

EDRi's response to the public consultation on the BEREC strategy 2018-2020

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.

EDRi welcomes this latest¹ opportunity to comment on the public [consultation](#) on the [draft](#) Body of European Regulators for Electronic Communications (BEREC) Strategy for 2018-2020.

This submission has been co-drafted by EDRi and EDRi-member Epicenter.works



Promoting #Netcompetition

We welcome that BEREC recognises the concerns that oligopolistic market structures and sub-national local fixed access monopolies have emerged among the heterogeneous markets across Europe. This is a serious problem which needs to be addressed by NRAs as well as closely monitored by BEREC. If this situation continues, regulatory remedies should be implemented.

EDRi is part of the NetCompetition Alliance², a community of organisations supporting competition and consumer choice in broadband and through all layers of the digital economy as the most effective way to spur innovation, drive investments in infrastructure and create consumer welfare. As indicated recently in the context of the discussions on the Electronic Communications Code, "*we share the [opinion of the Body of European Regulators for Electronic Communications \(BEREC\)](#) that investment will not be incentivised through deregulation. This is shown by experience over the last fifteen years. Effective and sustainable competition has been the driving force of success of the European liberalisation process in the telecoms sector.*"³

Bringing 5G specification in line with the EU's telecoms framework

We welcome the acknowledgement of BEREC that regulators will protect consumer interests as part of their balanced mandate in the ongoing debate about technological developments in the field of 5G, NFV and SDN. However, we are deeply concerned that the ongoing technological standardisation of new telecommunications technologies may undermine the current net neutrality protections in the European Union (EU).⁴ Therefore, we urge BEREC to closely monitor the

1 See EDRi's responses to the previous consultations on BEREC's mid-term strategy and BEREC's 2017 work programme:

https://edri.org/files/consultations/berecmidtermstrategy2018-2020_edriresponse_20170404.pdf

https://edri.org/files/consultations/20161102_berecworkprogramme2017_edriresponse.pdf

2 <http://savenetcompetition.eu/>

3 <https://edri.org/netcompetition-wants-an-improved-electronic-communications-code/>

4 See

<https://edri.org/endorial-5g-terrible-telecoms-providers-claim/>

standardisation process and participate in it whenever the opportunity may arise, so that new technical specifications are compatible with the current telecoms regulatory framework in the EU.

We reiterate what we had previously highlighted in our response to the consultation on the 2017 BEREC Work Programme:

“The next generation mobile network (5G) is currently being designed. It is very important that the 5G network is not designed in a way that makes it technically impossible for mobile operators (MNOs as well as MVNOs) to comply with the current net neutrality rules in Regulation 2015/2120. The intrinsic technical details of 5G networks are outside the natural scope of EDRI’s work, but the concept of 5G network slices is sometimes presented to the public as a functionality with built-in network discrimination which may very well be incompatible with the current regulatory framework on net neutrality. We encourage BEREC to monitor the ongoing development of the 5G standard with a view towards ensuring that the final standard is not be technically incompatible with the non-discrimination principles in the net neutrality regulation. This is of utmost importance.”

Accordingly, we would like to point out that such cooperation is already in the work programme of BEREC with regards to privacy: “NRAs will also need to enhance consumer trust in new services by working with manufacturers and network operators to ensure that the security and integrity of networks is paramount in their consideration and by building in privacy-by-design practices in digital services”⁵ – with the aim not to jeopardise the work of relevant data protection authorities, including the European Data Protection Supervisor (EDPS) and the Article 29 Working Party (WP 29).

Preventing a segmentation of the Digital Single Market

We welcome the BEREC’s awareness of the fact that new bottlenecks that may emerge in the service distribution chain. Nevertheless, the focus of the analysis should not be limited to device manufacturers or operation system providers. In our response to the public consultation on the BEREC medium-term strategy 2018-2020 we had already raised the issue of vertical integration between Internet Access Service (IAS) providers and Content and Application Providers (CAPs)⁶.

We have expressed our concern that “bundling” and other marketing strategies will create incentives for ISPs to violate key net neutrality principles. New products like “StreamOn” from Deutsche Telekom confirm our concerns. In this sense, we would like to highlight this new class of net neutrality violations, which are often referred to as “class based zero-rating”. Products like BingeOn in the USA⁷, Datafree Music in the Netherlands and most recently StreamOn in Germany are all based on zero rating a class of applications. In these products, the CAP enters into a contractual agreement with the ISP to have the data of its application zero-rated. These agreements require extensive and constant collaboration between the CAP and the ISP, restrict the

<https://edri.org/telcos-commission-attack-net-neutrality-berecs-independence/>

<https://www.article19.org/join-the-debate.php/252/view/>

5 https://edri.org/files/consultations/20161102_berecworkprogramme2017_edriresponse.pdf

6 See answer to question 5: https://edri.org/files/consultations/berecmidtermstrategy2018-2020_edriresponse_20170404.pdf

7 For an analysis of BingeOn, see <https://cyberlaw.stanford.edu/downloads/vanSchewick-2016-Binge-On-Report.pdf>

development of the CAP's service to a set of technologies supported by the zero-rating product of the ISP, oblige the CAP to notify the ISP about any changes to their product which could impact the identification of the service, and hold the CAP liable for any data wrongfully billed to the customers of the ISP. We believe this new class of net neutrality violations is clearly in breach of the Regulation (EU) 2015/2120 on the open internet⁸ because they are detrimental to innovation and constitute a violation of the rights of competing CAPs under Article 3 (1) of the Regulation.

Irrespective of regulatory assessment⁹, we urge BEREC to closely monitor such products. In particular, we are concerned about their detrimental effect to the Digital Single Market: no small business can cope with the administration overhead entailed by entering into such traffic identification and zero-rating agreements with thousands of ISPs in the EU, managing language barriers, liability spread, and the technical restrictions imposed by these zero-rating programmes¹⁰. Similarly, most smaller ISPs will be at a competitive disadvantage by not offering such programmes to their customers, owing to their smaller user-base and their inability to handle the administrative and technical burden to partner with or identify the traffic of the millions of streaming providers on the Internet.

Empower consumers to make informed choices

We have monitored the implementation of the Regulation (EU) 2015/2120 in various countries and have come to a disappointing conclusion. Some countries have only partly implemented the Regulation with regards to sanctions for unlawful activities according to Articles 3 and 4 of the Regulation. Several ISPs have not provided adequate information according to Article 4 of the Regulation, even in response to specific requests by consumers. Therefore, regarding the protection and empowerment of consumers, BEREC's focus in developing new quality of experience indicators should be complemented with a more rigorous enforcement of the existing provisions. We hope that in upcoming reports on the implementation of the Regulation these problems will be addressed and acted upon.

Brexit

The United Kingdom is likely to leave the European Union during the period covered by this strategy. The strategy document should lay out BEREC's work relevant to Brexit in this timeframe.

Ofcom – the UK's national regulator – is one of the more active members of BEREC. It would be useful for BEREC to provide detail on how it would deal with Ofcom leaving. In the meantime, the UK will remain as an EU Member state until at least March 2019. BEREC must not relax its work overseeing net neutrality principles in the UK while the UK is still a member of the EU.

8 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32015R2120>

9 See the submission of EDRI-member epicenter.works to Bundesnetzagentur (in German): <https://epicenter.works/document/483>

10 Such programmes limit the technologies by which the CAP can provide its service (e.g., in zero-rating video-streaming applications, no support for video streaming via RTMP, or a requirement to use Adaptive Bitrate streaming) and it often restricts the end users' ability to use third party clients, as such clients may introduce the possibility to access the ordinarily zero-rated content in a manner that does not match the way traffic is classified in the zero-rating programme.

If an EU-UK trade agreement (or any transitional arrangements) deal with net neutrality or roaming, BEREC should have a role in determining the EU's negotiating position. Where possible, BEREC should work with the European Commission and European Parliament to ensure that the UK Internet market functions with the same rules and enforcement as the EU to secure a fair playing field for business and consumers.

Stakeholder engagement

We welcome BEREC's intentions to continue its Stakeholder Forum in a consultative manner, to be as transparent as possible with topics that impact consumers, and to build upon the good practice of multi-step consultations. However, we are very concerned about the explicit reference to collaboration with "industry forums". BEREC should broaden its participation in public forums of all relevant stakeholder groups and not limit its presence to industry events or "forums".