

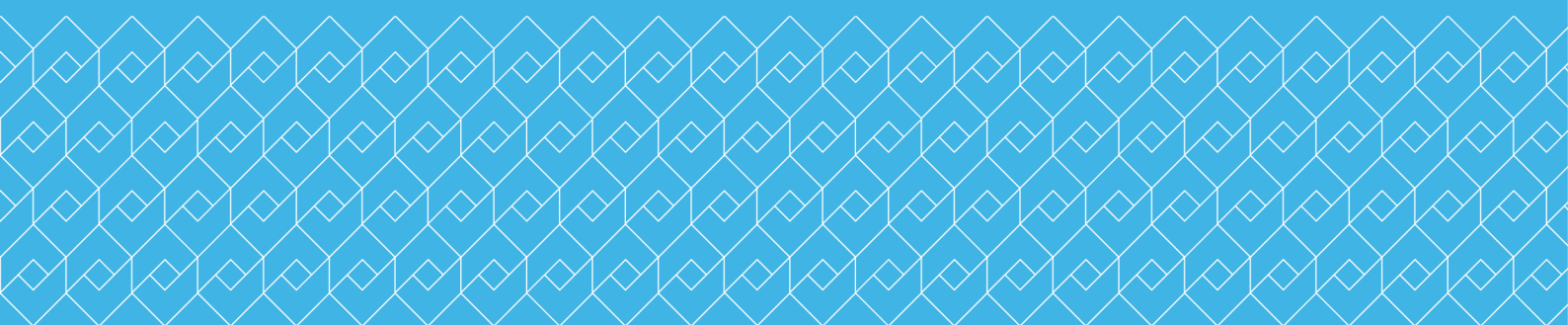
PROTECTING DIGITAL FREEDOM

EDRi's response to the call for input on BEREC Work Programme 2020

European Digital Rights (EDRi) is an association of civil and human rights organisations from across Europe. We defend rights and freedoms in the digital environment, including the rights to privacy, personal data protection and the freedom to seek, receive and impart information.

EDRi welcomes the opportunity to provide inputs on BEREC's Work Programme 2020 (BoR (19) 06). We also welcome BEREC's openness and constructive engagement with civil society. Because this is a collective contribution, we feel that it is better to reply in this format rather than the online tool provided in the context of the call for input.

Contributions by: Amelia Andersdotter and Maria Luisa Stasi (ARTICLE 19), Benedikt Gollatz (epicenter.works), Jesper Lund (IT-Pol), Sebastian Lissen (Digitalcourage), Kirsten Fiedler (EDRi), Jan Penfrat (EDRi).



Potential items

1.3 Guidelines on the Identification of the network termination point

We note that while this item is categorised under strategic priority 1 (“Responding to connectivity challenges and to new conditions for access to high-capacity networks”) it is also of significant importance to strategic priority 4 (“Fostering a consistent approach of the net neutrality principles”) as the definition of the network termination point (NTP) impacts the scope of the end-user rights, in particular the right to use terminal equipment of the end-user’s choice, provided for in Article 3(1) of Regulation (EU) 2015/2120.

The question of whether particular types of customer-premises equipment (CPE) lie on one side of the NTP or the other, and whether they therefore qualify as terminal equipment under the Regulation, is therefore of concern for its harmonised application, both in terms of current practices of IAS providers and potential future practices in connection with the introduction of new access technologies such as 5G. This question has very practical implications for the exercise of users’ freedom to provide service of their choice via their IAS, on the security of users’ networks, and for the viability of a consumer market in certain types of CPE.

As BEREC’s report on the location of the network termination point (BoR (18) 159) has shown, NRAs currently have differing opinions on the location of the NTP regarding the same access technology, or in many cases do not have a consistent definition at all. We therefore urge BEREC to carefully consider the implications of a the definition in particular regarding end-user rights in connection with net neutrality and users’ freedom of choice of which devices to operate in their networks.

1.6 Opinion on the review of the EC Recommendation on Relevant Markets

We encourage BEREC to engage with relevant stakeholders, including civil society, while forming its view about the Opinion to be addressed to the European Commission. Due to the substantial impact that any changes to the EC Recommendation at stake will have on market actors and consumers, we believe that these stakeholders deserve the opportunity to express their views.

3.1 The impact of 5G on regulation

We urge BEREC to take into due account fundamental rights when assessing the implications of 5G for regulation and the role of regulation in enabling the 5G ecosystem. Where needed, regulation should ensure that 5G deployment will not happen at the expense of consumers and citizens’ human rights.

BEREC has also an important role to play in expectation management. For instance, BEREC could assist legislators and other actors in society have realistic expectations regarding the ability to 5G to enable rural connectivity (with the frequency bands currently allocated, 5G would not appear to be optimally placed for rural connectivity), or its capacity to enhance consumer quality and choice (in effect, the authentication systems envisaged for the new network infrastructure appears to rather limit the opportunities for mobile virtual network operators (MVNOs) and choice, in effect increasing centralisation and decreasing choice, rather than the other way around).

4.1 Update to the Guidelines on Net Neutrality

EDRi welcomes BEREC's aim to ensure the application of Regulation (EU) 2015/2120 in a consistent way throughout Europe.

In order to achieve this, we urge BEREC to be more explicit in regulating application-specific price differentiation and give clearer guidance to NRAs on this matter. In addition to the planned deliverable, BEREC should assess the effects that new open class-based price-differentiation (or zero-rating) offers have on the provision of cross-border services. These offers seem to lead to new market entry barriers through increased technical and administrative burdens on service providers seeking to provide services competitively throughout the internal market, as pointed out in our contribution BoR PC01 (18) 38¹ to BEREC's public consultation in 2018. Such analysis should be complemented by a study of the effects of zero-rating and similar practices on the availability and affordability of IAS data volume.

4.2 Report on the implementation of Regulation (EU) 2015/2020 and BEREC Net Neutrality Guidelines

We support BEREC's goal to create a European-level net neutrality report. Given the fact that epicenter.works has identified² that NRA's annual net neutrality reports often do not comply with the criteria laid out by the BEREC Guidelines on the implementation of net neutrality and the Regulation itself, such a report can be valuable in order to provide guidance to NRAs regarding their monitoring and reporting duties and ensure complete and standardised reporting on the national level.

We welcome BEREC's initiative to further EU-wide discussion of net neutrality cases. In order to live up to the Regulation's aim of creating a digital single market, BEREC should use this forum to put an increased focus on the impact of commercial practices such as zero-rating on the cross-border provision of online services. Irrespective of a reform, the Guidelines currently call on NRAs to assess factors such as new market entry barriers when assessing the compatibility of commercial practices with Article 3(1) of the Regulation; however, we note that in concrete cases assessed by NRAs, which occur in the context of national proceedings, these effects appear to find little or no consideration, in particular regarding effects on the single market as a whole. BEREC should therefore establish itself as the forum to discuss these issues.

5.3 Report on Member States' best practices to support the defining of adequate broadband internet access service

We welcome BEREC's efforts in establishing a harmonised approach to the definition of adequate broadband internet access service. We note that this work could be informed by NRAs' work in performing their monitoring duties under Article 5 of Regulation (EU) 2015/2120, whereby NRAs should monitor the development of "non-discriminatory IAS at

1 See EDRi and epicenter.works contribution BoR PC01 (18) 38:
https://bereg.europa.eu/eng/document_register/subject_matter/bereg/public_consultations/8396-contribution-by-edri-and-epicenterworks-to-the-public-consultation-for-the-evaluation-of-the-application-of-regulation-eu-20152120-and-the-bereg-net-neutrality-guidelines-held-in-the-period-of-14-march-to-25-april-2018

2 See Lohninger, Gollatz, et al.: The Net Neutrality Situation in the EU. Evaluation of the First Two Years of Enforcement (29 January 2019), online at <https://epicenter.works/document/1522>

levels of quality that reflect advances in technology”³ in their respective countries and must ensure that specialised services according to Article 3(5) do not impact the general quality of IAS or are used to circumvent other provisions of the Regulation. As national net neutrality reports indicate that many NRAs do not currently sufficiently survey IAS their country in order to be able to assess the impact of new developments in the provision IAS and specialised services, we urge BEREC to use this process to foster monitoring practices in all Member States.

Outline BEREC WP 2020

Additional Items

EDRi agrees with the additional items as listed in Chapter 7 of the Outline BEREC WP 2020, and provides the following comments.

Workshop on NRA experiences with 5G

We support the BEREC plan to exchange information with NRAs about their experiences with 5G and we strongly advocate for this exchange to include also an assessment of how the deployment of 5G city networks has impacted on net neutrality and on consumers’ human rights.

Exchange on regulatory system on platform markets

As mentioned in previous contributions, we believe that there are significant failures in platform markets. The overall trend appears to focus on regulatory systems that are tailored to existing hyper-dominant actors. Nevertheless, an effective regulatory solution should take into due account the likely impact on market structure, competition dynamics, consumer protection and human rights.

We call on BEREC to ensure that the regulatory system is the outcome of a combined effort of relevant authorities: regulatory authorities for telecoms, regulatory authorities for media, competition authorities, data protection authorities, consumer protection authorities.

Furthermore, we call for a human rights impact assessment of any foreseen rules, ordinances and supervisory decisions, as well as for the respect of the principles of necessity and proportionality. In fact, it should not be forgotten that Article 51 of the Charter of Fundamental Rights clearly establishes that the EU bodies “shall (...) respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.” As evident from its wording, the Article imposes two obligations on BEREC. First, not to enforce any binding acts (decisions) that infringe or undermine any of the fundamental rights guaranteed by the Charter. Second, to actively pursue the enforcement of those rights in its action.

For maximum benefit to be gained from such activities, it is important that BEREC ensures engagement and cooperation with relevant authorities, with the view of adopting long-term, pro-competitive and fundamental rights friendly regulatory solutions, and that BEREC contributes with the specific technical expertise at its disposal. Among others, BEREC

3 BoR (16) 127, paragraph 183

could contribute with market studies, or by identifying best practices at national level. BEREC could also contribute with its historical knowledge of de-monopolisation of electronic networks.

We take this opportunity to draw BEREC's attention on three elements:

a. Market concentration

In recent years, a number of digital markets have become highly concentrated. A thorough analysis of the impact of increasing concentration should take into account its costs for consumers and for society. For consumers, excessive concentration might result in a reduction of choice, services foregone, an adverse impact on innovation and a real threat to the enjoyment of individuals' economic and non-economic freedoms. For society, concentration is a problem because monopolies and oligopolies might cause rising asset inequality and a lack of flexibility. Additionally, regulatory capture is more likely to occur in a concentrated market, especially if the dominant monopolies and oligopolies are domestic entities. This creates long-term problems for society to govern itself.

As BEREC's Strategic Priority 5 aims at consumers' empowerment, we call on BEREC to approach the challenges of market concentration from a consumer perspective, preferably in cooperation with consumer protection authorities or competition authorities, or at least with guidance from such authorities. Indeed, information and communication technologies constitute an essential instrument for people, to seek, access and share information. Thus, how the internet infrastructure and the world wide web develops, how much of it is concentrated in few hands and how it is regulated has a strong impact on the end-users' capacity to exercise in full their fundamental rights. In particular, a lack of quality and choice, combined with low flexibility or regulatory capture, risks inhibiting freedom of expression and privacy, which in this context reinforce each other.

We therefore call on BEREC to monitor the impact of market concentration in digital markets, and in particular of electronic communications markets, on consumers. Furthermore, we suggest to cooperate with competition authorities in order to support pro-competitive regulatory approaches that keep markets open to competitors and provide more quality and choice to consumers.

b. Vertical separation

We support the position taken by our member organisation ARTICLE 19, which we replicate here, for reference:

"The European Union recognises the political and economic nature of standards setting through the very incorporation of the **Harmonised Approach to Standards in European Policy** and it is in fact the case that technical standards which prescribe vertical or horizontal integration by design, will be very difficult to mitigate by regulatory means.

In line with this observation, as BEREC deems that effective competition in vertical applications and removing switching barriers continue to be important for the welfare of EU consumers, it should not ignore standards setting bodies' activities that are circumventing these priorities.

Particularly in mobile networks, it is the case that the design of the technology as such lends larger power to a single operator, vertically integrated over OSI layers 1 through 4. In technical standards setting bodies BEREC could consider

requesting a more flexible technical architecture, such that authentication functions allowing access to a network by MVNOs would be more autonomous of the MNO.

In relation to BEREC's obligations to ensure robust and secure networks and its proposed obligations to empower consumers under its Strategic Priority 5, BEREC must pay close attention to the proposed security enhancements in the 5G standard. We are concerned in particular with the apparent difficulties 5G standards bodies are having in prioritising and adopting reasonable security features such as end-to-end encryption. At the same time, we are concerned that emerging 5G standards bodies have focussed on finding ways of circumventing encryption introduced at higher layers, for instance in applications such as web browsers. Ensuring robust security throughout the network is imperative to ensure consumer welfare and trust in the network, and standards body participants should be encouraged to work towards this goal in line with EU law and regulatory frameworks.

BEREC should consider whether the technological standardisation that is being undertaken by industry-driven bodies is indeed undertaken with a view to enable vertical separation. It or its members should consider capacity building in the field of technical standards development in the same way that they are committing, for example, to capacity building in ex ante margin squeeze. BEREC and its members should also consider monitoring more closely the work of standard setting fora by attending meetings and stimulating debate on the impact of technological standards on competition and users' rights."

Were BEREC to work more closely with standard setting bodies, it would not represent and overstepping of its competence. Indeed, in many instances, the legislators have delegated responsibilities for the development of detailed guidelines to address technically complex issues to BEREC, such as those relating to the application of symmetric access obligations (Article 61(3) EEC), or the criteria to be met for a network to be deemed Very High Capacity (Article 82 EEC). This trend suggests that BEREC is considered to be best placed to address detailed technical matters, which would be difficult to reflect in legislation and on which the legislators themselves are ill-equipped to rule, particularly if there may be a need to revisit issues regularly rather than waiting until the next review of the framework as a whole.

c. Business models

We believe that a number of digital markets are characterised by market failures closely linked to the companies' business models. Therefore, we recommend BEREC to carefully examine those business models and at their impact on market dynamics as well as on consumers' rights. Once again, in order for this work to be carried out effectively, we strongly advocate for coordination among BEREC and other relevant authorities.

Cooperation among authorities relating to challenges in digital markets is not a novelty. For example, in 2016 the Italian regulator for postal, media and telecoms cooperated with the Italian competition and data protection authorities on a study on Big Data⁴. In 2010, the Swedish data protection authority and the Swedish post- and telecoms authority cooperated

⁴ See: Big Data Interim report in the context of the joint inquiry on "Big data" launched by the AGCOM deliberation No.217/17 / CONS, available at: <https://www.agcom.it/documents/10179/10875949/Allegato+4-9-2018/f9befcb1-4706-4daa-ad38-c0d767add5fd?version=1.0>

on a joint study of mobile markets.⁵

Calls for greater coordination have been put forward by various stakeholders and institutions. For example, the European Data Protection Supervisor has suggested, and the European Parliament has endorsed, the creation of a digital clearinghouse as a voluntary network of enforcement bodies that can contribute to enhancing their work and their respective enforcement activities, and that can help deepen the synergies and the safeguarding of the rights and interests of individuals⁶? The UK Digital Competition Expert Panel has called for the establishment of digital units, a sort of 'virtual' units with new powers to deal with digital markets' challenges, that act through co-operation with relevant authorities such as OFCOM, CMA and ICO⁷.

Being uniquely well positioned for what concerns the knowledge of electronic communications markets, BEREC's contribution to the debate, as well as to the adoption of informed policies and rules, would be very valuable.

Internet Value Chain

We consider the expression "Internet Value Chain" to be overbroad and difficult to define. Therefore, we suggest BEREC to adopt a narrower and more precise definition, which will bring more clarity on the scope of work and related actions.

5 Post- och telestyrelsen samt Datainspektionen, PTS-ER-2010:01/Datainspektionen 2010:1. Användning av trafikuppgifter i mobila innehållstjänster. Rapport efter avslutad tillsyn.

6 See: Big Data & Digital Clearinghouse, available at: https://edps.europa.eu/data-protection/our-work/subjects/big-data-digital-clearinghouse_en

7 See: Digital Competition Expert Panel (2019). Unlocking Digital Competition, Report, March 2019.

