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EDRi's response to the public consultation for inputs to BEREC Work Programme 2019

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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 right to privacy, and the freedom to seek, receive and impart information.

We welcome the opportunity to provide input to the [draft BEREC Work Programme 2019](#).

EDRi recommends that in 2019 BEREC focuses on:

- I. Continued commitment to net neutrality
- II. Implementing and Enforcing the Open Internet Regulation
- III. Clarifying the misleading claims that 5G and Net Neutrality are incompatible

I. Continuing commitment to Net Neutrality

We welcome BEREC's commitment to net neutrality thus far. BEREC's work on its Guidelines on net neutrality broadly represent a strong step in the right direction towards an open, free, competitive, and neutral internet and we congratulate BEREC on its endeavor to keep working to ensure net neutrality in Europe.

However, we urge that this is reinforced in 2019, particularly with regard to ensuring all relevant National Regulatory Authorities (NRAs) **put an end to harmful price differentiation practices** including zero-rating. Also, BEREC should focus on providing a **clearer mandate on monitoring and enforcing** the [Regulation \(EU\) 2015/2120](#).

II. Implementing and Enforcing the Open Internet Regulation

We encourage BEREC to duly implement and enforce the Open Internet Regulation and to review the Guidelines. We have seen several instances where these have not been followed.

In particular, BEREC should be resolute in prohibiting all forms of application-specific price differentiation, including zero-rating or, at the very least, BEREC should prohibit price differentiation based on individual applications and application-based price differentiation, these being the most egregious and harmful violations of the net neutrality principle.

We urge BEREC to closely monitor new forms of class based zero-rating products like Vodafone Pass and StreamOn based on paragraph 42 of the BEREC Net Neutrality Guidelines. Such offers create new risks of segmentation in the digital single market and undermine competition between telecom companies and CAPs. As the participation rules of such offers create new barriers within the digital single market stronger, cooperation between NRAs and an assessment of BEREC on the cross-border effects seem prudent.



We also recommend BEREC to conduct a study on the effect of zero-rating on the availability and affordability of data volumes. Such a study on the effects of zero-rating on the market developments in the 31 EEA countries would provide valuable insights for the global regulatory debate on zero-rating. In this context, we refer to the recent submission of 13 NGOs, including EDRi, to the Portuguese Telecoms Regulator ANACOM, which includes such analysis on a smaller scale.¹

Similarly, we would also recommend that BEREC and the Commission closely monitor the development of zero-rating products in general. ISPs are actively marketing their zero-rating products that are limited to certain partner applications. Furthermore, there is a strong trend towards national and USA based partner applications which runs contrary to the goal of the digital single market. Such an analysis should also include the technical and commercial conditions for CAPs to participate in such programmes as well as their development over time. Particular questions around new market entry barriers for European CAPs that offer their online services across borders should be answered. **The publication of more data on these new types of zero-rating offers and their impact on consumers, CAPs and the market is essential for evidence-based decision making and an informed debate on net neutrality.**

III. Clarifying the misleading claims that 5G and Net Neutrality are incompatible

There have been [misleading claims](#) that net neutrality impairs the deployment of 5G. However, no credible evidence has been presented.

Indeed, as per our [letter](#) to the Vice-President of the European Commission, the Digital Economy and Society Commissioner and ICT Ministers, “high quality connectivity and net neutrality go hand in hand [...] net neutrality rules will ensure that the number of innovative internet-based services and applications will continue to increase. With global demand for faster and better access to the internet on the rise, internet access providers will continue to have a strong incentive to develop and invest in enhanced network capacity. This so-called “virtuous circle” illustrates the long-term economic benefit for telecommunications companies to invest in infrastructure.”

We believe that any efforts to purport that 5G and Net Neutrality are incompatible - such as the so-called “5G manifesto” which the 2017 BEREC chair Sébastien Soriano publicly rejected on several occasions² - are an unconvincing lobbying tactic.

Potential technological evolution must not be allowed to be leveraged by telecommunication companies in order to weaken legislation. **Technology has to abide by the law and not the other way around.**

¹ <https://epicenter.works/document/1111>

² See, for instance <https://www.youtube.com/watch?v=H7r-bk9e1n8> or <https://www.euractiv.com/section/digital/interview/eu-telecoms-watchdog-we-are-independent-and-we-bother-powerful-people/>



We welcome BEREC's commitment to **dispelling misleading claims**, that seek to undermine that the web remains free, open, and without discrimination.

IV. Measurement and technological means of supervision

We strongly welcome the BEREC initiatives to create a European network measurement software that follows the principles of open data, open source and open methodology. In order to be successful on a European scale and empower users and invoke trust in their internet contract, all NRAs should certify such measurement software in their country. Negligence of some NRAs might prevent users to invoke remedies for non-compliant internet contracts.

According to BEREC's implementation report on the Open Internet Regulation and the Net Neutrality Guidelines, only 17% of NRAs actively measure the Internet in their country. As the introduction of 5G might create new incentives in the industry for the provisioning of specialised services, such historical measurement data is vital for NRAs to assess if such services influence the availability or general quality of Internet access services. Without such historical measurement data providers would be unable to fulfill their supervision and enforcement obligations under the regulation.

We will provide more details in our response to [BEREC's consultation](#) on the evaluation of the application of Regulation (EU) 2015/2120 and the BEREC Net Neutrality Guidelines.