



Access Now submission to the public consultation on draft BEREC Guidelines on the implementation of Open Internet Regulation

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Introduction

Access Now is an international organisation that defends and extends the digital rights of users at risk around the world.¹ By combining innovative policy, user engagement, and direct technical support, we fight for open and secure communications for all. We are a team of 70, with local staff in 13 locations around the world.

Access Now's policy team works at the intersection of human rights and technology, furthering our 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,² to the Telecom Regulatory Authority of India,³ and to the US Federal Communications Commission (FCC) 2015 Open Internet Order.⁴ Access Now helps coordinate the Global Net Neutrality coalition, a global platform for cooperation and the advancement of Net Neutrality protection worldwide.⁵

In the European Union, we were involved in the negotiation process of the Regulation (EU) 2015/2120 on Open Internet Access since its tabling by the European Commission in September 2013,⁶ have provided comments to the EU Parliament,⁷ Council of the EU,⁹ and input to the Body

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

² 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

³ Joint letter and counter-comments on the TRAI's consultation paper on differential pricing for data services, http://traai.gov.in/WriteReadData/ConsultationPaper/Document/201601180327042420938Access_Now_n_Ors.pdf

⁴ 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>

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

⁶ 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

⁷ 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

⁸ 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

of European Regulators for Electronic Communications' (BEREC) stakeholder dialogue on Net Neutrality and 2016 guidelines.¹⁰¹¹ Furthermore, we are members of the SaveTheInternet.eu coalition since its creation in January 2014.¹²

Three years after the conclusion of BEREC's Net Neutrality guidelines, we welcome the opportunity to provide our recommendations as BEREC advances the work to update the guidelines. As a member of European Digital Rights, we support the recommendations provided by EDRi to this consultation and call on BEREC and all NRAs to take those duly into account. To complement EDRi's recommendations, we will provide recommendations on three issues important for users that we believe could be further clarified in the final guidelines:

- **Internet Access Services filtering services violate the Regulation and should not be allowed by the guidelines,**
- **Deep packet inspection is not necessary for traffic management, and**
- **Zero rating practices should be banned.**

Finally, we welcome the clarification provided by the draft guidelines regarding the measures on the application-agnostic provision of Internet Access Services. This is particularly relevant to the application of the measures provided for in Regulation 2015/2120 with regards to 5G. This follows evidence which shows that 5G functionalities can be achieved with open standards that respect Net Neutrality.

1. Parental control and other filtering services

In the draft revised guidelines, BEREC has introduced new language in paragraphs 32a-b and 78-78b regarding the blocking of particular content, services, or applications including through the provision of parental control services and other filtering services.

As a basic matter, internet access service providers are not allowed to discriminate based on content. The Regulation requires all “[p]roviders of internet access service [to] treat all traffic equally ... irrespective of the content accessed.”¹³ In addition, “[e]nd-users ... have the right to access and distribute information and content ... of their choice ... via their internet access service.”¹⁴ While some exemptions exist for “specialized services” that are offered beyond the scope of internet access service, these are narrow exemptions and are based on optimization for

⁹ 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

¹⁰ 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

¹¹ Access Now submission to the public consultation on draft BEREC guidelines on the implementation of Net Neutrality rules <https://www.accessnow.org/cms/assets/uploads/2016/07/Net-Neutrality-BEREC-Access-Now-submission.pdf>

¹² SaveTheInternet.eu <https://savetheinternet.eu/en/>

¹³ European Union, Regulation 2015/2120 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2120&from=EN> (Article 3(3))

¹⁴ Id. Article 3(1)

specific content where optimization “is necessary in order to meet the requirements of the content.”¹⁵

The guidelines should not allow for internet access service providers to offer filtering services because they violate the Regulation. A filtering service that originates from an internet access service provider would violate the requirement that it allow equal access to online content. Filtering services do not constitute specialized services because there is nothing inherent *about the content* that requires “optimization” or otherwise differential treatment. Blocking certain websites or applications is not “optimization.”

Beyond the policy reasons to remove this change, this matter was heavily debated during the adoption of the Open Internet Access Regulation and there was an intentional choice from lawmakers not to allow parental control filters at the network level when providing Internet Access Services.. As BEREC’s guidelines are bound and delimited by the Regulation, the revised guidelines cannot go against the decision of lawmakers.

Recommendations: Delete 32a-b and the content of paragraph 78b from “However” onward.

2. Deep packet inspection

As part of the consultation on the revised guidelines, BEREC is specifically asking the following questions as regards paragraph 69 and 70 of the guidelines:

- 1) *Are you aware of any IAS which operate “specific categories of traffic” (ref. Article 3(3)) on the market, and if so which categories are defined? For ISPs: If you have implemented traffic categorisation in your network, please explain which technical quality of service requirements these categories are based on.*
- 2) *Please explain in detail which methods exist and which of these methods are used in practice for traffic identification for billing purposes (in particular zero rating) and for traffic categorisation for traffic differentiation purposes. For ISPs: If you have implemented any of these methods in your network, please explain why the particular methods have been chosen. Please give concrete examples.*
- 3) *Is it possible to identify traffic for billing purposes and for traffic categorisation using the techniques mentioned in BEREC GL paragraphs 69 and 70 and are there practical differences between the different use cases (billing/traffic categorisation)? Please explain why you believe the current Guidelines are sufficient or not by providing concrete examples.*
- 4) *For End-Users: Do you feel informed about reasonable traffic management measures and the methods used for the identification of traffic? Please explain.*

Paragraphs 69 and 70 of the guidelines refer to privacy safeguards against the widespread use of deep packet inspection technologies. The current text of the guidelines currently represent the

¹⁵ Id. Article 3(5).

fact that the provision of Internet Access Services does not require providers to look into or process information from the transport layer payload. This was true in 2016 when the guidelines were first developed and remains true today. The guidelines are also in line with the Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (ePrivacy Directive).

To the extent Internet Access Service providers are using deep packet inspection techniques, Access Now opposes that use. It is possible that, despite the current limitations and safeguards on the use of these techniques in the guidelines, Internet Access Services providers may be using deep packet inspection technology for traffic management purposes related to the offering of differentiated pricing of specific applications or services. Fellow EDRi-member, epicenter.works has conducted a mapping of zero rating offers in the European Union and identified 186 potential case of use of deep packet inspection by telecoms operators.¹⁶ Such practices appear to be in violation of the current guidelines and, if authorised, would undermine the objective of the Open Internet Access Regulation. In fact, deep packet inspection could allow Internet Access Service providers to identify and distinguish traffic in their networks in order to prioritise some categories of content over others. We therefore call on BEREC not to amend paragraphs 69 and 70 and instead encourage less intrusive ways to accommodate different billing practices.

Finally, regarding question 4 raised in the consultation, we appreciate that BEREC has raised this important matter to Internet Access Service providers. Users, in general, lack sufficient information on service provider practices to properly assess whether they can agree to those practices. In particular, deep packet inspection is a technical practice that users are unlikely to understand the ramifications of. Users may be uncomfortable with their provider snooping into their traffic for any reason (even for “billing purposes”), and that is likely why the Regulation does not authorises such practices. Therefore, transparency, even if sufficient, would not be enough to justify the use of deep packet inspection under the guidelines.

Recommendations: keep the current language of paragraphs 69 and 70 as it is.

3. Zero rating and differential pricing

We applaud BEREC’s intention to provide additional transparency requirements in the definition and conditions of use of zero rating and differential pricing offers in paragraphs 42b-e. However, we recommend for BEREC to explicitly ban all zero rating offers.

Zero rating is the practice of offering internet users unlimited access to some, but not all, of the internet, resulting in unequal access. 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 by not counting the data of those services against any existing data cap, or by allowing a bigger bandwidth.

¹⁶ Epicenter.works. Report: The Net Neutrality Situation in the EU <https://epicenter.works/document/1522>

We welcome that BEREC is maintaining in this revised version of the guidelines the clarification that “sub-internet services” constitute an infringement of users’ rights safeguarded by the Regulation and must therefore be banned.¹⁷ Regarding the second type of zero rating offers, BEREC provides more transparency requirements in the revised draft guidelines for the use and case by case assessment of each zero rating offer to determine their compliance with the Regulation, rather than banning those offers all together. Having seen a patchwork of implementation of these rules since 2016 in the European Union, we do not consider that this approach adequately protect users’ rights to receive and impart information from all internet end-points as protected under Article 3(1) and Recitals 3 and 4 of the Regulation.¹⁸

The practice of zero rating limits access to only a specific set or categories 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 applications, which removes possibility for innovation, dialogue, or exchange. Under zero rated offers, users become a passive consumer of products selected by others. 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”.

Finally, zero rating offers as well as differential pricing offers can have a negative effect on investment in the network. Providers often justify the need to bring these offers on the market to respond to the growing demand from users for better and faster internet access. Instead, this demand should be an incentive to develop and invest in enhanced network capacity. The so-called “virtuous circle” illustrates the long-term economic benefit for telecommunications companies to invest in infrastructure. Zero rating and differential pricing offers however limit this incentive. In fact, they act as a tactical way for telecommunications companies to keep data connectivity prices high, creating artificial scarcity and extracting more revenue from users than what the economics of connectivity markets would otherwise dictate.

Recommendations: Explicitly ban all zero rating offers by including the following changes:

“39. 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.~~”

Deleting paragraphs 42 - 42e.

“48. [...]

- ~~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~~

¹⁷ BEREC. Draft revised Open Internet Access guidelines, paragraphs 17 and 36.

¹⁸ Epicenter.works. Report: The Net Neutrality Situation in the EU <https://epicenter.works/document/1522>

~~their behaviour accordingly. Furthermore, the lower the data cap, the stronger such influence is likely to be. [...]"~~

Conclusion

We welcome the opportunity provided by BEREC to comment on the draft revised guidelines on the implementation of Open Internet Regulation. Protecting the neutrality, openness, and universality of the internet is a constant challenge, despite the existence of binding legislation such as the Open Internet Access Regulation. The work of BEREC through the revision of the guidelines and the much-needed harmonised implementation of the rules is crucial to ensure that the internet remains truly open.

While the reference to the principle of Net Neutrality has been sadly abandoned in the title of this guidelines, its essence is guaranteed in the Regulation and we look forward to see stronger implementation and enforcement of the rules across the EU in the years to come.

We look forward to the publication of the final document next year and remain at your disposal for any further questions.

For More Information

Please visit www.accessnow.org

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