered internet for their users; this disallows them from creating slow and fast-lanes over the internet.

BEREC reaffirms the clear objective of the Regulation in ensuring that services in accordance with the above definition do not circumvent users’ rights.<sup>13</sup> While the draft guidelines further set-out what qualifies as a specialised service and which requirements have to be met for the provision of such a service, additional clarification should be included to provide certainty and avoid the risk of online services receiving preferential treatment over others.<sup>14</sup>

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<sup>10</sup> Access Now’s written submission for the BEREC stakeholder dialogue on Net Neutrality, [https://www.accessnow.org/cms/assets/uploads/2015/12/BERECsubmission\\_NN\\_2015.pdf](https://www.accessnow.org/cms/assets/uploads/2015/12/BERECsubmission_NN_2015.pdf)

<sup>11</sup> SaveTheInternet.eu <https://savetheinternet.eu/en/>

<sup>12</sup> See Regulation EU/2015/2120 laying down measures concerning open internet access <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2120&from=EN>

<sup>13</sup> See BEREC draft guidelines on the implementation of net neutrality rules, paragraph 100.

<sup>14</sup> *Ibidem*, paragraphs 96-98.

Specifically, we recommend BEREC includes the following changes -- additions are marked in **bold** and proposed deletions with ~~strikethrough~~:

“99. According to Recital 16, the service shall not be used to circumvent the provisions regarding traffic management measures applicable to IAS. **For instance, granting content, services or applications, or a combination of thereof, priority over other content, applications and services available via the IAS is in breach of the Regulation.**”

“118. ~~While IAS and specialised services directly compete for the dedicated part of an end-user’s capacity, the end-user himself may determine how to use it. Therefore, NRAs should not consider this an infringement of Article 3(5) second subparagraph, as long as the end-user is informed pursuant to Article 4(1)(e) of the likely or possible impact on his IAS and can still obtain a minimum speed for any IAS subscribed to in parallel. NRAs should not consider it to be to the detriment of the general quality of IAS when activation of the specialised service by the individual end-user only affects his own IAS. However,~~ **The delivery of specialised services should not be to the detriment of the availability or general quality of end-users’ internet access services as established in Recital 17. This applies to** ~~detrimental effects should not occur in those parts of the network where capacity is shared between different end-users~~ **and to the network of an end-user contracting the delivery of a specialised service.**”

“121. NRAs should intervene if persistent decreases in performance are detected for IAS **as this amounts to an infringement of Article 3(3) and Recital 17 the Regulation.** This could be detected if the measured performance is consistently above (for metrics such as latency, jitter or packet loss) or below (for metrics such as speed) a previously detected average level for a relatively long period of time such as hours or days), or if the difference between measurement results before and after the specialised service is introduced is statistically significant. ~~In the case of short-term assessments, the difference between measurement results with and without the specialised service should be assessed similarly.~~”

Those minimum changes ensure the Regulation’s objectives to prevent prioritisation of content, service or applications and to safeguard end-users’ availability and quality of internet access services. Finally, BEREC’s supervision and enforcement of the rules and guidelines as well as full use of the powers outlined in Article 5(2) will be of the utmost important to guarantee the harmonised implementation of this rule and protect users’ rights.

## 2. Traffic management

Traditionally, an important part of the global Net Neutrality debate centers around the management of internet traffic by ISPs. The Telecoms Single Market Regulation defines the use of reasonable traffic management measures in Article 3(3) to be transparent, non-discriminatory, proportionate and not based on commercial considerations. Specific harmful practices such as blocking, slowing down, altering, restricting, interfering with, degrading or discriminating between content is prohibited. The Regulation however provides an exhaustive list of three specific exceptions to this ban. BEREC draft guidelines further clarify and bring certainty the use of these exceptions.<sup>15</sup>

However, the guidelines do not yet fully address the issue of agnostic traffic management. The language of Recital 9 of the Regulation on traffic management seems to indicate that ISPs can conduct application-specific traffic management practices, but all provisions on traffic management must be looked at jointly to understand the objective of the legislators and developed guidelines that reflect their intention. Article 3(3) subparagraph 1 clearly established the equal treatment of *all* traffic, thus discrimination based on types of traffic must be avoided. This objective is further established under Article 3(3) subparagraph 3 which explicitly prohibits network discrimination “between specific content, applications or services, or specific categories thereof”. Therefore, when Recital 9 authorises ISPs to deploy traffic management measures which differentiate on the basis of “objectively different technical quality of service requirements”, it shall be understood as “objective requirements of traffic” but not be based on content, services or applications’ characteristics. Any other interpretation is contrary to the overall objective of the Regulation.

To address this issue, we recommend BEREC to include the following changes, -- additions are marked in **bold** and proposed deletions with ~~strikethrough~~:

“49. Moreover, NRAs should ensure that traffic on an IAS is managed:

- *“without discrimination, restriction or interference”;*
- *“irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used”;* **and**
- **by treating “all traffic equally”.**

“60. Traffic categories should typically be defined based on QoS requirements, whereby a traffic category will contain a flow of packets from applications with equal (similar) requirements. Therefore, if ISPs implement different technical QoS requirements of specific categories of traffic, this should be done objectively by basing them on ~~the~~

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<sup>15</sup> *Ibidem*, paragraphs 73-76.

characteristics of the applications transmitting the packets **traffic requirements (such as, latency, jitter, packet loss, and bandwidth)**. For example, such a category may consist of real-time applications requiring a short time delay between sender and receiver.”

“63. Based on this, reasonable traffic management may be applied to differentiate between objectively different “*categories of traffic*”; for example by reference to an application layer protocol (such as SMTP, HTTP or SIP) or generic application types (such as file sharing, VoIP or instant messaging), only in so far as:

- the application layer protocol or generic application type are linked to they are based on objectively different technical QoS requirements;
- applications with equivalent QoS requirements are handled agnostically in the same traffic category; and
- justifications are specific to the objectives that are pursued by implementing traffic management measures based on different categories of traffic.”

### 3. Zero rating

Zero rating is the practice of offering internet users free access to some, but not all, of the internet, resulting in unequal access. This issue in particular, and the question of price discrimination more generally, is at the heart of the current global debate over the future of the free and open internet. Zero rating programmes manifest in different forms, the most frequent being “sub-internet” offers, where only a part of the internet is offered for “free”, and a second form where a telco prioritises or gives preferential treatment to either its own content or that of third parties. All forms of zero rating amount to price discrimination, and have in common an economically proven negative impact on users’ rights.

We welcome BEREC’s clarification that “sub-internet services” constitutes an infringement of users’ rights safeguarded by the Regulation and must therefore be banned.<sup>16</sup> Regarding the second type of zero rating offers, BEREC has proposed a case by case assessment of each zero rating offer to determine their compliance with the Regulation, rather than banning those offers all together. While the criteria set by BEREC are exhaustive, this approach does not adequately protect users’ rights to receive and impart information from all internet end-points protected under Article 3(1) and Recitals 3 and 4.

Zero rating limits access to only a specific set of services and applications selected by ISPs, therefore actively providing unequal access to all services, applications, and content available online. This practice limits the possibility for users to distribute content, services, or

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<sup>16</sup> *Ibidem*, paragraphs 17 and 35.

applications, which removes possibility for innovation, dialogue, or exchange. Under zero rating, users then become a passive consumer of products selected by others. As a result, zero rating intrinsically contradicts the objective of the Regulation encompassed in the title of Article 3 further and Recital 3 to “safeguard the open internet access” and “ensure the openness of the internet”. Furthermore, as mentioned in the previous paragraph, these offers limit users’ freedom to receive and impart information recognised under Article 3(1) of the Regulation.

We therefore recommend for BEREC to explicitly ban zero rating offers by including the following changes -- additions are marked in **bold** and proposed deletions with ~~strikethrough~~:

“36. However, some commercial conditions or practices, most obviously those involving price differentiation applied to categories of data traffic, are more likely to influence end-users’ exercise of the rights defined in Article 3(1) ~~without necessarily limiting it.~~”

“39. The ISP could either apply or offer zero-rating to an entire category of applications (e.g. all video or all music streaming applications) or only to certain applications thereof (e.g. its own services, one specific social media application, the most popular video or music applications). In the latter case, an end-user is not prevented from using other music applications. However, the zero price applied to the data traffic of the zero-rated music application (and the fact that the data traffic of the zero-rated music application does not count towards any data cap in place on the IAS) creates an economic incentive to use that music application instead of competing ones. The effects of such a practice applied to a specific application ~~are more likely to~~ “*undermine the essence of the end-users’ rights*” ~~or~~ **and** lead to circumstances where “*end-users’ choice is materially reduced in practice*” (Recital 7): ~~than when it is applied to an entire category of applications.~~ **This practice therefore constitutes an infringement of Articles 3(1) and 3(3) of the Regulation.**”

“40. When assessing such **other** agreements or commercial practices like zero-rating in relation to Article 3(2), NRAs and other competent authorities should take into account the aim of the Regulation to “*safeguard equal and non-discriminatory treatment of traffic*” (Article 1) and to “*guarantee the continued functioning of the internet ecosystem as an engine of innovation*” (Recital 1) as well as Recital 7, which directs NRAs and other competent authorities to intervene against agreements or commercial practices which, “*by reason of their scale, lead to situations where end-users’ choice is materially reduced in practice*”, or which would result in “*the undermining of the essence of the end-users’ rights*”.”

“45. [...]

- End-users of an IAS whose conditions include a lower (or zero) price for the data associated with a specific application or class of applications will be incentivised to use the zero-rated application or category of applications and not others modify their behaviour accordingly. Furthermore, the lower the data cap, the stronger such influence is likely to be. [...]"

## Conclusion

With the proposed modifications to the draft BEREC Guidelines on the implementation of net neutrality rules, internet users in the European Union will enjoy unfettered access to the whole internet as enshrined within the Telecoms Single Market Regulation. While minimal, these changes are crucial to deliver the objective of the Regulation and adequately implement its provisions. Anything less would leave the possibilities for telecoms operators and online content providers to introduce and develop network discrimination practices putting at risk the openness of the internet and limiting its capacity as a platform for the enjoyment and fulfillment of human rights online; fostering creation and innovation for anyone.

We commend BEREC on their thorough and deliberate effort in this draft, as well as their continued effort to involve all stakeholders in the development of these guidelines, we look forward to the publication of the final document at the end of August. We also welcome the clear rules on supervision and enforcement set out by BEREC in the Guidelines as a bright commitment to ensure a robust enforcement of the TSM. We encourage BEREC to closely cooperate with Competitions Authorities in performing the oversight of commercial practices required in Article 5(2), and with Data Protection Authorities to implement provisions of Article 3(4) on the protection of personal data.

### For More Information

Please visit [www.accessnow.org](http://www.accessnow.org)

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